TomTom/Tele Atlas
COMP/M.4854
European Commission, [2008] OJ C237/8

Market Definition
Data Markets
One-sided Supply Substitution

Facts

TomTom, a leading manufacturer of portable navigation devices and a supplier of navigation software, sought to acquire Tele Atlas, one of two main suppliers, both in Europe and North America, of digital map databases for navigation and other end-uses. The vertical merger would have enabled TomTom to control a key input, namely Tele Atlas' navigable digital map data. Following its investigation, the Commission cleared the transaction. In its decision the Commission considered whether or not digital map databases for navigation purposes and non-navigation purposes constitute separate markets.

Held

'The degree of demand-side substitutability between digital map databases for navigation purposes and for non-navigation purposes must be regarded as limited, because the quality requirements are very different. In order to be used for navigation, a digital map database must be sufficiently detailed, accurate and updated and must contain the necessary attributes and add-on layers, whereas a more basic database will suffice to provide simpler services such as route planning and address location. A navigation device will not function (… properly) if used with a basic digital map database of inferior quality.' (para 22)

'The degree of supply-side substitutability must be regarded as one-sided, because a provider of the higher quality digital map databases for navigation purposes may also easily provide the simpler database used for non-navigation purposes. The core databases used for the two types of applications are very similar (in fact, the basic map is the same). However, there is no supply-side substitution in the other direction due to the substantial costs and time required to upgrade a basic database to navigable quality. Whereas it is possible to produce a basic digital map database for many territories relatively quickly and at limited cost by compiling data from various public sources, producing a navigable digital map database is costly and very resource intensive.' (para 23)

'Compiling and processing the data necessary for a navigable digital map database is a very time-consuming process. Upgrading in this manner a basic digital map database covering the European Union, is likely to take several years' (para 26)

Comment

Given the lack of demand-side as well as supply-side substitutability the Commission concluded that digital map databases for navigation and non-navigation applications constitute separate product markets.

In its decision, the Commission considered the possibility of other companies entering the market. It noted that Google and Microsoft, which were customers of Tele Atlas and provided map services over the Internet, would find it difficult and costly to upgrade their map databases to navigable quality by using feedback from their user communities.

Recent advances in technology and analytics increased the significance of data and subsequently the scrutiny of mergers involving Big Data. When analysing the effects of data one commonly considers the four "V"s: the volume of data; the velocity at which data is collected, used and disseminated; the variety of information aggregated; and finally the value of the data.

The usability of data has significant implications on the way one may define the market. Here, the role of advanced analytics may play a significant role. Analytics and data have a mutual reinforcing relationship, as data would have less value if companies couldn't rapidly analyse and act upon it.

Clearstream v Commission
Case T-301/04
General Court, [2009] ECR II-3155,[2009] 5 CMLR 24

Market Definition
Judicial Review
Fresh Analysis

Facts

An application for annulment of Commission decision in Case COMP/38.096—*Clearstream*, in which the Commission found Clearstream Banking AG ('CBF') and its parent company, Clearstream International SA ('CI'), to have abused their dominant position by, among other things, refusing to provide cross-border clearing and settlement services to Euroclear Bank SA ('EB') for more than two years, and by applying discriminatory prices to EB. One of the claims made by CBF and CI was that the Commission erred in its market definition.

Held

'It should be noted, at the outset, that in so far as the definition of the product market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the [Union] judicature. However, this does not prevent the [Union] judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and is capable of substantiating the conclusions drawn from it (see Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 482, …).' (para 47)

'[F]or the purposes of investigating the possibly dominant position of an undertaking on a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services. Moreover, since the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and to behave to an appreciable extent independently of its competitors and its customers, an examination to that end cannot be limited solely to the objective characteristics of the relevant services, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.' (para 48)

'The concept of the relevant market implies that there can be effective competition between the products or services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned (Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 28).' (para 49)

'The applicants' claim that viewing matters from the point of view of the intermediary depositories conflicts with some earlier Commission decisions is irrelevant. The present case can be distinguished from the facts of the cases relied upon by the applicants. In any case, it must be noted that the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings, other product and service markets or other geographic markets at different times (Joined Cases T-346/02 and T-347/02 *Cableuropa and Others v Commission* [2003] ECR II-4251, paragraph 191).' (para 55)

In the present case the Commission did not make a manifest error of assessment when holding that the relevant market was the provision by CBF, to intermediaries, of primary clearing and settlement services in respect of securities issued under German law, over which CBF has a de facto monopoly and is therefore an indispensable commercial partner. (paras 50–73)

Comment

On the framework for judicial review and its limitations, see discussion in Chapter 10.

A Ahlström Osakeyhtiö and others v Commission (Wood Pulp II)
Joined Cases 89, 104, 114, 116, 117, 125, 129/85
Court of Justice, [1993] ECR I-1307, [1993] 4 CMLR 407

Article 101 TFEU
Concerted Practice
Price Announcements

Facts

The Commission found forty wood pulp producers and three of their trade associations to have infringed Article 101 TFEU by forming a price-fixing cartel. The market for pulp was characterised by long-term supply contracts and by 'quarterly price announcements' by which producers communicated to their customers the prices of pulp. The Commission found the practice of price announcement to facilitate collusion between the undertakings on the transaction prices for pulp (IV/29.725—*Woodpulp*). On appeal to the Court of Justice, the undertakings contested, among other things, the Commission's finding of concerted practice.

Held

A concerted practice refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition. In this case, the communications arising from the price announcements did not lessen each undertaking's uncertainty as to the future attitude of its competitors. The system of quarterly price announcements did not eliminate uncertainty as to the future conduct of the others and therefore is not to be regarded as constituting in itself an infringement of Article 101 TFEU. (paras 59–65)

The system of price announcements could, however, constitute evidence of concertation at an earlier stage. In its decision, the Commission stated that, as proof of such concertation, it relied on the parallel conduct of the pulp producers, the simultaneous price announcements and similarity in price and on different kinds of direct or indirect exchange of information. (paras 66–9)

'Since the Commission has no documents which directly establish the existence of concertation between the producers concerned, it is necessary to ascertain whether the system of quarterly price announcements, the simultaneity or near-simultaneity of the price announcements and the parallelism of price announcements ... constitute a firm, precise and consistent body of evidence of prior concertation.' (para 70)

'In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct ... [Article 101 TFEU] does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.' (para 71)

'In this case, concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.' (paras 126, 72–126)

Comment

Contrast the treatment of price announcements in this case with the Court's approach in Case 48/69 *Imperial Chemical Industries (ICI) v Commission* (Dyestuffs), page 71 above.

Hüls AG v Commission
Case C-199/92P
Court of Justice, [1999] ECR I-4287, [1999] 5 CMLR 1016

Article 101 TFEU
Concerted Practice
Burden of Proof/Cartel Meetings

Facts

This case arose out of the Commission's Polypropylene decision (IV/31.149—*Polypropylene*) in which it found Hüls AG (Hüls) to have infringed Article 101(1) TFEU by participating with other undertakings in an agreement and concerted practice aimed at coordinating their commercial practices and fixing the prices of polypropylene. Hüls appealed unsuccessfully to the General Court (Case T-9/89 *Hüls v Commission*). On appeal to the Court of Justice, it argued, among other things, that the Commission and General Court decisions were based on insufficient evidence as to its regular participation in the producers' meetings and did not establish the evidential requirements in respect of concerted practices within the meaning of Article 101(1) TFEU.

Held

On the burden of proof and the presumption of innocence

The presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which are protected in the Union legal order. In this case the Commission successfully established that Hüls had participated in meetings between undertakings of a manifestly anticompetitive nature. Subsequently the burden of proof reversed and it was for Hüls to put forward evidence to establish that its participation was without any anticompetitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. (paras 141–55)

On concerted practice

'The Court of Justice has consistently held that a concerted practice refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see Joined Cases 40/73 etc *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 26, and Joined Cases C-89/85 etc *Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307, paragraph 63).' (para 158)

Each economic operator must determine independently the policy it adopts on the market. 'Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market. (See, to that effect, *Suiker Unie and others v Commission*, paragraph 174).' (paras 159, 160)

'It follows, first, that the concept of a concerted practice, as it results from the actual terms of [Article 101(1) TFEU], implies, besides undertakings' concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two.' (para 161)

'However, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here, according to the findings of the [General Court].' (para 162)

'The examination required in the light of [Article 101(1) TFEU] consists essentially in taking account of the impact of the agreement on existing and potential competition (see, to that effect, Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 21) and the competition situation in the absence of the agreement (*Société Technique Minière* at 249–250), those two factors being intrinsically linked.' (para 71)

'The examination of competition in the absence of an agreement appears to be particularly necessary as regards markets undergoing liberalisation or emerging markets, as in the case of the 3G mobile communications market here at issue, where effective competition may be problematic owing, for example, to the presence of a dominant operator, the concentrated nature of the market structure or the existence of significant barriers to entry—factors referred to, in the present case, in the Decision.' (para 72)

'In order to take account of the two parts which this plea actually contains, it is therefore necessary to examine, first, whether the Commission did in fact consider what the competition situation would have been in the absence of the agreement and, second, whether the conclusions which it drew from its examination of the impact of the agreement on competition are sufficiently substantiated.' (para 73)

'It follows from the foregoing that the [Commission's Decision], in so far as it concerns the application of [Article 101(1) TFEU] and Article 53(1) of the EEA Agreement, suffers from insufficient analysis, first, in that it contains no objective discussion of what the competition situation would have been in the absence of the agreement, which distorts the assessment of the actual and potential effects of the agreement on competition and, second, in that it does not demonstrate, in concrete terms, in the context of the relevant emerging market, that the provisions of the agreement on roaming have restrictive effects on competition, but is confined, in this respect, to a "petitio principii" and to broad and general statements.' (para 116)

Comment

Note the General Court's clear comment in paragraph 69 regarding the scope of analysis under Article 101(1) TFEU. The court held that the examination of effect under Article 101(1) TFEU 'as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro-and anti-competitive effects of the agreement and thus to applying a rule of reason, which the [Union] judicature has not deemed to have its place under Article 101(1) TFEU.'

Allianz Hungária Biztosító Zrt and others v Gazdasági Versenyhivatal

Case C-32/11
Court of Justice, [2013] 4 CMLR 25

Article 101 TFEU
Object or Effect
Vertical Agreements

Facts

A request for a preliminary ruling concerning the interpretation of Article 101 TFEU and its application to agreements between Hungarian insurance companies and authorised dealers operating auto repair shops. Under the agreements in question (1) the parties agreed in advance on the rates applicable to repair services payable by the insurer in the case of accidents involving insured vehicles, and (2) the parties agreed that the dealers would act as intermediaries for the insurers by offering car insurance to their customers. According to the agreement, the hourly repair charge was linked to the number of insurance policies signed, thus incentivising the dealers to increase the sale efforts to their clients.

The Hungarian competition authority found that the agreements, considered together and individually, had the object of restricting competition in the car insurance contracts market and the car repair services market. That finding was contested and the proceedings eventually reached the Hungarian Supreme Court. In its preliminary reference to the Court of Justice the Court asked whether bilateral agreements between an insurance company and individual car repairers under which the hourly repair charge paid by the insurance company depends, among other things, on the number and percentage of insurance policies sold by the repairer, acting as the insurance broker for the insurance company, are anticompetitive by object.

Held

'The distinction between "infringements by object" and "infringements by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.' (para 33)

'In order to determine whether an agreement involves a restriction of competition "by object" regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part (see *GlaxoSmithKline Services and Others v Commission and Others*, paragraph 58; *Football Association Premier League and Others*, paragraph 136; and *Pierre Fabre Dermo-Cosmétique*, paragraph 35). When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see *Expedia*, paragraph 21 and the case-law cited).' (para 36)

'[I]n order for the agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages (see *T-Mobile Netherlands and Others*, paragraph 31).' (para 38)

The agreements referred to in the question submitted provide that the hourly charge will increase in accordance with the number and percentage of insurance contracts sold by the dealer. The agreements link the remuneration for the car repair service to that for the car insurance brokerage. That link does not automatically mean that the agreement concerned has as its object the restriction of competition. It can nevertheless constitute an important factor in determining the object of the agreement. It is also necessary to take account of the fact that such an agreement is likely to affect two markets—the car insurance and car repair services—and that its object must be determined with respect to the two markets concerned. In addition, the fact that the agreements are meant to maintain or increase the market shares of the insurance companies should be noted. (paras 39–43)

The fact that the agreements in this case are vertical in nature, does not exclude the possibility of them having the object of restricting competition. (paras 44–46)

***AC-Treuhand AG v Commission* (AC-Treuhand II)**
Case C-194/14
Court of Justice, [2015] CMLR 26

Article 101 TFEU
Liability for Cartel Activity
Cartel Facilitator

Facts

The Commission found a number of companies to have infringed Article 101 TFEU by participating in a set of anti-competitive agreements and concerted practices relating to heat stabilisers (COMP/38589—Heat Stabilisers). AC-Treuhand, a consultancy firm not active on the relevant markets, was found to have played an essential role in the infringements by organising meetings, collecting and supplying data, and offering to act as a moderator between the parties. An action for annulment of the Commission decision was dismissed by the General Court (Case T-27/10). The company subsequently appealed to the Court of Justice.

Held

There is nothing in the wording of Article 101 TFEU that indicates that it is directed only at the parties to agreements or concerted practices who are active on the markets affected by those agreements or practices. In order to be able to find that an undertaking participated in and is liable for an infringement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and was aware of the actual conduct planned. (paras 27–30)

'[P]assive participation in the infringement, such as the presence of an undertaking in meetings at which anti-competitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article 81(1) EC, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery (see, to that effect, judgment in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143 and the case-law cited).' (para 31)

The terms 'agreement' and 'concerted practice' in Article 101 TFEU do not presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present. Article 101 TFEU refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate. (paras 33–5)

In the present case AC-Treuhand played an essential role in the infringements at issue by organising meetings and actively participating in them, by collecting and supplying data on sales on the relevant markets, and by offering to act as a moderator. The action taken by AC-Treuhand did not constitute mere peripheral services but was directly linked to the anticompetitive efforts made by the producers of heat stabilisers. (paras 37–9)

Comment

Appeal dismissed. A facilitator is liable for cartel activity, irrespective of whether the facilitator operates on the relevant market as long as it is aware of the anticompetitive efforts of the cartel members.

Note the Commission decision in Case AT.39861—*Yen Interest Rate Derivatives* (COM(2015) 432 final), where ICAP was found to have facilitated the exchange of information between the banks, leading to manipulation of the yen LIBOR. Appeal pending: Case T-180/15 *ICAP AO v Commission*.

Also note the discussion on hub-and-spoke on pages 176–8 below.

Argos, Littlewoods and others v Office of Fair Trading
Case No 2005/1071, 1074 and 1623
Court of Appeal, [2006] EWCA Civ 1318

Horizontal Agreements
Price Fixing
Indirect Price Fixing

Facts

The appeals arose of two distinct investigations by the UK Office of Fair Trading (OFT) under the UK Competition Act 1998. In the first decision the OFT found a price-fixing agreement in the toys and games market between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd. In the second decision the OFT found that a number of companies fixed the prices of replica football kits. Both decisions were appealed (separately) to the UK Competition Appeal Tribunal (the Tribunal) (Football Shirts decision, Toys and Games decision). The Tribunal's decisions were appealed to the Court of Appeal (CA). In both cases the appellants challenged the OFT and Tribunal holding that there was a horizontal agreement between competitors (the appellants accepted the OFT's finding of an anticompetitive vertical agreement).

The CA judgment is long and detailed, not least because it concerns two different sets of facts. The analysis includes very interesting comments on indirect price fixing. Extracts of the analysis concerning the football shirt cartel are given below.

Held

'Although the concept of a concerted practice implies the existence of reciprocal contacts, that requirement may be met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.' (para 21(V))

'It is not in dispute that there could be a trilateral or multilateral agreement or concerted practice between two or more customers and their common supplier, nor that this might come about by virtue of indirect contact between the customers via that supplier. Equally it is clear that there could be a series of bilateral vertical agreements between one supplier and several of its customers, none of the customers being aware of the fact or nature of the agreements between the supplier and other customers, such that there would be no horizontal element to the customers' agreements. If, on the other hand, each customer did know of the other agreements, it could be equivalent to a multilateral agreement between the supplier and each of the customers.' (para 31)

'Mr Lasok QC, for JJB, criticised as too general paragraph 664 of the [Tribunal] judgment, as follows: "The cases about complaints cited above, notably *Suiker Unie* … and the Commission's decision in *Hasselblad* …, show that if a competitor (A) complains to a supplier (B) about the market activities of another competitor (C), and the supplier B acts on A's complaint in a way which limits the competitive activity of C, then A, B and C are all parties to a concerted practice to prevent, restrict or distort competition. We can see the sense of that case law. Were it otherwise, established customers would always be able to exert pressure on suppliers not to supply new and more competitive outlets, free of any risk of infringing the Chapter I prohibition. A competitor who complains to a supplier about the activities of another competitor should not in our view be absolved of responsibility under the Act if the supplier chooses to act on the complaint."' (para 33)

'Mr Lasok submitted that the law as to complaints does not permit a conclusion that, merely by complaining, the complainer is party to an agreement or concerted practice with the undertaking to which the complaint is made, let alone with the party complained about. Of course there is and could be no general rule on the point. There can be complaints of all sorts, by no means all of which are made in the expectation that anything will be done about the matter complained about, still less something that might amount to a breach of the Chapter I prohibition. In the present case, however, as the Tribunal pointed out at paragraph 667, the complaints were vigorous and repeated, they were made at the highest levels, and they were backed up by an implicit threat arising from the strength of JJB's commercial position in relation to Umbro.' (para 72)

'Mr Lasok submitted that, for an undertaking to be involved in an anti-competitive arrangement reached between others, it must know of the arrangement, not merely of the possibility that there might be such an arrangement. He cited passages from the judgment of the General Court in *Cimenteries v Commission*, Cases T-25/95 etc [2000] ECR II-491 for this proposition, where the General Court considered whether one

Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis
Case 161/84
Court of Justice, [1986] ECR 353, [1986] 1 CMLR 414

Vertical Agreements
Franchise Agreements

Facts

A reference for a preliminary ruling from the German Federal Court of Justice concerning the application of Article 101 TFEU to franchise agreements. The questions arose in proceedings between Pronuptia de Paris GmbH (the franchisor), a distributor of wedding dresses which was a subsidiary of the French company of the same name, and Mrs Schillgalis, an independent retailer who acted as the franchisee in Hamburg, Oldenburg and Hanover.

Held

'[A] distinction must be drawn between different varieties of franchise agreements. In particular, it is necessary to distinguish between (i) service franchises, under which the franchisee offers a service under the business name or symbol and sometimes the trade-mark of the franchisor, in accordance with the franchisor's instructions, (ii) production franchises, under which the franchisee manufactures products according to the instructions of the franchisor and sells them under the franchisor's trade-mark, and (iii) distribution franchises, under which the franchisee simply sells certain products in a shop which bears the franchisor's business name or symbol. In this judgment the court is concerned only with this third type of contract, to which the questions asked by the national court expressly refer.' (para 13)

In a system of distribution franchises, the franchisor which has established itself in a given market grants independent traders, for a fee, the right to establish themselves in other markets using its business name and the business methods that have made it successful. The system allows the franchisor to expand without investing its own capital and the franchisee to benefit from the reputation and experience of the franchisor. 'In order for the system to work two conditions must be met. First, the franchisor must be able to communicate his know-how to the franchisees and provide them with the necessary assistance in order to enable them to apply his methods, without running the risk that that know-how and assistance might benefit competitors, even indirectly. It follows that provisions which are essential in order to avoid that risk do not constitute restrictions on competition for the purposes of [Article 101(1) TFEU]. That is also true of a clause prohibiting the franchisee, during the period of validity of the contract and for a reasonable period after its expiry, from opening a shop of the same or a similar nature in an area where he may compete with a member of the network. The same may be said of the franchisee's obligation not to transfer his shop to another party without the prior approval of the franchisor; that provision is intended to prevent competitors from indirectly benefiting from the know-how and assistance provided. Secondly, the franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol. It follows that provisions which establish the means of control necessary for that purpose do not constitute restrictions on competition for the purposes of [Article 101(1) TFEU].' (paras 15–17)

'The same is true of the franchisee's obligation to apply the business methods developed by the franchisor and to use the know-how provided. That is also the case with regard to the franchisee's obligation to sell the goods covered by the contract only in premises laid out and decorated according to the franchisor's instructions, which is intended to ensure uniform presentation in conformity with certain requirements. The same requirements apply to the location of the shop, the choice of which is also likely to affect the network's reputation. It is thus understandable that the franchisee cannot transfer his shop to another location without the franchisor's approval. The prohibition of the assignment by the franchisee of his rights and obligations under the contract without the franchisor's approval protects the latter's right freely to choose the franchisees, on whose business qualifications the establishment and maintenance of the network's reputation depend.' (paras 18–20)

The control exerted by the franchisor on the selection of goods offered by the franchisee enables the public to obtain goods of the same quality from each franchisee and is necessary for the protection of the network's reputation. Such control should not prevent the franchisee from obtaining those goods from other franchisees. (para 21)

A provision requiring the franchisee to obtain the franchisor's approval for all advertising is essential for the maintenance of the network's identity, so long as it concerns only the nature of the advertising. (para 22)

Certain provisions may restrict competition between the members of the network and may lead to the sharing of the market. 'In that regard the attention of the national court should be drawn to the provision which obliges the franchisee to sell goods covered by the contract only in the premises specified therein. That provision prohibits the franchisee from opening a second shop. Its real effect becomes clear if it is examined in conjunction with the franchisor's undertaking to ensure that the franchisee has the exclusive use of his business name or symbol in a given territory. In order to comply with that undertaking the franchisor must not only refrain from establishing himself within that territory but also require other franchisees to give an undertaking not to open a second shop outside their own territory. A combination of provisions of that kind results in a sharing of markets between the franchisor and the franchisees or between franchisees and thus restricts competition within the network. As is clear from [Joined cases 56, 58/64 *Consten and Grundig v Commission* (1966) ECR 299)], a restriction of that kind constitutes a limitation of competition for the purposes of [Article 101(1) TFEU] if it concerns a business name or symbol which is already well-known. It is of course possible that a prospective franchisee would not take the risk of becoming part of the chain, investing his own money, paying a relatively high entry fee and undertaking to pay a substantial annual royalty, unless he could hope, thanks to a degree of protection against competition on the part of the franchisor and other franchisees, that his business would be profitable. That consideration, however, is relevant only to an examination of the agreement in the light of the conditions laid down in [Article 101(3) TFEU].' (paras 24, 26)

The franchisor may provide the franchisee with price guidelines as long as these do not impair the franchisee's freedom to determine its own prices, and so long as there is no concerted practice between the franchisor and franchisees or between the franchisees themselves for the actual application of such prices. (para 25)

Comment

The provisions of the franchise agreement were analysed as ancillary restraints. The court considered whether they were necessary for achieving the objectives of the franchise system. It considered provisions protecting know-how, branding advertising and product choice to be necessary in this respect. On the other hand a franchising agreement which leads to market sharing was held to restrict competition. (para 24)

A combination of exclusivity and territorial allocation (para 24) led to absolute territorial protection and, in line with *Consten and Grundig v Commission*, was found to restrict competition.

The Commission noted in several cases that clauses which are essential to prevent the know-how supplied and assistance provided by the franchisor from benefiting competitors and clauses which provide for the control that is essential for preserving the common identity and reputation of the network do not constitute restrictions of competition within the meaning of Article 101(1) TFEU. See, for example, Commission decision granting exemption under Article 101(3) in Case IV/31.697 *Charles Jourdan* [1989] OJ L35/31, and Commission decision in Cases IV/31.428 to 31.432 *Yves Rocher* [1987] OJ L8/49.

The Commission Guidelines on Vertical Restraints [2000] OJ C291 consider the analysis of franchise agreements (paras 189–91) as well as the transfer of know-how and licensing of intellectual property rights (paras 31–45).

Manufacture Française des Pneumatiques Michelin v Commission **Article 102 TFEU**
Case T-203/01 (Michelin II) Abuse
General Court, [2003] ECR II-4071, [2004] 4 CMLR 18 Rebates

Facts

This case concerned the commercial policy pursued by Michelin in the French markets for new replacement tyres for trucks and for retreaded tyres for trucks. The Commission found Michelin to have abused its dominant position on this market via, among other things, its loyalty-inducing rebate system. An action for annulment before the General Court.

Held

A quantity rebate system linked solely to the volume of purchases made from a dominant undertaking is generally considered not to have the foreclosure effect prohibited by Article 102 TFEU. On the other hand a loyalty rebate, which is granted by a dominant undertaking in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article 102 TFEU. Such a rebate is designed through the grant of financial advantage, to prevent customers from obtaining their supplies from competing producers. It thus has a foreclosure effect on the market and therefore is regarded as contrary to Article 102 TFEU. (paras 56–8)

'It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe [Article 102 TFEU] unless the criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors …' (para 59)

In assessing rebate systems it is necessary to consider in particular 'the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.' (para 60)

The mere fact that an undertaking characterises a discount system as 'quantity rebates' does not mean that the grant of such discounts is compatible with Article 102 TFEU. (para 62)

A loyalty-inducing rebate system applied by a dominant undertaking has foreclosure effects prohibited by Article 102 TFEU, irrespective of whether or not the rebate system is discriminatory. In the present case, the Commission concluded that the rebate system constitutes an infringement of Article 102 TFEU because it is unfair, it is loyalty-inducing and it has a partitioning effect. (paras 64–5)

'This Court considers that it is necessary, first, to consider whether the Commission had good reason to conclude, in the contested decision, that the quantity rebate system was loyalty-inducing or, in other words, that it sought to tie dealers to the applicant and to prevent them from obtaining supplies from the applicant's competitors. As the Commission acknowledges in its defence, moreover, the alleged unfairness of the system was closely linked to its loyalty-inducing effect. Furthermore, it must be held that a loyalty- inducing rebate system is, by its very nature, also partitioning, since it is designed to prevent the customer from obtaining supplies from other manufacturers.' (para 66)

The Quantity Rebates (these provided for an annual refund expressed as a percentage of the turnover achieved by the dealer)

Although a dominant undertaking can take reasonable steps to protect its commercial interests, not all competition on price can be regarded as legitimate. A loyalty-inducing discount system which seeks to tie dealers to a dominant undertaking by granting advantages which are not based on a countervailing economic advantage and seeks to prevent those dealers from obtaining their supplies from the undertaking's competitors infringes Article 102 TFEU. A quantity rebate system is compatible with Article 102 TFEU if the advantage conferred on dealers is economically justified by the volume of business they bring or by any economies of scale they allow the supplier to make. (paras 74–101)

'A quantity rebate system in which there is a significant variation in the discount rates between the lower and higher steps, which has a reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period, has the characteristics of a loyalty-inducing discount system.' (para 95)

Michelin failed to establish that the quantity rebate system, which presents the characteristics of a loyalty-inducing rebate system, was based on objective economic reasons. The fact that the rebate system was transparent does not affect this conclusion. A loyalty-inducing rebate system is contrary to Article 102 TFEU, whether it is transparent or not. (paras 107–11)

The Commission was therefore entitled to conclude, that 'the quantity rebate system at issue was designed to tie truck tyre dealers in France to the applicant by granting advantages which were not based on any economic justification. Because it was loyalty-inducing, the quantity rebate system tended to prevent dealers from being able to select freely at any time, in the light of the market situation, the most advantageous of the offers made by various competitors and to change supplier without suffering any appreciable economic disadvantage. The rebate system thus limited the dealers' choice of supplier and made access to the market more difficult for competitors, while the position of dependence in which the dealers found themselves, and which was created by the discount system in question, was not therefore based on any countervailing advantage which might be economically justified.' (para 110)

The Service Bonus (this was paid to specialist dealers, who achieved a minimum annual turnover, to improve their facilities and after-sales service)

Michelin argued that the aim of the service bonus was to encourage dealers to improve the quality of their services and the brand image of Michelin products through remuneration. This reward system was fixed annually by mutual agreement with the dealer according to the commitments entered into by him.

The Court pointed out that the fact that the service bonus remunerates services rendered by the dealer and is not formed as a discount has no relevance for the purpose of Article 102 TFEU. The question under Article 102 TFEU is whether the service bonus system was unfair and loyalty-inducing and had a tied sales effect.

'The granting of a discount by an undertaking in a dominant position to a dealer must be based on an objective economic justification. … It cannot depend on a subjective assessment by the undertaking in a dominant position of the extent to which the dealer has met his commitments and is thus entitled to a discount. As the Commission points out in the contested decision … [that] such an assessment of the extent to which the dealer has met his commitments enables the undertaking in a dominant position "to put strong pressure on the dealer … and allow[s] it, if necessary, to use the arrangement in a discriminatory manner"' (para 140)

'It follows that a discount system which is applied by an undertaking in a dominant position and which leaves that undertaking a considerable margin of discretion as to whether the dealer may obtain the discount must be considered unfair and constitutes an abuse by an undertaking of its dominant position on the market within the meaning of [Article 102 TFEU]. …Because of the subjective assessment of the criteria giving entitlement to the service bonus, dealers were left in uncertainty and on the whole could not predict with any confidence the rate of discount which they would receive by way of service bonus.' (para 141)

Analysing 'Effect'

Michelin argued that the Commission did not examine the actual economic effect of the criticised practices and that such examination would have revealed that the conduct in question did not have the effect of either reinforcing its position or limiting the degree of competition on the market. In support of its argument, Michelin referred to the consistent line of decisions which show that 'an "abuse" is an objective concept

Tetra Pak International SA v Commission
Case C-333/94P
Court of Justice, [1996] ECR I-5951, [1997] 4 CMLR 662

Article 102 TFEU
Abuse
Tying and Bundling

Facts

Tetra Pak International SA (Tetra Pak) specialises in equipment for the packaging of liquid or semi-liquid food products in cartons. The Commission found Tetra Pak to have abused its dominant position by, among other things, tying the sales of machinery for packaging with the sales of cartons, and by engaging in predatory pricing (IV/31.043—*Tetra Pak II*). The General Court dismissed Tetra Pak's application for annulment of the Commission's decision. Tetra Pak appealed to the Court of Justice.

Held

Article 102 TFEU may apply to an act committed by an undertaking in a dominant position on a market distinct from but associated to the dominated market. (paras 24–7)

'Tetra Pak interprets [Article 102(d) TFEU] as prohibiting only the practice of making the conclusion of contracts dependent on acceptance of additional services which, by nature or according to commercial usage, have no link with the subject-matter of the contracts. It must be noted, first, that the [General Court] explicitly rejected the argument put forward by Tetra Pak to show the existence of a natural link between the machines and the cartons. In paragraph 82 of the judgment under appeal, it found: "consideration of commercial usage does not support the conclusion that the machinery for packaging a product is indivisible from the cartons. For a considerable time there have been independent manufacturers who specialize in the manufacture of non-aseptic cartons designed for use in machines manufactured by other concerns and who do not manufacture machinery themselves". That assessment, itself based on commercial usage, rules out the existence of the natural link claimed by Tetra Pak by stating that other manufacturers can produce cartons for use in Tetra Pak's machines. With regard to aseptic cartons, the [General Court] found, at paragraph 83 of its judgment, that "any independent producer is quite free, as far as [Union] competition law is concerned, to manufacture consumables intended for use in equipment manufactured by others, unless in doing so it infringes a competitor's intellectual property right". It also noted, at paragraph 138, rejecting the argument based on the alleged natural link, that it was not for Tetra Pak to impose certain measures on its own initiative on the basis of technical considerations or considerations relating to product liability, protection of public health and protection of its reputation. Those factors, taken as a whole, show that the [General Court] considered that Tetra Pak was not alone in being able to manufacture cartons for use in its machines.' (paras 35, 36)

'It must, moreover, be stressed that the list of abusive practices set out in the second paragraph of [Article 102 TFEU] is not exhaustive. Consequently, even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse within the meaning of [Article 102 TFEU] unless they are objectively justified. The reasoning of the [General Court] in paragraph 137 of its judgment is not … in any way defective.' (para 37)

Comment

Note that abusive tying may be established even when the tied sales of two products is in accordance with commercial usage or there is a natural link between the two products in question. Such sale may constitute an abuse unless it is objectively justified. (para 37)

In Case T-30/89 *Hilti AG v Commission*, the Commission accused Hilti of abusing its dominant position by tying the sale of nails to the sale of cartridge strips, a practice that excluded competitors from the market and aimed at increasing Hilti's market power. The General Court rejected Hilti's argument that its practice was objectively justifiable. (See detailed analysis on page 308 below.)

Microsoft Corp v Commission
Case T-201/04
General Court, [2007] 5 CMLR 11

Article 102 TFEU
Abuse
Tying and Bundling

Facts

An action for annulment of Commission decision Comp/C-3/37.792 in which the Commission found Microsoft to have infringed Article 102 TFEU by refusing to supply interoperability information to its competitors and by bundling its Windows Media Player with its operating system (on refusal to supply, see page 289 above). The Commission found that Microsoft had abused its market power by bundling its Windows Media Player with its Windows operating system. This conduct enabled Microsoft to anticompetitively expand its position of market power and to significantly weaken competition on the media player market by foreclosing this market and artificially reducing the incentives of media companies, software developers and content providers to develop competing media players. The Commission ordered Microsoft to provide a version of its operating system without the Windows Media Player. Microsoft appealed the decision. The General Court held that the Commission's analysis of the constituent elements of bundling was correct. The Commission was right to base its finding that there was abusive tying in the present case on the following factors (Commission Decision, Recital 794): (1) the tying and tied products are two separate products; (2) the undertaking concerned is dominant in the market for the tying product; (3) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (4) the practice in question forecloses competition. (paras 842–59)

Held

'It must be borne in mind that the list of abusive practices set out in the second paragraph of [Article 102 TFEU] is not exhaustive and that the practices mentioned there are merely examples of abuse of a dominant position. … It follows that bundling by an undertaking in a dominant position may also infringe [Article 102 TFEU] where it does not correspond to the example given in [Article 102(d) TFEU]. Accordingly, in order to establish the existence of abusive bundling, the Commission was correct to rely in the contested decision on [Article 102 TFEU] in its entirety and not exclusively on [Article 102(d) TFEU].' (paras 860, 861)

The existence of two separate products

'Microsoft contends, in substance, that media functionality is not a separate product from the Windows client PC operating system but forms an integral part of that system. As a result, what is at issue is a single product, namely the Windows client PC operating system, which is constantly evolving. In Microsoft's submission, customers expect that any client PC operating system will have the functionalities which they perceive as essential, including audio and video functionalities, and that those functionalities will be constantly updated.' (para 912)

The IT and communications industry is an industry in constant and rapid evolution. In such an industry what initially appear to be separate products may subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of the competition rules. The Court must assess whether the Commission was correct to find two separate products at the period of the investigation. (paras 913–16)

The distinctness of products for the purpose of an analysis under Article 102 TFEU has to be assessed by reference to customer demand. In the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying. (paras 917–21)

According to the EU case-law on bundling, complementary products can constitute separate products for the purposes of Article 102 TFEU. It is possible that customers will wish to obtain the client PC operating systems and application software together, but from different sources. For example, the fact that most client PC users want their client PC operating system to come with word-processing software does not transform those separate products into a single product for the purposes of Article 102 TFEU. (paras 922–3)

Imperial Chemical Industries (ICI) v Commission (Dyestuffs) — **Conscious Parallelism**
Case 48/69 — Parallel Behaviour
Court of Justice, [1972] ECR 619, [1972] CMLR 557

'Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.' (para 66)

CISAC v Commission — **Conscious Parallelism**
Cases T-442/08 — Concerted and Independent Action
General Court, [2013] 5 CMLR 15 — Parallel Behaviour

As the Commission did not establish, to the requisite legal standard, the existence of a concerted practice between the collecting societies to fix the national territorial limitations, it is necessary to examine whether the Commission provided sufficient evidence to render implausible the explanations of the collecting societies' parallel conduct, put forward by the applicant, other than the existence of concertration. (paras 132, 133)

The evidence relied on by the Commission is not sufficient to render implausible the explanation provided by the applicant according to which the national territorial limitations are the result of individual, carefully considered and rational decisions on a practical and economic level, given the specific conditions of the market, and not the result of a concerted practice. (paras 134–81)

Brooke Group Ltd v Brown & Williamson Tobacco Corporation — **Conscious Parallelism**
No 92–466 — Parallel Behaviour
Supreme Court of the United States, 509 US 209 (1993)

'[E]ven in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut; the antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition.' (page 224)

'Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions. See Areeda & Turner ¶ 404; Scherer & Ross 199–208.' (page 227)

Monsanto Co v Spray-Rite Service Corp — **Conscious Parallelism**
No 82-914 — Concerted and Independent Action
Supreme Court of the United States, 465 US 752 (1984)

'[T]here is a basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination … or conspiracy" between the manufacturer and other distributors in order to establish a violation … [to prove concerted action] the correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the [parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.' (page 465)

Aircraft Check Services Co. v Verizon Wireless — **Conscious Parallelism**
No 14-2301 — Concerted and Independent Action
United States Court of Appeal — Parallel Behaviour

'[T]he Sherman Act imposes no duty on firms to compete vigorously, or for that matter at all, in price. This troubles some antitrust experts, such as Harvard Law School Professor Louis Kaplow, whose book Competition Policy and Price Fixing (2013) argues that tacit collusion should be deemed a violation of the Sherman Act. That of course is not the law, and probably shouldn't be. A seller must decide on a price; and if tacit collusion is forbidden, how does a seller in a market in which conditions (such as few sellers, many buyers, and a homogeneous product, which may preclude non price competition) favor convergence by the sellers on a joint profit-maximizing price without their actually agreeing to charge that price, decide what price to charge? If the seller charges the profit-maximizing price (and its "competitors" do so as well), and tacit collusion is illegal, it is in trouble. But how is it to avoid getting into trouble? Would it have to adopt cost-plus pricing and prove that its price just covered its costs (where cost includes a "reasonable return" to invested capital)? Such a requirement would convert antitrust law into a scheme resembling public utility price regulation, now largely abolished.'

'And might not entry into concentrated markets be deterred because an entrant who, having successfully entered such a market, charged the prevailing market price would be a tacit colluder and could be prosecuted as such, if tacit collusion were deemed to violate the Sherman Act? What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets? Prices might fall if the new entrant's output increased the market's total output, but then again it might not fall; the existing firms in the market might reduce their output in order to prevent the output of the new entrant from depressing the market price. If as a result the new entrant found itself charging the same price as the incumbent firms, it would be tacitly colluding with them and likewise even if it set its price below that of those firms in order to maximize its profit from entry yet above the price that would prevail were there no tacit collusion.'

'Further illustrating the danger of the law's treating tacit collusion as if it were express collusion, suppose that the firms in an oligopolistic market don't try to sell to each other's sleepers, "sleepers" being a term for a seller's customers who out of indolence or ignorance don't shop but instead are loyal to whichever seller they've been accustomed to buy from. Each firm may be reluctant to "awaken" any of the other firms' sleepers by offering them discounts, fearing retaliation. To avoid punishment under antitrust law for such forbearance (which would be a form of tacit collusion, aimed at keeping prices high), would firms be required to raid each other's sleepers? It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete. How is a court to decide how vigorously they must compete in order to avoid being found to have tacitly colluded in violation of antitrust law? Such liability would, to repeat, give antitrust agencies a public-utility style regulatory role.'

'Or consider the case, of which the present one may be an exemplar, in which there are four competitors and one raises its price and the others follow suit. Maybe they do that because they think the first firm—the price leader—has insights into market demand that they lack. Maybe they're afraid that though their sales will increase if they don't follow the leader up the price ladder, the increase in their sales will induce the leader to reduce his price, resulting in increased sales by him at the expense of any firm that had refused to increase its price. Or the firms might fear that the price leader had raised his price in order to finance product improvements that would enable him to hold on to his existing customers—and win over customers of the other firms. If any of these reflections persuaded the other firms—without any communication with the leader—to raise their prices, there would be no conspiracy, but merely tacit collusion, which to repeat is not illegal despite the urging of Professor Kaplow and others.'

'Competitors in concentrated markets watch each other like hawks. Think of what happens in the airline industry, where costs are to a significant degree a function of fuel prices, when those prices rise. Suppose one airline thinks of and implements a method for raising its profit margin that it expects will have a less negative impact on ticket sales than an increase in ticket prices—such as a checked-bag fee or a reservation-change fee. … The airline's competitors will monitor carefully the effects of the airline's response to the higher fuel prices afflicting the industry and may well decide to copy the response should the responder's response turn out to have increased its profits.' (pages 10–12)

Nungesser v Commission (the Maize Seeds case) **Licensing**
Case 258/78 Article 101(1) TFEU
Court of Justice, [1982] ECR 2015, [1983] 1 CMLR 278 Open Exclusive Licences

Facts

An action for the annulment of a Commission decision (Case IV/28.824, *Breeders' Rights—Maize Seed*) in which the Commission found an exclusive licence of breeders' rights to infringe Article 101(1) TFEU and rejected Mr Eisele's application for an exemption under Article 101(3) TFEU. The agreement in question concerned a 'maize seed production and sales licensing contract' which was signed between the Institut National de Recherche Agronomique (INRA) and Mr Kurt Eisele. Under the agreement Mr Kurt Eisele (and Nungesser KG) acquired exclusive rights to sell INRA's varieties of maize in Germany. The agreement stipulated that Mr Eisele was obliged to import at least two-thirds of the German market's requirements from France through the French organisation responsible for centralising and coordinating exports (SSBM, later FRASEMA); the balance, that is to say no more than one-third, may be produced by Mr Eisele himself, or produced under his responsibility, on payment of royalties; Mr Eisele undertook to enforce INRA's proprietary right in its varieties, notably by protecting them against trademark infringement and passing-off.

Held

'By this submission the applicants criticize the Commission for wrongly taking the view that an exclusive licence of breeders' rights must by its very nature be treated as an agreement prohibited by [Article 101(1) TFEU]. They submit that the Commission's opinion in that respect is unfounded in so far as the exclusive licence constitutes the sole means, as regards seeds which have been recently developed in a Member State and which have not yet penetrated the market of another Member State, of promoting competition between the new product and comparable products in that other Member State; indeed, no grower or trader would take the risk of launching the new product on a new market if he were not protected against direct competition from the holder of the breeders' rights and from his other licensees.' (para 44)

'The statement of reasons on which the decision is based refers to two sets of circumstances in order to justify the application of [Article 101(1) TFEU] to the exclusive licence in question …' (para 48)

'The *first set* of circumstances is described as follows: "By licensing a single undertaking to exploit his breeders' rights in a given territory, the licensor deprives himself for the entire duration of the contract of the ability to issue licences to other undertakings in the same territory …" "By undertaking not to produce or market the product himself in the territory covered by the contract the licensor likewise eliminates himself, as well as FRASEMA and its members, as suppliers in that territory".' (para 49)

The Commission found the exclusive nature of the licence to be contrary to Article 101 TFEU insofar as it imposes an obligation upon INRA to refrain from having the relevant seeds produced or sold by other licensees in Germany or producing or selling the relevant seeds in Germany themselves. (para 50)

The *second set* of circumstances referred to in the decision is described as follows: 'The fact that third parties may not import the same seed (namely the seed under licence) from other [Union] countries into Germany, or export from Germany to other [Union] countries, leads to market sharing and deprives German farmers of any real room for negotiation since seed is supplied by one supplier and one supplier only.' (para 51)

'The Commission found this exclusive nature of the licence to be contrary to [Article 101 TFEU] insofar as it imposes an obligation to prevent third parties from exporting the relevant seeds to Germany without the licensee's authorization for use or sale there, and Mr Eisele's use of his exclusive rights to prevent all imports into Germany or exports to other Member States of the relevant seeds.' (para 52)

'It should be observed that those two sets of considerations relate to two legal situations which are not necessarily identical. The first case concerns a so-called open exclusive licence or assignment and the exclusivity of the licence relates solely to the contractual relationship between the owner of the right and the licensee, whereby the owner merely undertakes not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory. On the other hand, the second case involves an exclusive licence or assignment with absolute territorial protection, under which the parties to the contract propose, as regards the products and the territory in question, to eliminate all competition from third parties, such as parallel importers or licensees for other territories.' (para 53)

The open licence, in this case, is necessary for the protection of agricultural innovations and constitutes a means of encouraging such innovations. 'A total prohibition of every exclusive licence, even an open one, would cause the interest of undertakings in licences to fall away, which would be prejudicial to the dissemination of knowledge and techniques in the [Union].' (para 55)

'In fact, in the case of a licence of breeders' rights over hybrid maize seeds newly developed in one Member State, an undertaking established in another Member State which was not certain that it would not encounter competition from other licensees for the territory granted to it, or from the owner of the right himself, might be deterred from accepting the risk of cultivating and marketing that product; such a result would be damaging to the dissemination of a new technology and would prejudice competition in the [Union] between the new product and similar existing products.' (para 57)

'Having regard to the specific nature of the products in question, the court concludes that, in a case such as the present, the grant of an open exclusive licence, that is to say a licence which does not affect the position of third parties such as parallel importers and licensees for other territories, is not in itself incompatible with [Article 101(1) TFEU].' (para 58)

'With respect to the exclusive licence, which confers absolute territorial protection, it must be examined whether such agreement may benefit from an exemption from the prohibition contained in Article 101(1) TFEU. As the seeds in the case are intended to be used by a large number of farmers, an absolute territorial protection goes beyond what is indispensable for the improvement of production or distribution or the promotion of technical progress. It thus constituted a sufficient reason for refusing to grant an exemption under Article 101(3) TFEU. (paras 76–9)

Comment

In paragraph 58 the Court of Justice distinguished between an 'open exclusive licence agreement' and an agreement which entails absolute territorial protection. The former does not affect the position of third parties, parallel importers, and licensees for other territories. It is subsequently not in itself incompatible with Article 101(1) TFEU.

The Court of Justice took notice of the nature of the product, the impact of the licensing agreement on innovation, and the agreement's role in encouraging the licensee to accept risk in marketing a new product.

In Case IV/4.204 *Velcro/Aplix* [1985] OJ L233/22, [1989] 4 CMLR 157, the Commission referred to the *Maize Seed* judgment and applied it to a licensing agreement concerning the exploitation of the Velcro patents. It found the agreement to facilitate the development of a new product, contribute to technical and economic progress, and subsequently to fall outside the scope of Article 101(1) TFEU. It noted, however, that that justification does not apply once the patent expired and the technology was no longer novel.

Ernst & Young/Andersen Germany
Case IV/M.2824
European Commission, [2002] OJ C246/21

Concentrations
Article 3(1)(a)
Single Economic Entity

Facts

A proposed concentration by which the global Ernst & Young network (Ernst & Young) through its German undertakings merged within the meaning of Article 3(1)(a) with both parts of the German entities of the Andersen network and the German undertaking Menold & Aulinger.

Held

The merger of Ernst & Young, Andersen Germany and Menold & Aulinger has to be considered as a tri-lateral merger which constitutes one concentration. (para 25)

'The new merged entity will combine Ernst & Young, Andersen Germany and Menold & Aulinger. Although the newly formed legal branch, called Luther Menold, will form a separate legal entity after the merger, it will be economically integrated into Ernst & Young and will share the same permanent economic management and financial interests.' (para 26)

Comment

Similarly, in Case IV/M.1016 *Price Waterhouse/Coopers & Lybrand* [1999] OJ L50/27, [1999] 4 CMLR 665, the Commission considered a series of transactions and contractual arrangements through which the networks of companies owned by Price Waterhouse and Coopers & Lybrand combined worldwide. Given the fact that both parties were structured as international networks of separate and autonomous national firms, it was necessary to examine whether these groups of firms can be regarded as single undertakings for the purposes of the Merger Regulation, whose combination would constitute a single concentration within the meaning of Article 3(1)(a). This was done by considering whether the combination of activities had a sufficiently high degree of concentration of decision-making and financial interests to confer on it the character of a single economic entity for the purposes of the Merger Regulation. With respect to the Price Waterhouse group of companies, the Commission noted the existence of a combined management board, agreements to pool resources between the members of the group and the existence of a 'combination contract' among the companies operating in Europe and the USA, which led to their functioning as a single economic unit. These features indicated considerable centralisation of management and led the Commission to conclude that for the purpose of the Merger Regulation the Price Waterhouse group constituted one single economic entity which is party to the transaction.

Paragraph 10 of the Commission Consolidated Jurisdictional Notice elaborates on this issue and states that 'a merger within the meaning of Article 3(1)(a) may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of a single economic unit. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management or the structure of a dual listed company. If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. A prerequisite for the determination of such a *de facto* merger is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing. The *de facto* amalgamation may be solely based on contractual arrangements, but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.'

Arjomari-Prioux-SA/Wiggins Teape Appleton plc
Case IV/M.0025
European Commission, [1990] OJ C285/18

Concentrations
Article 3(1)(b)
Sole Control

Facts

The notified transaction involved the transfer of 39 per cent of Wiggins Teape Appleton plc ('WTA') shares to Arjomari-Prioux SA ('Arjomari') in return for Arjomari's shareholding in its wholly owned subsidiary, Arjomari Decor. Following its notification, the Commission considered whether the transaction amounted to a 'concentration' within the meaning of Article 3(1)(b) of the Merger Regulation.

Held

'The situation after the merger has been completed will be that Arjomari will hold 39% of the shares in WTA which in turn will hold 99% of the shares in Arjomari's operating company. Arjomari will be able to exercise decisive influence on WTA because the remainder of WTA's shares are held by about 107.000 other shareholders none of whom own more than 4%, with only three shareholders having over 3% of the issued share capital. Hence Arjomari will acquire control of the undertaking within the meaning of Article 3 of the Regulation. It follows that the transaction constitutes a concentration.' (para 4)

Comment

Similarly, in Case No IV/M.754 *Anglo American Corporation (AAC)/Lonrho* [1998] OJ L145/21, the Commission established the existence of a concentration through the acquisition of control. In that case AAC acquired 27 per cent in Lonrho. The disparity of the other shareholders meant that the transaction resulted in AAC's de facto control over Lonrho. To establish this, the Commission considered evidence from polls held at Lonrho shareholders' meetings in previous years and concluded that its level of holding would suffice to establish control, thus classifying the operation as a concentration.

In Case No IV/M.613 *Jefferson Smurfit Group plc/Munksjo AB* [1995] OJ C169, the Commission repeated the same test, holding that 'where a shareholder has a substantial minority interest in an undertaking and the remaining shares are widely dispersed, and particularly where the substantial but minority shareholder de facto controls the voting at the annual meeting, that shareholder exercises decisive influence on the undertaking within Article 3(3) of the Regulation.' (para 6)

Interestingly, in Case No COMP/M.2567 *Nordbanken/Postgirot* (SG (2001) D/292080) the Commission reviewed the acquisition by Scandinavian banking group Nordea of the sole control of Sweden's Postgirot Bank AB. In order to resolve the competition concerns arising from the transaction, Nordbanken undertook to eliminate its control in a third undertaking. This supposedly remedied concerns regarding structural links and potential coordination in the market. The divestiture included, among others, a reduction of Nordbanken shareholdings in the third undertaking to no more than 10 per cent. In its press release the Commission stated that 'Nordea undertook to reduce its stake in Bankgirot to 10%, a level which will no longer give it decisive influence over the company.' Although this was part of the commitments required by the Commission, and did not form part of the examination of whether there was a concentration, the Commission's statement is interesting. It implies that the Commission is willing to 'stretch' the notion of control and establish decisive influence even in a case with relatively low shareholdings.

The level of shareholdings alone should not be interpreted as setting a definite criterion. In principle, even absent special voting and veto rights, collective choice problems could result in decisive influence at even lower levels of shareholding than described above. In Case No IV/M.159 *Mediobanca/Generali* [1991] OJ C334/23, the Commission applied a similar analysis and considered whether a holding of 12.84 per cent could establish control. The Commission analysed the level of shareholder participation in meetings and subsequently concluded that sole control could not be established with such a holding.

Aerospatiale-Alenia/de Havilland **Horizontal Mergers**
Case IV/M.53 Non-coordinated Effects
European Commission, [1991] OJ L334/42

Facts

The Commission received notification of a joint acquisition by Aerospatiale SNI (Aerospatiale) and Alenia-Aeritalia e Selenia SpA (Alenia) of the assets of the de Havilland division (de Havilland) from Boeing Company (Boeing). After establishing that the proposed joint venture had a Community (Union) dimension, the Commission assessed it in accordance with Article 2 of the Merger Regulation. Following its appraisal, the Commission declared the concentration incompatible with the internal market.

Held

'The operation has as its effect that Aerospatiale and Alenia, which control the world and European leading manufacturer of regional aircraft (ATR), acquire the world and European number two (de Havilland) as explained below. Regional aircraft (commuters) are aircraft in a range of between 20 and 70 seats intended for regional carriers and have an average flight duration of approximately one hour. The regional transport market is mainly characterized by low density traffic where turbo-prop engined aircraft are, as a general rule, less expensive to operate than jet aircraft. Although the market has for the time being and will have until the mid-90s a relatively high growth rate, the commuter market is comparatively small in terms of aerospace markets generally.' (para 7)

'The proposed concentration would significantly strengthen ATR's position on the commuter markets, for the following reasons in particular: high combined market share on the 40 to 59 seat market, and of the overall commuter market; elimination of de Havilland as a competitor; coverage of the whole range of commuter aircraft; considerable extension of the customer base.' (para 27)

'The proposed concentration would lead to an increase in market shares for ATR in the world market for commuters between 40 to 59 seats from 46% to 63%. The nearest competitor (Fokker) would have 22%. This market, together with the larger market of 60 seats and above where ATR has a world market share of 76%, is of particular importance in the commuter industry since there is a general trend towards larger aircraft.' (para 28)

'ATR would increase its share of the overall worldwide commuter market of 20 to 70 seats from around 30% to around 50%. The nearest competitor (Saab) would only have around 19%. On the basis of this the new entity would have half the overall world market and more than two and a half times the share of its nearest competitor.' (para 29)

'The combined market share may further increase after the concentration. The higher market share could give ATR more flexibility to compete on price (including financing) than its smaller competitors. ATR would be able to react with more flexibility to initiatives of competitors in the market place. Following a concentration between ATR and de Havilland, the competitors would be faced with the combined strength of two large companies. This would mean that where an airline was considering placing a new order, the competitors would be in competition with the combined product range of ATR and de Havilland.' (para 30)

The concentration would lead to the elimination of de Havilland as a competitor of ATR. (para 31)

The new entity ATR/de Havilland would be the only commuter aircraft manufacturer present in all the various commuter aircraft markets. It will allow ATR to significantly broaden its customer base thus strengthening its market power, especially once customers have made a commitment to ATR as a manufacturer and would face additional costs if they chose to place orders with another manufacturer. (paras 32–3)

The current and expected future strength of the remaining competitors is limited and it is questionable whether, outside the market of 20- to 39-seat commuters, competitors could provide effective competition in the medium to long term. (paras 34–42)

As for the position of customers in the commuter markets it appears that for most established airlines a direct negative effect from the proposed concentration would only appear over time. New airlines entering the market are likely to feel a more immediate impact. (paras 43–50)

'In general terms, a concentration which leads to the creation of a dominant position may however be compatible with the [internal] market within the meaning of Article 2(2) of the Merger Regulation if there exists strong evidence that this position is only temporary and would be quickly eroded because of high probability of strong market entry. With such market entry the dominant position is not likely to significantly impede effective competition. … In order to assess whether the dominant position of ATR/de Havilland is likely to significantly impede effective competition therefore, it is necessary to assess the likelihood of new entry into the market.' (para 53)

'Any theoretical attractiveness of entry into the commuter market by a new player must be put into perspective taking into account the forecast demand and the time and cost considerations to enter the market … in terms of increase in annual deliveries the market appears to have therefore already reached maturity. Even for a company currently active in a related industry not already present on the commuter market—in practice this would seem to be limited to large jet aircraft manufacturers—it would be very expensive to develop a new commuter from scratch. According to the study submitted by the parties, there are high sunk initial costs of entering the regional aircraft market and delays in designing, testing and gaining regulatory approval to sell the aircraft. These are important for several reasons. The critical point is that with substantial fixed and sunk costs of entering the industry, these markets will be viable only for a limited number of producers. Furthermore, once a manufacturer is committed to the design and production of an aircraft, it is extremely costly and lengthy to adjust that design and production to unanticipated changes in market demand for aircraft. … In terms of time, the study states that it takes approximately two to three years of marketing research to determine which plane is required to meet the anticipated needs of the market. … The study concludes that there is no doubt that the presence of substantial and fixed entry costs significantly reduces the entry response by others to any successful aircraft by one manufacturer. … It follows from the above that a new entrant into the market would face high risk. Furthermore, given the time necessary to develop a new aircraft and the foreseeable development of the market as described above, a new manufacturer may come too late into the market to catch the expected period of relatively high demand.' (paras 53–6)

The proposed concentration would allow the parties to the concentration to act to a significant extent independently of their competitors and customers. The dominant position created by the transaction is not merely temporary and will therefore significantly impede effective competition. (para 72)

Comment

In its decision the Commission noted how, once customers have made a commitment to ATR and purchased from it, they would be exposed to additional costs associated with purchasing products from another manufacturer.

In Case IV/M.986 *Agfa Gevaert/DuPont* [1998] OJ L211/22 the Commission considered the impact of locked-in customers who are unable to switch suppliers. It noted that the majority of end-users and dealers had difficulties in switching suppliers of negative plates. Although switching between products was theoretically possible, it was limited in practice. This undermined the ability of other competitors to challenge the market position of the merged entity. (paras 63–71) The Commission concluded on this point that 'not only the disruptive effect of switching suppliers for end-users but also the practice of tying sales of consumables to sales of equipment, and the exclusivity arrangements with dealers, are factors which limit the possibilities for current

commercial jet aircraft engines. The Commission's case is based on the complementary nature of jet engines, avionics and non-avionics products. (paras 399–400)

'It should be noted, as a preliminary point, that the way it is predicted that the merged entity will behave in the future is a vital aspect of the Commission's analysis of bundling in the present case. It follows from the fact that the applicant had no presence on the markets for avionics and non-avionics products prior to the merger, together with the fact that Honeywell had no presence on the market for large commercial jet aircraft engines before the merger, that the merger would have had no horizontal anti-competitive effect on those markets. Thus, the merger would, prima facie, have had no effect whatsoever on those markets.' (para 401)

'The Commission held in the contested decision that each avionics product for regional and corporate aircraft constitutes a market in itself and that there is a market for each non-avionics product for all types of aircraft, including large commercial aircraft. Accordingly, its reasoning with regard to the creation, by means of bundling, of dominant positions on the markets for the different avionics products cannot be accepted in relation to the markets for each of the various avionics products for corporate and regional aircraft. Indeed, on the assumption that it actually becomes a reality after the transaction, any bundling attributable to the merger will affect only one segment of those markets, the large regional aircraft segment. In the same way, the Commission's reasoning is undermined (albeit to a lesser degree) in relation to non-avionics products, for which the Commission defined an individual market for each specific product, irrespective of the size and other features of the aircraft equipped.' (para 403)

It is only in the sector for large commercial aircrafts, for which the Commission has defined distinct markets both for jet engines and for each avionics product, that the Commission's case on bundling could conceivably be sustained. In these markets the Commission should have established that the merged entity would not only have the capability to engage in the bundling practices but also, on the basis of convincing evidence, that it would have been likely to engage in those practices after the merger and that, in consequence, a dominant position would have been created or strengthened on one or more of the relevant markets in the relatively near future (*Tetra Laval v Commission*, paras 146–62). However, in its decision the Commission has not sufficiently established the above. The mere fact that the merged entity would have had a wider range of products than its competitors is not sufficient to justify the conclusion that dominant positions would have been created or strengthened for it on the different markets concerned. (paras 404–70)

Comment

The Court heavily criticised the Commission's analysis of the conglomerate effects. Despite this, it did not annul the decision since these errors did not affect the rest of the Commission analysis which prohibited the transaction due to the merged undertakings' competing products and services.

The Commission's decision contrasted with the conclusion of the US Department of Justice (DOJ), which had cleared the merger earlier that year, requiring only minimal disposals. This was, and still is, the only case of the European Union blocking a merger already approved by US authorities.

In its investigation the DOJ determined that the merger, as modified by the remedies insisted upon, would have been pro-competitive and beneficial to consumers. In doing so it focused predominantly on the short-term efficiencies and the expected positive effects on consumers. On the other hand the Commission's main concern was that in the long-term, the post-merger price reductions would force competitors to exit the industry, eventually leading prices to rise above pre-merger levels.

Commenting on the Commission's *GE/Honeywell* decision, Charles A James, then Assistant Attorney General for the US DOJ Antitrust Division, issued a statement backing the DOJ decision, stating that clear and longstanding US antitrust policy holds that antitrust laws protect competition, not competitors, thus implying that the Commission's decision reflected a significant point of divergence. Carl Shapiro, then Chief Economist for the US DOJ, noted that: 'In North America, mergers expected to lead to lower prices are regarded as pro-competitive; in the EU, such mergers can be branded anticompetitive based on the fear that added pressure on rivals will ultimately cause them to exit the market. We believe the EU approach is unsound as a matter of competition policy, and that it is more accurately regarded as a form of industrial policy.'

Intel/McAfee — Conglomerate Effects

COMP/M.5984
European Commission, C(2011) 529 final

Facts

A proposed concentration between Intel, a leading producer of central processing units (CPUs) and chipsets, and McAfee, a security technology company. The two companies operated in closely related and complementary markets. In its analysis, the Commission considered possible conglomerate effects which may stem from the fact that Intel would have had the ability to offer both hardware and security solutions.

Held

'In most circumstances, conglomerate mergers do not give rise to competition problems. In some cases, in particular where as in the present case the merged entity enjoys strong market power in at least one of the markets concerned, a conglomerate merger may however create possibilities for exclusionary bundling or tying practices that could disadvantage or foreclose competitors and ultimately lead to them exiting the market, or otherwise significantly impede competition in the markets concerned.' (para 121)

The merged entity might engage in three main types of practices which should be considered:

(1) Degradation of interoperability between Intel's hardware and security solutions, and the products of competitors—Intel could keep undisclosed certain parameters and reserve those for exclusive use by McAfee. This would allow McAfee to develop better security solutions within less time than its competitors. Moreover, Intel could optimise the interfaces between its chipsets/CPUs and McAfee's security solutions. The Commission considers it likely that Intel has incentives to degrade interoperability of its hardware with other security solutions than McAfee's products and that customers would not be in a position to exert pressure on Intel to maintain interoperability. A degradation of the interoperability between the parties' products and those of the parties' competitors would lead to foreclosure of McAfee's competitors in the endpoint security markets and thereby possibly strengthen the current dominant position of Intel in the chipset and CPU markets. (paras 123–74)

(2) Technical bundling/tying—Technical tying consists in the technical combination of products of both parties, for example, by embedding McAfee security solutions in Intel's CPU and chipset platforms. The Commission's analysis suggests that Intel has the ability and incentive to engage in technical tying and that the negative effects of such a practice would be significant. It is likely that the conglomerate effects resulting from a technical tie between the parties' products would lead to the foreclosure of McAfee's competitors in the endpoint security markets and thereby possibly to the strengthening of the current dominant position of Intel in the chipset and CPU markets.' (paras 175–221)

(3) Commercial bundling strategies (pure and mixed bundling)—'In the present case, pure bundling would imply that CPUs and security software are sold exclusively together while mixed bundling would imply that either the CPUs or the security software would be offered at a discount when customers buy both products from Intel/McAfee.' (para 222) The Commission analysis suggests that Intel is able to commercially bundle hardware and security software products but that it would have limited incentive to do so. 'The market investigation also suggests that possible antitrust enforcement would have a certain deterrent effect. Finally, foreseeable effects of such a strategy would also probably remain limited.' (para 289)

Comment

Transaction cleared subject to commitments. In order to address the Commission's concerns, Intel committed to ensure interoperability and that vendors of rival security solutions will have access to necessary information in the same way as McAfee. Intel also committed not to actively impede competitors' security solutions from running on Intel CPUs or chipsets and to ensure that McAfee's security solutions will run on CPUs or chipsets sold by Intel's competitors.

Energia Italia/Interpower
Case M.3003
European Commission, [2003] OJ C22/5

FFJVs
Full Functionality
Reliance on Parent Company

Facts

The Commission received a notification of a proposed concentration by which the Belgian undertaking Electrabel SA (Electrabel), and the Italian undertaking Energia SpA (Energia) intended to acquire joint control of the Italian company Interpower SpA (Interpower). After examination of the notification, the Commission concluded that the proposed joint venture lacked full functionality and subsequently did not fall within the scope of the Merger Regulation.

Held

'Interpower currently sells most of the electricity produced to Enel through a Power Purchase Agreement (PPA) and, to a much lesser extent, to the National Grid Operator (the "GRTN"). After the expiration of these contracts, expected in 2003, and based on the Joint Venture Agreement, most of the electricity produced by Interpower will be committed to the parties, in proportion of their shareholdings.' (para 10)

'Furthermore, Interpower will have neither its own customers nor an independent commercial strategy. It will therefore depend for the greatest part of its turnover upon the sales to its parent companies. In the light of the above …, it can be concluded that the proposed joint-venture will not perform on a lasting basis all the functions of an autonomous economic entity within the meaning of Article 3(2) of the Merger Regulation.' (para 11)

Comment

The reliance of Interpower on its parent companies served as a decisive factor which underlined its lack of independent activity and commercial strategy.

In Case IV/M.556 *Zeneca/Vanderhave* [1996] OJ C188/10 the Commission considered the full functionality of a proposed joint venture 'Zeneca VanderHave BV' (Newco) operating in the seeds market. The Commission concluded that the notified operation fell within the scope of the Merger Regulation. It subsequently cleared the transaction. With respect to the relationship between the joint venture and the parent companies, the Commission noted that one of its parents, Suiker Unie, operates downstream of Newco in the sugar business, and is expected to continue being an important customer in the Netherlands. However, the Commission concluded that 'this relationship is not considered materially important (accounting for less than 4% of Newco's sales) for the overall joint venture operations. It presently operates on an arm's length basis vis-à-vis the seed business which is the subject of the concentration.' (para 8)

The Commission's Consolidated Jurisdictional Notice elaborates on this point: 'The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture. The fact that, for an initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character. Such a start-up period may be necessary in order to establish the joint venture on a market. But the period will normally not exceed a period of three years, depending on the specific conditions of the market in question.' (para 97) 'Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor.' (para 98)

DaimlerChrysler/Deutsche Telekom
Case COMP/M.2903
European Commission, [2003] OJ L300/62

FFJVs
Full Functionality
A Lasting Basis

Facts

The Commission received notification of a proposed concentration by which DaimlerChrysler AG and Deutsche Telekom AG will jointly own a newly created joint venture Toll Collect GmbH. The new joint venture was to establish and operate a system for the collection of road toll from heavy trucks in Germany and provide telematics services. The Commission cleared the transaction subject to conditions. In its assessment the Commission considered whether a joint venture which was limited in time could be regarded as a full function joint venture which performs on a lasting basis.

Held

'Toll Collect will perform on a lasting basis all the functions of an autonomous economic entity. It has adequate financial resources, its own staff, its own technical equipment and its own management and as such will operate independently on the market and separately from its parents.' (para 11)

'The fact that the agreement concluded on 25 June 2002 with the Federal Republic of Germany on the collection of the toll for the use of motorways by heavy goods vehicles and the establishment and operation of a system for the collection of the motorway toll from heavy goods vehicles (the Operator Agreement) stipulates that the agreement is to terminate after 12 years and can be extended only for three one-year periods is not a bar to the joint venture being established on a lasting basis. First, under Article 3 of the Joint Venture Agreement, Toll Collect's existence is not subject to any time limit. Secondly, a period of 12 years is sufficient to introduce changes on a lasting basis to the structure of the notifying undertakings.' (para 12)

Comment

The Commission considered a period of 12 years to be sufficiently long to introduce changes on a lasting basis to the structure of the notifying undertakings. Subsequently it held that the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

The Commission's Consolidated Jurisdictional Notice elaborates on this point:

'Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies. This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned, or where the agreement provides for the possible continuation of the joint venture beyond this period.' (para 103)

'By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.' (para 104)

Deutsche Bahn and Others v Commission — **Inspection Powers**
Case C-583/13P — Infringement of the Rights of the Defence
Court of Justice, [2015] 5 CMLR 5 — Obligation to State Reasons

Facts

The Commission issued three decisions ordering Deutsche Bahn AG and other undertakings to submit to inspections in accordance with Article 20(4) of Regulation 1/2003. In its first inspection, carried in three sites, the Commission found documents which it believed suggested the existence of another anticompetitive practice not targeted under the first inspection. The Commission adopted a second inspection decision to address the new suspicions. During the second inspection the Commission received additional information about additional anticompetitive conducts. Subsequently, the Commission ordered a third inspection. The applicants applied for annulment of the three inspection decisions. Among other things, they argued that in its first inspection the Commission came across documents which were completely unrelated to the subject matter of the inspection decision. In addition, the Commission used keywords in its electronic research which went beyond the scope of investigation. This information, the applicant argued, was obtained illegally and served as the basis for the second and third inspection decisions.

The General Court dismissed the action (Case T-289/11 etc *Deutsche Bahn and Others v Commission*). It held that if the Commission comes across a document incidentally, it may take copies of it and use it to launch new procedure to explore concerns raised from that information. The undertaking's rights of defense are respected when that information was obtained during an authorized inspection. (paras 124–34) Further, the Court held that the Commission can search exhaustively the content of offices, even without clear indication that information may be found in those premises. These powers are essential as they enable the Commission to locate information which is hidden or referenced incorrectly. Note that the title and content of a document may not always indicate its subject matter and scope. (paras 139–41) As for keyword search, the Court held that the list of keywords used during an inspection may change depending on the knowledge acquired during the inspection. (paras 145–60) Finally, with respect to the scope of the inspection, the Court noted that Article 20(4) Regulation 1/2003 requires the Commission to indicate the object and purpose of the inspection ordered. That requirement serves as a fundamental guarantee of the undertakings' rights of defence. While the Commission is not required to communicate all the information at its disposal or to define precisely the relevant market, it must indicate as accurately as possible the matters to be covered by the inspection and the essential features of the suspected infringement. (paras 161–76). Deutsche Bahn AG appealed the judgment to the Court of Justice. It argued, among other things, that its rights of defence were infringed because Commission officials were made aware of another complaint made against a subsidiary of the company, DUSS. This, it argued, has led the officials to direct their attention specifically to these documents even though they did not relate to the subject-matter of the first inspection.

Held

'Article 20(4) of Regulation No 1/2003 requires the Commission to state reasons for the decision ordering an investigation by specifying its subject-matter and purpose. As the Court has held, this is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence (… *Roquette Frères*, C-94/00, … paragraph 47, and *Nexans and Nexans France v Commission*, C-37/13 P, … paragraph 34).' (para 56)

'Moreover, under Article 28(1) of Regulation No 1/2003, information obtained during investigations must not be used for purposes other than those indicated in the inspection warrant or decision (… *Dow Benelux v Commission*, 85/87, … paragraph 17). The Court stated in that regard that such a requirement is aimed at preserving, in addition to business secrecy, expressly referred to in Article 28, undertakings' rights of defence, which Article 20(4) is intended to safeguard. Those rights would be seriously endangered if the Commission were able to rely on evidence … which was obtained during an investigation but was not related to the subject-matter or purpose thereof (… *Dow Benelux v Commission* … paragraph 18).' (paras 57–8)

'On the other hand, it cannot be concluded therefrom that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is required to safeguard professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market and identifying infringements of Articles 101 TFEU and 102 TFEU (… *Dow Benelux v Commission*, 85/87, … paragraph 19).' (para 59)

'It follows from the foregoing that, on the one hand, the Commission is required to state reasons for its decision ordering an inspection. On the other hand, if the statement of reasons for that decision circumscribes the powers conferred on the Commission's agents, a search may be made only for those documents coming within the scope of the subject-matter of the inspection.' (para 60)

In the present case, the Commission informed its agents before the first inspection was conducted, that there was another complaint against Deutsche Bahn concerning its subsidiary, DUSS. Although the efficacy of an inspection requires the Commission to have provided the agents responsible for the inspection with all relevant information, that information must nevertheless relate solely to the subject-matter of the inspection ordered by decision. The lack of reference to that complaint in the description of the subject-matter of the first inspection decision infringes the obligation to state reasons and the rights of defence of the undertaking concerned. (paras 61–4)

'Therefore, the first inspection was vitiated by irregularity since the Commission's agents, being previously in possession of information unrelated to the subject-matter of that inspection, proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision.' (para 66)

The General Court erred in law in holding that the information about the existence of the complaint about DUSS before the first inspection decision was based on valid reasons for providing the officials with general background information on the case, when that information falls outside the subject-matter of the first inspection decision. Subsequently, the second and third inspection decisions should be set aside on grounds of infringement of the rights of the defence. (paras 67–71)

Comment

The judgment sharpens the distinction between incidental finding of documents and an illegitimate 'fishing expedition'. On one hand, the Commission is not required to turn a blind eye when it finds, by coincidence, documents indecently found during an inspection, even when these are unrelated to its subject-matter (Case 85/87 *Dow Benelux NV v Commission*, para 19: 'it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during previous investigation'). On the other hand, the obligation to state reasons and the rights of defence will be infringed, if such find was not incidental, but was a result of earlier discussion with the officials, before the inspection, of information relevant to other suspicions, which is outside the subject-matter of the inspection decision.

In his opinion, Advocate General Wahl noted the lack of any clear relationship between the subject-matter of the first inspection and the suspected infringement by DUSS. He opined that the only plausible explanation to discuss the DUSS suspicions before the first inspection was so Commission staff 'could "keep their eyes peeled" for evidence related to the second complaint'. He added that 'it is by no means certain that the Commission staff—without that prior information—would have been able to understand the meaning of the DUSS documents.' (paras 77, 78, AG opinion)

Note that, in principle, it may have been possible for the Commission to widen the scope of its first inspection decision to include DUSS. But, having decided not to do so, the Commission was not at liberty to execute an informal fishing expedition. That practice undermined the undertaking's right of defence and led to the condemnation.