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ANTITRUST & COMPETITION LAW DIGEST

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EUROPEAN UNION - RESTRICTIVE AGREEMENTS

"*Pay-for-delay*": The General Court approves the Commission's restrictive approach in the Lundbeck case

Case T-472/13 of the General Court (Ninth Chamber), *Lundbeck* v. *European Commission*, March 10, 2016

On September 8, 2016, the General Court confirmed in six judgments the Commission's decision in the so-called *Lundbeck* case, the first "pay-for-delay" case in Europe.

In 2002, the pharmaceutical group Lundbeck executed patent settlement agreements with four generic manufacturers, which pertained to Lundbeck's flagship treatment against depression. These agreements provided for a commitment by the generic manufacturers not to launch their generic versions of the treatment in question on the market, in exchange for payments from Lundbeck ("reverse payments").

On June 19, 2013, the Commission fined Lundbeck and the other four generic manufacturers in application of Article 101 TFEU, considering that the agreements were anticompetitive by object. The Commission held that (i) the generic manufacturers were, at the time of the conclusion of the agreements in question, potential competitors of Lundbeck, and (ii) the agreements were intended to prevent new entry into the market by the generic manufacturers, a condition they would not have accepted in the absence of the reverse payments.

The General Court's judgment of September 8 confirms the Commission's decision.

Regarding the qualification of the generic manufacturers as "potential competitors", the General Court considers that the latter indeed had "real and concrete possibilities" of entering the market, especially in light of the investments already made, the steps taken in order to obtain a marketing authorization, and the supply contracts concluded with, amongst others, their Active Pharmaceutical Ingredient ("API") suppliers. The General Court further indicates that other routes to market were available to the generic manufacturers, despite Lundbeck's patent: launching the product "at risk", requesting a declaration of non-infringement from a national court before entering the market, claiming patent invalidity before the national courts, opposing a patent before the competent national authorities or the EPO, working with their current API producer or its supplier to change the API producer's process, or switching to another API producer, so as to limit or eliminate the risk that the API would be found to infringe Lundbeck's process patents.

Regarding the qualification of the agreements as anticompetitive "by object", the General Court confirms that any settlement agreement between originator and generic companies is not necessarily anticompetitive by object, but that it can be the case, in particular when such agreement (i) provides for reverse payments, the amount of which appears to be linked to the profits expected by the generic company had it entered the market, (ii) does not enable the resolution of the underlying patent dispute, and in particular does not provide that the generic company will be allowed to launch its product on the market upon the expiry of the agreement without having to fear infringement actions brought by the originator, or (iii) contains restrictions going beyond the scope of the patent(s) held by the originator company.

The judgment adopts an extensive view of the notion of potential competition. Indeed, for the General Court there is potential competition as soon as a generic manufacturer undertook investments in order to enter the market and where there exist possibilities, at least potential, to circumvent the barrier constituted by a valid patent. In the same vein, the notion of a restriction of competition by object is interpreted extensively even though, depending on the litigation options to disrupt the market and the potential outcomes of the patent litigations, it is hard to assert that such agreements necessarily lead to impede competition.

In our opinion, in line with the *Groupement des cartes bancaires* judgment,[1] the notion of restriction by object should be interpreted restrictively and limited to agreements for which it is certain that they will have restrictive effects on competition.

From a general perspective, it is legitimate to wonder what will be the long term consequences of such a decision. By reducing the incentives to settle patent disputes, there is a risk that generic manufacturers will challenge fewer patents and therefore that competition will be *in fine* restricted. This is probably not the intended objective of the General Court…

[1] Judgment of the Court dated September 11, 2014, *Groupement des cartes bancaires*, case C-67/13.

EUROPEAN UNION - ABUSE OF DOMINANT POSITION

Intel to wait before popping champagne

Case C-413/14P, Opinion of the Advocate General Wahl, *Intel Corporation Inc.* v. *European Commission*, October 20, 2016

On October 20, 2016, Advocate General Wahl issued his Opinion after Intel Corporation ("Intel") appealed the General Court's judgment dated June 12, 2014[1] rejecting Intel's action for annulment of the Commission's decision of May 13, 2009,[2] whereby the latter fined Intel €1.06 billion for abusing its dominant position.

According to the Commission, Intel – whose share amounted to 70% of a market characterized by significant barriers to entry – abused its dominant position on the worldwide market for x86 CPUs from 2002 to 2007, by (i) granting rebates to four major computer manufacturers (Dell, Lenovo, HP and NEC) on the condition that they purchase from Intel all, or almost all, of their x86 CPUs and by (ii) awarding payments to Media-Saturn – a European retailer of microelectronic devices – which were conditioned on the latter exclusively selling computers containing Intel's x86 CPUs.

Advocate General Wahl accepted five of the six grounds for annulment submitted by Intel and considered that Intel's appeal should be upheld and suggested that the case should be referred back to the General Court.

In particular, Advocate General Wahl considered that the General Court erred in finding that "exclusivity rebates" are *per se* illegal.

1 Judgment of the General Court dated June 12, 2014, *Intel Corp./Commission*, case T 286/09.

2 Commission decision, C(2009)3726 dated May 13, 2009.

The General Court found that the rebates offered to computer manufacturers were "exclusivity rebates", distinct from volume-based rebates and other types of rebates where the granting of a financial incentive is not directly linked to exclusive or quasi-exclusive supply. In this context, the General Court strictly interpreted the *Hoffmann-La Roche* judgment of 1979, where the Court of Justice ruled that "exclusivity rebates" can be sanctioned without examining all the circumstances of the case when seeking to establish the existence of a dominant position.[3]

According to Advocate General Wahl, the reasoning of the General Court is flawed because (i) it contradicts the case law of the Court of Justice (including the *Hoffmann-La Roche* case), (ii) it creates an irrebuttable presumption of illegality when dominant companies should be enabled to attempt to demonstrate that the foreclosure effects of such rebates are offset by efficiency gains, (iii) it overlooks the fact that the effects of "exclusivity rebates" largely depend on context and (iv) it makes an unwarranted distinction with regard to similar types of foreclosure pricing practices (e.g. margin squeeze practices and predatory pricing).

It remains to be seen whether the Court of Justice will ultimately follow the Opinion of its Advocate General and annul the General Court's judgment.

3 Judgment of the Court dated February 13, 1979, *Hoffmann-La Roche & Co. AG/ Commission*, case 85/76.

EUROPEAN UNION - STATE AIDS / PROCEDURE

The General Court's severe approach to the standing of the competitor of a State aid beneficiary

Case T-118/13 of the General Court (second chamber), *Whirpool Europe BV* v. *European Commission*, June 22, 2016

In a decision dated June 22, 2016, the General Court opted for a restrictive interpretation of the standing of the competitors of a State aid beneficiary to bring an action against the decision authorizing the aid.

By decision of July 25, 2012, the Commission authorized restructuring aid for the benefit of FagorBrandt. As required by the provisions applicable to this type of aid, the authorization was subject to compensatory measures. These measures consist of commitments aimed at offsetting the adverse effects on competition resulting from such aid. The 2012 decision followed an initial authorization decision by the Commission of October 21, 2008 that had been annulled at the request of Whirlpool and Electrolux by the General Court on February 14, 2012 on the grounds that the compensatory measures initially required were not sufficient.

In its action against the Commission's second decision, Whirlpool argued that, but for the aid, it would have been able to capture the market shares that would have been liberated by the absence of FagorBrandt.

Contrary to what it had ruled in 2012, the General Court determined this summer that Whirlpool's action was inadmissible because of the lack of the company's standing to bring an action against a European Union act of which it was not the addressee.

The General Court claimed to apply the established case law to the question of the standing of competitors of State aid recipients (in particular the *Plaumann*[1] case). It recalled that any operator may bring an action against acts of which it is the addressee or which concern it directly and individually. With regard to State aid, and in the case of competitors of the recipient entity, an entity is considered to be individually concerned by a Commission decision when its position on the market has been substantially affected by the aid (it should be noted in this regard that the General Court confirms that the fact of having played an active role in the proceedings before the Commission may militate for the admissibility of the competitor's action, although it is not sufficient for the claim to be admitted).

In the present case the General Court points out that in order for its claim to be admissible, the competitor must demonstrate the particularity of its situation as

[1] General Court, July 15, 1963, case 25-62, *Entreprise Plaumann & Co., Hambourg a.o./Commission.*

compared to other competitors.[2] Consequently, Whirlpool should have demonstrated that it itself would have been more affected by the aid than how the remaining fifteen competitors could have been affected on average, and not only claim that the absence of FagorBrandt would have led it, in a manner similar to other European operators, to increase its sales. The General Court further considers that the fact that Whirlpool was ranked second in the market did not, *per se*, allow it to consider that it was individually concerned, since the market was characterized by a non-concentrated structure, with a large number of operators.

Moreover, it should be noted that with this ruling the Tribunal has shown it is not afraid to contradict itself and to discard Whirlpool's *locus standi*, even though it had previously accepted it in its judgment of February 14, 2014.

[2] See General Court, January 11, 2012, case T 58/10, *Phoenix-Reisen and DRV/ Commission*, pt 50-55; General Court, August 27, 2008, case T 315/05, *Adomex/Commission*, pt 28-31; General Court, December 3, 2014, case T 57/11, *Castelnou Energía/Commission*, pt 35.

EUROPEAN UNION - STATE AIDS

FT's saga on shareholder loans: end of the story

Case C-486/15 P of the Court of Justice, *European Commission* v. *France and Orange*, November 30, 2016

Finally, the long-running litigation between Orange (formerly France Télécom; hereinafter, FT) and the Commission regarding alleged State aid in the case involving shareholder loans granted by the State has come to an end.

The story dates back to 2004, when the Commission determined that a loan offer in December 2002, coupled with public statements (in particular, statements in July and October, and the announcement of a €9 billion loan offer in December 2002), had conferred an economic advantage on FT and potentially committed State resources, even though the loan was not actually implemented.

FT and the French State sought annulment of the Commission's decision. The judicial battle that followed shed light on controversial legal questions. The General Court first annulled the Commission's decision in 2010. Following the appeal of *Bouygues Telecom*, a competitor of FT, the Court of Justice in 2013 set aside the General Court's judgment, which analyzed each measure individually, i.e. each public statement and the loan offer.

By its 2013 judgment, the Court of Justice considered that the General Court erred in law, both in its review of the Commission's identification of the State intervention and of State resources. The Court of Justice clarified important legal issues.

First, the Court of Justice held that consecutive measures of State intervention might be regarded as a single State intervention, in particular where consecutive interventions, especially with regard to their chronology, their purpose and the circumstances of the recipient undertaking at the time, are so closely linked to each other that they are considered to be inseparable.

Second, the Court of Justice also made clear that, contrary to the General Court's contention, it is not necessary that the reduction in State resources should correspond or be equivalent to an advantage granted to the beneficiary. According to the Court of Justice, for the purpose of establishing the existence of State aid, the Commission must merely establish a sufficient link between, on the one hand, the advantage awarded to the recipient and, on the other, a reduction of the State budget or a sufficiently concrete economic risk.

The Court of Justice decided that, even if the loan had not been accepted, the appearance given to the market was that FT's financial position was more secured following the State's intervention. The Court of Justice concluded that the potential additional burden on State resources resulted in an economic advantage.

The Court of Justice referred the case back to the General Court. The General Court considered in 2015 that the

Commission was wrong to classify the offer of the loan as State aid and once again annulled the decision.

First, the General Court pointed out that in the contested decision it was the announcement of December 4, 2002 and the shareholder loan offer, taken together, which were considered to be the State measure conferring on FT an economic advantage deriving from State resources and characterized as State aid.

The General Court therefore considered that it was to those two measures, taken together, that the Commission had to apply the prudent private investor criterion. The General Court concluded that the Commission applied the prudent investor principle test primarily to declarations from July 2002 in order to conclude that the shareholder loan offer, as announced and notified on December 4, 2002, constituted State aid. Such an application of the test was considered all the more wrong because the Commission did not have sufficient information at its disposal for determining whether the statements made from July 2002 were, in and of themselves, capable of committing State resources.

In addition, the General Court pointed out that the Commission was required to apply the test of the prudent private investor in relation to the time when the decision to provide FT with financial support through the shareholder loan offer had been taken by the French State, namely in December 2002.

The Commission disputed these findings. According to the Commission, the prudent investor test ought to have been applied within the context of the July 2002 and not the December 2002 announcement. The Court of Justice, however, looked at the circumstances of the case (as stated by the General Court) and, in particular, at the fact that (i) the shareholder loan offer came up for approval only in December 2002; (ii) the French State had made no firm commitment in July 2002, and (iii) the decision to provide FT with financial support through the shareholder loan had been taken not in July 2002 but early December 2002. Taking these circumstances into account, the Court of Justice held that deciding in advance of July 2002 the time when the prudent private investor test fell to be assessed would have necessarily excluded from that assessment relevant factors that occurred between July 2002 and December 2002.

The Court of Justice therefore definitively annulled the Commission's decision of 2004.

The European judges admit secret recordings of phone conversations as evidence of a cartel

Case T-54/14 of the General Court (ninth chamber), *Goldfish* v. *European Commission*, September 8, 2016

In its judgment handed down on September 8, 2016 the General Court clarified the issue of admissibility of secret recordings of telephone conversations as evidence of the existence of an anticompetitive agreement.

Between June 2000 and January 2009, Heiploeg and Klaas Puul conspired to fix prices and share sales volumes of North Sea shrimp. Two other companies were alleged to have participated in this cartel and were fined more than €28 million by the Commission on November 27, 2013 – Kok Seafood from February 2005 and Stührk between March 2003 and November 2007.

On January 26, 2009, Klaas Puul submitted a leniency application to the Commission, blowing the whistle on the existence of this cartel. The Commission later carried out inspections, including at the Kok Seafood premises. There the Commission seized audio files of the recordings of telephone conversations made by an employee of Kok Seafood without the knowledge of his interlocutor at the competing company, Heiploeg, as well as his notes of these conversations.

In its decision, the Commission took into consideration both the audio files and notes taken by the Kok Seafood employee. Use of this evidence was at the heart of the appeal lodged by the remaining companies, as they disputed both its credibility and legality.

In its judgment, the General Court dismissed the appeals on the grounds of the well-settled EU principle of the unfettered evaluation of evidence. In order to apply this principle in the present case, the Court of Justice analyzed the conditions laid down by the European Court of Human Rights regarding the admissibility of legal evidence. According to this Court, the use of an unlawful recording as evidence does not *per se* conflict with the principles of fairness as set forth under Article 6(1) of the European Convention of Human Rights (the "ECHR"), and that even if the evidence gathered is in breach of Article 8 of the ECHR, it is nonetheless legally admissible if two requirements are met:

- first, the appellant has not been deprived of its right to a fair trial or of its rights of defense, and
- second, the disputed recording does not constitute the sole evidence establishing the infringement.

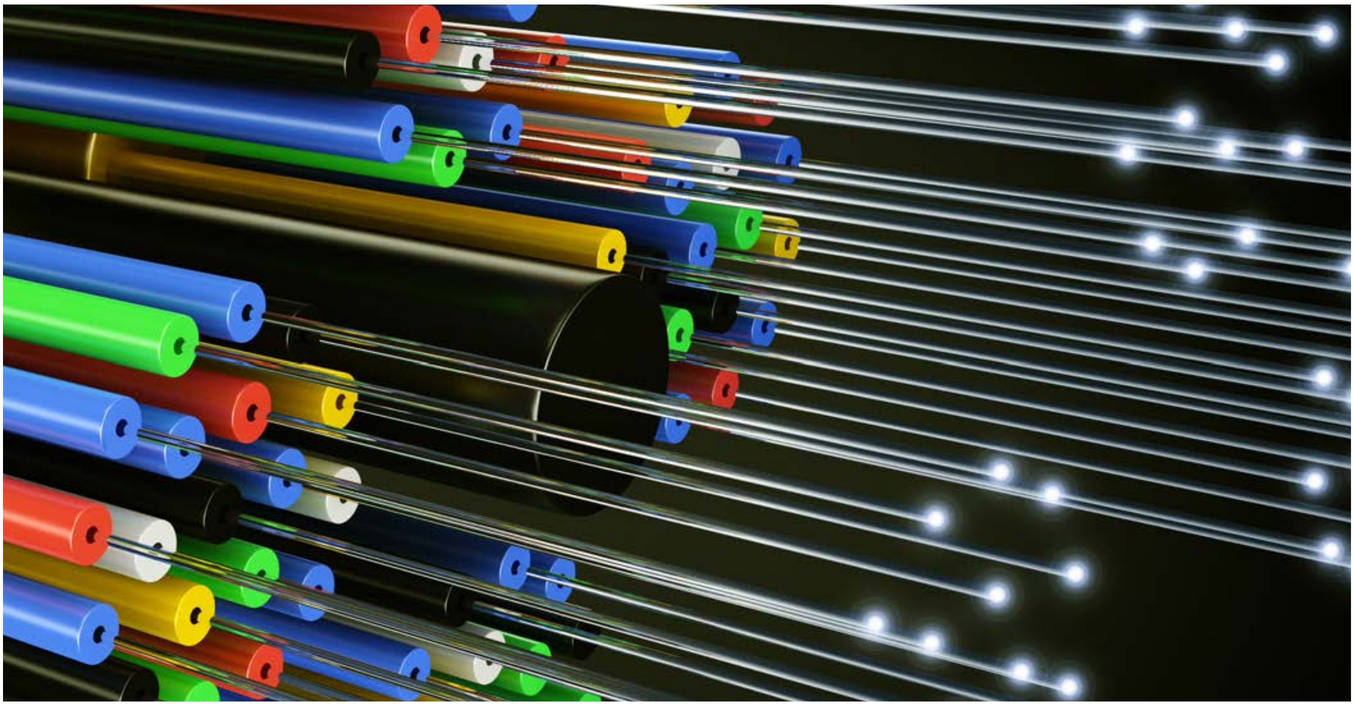
In this case, the General Court considered that the two requirements were met, and accordingly, it admitted the secret recordings as valid evidence. The Court of Justice also dismissed the appellant's argument on the credibility of the notes of the telephone conversations. In that regard, the Court of Justice observed that the Commission had analyzed the notes in light of the recordings and took into consideration that the author added some personal comments from time to time.

This judgment of the General Court avers that the Commission can use as evidence recordings legally obtained during an inspection at a company's premises, even if such recordings were illegally made without the knowledge of all persons concerned.

By this decision, the General Court adopts a radically different approach from that of the French Supreme Court (Cour de cassation). In the *Philips* case, the Supreme Court clearly considered in plenary session that the FCA cannot base its decisions on recordings made without the knowledge of the person being recorded.[1]

Incidentally, the French judgment was used by the appellants before the General Court, even though their case had no links to France. The General Court highlighted the singularity of the interpretation of the French Supreme Court and rejected it, noting that if the EU jurisdictions can learn anything from the experience of the national laws, it is that there is no obligation to apply the law of the Member State that has the strictest rules on the admissibility of evidence.

1 French Supreme Court, plenary session, January 7, 2011, no. 09-14.316 and 09-14.667, *Philips France & Sony France.*



FRANCE - MERGER CONTROL

The French Competition Authority ("FCA") fines the Altice group €80 million for gun-jumping

Decision of the French Competition Authority 16-D-24, November 8, 2016

On November 8, 2016, the FCA imposed a heavy fine of €80 million on the Altice group in a "gun-jumping" probe related to two proposed acquisitions in the telecommunications sector.

According to the FCA, even though Altice had not acquired SFR and Virgin Mobile's assets during the stand-still period, it had started exercising decisive influence over them and obtained access to competitively sensitive information concerning its competitors.

Regarding the SFR operation, the FCA stated that the two companies (SFR and OTL) had been working together to prepare a new cable TV service for several months before receiving merger approval. This new offer was therefore released in the market only a few days after Altice received the clearance at the end of October 2014. Moreover, Altice has approved the participation of a subsidiary to a call for tender and refused SFR permission to undertake several investments in IT infrastructures even though SFR considered those investments to be in compliance with its commitment to sound management of the company during the stand-still period. Altice also directly interfered in SFR's commercial policy, notably by asking SFR to suspend several ongoing marketing operations.

This decision is the first to be handed down in a "gun-jumping" case in France and thus sets an important precedent for French merger control. In this case, the FCA provided more clarity with regard to rules that the merging parties must observe during the stand-still period.

First, the FCA severely limits the contractual stipulations that may be imposed on a target during the stand-still period of an acquisition process. In the context of the OTL operation, the fact that prior approval by the buyer was necessary (i) to negotiate certain investments above an express amount, not specified in the decision but described as "*very low*" by the FCA, (ii) to effect the conclusion or modification of major contracts, and (iii) for the opening of new stores, were all considered as signs of early implementation of the operation. The FCA's more restrictive approach contradicts Commission practice, which considers such contractual clauses to be "*ancillary restrictions*" as long as they are necessary to the implementation of the merger and limited to safeguarding the target's value.[1] While in this case the contractual terms may have been construed as unduly broad, and conferring on the buyer effective operational control of the target (the FCA cites an absence of clearly stated thresholds), this approach nonetheless raises the question of the border between protection of the target's value and "gun-jumping". We can in this respect fear that the FCA decision invalidates any consultative mechanism imposed by the buyer during the stand-still period.

Moreover, the FCA greatly restricts the composition of the "*clean teams*", i.e. the individuals that may have access to sensitive information during the stand-still period. The FCA indeed holds that the transfer of sensitive information to in-house counsels of the buyer, not subject to any obligation of confidentiality and hierarchically subordinate to their employer, was not a mechanism that could prevent the dissemination of commercially sensitive information. As underlined by the FCA, "*it must be considered that their access to commercially sensitive information is equivalent to an access of the entire company to this information*".

Even if the FCA noted that, in this specific case, the mechanism had not been implemented, it is nonetheless true that it limits the access to clean teams to external counsel only and recommends that the results of the analysis carried on by such third parties be presented "*anonymously or in an aggregated manner in order not to reveal any strategic information*".

The FCA thus maintained a strict interpretation of the obligation for the merging parties to behave as independent competitors, ignoring the importance of exchanges between the parties that occur prior to implementation of the transaction. A critical exception are those employees of the buyer authorized to exchange sensitive information as long as they are bound by confidentiality agreements and do not participate in corporate decision-making.

Finally, it is worth noting that the FCA settled the amount of the fine with the parties, which implies that they did not dispute either the existence of the alleged violation or their legal qualification.

1 See e.g. Commission decision, case IV/M.319 – BHF/CCF/CHARTERHOUSE, para. 17; IV/M.465 – GE/ CIGI, para. 15; IV/M.861 – TETRON/KAUTEX, paras 19, 22; IV/M.597 – SWISS BANK CORPORATION/S.G. WARBURG, para. 23.

FRANCE - ABUSE OF DOMINANT POSITION

The French Supreme Court confirms the fine imposed on Sanofi-Aventis for implementing a denigration strategy against generic versions of Plavix

Cour de cassation, October 18, 2016, n°15-384

On October 18, 2016, the French Supreme Court dismissed Sanofi-Aventis' appeal lodged against the judgment of the Paris Court of Appeal of December 18, 2014,[1] and therefore confirmed the €40.6 million fine imposed on May 14, 2013 by the FCA on Sanofi-Aventis for having abused its dominant position in the market for Clopidogrel.[2]

Sanofi-Aventis is a pharmaceutical company which markets Plavix – an originator drug based on Clopidogrel – which is used to prevent relapses of serious cardiovascular diseases. Sanofi-Aventis was fined for implementing a denigration strategy against generic versions of Plavix in order to limit their entry into the market and promote Winthrop, its own generic version of Clopidogrel. More specifically, Sanofi-Aventis was alleged to have implemented "*a global and structured communication strategy, with an aim to influence doctors and pharmacists in order to stop the generic substitution process.*"

The French Supreme Court held that, although Sanofi-Aventis had the right to carry on professional communications regarding the objective differences between Plavix and competing generic products, its communication with doctors and pharmacists had served to raise doubts as to the quality and safety of generics without any evidence to prove its allegations.

Moreover, the French Supreme Court confirmed the method followed by the FCA for the calculation of the fine, which took into account the entire period for which the exclusionary practice had produced effects on the market, instead of the sole period of the duration of the infringement.

1 Paris Court of Appeal, December 18, 2014, case no. 2013/12370.
2 French Competition Authority, Decision no. 13-D-11 relating to practices implemented in the pharmaceutical sector, dated March 14, 2013.

FRANCE - PROCEDURE

Adversarial principle and interim measures: a gentle reminder by the French Supreme Court

Cour de Cassation, October 4, 2016, n°15-14.158

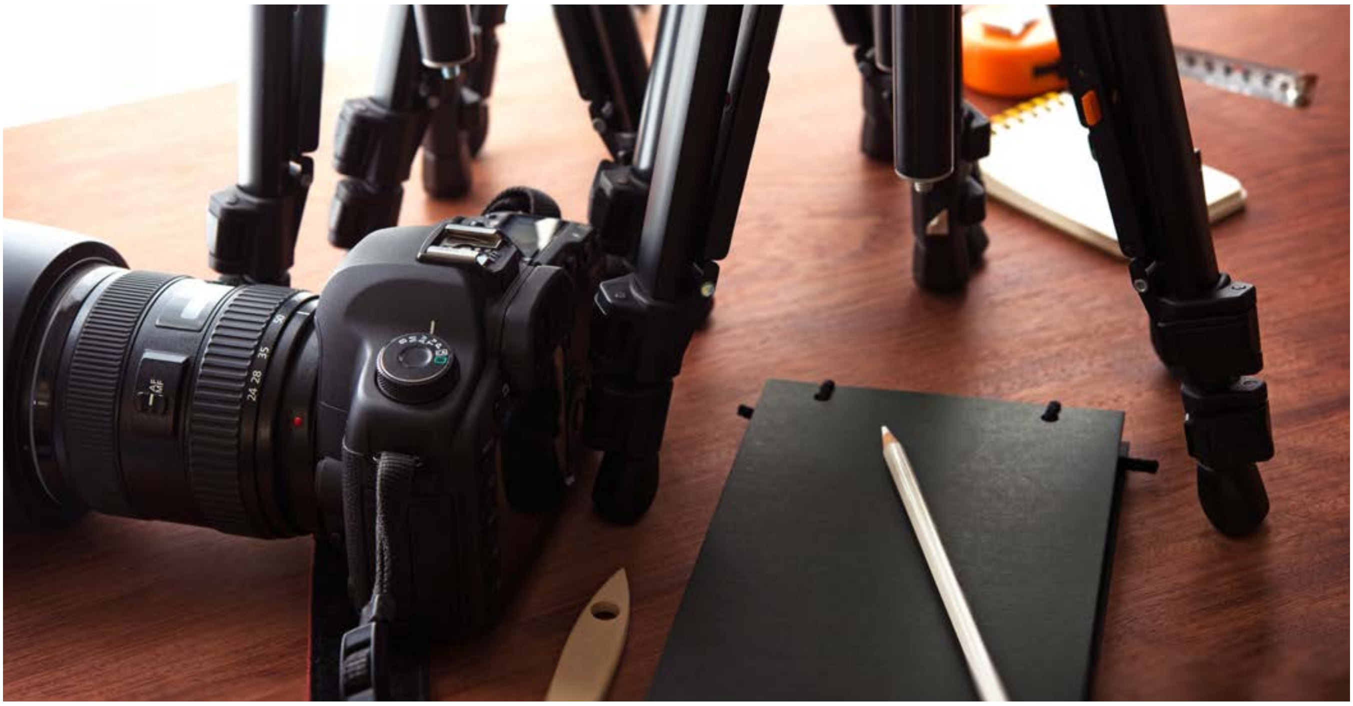
On October 4, 2016, the French Supreme Court dismissed the appeal brought by Orange S.A. against a judgment dated February 5, 2015, whereby the Paris Court of Appeal upheld the FCA's decision no. 14-D-10 of September 25, 2014. The latter rejected the request for interim measures submitted by Orange S.A. for the immediate suspension of the network-sharing agreement signed between its competitors Bouygues Telecom and SFR, which also sets out 4G roaming services provided by Bouygues Telecom to SFR, enabling SFR to significantly and promptly increase its 4G coverage.[1]

The judgment of the French Supreme Court is of significant interest for two reasons.

First, the Court recalled the scope of the adversarial principle. The Court stressed that "*the adversarial principle does not imply that the applicant – who does not have any rights of the defense to be protected – may obtain the disclosure of documents related to the defendant that are protected by business confidentiality.*" In order to ensure the effectiveness of decisions granting protection of business secrets, the Court held that the applicant cannot attend hearings before the College of the Competition Authority when these relate to documents containing business secrets.

Second, the Court pointed out that interim measures must be strictly linked to what is necessary to tackle the emergency. In this case, the Court held that the roaming service "*is not irreversible and may be interrupted anytime without severely disrupting SFR.*" The reversibility of the 4G roaming services, taken together with the fact that the service covers 20% of the French population, led the Court to consider that the criticized 4G roaming services are not a sufficiently serious and immediate threat requiring interim measures to be granted. Lastly, the Court took the view that Orange S.A. failed to demonstrate how the loss of a competitive advantage with regard to network coverage would seriously and immediately damage its business activities.

[1] Press release of the French Telecom regulator, May 27, 2015: "*The 4G coverage provided by SFR has increased substantially between July and December 2014: from 30% to 53% of the population covered in France. This increase is due in part to the roaming services that SFR offers its customers on the Bouygues Telecom 4G network, most of which became available in November 2014.*"



FRANCE - RESTRICTIVE AGREEMENTS

The FCA fines the modeling sector's main professional union and 37 modeling agencies

Decision of the French Competition Authority 16-D-10, September 29, 2016

In its decision of September 29, 2016, the FCA levied fines of more than €2.3 million against the main professional union of modeling agencies for having, between 2000 and 2010, drawn up and distributed pricing schedules as a guide to modeling agencies' commercial policies, and against 37 modeling agencies for having participated in statutory meetings on union pricing schedules between 2009 and 2010.

As regards the main professional union, the Authority observed that even though its pricing schedules took into account the rules imposed by the collective agreement and the Labor Code concerning a model's salary, the pricing schedules did not only include the minimum hourly salary, but also fixed the total price that clients were invoiced for modeling services. These prices not only included the model's remuneration, but also the agency's margin. The Authority then considered that, by acting above and beyond its primary task of providing information, advice and the defense of its members' professional interests, the union caused harm to the commercial autonomy of modeling agencies by price-fixing and reduced competition on the market for the services provided by modeling agencies to their clients.

With respect to the modeling agencies, the Authority observed that, between 2009 and 2010, they participated in statutory meetings during which they voted on increasing union prices and/or discussed a rule regarding the ban on distributing their own pricing schedules. The 37 modeling agencies involved represented almost the entire relevant market. The Authority considered that by participating in the drawing-up, distribution and, in some cases, application of pricing schedules, the agencies disrupted the basis for commercial negotiations and created obstacles to competition to the detriment of their clients.

To determine the amount of the fines, the Authority took into account, notably, the seriousness of the practices and the damage caused to the economy. The Authority also took into account the specific characteristics of the practices and the disparity, notably in terms of size, between the entities involved, some of which also experienced a sharp drop in their turnover. Finally, the Authority took into account the financial difficulties encountered by several agencies and granted three agencies who did not contest the findings a 10% reduction in their fines.

New case law on prohibitions to sell over the Internet in distribution agreements

As reported in the previous edition, the Federal Cartel Office has taken a tough stance on enforcing the antitrust laws against clauses in distribution agreements which prevent the retailing of products over the Internet. For example, ASICS and adidas were forced to amend their existing distribution systems.[1]

The same antitrust question has also given rise to several – potentially contradictory – court judgments throughout Germany. While some courts acknowledge the right of a manufacturer to prohibit the resale of its products via Internet marketplaces or the use of price comparison websites in selective distribution systems, others strictly uphold the right of a distributor to sell via the Internet. For the avoidance of doubt, none of the German courts, nor in fact any of the parties in the relevant case, dispute the general notion that a manufacturer may in principle not prevent sales by its distributors over the Internet.[2] Instead, the cases focus on a limited subset of circumstances, where, following the *Pierre Fabre* judgment,[3] limitations on Internet sales may still be possible, namely in selective distribution systems.

Most prominently, the Higher Regional Court of Frankfurt is considering whether a manufacturer and supplier of cosmetics can prohibit its distributors from selling products via third-party Internet sites or platforms, if such third parties are identifiable (i.e. market places).[4] The Court issued an order for reference to the European Court of Justice to consider in particular whether protection of a "luxury image" is a legitimate reason for organizing a selective distribution system and if so, whether it is permissible to impose on distributors an outright ban on sales via third-party platforms regardless of whether the third-party platform meets legitimate quality criteria set by the manufacturer and whether a general prohibition of sales via identifiable third-party Internet platforms qualifies as an illegal restriction of customer groups or a prohibition of parallel sales. This will provide an additional opportunity to clarify the *Pierre Fabre* judgment and should give some insight as to how the EU Courts approach restrictions on the use of the Internet for the distribution of products.

There is also a significant number of other German court cases which consider similar questions. For example, the Higher Regional Court of Frankfurt ruled in another case that backpack manufacturer Deuter has a right to limit the resale of its products on Internet marketplaces such

1 See FCO decision of August 19, 2015, case no. B3 - 137/12 (*adidas*); FCO decision of August 28, 2015, case no. B2 - 98/11 (*ASICS*); press releases are available at www.bundeskartellamt.de.

2 Regulation 330/2010/EU of the European Commission of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102 of April 23, 2010, pages 1-7.

3 European Court of Justice, judgment of October 13, 2011 (Case no. C-439/09).

4 Higher Regional Court of Frankfurt a. M., Decision of April 19, 2015 (Case no. 11 U 96/14), pending now at the European Court of Justice (Case C-230/16).

as *Amazon* provided its distribution system meets the requirements for a selective distribution system.[5] At the same time, the Court did not allow the prohibition of the use of price comparison websites.

In this case, Deuter had argued that preventing its distributors from selling via Internet marketplaces could not be compared to preventing distributors from selling on the Internet via their own Internet stores. The distributor, of course, considered that the prohibition to sell via Internet market places or a prohibition of the use of price comparison websites was a restriction of the sale of products on the Internet by itself.

The Regional Court of Frankfurt, as the court of first instance in that case, had followed the arguments of the distributor and had declared both restrictions illegal under the antitrust laws. The Higher Regional Court of Frankfurt disagreed with regard to Internet market places. It ruled that Deuter had the right to limit the resale of its products on Internet market places because the requirements for a selective distribution system were met. The Court considered that the average customer would not know whether he or she purchased the products directly from the Internet market place or from a distributor of Deuter. Furthermore, Deuter had an interest to ensure, for example, proper sales advice on the various products by its retailers. By contrast, the restriction of the use of price comparison websites was considered illegal also by the Higher Regional Court of Frankfurt, as these websites obviously did not sell products directly, but only passed on to interested customers the offers of retailers and their Internet stores.

The Higher Regional Court of Frankfurt is aligned with other German courts on this issue. In particular, the Higher Regional Court of Karlsruhe[6] and the Higher Regional Court of Munich[7] also upheld restrictions on Internet platform resales in the context of selective distribution systems:

- For example, in a case concerning school backpack brand Scout (*Scout 1*), manufacturer Alfred Sternjakob had limited its distributors in their sale of Scout backpacks via Internet auction platforms, such as eBay. Alfred Sternjakob argued that this restriction on its retailers was necessary to ensure proper sales advice and the reputation of its products. The distributor argued that the restriction was illegal under the antitrust laws. In the view of the distributor, the real goal of Alfred Sternjakob was to maintain the recommended retail price. The Regional Court of Mannheim as well as the Higher Regional Court of Karlsruhe disagreed and accepted the arguments of Alfred Sternjakob and declared the prohibition to sell products via eBay as legal under the antitrust laws. Both courts pointed out that the selection of distributors due to objective criteria, such as sales advice and reputation, was not an unlawful restraint of its retailers but an integral part of the distribution system.
- The Regional Court and the Higher Regional Court of Munich decided a similar case in the same way. The German Center for Protection against Unfair Competition (*Wettbewerbszentrale*) had requested that adidas should be banned from including clauses in its distribution agreements that prohibit the sale of adidas products via Internet auction platforms. The courts, however, declared this clause legal under antitrust laws, since quality requirements for Internet retailing were as permissible as in the case of conventional (offline) retailing.

At the same time, the Higher Regional Court of Schleswig[8] and the Higher Regional Court of Berlin[9] took the view that a prohibition to sell via Internet market places was not justified, at least not in the particular cases.

- In the case concerning Casio, the Higher Regional Court of Schleswig[10] considered that the restriction by Casio with regard to the resale of digital cameras

[5] Higher Regional Court of Frankfurt a. M., judgment of December 22, 2015 (Case no. 11 U 84/14).

[6] Higher Regional Court of Karlsruhe, judgment of November 25, 2009 (Case no. 6 U 47/08).

[7] Higher Regional Court of Munich, judgment of July 2, 2009 (Case no. U 4842/08).

[8] Higher Regional Court of Schleswig, judgment of June 5, 2014 (Case no. 16 U 154/13), following Regional Court of Kiel, judgment of November 8, 2013 (Case no. 14 O 44/13).

[9] Kammergericht Berlin, judgment of September 19, 2013 (Case no. 2 U 8/09).

[10] See above, footnote 5.

over an Internet platform limited the price pressure and prevented distributors from reaching a significant number of potential customers. Such a limitation would have been legal only in the context of a selective distribution system and in particular only to ensure the quality of sales advice and correct use of the product. However, this was not the case here, as Casio sold the cameras to wholesale distributors who resold the products to unauthorized distributors.

- In *Scout 2*, the Higher Regional Court of Berlin[11] prohibited a restriction on the resale of products via Internet marketplaces by arguing that the criteria for selective distribution must be applied across all distribution channels. Since in this particular case the manufacturer sold its products offline in a no-name discount environment, it was not allowed to prevent its distributors from using similar online environments such as Internet platforms or price comparison websites.

[11] See above, footnote 6.

The preliminary ruling of the European Court of Justice initiated by the Higher Regional Court of Frankfurt in *Coty* might clarify whether and to what extent Internet distribution can be prohibited in a qualitatively selective distribution system.[1] Furthermore, at least the judgment from the Higher Regional Court of Frankfurt in *Deuter*[2] and the judgment from the Higher Regional Court of Berlin in *Scout 2*[3] are currently subject to pending appeals at the Federal Supreme Court. It will be interesting to see whether the Federal Supreme Court will (i) prohibit restrictions on Internet resales outright, (ii) allow them on a case-by-case basis, e.g. by applying *Pierre Fabre*, or (iii) will also seek guidance from the European Court of Justice by way of a preliminary ruling.

[1] European Court of Justice, pending (Case C-230/16).
[2] Federal Court of Justice, pending (Case no. KZR 3/16).
[3] Federal Court of Justice, pending (Case no. N. N.).

BELGIUM - COMMITMENTS

MFN clauses: The Belgian Competition Authority has closed its investigation against Immoweb, subject to commitments

Decision of the Belgian Competition Authority ABC-2016-I/O-31-AUD, November 7, 2016

On January 30, 2015, the Belgian Competition Authority ("BCA") opened an investigation against Immoweb S.A., a company that manages a real estate online portal. The investigation concerned Most Favoured Nation clauses ("MFN clauses") in contracts entered into between Immoweb and developers of software for real estate agencies. The BCA considered that the specific clauses might raise questions with regard to Articles 101 and 102 TFEU (as well as the Belgian equivalent provisions, i.e. Articles IV.1 and IV.2 of the Code of Economic Law).

The concerned developers create software for real estate agencies, allowing them to transfer directly and automatically the real estate they have in their portfolio onto Immoweb's website. According to the BCA, the Belgian market is unique in the sense that online portals pay a fee to software developers per real estate listing that is transferred through the developers' software. In other jurisdictions the developers usually do not receive any compensation from the online portals but only from the real estate agencies.

The current version of the contracts between Immoweb and developers contains MFN clauses that require the software developers to offer equal terms to Immoweb when signing contracts with Immoweb's competitors in conditions that are financially more advantageous.

The BCA concluded that in practical terms these clauses prevent Immoweb's competitors from negotiating with software developers better financial terms and conditions than Immoweb's. Indeed, according to the BCA, because of the predominance of Immoweb in the Belgian market, real estate agencies would want to have their offerings principally listed there; software developers could actually lose revenue despite negotiating better terms and conditions with an Immoweb competitor. Consequently, according to the BCA, the investigated MFN clauses restrict competition insofar as they artificially raise the cost of entry and/or the cost of development of Immoweb's competitors.

On the basis of the BCA's preliminary analysis, Immoweb decided to offer commitments in order to alleviate the authority's concerns and committed to unilaterally remove these MFN clauses. As part of the commitments, the company also decided to no longer incorporate MFN clauses in future contracts with software developers for a period of five years.

Following these commitments, the BCA decided to close the investigation and therefore no infringement of competition rules was found.

First company director disqualification order imposed by the UK Competition Authority

CMA, December 1, 2016, CDDA

On December 1, 2016, the UK Competition and Markets Authority ("CMA") announced that it had secured its first company director disqualification order against the director of a company who had been found to have infringed competition law in the UK.[1]

Under the order Mr. Daniel Aston, the managing director of the online poster supplier Trod Ltd., has given a disqualification undertaking not to act as a director of any UK company for five years.

Under the Company Director Disqualification Act 1986 ("CDDA"), the CMA can apply to the High Court for an order disqualifying a director (which includes acting as a shadow director) from holding company directorships or performing certain roles in a company for a specified period up to 15 years. The Court must make such an order if the following conditions are satisfied:

- a company of which the individual is a director commits a breach of competition law; and
- the Court considers that the individual's conduct as director makes him unfit to be concerned with the management of a company.

The CDDA also empowers the CMA to accept a disqualification undertaking from a director instead of making an application to court. Such an undertaking has the same legal effect as a court order.

In June 2010, the UK competition authority (then the OFT) issued revised guidance on competition disqualification orders for company directors who are implicated in competition law breaches of their company, setting out the circumstances in which the authority will seek to disqualify directors who have infringed UK or EU competition law. This guidance has since been adopted by the OFT successor authority, the CMA.[2]

In addition to director disqualification orders, the CMA has the power to impose a range of other sanctions on individuals in cases involving serious infringements of EU and/or UK competition law. These include unlimited criminal fines and/or jail time of up to five years (under the Enterprise Act 2002) and the confiscation of assets

[1] The CMA had previously secured director disqualifications in the *Marine Hoses* cartel case. However, this was under different provisions of the CDDA which permit an order to be made as a result of an individual's criminal *conviction* for an indictable offence (in that case the UK criminal cartel offence), rather than as a result of the individual being the director of a company who has infringed competition law as is the case in the current *Trod* case.

[2] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324978/oft510.pdf

(under the Proceeds of Crime Act 2002). All of these personal sanctions can be applied irrespective of the place of residence or nationality of the individual concerned.

The disqualification in the Trod case relates to the CMA's investigation into anticompetitive conduct between Trod Ltd. and GB Eye Ltd. On July 21, 2016, the CMA announced that Trod Ltd. has admitted agreeing with GB Eye Ltd. that they would not undercut each other's prices for licensed sport and entertainment posters and frames sold on Amazon's UK Marketplace website. The agreement was implemented using automated repricing software.

Trod agreed to a settlement with the CMA under which it accepted a fine of £163,371 (after a 20% discount for settlement). As Mr. Aston, who was a director of Trod at the time, personally contributed to the competition infringement, the CMA considered that this conduct made him unfit to be a director.

As noted above, the CMA is empowered to apply to the Court to disqualify a director for up to 15 years. However, in this case the CMA noted that, taking into account Mr. Aston's conduct and the fact that Mr. Aston was willing to give a statement before court proceedings were commenced, the CMA agreed to reduce the period of disqualification it was prepared to accept to five years.

GB Eye, the other company involved in the infringement, applied for and obtained immunity, as it had reported the infringing conduct to the CMA. Under the CMA's leniency policy, in addition to granting the company immunity from penalties, the CMA will, as a general rule, not apply for director disqualification orders against the directors of the whistle-blower.

Announcing the director disqualification order, Michael Grenfell, Executive Director for Enforcement at the CMA, said: "The responsibility to ensure that companies don't engage in illegal anticompetitive practices is an important one, and company directors should not shirk that responsibility."

The case sends an important message to companies that the CMA will continue to use the full arsenal of its powers to secure the imposition of personal sanctions where a company has breached competition law in the UK.

UNITED STATES - MERGER CONTROL

The U.S. DOJ requires Wabtec to divest Faiveley's entire U.S. freight car brakes business

United States District Court for the District of Columbia: *U.S.* v. *Wabtec, Faiveley* (1:16-cv-02147)
December 15, 2016

The U.S. Department of Justice ("DOJ") announced on October 26, 2016 that Westinghouse Air Brake Technologies Corporation ("Wabtec"), a U.S.-based supplier of various types of train equipment such as brakes and friction materials, could proceed with its planned acquisition of French competitor Faiveley Transport ("Faiveley"), subject to divestitures (the "Acquisition"). Wabtec had made an irrevocable offer, on July 27, 2015, to acquire a 51% controlling stake in Faiveley, for cash and stock totaling approximately $1.8 billion. In a press release dated December 1, 2016, Wabtec announced its plans to launch a tender offer for the remaining public shares, which offer it intends to close in early 2017.

Earlier, on October 4, 2016, the European Commission (the "Commission") cleared the Acquisition, also subject to divestment remedies, following an in-depth investigation. (Wabtec has a number of subsidiaries active in Europe in the field of train friction materials.) The Commission had concerns relating to so-called "sintered train friction brake materials" – key components of many modern train braking systems – as the transaction would have eliminated one of only three major suppliers of such products in Europe. To gain antitrust approval, the parties offered to sell, in its entirety, Faiveley's sintered friction material business in Europe (i.e. Faiveley Transport Gennevilliers).

On the other side of the Atlantic, the DOJ filed a complaint on October 26, 2016 with the U.S. District Court for the District of Columbia to enjoin the proposed Acquisition. (*U.S. Department of Justice v. Westinghouse Air Brake Technologies Corp., Faiveley Transport S.A. and Faiveley Transport North America*, 1:16-cv-02147; the "Complaint"). At the same time, the DOJ filed a proposed settlement as agreed with the parties – the "Hold Separate Stipulation and Order" – that, if approved by the court, would resolve the DOJ's competitive concerns.

In its Complaint, the DOJ argued that each product considered (hand brakes, slack adjusters, truck-mounted brake assemblies, empty load devices, brake cylinders, and control valves/co-valves) constituted different lines of commerce and separate relevant product markets, given the unique characteristics and uses, and distinctive prices, of such products, along with the existence of specialized vendors for the products. (Complaint at 21.)

The DOJ alleged *inter alia* that, with respect to components of freight car brake systems, Wabtec and Faiveley were two of the top three suppliers approved by the Association of American Railroads ("AAR"), with combined market share ranging from approximately 41% to 96% for many of the products in which they compete. (Complaint at 1.) (Where a product must be AAR-approved, freight car builders must, as per the applicable mandatory regulations, source sub-systems and components from an AAR-approved supplier.) The Acquisition would have allegedly created the world's largest rail equipment supplier, with a presence in every key rail market in the world, while customers would face a duopoly post-merger in almost all of the relevant markets. (Complaint at 22.)

The DOJ further argued that the rigorous testing and approval processes implemented by the AAR, the most critical of which being the ones of concern here, as overseen by the Brake Systems Committee, constituted a high barrier to entry in selling freight car brakes in the U.S. The DOJ also emphasized that suppliers with broad offerings, such as the parties, often have a competitive advantage over niche suppliers, considering that large rail equipment suppliers will typically offer better pricing to customers who purchase multiple freight car brake system components as a bundle. (Complaint at 20.)

Accordingly, the DOJ considered that the proposed Acquisition likely would substantially lessen existing and future competition in the development, manufacture, and sale of freight car brake system components in the U.S., in violation of Section 7 of the Clayton Act (15 U.S.C. § 18). To reach that conclusion, the DOJ largely relied on the Horizontal Merger Guidelines, which provide that anticompetitive effects are likely when a post-merger Herfindahl-Hirschman Index ("HHI") is above 2,500 and the increase in HHI is above 200 in the relevant market.

However, with respect to control valves, which did not meet the same Guidelines threshold, the DOJ noted that Faiveley had obtained, in June 2016, conditional approval from the AAR to sell such products, thereby disrupting the century-old duopoly between Wabtec (which benefitted from a market share of approximately 40%) and another unnamed manufacturer. The DOJ focused on the merger's potential effect on the competitor that likely would have entered the market in the absence of the merger: "*[b]ut for the merger, Faiveley would have entered the control valve market, thereby invigorating competition between Wabtec and its only competitor in the control valve market... As a result, Faiveley likely would have had a substantial impact on pricing, service and other commercial terms offered by the incumbent suppliers, even with a small initial share of actual sales.*" (Complaint at 45-46.)

The DOJ concluded that the transaction may proceed on the condition that Faiveley's entire American freight car brakes business (i.e. Faiveley Transport North America) is divested. Acting Assistant Attorney General Renata Hesse of the DOJ's Antitrust Division explained that "*[t]he Acquisition as originally proposed would have eliminated Faiveley as one of only three major companies that supplies freight car brake components in the U.S. and eliminated Faiveley as a pipeline competitor in the development, manufacture and sale of freight car control valves – essentially freezing a century-old duopoly in that market.*" (DOJ, Press Release 16-1250, October 26, 2016.) Under the terms of the proposed consent decree, Wabtec must divest Faiveley's entire U.S. freight brake business to a single independent buyer approved by the DOJ, namely Amsted Rail Company Inc., as already offered by Wabtec. The proposed divestiture also included Faiveley's so-called "FTEN" pipeline control valve, still under development pending AAR approval.

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