Summary: *Electrolux AB and Whirlpool Europe BV v European Commission*

Joined Cases T-115/09 and T-116/09

Application of Electrolux AB and Whirlpool Europe BV for annulment of Commission Decision 2009/485/EC of 21 October 2008 concerning the grant of restructuring aid to FagorBrandt, a manufacturer of large home appliances notified by the French Republic. The Court gives guidelines for the grant of State aid for restructuring and rescuing firms in difficulty.

Judgment of the General Court (Fourth Chamber) of 14 February 2012:

1. Although a compensatory measure may be implemented before or after the grant of the aid, it must in any event be an integral part of the restructuring plan to be considered a 'compensatory measure adopted to limit the negative effects of the grant of restructuring aid on competition and trade' as per point 38 of the Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (OJ 2004 C 244, 'the Guidelines'). (§§ 44-52)
2. In order for a compensatory measure to be considered as having the effect of reducing or limiting (even minimally) the negative effects of the grant of restructuring aid, it must be implemented in the main market in which the firm receiving the aid will have a significant market position after restructuring, and not merely in one of the segments/parts of this market. (§§ 44-50, 53)
3. The mere fact that a measure does not constitute a write-off or closure of a loss-making activity (as per point 40 of the Guidelines) does not necessarily make it a compensatory measure capable of reducing the negative effects on competition created by the grant of aid. It must, in addition, have been intended to, and actually have the effect of, limiting the negative effects of the grant of aid on trade and competition. (§§ 44, 54)
4. The Court will not replace the Commission by carrying out in its stead an examination of whether a compensatory measure was sufficient on its own to limit the negative effects on competition resulting from a grant of aid and by drawing conclusions from that examination. However, the Court can rule on whether the Commission committed a manifest error of assessment of the facts. Accordingly, the Court may find that a measure does not constitute an appropriate compensatory measure within the meaning of points 38-40 of the Guidelines. (§§ 40, 55, 58)
5. In examining the compatibility of the restructuring aid with the common market, the Commission must in principle examine the cumulative effect of that aid with any earlier aid that has not yet been recovered. (§ 66)
6. If the Commission makes the grant of the planned aid subject to the prior recovery of earlier aid, it is not obliged to examine the cumulative effect of the aid on competition. (§ 67)
7. Even if the true economic effect of a prior (incompatible) aid is minimal, and/or the amount of earlier aid outstanding is proportionally insignificant as compared with the planned aid, the cumulative effect of the aid at issue (planned aid) and the prior (incompatible) aid must be taken into consideration if the grant of the aid in issue (planned aid) is not made conditional on the recovery of the prior (inconsistent) aid. (§§ 71, 74-76)

Mrinalini Kochupillai

The full text of the judgment is available at:
http://curia.europa.eu/juris/document/document.

Judgment of the General Court in the FagorBrandt Case: Analysis of Compensatory Measures and Repayment of Prior Unlawful Aid

Annotation on the Judgment of the General Court (Fourth Chamber) of 14 February 2012 in Joined Cases T-115/09 and T-116/09 *FagorBrandt*

*Pedro Callol and Jorge Manzarbeitia**

I. Introduction

The judgement of the General Court in the *FagorBrandt* case[1, 2] (the "*Judgement*") relates to the application for annulment of the European Commission (the "*Commission*") State aid Decision declaring the compatibility of the restructuring aid of €31 million by France to FagorBrandt subject to conditions (the "*Decision*").[3] The General Court quashed the Decision on the grounds that the Commission committed a manifest error when assessing the compensatory measures adopted in the case in order to ensure that the distorting effects of the aid are minimized. In addition, the General Court found that the Commission failed to take into account that FagorBrandt's Italian subsidiary had received incompatible and not recovered aid when assessing the effect on competition of the advantage granted by the €31 million restructuring aid planed by France. We will expand on this in Section II below. As it will be discussed, the General Court applied extensively the *Deggendorf* doctrine, which allows the Commission to condition the compatibility of new aid to the same undertaking or group of undertakings to the effective recovery of incompatible aid.

Following the Judgment, on 25 July 2012, the Commission approved the €31 million restructuring aid in a new decision on the case, subject to more stringent conditions.[4] At the time of drafting this case annotation, the new decision of the Commission has not yet been published.

Before entering into the details of the case and the General Court's reasoning we deem it necessary to go over the relevant provisions set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty[5] (the "*Guidelines*") that have been interpreted by the General Court in the Judgment.

Points 38 to 42 of the Guidelines deal with the compensatory measures that should be adopted in order to avoid undue distortions of competition as a result of restructuring aid.

Point 38 of the Guidelines establishes that compensatory measures (in the form of divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned) must be adopted in order to limit the negative effects of the grant of restructuring aid on competition and trade. In the absence of such compensatory measures, the restructuring aid will be regarded as "contrary to the common interest", rendering the measure incompatible with the internal market. Second, pursuant to point 39 of the Guidelines, the Commission must assess whether or not the compensatory measures are appropriate in that they must not lead to deterioration in the structure of the market. In addition, according to point 40 of the Guidelines, the compensatory measures must be proportionate to the distortive effects of the aid, in particular to the size of the recipient of the restructuring aid and its importance in the markets where it is present. The compensatory measures should take place in particular in the market or markets where the aid

* Respectively Partner and Associate at Roca Junyent.

1 Judgement of 14 February 2012, Joined Cases T-115/09 and T-116/09 – *FagorBrandt* [2012] ECR n.y.r.

2 For a brief summary of the Judgement see *Idot*, Aides à la restructuration, Europe 2012 Avril Comm. nº 4 p. 24.

3 Commission Decision 2009/485/EC of 21 October 2008 on State aid No C 44/2007 (ex N 460/07) which France is planning to implement for FagorBrandt, OJ 2009 L 160/11.

4 European Commission press release of 25 July 2012, IP/12/842.

5 Communication from the Commission, Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 2004 C 244/2 -17.

recipient will have a significant market position after restructuring. In addition, while those measures may take place before or after the granting of the aid, they must in any event be an integral part of the restructuring plan. Finally, measures such as write-offs and the closure of loss-making activities, which would be necessary in any case to restore the viability of the recipient, would not account as compensatory where they would not lead to a reduction of capacity or market presence of the aid recipient.

With regard to the assessment of previous unlawful aid, point 23 of the Guidelines sets out the relevant criteria to be taken into account by the Commission. In particular, in the event that unlawful aid has previously been granted to the recipient of intended new aid (in respect of which the Commission has adopted a negative decision with a recovery order, and where no such recovery has taken place), the assessment of any rescue and restructuring aid to be granted to the same undertaking shall take into account, first, the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid.

The above criteria were developed by the European Court of Justice in its judgement in the well-known *Deggendorf* case,[6] where it was held that the Commission may subject the payment of compatible aid measures to the recovery of previous unlawful aid. The reason for that finding is that the cumulative effect of the aid measures granted to the aid recipient in the *Deggendorf* case (TWD) could have distorted competition in the internal market to a significant extent, as found by the Commission and confirmed by the Court of First Instance and the European Court of Justice.[7] Under those circumstances, the European Court of Justice stated that the failure to repay the unlawful aid constituted an essential factor which was lawfully taken into account by the Commission when the compatibility of the new aid measures afforded to TWD was analysed.[8] Pursuant to the above reasoning, the European Court of Justice found in its judgement in the *Deggendorf* case that the Commission did not exceed the limits of its discretion when making the approval of the restructuring aid conditional upon the repayment of previous incompatible aid.[9] The Court confirmed that the Commission had acted within its powers when it took into consideration the cumulative effects of the old aid that had been granted to TWD and the new aid measures that were to be granted to TWD.[10] The Court departed from the opinion of the Advocate General, [11] who opined that, by conditioning the compatibility of new aid measures to the repayment of previous incompatible aid, the Commission was just trying to force the repayment of previous aid in the absence of other, more effective, mechanisms.[12]

The *Deggendorf* rationale has been subsequently applied in other cases by the European Commission

6 Case C-355/95 P – *Textilwerke Deggendorf GmbH (TWD)*, [1997] ECR I-02549. Paras. 24-29, in particular para. 27. The European Court of Justice upheld the Judgement issued by the Court of First Instance in Joined cases T-244/93 and T-486/93 – *TWD Textilwerke Deggendorf GmbH v Commission of the European Communities* [1995] ECR II-02265.

7 The implications of the *Deggendorf* case have been discussed widely. For further details see for instance, the following papers: *Travers*, Retroactivity and the Commission's Powers to Implement State Aid Rules, European Law Review 1998 p. 264-271; *Estoa Pérez*, La jurisprudencia Deggendorf como medio de forzar la recuperación de las ayudas ilegales, Revista de Derecho Comunitario Europeo 2008 p. 193-211.

8 In its judgement in the case C-261/89 – *Italy v. Commission* [1991] ECR I-4437, the Court of Justice had previously ruled that, when the Commission considers the compatibility of a State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State (para. 20).

9 Case Textilwerke Deggendorf GmbH (TWD) (fn. 6), para. 26.

10 Case Textilwerke Deggendorf GmbH (TWD) (fn. 6), para. 27.

11 Opinion of AG *Tesauro* , Case C-355/95 P, *Textilwerke Deggendorf GmbH (TWD)* [1997] ECR I-02549, para 18 et seq. According to the AG the Commission has two possible alternatives "either to state, taking into account of all the relevant factors, including the financial situation of the undertaking and previous circumstances that the aid is incompatible with the common market, in which case it can an indeed must order payment to be suspended, or to state, as a result of such an investigation, that the aid is compatible but the common market, but in that case it is obviously not permitted to oppose its disbursement" (para. 18). According to AG, suspending the payment of new aid could only be justifiable if the Commission had found that such new aid is incompatible with the common market due to the its cumulative effects with previous aid (para. 19).

12 AG *Tesauro* was of the opinion that the Commission's intentions were plain to see "In that regard, however, the Commission does not conceal the fact that it is pursuing a precise objective, namely in the absence of other 'means of coercion' that of enforcing the obligations incumbent on the German authorities and on TWD as a result of the TWD I decision. It therefore seems rather obvious to me that the Commission really intended to seize the opportunity offered by the procedures for the TWD II and TWD III aid to give effect to and enforce the obligation imposed on the German authorities (and indirectly on TWD) by the TWD I decision to recover the TWD I aid." (para. 20).

and the European Judiciary, progressively extending the scope of the *Deggendorf* doctrine.

In the *Iride* case, the European Court of Justice confirmed that the *Deggendorf* doctrine applies regardless of whether the aid measures are individual aid or they stem from an aid scheme. In the mentioned case, the Court of First Instance[13] and the European Court of Justice[14] confirmed a 2006 Commission Decision[15] which declared compatible an Italian aid scheme to cover stranded costs in the energy sector subject to the repayment of previous incompatible aid by AEM Torino. AEM Torino is a local utility (of the so-called "municipalizzate"), which produces, distributes and sells electricity and heating. In 2002, the Commission issued a negative decision on fiscal aid granted by Italy to the "municipalizzate".[16] In application of the *Deggendorf* doctrine, although the Commission found that the stranded costs compensation scheme was compatible, it ordered Italy to suspend the payment of new aid until AEM Torino had reimbursed the previous illegal aid. Additionally, the Court ruled that the Commission may declare that the new aid is compatible with the common market only when the evidence at its disposal enables it to reach such a conclusion.[17] Therefore, the Commission merely needs to establish that the aid in question is of such a kind as to affect trade between Member States and distort or threaten to distort competition.

In the *AceaElectrabel* case,[18] the European Court of Justice endorsed the application of the *Deggendorf* doctrine to cases where previous incompatible aid has been granted, not just to the same undertaking, but to other undertakings forming part of the same economic unit. In the mentioned case, the Commission conditioned the compatibility of aid for the installation of urban heating networks in Rome granted to the company AceaElectrabel Produzione SpA (AEP, a joint venture controlled by ACEA and Electrabel) to the repayment of previous incompatible aid by ACEA. AEP and Electrabel challenged before the European Court of Justice the General Court's finding that the Commission was entitled to consider AEP and ACEA as forming an economic unit for the purpose of the earlier incompatible aid and the new aid analysed in the Decision. The European Court of Justice confirmed the General Court's finding, concluding that both ACEA and AEP formed part of the same economic unit.[19]

By way of background, the undertaking originally benefiting from the aid was ACEA, the former municipalizzata (local utility) of Rome. After a restructuring which involved a number of other undertakings, the final beneficiary of the aid was AEP.[20] Such restructuring entailed the transfer of production facilities from one company to other newly constituted manufacturing companies, the former company retaining an interest in those newly constituted manufacturing companies. The European Court of Justice found that, under such circumstances, all companies formed part of the same group, notwithstanding the fact that each of the newly constituted manufacturing companies has a legal personality separate from the former company.[21] In addition, in the opinion of the Court, an entity which, owning a controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management of that company must be regarded as

13 Case T-25/07 – *Iride SpA and Iride Energia SpA v Commission* [2009] ECR II-245.

14 Order of the European Court of Justice in Case C150/09 P – *Iride and Iride Energia v Commission* [2010] ECR I-5.

15 Commission Decision 2006/941/EC of 8 November 2006 on State aid C 11/06 (ex N 127/05) which Italy is planning to implement for AEM Torino, OJ 2006 L 366/62.

16 Commission Decision 2003/194/EC of 5 June 2002 on State aid C 27/99 (ex NN 69/98) granted by Italy in the form of tax exemptions and subsidized loans to public utilities with a majority public capital holding, confirmed by the Courts.

17 Order of the Court in Case C150/09 P – *Iride* (fn. 14), para, 70. Both Italy and AEM Torino failed to provide the Commission with information on the repayment of previous aid. The Court of First Instance found that "it was for the Italian Republic and AEM Torino to provide the Commission with information, in the context of the formal investigation procedure, to show that there was no cumulative effect of the old aid and the measure at issue and that the measure at issue would not result in distortion of competition in the common market. Consequently, the applicants must not be allowed to criticise the Commission for not setting out, in the contested decision, the potentially negative effects on competition of an accumulation of earlier unlawful aid with the measure at issue, since it was not for the Commission, given the lack of cooperation from the Italian Republic and the applicants, to seek out proof of such effects." Case T-25/07 –*Iride* (fn. 13), para. 108.

18 Case C-480/09 P – *AceaElectrabel Produzione SpA v European Commission* [2010] ECR I-13355, which confirms Case T-303/05, *AceaElectrabel Produzione SpA*, [2009] ECR II-137, confirming Commission Decision 2006/598/EC of 16 March 2005 on State aid C27/99 (ex NN 69/98) concerning State aid that Italy (Regione Lazio) intends to grant for the reduction of greenhouse gas emissions (OJ 2006 L 244/8-16).

19 See *Joris*, The Concept of an "Economic Unit" in State Aid Matters and the Deggendorf Principle, EStAL 1/2012 pp. 149-162.

20 Commission Decision 2006/598/EC (fn. 18), para 8.

21 Case C-480/09 P – *AceaElectrabel* (fn. 18), paras. 47-48. See Judgment of the Court of Justice in Case 323/82 – *Intermills v Commission* [1984] ECR 3809, para. 11.

taking part in the economic activity carried out by the controlled undertaking.[22]

The European Court of Justice concluded that in the event that ACEA had been able to benefit from the aid at issue it would have been sufficient to deprive the rules of the European Union on State aid of their practical effect and would also have been incompatible with the reasoning of the *Deggendorf* case-law.[23]

In addition, following the principles set out in the *Iride* case,[24] the Court of Justice Confirmed that the Commission is not obliged to carry out a specific detailed examination of the advantages to be derived from the aid at issue by taking into account the position of the undertaking concerned on the relevant market and existing trends in interstate trade. [25]

II. The Commission's analysis in the Decision

In the Decision, the Commission declared compatible, subject to conditions, the restructuring aid which France was planning to implement in favour of the French company FagorBrandt. FagorBrandt is owned indirectly by Fagor Electrodomésticos Sociedad Cooperativa, a cooperative incorporated under Spanish law which pertains to the group of cooperatives Mondragón Corporación Cooperativa. FagorBrandt is present in the electrical household appliance market. In particular, the company sells cooking appliances, refrigeration appliances and washing appliances. The planned aid in question consisted of restructuring aid, amounting to €31 million, to be made available by the French Ministry of Economic Affairs, Finance and Employment.

Central to the case is that FagorBrandt had previously received incompatible aid. In the first place, FagorBrandt benefited from the tax exemption on company profits under Article 44 f septies of the French General Tax Code (the "*Septies aid*"), the recovery of which was ordered by the Commission.[26] The recovery of the Septies aid from FagorBrandt was pending at the time the Decision was issued.

Secondly, FagorBrandt's Italian subsidiary had also received unlawful and incompatible State aid from Italy. As it was the case for the Septies aid repayment, the total recovery of such aid had not taken place at the time when the Commission analysed the case.

France notified the planned aid to the Commission on 6 August 2007. On 10 October 2007, the Commission informed France that it had decided to open in-depth investigation proceedings pursuant to ex-Article 88 EC (now Article 108 TFEU). The Commission entertained doubts regarding the compatibility of the aid as a result of its preliminary analysis. In particular, there were five areas of concern.[27] In the first place, the Commission detected that a risk of circumvention of the prohibition on restructuring aid to newly created firms may exist (point 12 of the Guidelines). Second, the Commission had doubts that the planned restructuring aid would be used to finance the recovery of the Septies aid received in 2002, undermining the effects of the recovery. Third, the Commission entertained doubts about the capacity of the restructuring aid to restore FagorBrandt's long-term viability. Fourth, the Commission preliminarily found that the compensatory measures could be inadequate. Finally, the Commission doubted that the aid was limited to the necessary minimum, and in particular it had doubts regarding the quantum of FagorBrandt's contribution.

On 21 October 2008 the Commission issued the Decision. Its Section 6 refers to the assessment of the aid by the Commission. The Commission confirms that the planned measure constituted State aid according to ex-Article 87(1) EC (now Article 107(1) TFEU).

With regard to the eligibility of FagorBrandt for restructuring aid, the Commission found in the Decision that the beneficiary company was indeed eligible, given that the financial situation of the company had turned too serious to be dealt with by Fagor alone. As for the possible circumvention of the prohibition on restructuring aid to newly created firms, the Commission concluded, after carrying out the relevant financial analysis, that FagorBrandt could

22 Case C-480/09 P – *AceaElectrabel* (fn. 18), para. 49. See Judgment of the Court of Justice in Case C222/04 – *Cassa di Risparmio di Firenze and Others* [2006] ECR I289, paras 112 and 118.

23 Case C-480/09 P – *AceaElectrabel* (fn. 18), para. 62.

24 Judgment of the Court of First Instance in Case T-25/07 *Iride* (fn. 13) and Order of the European Court of Justice in Case C150/09 P – Iride (fn. 14).

25 Case C-480/09 P – *AceaElectrabel* (fn. 18), para. 102.

26 Commission Decision 2004/343/EC of 16 December 2003 on the State aid scheme implemented by France for the takeover of firms in difficulty, OJ 2004 L 108/38.

27 Commission Decision 2009/485/EC (fn. 3), Section 3.

not be regarded as being in difficulty during the first three years of its existence.[28]

Next, the Commission analysed in the Decision whether or not the planned restructuring aid would be used to finance the recovery of the Septies aid, which was one of the Commission's concerns according to the opening decision.[29] The Commission concluded on the issue that the difficult financial situation of FagorBrandt did not stem mainly from the reimbursement of the Septies aid and that the company was eligible for receiving restructuring aid. In addition, according to the Commission there would be no combined effects of the Septies aid with the restructuring aid planned by France, given that the Commission, applying the *Deggendorf* doctrine,[30] made the reimbursement of the old aid a condition precedent for the compatibility of the new aid.[31] In the Commission's view, nothing prevented the application of the Deggendorf doctrine to the Septies aid. In that regard, France undertook to recover the Septies aid before paying the new aid. The Commission transformed then such commitment into a condition precedent to the compatibility of the notified aid to ensure that there was no combination of the old aid with the new aid and that the old aid was reimbursed.

With regard to the Italian aid to be repaid by FagorBrandt's Italian subsidiary, the Commission stated in the phase 2 opening Decision that it did not consider the *Deggendorf* doctrine to be applicable to such aid, given that it was granted by Italy. In the Commission's view, the *Deggendorf* principles are not applicable where the old aid to be repaid and the new aid are granted by different Member States.[32] As it will be shown, the General Court does not concur with the Commission's view in this particular point.

On the issue of the restoration of the long term viability of FagorBrandt, the Commission concluded that the restructuring plan allowed the company to secure its long-term viability.[33] The Commission took that view after evaluating the forecasts stemming from the restructuring plan. In addition, the Commission found that the additional compensatory measures proposed by the Member State following the opening decision would not impede the restoration of the long-term viability of the company, although such measures would weaken its prospects. On the recovery of the Italian aid, the Commission pointed out that the restructuring plan did not indicate how FagorBrandt intended to reimburse the incompatible Italian aid. Such reimbursement could cast doubts over the long term viability of FagorBrandt. There, the Commission explained in the Decision that, according to France, the recovery of that aid should have no impact on the group's financial situation since, in essence, the amount of that reimbursable aid would be less than €1 million.[34] The Commission did not look further on the possible combined effects of the reimbursable Italian aid and the planned restructuring aid.

Regarding the avoidance of undue distortions of competition, the Commission concluded that there were three factors limiting the negative impact on competition of the planned restructuring aid.[35] Firstly, FagorBrandt position in the market was not important. According to the Commission's analysis, FagorBrandt had only a 5% market share in Europe at that time, whereas the combined market shares of Fagor and FagorBrandt were, at the most, of 8% in Europe. Secondly, four other players competing with the company had market shares of 10% or more. As a third limiting factor, the Commission considered that the amount of the aid was small when compared with the total FagorBrandt's turnover in Europe (the restructuring aid at issue accounted for less than 4% of FagorBrandt's European turnover in 2007).

Despite the limiting factors of the negative impact on competition of the aid listed above, the Commission considers that compensatory measures were necessary, given that the aid at issue has adverse effects on trading conditions between Member States (FagorBrandt's products, although manufactured in France, are in competition with products of competitors located in other Member States). In the Decision, the Commission analyzed the measures that had been already implemented and additional measures proposed by France.

Regarding the measures already adopted, the Commission found that the shutting down of two plants in France could not be regarded as a compensatory measure, given that these involved the clo-

28 Commission Decision 2009/485/EC (fn. 3), paras. 37-43.

29 Commission Decision 2009/485/EC (fn. 3), paras. 44-50.

30 Case Textilwerke Deggendorf GmbH (TWD) (fn. 6).

31 Commission Decision 2009/485/EC (fn. 3), paras. 48-50.

32 Letter of 10 October 2007, State aid C 44/07 (ex N 460/07), restructuring aid for FagorBrandt. OJ 2009 C 275/18-26, para 31.

33 Commission Decision 2009/485/EC (fn. 3), paras. 51-71.

34 Commission Decision 2009/485/EC (fn. 3), para. 61.

35 Commission Decision 2009/485/EC (fn. 3), paras. 72-95.

sure of loss-making businesses (see point 40 of the Guidelines[36]). On the other side of the spectrum, the Commission concluded that the sale in March 2004 of FagorBrandt's subsidiary (Brandt Components) to the Austrian group ATB could be regarded as a compensatory measure. According to the Commission, the sale of Brandt Components was neither a write-off nor a closure of a loss-making activity. Brandt Components had in 2003 a turnover of €25-45 million (equivalent to [2-5] % of FagorBrandt's 2003) and (250-500) employees (equivalent to [5-10] % of the company's workforce). The divested company was active in the design, development, manufacture and marketing of electric motors for washing machines. According to the Commission, the divestment led to a reduction in FagorBrandt's presence in the washing machine components market. The Commission found that this divestment was an integral part of the same restructuring plan for the purposes of point 40 of the Guidelines. According to the Commission, FagorBrandt started its restructuring in 2004, when the lack of competitiveness and the first financial difficulties were evident.

The Commission concluded, however, that the above measure alone was not sufficient, and went on to analyse the additional compensatory measures put forward by France. In particular, the Commission took the view that the measure consisting in the cessation of marketing for five years of refrigeration, cooking and dishwashing appliances under the *Vedette* brand must be preferred to the divestment of the brand, which was also proposed by France. In conclusion, the Commission found that the cessation of marketing of the *Vedette* refrigeration, cooking and dishwashing appliances for a period of five years and the sale of its subsidiary Brandt Components compensated in an adequate and proportionate level the distortion of competition for the purposes of points 38 to 40 of the Guidelines.

Finally, the Commission analyzed whether or not the aid was limited to the minimum and if FagorBrandt significantly contributed to its restructuring. According to points 43 to 45 of the Guidelines, the amount and intensity of the aid should be limited to the strict minimum necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Aid recipients must make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing on market conditions. The Commission raised two questions in the opening decision:

First, it asked the French authorities to explain why they had not included the Septies aid reimbursement in the restructuring costs. According to France, the reimbursement of incompatible aid, which amounted to €25 to €30 million, including interest, were unrelated to the restructuring of the company. On the contrary, the reimbursement was included in the business plan attached to the restructuring plan as any other financial expenditure. Even if the reimbursement were included as a restructuring cost, that would not have the effect of reducing the recipient's own contribution to below the 50% required by point 44 of the Guidelines for large firms.[37]

Secondly, the Commission asked for an explanation as to the nature of the "recipient's own share". The French authorities clarified that the contribution of the aid recipient at issue consisted of bank loans raised on the market amounting to €30 to €35 million secured by stocks of finished products.

Pursuant to the above, the Commission found that the "recipient's own share" and that of its shareholder was greater than 50 % of the restructuring costs, as required for large firms by point 44 of the Guidelines. In addition, the Commission considered that the aid

36 "The measures must be in proportion to the distortive effects of the aid and, in particular, to the size and the relative importance of the firm on its market or markets. They should take place in particular in the market(s) where the firm will have a significant market position after restructuring. The degree of reduction must be established on a case-by-case basis. The Commission will determine the extent of the measures necessary on the basis of the market survey attached to the restructuring plan and, where appropriate on the basis of any other information at the disposal of the Commission including that supplied by interested parties. The reduction must be an integral part of the restructuring as laid down in the restructuring plan. This principle applies irrespective of whether the divestitures take place before or after the granting of the State aid, as long as they are part of the same restructuring. Write-offs and closure of loss-making activities which would at any rate be necessary to restore viability will not be considered reduction of capacity or market presence for the purpose of the assessment of the compensatory measures. Such an assessment will take account of any rescue aid granted beforehand."

37 "The Commission will normally consider the following contributions to the restructuring to be appropriate: at least 25 % in the case of small enterprises, at least 40 %, for medium-sized enterprises and at least 50 % for large firms. In exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State, the Commission may accept a lower contribution."

was limited to the strict minimum under point 45 of the Guidelines.[38]

Pursuant to the above, the Commission decided that the restructuring aid in favour of FagorBrandt was compatible with the Common Market, subject to certain conditions, such as the recovery of Septies aid, the full implementation of the restructuring plan and the cessation of the commercialization of the *Vedette* refrigeration, cooking and dishwashing appliances by FagorBrandt for a period of five years.

The Decision was contested by Electrolux AB, of Sweden, and Whirlpool Europe BV, of Netherlands (the "*Applicants*"). Both applicants are active in the household appliances markets, as FagorBrandt.

III. General Court's findings in the Judgement

The Applicants contested the validity of the Decision, bringing actions for annulment before the General Court. The Applicants submitted two pleas in law. In their first plea, divided in eight parts, the Applicants claimed that the Commission misapplied the Guidelines when declaring the restructuring aid planned by France compatible with the common market. As for the second plea, comprising three parts, the Applicants stated that the Commission has failed to fulfill its duty to state reasons laid down in ex-Article 253 EC (now 293 TFEU).

The General Court focused its analysis on the seventh and third parts of the first plea. The seventh part related to a possible infringement of points 38 to 40 of the Guidelines relating to the fact that the compensatory measures adopted are not proportional to the distortion of competition caused by the planned restructuring aid in favor of FagorBrandt. In turn, the third plea refers to the an alleged failure to take into consideration the earlier aid granted and not recovered, as ordered in point 23 of the Guidelines.

1. Lack of proportionality of the compensatory measures: Infringement of points 38 to 40 of the Guidelines

According to the General Court, the Commission incurred in a manifest error of assessment when it considered the sale of Brandt Components as an appropriate and proportionate compensatory measure to the distortive effects on the planned aid on competition. As mentioned above, the divestment of Brandt Components was regarded by the Commission as forming integral part of the restructuring plan, as required by the Guidelines.

To reach the conclusion above, the General Court took into account two factors.

Firstly, the General Court refers to the timing of Brand Components' sale to the Austrian group ATB by FagorBrandt. It is undisputed that the mentioned sale was carried out in March 2004, whereas the French Republic notified the planned restructuring aid to the Commission on 6 August 2007 (i.e. the divestment took place three and a half years before the notification of the aid). Given the wide time gap between the two events, the General Court upholds the arguments put forward by the Applicants that, at the time the sale occurred, it was not intended to reduce, and could not have had the effect of reducing, the distortions of competition to which the grant of the planned aid by the French Republic in its notification of 6 August 2007 gave rise.[39] The General Court does not sustain the Commission's argument that compensatory measures can take place before the execution of the restructuring plan, according to the judgment of the General Court in the *Corsica Ferries* case.[40] In particular, the General Court distinguished the *Corsica Ferries* case on the facts. In the *Corsica Ferries* case the measure concerned had been decided almost one month before the adoption of the restructuring plan and it had been implemented almost one month after the plan had been notified to the Commission. By contrast, as already mentioned, the sale of Brandt Components took place almost three and a half years before the restructuring aid and FagorBrandt's restructuring plan were both notified to the Commission.[41]

38 "To limit the distortive effect, the amount of the aid or the form in which it is granted must be such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. The Commission will accordingly examine the level of the firm's liabilities after restructuring, including the situation after any postponement or reduction of its debts, particularly in the context of its continuation in business following collective insolvency proceedings brought against it under national law. None of the aid should go to finance new investment that is not essential for restoring the firm's viability."

39 Case *FagorBrandt* (fn. 1), para. 51.

40 Case T349/03 *Corsica Ferries France v Commission* [2005] ECR II2197, para. 225.

41 Case *FagorBrandt* (fn. 1), para. 52.

Secondly, the General Court finds that the sale of Brand Components does not qualify as a compensatory measure on the grounds that the measure did not reduce FagorBrandt's presence in the main market where it is active. In particular, the sale of Brandt Components could only reduce FagorBrandt's presence on the market for washing machine components. However, that measure had no real effect on the washing machine market, which was the main product market where FagorBrandt was active, as pointed out by the Commission itself.[42]

The effects of the above on the substance of the Commission's analysis is that the Commission erred when it concluded that the combination of the sale of Brandt Components with the cessation of the marketing of some products under the *Vedette* brand for five year period limited proportionately the distorting effects on competition stemming from the planned aid.[43]

2. Failure to take into consideration the earlier aid granted and not recovered: Infringement of point 23 of the Guidelines

The Applicants submitted that the Commission had infringed point 23 of the Guidelines and, therefore, the principles set out by the Court in *Deggendorf*. Notably, the Applicants claimed that the Commission failed in the Decision to analyze the cumulative effect of the restructuring aid at issue with both the Septies aid and with the incompatible Italian aid.

As mentioned above, at the time when the Decision was adopted by the Commission, FagorBrandt's Italian subsidiary remained liable for the repayment of part of the Italian aid (less than €1 million). The General Court notes in the Judgment that the Commission did not make the grant of France's restructuring aid conditional on the previous recovery of the outstanding Italian aid. Under those circumstances the Commission should have looked at the cumulative effect of the restructuring aid and the Italian aid.[44]

In our view, the most remarkable finding of the Judgment is that the General Court further broadens the application of the *Deggendorf* principles to situations where the old incompatible aid to be repaid by the undertaking (in the sense of economic unit) in question and the new aid are granted by different Member States. Indeed, the General Court finds in the Judgment that, since the Commission did not make the grant of the aid at issue conditional on the recovery of the incompatible Italian aid, it should therefore have examined the cumulative effect of the two different aid measures. According to the General Court, such finding is valid even taking into account that the Commission maintained that it was not possible for it, pursuant to the *Deggendorf* case law, to make the grant of the new aid at issue by the French Republic conditional on the prior recovery of the incompatible Italian aid by Italy.[45] It is still to be seen how two (or more) Member States will interact is such a situation.

The General Court disregarded the arguments of the Commission pointing out that the Italian aid's outstanding amounts were negligible and that the repayment of the aid should have no impact on the financial situation of the recipient group. The General Court decided that the Commission committed a manifest error of assessment in its examination of the distortion of competition in the case, clearly stating that the Commission must in principle examine the cumulative effect of that aid with any earlier aid which has not yet been recovered regardless of the "nationality" of the State aid.

Thus, the General Court annulled the Decision without needing to give a ruling on the six remaining parts of the first plea or on the second plea.

According to the press releases published by the Commission, the Commission has now authorised the €31 million restructuring aid, subject to stricter compensatory measures that those included in the Decision.[46] Pursuant to the new decision (always according to the press release issued by the Commission), the Commission has extended by three years the ban on the sale of the products sold under the Vedette brand. On the other hand, in order to take account of the cumulative effect on competition of

42 Commission Decision 2009/485/EC of 21 October 2008 on State aid No C 44/2007 (fn. 2), para 83, fn. 32: "...the French authorities have not furnished any evidence such as might enable it to establish beyond doubt — and even less to quantify the resulting effect — that the divestment of Brandt Components will reduce FagorBrandt's ability to develop competitive washing machines and will consequently reduce the presence of FagorBrandt in the washing machine market. The Commission cannot therefore conclude that the divestment of Brandt Components has a real effect on the large electrical household appliance market."

43 Case *FagorBrandt* (fn. 1), para. 58.

44 Case *FagorBrandt* (fn. 1), paras. 70-71.

45 Case *FagorBrandt* (fn. 1), para. 71.

46 European Commission press release of 25 July 2012, IP/12/842. Decision not yet available.

the earlier illegal aid and the notified aid, the Commission has required the FagorBrandt Group to make a greater contribution to the restructuring costs.

IV. Comment and outlook

As a general comment, the General Court makes clear in the Judgment that the European judiciary will expect the Commission to apply the Guidelines strictly when assessing restructuring aid. That means that, in these times of financial turmoil, the Commission is not expected to relax the application of State aid rules, particularly those applicable to rescue and restructuring.

The findings regarding the lack of qualification of the sale of Brandt Components by the General Court seem well grounded. In our view, the decision is justified in particular taking into account the considerable time gap between the sale of the mentioned FagorBrandt's subsidiary and the notification of the restructuring aid and restructuring plan. In addition, it is apparent that the Commission itself was unconvinced of the real effect of the abovementioned divestment upon the presence of FagorBrandt in its main market.

On the opposite side of the spectrum, the General Court may have adopted a rather strict stance on the application of point 23 of the Guidelines and the *Deggendorf* doctrine. In particular, the General Court extended the application of the *Deggendorf* doctrine to cases where the Member States granting the old and the new aid are different. Thus, the General Court has applied widely the stance taken by the Court of Justice in the seminal case *Italy v Commission*,[47] where the Court established that the Commission has discretion to take into account previous State aid decisions where relevant in analysing new aid measures. In this regard, pursuant to the Judgment, the General Court is turning the discretion of the Commission into an obligation to analyse the cumulative effects of any incompatible aid measures granted by any Member State still to be repaid when analysing new aid, at least when it comes to restructuring aid (we understand that due to the literal wording of point 23 of the Guidelines).

Since the Judgement has not been appealed before the European Court of Justice, the views of the highest EU court on these issues remain to be seen.

Despite the fact that the Commission failed to analyse the combined effect of the new restructuring aid and the old Italian aid, the reality is that the amount to be recovered can be considered negligible. The distortive effects of such a small amount (less that €1 million) would arguably be minimal. As a suggestion, in order to avoid that kind of situation, it would be convenient that the Commission sets a sort of *de minimis* rule. For instance, where the pending reimbursable aid does not reach a particular minimum amount (by reference to the size of the aid recipient, for instance) the Commission could opt for requiring further contributions from the recipient of the planned aid to the restructuring plan.

47 Case C-261/89, *Italy v. Commission* (fn. 8).