Major Events and Policy Issues in EU Competition Law, 2012–2013 (Part 1)

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This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU[1] from November 2012 until the end of October 2013.[2] The article is divided into an overview of:

- legislative developments;
- European Court judgments;
- European Commission (EC) decisions and settlements;
- EC/ECN initiatives; and
- current policy issues.

Legislative developments and European Court judgments on general issues and part of the cartel appeals are included in Part 1. The remaining cartel appeals and other judgments dealing with inspections, access to file, other horizontal agreements and art.102 TFEU issues are included in Part 2, together with the other sections. This will be published in the next issue of the I.C.C.L.R.

The main themes of the year for the author are shown in Box 1. These are discussed in the appropriate sections below and in Part 2.

Box 1

- *Major themes/issues in 2012/13*
  - — The Proposed Damages Directive: finally proposed.
  - — Important General Court cases, e.g.:
    - * Restriction by object in complex cases? *Allianz Hungaria*.
    - * *Donau Chemie*: National rules preventing *Pfleiderer* "weighing-up of interests" unlawful.
  - — Important court cases on inspections.
    - * EC must have evidence to justify scope of inspection; but can obtain a new decision and widen scope if it finds something else "incidentally" (*Nexans*/*Prsymian*/*Deutsche Bahn*).
  - — Many cartel appeals:
    - * Issues such as single and continuing infringement, continued or repeated infringement and the GC using its unlimited jurisdiction.
  - — More access to file/confidentiality cases. (e.g. *Donau Chemie*)
  - — A 2% value of sales finding for a restriction by object (*Telefonica/Portuguese Telecom*).
  - — A €561 million fine on *Microsoft* for breach of its browser commitments.

Legislative developments

Technology Transfer Block Exemption and Guidelines

Box 2

- *TTBE/TTG*
  - — No radical changes suggested.
  - — Grant-backs excluded from BE.
  - — Termination for challenge provisions excluded from BE so would have to be individually assessed.
  - — New materials on patent pools.

It will be recalled that, in December 2011, the EC initiated a preliminary consultation on revision of the *Technology Transfer Block Exemption* ("TTBE"), which expires in April 2014 and the related *Technology Transfer Guidelines*.[3] The consultation focused mainly on grant-back clauses, cross-licences and patent pools.

In February 2013, the EC published a revised draft Technology Transfer Block Exemption Regulation (the "draft BE") and a revised draft of its Technology Transfer Guidelines (the "draft Guidelines"). Compared with the 2004 amendment of these texts which, for example, introduced the market share thresholds, the draft documents would not amend the current TTBE or Guidelines significantly. Nonetheless, in some areas, material changes are proposed.

First, both the draft BE and the draft Guidelines address the relationship between the rules on technology transfer and the Research and Development Block Exemption (R&D BE). The draft documents propose that normally the R&D BE should be applied, not the TTBE, if the R&D BE is applicable to the "subject-matter" of the licence.[4] Nonetheless, the draft BE provides that it can still apply

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[1] The article does not cover merger control. "TFEU" is the abbreviation for Treaty on the Functioning of the European Union; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court and "CJEU" for the Court of Justice of the European Union. "SO" is the abbreviation for Statement of Objections; "Article 27(4) Notice" refers to the EC's Communications under that article of Regulation 1/2003 [2003] OJ L1/1. References to the "ECHR" are to the European Convention of Human Rights and references to the "CFR" are to the EU Charter of Fundamental Rights.

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page: *http://ec.europa.eu/competition/index_en.html* [Accessed December 26, 2013]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in (formerly EC) EU Competition Law", published in the *International Company and Commercial Law Review*.

[3] With thanks to Cormac O'Daly for his help with this section.

[4] Draft BE Recital 7 and art.9; and paras 46 and 58–62 of the draft Guidelines.

even if the licensee is carrying out "further research and development by the licensee" provided this leads to the production of contract products.[5] This is a complex area and the EC's proposals are welcome. However, a flexible approach will still be required in some factually complex cases.

Secondly, on market share thresholds, the 20 per cent combined threshold normally applicable to agreements between competitors would also apply to agreements between non-competitors (rather than the 30 per cent individual thresholds) if the licensee already owns a technology that is substitutable for the licensed technology, but does not license this out and rather uses for it in-house production.[6] This could be complicated to apply. (Otherwise these thresholds remain controversial as often difficult to apply in practice.)

Thirdly, whereas currently agreements between non-competitors can expressly restrict passive sales by a licensee into another licensee's exclusive territory or customer group during the first two years of the agreement,[7] such a restriction would no longer be exempt under the draft BE. Rather, the draft Guidelines state that restrictions on passive sales may be allowed if they are "objectively necessary" "for a certain duration".[8] The "frequently asked questions" document published on the same day as the draft BE indicates that the proposed change aims to align the treatment of passive sales under the technology transfer rules with the rules in block exemption Regulation 330/2010 on vertical agreements (i.e. para.61 of the *Guidelines on Vertical Restraints*).

Fourthly, the draft BE proposes to *exclude* all exclusive grant-backs from the exemption, so they would all have to be assessed individually for compliance with art.101 TFEU.[9] Up to now, there was a distinction between the treatment of "severable" exclusive grant-backs (i.e. those capable of being exploited without infringing upon the licensed technology) and "non-severable" exclusive grant-backs of improvements to the licensed technology and only the former were excluded from automatic exemption.

Fifthly, the current block exemption excludes provisions which prevent the licensee from challenging the validity of the licensed technology from its scope, but allows for the agreement's termination if the licensee challenges the licensed technology's validity.

The draft BE proposes to *exclude* provisions allowing the licensor to terminate the BE (so these also have to be assessed individually for compliance with art.101 TFEU).[10] This is controversial since the existing rules are reflected in many agreements and seek to strike a balance between the licensee's (and society's) interest in seeing invalid IP eliminated and encouraging pro-competitive licensing from the licensor. Some argue that the changes appear to unduly favour the licensee. There are also statements in the draft Guidelines suggesting a more cautious approach to accepting no-challenge clauses in the context of settlements.[11]

Sixthly, in a new paragraph which appears inspired by the EC's action in "pay-for-delay" cases, the draft Guidelines state that "scrutiny is necessary" when a licensor provides an

> "inducement, financially or otherwise, for the licensee to accept more restrictive settlement terms than would otherwise have been accepted based on the merits of the licensor's technology".[12]

The reference to the "merits of the licensor's technology" suggests that the EC proposes to examine the strength of the underlying patent to determine if the payment infringes art.101 TFEU. This could be controversial given the difficulties inherent in assessing a patent's strength.

Seventhly, the draft Guidelines contain new material on patent pools.

While currently a licence from a patent pool to a third-party licensee in theory could fall under the TTBE, the draft Guidelines exclude this on the basis that such licences are multi-party rather than bilateral agreements.[13]

The guidance on what constitutes "essential" technology has been revised to cover not only technology that is essential to producing a product, but also technology that is essential to complying with a standard.[14]

The Guidelines introduce what they term a "safe harbour" for pools that[15]:

- allow open participation in the standard and pool creation process;
- contain sufficient safeguards to ensure that only essential technologies are pooled;
- contain sufficient safeguards to limit the exchange of sensitive information to what is necessary;
- require licensing of the pooled technologies into the pool on a non-exclusive basis;
- envisage licensing of the pooled technologies to third parties on FRAND terms;
- allow both contributors and licensees to challenge pooled technologies' validity and essentiality; and

[5] Draft BE Recital 7.
[6] Draft BE art.3(2).
[7] TTBE art.4(2)(b)(ii).
[8] Draft Guidelines para.116.
[9] Draft BE art.5(1)(a).
[10] Draft BE art.5(1)(b).
[11] Draft Guidelines para.227.
[12] Draft Guidelines para.223.
[13] Draft Guidelines paras 231 and 249.
[14] Draft Guidelines para.236.
[15] Draft Guidelines para.244.

- allow both contributors and licensees to develop competing products and technology.

While none of these conditions appears controversial, some give rise to considerable discussion. Consequently it may be difficult to be certain that a pool falls squarely within the safe harbour.

The draft Guidelines provide some guidance on pools that are outside the safe harbour and acknowledge that it can be pro-competitive to include non-essential technologies in a pool, if, for example, the cost of assessing whether all the technologies are essential is high due to the number of technologies involved.[16]

Proposed Damages Directive

Box 3

- *Proposed Damages Directive*
  - To promote claims and harmonise laws so actions can be brought across the EU and to address *Pfleiderer*.
  - Applies to related national competition law also.
  - National court and NCA decisions to have *Masterfoods*/art.16 effect.
  - Rules to promote specific, proportionate disclosure of relevant evidence.
  - *But* leniency statements and settlement submissions *not to be disclosed "at any time"*. Other material *after* EC/NCA investigation; or, if existing documents, at any time.
  - Passing-on defence to be accepted, if shown.
  - *No* rules on class actions / consumer redress.

In June 2013 the EC adopted a proposed Directive on rules governing actions for damages under national law for competition law infringements (the "Proposed Directive").[17]

It will be recalled that this is controversial, insofar as there has been considerable concern *not* to follow the US model of treble damage class actions, while recognising that the payment of compensation to those affected is an EU right.

It will be recalled also that there has been much discussion as to whether there should be *special* rules for competition law harm, when some argue that similar issues apply in other areas, so there should be a *general* Directive facilitating all those claims. This proposal stays specific to competition law and leaves the broader issues of consumer redress "class" or "representative" actions to a separate recommendation[18] and national law.[19]

In the midst of the legislative debate about damages actions, we have also seen develop the whole question of the interplay between public and private enforcement, as reflected in the *Pfleiderer* judgment[20]: to what extent should a plaintiff be able to obtain access to leniency applications to competition authorities, if at all? The EC's proposal is "not at any time". *Pfleiderer* suggested a "weighing-up of interests" test as between defendants and plaintiffs, at least in the absence of EU legislation on the issue.

The Proposed Directive is now with the European Parliament and the EU Council.

Main provisions

It is proposed now to outline the main provisions, many of which are important and ambitious, and then to offer some comments. The main points are as follows:

First, the Proposed Directive sets out in the Preamble what it aims to do. The three main points are:

- to improve the conditions for the bringing of damages actions, effectively trying to move beyond the slower process of case-by-case challenges to national rules which may limit bringing such claims;
- to *harmonise* the substantive and procedural rules concerned, so that actions can be brought in all Member States, not just in those where the litigation system appears more favourable; and
- to address the *Pfleiderer* issue and lay down general rules on what can be disclosed when, rather than leaving that issue to an individual weighing-up process case by case; it is argued that this is essential to protect the public enforcement process which is at the origin of almost all damages actions (at least in cartel cases).

Second, the Proposed Directive applies not only to EU competition law claims, but also claims based on *national competition law* applied in parallel.[21]

Third, the Proposed Directive provides that compensation should be for actual loss, loss of profit and interest (from the time the harm occurred until compensation is paid).[22]

Fourth, being a Proposed Directive, the system envisaged is that "Member States [EU and EEA] shall ensure" that damages claims can be brought effectively.[23]

Fifth, in an important section, the Proposed Directive requires Member States to ensure that where a plaintiff has put forward "plausible grounds" for his claim, national

[16] Draft Guidelines para.247.
[17] IP/13/525, June 11, 2013; COM(2013) 404 final, available on the EC's website.
[18] IP/13/524, June 11, 2013.
[19] Proposed Directive, Explanatory Memorandum, p.7.
[20] (C-360/09) [2011] E.C.R. I-5161. See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 73–75.
[21] Proposed Directive art.1(1).
[22] Proposed Directive art.2 (2).
[23] Proposed Directive art.3 (with more detail in arts 5–18).

courts can order the defendant or a third party to disclose evidence. The concept here is one of ordering a *specific, proportionate disclosure of relevant evidence*, rather than general disclosure (i.e. either particular pieces of evidence or categories of evidence).[24]

Member States are also to ensure that national courts have at their disposal effective measures to protect confidential information from improper use; and to respect legal privileges.[25]

Sixth, the Proposed Directive sets out important limits on access to a competition authority's file. As noted above, the text states that the "*national courts cannot at any time order a party or a third party to disclose*" (emphasis added) leniency corporate statements and settlements submissions.[26]

Further, the text provides that national courts can only order disclosure of certain types of document after the competition authority has closed its proceedings or taken a decision on the matter.[27] This concerns information prepared by a person specifically for competition authority proceedings (meaning, it appears, responses to requests for information); or information drawn up by a competition authority in such proceedings (meaning, it appears, statements of objections).

Other evidence can be disclosed (e.g. *pre-existing documents*).[28]

Member States are also to ensure that evidence falling into one of the restricted categories noted above, which is obtained solely through access to the file of a competition authority, is not admissible in damages actions.[29] Further, that it can only be used in an action for damages by the person who obtained it, or a person who acquired the claim.

Seventh, Member States are to ensure that there are sanctions for a failure to disclose information and/or the destruction of relevant evidence.[30] Here the Proposed Directive appears to follow American law, in stating that sanctions shall include the possibility to draw *adverse inferences*, such as presuming the relevant issue proven.[31]

Eighth, the Proposed Directive provides, importantly, that *decisions of national competition authorities, or review courts* rendering such decisions final, or taking the decisions concerned, *are to have effect as regards the finding of infringement*. As in the case of EC decisions, national courts "cannot take decisions running counter to" that finding.[32]

Ninth, and importantly, the Proposed Directive sets out rules designed to harmonise *limitation periods* for the bringing of damages claims. Time is to run from when the plaintiff can reasonably be expected to have knowledge of the infringement, with a limitation period of at least five years, suspended if a competition authority takes proceedings.[33]

Tenth, an interesting development is the inclusion of some *protection for the immunity applicant* from damages claims. The Proposed Directive states that such an applicant is only to be liable to injured parties other than its own direct or indirect purchasers, where injured parties show they cannot obtain compensation from the other undertakings involved.[34] This appears to be inspired partly by American law and partly by a similar idea in Hungarian law.

Eleventh, the Proposed Directive states that undertakings involved in joint behaviour should be *jointly and severally liable*; and that an infringing undertaking should be able to recover a *contribution* from other infringing undertakings based on "their relative responsibility for the harm caused".[35]

Twelfth, the Proposed Directive also provides, again importantly, that Member States will ensure that "passing-on" can be raised as a defence, where the defence can show that the claimant passed on all or part of the overcharge.[36] However, the defence is not to be available if it is shown that the overcharge has been passed on to persons for whom it is legally impossible to bring a claim for compensation.

Thirteenth, the Proposed Directive states that passing on to indirect purchasers is deemed to have occurred if: (1) the infringement by the defendant is shown; (2) the infringement resulted in an overcharge for the direct purchaser; and (3) the indirect purchaser bought relevant goods or services from the direct purchaser.[37]

Fourteenth, importantly also, the Proposed Directive provides that Member States shall ensure that the national court has the power to *estimate* what share of overcharge was passed on.[38]

Fifteenth, in order to address the issue of multiple actions at multiple levels, the Proposed Directive provides that national courts shall "take due account" of other actions and judgments related to the same infringement.[39] This is controversial, as rather complex.

[24] Proposed Directive art.5.
[25] Proposed Directive art.5(4) and (5).
[26] Proposed Directive art.6(1).
[27] Proposed Directive art.6(2).
[28] Proposed Directive art.6(3).
[29] Proposed Directive art.7.
[30] Proposed Directive art.8.
[31] Proposed Directive art.8(2).
[32] Proposed Directive art.9.
[33] Proposed Directive art.10.
[34] Proposed Directive art.11.
[35] Proposed Directive art.11(3).
[36] Proposed Directive art.12.
[37] Proposed Directive art.13.
[38] Proposed Directive art.12(2).
[39] Proposed Directive art.15.

Sixteenth, the Proposed Directive also states that "it shall be presumed that the infringement caused harm", a point which is important and controversial.[40]

Finally, the Proposed Directive sets out provisions concerning consensual settlements,[41] designed to encourage their use.

Member States are to have two years to transpose the Proposed Directive from its adoption; with a review five years from then.

Other proposals

To complete the picture of the EC's legislative package of proposals here, it should be noted again that the issue of consumer redress is left to an EC Recommendation and the EC has also issued a *Communication on quantifying harm in actions for damages*.[42] The main point in the latter is that the EC emphasises that national rules on quantification may have to provide for "best estimates" or "equitable considerations" for, if not, obtaining compensation may become disproportionately difficult.[43] This links to a similar point made in the Proposed Directive.[44]

To assist, the EC has also published what it calls a *Practical Guide* on quantification of harm. This is information on how quantification may be done, not binding guidance.[45] The Guide is an EC Staff Working Document.

Comments

Box 4

- *Some issues*
  - Member States will have a lot to do.
  - Substance and procedure affected.
  - Does the Proposed Directive trump *Pfleiderer* and *Donau Chemie*?
  - The role of "competition law judges".
  - Confidentiality issues.
  - Presumption of harm.
  - "Relative responsibility for the harm caused".

This is all clearly very important. It is to be expected that there will continue to be lively discussions about it all, with potential defendants concerned that this will give a further boost to the growing EU "plaintiff bar"; and potential plaintiffs concerned that the Proposed Directive does not go far enough, especially insofar as it may restrict access to immunity and leniency applications beyond the rules in *Pfleiderer*. That said, it is clear that it is a very serious proposal, which appears to have taken into account many of the points made on both sides in recent years.

The author's initial comments are as follows:

First, Member States will have a lot to do to implement and "ensure" all they are required to do.

Secondly, these are far-reaching proposals, insofar as they go not only to matters of substance, but also procedure; and in some cases require that Member States take action affecting the nature of national court decisions.

Thirdly, a big issue is whether the Proposed Directive would "trump" *Pfleiderer* or not. The EC's position is clear: the uncertainty that different courts will reach different conclusions needs to be addressed and harmonised in favour of protecting the leniency applications which enable *both* the public enforcement and private compensation process to take place.[46]

It may also be recalled that in *Pfleiderer* itself, while considering national law, the CJEU stated its position "[i]n the absence of EU legislation", so it would appear that the court recognises that as the superior norm.

However, we may also come back to the *Pfleiderer* point that if it is "practically impossible", or "excessively difficult" to bring a claim without access to a leniency document an "effective application" of the EC rules may justify access.[47]

Into that debate, we may also now add *Donau Chemie*,[48] where the CJEU found that an Austrian provision which denied access to leniency documents, unless all the defendants agreed, went too far and was unlawful, because it prevented a national court from applying the "weighing-up of interests" test in *Pfleiderer*. (*Donau Chemie* is summarised in Part 2, in next month's journal.)

Fourthly, one may question whether the Proposed Directive will level the "playing field" for competition litigation in all Member States. Some Member States' litigation systems appear to be better suited to it than others and a Directive sets a minimum standard, not a maximum. Nevertheless, if implemented effectively, the Proposed Directive could make a big difference in many Member States.

One senses that all this will still require the active co-operation of Member States and "competition law judges" across Europe to make it work, not least because implementing the Proposed Directive will give rise to numerous follow-up questions.

Fifthly, it is interesting to see that the Proposed Directive recognises that there will be complex issues on confidentiality in national court cases[49] with discussion

40 Proposed Directive art.16(1).
41 Proposed Directive art.15.
42 Commission, *Communication on quantifying harm in actions for damages* [2013] OJ C167/19.
43 Commission, *Communication on quantifying harm in actions for damages* [2013] OJ C167/19, paras 8–9.
44 Proposed Directive art.16/123.
45 The Practical Guide is available on the EC's website. The Draft was summarised last year in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 70–72.
46 Proposed Directive, Explanatory Memorandum, p.3.
47 *Bundeswettbewerbsbehorde v Donau Chemie AG* (C-356/11) [2013] 5 C.M.L.R. 19 at [27].
48 *Donau Chemie* [2013] 5 C.M.L.R. 19
49 Proposed Directive, Preamble Recital 17.

of "confidentiality rings" and experts to make confidential summaries (an issue already arising: see the *Alstom* case noted below).

Sixthly, the joint and several liability and contribution provisions (in art.16) will also be a worry to many. Again this is not new. Joint and several liability is even old. Contribution is known, at least in English law, where such claims can be brought. However, the idea of a company being caught with residual liability for the whole cartel, as confirmed here; and the prospect of further complex claims on the "relative responsibility for the harm caused" will be sobering for many.[50]

Finally, the proposed presumption of harm[51] remains controversial. The EC decision proves a "restriction by object". Why should the plaintiff not then have the burden to prove actual harm in the usual way? If the plaintiff has access to evidence through specific disclosure, why go further?

It will be interesting to see what happens in the coming months as the Proposed Directive is considered by the European Parliament.

Other legislation and EC materials

In February 2013, the EC decided to allow its *Maritime Transport Guidelines* to expire on September 26, 2013.[52] This is in line with the EC's policy of phasing out sector specific competition rules.

In March 2013, the EC issued a revised *Explanatory Note on its procedures during inspections*.[53] The main point appears to be to give information on how the EC carries out the IT/data collection and review side of such inspections. For example, the Note explains that the EC can search mobile phones and tablets and may need co-operation from the company to work with its IT environment. The EC is now collecting information using a NUIX system, which indexes and reviews material copied.[54]

In May 2013, the EC announced that it had signed a *Cooperation Agreement with Switzerland on Competition Matters*.[55] This is the fifth agreement, after others with the United States, Canada, Japan and Korea.

What is new and important is that the agreement allows the EC and the Swiss Competition Commission to exchange information which they have obtained in their investigations. This includes information obtained in dawn raids and from requests for information.

It can be done without the consent of the parties, save as regards information obtained in leniency or settlement procedures, where written consent is still required.[56] There are various conditions, including respect for procedural rights such as the privilege against self-incrimination and legal professional privilege. Information transmitted can only be used for similar procedures into the same conduct. It cannot be used to impose sanctions on individual persons.

In July 2013, the EC issued a proposal to amend its *De Minimis Notice (Notice on Minor Agreements)*.[57] The proposed revision appears essentially to take account of the CJEU's ruling in the *Expedia* case noted below,[58] that an agreement which may affect trade between Member States and has an anti-competitive object (a "restriction by object") constitutes, by its nature and independently of any concrete effect it may have, an appreciable restriction of competition. So, in such a case it is not necessary to show that the market share thresholds of that Notice are met to apply EU competition law.

It may be recalled that the Notice creates legitimate expectations as regards the EC's enforcement practice, but is not binding on national courts or NCAs.

European Court judgments

General

Box 5

Main European Court cases

- *General principles*
  - — *Otis and Others*
    - * The EU has the right to sue for cartel damages without being judge and party in its own cause or infringing the principle of a right to a fair hearing.
  - — *Expedia*
    - * An agreement which may affect trade, which has an anti-competitive object, is an appreciable restriction, independently of its effects.
    - * The *De Minimis Notice* is not binding on NCAs and national courts.
  - — *Slovak Banks*
    - * The Slovak CA could penalise conduct designed to restrict competition by a Czech based competitor, even if that competitor was operating illegally.
  - — *Allianz Hungaria*
    - * Complex set of facts whereby car repairers' remuneration turned on insurance sold considered possible "restriction by object".
    - * Notably, if the combination of repair/insurance roles restricted the functioning of competition.
    - * Related agreements could also be restrictions by object if they reinforced and harmonised recommended prices for car repairs.

[50] Proposed Directive, Explanatory Memorandum, p.16; and Recital 27; and see also Recital 41, noting that "not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement".
[51] Proposed Directive, Explanatory Memorandum, p.18 and Proposed Directive, Preamble Recital 35.
[52] IP/13/122, February 19, 2013.
[53] The text is available on the EC's website.
[54] D. van Erps, "Digital Evidence gathering: An up-date" (2013) 2 *Concurrences* 213.
[55] IP/13/444, May 17, 2013.
[56] Cooperation Agreement with Switzerland on Competition Matters art.VII(6).
[57] IP/13/685, July 11, 2013. The proposal is on the EC's website.
[58] *Expedia Inc v Autorité de la concurrence* (C-226/11) [2013] 4 C.M.L.R. 14.

  * Question is whether the restriction is by nature sufficiently injurious to competition or not.
- — *Schenker and Others*
  * No defence to infringement that legal advisers and a national court had found no infringement (thinking the case covered by an exemption in Austrian competition law).
  * NCA not allowed to rule that there was no infringement as regards EU competition law (and had, in fact, only ruled on national competition law).
- — *Portuguese Accountants*
  * *Wouters* applied to Portuguese rules on compulsory training for accountants.
  * Commercial activity within art.101(1) TFEU.
  * CJEU ruled that a system of training reserved to professional body with that body regulating independent training may restrict competition and not qualify for art.101(3) TFEU.

Otis

In November 2012, the CJEU ruled on a controversial reference from a Belgian Court, which was considering the EC's claim (on behalf of the European Community, now the EU) for damages, relating to its purchases of lifts and escalators alleged to be affected by the lifts and escalators cartel.[59]

A first issue was whether the EC was entitled to act for the other EU institutions. At the time the claim was brought, art.282 of EC Treaty applied, expressly providing that the European Community was to be represented in legal proceedings by the EC. So the CJEU ruled that the EC was entitled to bring such a claim for the other institutions.[60]

A second issue was whether the defendants would be denied the right to a fair hearing, contrary to art.47 CFR and art.6 ECHR, insofar as the EC decision is binding on the national court and it could be argued that the EC was therefore both judge and party in its own cause.

The CJEU decided not. The court started from the point that the EU also enjoyed the right to claim compensation for harm suffered from "anti-competitive conduct".[61]

Although a national court could not take a decision "running counter" to an EC decision, so had to accept that the prohibited conduct existed, that did not mean that the defendants were denied access to an (independent) tribunal. The EC's decision on liability was subject to effective judicial supervision by the European Courts.[62] The national court also remained responsible for establishing the existence of loss and a direct causal link between the loss and the conduct in question.[63]

As a result, the court considered that the EC was *not* judge and party in its own cause.[64]

A third issue was whether the EC had access to confidential information to bring its case, so there was an infringement of the principle of equality of arms. The court found not, also, because the EC had explained to the national court and the CJEU: (1) that the relevant EC department did not have privileged access to the confidential file of DG Competition; (2) it had based its pleadings on the public, non-confidential version of the decision; and (3) the EC was not allowed under art.28(1) of Regulation 1/2003 to use information from its investigation for other purposes (i.e. bringing its own claim for damages).[65]

The CJEU's conclusion was that art.47 CFR did not preclude the EC from bringing such an action for damages.[66]

Expedia

This case involved a reference from the French *Cour de Cassation*, in the context of an appeal by Expedia against a decision imposing fines on Expedia as regards its joint venture with SNCF offering travel services.[67]

The French Competition Authority ("FCA") found that the SNCF and Expedia had entered into an unlawful JV for the sale of train tickets and travel over the internet and fined them. The FCA found that the object and effect of the arrangement was to restrict competition. On appeal, Expedia argued that the JV's market share was less than 10 per cent, so that the agreement should be treated as "de minimis", but the Paris Court of Appeal ruled that, even if that is true, the FCA could bring proceedings, since the EC's Notice was not binding on it.

On further appeal, the *Cour de Cassation* noted that it was not disputed that the agreement in question had an anti-competitive object. However, it asked the CJEU whether proceedings are precluded where the market share thresholds of the EC's *De Minimis Notice* were not met. The CJEU's answer was essentially "no".

First, the CJEU noted that to be caught by art.101(1) TFEU an agreement had to have the object or effect of "perceptibly restricting competition" and "be capable of affecting trade",[68] which was a question of looking at the actual circumstances.

[59] *Europese Gemeenschap v Otis NV* (C-199/11) [2013] 4 C.M.L.R. 4. With thanks to Asta Rimkute for her assistance.
[60] *Otis* [2013] 4 C.M.L.R. 4 at [34]–[36].
[61] *Otis* [2013] 4 C.M.L.R. 4 at [41] and [44].
[62] *Otis* [2013] 4 C.M.L.R. 4 at [55]–[63].
[63] *Otis* [2013] 4 C.M.L.R. 4 at [65].
[64] *Otis* [2013] 4 C.M.L.R. 4 at [67].
[65] *Otis* [2013] 4 C.M.L.R. 4 at [70] and [74].
[66] *Otis* [2013] 4 C.M.L.R. 4 at [77].
[67] *Expedia* [2013] 4 C.M.L.R. 14.
[68] *Expedia* [2013] 4 C.M.L.R. 14 at [17] and [20].

Secondly, the CJEU agreed with the *Cour de Cassation* that the EC's Notice was not binding on a national court.[69] So a national court *could* take into account the thresholds set out by the EC in its Notice, but was not *required* to do so.[70]

Thirdly, interestingly for Expedia, the French Government and the EC questioned the finding of the national court that the agreement had an anti-competitive object, but the CJEU considered this to be a fact which, on an art.267 TFEU reference, was for the national court to decide.[71]

Fourthly, the court noted that if an agreement is a "restriction by object" (i.e. by nature) there is no need to consider its concrete effects. An agreement which "may affect trade" and has an anti-competitive *object* constitutes an appreciable restriction of competition, independently of its concrete effects.[72]

As noted above, the EC is already proposing to amend its *De Minimis Notice* in light of this judgment.

Slovak Banks

In February 2013, the CJEU ruled on a reference from the Supreme Court of the Slovak Republic, in the context of appeals against a decision of the Slovak Competition Authority[73] ("SCA"). The SCA found that three Slovak banks had agreed to terminate contracts relating to current accounts with a non-bank financial institution called Akcenta, which was based in Prague, and imposed fines for a breach of art.101(1) TFEU and its national equivalent. Akcenta offered cashless foreign exchange transactions and needed current accounts in banks to carry out its activities.

On appeal the banks argued that this was wrong because Akcenta was not authorised to offer banking services in the Slovak Republic, so was not a lawful competitor: there was no reason to penalise conduct resulting in the exclusion of an undertaking which was operating illegally.[74]

The Slovak Supreme Court asked the CJEU if such a factor was relevant. The CJEU's answer was "no". The agreement in question had as its object to restrict competition with Akcenta. None of the banks had challenged the legality of Akcenta's conduct before the proceedings concerned. Moreover, it is for public authorities, not private undertakings to ensure compliance with relevant laws. The legality of Akcenta's position was therefore considered irrelevant to whether there was an infringement of art.101(1) TFEU.[75]

Allianz Hungaria

In March 2013, the CJEU ruled on a reference from the Supreme Court of Hungary,[76] in the context of a challenge by two insurance companies and certain car undertakings against a decision of the Hungarian Competition Authority.

The background to the reference was that the Hungarian Competition Authority ("HCA") had found that certain annual agreements between car insurers (including Allianz and Generali) and car dealers, or their national association, on the conditions and rates applicable to repair services had as their object the restriction of competition. The HCA prohibited their continuation and imposed fines.

It appears that the car repairers both repaired for insurers and were agents for the sale of insurance. The amount that the car repairers were paid for car repairs for insurers increased according to the number and percentage of insurance policies sold for an insurer.

On appeal, the Supreme Court of Hungary asked the CJEU if such agreements involved restrictions of competition "by object".

The CJEU's answer was essentially "yes", although depending on what the national court found. Thus the court stated that the question of the nature of such agreements depended on the economic context, although it was not necessary to examine the effects on competition.[77] The court then made several important general statements on what is a "restriction by object".

First, the Court noted that here the agreements linked two independent activities, car repair services and car insurance brokerage/intermediation. Such a link could be an important factor in deciding whether the agreements involved a "restriction by object", notably if independence of the two activities is necessary for the proper functioning of normal competition.[78]

Secondly, the court stated that, although the case involved vertical agreements, they could still involve "restrictions by object".[79]

Thirdly, as regards the car insurance market, the CJEU stated that the Hungarian court had to decide whether, in the economic and legal context, the agreements were "sufficiently injurious" to competition in the car insurance market as to justify a finding of "restriction by object" (even if there was no concerted practice among insurance companies).[80] That could be the case if national law required that dealers acting as intermediaries or insurance brokers be independent of insurance companies[81]; or

69 *Expedia* [2013] 4 C.M.L.R. 14 at [24]–[30].
70 *Expedia* [2013] 4 C.M.L.R. 14 at [31].
71 *Expedia* [2013] 4 C.M.L.R. 14 at [34].
72 *Expedia* [2013] 4 C.M.L.R. 14 at [35]–[37].
73 *Protimonopolny urad Slovenskej republiky v Slovenska sporitel'na AS* (C-68/12) [2013] 4 C.M.L.R. 16.
74 *Protimonopolny urad Slovenskej republiky* [2013] 4 C.M.L.R. 16 at [11].
75 *Protimonopolny urad Slovenskej republiky* [2013] 4 C.M.L.R. 16 at [19]–[21].
76 *Allianz Hungaria Biztosito Zrt v Gazdasagi Versenyhivatal* (C-32/11) [2013] 4 C.M.L.R. 25. With thanks to Svetlana Chobanova for her assistance.
77 *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [33]–[38].
78 *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [39]–[41].
79 *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [43].
80 *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [46].
81 *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [47].

where it was likely that, through the agreements, competition on the car insurance market would be eliminated or seriously weakened.[82]

Fourthly, the court stated that, as regards the car repair market, the Hungarian court should take into account that the agreements appeared to have been concluded on the basis of recommended prices, established in decisions taken by the car dealers' national association. The court found that if those decisions had the object of restricting competition by harmonising hourly charges for car repairs; and that, through the agreements, the insurance companies confirmed those decisions (which was to be assumed where they concluded an agreement with the association of dealers), the unlawfulness of those decisions would also vitiate those agreements, which would then also be a "restriction by object".[83]

Although these questions arose as regards Hungarian competition law, because it was considered by the HCA that there was no impact on intra-community trade, the CJEU still found that it had jurisdiction to rule, given the interest in a uniform interpretation of comparable practices of national and EU law.[84]

The agreements with the national association were framework agreements, implemented by individual agreements. However other agreements with car dealers provided for similar incentives.

Finally, the CJEU emphasised that it was for the national court here to decide if there was a "restriction by object".[85] However the CJEU found that, if the all conditions noted were found, the restrictions could be a "restriction by object".[86]

The case is already controversial, mainly insofar as some practitioners argue that what is a "restriction by object" should be a narrow category of infringement, such as price-fixing or market-sharing, but not something complex like this, which they would treat as a restriction by effect. However, the CJEU's position is clear, that whether something is a "restriction by object" depends on the nature of the restrictions concerned and that is an open question, depending on appraisal of the circumstances, as to how serious the restriction is.

Schenker

This case involved a reference from the Supreme Court of Austria, in the context of a decision by the Austrian Competition Authority ("ACA") imposing fines on undertakings found to be involved in a cartel on freight forwarding, contrary to Austrian law.[87]

Schenker and other companies in Austria were members of an association of freight forwarders, SSK, which represented their collective interests, including the objective of more favourable consignment rates for shippers and the creation of equal conditions of competition.

The SSK was formed relying on an exemption in Austrian competition law for "minor cartels". SSK was given legal advice that it met the conditions for that exemption and the Austrian Cartel Court also declared that. This was in 1996, with further advice in 2005.

Then, in 2007, the EC announced that it had carried out inspections of various suppliers of international freight forwarding services. Shortly afterwards the SSK met and, being advised that its activities might be unlawful in EU competition law, unanimously dissolved the SSK immediately.

In 2010, the ACA applied to the Higher Regional Court in Vienna for an order that Schenker had infringed inter alia art.101(1) TFEU between 1994 and 2007, but imposed no fine, while ordering other defendants to pay fines. It appears that Schenker had made a leniency application to the ACA.

The defendants raised the legal advice and Cartel Court's ruling in defence (among other things) to show there was no fault on their part. The Higher Regional Court dismissed the ACA's application, finding no fault or effect on trade and ruling that only the EC could find infringements without imposing a fine.

On further appeal to the Supreme Court of Austria, that court asked the CJEU: (1) if the legal advice and finding of the Cartel Court were grounds not to penalise conduct contrary to art.101 TFEU; and (2) whether NCAs could decide not to fine an undertaking for a cartel infringement under art.101(1) TFEU on the basis of its application for leniency.

The CJEU ruled essentially "no" and "yes".

On the first issue, the CJEU noted that, on the case law of the European Court, an undertaking could be fined if its conduct was intentional or negligent, i.e. if it could not have been unaware of the anti-competitive nature if its conduct. Further, it was in the interests of a uniform and effective application of EU competition law that Member States apply conditions which are at least as stringent.[88]

The fact that an undertaking had wrongly characterised its conduct in law could not prevent a fine, if it could not have been unaware of the anti-competitive nature of its conduct.[89] That was the case here.

[82] *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [48].
[83] *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [49]–[50].
[84] *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [19]–[23].
[85] *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [29].
[86] *Allianz Hungaria* [2013] 4 C.M.L.R. 25 at [51].
[87] *Bundeswettbewerbsbehörde v Schenker & Co AG* (C-681/11) [2013] 5 C.M.L.R. 25.
[88] *Schenker* [2013] 5 C.M.L.R. 25 at [36]–[37].
[89] *Schenker* [2013] 5 C.M.L.R. 25 at [38].

Nor could an undertaking rely on the decision of a national authority to establish a legitimate expectation that its conduct was not contrary to art.101(1) TFEU, because national authorities do not have the power so to rule (referring to *Tele2/Polska*).[90] In any event, the Cartel Court ruled only on Austrian competition law, *not* EU competition law.[91]

On the second issue, the CJEU noted that art.5 of Reg 1/2003 does not expressly provide that NCAs can find an infringement, yet not impose a fine. However, it does not exclude that power either.

NCAs could decide not to fine, based on a national leniency programme. However to ensure that EU competition law is applied effectively this should be "by way of exception only"; and if a national leniency programme is implemented, this should not undermine an effective and uniform application of art.101 TFEU.[92]

In practice, that meant that such a reduction is only justified if co-operation makes it easier to find an infringement and, where relevant, bring the infringement to an end.[93] The undertaking's conduct also had to reveal a genuine spirit of co-operation. Immunity should only be granted in strictly exceptional situations where an undertaking's co-operation was decisive in detecting and suppressing a cartel.[94]

Portuguese Accountants

In November 2011, the Lisbon Court of Appeal made a reference to the CJEU in proceedings between the Portuguese Competition Authority ("PCA") and the *Ordem dos Técnicos Oficiais de Contas* ("OTOC"), the Portuguese Association of Chartered Accountants.[95]

The proceedings before the Lisbon Court of Appeal related to the compatibility with art.101 TFEU of a system of compulsory training for chartered accountants which required accountants annually to obtain a number of training credits. Most credits could be obtained from training sessions organised by either OTOC or private training bodies, but part of the credits *had* to be obtained from training sessions provided exclusively by OTOC. In order to provide training giving entitlement to training credits, private training bodies had to obtain an authorisation from OTOC and approval from OTOC for each of the sessions they planned to offer.

The Lisbon Court of Appeal referred two questions to the CJEU: (1) the Court of Appeal asked whether the regulations in question fell within the scope of art.101 TFEU; and (2) the Court of Appeal asked the CJEU whether EU competition law precludes a professional association from adopting a regulation such as the one introducing the compulsory training system.

As regards the first question, the CJEU ruled,[96] in line with its *Wouters*[97] case law, that competition law does not apply to: (1) activities which, by their nature, aim and the rules to which they are subject, do not belong to the sphere of economic activity; or (2) which are connected with the exercise of a public authority's powers.[98]

However, the CJEU ruled that the training system could restrict competition, not only on the market on which the accountants are active, but also on the market for compulsory training for accountants. Therefore a regulation introducing such a system belongs to the sphere of economic activity.[99]

As regards the second type of activities that are exempted from the application of competition law, the CJEU ruled that when OTOC adopts rules on a training system, it does not exercise the powers of a public authority, but instead acts as a regulatory body of a profession the practice of which constitutes an economic activity. The court noted that national authorities are not involved in the nomination of OTOC's managing bodies' members; that OTOC has wide discretionary regulatory powers that are not subject to any conditions; and that OTOC adopted the training system without any input from the national authorities.[100] A regulation introducing a training system such as the one introduced by OTOC should thus be regarded as a decision of an association of undertakings.[101]

As regards the second question, the CJEU noted that the training system is liable to affect trade between Member States, since it may impact the decision of another Member State's accountant as to whether or not to exercise his or her activities in Portugal.[102] The training system's object was to guarantee the quality of the accountants' services, but the CJEU indicated that it was for the Lisbon Court of Appeal to examine its effects on the internal market.[103]

The CJEU provided a list of points of interpretation allowing the Court of Appeal to reach a decision, both as regards the structure of the training market and as regards

[90] *Prezes Urzedu Ochrony Konkurencji i Konsumentow v Tele2 Polska sp z oo (now Netia SA)* (C-375/09) [2011] E.C.R. I-3055; [2011] 5 C.M.L.R. 2. See Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 76.
[91] *Schenker* [2013] 5 C.M.L.R. 25 at [42].
[92] *Schenker* [2013] 5 C.M.L.R. 25 at [45]–[47].
[93] *Schenker* [2013] 5 C.M.L.R. 25 at [48].
[94] *Schenker* [2013] 5 C.M.L.R. 25 at [49].
[95] With thanks to Philippe Claessens for his assistance.
[96] *Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrência* (C-1/12) [2013] 4 C.M.L.R. 20.
[97] *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577; [2002] 4 C.M.L.R. 27. See John Ratliff, "Major Events and Policy Issues in EC Competition Law 2001–2002: Part 1" [2003] I.C.C.L.R. 39, 48.
[98] *OTOC* [2013] 4 C.M.L.R. 20 at [40].
[99] *OTOC* [2013] 4 C.M.L.R. 20 at [45].
[100] *OTOC* [2013] 4 C.M.L.R. 20 at [46]–[53].
[101] *OTOC* [2013] 4 C.M.L.R. 20 at [59].
[102] *OTOC* [2013] 4 C.M.L.R. 20 at [67].
[103] *OTOC* [2013] 4 C.M.L.R. 20 at [72].

the conditions of access to that market, suggesting that the training system is likely to constitute a restriction of competition by effect.

First, the Court found that the distinction between the two types of training (that reserved to OTOC and that not) appears artificial and therefore not justified. Both types of training are part of the same relevant market.[104]

Secondly, given that one of the two types of training can only be provided by OTOC, OTOC reserves for itself a significant part of the market.[105]

Thirdly, the type of training that can only be provided by OTOC has a *maximum* duration of 16 hours, whereas the other type of training has a *minimum* duration of 16 hours. A potential result is thus that training bodies wishing to offer short training programmes may be prevented from doing so.[106]

Fourthly, accountants can meet their overall credit requirement by attending training sessions that can only be provided by OTOC, whereas the opposite is not possible. Given that the training sessions that can only be organised by OTOC are shorter, the training system is liable to confer a competitive advantage on the training sessions provided by OTOC.[107]

Fifthly, OTOC's training system may not ensure equality of opportunity between the various economic operators because OTOC can reject training bodies and approved training bodies' training sessions, while providing training sessions in competition with those training bodies.[108]

Sixthly, the conditions for a training body or session to obtain OTOC's approval are drafted in vague terms, which may lead to OTOC favouring its own training sessions.[109]

The CJEU also noted that arts 101(3) and 106(2) TFEU do not apply since, among other things, a number of the system's features, such as the fact that OTOC reserves a part of the market to itself and the discriminatory conditions for access to the other part of the market, go beyond what is necessary.[110]

The CJEU indicated that the objective of guaranteeing the quality of the accountants' services could be achieved by setting up a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria ensuring that training bodies would have equal access to the market.[111]

Cartel appeals

Dutch Beer

In December 2012 the CJEU rejected the appeals by Bavaria and Heineken against the GC's judgments, essentially upholding the EC's decision in the Dutch Beer case, but increasing the reduction in fine for excessive delay in the proceedings.[112]

Calcium Carbide

Box 6

- *Main points on cartel appeals*
  - — Calcium Carbide cartel
    - * Inability to pay is not just about bankruptcy; it is about jeopardising the viability of the undertaking and the sale of the assets being unlikely/impossible (so they "lose all value").
  - — Chloroprene and Synthetic Rubber cartels
    - * To find recidivism, the EC must show a previous infringement by the same undertaking, including the decision so that defence rights are respected (*Eni*).

In December 2012 the GC also issued judgments concerning four appeals by companies involved in this cartel.[113] In 2009 it will be recalled that the EC had found a cartel between seven companies in calcium carbide and magnesium-based reagents between 2004 and 2007 and imposed fines in total of some €61 million. The focus of the judgments is on EC decisions as to whether to grant fine reductions for inability to pay ("ITP"), or for special circumstances on the *2006 EC Fining Guidelines*, paras 35 and 37 respectively. The GC upheld the EC's decision.

The main points are as follows:

First, the fact that a company may go bankrupt is not enough to justify ITP relief. The issue on para.35 of the *2006 EC Fining Guidelines* is whether the EC fine would jeopardise the economic viability of the undertaking and cause its assets to lose all value.[114] ITP is intended to be for the situation where the acquisition of a company's assets appears unlikely or even impossible. However, if the assets *are* sold, they have not lost all their value, even if they could have been sold at a higher price.[115]

[104] *OTOC* [2013] 4 C.M.L.R. 20 at [75]–[77].
[105] *OTOC* [2013] 4 C.M.L.R. 20 at [78]–[79].
[106] *OTOC* [2013] 4 C.M.L.R. 20 at [80]–[82].
[107] *OTOC* [2013] 4 C.M.L.R. 20 at [83].
[108] *OTOC* [2013] 4 C.M.L.R. 20 at [85]–[89].
[109] *OTOC* [2013] 4 C.M.L.R. 20 at [90]–[91].
[110] *OTOC* [2013] 4 C.M.L.R. 20 at [96]–[100], [103] and [106].
[111] *OTOC* [2013] 4 C.M.L.R. 20 at [99].
[112] *Bavaria NV v European Commission* (C-445/11) and *Heineken Nederland BV Heineken NV v European Commission* (C-452/11 P), judgments of December 19, 2012; CJEU Press Release No.170/12, December 19, 2012. For the GC judgments see Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 91–92. With thanks to Youenn Beaudouin for his assistance.
[113] *Novácke chemické závody v European Commission (Ncz)* (T-352/09) [2013] 4 C.M.L.R. 23; *1.Garantovana v European Commission (1.G)* (T-392/09) [2011] 5 C.M.L.R. 13; *Ecka Granulate and non ferrum Metallpulver v European Commission* (T-400/09) [2013] OJ C32/16, judgment of December 12, 2012; and *Almamet v European Commission* (T-410/09) [2013] 4 C.M.L.R. 24. With thanks to Youenn Beaudouin for his assistance.
[114] *Ncz* [2013] 4 C.M.L.R. 23 at [189]–[190].
[115] *Ncz* [2013] 4 C.M.L.R. 23 at [228].

Secondly, if a company terminates its activities and realises all its assets, ITP cannot be claimed, as the economic viability of the company is no longer relevant.[116]

Thirdly, several companies argued on appeal that the effect of these fines would be to drive them out of business, favouring Akzo Nobel (the immunity applicant) and causing increased market concentration. The GC excluded that on the evidence noting, in particular, that it did not appear that if that occurred it would increase Akzo Nobel's market position to one of dominance.[117]

Fourthly, 1.Garantovana ("1.G") argued that the EC had been wrong to take into account its turnover in 2007 when the preceding business year for fining purposes was 2008, since the EC's decision was taken in 2009.

The GC rejected this. Applying *Britannia Alloys*,[118] the court held that the EC was entitled to find that 2007 was 1.G's last full year of normal activity. It appeared that 1.G had sold many of its assets in 2008, so that its turnover fell from €229 million to €21 million. 1.G therefore argued that the maximum fine the EC should have imposed was €2.1 million, applying the 10 per cent of turnover fine ceiling.

The GC disagreed, noting that just because 1.G still had a turnover in 2008 did not mean that the EC had to use that turnover.[119] The GC reviewed the position on that, noting that a mandate had been given to the board of directors of 1.G for the sale of its assets. The court found that the sales which had taken place were not part of its normal economic activity, but rather designed to convert the assets into cash with a view to terminating its activities and to a possible dissolution and distribution of assets.

While it was not entirely clear what 1.G was doing in this period, the court considered that the EC was entitled to conclude that this was not a normal economic year and therefore to pick 2007 as the reference year for fines, not 2008.

Fifthly, 1.G argued that it should have been given the right to be heard as regards the EC's choice of turnover to be taken into account in its fine. However, the court stated that, provided that the EC had given 1.G the elements necessary to see what the EC's decision might be, it did not have to allow 1.G to be heard on the EC's final position.[120]

Sixthly, as regards the concept of "special circumstances"[121] in para.37 of the *2006 EC Fining Guidelines*, there is also a further clarification as to why the EC gave Almamet such a reduction. The key point is that Almamet was a trader focussed mainly on the products covered by the cartel decision. As a result, the EC appears to have decided that a fine would have had a greater impact on Almamet than other companies that were producing as well as trading and which were less focussed on the products concerned.[122]

Finally, there is a noteworthy passage in the *Ncz* judgment where the court notes that if there is a detailed discussion between the EC and the defence on a particular issue, which is relevant to the EC's overall decision, then a more detailed statement of reasons is required.

On the facts, there had been a detailed discussion with the defence on certain points but, in the end, the EC had ruled that none of that was relevant, because the applicant had failed the relevant criterion for another reason.[123] The EC did not therefore have to deal with it at length in its reasons.

Chloroprene Rubber

Versalis and Eni In December 2012, the GC ruled on an appeal by Versalis and Eni against the EC's Chloroprene Rubber ("CR") decision.[124] It may be recalled that in 2007[125] the EC had found a cartel between six groups of companies in the CR market, with market-sharing and price-fixing between 1993 and 2002. There had been inspections in 2003, prompted by an immunity application by Bayer.

Eni was fined €132.16 million and Versalis (formerly Polimeri Europa, which was acquired in 2002 by Eni) and Eni were held jointly and severally liable. Polimeri Europa had acquired in 2002 from EniChem (now Syndial), a subsidiary of Eni, a certain number of activities including CR and was therefore considered liable for EniChem's activities on the CR market.

The base amount of the fine was set as 21 per cent of the value of sales, with a 60 per cent increase for Eni/Versalis for recidivism (and 50 per cent for Bayer.) No mitigating circumstances were found. Further, the EC increased the fine for deterrence using a multiplying factor of 1.4 for Eni/Versalis (and 1.1 for Dow).

On appeal by Eni/Versalis, the GC upheld the EC's decision as regards the companies' involvement in the cartel. However, the court reduced the fine by €25.96 million to €106.2 million. The main points are as follows:

First, the court found that the EC had not sufficiently established Eni's involvement in the previous cartels on which recidivism had been based.[126] The court noted that the EC had considered that Eni (and Bayer) were to be considered recidivists and imposed a 60 per cent increase. The previous infringements attributed to Eni were in the *Polypropylene* (1986) and *PVC* (*PVC II*, 1994) cartels.

116 *1.G* [2011] 5 C.M.L.R. 13 at [143]–[144].
117 *Ncz* [2011] 5 C.M.L.R. 13 at [243]–[245].
118 *Britannia Alloys & Chemicals Ltd v Commission* (C-76/06 P) [2007] E.C.R. I-4405; [2007] 5 C.M.L.R. 3.
119 *1.G* [2011] 5 C.M.L.R. 13 at [87].
120 *1.G* [2011] 5 C.M.L.R. 13 at [73]–[79].
121 This provides that the EC may depart from its general methodology if the particularities of a case or the need to achieve deterrence justify it.
122 *Ncz* [2011] 5 C.M.L.R. 13 at [133], [139]–[146].
123 *Ncz* [2011] 5 C.M.L.R. 13 at [207]–[208].
124 *Versalis and Eni v Commission* (T-103/08), judgment of December 13, 2012. With thanks to Youenn Beaudouin for his assistance.
125 Summarised in John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2007–2008: Part 2" [2009] I.C.C.L.R. 113, 115.
126 *Versalis and Eni*, December 13, 2012 at [263]–[287].

However, the court noted that in *Polypropylene*, Anic SpA (another subsidiary of Eni, later named EniChimica, absorbed by EniChem in 1986) was fined for cartel participation; and in *PVC*, EniChem had been fined for cartel participation. In these cases, the EC did not argue, nor did it try to demonstrate that Anic and EniChem did not act independently. Moreover, Eni was not heard in the context of these procedures.

The GC considered that the EC could not find recidivism as an aggravating circumstance as regards Eni, when the company had not been sanctioned for the infringements referred to and was not even sent a SO in those cases, making it impossible for Eni to contest its liability.[127]

However, the court held that insofar as Eni was responsible for Polimeri Europa's (Versalis') behaviour, which was the economic successor of EniChem, the previous infringement of EniChem in the *PVC* cartel could be considered as an aggravating circumstance.

Secondly, the parties argued that the decisions were too old for recidivism to be considered. Here the court recalled that, in principle, recidivism cannot be considered without restriction over time.[128] However, the court considered that in the present case, despite having been sanctioned in the *PVC II* decision in 1994, the parties did not discontinue their participation in the present infringement,[129] so such an increase was justified here.

Thirdly, the court considered that the EC's adjustment of the fine for deterrence was contrary to the principle of equal treatment.[130] The EC, considering that EniChem (along with Dow, DuPont and Bayer) had a significantly high turnover other than from CR, adjusted the amount of fines to ensure their deterrent effect. The court noted that Eni's 2006 turnover was some €86.1 billion. Based on this, the EC had multiplied Eni's fine by 1.4.

The companies argued this was a breach of the principle of equality of treatment because Dow's 2006 turnover was some €39.1 billion (around half of Eni's) and based on that, the EC had multiplied Dow's fine by 1.1.

Interestingly, the GC considered that the difference in the multipliers was unjustified. Eni's 2006 turnover being twice that of Dow's, which was in a comparable situation, the EC held that the multiplier for Eni should be set at 1.2. Further the court held that the EC had not given sufficient reasons to depart from that conclusion and justify a 1.4 multiplier. The court also considered, unlike the EC, that the relevant differential was between 10 per cent and 40 per cent, the percentage increase of the two group's fines and not between 1.1 and 1.4 which made Eni's multiplier 400 per cent that of Dow.[131]

The court therefore concluded as follows[132]: as regards recidivism, since Bayer's recidivism increase for one previous infringement was set at 50 per cent, the court held that Eni's increase should be set in the same way.[133] As regards the multiplying factor to ensure the deterrent effect, the court set this at 1.2.[134] The final amount of the fine was thus set at €106.2 million.

Dow Chemical In September 2013, the CJEU dismissed an appeal by Dow Chemical against the GC's judgment,[135] which confirmed the findings in the EC's CR decision, discussed above.[136] Dow was found solely liable for a fine of €4.425 million and jointly and severally liable with EI DuPont for €44.25 million for the conduct of their joint venture ("JV") DuPont Dow Elastomers ("DDE"), held in equal shares between 1996 and 2005.

With regard to parental liability, Dow argued that: (1) the GC misconstrued the terms "single economic unit", insofar as the finding of joint liability with DuPont and DDE leads to Dow being simultaneously part of a number of undertakings all of which comprise JVs with their parents; (2) the condition of "decisive influence" would not be fulfilled where parent companies exercise joint control and therefore only have negative power over the JV's decisions; (3) a finding of "decisive influence" was improbable in the case of full-function JVs, since such a JV had autonomy regarding its day-to-day management; and (4) the finding went contrary to the EU Merger Regulation, according to which the change from joint to sole control was a notifiable concentration and any co-operation between parent companies of a JV should be examined under art.101 TFEU.[137]

The CJEU rejected all these claims. Insofar as the EC was obliged to determine actual exercise of decisive influence of both parents, solely for establishing liability for the infringement, the GC had rightly interpreted the term "single economic unit".[138] Since evidence of decisive influence had been assessed with regard to all the economic, organisational and legal links between the parents and the subsidiary, the assessment was also

127 *Versalis and Eni*, December 13, 2012 at [274].
128 *Versalis and Eni*, December 13, 2012 at [266].
129 *Versalis and Eni*, December 13, 2012 at [284].
130 *Versalis and Eni*, December 13, 2012 at [308]–[327].
131 *Versalis and Eni*, December 13, 2012 at [325].
132 *Versalis and Eni*, December 13, 2012 at [367]–[369].
133 *Versalis and Eni*, December 13, 2012 at [367].
134 *Versalis and Eni*, December 13, 2012 at [368].
135 *Dow Chemical v Commission* (T-77/08) [2012] 4 C.M.L.R. 19, summarised in John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2011–2012: Part 1" [2013] I.C.C.L.R. 81, 91–92. With thanks to Svetlana Chobanova for her assistance.
136 *Dow Chemical v Commission* (C-179/12 P), judgment of September 26, 2013.
137 *Dow Chemical*, judgment of September 26, 2013 at [36]–[37], [39], [42]–[43].
138 *Dow Chemical*, judgment of September 26, 2013 at [57]–[58].

compatible with the possibility to only block strategic decisions and with the framework of the EU Merger Regulation.[139]

DuPont In September 2013 the CJEU also dismissed an appeal by DuPont against a GC judgment[140] confirming the EC decision noted above.[141] As already noted, DuPont was fined €44.25 million, jointly and severally liable with Dow, for the conduct of their JVDDE.

DuPont, like Dow, claimed misinterpretation of the term "single undertaking": (1) essentially since no decisive influence could be exercised over a full-function JV (and so it argued that the GC had expanded the notion of a parent company beyond the normal links between a parent and a subsidiary); and (2) since it argued that a distinction had to be drawn between joint control of a full-function JV and exclusive control over a wholly owned subsidiary.[142] The court similarly rejected all arguments.[143]

Marine Hose

Box 7

- *Main points on cartel appeals (cont'd)*
  - Marine Hose cartel
    - Liability not transferred to purchaser through sales vehicle when parent ran business in interim period; break in economic continuity (*Parker ITR*).
    - Company held liable for returning to cartel after 18 months; no fine for that period, but liability for earlier period not time-barred because infringement continued/repeated (*Trelleborg*).
    - GC considered greater fine reduction for co-operation justified, but did not award it because the court considered the EC could have fined MRI more for a repeated infringement (*Manuli Rubber Industries*).

In May 2013, the GC gave a number of important rulings in this cartel case.[144]

Parker ITR In *Parker ITR*, the main issue was whether liability for an infringement passed to a purchaser when it acquired the relevant business. The purchaser was a company called Parker Hannefin. The vendor was a group called Saiag/ITR.

ITR had transferred the relevant business into a special subsidiary, which was called ITR Rubber, in June 2001 for the purpose of *selling* the business. Parker Hannefin had established a special subsidiary in its group for the purpose of *acquiring* the target business. From the moment when the sales vehicle was created, for about six months, it was not actually involved in economic activities, with the relevant business being handled by its parent. The acquisition was agreed in December 2001, with closing in January 2002.

The EC argued that there was economic continuity so that ITR Rubber was liable for the infringement for which it had been involved previously and that the liability was transferred to the purchaser through this acquisition. It appears that the EC was taking this approach partly because otherwise its claim against ITR Rubber for the earlier period of infringement would have been time-barred.[145] The EC proceedings had started with a dawn raid in May 2007, which led to a decision in January 2009. The EC found an infringement from at least 1990 to May 2007.

The GC disagreed. The court stated that the economic continuity principle was not intended to allow the EC to hold a purchaser liable unless the two undertakings concerned had structural links, economically and organisationally, or the legal person which committed the infringement had been transferred to a third party abusively (i.e. not in market conditions, in order to avoid anti-trust law penalties).

The court also noted that ITR (i.e. the vendor) could still have been held liable subject to the rules on limitation, for the infringement prior to the transfer.[146] In the court's view, Saiag/ITR were therefore, in principle, liable for the infringement from 1990 until December 2001.[147] Since there was no structural link between Saiag/ITR and Parker Hannefin, nor any evidence to suggest that the sale took place abusively, the liability did not however transfer to Parker Hannefin.[148] The EC could not hold the transferred business ITR Rubber and Parker Hannefin to be liable for the earlier infringement. The liability did not "attach" itself to the subsidiary ITR Rubber, then to be transferred to Parker Hannefin.

However, ITR Rubber *was* liable for its activities from January 1, 2002 until January 31, 2002 and Parker Hannefin was liable from the moment that it closed the transfer of ITR Rubber on January 31, 2002.[149]

In practice, that meant that the GC reduced the fine on Parker Hannefin for duration, reducing its liability from 19 years to 5.5 years. In addition, insofar as the EC had increased the fine on ITR and Parker Hannefin for the earlier activity of Saiag/ITR as leader of the cartel, that increase also had to be taken away as regards the liability

[139] *Dow Chemical*, judgment of September 26, 2013 at [60] and [64].
[140] *EI du Pont v Commission* (T-76/08) [2012] 4 C.M.L.R. 18, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2011–2012: Part 1" [2013] I.C.C.L.R. 81, 91–92. With thanks to Svetlana Chobanova for her assistance.
[141] *EI du Pont* (T-76/08) [2012] 4 C.M.L.R. 18.
[142] *EI du Pont* (T-76/08) [2012] 4 C.M.L.R. 18 at [33]–[35].
[143] *EI du Pont* (T-76/08) [2012] 4 C.M.L.R. 18 at [38]–[54].
[144] *Parker ITR Srl v European Commission* (T-146/09) [2013] 5 C.M.L.R. 21; *Trelleborg Industrie SAS v European Commission* (T-147/09 and T-148/09) [2013] 5 C.M.L.R. 22; *Manuli Rubber Industries v Commission (MRI)*, judgment of May 17, 2013; GC Press Release No.60/13, May 17, 2013.
[145] *Parker ITR* [2013] 5 C.M.L.R. 21 at [113].
[146] *Parker ITR* [2013] 5 C.M.L.R. 21 at [96]–[98].
[147] *Parker ITR* [2013] 5 C.M.L.R. 21 at [116].
[148] *Parker ITR* [2013] 5 C.M.L.R. 21 at [117].
[149] *Parker ITR* [2013] 5 C.M.L.R. 21 at [104]–[129].

of ITR Rubber and Parker Hannefin *after* the transfer.[150] The net result was that the liability of the transferred business, Parker ITR, was reduced from €25.6 million to €6.4 million and Parker Hannefin's joint and several liability was reduced from €8.32 million to €6.3 million.

Trelleborg In *Trelleborg* the issues were somewhat different, namely: (1) whether there had been an interruption in the cartel; and (2) did that lead to a situation where Trelleborg was not liable for the earlier period of infringement, because it was a separate infringement, or was it still liable overall with an interruption. It is an interesting case because it focuses on the prescription rules and, in particular, the notions of "continuous" infringement and "repeated or continued" infringement.

Trelleborg's argument was that there was an interruption of some two years in the running of the cartel so the EC could not argue that there had been a single and continuous infringement. As a result, the period prior to that interruption could not be the subject of the fine because it was time-barred. It should be noted that the EC had not fined Trelleborg for the two years in question, but argued that Trelleborg's liability continued because Trelleborg had not publicly distanced itself from the cartel and, in the alternative, that after the cartel it had just repeated the infringement, i.e. continued it.

The GC found that the infringement was not "continuous". There was no proof that Trelleborg had been involved in multilateral contracts with other infringers for 18 months and there was no evidence that Trelleborg had intended to restart the cartel during that period or that it was even aware of other unlawful contacts.[151] The court also found that since there was 18 months during which there was no evidence of contacts, the EC could not argue that Trelleborg did not distance themselves from the cartel. The normal functioning of the cartel simply had been interrupted and therefore it was illusory to think that Trelleborg could distance itself from it.[152]

However, the court found that there was a repeated or continued infringement. Trelleborg did not contest that after the period of interruption it went back into the cartel which then had identical objectives, practices, etc.[153] In such circumstances, the court held that the EC was entitled to find that there was a repeated, continued infringement.

Interestingly, the court looked closely at the legislative context to point out that reg.1 reflects the same principles as in the preceding prescription regulation, namely that it is possible to be liable for a "continued" infringement (that being clearer in the French version than the English. In English it is now phrased as "repeated").

As a result, the EC was entitled to fine Trelleborg in respect of the whole period, save for the period in which the infringement had been interrupted. It should also be noted that the EC had indicated in its decision that it considered the infringement to be continuous or repeated, so there was no breach of defence rights in that respect.

Finally, Trelleborg was not entitled to claim discrimination or an infringement of the principle of equal treatment insofar as the EC did not take the same view as regards Manuli Rubber Industries ("MRI"). It appears that in that company's case, the EC had found a four-year interruption in its involvement in the cartel and therefore not fined for the earlier period. The court emphasised that these were different circumstances and that anyway, a person may not rely on an unlawful act committed in favour of a third party (there was no principle of "equal treatment in illegality").[154]

So the overall result was the finding that Trelleborg had not committed the *continuous* infringement, but a *continued* infringement and there was no change to the overall fine.

Manuli Rubber In *MRI*, it is interesting to note the EC's approach to fining in its unlimited jurisdiction. As explained above, MRI had only been fined for a period subsequent to a four-year break in its involvement in the cartel. In MRI's case the EC did not pursue the idea of a repeated infringement.

The court was asked to consider whether MRI should have had a greater reduction for co-operation than 30 per cent. Interestingly, the court thought that it should have done, emphasising that MRI's co-operation had been both very quick and of significant value. As a result the court increased the percentage of reduction from 30 per cent to 40 per cent.

However, considering the matter in its unlimited jurisdiction, the court then decided *not* to change the ultimate fine. In particular, the court found that the EC could have found that there was a *repeated* infringement and fined MRI more![155]

As a result, the court annulled the EC's decision as regards the fine, but then fixed it again at the same amount, €4.9 million.

Synthetic Rubber

Eni In May 2013 the CJEU dismissed an appeal by Eni against the EC's 2006 decision, by which it fined six groups of companies for a market-sharing and price-fixing

[150] *Parker ITR* [2013] 5 C.M.L.R. 21 at [246]–[257].
[151] *Trelleborg* [2013] 5 C.M.L.R. 22 at [66]–[67].
[152] *Trelleborg* [2013] 5 C.M.L.R. 22 at [68] and [71].
[153] *Trelleborg* [2013] 5 C.M.L.R. 22 at [64] and [91].
[154] *Trelleborg* [2013] 5 C.M.L.R. 22 at [104].
[155] *Trelleborg* [2013] 5 C.M.L.R. 22 at [357]–[359].

cartel in the synthetic rubber ("SR")[156] market between 1996 and 2002. The court also dismissed the EC's cross-appeal.[157] The GC had partly upheld the EC decision, but annulled the 50 per cent fine increase for recidivism due to lack of sufficient evidence, reducing the fine from €272 million to €181 million.[158]

The main points are as follows:

First, Eni argued generally that the GC had been wrong to uphold Eni's liability for the actions of its subsidiaries Syndial (formerly EniChem) and/or Versalis (formerly Polymeri Europa). The court rejected this, noting in classic terms that since the EC could rely on the presumption of liability, it was not required to prove actual exercise of a decisive influence by Eni on Versalis.[159]

Secondly, Eni contended that the evidence submitted, i.e. that it only exerted typical prerogatives of a principal shareholder and only held 100 per cent control of Versalis indirectly, should have been sufficient to overturn the presumption.

However, the CJEU stated that the fact that Eni had never operated directly in the chemical sector, or that there had never been any management overlap between it and its subsidiaries was not relevant.[160]

The court also denied again that the parent-subsidiary presumption was irrebutable, even if that was "difficult". According to the court, to rebut the presumption Eni would have to prove that Versalis was able to act with complete autonomy, not only at an operational level, but also on a financial level.[161] It really is hard to see how this could arise, but the court's position is now standard.

Thirdly, the CJEU rejected the EC's cross-appeal on the issue of recidivism.[162] The court noted (in similar terms to the GC in the similar CR case above) that in its decision the EC had imposed on Eni a 50 per cent fine increase for previous infringements of its subsidiaries in the *Polypropylene* and *PVC* cartels (Anic and EniChem respectively).

However, the EC did not try to demonstrate that Anic and EniChem did not act independently from Eni. Nor was Eni heard in the context of these procedures, or named or sent a SO, so it had not had an opportunity to contest its liability. The EC had also recapped the corporate changes between 1996 and 2002 (the SR infringement period), but not those covered by the previous infringement.

The CJEU found that the EC was required to provide a statement of reasons enabling the EU Courts and the company concerned to understand in what capacity and to what extent it was involved in the earlier infringement.[163] Here, the EC decision: (1) did not contain a statement as to who were the companies which were addressees of the *PVC II* and *Polypropylene* decisions; (2) did not mention whether those companies were identical to those referred to in the SR decision; and (3) did not deal with the changes which took place between the adoption of the *Polypropylene* decision (1986) and the *PVC II* decision (1994), all the way to the start of the infringement (1996).[164]

In such circumstances, the EC could not invoke these decisions as evidence of recidivism against Eni.

Fourthly, the EC also submitted that the GC should have asked about the issue of repeated infringements either in written questions or at the hearing in the case, to give the EC an opportunity to be heard. The EC also argued that since Eni did not take a position regarding the liability for previous infringements during the procedure after the SO had been issued, it should not be allowed to raise it on appeal.

The CJEU rejected these arguments, noting that the EC had had the opportunity to state its position in full in its defence and at the hearing at first instance. Moreover, the court recalled (again) that no obligation under EU law required the addressee of a SO to dispute the various factual and legal elements during the administrative procedure.[165]

Versalis In June 2013 the CJEU also dismissed the appeal concerning the SR cartel by Versalis and the EC cross-appeal.[166] As just noted, in July 2011 the GC found that the EC had been wrong to increase the fine imposed jointly and severally on Eni and Versalis, its subsidiary, by 50 per cent for recidivism since, given the particular complexity of the development of their structure and control, existence of a repeated infringement had not been proved. The fine was reduced from €272.25 million to €181.50 million.[167]

In one of its pleas on appeal Versalis argued that it should not have been held liable, since there was a discrepancy between: (1) the first and second EC SOs in the case, in which Versalis was held jointly liable with Syndial and Eni; and (2) its final decision, which did not

[156] Butadiene rubber and emulsion-styrene-butadiene rubber.

[157] *Eni SpA v European Commission* (C-508/11 P) [2013] 5 C.M.L.R. 17. With thanks to Youenn Beaudouin and Svetlana Chobanova for their assistance.

[158] *Eni SpA v European Commission* (T-39/07), judgment of July 13, 2011, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 101–102.

[159] *Eni*, judgment of July 13, 2011 at [38]–[87].

[160] *Eni*, judgment of July 13, 2011 at [65].

[161] *Eni*, judgment of July 13, 2011 at [68].

[162] *Eni*, judgment of July 13, 2011 at [115]–[138].

[163] *Eni*, judgment of July 13, 2011 at [129].

[164] *Eni*, judgment of July 13, 2011 at [132].

[165] *Eni*, judgment of July 13, 2011 at [136].

[166] *Versalis SpA v European Commission* (C-511/11 P) [2013] 5 C.M.L.R. 24. With thanks to Svetlana Chobanova for her assistance.

[167] *Eni* (T-39/07) and *Polimeri Europa* (T-59/07), judgments of July 13, 2011, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 101–102.

find Syndial responsible for the infringement, so that Versalis was only liable with Eni.[168] It was argued that this was an infringement of the rights of the defence.

The CJEU rejected this, noting that since Eni, Versalis and Syndial had formed a single undertaking during almost the entire duration of the infringement Versalis could not have been in doubt as to the fact that any anti-competitive conduct by the undertaking would be imputed to it. Further, the court noted that Versalis had not shown how the result of the EC decision would have been different, if it had known that Syndial would ultimately not be held liable by the EC.[169]

In its cross-appeal the EC argued again that the GC was wrong to find the evidence before it insufficient to establish the repeated infringements by Eni and Versalis. However, the CJEU confirmed that the EC decision did not contain sufficient reasons as to whether the addressees of the *Polypropylene* and *PVC II* decisions were identical to those in the SR case, or as to the changes within the Eni group between the adoption of these decisions and the start of the infringement in issue.[170]

Dow Chemical In July 2013, the CJEU also upheld the GC's judgment as regards Dow Chemical in the SR case.[171] The GC had upheld the fine imposed by the EC of €64.6 million. Dow Chemical argued that the EC had incorrectly held the US parent company liable for this European cartel, but this was rejected.[172]

Methacrylates

Quinn Barlo In May 2013, the CJEU dismissed an appeal by Quinn Barlo (Quinn) against the GC's judgment as regards Quinn's participation in the methacrylates (acrylic glass) cartel.[173]

The GC reduced the fine imposed on Quinn from €9 million to €8.25 million, having concluded that Quinn had participated in the cartel for a shorter duration than the period found by the EC. The GC considered that the EC had not adduced sufficient evidence to establish that Quinn had participated in the cartel between November 1998 and February 2000 and subsequently reduced the duration increase from 20 to 10 per cent,[174] reflecting a duration of just *under* 12 months instead of two years and three months.

There are two points of interest:

First, the CJEU dismissed Quinn's argument that the GC should not have applied a duration increase at all, given that this was an infringement of short duration and, under the *1998 EC Fining Guidelines*, an increase for duration should not be applied for infringements of short duration. Quinn argued that, had the EC assessed the duration of the infringement correctly from the outset, no increase in the amount of the fine would have been applied.[175]

The CJEU dismissed this plea given that the GC is entitled, in the exercise of its unlimited jurisdiction, to substitute its own appraisal for the EC's and therefore was entitled to increase the fine imposed. Moreover, the EC's Fining Guidelines were not binding on the Courts of the European Union.[176]

Secondly, it may be recalled that this was a cartel with three different elements: (1) PMMA moulding compounds; (2) PMMA sanitary ware; and (3) PMMA solid sheet. Quinn argued that, having not been held liable for the first two elements of the cartel, the GC should have further reduced the starting amount of the fine.[177] The CJEU dismissed this plea, finding that Quinn's fine adequately reflected the gravity of Quinn's participation in the cartel. It had already been reduced by 25 per cent to reflect Quinn's limited involvement. This was also appropriate since the PMMA solid sheet part of the infringement in which Quinn had been involved represented the largest proportion of overall turnover (60 per cent).[178]

Fittings

Box 8

- *Main points on cartel appeals (cont'd)*
  - — Fittings
    - * GC entitled to adjust a parent's liability where subsidiary's liability is changed, former is based on the latter and both had brought claims on the issue (*Tomkins*).
    - * GC entitled to annul whole decision if EC found *only* SCCI and that was overturned, even if a lesser infringement was still shown (*Aalberts*).

Tomkins In January 2013, the CJEU ruled[179] on the EC's appeal against the GC's judgment in the *Tomkins* fittings case.[180] It may be recalled that, in rather unusual circumstances, the GC had decided that: (1) since Tomkins' liability was as the parent of a company called

168 *Versalis* [2013] 5 C.M.L.R. 24 at [33].
169 *Versalis* [2013] 5 C.M.L.R. 24 at [40]–[43].
170 *Versalis* [2013] 5 C.M.L.R. 24 at [144]–[146]. It is reported that the EC, having send a revised SO on this issue (IP/13/179, March 1, 2013) has now decided not to retake its decision on the point; see Mlex, "EU drops threat of €90.75 m cartel fine on Eni, Versalis", October 1, 2013.
171 *Dow Chemical Co v European Commission* (C-499/11 P), judgment of July 18, 2013. With thanks to Thomas Jones for his assistance.
172 *Dow Chemical*, judgment of July 18, 2013 at [60].
173 *Quinn Barlo Ltd v European Commission* (C-70/12 P) [2013] 5 C.M.L.R. 18. With thanks to Thomas Jones for his assistance.
174 *Quinn Barlo* [2013] 5 C.M.L.R. 18 at [16]–[17].
175 *Quinn Barlo* [2013] 5 C.M.L.R. 18 at [44].
176 *Quinn Barlo* [2013] 5 C.M.L.R. 18 at [52]–[53].
177 *Quinn Barlo* [2013] 5 C.M.L.R. 18 at [55].
178 *Quinn Barlo* [2013] 5 C.M.L.R. 18 at [59].
179 *European Commission v Tomkins Plc* (C-286/11 P) [2013] 4 C.M.L.R. 15. With thanks to Stéphenie Strievi for her assistance.
180 *Tomkins Plc v European Commission* (T-382/06) [2011] E.C.R. II-1157; [2011] 4 C.M.L.R. 31, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 89.

Peglar (i.e. as part of a single economic unit); (2) Peglar's liability had been reduced by the court; and (3) both Tomkins and Peglar had appealed Peglar's participation in the infringement, it should also reduce the liability of Tomkins.[181]

The EC argued that the GC could not do that. The GC, the EC argued, was acting "*ultra petita*", raising a claim of its own initiative, which had not been pleaded, which the GC was not entitled to do. Rather, it was for the EC itself to draw the consequences of the GC's ruling as regards Peglar.[182] Moreover, the EC argued that the cases could not be considered to have the "same object" as the claims were not identical.[183]

The CJEU disagreed. The court agreed with the GC that Tomkins' and Peglar's claims had the same object, so the GC could take account of the Peglar ruling as regards Tomkins, without ruling *ultra petita*. The court also considered that to leave the EC to draw the appropriate conclusions from the *Peglar* ruling was not a sufficient guarantee that the rights of undertakings in EU competition law would be protected.[184]

The EC also argued that it had been denied a right to a fair hearing because it had not been given the opportunity to comment on what the GC proposed to do.[185] However, the CJEU noted that, in fact, the EC had not requested a hearing in the case and, in any event, the GC was entitled to make its legal assessment, without notifying the parties, prior to the delivery of the judgment.[186]

Aalberts In July 2013, the CJEU ruled on an appeal by the EC[187] against the GC's ruling in *Aalberts*.[188] It may be recalled that in that judgment, the GC had overturned the EC's findings that two of Aalberts subsidiaries (Aquatis and Simplex) had participated in the fittings infringement from June 2003 to April 2004.

The GC found that it had not been proved to the requisite legal standard that Simplex had participated in the infringement. In the case of Aquatis, the GC found that it had not been established that Aquatis was aware that it had rejoined the broader cartel in which it had participated before 2001. The fine on Aalberts as parent was also annulled.

Before the CJEU, the EC argued first that the GC should have dealt with the Aalberts group's pleas on the parent-subsidiary relationship between Aalberts and Aquatis and Simplex, before looking at evidence that each of the subsidiaries had rejoined the earlier cartel. The EC's idea was that only focussing on the evidence subsidiary by subsidiary had not given the overall evidentiary picture.

The CJEU agreed that the GC should have considered the plea, which was core to Aalbert's liability and consideration of the three companies as a single economic unit.[189] However, the court did not consider that a ground for overturning the GC's judgment since there was nothing to suggest that, if the GC had done so, it would have found an infringement by one or several of the companies in the single economic unit.[190]

The CJEU also rejected as inadmissible the EC's request, effectively to re-examine the links between all the evidence. Nor had the EC shown that the GC had manifestly exceeded the limits of a reasonable assessment of the evidence, even if the EC had taken a different view of it.[191]

Secondly, the EC argued that the GC should not have annulled the contested decision as regards Aquatis and Aalberts, because the court still had found that Aquatis participated in cartel activities as regards the French market.

The court rejected this, noting that the EC had found that Aquatis participated in a single, complex and continuous infringement ("SCCI") covering the "Pan European" market, whereas the GC had found that Aquatis had only participated in certain French trade association meetings and it had not been established that Aquatis was aware that by doing so, it was rejoining the earlier cartel.[192]

Moreover, the GC could only partially annul the EC's decision if the elements which it sought to annul could be severed from the rest of the decision. That was not possible there, where the EC found Aquatis only to have participated in the SCCI.[193] One may expect the EC to make broader or alternative findings of infringement in SCCI cases in future to cover this point.

Other

In March 2013,[194] the CJEU rejected Viega's appeal against the GC's ruling in this cartel case.[195]

[181] *Tomkins* [2013] 4 C.M.L.R. 15 at [6]–[8].
[182] *Tomkins* [2013] 4 C.M.L.R. 15 at [14]–[18].
[183] *Tomkins* [2013] 4 C.M.L.R. 15 at [60].
[184] *Tomkins* [2013] 4 C.M.L.R. 15 at [49]–[50].
[185] *Tomkins* [2013] 4 C.M.L.R. 15 at [30] and [58].
[186] *Tomkins* [2013] 4 C.M.L.R. 15 at [61].
[187] *European Commission v Aalberts Industries NV* (C-287/11 P) [2013] 5 C.M.L.R. 26.
[188] *Aalberts Industries NV v European Commission* (T-385/06) [2011] E.C.R. II-1223; [2011] 4 C.M.L.R. 33, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 87–88.
[189] *Aalberts* [2013] 5 C.M.L.R. 26 at [27]–[29].
[190] *Aalberts* [2013] 5 C.M.L.R. 26 at [43] and [45].
[191] *Aalberts* [2013] 5 C.M.L.R. 26 at [48]–[52].
[192] *Aalberts* [2013] 5 C.M.L.R. 26 at [61]–[63].
[193] *Aalberts* [2013] 5 C.M.L.R. 26 at [64]–[66].
[194] *Viega GmbH & Co KG v European Commission* (C-276/11 P), judgment of March 14, 2013. With thanks to Philippe Claessens for his assistance.
[195] *Viega GmbH & Co KG v European Commission* (T-375/06), judgment of March 24, 2011.

Lifts and escalators

Schindler In July 2013, the CJEU ruled on Schindler's appeal against the EC's decision imposing a fine on the Schindler group of some €143 million.[196] Schindler's appeal was dismissed. The main interest of the case lies in certain challenges of principle to the EU liability system and statements as to the court's review process.

The main points are as follows:

First, Schindler argued that the case law of the European Courts infringed the principle of personal liability of legal persons insofar as it allowed a parent company to be made jointly and severally liable for the acts of its subsidiaries.[197] The court rejected this, noting that

> "[t]he authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law … and not the concept of a company or firm or of a legal person".[198]

It was through that concept that a parent was liable for the acts of its subsidiaries.[199]

Secondly, the CJEU noted that, in describing its review powers, the GC had referred incorrectly to the idea of the EC having a margin of discretion, subject only to review for manifest error. However, the court noted that in fact, the GC had carried out a full review of the law and facts,[200] consistent with the CJEU's judgment in *Chalkor*.[201]

Thirdly, Schindler argued that the judgment of the European Court of Human Rights ("ECtHR") in *Menarini Diagnostics*[202] holding that the Italian competition system was lawful even though penalties were imposed by an administrative authority, had to be distinguished from the EU system since the EC was not an "independent administrative authority" and the GC did not carry out an unlimited examination of the facts as required to comply with art.6 ECHR.[203]

The CJEU disagreed, considering the review by the European Courts to be effective judicial protection consistent with art.47 of the CFR (and art.6 ECHR, even though the latter did not yet apply, because the European Union has not yet acceded to the ECHR).[204]

Kone In October 2013, the CJEU dismissed the appeal by Kone against the GC's judgment upholding fines on Kone for cartel infringements as regards the supply of lifts and escalators in Germany and the Netherlands.[205] Kone had been granted immunity as regards Belgium, but had been fined €62.37 million as regards Germany and €79.5 million as regards the Netherlands.

The main point of interest in the judgment relates to Kone's claim, similar to that of *Schindler* above, that the GC had deferred too much to the EC in its review, in particular noting that the EC had a margin of discretion with which the GC would only interfere in the event of manifest error. The CJEU noted that this was no longer the correct formulation. Such a discretion could not be a basis for dispensing with the conduct of an in-depth review of the law and of the facts.[206]

However, even if the formulation of the judicial review test was incorrect, the CJEU reviewed what the GC had done in fact and considered that it had carried out a full review.[207]

Box 9

- *Main points on cartel appeals (cont'd)*
  - — Bathroom Fittings
    - * SCI concerning three product groups, six Member States.
    - * Companies involved to varying extents but generally found to have participated in a *single* infringement.
    - * Wabco fine reduced by some €200 million for lack of evidence re Italian ceramics infringement and an error as regards immunity re the Belgian and French market; some other applicants' fines reduced by smaller amounts.
    - * A company which attends a meeting of producers of other products than those which it sells and reveals information on its prices cannot be presumed to have done something anti-competitive. Need to show impact of the statements on that other product market and vice-versa.
    - * A company cannot collude with itself.
    - * A finding of a single infringement covering three product markets does not relieve the EC of its obligation to establish a distortion of competition on each of the markets.
    - * Evidentiary rules applied (esp. *Sanitec*).

Bathroom Fittings

Wabco In September 2013, the GC ruled on the appeal by Wabco and related group companies ("Wabco") against the decision which imposed fines of some €326 million on Wabco.[208]

It may be recalled that the EC, acting on an immunity application by Masco (including Hans Grohe) had found a single and continuous infringement ("SCI") covering three groups of product: taps and fittings; shower

[196] *Schindler Holding Ltd v European Commission* (C-501/11 P) [2013] 5 C.M.L.R. 39; CJEU Press Release No.97/13, July 18, 2013. This was an appeal against the GC's judgment in *Ltd v European Commission* (T-138/07) [2013] 4 C.M.L.R. 39.
[197] *Schindler* [2013] 5 C.M.L.R. 39 at [86].
[198] *Schindler* [2013] 5 C.M.L.R. 39 at [101]–[102].
[199] *Schindler* [2013] 5 C.M.L.R. 39 at [103]–[111].
[200] *Schindler* [2013] 5 C.M.L.R. 39 at [155]–[158].
[201] *Chalkor AE Epexergasias Metallon v European Commission* (C-386/10 P) [2012] 4 C.M.L.R. 9.
[202] *Menarini Diagnostics v Italy*, Case No.43509/08, September 27, 2011.
[203] *Schindler* [2013] 5 C.M.L.R. 39 at [28].
[204] *Schindler* [2013] 5 C.M.L.R. 39 at [30]–[39].
[205] *Kone Oyj Kone GmbH Kone BV v European Commission* (C-510/11 P), judgment of October 24, 2013. CJEU Press Release No.142/13, October 24, 2013. This was an appeal against the GC's judgment in *Kone Oyj v European Commission* (T-151/07) [2011] 5 C.M.L.R. 29.
[206] *Kone*, judgment of October 24, 2013 at [24].
[207] *Kone*, judgment of October 24, 2013 at [44], [54]–[55] and [92]–[93].
[208] *Wabco Europe v Commission* (T-380/10), judgment of September 16, 2013.

enclosures; and accessories and ceramics, in six EU Member States. Wabco was found to have participated in infringements relating to ceramics and taps and fittings in various periods from March 1993 to November 2004 in five of the six Member States.

The main points are as follows:

First, Wabco argued that the EC had not shown that it had participated in an infringement as regards ceramics sold in Italy for the alleged period, 11 years and seven months. Therefore the fine should be reduced by 75 per cent, or €248 million. Interestingly, after a detailed review of the evidence, the GC essentially agreed, finding proof of an infringement only for 11 months.

Secondly, Wabco argued that, although Wabco participated in an infringement covering taps and fittings in Italy, the EC could not reasonably infer that it was involved in a ceramics infringement there on the evidence.[209]

Wabco argued that insofar as the EC's case was based on statements made by Wabco about price increases in ceramics, in a forum dealing with taps and fittings attended by taps and fittings producers (save in a limited number of cases), the meetings concerned were not among competitors. Further, the EC had not shown that price statements as regards ceramics had an impact on taps and fittings and vice-versa. It could not be presumed in such a case that the exchange of commercially sensitive information was anti-competitive.

Thirdly, Wabco argued that it could also not be held to have colluded with itself. If it was the only producer of ceramics at meetings of taps and fittings, it could not be said to be colluding with competitors there as regards ceramics.[210]

Again the GC essentially agreed.[211] The court held that the EC's characterisation of the conduct concerned as a single infringement did not relieve it of the obligation to establish a distortion of competition in relation to *each* of the three product groups.[212]

Fourthly, evidence of possible unlawful discussions, which pre-dated the period concerned by the decision, could also not be used to prove the infringement.[213]

So the EC had not shown that announcements on future price increases for ceramics to companies on the taps and fittings market which were not ceramics competitors of Wabco had the object or effect of distorting competition on the ceramics market.

Fifthly, in doing so, the GC also agreed with Wabco's argument that the EC had not provided sufficient reasons in its SO and decision to show the existence of a ceramics cartel within another Italian trade association's meetings.[214]

Sixthly, nor could the EC remedy this on appeal, by substituting the reasons in its decision with others put forward in its pleadings.[215]

Seventhly, the court therefore held that the EC could only conclude therefore that there was an exchange of commercially sensitive information here in certain trade association meetings, where two competitors were attending.[216] For reasons of equal treatment with the other competitor at those meetings, the GC therefore found that Wabco had participated in the ceramics cartel in Italy for 11 months[217] (rather than 11 years seven months).

Eighthly, Wabco argued that the EC had failed to take into account that Wabco had been granted partial immunity from fines as regards its involvement in infringements in Belgium and France. As a result, the evidence provided should not have been taken into account against the company which provided it.[218]

Again the GC agreed, noting that the EC had taken into account in the calculation of the basic amount of the applicant's fine, amounts related to infringements in France and Belgium.[219]

Ninthly, Wabco argued that the EC should have considered that it was the second undertaking to provide the EC with co-operation of significant added value, not the third. Wabco's point here was that the second undertaking (in the EC's view), Grohe, gave information before Wabco, but the EC had itself suggested that the information was not very useful and only granted Grohe a 30 per cent reduction in fine for that co-operation (the bottom of the 30–50 per cent range). Whereas Wabco might have been the third to provide information, Wabco argued that the information provided by Grohe prior to Wabco did not meet the "significant added value" test. Wabco had received the maximum 30 per cent reduction for being the third to provide such information, but in its appeal effectively sought more, given what it had provided.

The GC disagreed after a thorough review of the EC's assessment, which the court considered it had to do, even if the EC had a margin of discretion when assessing what is significant added value.[220]

209 *Wabco*, judgment of September 16, 2013 at [59].
210 *Wabco*, judgment of September 16, 2013 at [67]–[68].
211 *Wabco*, judgment of September 16, 2013 at [75]–[88] and [102].
212 *Wabco*, judgment of September 16, 2013 at [92].
213 *Wabco*, judgment of September 16, 2013 at [95]–[97].
214 *Wabco*, judgment of September 16, 2013 at [107]–[108].
215 *Wabco*, judgment of September 16, 2013 at [109]–[112].
216 *Wabco*, judgment of September 16, 2013 at [113] and [121], [125].
217 *Wabco*, judgment of September 16, 2013 at [127].
218 2002 Leniency Notice [2002] OJ C45/3–5, point 23(b).
219 *Wabco*, judgment of September 16, 2013 at [137]–[140].
220 *Wabco*, judgment of September 16, 2013 at [153].

The court noted that in assessing this issue, the EC was not obliged to compare the usefulness of information from the Grohe application with that from Wabco. It had to see whether the information submitted by Grohe before that of Wabco represented significant added value by comparison to what it already had in its case file at that date.[221] The GC found that the EC had found correctly that Grohe's information represented significant added value, even if some of it did not meet that standard.[222]

Tenthly, the court then recalculated the fine, "drawing on" the EC's Fining Guidelines.[223] As a result, the fine on Wabco for the Italian ceramics infringement was set at €60.6 million rather than €360 million and the court also excluded the fine on Wabco for ceramics-related infringements in Belgium and France.

The result was a fine of €120.3 million, instead of €326 million, which the Court allocated between the group members.[224]

Sanitec In September 2013, the GC also ruled on the appeals by several companies in the Sanitec Group which had been fined a total of some €57.69 million. On appeal, the GC reduced this to €50.58 million.[225]

Again, the EC's decision was based on the concept that Sanitec had been involved in a single and continuous infringement as regards three groups of products: taps and fittings, shower enclosures and accessories and ceramics. The Sanitec Group companies made the last two categories of products, but not the first. The EC found that Sanitec had been involved in various national practices and that there had been an overall plan, linking the practices in these product groups across six Member States. The EC found that Sanitec had been in a central group which was involved in, or should have been aware of, the full scope of the cartel, both as regards the products and the countries concerned.[226]

The main points of interest are as follows:

First, the GC held that an exchange of or an agreement on *list* prices had an anti-competitive object (even though these might be amended by discounts).[227]

Secondly, the Court found that the EC was entitled to find an overall plan in this case, justifying a finding of single and continuous infringement.[228] The EC found that there were close synergies between the different cartel arrangements, both across the six Member States and the three product groups. The EC also found that the actions of the participants were complementary and contributed through their interaction to bring about the "set of anti-competitive effects". That "set" constituted the overall plan.

Thirdly, and importantly, as in *Wabco* the court found that such a characterisation of the infringement "did not relieve the EC of its obligation to establish a distortion of competition on each of the markets concerned".[229]

The court noted that a finding of a single and continuous infringement may mean that undertakings are liable even though they are not competitors. However, the court held that, if so, the EC still has to show that the undertaking actively contributed to a restriction of competition and the EC may not presume that an undertaking's conduct affected competition.[230] So, if an undertaking attends a meeting with other undertakings, which are exchanging confidential information and it does not make the products concerned, it cannot be *presumed*, based on the finding of that exchange, that the undertaking has participated in something anti-competitive.[231]

Fourthly, the court undertook a detailed review of the evidence of the infringement in relation to the various countries concerned.

As regards France, Sanitec argued that there was no evidence that two of its subsidiaries, Allia and PCT, had co-ordinated minimum prices in a meeting of a French association. The court agreed, noting in particular that one statement which the EC relied on had not been disclosed in the SO and therefore was inadmissible.[232] The court also found that other leniency statements relied on by the EC, but challenged by the defence, had not been corroborated and therefore could not be treated as evidence of the infringement.[233]

As regards Germany, the court noted that attendance at certain meetings by Sanitec could not be used, because it had not been mentioned in the grounds for the EC's decision as having given rise to any anti-competitive conduct.[234] However, otherwise, after a detailed review of the evidence, the GC found that the EC was entitled to find an infringement between 2000 and 2004.

As regards Italy, the court noted that the fact that EC did not take action against two other competitors on the Italian market was irrelevant.[235] Similarly to the *Wabco*

[221] *Wabco*, judgment of September 16, 2013 at [157], [160].
[222] *Wabco*, judgment of September 16, 2013 at [170].
[223] *Wabco*, judgment of September 16, 2013 at [186].
[224] *Wabco*, judgment of September 16, 2013 at [192]–[193]. Order for Rectification of October 16, 2013.
[225] *Keramag Keramische Werke and Sanitec v European Commission* (T-379/10 and T-381/10), judgment of September 16, 2013. With thanks to Philippe Claessens for his assistance.
[226] *Sanitec*, judgment of September 16, 2013 at [15]–[16].
[227] *Sanitec*, judgment of September 16, 2013 at [59] and [67].
[228] *Sanitec*, judgment of September 16, 2013 at [76]–[77] and [81].
[229] *Sanitec*, judgment of September 16, 2013 at [72]–[73].
[230] *Sanitec*, judgment of September 16, 2013 at [91]; and see *AC-Treuhand AG v Commission of the European Communities* (T-99/04) [2008] E.C.R. II-1501; [2008] 5 C.M.L.R. 13.
[231] *Sanitec*, judgment of September 16, 2013 at [92]–[93].
[232] *Sanitec*, judgment of September 16, 2013 at [115].
[233] *Sanitec*, judgment of September 16, 2013 at [115]–[121].
[234] *Sanitec*, judgment of September 16, 2013 at [129].
[235] *Sanitec*, judgment of September 16, 2013 at [209]–[212] and [345]–[347].

case, the court also held that the EC could not presume that two of the meetings where Sanitec (Pozzi Ginori) was the only ceramics producer present had any anti-competitive object.[236] Otherwise, the GC found that there was evidence of the infringement, save for the last few months of 2001.[237]

As regards the Netherlands, the court held that the EC was entitled to find that a subsidiary of Sanitec called Sphinx had participated in the infringement, even though it was unable to fine Sphinx, because the infringement was time-barred.

Fifthly, the GC found that the EC was entitled to fine Sanitec directly, where it formed a single economic unit with the subsidiaries involved in the infringement.

Sixthly, Sanitec was also liable for the subsidiaries in the group although it only owned 92 to 95 per cent of the subsidiaries because the EC had additional evidence of its control of those companies.

The EC then redid the fines, "drawing on" the EC's Fining Guidelines.[238]

Finally, it may be noted that the review of evidence in this case is particularly systematic, considering direct evidence first, then fragmentary evidence going to the overall consideration of the evidence as a whole.

Villeroy & Boch In September 2013 the GC also ruled on four appeals by companies in the Villeroy & Boch group ("V&B").[239] These appeals related to the EC's findings that V&B had participated in the single and continuous infringement in relation to bathroom fittings in six different Member States for varying periods. The V&B group had been fined overall €71.5 million. The court rejected V&B's appeals. The main points of interest are some points as regards evidence:

First, V&B argued that if there was only one piece of evidence for something that was not enough. Evidence had to be corroborated. This the court rejected, noting that the principle applicable was the free appraisal of evidence.[240] In general, the court looked at the *direct* documentary evidence and then, in the usual way, looked at leniency statements and other indications adding to an overall appraisal of the evidence.

Secondly, in that context, the court rejected the argument that documents that were given to the EC with a leniency statement had to be corroborated. The court noted that such documents were still direct evidence and therefore the rule as regards the statements themselves did not apply (e.g. a contemporaneous note supplied with such a statement did not have to be corroborated).[241]

Thirdly, the court held that two leniency statements can corroborate each other.[242]

Fourthly, V&B challenged the idea that it was participating in a single infringement, covering all three of the product groups concerned, when it only made shower enclosures and ceramics. Again, the court stated that the notion of single infringement relates to the interaction of conduct which is complementary and addressing a single objective. If V&B was aware, or should reasonably have been aware of other related conduct, then it could be liable even if it was not selling on the other market concerned (here, taps and fittings).

The core point here was that the suppliers were found to be dealing with many wholesalers, raising prices in a concerted way.[243] V&B was found to have contributed to the realisation of a single infringement covering the three product groups[244] and therefore did not have to be present on all these markets.[245]

Fifthly, the court then worked through the different markets, dealing with V&B's claims that the EC had not proved the infringement for the relevant period. A point of interest is that, in one case, a subsidiary was held responsible even though it was no longer selling in the market concerned because its employee was, in fact, still attending the relevant meetings.[246]

Sixthly, V&B argued that a parent's responsibility in a case like this should be assessed separately from the responsibility of its subsidiaries, in particular, that the gravity and culpability of its role should be assessed in that way.[247] This the court rejected, emphasising that the fine in question was applied to *a single economic unit* of the parent with the subsidiaries. The fines were also set jointly and severally in order to ensure payment.[248] The court then noted that the responsibilities of companies in an undertaking may not be identical, but they can still be made jointly and severally liable if the parent is in a single economic unit with a subsidiary.[249]

[236] *Sanitec*, judgment of September 16, 2013 at [220]–[223].
[237] *Sanitec*, judgment of September 16, 2013 at [244]–[245].
[238] *Sanitec*, judgment of September 16, 2013 at [326].
[239] *Villeroy & Boch Austria v Commission* (T-373/10, T-374/10, T-382/10 and T-402/10) judgment of September 16, 2013. With thanks to Philippe Claessens for his assistance.
[240] *Villeroy & Boch*, judgment of September 16, 2013 at [257].
[241] *Villeroy & Boch*, judgment of September 16, 2013 at [207].
[242] *Villeroy & Boch*, judgment of September 16, 2013 at [289].
[243] *Villeroy & Boch*, judgment of September 16, 2013 at [66]–[68].
[244] *Villeroy & Boch*, judgment of September 16, 2013 at [49], [86] and [168].
[245] *Villeroy & Boch*, judgment of September 16, 2013 at [54].
[246] *Villeroy & Boch*, judgment of September 16, 2013 at [242]–[245].
[247] *Villeroy & Boch*, judgment of September 16, 2013 at [322].
[248] *Villeroy & Boch*, judgment of September 16, 2013 at [325].
[249] *Villeroy & Boch*, judgment of September 16, 2013 at [326]–[329].

Finally, the court accepted that the EC had incorrectly found that V&B had participated in an infringement in Belgium before October 1994.[250] However, this had no consequence on the fine because the EC had only fined from October 1994.[251]

Duravit As regards appeals by the Duravit Group,[252] the court held that the EC had been wrong to find that those companies had participated in an infringement in Austria, Italy and the Netherlands.[253]

However, interestingly, the court still decided to keep Duravit's fine at the same level, namely €29.27 million, since the court considered that, in view of the duration and gravity of the infringement in which those companies took part, that was still an appropriate and dissuasive penalty for their conduct. Gravity had been set previously at 15 per cent for six Member States, but there were still three concerned and 15 per cent was the bottom end of the scale for value of sales for this type of infringement.[254]

Roca As regards the Roca Group,[255] the GC annulled the EC's decision in relation to Roca France, insofar as the amount of fine had not taken into account Roca France's co-operation with the EC during the administrative proceedings.

The main points are as follows:

First, Roca France argued that it had provided evidence of significant added value to the EC's case, insofar as it allowed the EC to prove the infringement as regards ceramics in France in 2004. The court agreed.

The court also disagreed with the EC's position that in challenging other evidence provided by Ideal Standard, Roca had diminished the value of its contribution to the EC's case. The court noted that Roca appeared to be questioning the latter, merely to strengthen its own claim to have added significant added value.[256]

The GC then decided to award Roca France a reduction of 6 per cent for this co-operation, so its fine was reduced from €6.7 million to €6.298 million.[257]

Secondly, similarly to the *Duravit* case, the court also rejected Roca's claim that the percentage of sales taken into account for gravity and the additional amount for its limited infringement should have been less than 15 per cent, if others had that same percentage, but had been involved in a much broader infringement in terms of products and geography. The court agreed that the others should have had a higher percentage, but in its unlimited jurisdiction did not think it appropriate to reduce Roca's percentage below 15 per cent.[258]

Thirdly, Roca France had been held jointly and severally liable with its parent Roca Sanitario for the fine imposed. The GC also held, in the parallel case brought by Roca Sanitario, that since that company had been held jointly and severally liable with Roca France as its parent and its liability was purely derivative, secondary and dependent on the liability of its subsidiary and could not therefore exceed it, that its fine should also be reduced to €6.298 million[259]—in other words, applying the *Tomkins* judgment noted above.

Other

The other appeals were rejected.[260]

In Part 2, to be published in the next issue, John Ratliff will outline other European Court rulings:

- on cartel appeals, including *Bananas*, *International Removals* and *Spanish Bitumen*;
- on EC powers during inspections (*Nexans*, *Deutsche Bahn*);
- on access to file (*Donau Chemie* and *Dutch Bitumen*); and
- on other horizontal agreements, such as the *CISAC/Collecting Societies* cases.

The author also summarises EC decisions and settlements, notably the *Telefonica/Portuguese Telecom* and *E.books* cases and the €861 million fine on *Microsoft* for breach of its browser commitments.

250 *Villeroy & Boch*, judgment of September 16, 2013 at [311]–[313].
251 *Villeroy & Boch*, judgment of September 16, 2013 at [395].
252 *Duravit v Commission* (T-364/10), judgment of September 16, 2013.
253 *Duravit*, judgment of September 16, 2013 at [326]–[339].
254 *Duravit*, judgment of September 16, 2013 at [370]–[376] and [386].
255 *Roca Sanitario v Commission* (T-408/10) and *Roca France v Commission* (T-412/10), judgments of September 16, 2013.
256 *Roca France*, judgment of September 16, 2013 at [171]–[215].
257 *Roca France*, judgment of September 16, 2013 at [231]–[240].
258 *Roca France*, judgment of September 16, 2013 at [247]–[249].
259 *Roca Sanitario*, judgment of September 16, 2013 at [199]–[203] and [213].
260 *Zucchetti Rubinetteria v Commission* (T-396/10); (*Masco v Commission* T-378/10); *Laufen Austria* (T-411/10); *Rubinetteria Cisal v Commission* (T-368/10); *Hansa Metallwerke v Commission* (T-373/10); *Mamoli Rubinetteria v Commission* (T-376/10); *Aloys Dornbracht v Commission* (T-386/10), all judgments of September 16, 2013.

Major Events and Policy Issues in EU Competition Law, 2012–2013 (Part 2)

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Abuse of dominant position; Anti-competitive practices; Cartels; Confidential information; Disclosure; EU law; European Commission; Investigations; Private enforcement

This is the second and final part of the overview of "Major Events and Policy issues in EU Competition Law, 2012–2013", following on from Part 1 published in last month's journal.[1]

It may be recalled that the reference period is from November 2012 until the end of October 2013.

The first part of the article summarises the remaining European Courts' rulings on: (1) cartel appeals, including the *International Removals* and *Spanish Bitumen* cases; (2) EC inspections, including the *Nexans* and *Deutsche Bahn* cases; (3) access to file issues, such as the *Donau Chemie* and *Dutch Bitumen* cases; (4) other horizontal issues, such as the French *Groupement de Cartes Bancaires* case and the *Collecting societies/CISAC* cases; (5) the *AstraZeneca* ruling of the CJEU[2]; and (6) various EC complaint rejection appeal cases.

The second part is devoted to the EC's recent decisions and settlements. First, those on cartels, such as *Cathode Ray Tubes*. However, in the reference period, there were not many cartel decisions published (new or old). Then we summarise the EC's other art.101 TFEU decisions and settlements, notably as regards *Telefonica/Portuguese Telecom* and *E-Books*. We also outline recent developments in art.102 TFEU cases, such as the €561 million fine on *Microsoft* for breach of its Browser Choice commitments, developments in the *Google* and *Samsung/Motorola* cases and the new *Deutsche Bahn* traction case.

Finally, we note ECN work, with its Revised Model Leniency Programme and two reports on NCAs' investigative powers and decision-making powers and comment briefly on other current policy issues than the Proposed Damages Directive, described in Part 1 in last month's journal.

European Court judgments (cont'd)

Cartel appeals (cont'd)

Bananas

In March 2013 the GC issued two judgments on appeals against an EC decision in 2008 imposing fines on two banana importers, *Dole* and *Del Monte/Weichert*, for their participation in a cartel with Chiquita.[3]

It may be recalled that the EC found that the cartel concerned co-ordination of the quotation prices for bananas in eight (Northern) EU Member States by means of pre-pricing bilateral information exchanges, i.e. discussions on price-setting factors and price trends (between Dole and Chiquita and between Dole and Del Monte), between January 2000 and December 2002. Dole was fined €45.6 million and Del Monte/Weichert €14.7 million.[4]

The GC upheld the EC decision as regards Dole. Del Monte/Weichert's fine was reduced by €5.88 million to €8.82 million on account of Weichert's limited participation, which was treated as a mitigating circumstance and on account of its co-operation.

The main issues are as follows:

First, Del Monte, which owned 80 per cent of Weichert between 1993 and 2003, contested its liability for Weichert's involvement in the cartel. It claimed that Weichert was a limited partnership and that under its partnership agreement, as a limited partner, Del Monte could not influence the management or the day-to-day activities of Weichert, which were entrusted to the general partner, a person with personal and unlimited liability.

The court rejected this argument, essentially because a range of important acts with impact on Weichert's management could not be taken without the limited partner's consent.[5] Further, Weichert supplied exclusively Del Monte products under an exclusive distribution agreement with Del Monte since 1971.[6] The weekly reports sent by Weichert to Del Monte, concerning prices

* With many thanks to Sinéad Mooney, Katrien Vanspringel and Katrin Guéna for their general help in the production of this article; and to my Brussels colleagues for their assistance, which is indicated with the appropriate section.

[1] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page: *http://ec.europa.eu/competition/index_en.html* [Accessed January 28, 2014]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in [formerly EC] EU Competition Law", published in the *International Company and Commercial Law Review*.

[2] "TFEU" is the abbreviation for "Treaty on the Functioning of the European Union"; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court and "CJEU" for the Court of Justice of the European Union. "SO" is the abbreviation for "Statement of Objections"; "Article 27(4) Notice" refers to the EC's Communications under that article of Regulation 1/2003 [2013] OJ EU L1/1. References to the "ECHR" are to the European Convention of Human Rights and references to the "CFR" are to the EU Charter of Fundamental Rights.

[3] *Fresh Del Monte Produce Inc v European Commission* (T-587/08) [2013] 4 C.M.L.R. 30; and *Dole Food Co Inc v European Commission* (T-588/08) [2013] 4 C.M.L.R. 31, judgments of March 14, 2013. With thanks to Svetlana Chobanova and Youenn Beaudouin for their assistance.

[4] Summarised in John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2007–2008: Part 2" [2009] I.C.C.L.R. 113, 117.

[5] *Del Monte* [2013] 4 C.M.L.R. 30 at [94]–[97] and [101].

[6] *Del Monte* [2013] 4 C.M.L.R. 30 at [132]–[135].

and volumes on the market, not required by their contractual relations, were further evidence of the exercise of Del Monte's decisive influence over Weichert.[7]

Secondly, the applicants argued that the EC did not sufficiently consider the legal and economic context of the conduct, notably the fact that the banana market was highly transparent (all producers and customers had weekly access to arrival volumes) and heavily regulated (quotas restricting output and high prices).

However, the GC found that the EC had taken into account the regulation of the sale of the product when taking its decision and, since imports were decided in weekly cycles, it was right to find that there was some latitude by importers as regards the volume available on the market. The increased transparency on the market made it all the more important to protect the remaining uncertainty as to competitors' future pricing decisions.[8]

Thirdly, the applicants challenged the EC finding that bilateral agreements between Dole and Chiquita and between Dole and Weichert constituted a single and continuous infringement, since the EC had admitted that Weichert had no knowledge of the exchanges between Dole and Chiquita.

The GC confirmed, however, that the practices were "linked and complementary", since there was the same pattern for all bilateral pre-pricing communications in terms of timing and means (pre-pricing information exchange on Wednesdays; information on quotation prices on Thursday mornings). Moreover, such a finding would be incompatible with the fact that the same operator (Dole) was involved in both systems. Another important factor was that the three companies were among the main banana suppliers in Northern Europe and there was an identity of purpose between the two sets of bilateral communications.[9]

Fourthly, the GC rejected the contention that the exchange of information ("pre-pricing communications") and quotation prices for bananas were not relevant for the setting of actual prices, given that these were not a final price and there were strong negotiations afterwards.

The court found that such prices were actually a basis for the weekly negotiations of the final prices and, since customers expected that higher quotation prices would result in higher transaction prices, had an impact on definitive prices. The importance paid by the companies to the process of setting the quotation prices also confirmed that they were regarded as a commercial instrument leveraging pricing positions. Finally, in certain transactions, the two sets of prices were directly linked through pre-established pricing formulae.[10] Thus, the combination of pre-pricing communications and quotation prices created a climate of mutual certainty as to the companies' future pricing policies.[11]

Fifthly, the GC, in its unlimited jurisdiction, increased the reduction of Del Monte/Weichert's fine by 10 per cent to 20 per cent to reflect the relative gravity of its participation and on the basis that its bilateral communications with Dole were less harmful to competition than those between Dole and Chiquita, given Chiquita's economic strength.[12]

Sixthly, the GC decided that Del Monte/Weichert had given information of "significant added value" (contrary to the EC's position) when it informed the EC of discussions with Dole about the possible evolution of official prices prior to their disclosure. Consequently, the court reduced the fine by a further 10 per cent for that co-operation, which it found had enabled the EC to establish the infringement more easily.[13]

Aluminium Fluoride

In June 2013, the GC rejected two appeals against the EC's decision concerning the Aluminium Fluoride cartel. The first case concerned *Fluorsid* and *Minmet*,[14] the second, *Industries Chimiques du Fluor* ("ICF").[15]

Both cases involved procedural issues. Minmet's application was received late and out of time as regards its own liability, but was accepted insofar as it concerned its subsidiary Fluorsid. ICF's original application was only signed on a covering letter, rather than on the application itself, but this the court considered fully acceptable. On the substance both cases were dismissed.

International Removals

Box 1

- *Main points on cartel appeals (cont'd)*
- *International Removals*
  - —*Coppens*
    - * GC should have only annulled *part* of EC decision where SCI not shown, but a self-standing infringement still found,
      - which could be severed from the rest, without affecting the substance of the decision, and
      - clear in proceedings and decision, so defence rights respected.
      - Contrast *Aalberts*
  - —*Portielje*
    - * CJEU reversed GC's ruling that Stichting Portielje was not liable for the activities of Gosselin.
    - * Fact that Portielje a foundation irrelevant, if part of the infringing "undertaking".

[7] *Del Monte* [2013] 4 C.M.L.R. 30 at [153-[158].
[8] *Del Monte* [2013] 4 C.M.L.R. 30 at [377]–[378], [386], [389].
[9] *Del Monte* [2013] 4 C.M.L.R. 30 at [593]–[599].
[10] *Dole* [2013] 4 C.M.L.R. 31 at [402] and [431]–[585] ; and *Del Monte* [2013] 4 C.M.L.R. 30 at [448]–[562].
[11] *Dole* [2013] 4 C.M.L.R. 31 at [402]–[405].
[12] *Del Monte* [2013] 4 C.M.L.R. 30 at [814]–[817].
[13] *Del Monte* [2013] 4 C.M.L.R. 30 at [849]–[856].
[14] *Fluorsid SpA v European Commission* (T-404/08) [2013] 5 C.M.L.R. 27, judgment of June 18, 2013.
[15] *ICF v Commission* (T-406/08), judgment of June 18, 2013.

* Decisive influence a question of economic reality, not company law.

—*Gosselin*

* Submission of cover quotes and payment of commissions a restriction by object.
* GC correct to find that if there is a break in an infringement, but it is then restarted and repeated, prescription ran from the end of the repeated conduct.

—*Ziegler*

* GC correct to find that EC has to define market if relevant (e.g. here to determine if effect on trade threshold met) and to rule that EC *had* done enough to do so here.

Coppens In December 2012, the CJEU ruled on an appeal by the EC against the GC's judgment in the *Verhuizingen Coppens* case[16] ("*Coppens*"). The GC had annulled the fine imposed on Coppens *in its entirety*, despite finding that it had participated in anti-competitive practices involving the issue of "cover quotes". The EC argued that it should only have annulled the decision in part.[17]

The GC had found that Coppens could not be found to have been aware of other practices, such as invoicing competitors for not competing, which costs were passed on to customers and therefore had not participated in the single and continuous infringement here.

The EC argued Coppens could be liable still because Coppens had *not* denied that it was aware of the agreement on commissions found by the GC, but had not offered other specific evidence on the point.[18] The GC had not accepted that, noting that the burden of proof was on the EC.

The CJEU agreed with the EC. The court recalled that annulment of the entire decision was only appropriate if partial annulment should have altered its substance.[19] However, that was not the case here because the EC had regarded Coppens as participating in the single and continuous infringement ("SCI"), but also said that the agreement on quotes could amount to an infringement in itself.[20]

The court then reviewed the law on SCIs[21] and noted that even if an undertaking could not be held to have participated in such a SCI, that could not relieve it of liability for conduct in which it has undeniably taken part.[22]

However, a SCI could be divided in that way only if: (1) the conduct upheld could be severed from the remaining conduct, without changing the substance of the EC's decision; (2) the defence had been made aware during the administrative procedure that such a separate allegation had been made, so the defence had had the opportunity to defend itself; and (3) the EC decision was sufficiently clear on the point.[23]

These conditions were met and partial annulment would not alter the substance of the EC's decision here.[24]

The CJEU then gave final judgment in the case. The court found that Coppens could be found to have participated in the cover quote practice for 10 years and nine months, despite two years where the EC had no evidence of active participation, since it had not publicly distanced itself from the anti-competitive practices and there was clear evidence of its participation *after* that period.[25]

The CJEU then set the fine on Coppens in its unlimited jurisdiction, having regard to the EC's Fining Guidelines, so there was no discrimination against others which had been fined by reference to those Guidelines. The CJEU set the fine at €35,000,[26] listing its reasons, including that the agreement on cover quotes was a serious restriction of competition and that there were 67 documented cases of Coppens' participation in such practices established by the EC and unchallenged.

Portielje In July 2013, the CJEU set aside the GC's ruling[27] in this case,[28] acting on an appeal by the EC.

It may be recalled that the GC had found that Stichting Administratiekantoor Portielje, a Dutch foundation which held directly or indirectly almost all the shares in Gosselin, a Belgian removal company, was not an "undertaking" insofar as it did not engage in any commercial activity and therefore could not be fined jointly and severally with Gosselin.

The GC also found that the EC had not shown that Portielje was liable, as shareholder of Gosselin, insofar as it had not shown that Portielje was involved in the economic activity of the management of Gosselin and such involvement could not just be assumed.[29]

The GC also found that Portielje had rebutted the presumption of parent-subsidiary control, based on its shareholding, mainly because: (1) there had been no board or shareholders' meetings in the relevant period of the

[16] *European Commission v Verhuizingen Coppens NV* (C-441/11 P) [2013] 4 C.M.L.R. 8, December 6, 2012. CJEU Press Release 159/12.
[17] *Verhuizingen Coppens v Commission* (T-210/08) [2011] 5 C.M.L.R. 11, judgment of June 16, 2011, summarised in John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 97.
[18] *Coppens* [2013] 4 C.M.L.R. 8 at [66]–[67].
[19] *Coppens* [2013] 4 C.M.L.R. 8 at [39].
[20] *Coppens* [2013] 4 C.M.L.R. 8 at [40].
[21] *Coppens* [2013] 4 C.M.L.R. 8 at [41]–[44].
[22] *Coppens* [2013] 4 C.M.L.R. 8 at [45].
[23] *Coppens* [2013] 4 C.M.L.R. 8 at [38-[39] and [46].
[24] *Coppens* [2013] 4 C.M.L.R. 8 at [51].
[25] *Coppens* [2013] 4 C.M.L.R. 8 at [75].
[26] *Coppens* [2013] 4 C.M.L.R. 8 at [80]–[82].
[27] *European Commission v Stichting Administratiekantoor Portielje* (C-440/11 P) [2013] 5 C.M.L.R. 37, judgment of July 11, 2013.
[28] *Gosselin and Portielje v European Commission* (T-208/08 and T-209/08) [2011] E.C.R. II-3639; [2013] 4 C.M.L.R. 21, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 95–97.
[29] *Portielje* [2013] 5 C.M.L.R. 37 at [20]–[22].

infringement since Portielje was established, when Portielje could have exercised control of Gosselin; and (2) the GC considered that the fact that the three members of the board of Gosselin, were also on the board of Portielje was not enough to show that the latter controlled the former.[30]

The CJEU disagreed. First, the court considered that the fact that a parent company is a foundation, rather than an undertaking, was irrelevant. It was also not necessary that each entity in an undertaking be economically active and individually an undertaking. For the court, the only decisive factor is that all the legal entities which are jointly and severally liable for a fine constitute a single "undertaking".[31]

Secondly, the CJEU found that the GC had been wrong not to apply the usual parent-subsidiary presumption of decisive influence, based on Portielje's shareholding. The court emphasised that such an assessment was not just a question of formal management decisions in company law terms. Rather, it involved looking at all relevant factors relating to the economic, organisational and legal links between the entities concerned and therefore "the economic reality".[32]

The court also appears to have been influenced by the fact that the three persons who held the majority of the voting rights in Portielje's board, where decisions were taken by simple majority, comprised the entire board of directors of Gosselin.[33] In other words, the court found that the two entities were managed by the same persons.

As a result, the court restored the fine on Portielje.

Gosselin In July 2013, the CJEU also ruled on Gosselin's appeal against the GC's judgment in its case.[34] The court dismissed the appeal. The main points of interest are as follows:

First, the court found that the GC had been correct to qualify the practices in which Gosselin was involved, the submission of cover notes and payment of commissions, as a "restriction by object", given the GC's findings that such practices would lead to higher prices.[35]

Secondly, Gosselin also argued that, having found that Gosselin could not be held responsible for the infringement for some three years (October 1993 to November 1996), it should have applied prescription to the earlier period of infringement, whereas the GC had noted that Gosselin had restarted and repeated its earlier conduct and therefore not done so.

The CJEU agreed with the GC, noting that Gosselin did not deny having gone on with the same conduct and that it was correct that in such a case prescription did not run until the end of the repeated conduct.[36]

Otherwise there were similar points to those noted in the *Zeigler* case below, on the GC's findings on whether the EC had to define the relevant market and whether or not it had done so sufficiently here.

Ziegler In July 2013, the CJEU ruled on the appeal by Ziegler SA ("Ziegler") against the GC's judgment in its case.[37] The court rejected Ziegler's appeal, and the EC's application to substitute new grounds of reasoning.

The main points of interest are as follows:

First, the court agreed with the GC's finding that the EC was required under the *Effect on Trade Notice*[38] to define the relevant market here. The CJEU stated that, even though in certain circumstances it is unnecessary to define the relevant market in order to establish whether there is an appreciable effect on trade between Member States,

> "it is not possible, by definition, to verify whether a market share threshold has been exceeded in the absence of any definition whatsoever of that market".[39]

Since a market share threshold was in issue here, definition of the market was required. The CJEU therefore rejected the EC's related request to substitute new reasons in the GC's judgment.

Secondly, the court rejected Ziegler's argument that the GC had wrongly exempted the EC from defining the relevant market "exceptionally". The CJEU found that the EC in fact had correctly identified the services concerned insofar as it "provided a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope".[40] Such a description enabled the courts to verify the EC's basic assertions, including that the combined market share far exceeded the 5 per cent threshold required by the *Effect on Trade Notice*. That was enough.

30 *Portielje* [2013] 5 C.M.L.R. 37 at [23]–[25].
31 *Portielje* [2013] 5 C.M.L.R. 37 at [42]–[44].
32 *Portielje* [2013] 5 C.M.L.R. 37 at [65]–[67.
33 *Portielje* [2013] 5 C.M.L.R. 37 at [85].
34 *Gosselin Group NV v European Commission, Stichting Administratiekantoor Portielje* (C-429/11 P), judgment of July 11, 2013.
35 *Gosselin*, July 11, 2013 at [45]–[50].
36 *Gosselin*, July 11, 2013 at [142]–[145]. See art.25(2) of Regulation 1/2003.
37 *Ziegler SA v European Commission* (C-439/11 P) [2013] 5 C.M.L.R. 36, judgment of July 11, 2013. The GC's judgment was *Ziegler SA v European Commission* (T-199/08) [2011] E.C.R. II-3507; [2011] 5 C.M.L.R. 9, judgment of June 16, 2011, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 94–95. With thanks to Roberto Grasso for his assistance.
38 [2004] OJ C101/81.
39 *Ziegler* [2013] 5 C.M.L.R. 36 at [63]–[64].
40 *Ziegler* [2013] 5 C.M.L.R. 36 at [67] and [69].

Thirdly, the CJEU rejected Ziegler's argument that it should have been given special treatment under para.37 of the *2006 EC Fining Guidelines*.[41] The CJEU held that unlike para.35[42] of the *EC Fining Guidelines*, para.37[43] may be applied independently of the ability of the undertaking concerned to pay the fine.[44] An undertaking's inability to pay may be relevant under para.37. However, the conditions for the application of paras 35 and 37 are different, and an inability or reduced ability to pay under para.35 is not sufficient to state a claim under para.37.[45]

Fourthly, the court rejected Ziegler's claim that the EC was not impartial because the EC considered itself to be a victim of the restrictive practice in question.[46] That mere possibility would deprive the EC, or any other EU institution which might be a victim of anti-competitive conduct, of its competence to investigate such conduct, a view which could not be accepted.[47] Otherwise, the court referred to its reasoning in *Otis and Others*, summarised in Part 1.

Other The court also dismissed an appeal by *Team Relocations*.[48]

Italian Raw Tobacco

Mindo In April 2013 the CJEU upheld an appeal by Mindo against the GC's judgment, confirming the EC decision in 2005 in which the EC found an Italian cartel on the raw tobacco market between 1995 and 2002.[49]

It may be recalled that when Mindo appealed, the GC rejected its application on the grounds that it had not demonstrated its vested and present interest in pursuing the proceedings.[50]

Mindo, formerly Dimon Italia, was sold in 2004 and ultimately merged with Standard Commercial Corp, forming Alliance One International ("AOI"). Both AOI and Mindo were addressees of the EC's decision as legal successors of, respectively, the group to which Mindo belonged and Dimon Italia. The EC imposed a €10 million fine on the two companies, Mindo being jointly and severally liable for €3.99 million. In 2006 AOI paid the fine in full. The same year Mindo went into liquidation.

On further appeal to the CJEU, the court disagreed and set aside the GC's judgment and remitted it to the GC again.

The main points are as follows:

First, the GC had stated that the annulment of the EC's decision would not procure any advantage for Mindo, since the fine had been paid already in full by AOI and no contribution from Mindo had been claimed after more than five years. Also Mindo had failed to establish that AOI had a claim against it.

The CJEU disagreed and found that Mindo had in fact demonstrated that AOI's payment gave rise to a claim against it as a jointly and severally liable co-debtor, which was moreover not time-barred under Italian law.[51] The GC had also failed to explain why AOI's payment did not suffice to give rise to a claim on the part of AOI.

Secondly, while the GC had considered that Mindo had not established that AOI was "still capable" of recovering its claim, it had not taken into account Mindo's arguments that, even after the arrangement with creditors in the insolvency proceedings, Mindo would still be liable for paying or have an interest to settle its debts.[52]

Thirdly, by requiring Mindo to demonstrate that AOI "had the intention" of recovering its claim and not examining AOI's statement that it intended to bring an action depending on the outcome of the proceedings, the GC had placed an impossible burden of proof on Mindo and made its interest in bringing proceedings subject to proving a third party's intention.[53]

The CJEU therefore concluded that the finding of a lack of interest in bringing proceedings on the part of the addressee of an EC's decision could not be based on "mere assumptions" and did not take sufficient account of arguments "intended to cast a different light on the facts of the case".[54]

Spanish Raw Tobacco

Alliance One In September 2013, the CJEU upheld[55] the GC's judgments in the *Spanish Raw Tobacco* case.[56] The GC had reduced the fine imposed on Agroexpansión,

[41] *Ziegler* [2013] 5 C.M.L.R. 36 at [174]; [2006] OJ C210/2.
[42] Paragraph 35 of the *EC Fining Guidelines* states that "[i]n exceptional cases, the EC may, upon request, take account of the undertaking's inability to pay in a specific social and economic context".
[43] Paragraph 37 of the *EC Fining Guidelines* provides that "[a]lthough these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21".
[44] *Ziegler* [2013] 5 C.M.L.R. 36 at [171].
[45] *Ziegler* [2013] 5 C.M.L.R. 36 at [173].
[46] *Ziegler* [2013] 5 C.M.L.R. 36 at [156].
[47] *Ziegler* [2013] 5 C.M.L.R. 36 at [157]–[160].
[48] *Team Relocations NV v European Commission* (C-444/11 P) [2013] 5 C.M.L.R. 38, judgment of July 11, 2013.
[49] *Mindo Srl v European Commission* (C-652/11 P) [2013] 4 C.M.L.R. 33, judgment of April 11, 2013. With thanks to Moritz Jakobs and Svetlana Chobanova for their assistance.
[50] *Mindo Srl v European Commission* (T-19/06) [2011] 5 C.M.L.R. 34, judgment of October 5, 2013, summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 104.
[51] *Mindo* [2013] 4 C.M.L.R. 33 at [34]–[39].
[52] *Mindo* [2013] 4 C.M.L.R. 33 at [42]–[46].
[53] *Mindo* [2013] 4 C.M.L.R. 33 at [47]–[50].
[54] *Mindo* [2013] 4 C.M.L.R. 33 at [53].
[55] *Alliance One International, Inc v European Commission* (C-668/11 P and C-679/11 P), judgments of September 26, 2013; see also CJEU Press Release 118/13, September 26 2013. With thanks to Thomas Jones for his assistance.
[56] *Agroexpansion v Commission* (T-38/05) [2011] E.C.R. II-7005; and *Alliance One International v European Commission* (T-41/05) [2011] E.C.R. II-7101; [2011] 5 C.M.L.R. 35.

a subsidiary of Alliance One International, to €2.43 million and also reduced the fine which Alliance One International was liable to pay to €2.19 million.

The CJEU dismissed a cross-appeal brought by the EC arguing an infringement of the principle of "*ne ultra petita*" (i.e. that a court may not decide more than it has been asked to). The fact that Alliance One International had not requested a reduction in fine did not prevent the CJEU from deciding to grant one, owing to its unlimited jurisdiction to substitute its own appraisal of fines for that of the EC.[57]

Spanish Bitumen

Box 2

- *Main points on cartel appeals (cont'd)*
  - *Spanish Bitumen*
    - New evidence in pleadings could not be relied on in the GC's review of the legality of an EC decision.
    - But it could be taken into account by the court in its unlimited jurisdiction (*Galp*).
  - *Paraffin wax/Slack wax*
    - Rounding up for duration could lead to a lack of proportionality and unequal treatment (*Total France*)

Galp and Others In September 2013, the GC ruled on an appeal by the Galp Energia Group ("Galp"[58]) against the EC's decision in 2007, in which the EC fined Galp for its involvement in the Spanish bitumen cartel.[59] The court rejected most of the arguments put forward by Galp and reduced the fine by 4 per cent.[60]

The main points are as follows:

First, the GC held that the EC failed to establish both the applicants' participation in the monitoring system and in the compensation mechanism relating to the market-sharing and customer-allocation arrangements in the cartel and to adduce sufficient evidence to hold them liable in respect of those aspects of the infringement.

As regards the monitoring system, the court considered that the contemporaneous documents, by which the EC linked the applicants with the monitoring system, did not constitute indicia of their participation in that system.[61] As regards the compensation mechanism, the court considered it apparent from the EC's statements in the contested decision that the applicants did not participate directly in the compensation mechanism.[62]

Secondly, the court stated that the evidence relied upon in the pleadings, adduced by the applicants with their application, showed that the applicants were aware of the participation of the other members of the cartel in the compensation mechanism and could have reasonably foreseen the existence of the monitoring system (because the compensation mechanism could not have existed without a monitoring system[63]).

However, the GC concluded that it was not for the court when reviewing legality to substitute an entirely new statement of reasons for the erroneous statement by the EC.[64] The EC also could not produce new inculpatory evidence not contained in the contested decision to support its legality, nor could the court rely on such evidence.[65]

Thirdly, the court then noted that when a single and continuous infringement consists of several forms of anti-competitive conduct, the finding that an undertaking participated in one of those forms of conduct is severable from the rest of the decision to the extent that the other forms of conduct found in the decision constitute in themselves an infringement of art.101.[66]

Referring to *Coppens*, noted above, the court held that the various aspects of the single and continuous infringement, in particular those in respect of which the liability of the undertaking has not been established, must also be identified sufficiently clearly in the contested decision in order to permit the division of that decision.[67]

The court concluded that in this case the monitoring system and the compensation mechanism were severable from the other forms of unlawful conduct, and could be the subject of an autonomous finding by the EC.[68]

Fourthly, Galp argued that the amount of the fine should reflect the fact that they did not participate in the monitoring system and the compensation mechanism.[69] However, the court referred to the evidence submitted a posteriori, showing that Galp was aware of the compensation mechanism and could have reasonably foreseen the existence of the monitoring system.

Importantly, the court then stated that the impossibility of taking into account such evidence in the context of the review of *legality* does not apply in the context of the exercise of *unlimited jurisdiction*.[70] Thus, despite not

[57] *Alliance One*, September 26, 2013 at [103]–[104].
[58] The appeal was filed by Galp Energía España, Petróleos de Portugal (Petrogal) and Galp Energia. Between 1990 and 2003, Petróleos de Portugal held 89.29% shares in Galp Energía España. Tagus, RE, an insurance company which was itself controlled as to 98% by Petróleos de Portugal, owned the remaining 10.71%. Since 2003, Galp Energía España was a wholly owned subsidiary of Petróleos de Portugal, which has been a wholly owned subsidiary of Galp Energia, since April 22, 1999. With thanks to Roberto Grasso and Thomas Jones for their assistance.
[59] *Galp Energía España and Others v Commission* (T-462/07), judgment of September 16, 2013.
[60] *Galp*, judgment of September 16, 2013 at [637].
[61] *Galp*, judgment of September 16, 2013 at [250]–[265].
[62] *Galp*, judgment of September 16, 2013 at [267]–[272].
[63] *Galp*, judgment of September 16, 2013 at [293]–[294].
[64] *Galp*, judgment of September 16, 2013 at [295].
[65] *Galp*, judgment of September 16, 2013 at [300]–[301].
[66] *Galp*, judgment of September 16, 2013 at [524].
[67] *Galp*, judgment of September 16, 2013 at [526]–[527].
[68] *Galp*, judgment of September 16, 2013 at [533].
[69] *Galp*, judgment of September 16, 2013 at [605].
[70] *Galp*, judgment of September 16, 2013 at [615]–[624].

being directly involved, the court found Galp liable in respect of these two aspects of the infringement insofar as it was aware of them and confirmed that the starting amount of the fine applied by the EC was appropriate.[71]

The court concluded, however, that Galp should benefit from a further 4 per cent reduction in its fine, in addition to the 10 per cent reduction already granted by the EC in respect of attenuating circumstances, given that Galp did not participate in the monitoring system and the compensation mechanism.[72]

Accordingly, the amount of the fine imposed on Galp Energía España and Petróleos de Portugal was set at €8.27 million, while the amount of the fine imposed on Galp Energia, SGPS was set at €6.14 million.

Nynäs In September 2013, the GC also ruled on Nynäs' appeal in relation to this case.[73] It may be recalled that Nynäs is one of the smaller producers of bitumen in Spain, which was found to have participated in the cartel, but given a 10 per cent reduction in its fine for its limited involvement in the infringement.[74] Nynäs Petroleo was therefore fined €10.642 million and its parent Nynäs Petroleum €10.395 million.

The GC rejected almost all of Nynäs' arguments on appeal, including a complaint by Nynäs that the EC had failed to transcribe all of an oral recording of a witness. For the latter, the court notes that Nynäs had been given access to the oral recording and had not pleaded how this omission affected its claims before the court.[75]

However, the GC agreed with Nynäs' point that the EC had not shown that Nynäs participated in the monitoring system of the cartel.[76] The GC therefore decided to adjust the EC's decision in its unlimited jurisdiction and increase the fine reduction for limited involvement to 12 per cent. As a result, the fines were reduced to €10.406 million for Nynäs Petroleo and €10.164 million for Nynäs Petroleum.[77]

Other The other appeals in the *Spanish Bitumen* case were rejected by the court.[78]

Paraffin waxes/Slack wax

Total France and Total SA In September 2013, the GC ruled on appeals by Total Raffinage Marketing (formerly Total France) and its parent company, Total SA, which had been held to have participated in the paraffin waxes and slack wax cartel.[79] The GC reduced the fine imposed on Total France from €128 million to €125 million on the basis that, in its decision, the EC had breached the principles of proportionality and equal treatment in relation to the method used to calculate the duration of Total France's participation in the cartel. The GC rejected the appeal by Total SA in its entirety.

Concerning the appeal brought by Total France, the main points were as follows:

First, the GC found that Total France's participation in the paraffin waxes and slack wax parts of the cartel formed part of the same single, complex, and continuous infringement.[80]

The GC held that it made no difference to the finding of a single, complex and continuous infringement that: (1) paraffin waxes and slack wax were part of different product markets[81]; (2) paraffin waxes and slack wax were part of different geographic markets[82]; (3) the various components of this infringement were of different durations[83]; or (4) certain technical meetings for slack wax were not attended by employees from Total France, but from Total Deutschland.[84] The GC held that the EC had adduced sufficient evidence to establish that Total France had participated in anti-competitive practices in relation to the sale of slack wax to final consumers in Germany[85] and that these practices, taken together, consisted of a continuous infringement.[86]

Secondly, the GC held that the EC was not obliged to use Total France's value of sales for the final year of the cartel infringement to determine the starting amount of the fine, despite "normally" doing so pursuant to the *2006 EC Fining Guidelines*.[87] The EC was entitled, to use an average of the sales from the last three financial years of the participants in the cartels at the end to determine the starting amount of its fine.[88] It appears that the EC did so because it considered 2004 an exceptional year because of EU enlargement bringing in 10 more countries.

71 *Galp*, judgment of September 16, 2013 at [625]–[626].
72 *Galp*, judgment of September 16, 2013 at [635]–[636].
73 *Nynäs Petroleum and Nynas Petróleo v Commission* (T-482/07), judgment of September 16, 2013.
74 *Nynäs*, judgment of September 16, 2013 at [83].
75 *Nynäs*, judgment of September 16, 2013 at [92]–[117].
76 *Nynäs*, judgment of September 16, 2013 at [420]–[431].
77 *Nynäs*, judgment of September 16, 2013 at [434]–[447].
78 *Repsol Lubricantes y Especialidades v Commission* (T-496/07); *CEPSA v Commission* (T-497/07); *PROAS v European Commission* (T-495/07), all judgments of September 16, 2013.
79 *Total Raffinage Marketing v Commission* (T-566/08) and *Total v Commission* (T-548/08), judgments of September 13, 2013. With thanks to Thomas Jones for his assistance.
80 *Total*, September 13, 2013 at [314].
81 *Total*, September 13, 2013 at [271].
82 *Total*, September 13, 2013 at [286].
83 *Total*, September 13, 2013 at [309].
84 *Total*, September 13, 2013 at [312]–[313].
85 *Total*, September 13, 2013 at [354].
86 *Total*, September 13, 2013 at [359].
87 *Total*, September 13, 2013 at [412]–[413].
88 *Total*, September 13, 2013 at [410]–[416].

Thirdly, according to the EC's decision, Total France participated in the paraffin waxes part of the cartel for 12 years, 7 months and 28 days and in the slack wax part for 6 years, 6 months and 12 days. Pursuant to para.24 of the *2006 EC Fining Guidelines*, the EC rounded these figures up to 13 and 7 years, respectively.[89]

The court noted that in relation to the paraffin waxes part, Total France's participation had been rounded up by an additional 4 months and 3 days, whereas ExxonMobil and Sasol's participation had been rounded up by just 10 and 3 days, respectively.[90]

In relation to the slack wax part, Total France's participation had been rounded up by an additional 5 months and 18 days, whereas Esso's participation had been rounded up by just 2 months and 21 days.[91]

Interestingly the GC held that the EC had therefore breached the principles of proportionality and equal treatment in relation to the calculation of the duration of Total's participation in the cartel and, having previously declared that the multiplication coefficient applied to fines should better reflect the actual duration of the participation of the company, the fine was reduced accordingly.[92]

Inspections

Box 3

- *Inspections*
  - — *Nexans*
    - * "X" products, including, among others "a" and "b", not an overly broad and vague scope of decision. (It meant X.)
    - * EC has to have reasonable grounds to justify an inspection. Here EC only had that for "a" and "b".
  - — *Deutsche Bahn*
    - * EC not prevented from opening an inspection procedure to check the exactitude or completeness of information which it learned incidentally in a previous inspection, if that information indicates an infringement.

Nexans

In November 2012, the GC ruled on an application by Nexans, challenging the legality of various aspects of the EC's inspection of Nexans France.[93]

The EC arrived with an inspection decision, which stated that the EC investigation related to the supply of

> "*electronic cables* and material associated with such supply, *including, amongst others*, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables". (Emphasis added)

At the end of the inspection, the EC took copy-images of the hard drive of an employee, sealed them and took them back to Brussels, where they were later reviewed in the presence of Nexans' lawyers.

The main points on appeal to the GC were as follows:

First, Nexans argued that the decision concerned was not precise enough for it to be able to exercise its defence rights, or to see what documents were within the scope of the investigation or not. Nexans stated that the inspection decision appeared as a licence for the EC to conduct a "fishing expedition" into Nexans' activities. In short, the scope of the investigation was "overly broad and vague".[94]

The GC rejected this claim. The court considered that the EC had met its obligation to define the subject-matter of the investigation under art.20(4) of Regulation 1/2003. It may be that the EC had done so broadly, since it applied to "all electric cables", but it had done so in a way which allowed Nexans to assess its obligations.[95] Further, the EC is not required to delimit precisely the market covered by its investigation in an inspection decision.[96] As for the "fishing expedition" issue, that was a different question, whether the inspection was justified in its scope.

Secondly, Nexans argued that the breadth of the EC decision was not justified. Nexans argued that the EC only had information justifying an investigation for the underwater cable sector, based on the EC's Press Release and the questions which were asked by the EC during the investigation.[97]

Here the GC noted that the EC's right to investigate implied a power to search and a right to examine business records, even if it does not know whether they relate to its investigation, in order to see if that is the case. However, the EC was required to restrict such searches to the activities of the undertaking relating to the inspection decision.[98] If not restricted in that way, the EC inspection powers would be

> "incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society".[99]

[89] *Total*, September 13, 2013 at [541].
[90] *Total*, September 13, 2013 at [551].
[91] *Total*, September 13, 2013 at [560].
[92] *Total*, September 13, 2013 at [566]–[567].
[93] *Nexans France SAS v European Commission* (T-135/09) [2013] 4 C.M.L.R. 6, judgment of November 14, 2012. See also *Prysmian and Prysmian Cavi e Sistemi Energia v Commission* (T-140/09), judgment of November 14, 2012, which is similar. With thanks to Roberto Grasso for his assistance.
[94] *Nexans* [2013] 4 C.M.L.R. 6 at [33] and [35].
[95] *Nexans* [2013] 4 C.M.L.R. 6 at [50], [53] and [54].
[96] *Nexans* [2013] 4 C.M.L.R. 6 at [44] and [56].
[97] *Nexans* [2013] 4 C.M.L.R. 6 at [60] and [68].
[98] *Nexans* [2013] 4 C.M.L.R. 6 at [62]–[64].
[99] *Nexans* [2013] 4 C.M.L.R. 6 at [65].

The court noted therefore that the EC had to have reasonable grounds to justify an investigation into all electric cables and associated materials.[100]

The court also noted that, since the EC could not be required to communicate the evidence for its inspection decision at the moment of the inspection, Nexans could not be required to provide evidence that the EC only had information as regards the high voltage underwater cable sector in its application to the court.[101] However, if an applicant could offer "some evidence casting doubt on whether the EC had reasonable grounds for adopting such a decision", the court had to review the issue.[102]

Interestingly, the court then reviewed the evidence available to the EC and concluded that the EC did *not* have enough to justify the wider scope of its investigation.[103] The court found that the EC only had reasons for ordering an inspection of HV underwater und underground electric cables and the material associated with that supply. The court therefore annulled the EC decision, insofar as it concerned other electric cables and related material.[104]

Thirdly, Nexans argued that the EC was not entitled to copy data and take it to Brussels for review. Here, the GC held that such an act was not an independent, actionable measure, the legality of which could be challenged at this stage in the proceedings. The EC's decision could only be challenged if the EC decided to impose a penalty for non-compliance; or through a challenge to the EC's final decision.[105]

This is an interesting case because it is not often that companies choose to bring such procedural actions, fearing that they may antagonise the EC's case-team dealing with their case, although some argue that the earlier the issue is raised the better.

While the matter was before the court, the case before the EC proceeded to SO, which meant that the EC had then to disclose the evidence on which it was relying for the inspection, so the court and Nexans could then see more precisely what the EC had before it took the inspection decision.

Deutsche Bahn

This case involved challenges to the legality of EC inspections in the context of investigations into whether Deutsche Bahn ("DB") had infringed art.102 TFEU.[106] The GC rejected the challenges.

There were three inspections, with related EC decisions:

First, an inspection between March 29 and 31, 2011. This was to investigate potentially unjustified preferential treatment granted by DB Energie to other subsidiaries of DB, notably in the form of a rebate as regards electric energy for traction ("EET").[107] However, before the inspection, the EC had also had a complaint regarding access to rail terminals.

Between March 29 and 31, 2011, the EC found, copied and kept to one side[108] documents indicating other possible anti-competitive conduct, i.e. discrimination as regards access to rail infrastructure by another DB subsidiary, DUSS.[109]

Secondly, an inspection between March 31 and April 1, 2011. This one started during the first inspection. The EC decision referred to DB and several different subsidiaries, including DUSS. The focus was on potentially unjustified discrimination by DUSS (e.g. inappropriate access to a terminal, less efficient services or refusal of access to a terminal).[110] The decision stated that it was based on information which the EC had already, but referred to fact that the EC had learned on March 29, 2011, during the first inspection, of proof on this issue.[111]

Thirdly, an inspection between July 26 and 29, 2011. The focus was on infrastructure access to terminals and prices for terminals and related services.[112] The decision was said to be based on information which the EC possessed already, including from previous inspections (but not just that).[113]

No objections to the procedures during the inspections were recorded. This was commented on by the GC, suggesting that DB's lack of formal evidence of its objections made more difficult the court's task of checking whether the inspection was for unlawful purposes.[114] The clear message is that if the defence has objections during an inspection, it should ask that they be noted formally.

[100] *Nexans* [2013] 4 C.M.L.R. 6 at [67].
[101] *Nexans* [2013] 4 C.M.L.R. 6 at [69]–[71].
[102] *Nexans* [2013] 4 C.M.L.R. 6 at [72].
[103] *Nexans* [2013] 4 C.M.L.R. 6 at [81]–[91].
[104] *Nexans* [2013] 4 C.M.L.R. 6 at [93], [101], [137].
[105] *Nexans* [2013] 4 C.M.L.R. 6 at [130]–[133].
[106] *Deutsche Bahn v Commission* (T-289/11, T-290/11 and T-521/11), judgment of September 6, 2013.
[107] *Deutsche Bahn*, September 6, 2013 at [3]. (See now EC Press Release IP/13/780, August 15, 2013, noted below.)
[108] It appears held in a sealed office; see *Deutsche Bahn*, September 6, 2013 at [189].
[109] *Deutsche Bahn*, September 6, 2013 at [9]–[10] and [149].
[110] *Deutsche Bahn*, September 6, 2013 at [13].
[111] *Deutsche Bahn*, September 6, 2013 at [15].
[112] *Deutsche Bahn*, September 6, 2013 at [20] and [22].
[113] *Deutsche Bahn*, September 6, 2013 at [22].
[114] *Deutsche Bahn*, September 6, 2013 at [88] and [136].

DB had three main appeal arguments.[115] First, DB argued that there was a violation of the fundamental right to inviolability of domicile, because there had been no prior judicial authorisation for the inspection. DB also argued that arts 20(4)–(8) Regulation 1/2003 were illegal insofar as they did not provide for that prior judicial authorisation.

The GC rejected these claims. The court held that, on the ECHR case law (e.g. *Harju v Finland*[116]), it is enough if there is a full legal control *afterwards*. The GC then reviewed if there was adequate judicial control of the EC's powers and held that there was.[117]

In the process, it may be noted that the court stated that the defence was entitled to a reasonable, if brief period to examine the EC inspection decision with its lawyers; and a brief period to consult its lawyers before the EC took copies, applied seals or asked for oral explanations.[118]

Secondly, DB argued that the fundamental right to effective judicial review requires that a national judge control the necessity and proportionality of the inspection decision in fact and law before the inspection (and also that there should be full judicial review afterwards). Again the GC rejected these claims. For the court the key point was the intensity of the control, not when it is done. The control could be after the inspection and the court noted that there was an appeal right to the GC here, so it considered that the defence rights were adequately protected.[119]

Thirdly, DB argued that the EC had violated DB's defence rights with a detailed review of documents outside the scope of the EET issue and with search terms focused on DUSS.

This the GC also rejected. The court found that the EC was entitled to carry out a detailed review. The EC was also not prevented from opening a procedure to check the exactitude or completeness of information which it learned incidentally in a previous inspection, if that information indicates an infringement,[120] applying *Dow Benelux*.[121]

The court held that the EC is allowed to do a detailed search of offices or files, if there are indications that information on the subject of the inspection could be there.[122] The GC also found that there were reasons for the detailed search here.[123] The use of the search terms in question was justified and there was no evidence of a "targeted illegal search" outside the scope of the inspection mandate.[124]

This remains controversial, because in practice the EC is using documents found outside its initial inspection mandate for other proceedings. In sum, the court appears to be saying:

- Prior judicial review is not required for dawn raids on office premises.
- If the EC comes to a company, ostensibly looking for information about one possible infringement, but in fact looking for information about another, that may be unlawful.
- However, if the EC comes to investigate one possible infringement and *incidentally* finds evidence of another, it can take measures to preserve the evidence, take a new inspection decision covering the second possible infringement and then proceed.

E.ON

In November 2012, the CJEU ruled on the further appeal by E.ON against the GC's ruling[125] that the EC had lawfully imposed a fine of €38 million on E.ON Energie for breach of a seal during an EC inspection.[126]

The CJEU found that the GC had not reversed burden of proof. E.ON had to do more than show that the seal concerned *might* have been defective,[127] given that the EC had offered evidence of a breach of seal. Moreover it was for the GC to evaluate the evidence produced.

The CJEU also found that E.ON had not shown that the fine was excessive to the point of being disproportionate (which was required if the court was to intervene). In particular, the court held that given that a fine for an anti-competitive infringement, could be 10 per cent of turnover, a fine for breach of seal representing 0.14 per cent of turnover was not excessive in light of the need to ensure deterrence.[128]

Confidentiality/Access to file issues

Box 4

- *Confidentiality/Access to file issues*
  - *— Donau Chemie*

[115] *Deutsche Bahn*, September 6, 2013 at [35]–[41].
[116] See *Deutsche Bahn*, September 6, 2013 at [65]–[100]; *Harju v Finland* (56716/09), judgment of February 15, 2011 ECtHR.
[117] *Deutsche Bahn*, September 6, 2013 at [66]–[67], [95]–[97] and [112].
[118] *Deutsche Bahn*, September 6, 2013 at [89].
[119] *Deutsche Bahn*, September 6, 2013 at [105] and [110]–[113].
[120] *Deutsche Bahn*, September 6, 2013 at [124]–[128].
[121] *Dow Benelux NV v Commission of the European Communities* (85/87) [1989] E.C.R. 3137 at [19].
[122] *Deutsche Bahn*, September 6, 2013 at [139]–[142].
[123] *Deutsche Bahn*, September 6, 2013 at [141].
[124] *Deutsche Bahn*, September 6, 2013 at [138]–[165].
[125] *E.ON Energie AG v European Commission* (T-141/08) [2010] E.C.R. II-5761. Summarised in Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 78.
[126] *E.ON Energie AG v European Commission* (C-89/11 P) [2013] 4 C.M.L.R. 3, judgment of November 22, 2012.
[127] *E.ON Energie* [2013] 4 C.M.L.R. 3 at [76]–[78].
[128] *E.ON Energie* [2013] 4 C.M.L.R. 3 at [125]–[134].

- * Any absolute rule for non-disclosure or generalised access is too rigid (so national law setting very high standard for disclosure unlawful, as making plaintiff's claim excessively difficult).

— *Dutch Bitumen*

- * EU Transparency Regulation.
- * Dutch Government application denied.
- * Reliance on *Odile Jacobs* by analogy.

Interim applications re disclosure

It may be interesting to note that we are now seeing applications to the General Court as regards the disclosure of confidential information by the EC. For example, in December 2012, in *Alstom*,[129] the President of the GC ruled on an application to prevent the EC transmitting to the English High Court the confidential reply of Alstom to the EC's SO in the Gas Insulated Switchgear cartel case.

He granted the order on an interim basis, noting that the case raised novel issues. In particular, it appears that the High Court envisaged disclosure to a confidentiality ring, which solution the President questioned insofar as it was a large group of some 92 people, including not just external counsel, but also in-house counsel, a secretary and IT support.[130] An interesting point, since this sort of issue is also raised by the Proposed Damages Directive.

Similarly, we have seen four interim rulings this year as to whether the EC could publish a more detailed version of a cartel decision on the EC website, in all cases ruling "no" in the interim context.

Two rulings concerned the Hydrogen Peroxide cartel case, with orders against further disclosure by *Evonik Degussa* and *Akzo Nobel* in November 2012.[131] The other order concerned the Car Glass cartel case with a ruling by the President of the GC on an application by *Pilkington* in March 2013.[132] This was recently confirmed on appeal by the Vice-President of the CJEU.[133]

Interestingly in the Hydrogen Peroxide cases, it appears the applicants are arguing that the EC was planning to include confidential information from their leniency applications (albeit without the sources of such information). They say that is contrary to para.32 of the *EC Leniency Notice* and a violation of their legitimate expectations.[134]

Schenker (EFTA)

In December 2012, the EFTA Court also annulled an EFTA Surveillance Authority ("ESA") decision, by which the ESA rejected Schenker's application for documents in ESA's file, since it was preparing a follow-on damages case against Norway Post.[135]

The case turns on the EEA rules equivalent to the EU Transparency Regulation. ESA argued generally, among other things, that disclosure would infringe protections of privacy and personal integrity, Norway Post's commercial interests and that providing partial access would be unduly burdensome.

The court disagreed on all counts and annulled ESA's decision, noting that there were only 352 documents, amounting to some 2,800 pages and that the private enforcement of competition law may constitute an overriding public interest justifying disclosure.[136]

Donau Chemie

This important case was a reference from the *Oberlandesgericht* ("OLG") Vienna.[137] An association of printing undertakings sought access to file as regards judicial proceedings brought by the Austrian Competition Authority ("ACA") against various undertakings involved in the wholesale distribution of printing chemicals. The OLG Vienna had imposed fines amounting to €1.5 million on them.

The OLG Vienna found itself unable to give such access and unable to carry out the "weighing-up of interests" assessment set out in *Pfleiderer*,[138] because Austrian competition law provided that access to file could not be granted without the consent of *all* the parties so if even one objected that was enough, access could not be granted.[139] That law also did not allow for differentiation as regards documents or other circumstances.

The OLG Vienna therefore asked the CJEU if that situation was unlawful in the circumstances. The CJEU said "yes".[140] The Austrian national rule, allowing for systematic refusal of access, made it excessively difficult for a claimant for damages to exercise its rights conferred by EU law, i.e. it was contrary to the "principle of effectiveness".[141]

The court also made a number of general statements amplifying *Pfleiderer*. The court stated that:

[129] Order in *Alstom v European Commission* (T-164/12 R) [2013] 4 C.M.L.R. 13, November 29, 2012, available on the court's website.
[130] *Alstom* (T-164/12 R) [2013] 4 C.M.L.R. 13 at [57].
[131] Orders in *Evonik Degussa v Commission* (T-341/12 R) and *Akzo Nobel v Commission* (T-345/12 R), both of November 16, 2012 and available on the court's website. With thanks to Tomasz Koziel for his assistance.
[132] Order in *Pilkington Group v Commission* (T-462/12 R), March 11, 2013. With thanks to Cormac O'Daly for his assistance.
[133] *European Commission v Pilkington* (C-278/13 P(R)), order of September 10, 2013.
[134] *Akzo Nobel*, November 16, 2012 at [5] and [54]–[55].
[135] *Schenker v EFTA* (E-14/11), judgment of December 21, 2012, Surveillance Authority, available on the EFTA Court's website.
[136] *Schenker*, December 21, 2012 at [241].
[137] *Bundeswettbewerbsbehörde v Donau Chemie* (C-536/11) [2013] 5 C.M.L.R. 19, judgment of June 6, 2013.
[138] *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011] E.C.R. I-5161; [2011] 5 C.M.L.R. 7.
[139] *Donau Chemie* [2013] 5 C.M.L.R. 19 at [8] and [11].
[140] *Donau Chemie* [2013] 5 C.M.L.R. 19 at [39], [43] and [49].
[141] *Donau Chemie* [2013] 5 C.M.L.R. 19 at [34]–[39].

- The case-by-case "weighing-up of interests" provided for in *Pfleiderer* is necessary, because any absolute rule for non-disclosure or generalised access is too rigid.[142]
- A refusal to give access to file had to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused.[143]
- The mere risk that disclosure of a document would undermine the effectiveness of a national leniency programme is liable to justify the non-disclosure of the document.[144]

This raises interesting points as to how the proposed art.6 of the Proposed Damages Directive sits with this ruling.

Dutch Bitumen

In September 2006, the EC adopted its decision in the *Dutch Bitumen* case, imposing a total fine of €267 million for a cartel involving suppliers and purchasers of bitumen in the Netherlands.[145]

In 2008, the Dutch Government requested access to the confidential version of the EC's decision based on the EU Transparency Regulation. The non-confidential version of the decision restricted access to information regarding the scope of the distortion of competition, the exact functioning of the cartel, the price agreements, the names of the individuals participating in the cartel, the cartel members' market shares, etc.

The EC rejected the Dutch Government's request based on arts 4(1) and (2) of Regulation 1049/2001. In particular, the protection of the commercial interests of the companies involved; the protection of the purpose of inspections and investigations; the lack of overriding public interest in disclosure; and the protection of the privacy of the individuals involved.

In September 2013,[146] the GC ruled on the Dutch Government's appeal against the EC's rejection of its request. Referring to established case law by analogy,[147] the GC indicated that Regulations 1/2003 and 1049/2001 pursue different objectives and that both Regulations need to be applied in a way that is compatible with the other and which enables a coherent application of both Regulations.[148]

The GC also confirmed the existence of a general presumption that disclosure of documents exchanged between the EC and undertakings during art.101 proceedings undermines both the protection of the objectives of investigation activities and of the commercial interests of the undertakings involved in such a procedure.[149]

As regards the Dutch Government's claim that the protection of commercial interests only covers interests that are legitimate and therefore does not cover the interests of cartel members and the protection against damages claims, the GC indicated that neither Regulation 1049/2001 nor Regulation 1/2003 provides that when an undertaking participates in a cartel, the EC would not be able to invoke the commercial interests of that undertaking in order to refuse access to information or documents.[150]

The Dutch Government also argued that, in line with the *Pergan Hilfstoffe*[151] judgment, a cartel member's interest in the non-disclosure of details of the infringement does not merit protection because of the interest of the public in knowing those details and because of the fined undertaking's ability to seek judicial review.[152]

The GC noted that the *Pergan Hilfstoffe* judgment also referred to the need to respect the reputation and dignity of the person concerned when that person has not been finally found guilty of an infringement and that, at the time of the Dutch Government's request, several appeals against the GC's rejection were still pending before the GC. The GC also indicated that the relevant statement in the *Pergan Hilfstoffe* judgment did not relate to all details of the infringement and suggested that whether certain details merit protection depends, among other things, on the interests of the public in knowing those details.

Moreover, the GC noted that the Dutch Government did not argue that the non-confidential version of the EC's decision did not allow economic operators to understand the type of behaviour that was found to be punishable in the decision. As regards the interests of the victims, the GC ruled that the decision's non-confidential version sufficed, because it allows the victims to identify the liable undertakings, the nature and duration of the infringement and the essence of the cartel's functioning.[153]

As regards the Dutch Government's claim that there was an overriding public interest in disclosure since the Dutch Government is not a private party, but a Member State defending the interest of its treasury, the GC noted

[142] *Donau Chemie* [2013] 5 C.M.L.R. 19 at [31]–[33].
[143] *Donau Chemie* [2013] 5 C.M.L.R. 19 at [47].
[144] *Donau Chemie* [2013] 5 C.M.L.R. 19 at [48].
[145] With thanks to Philippe Claessens for his assistance.
[146] *Netherlands v European Commission* (T-380/08), judgment of September 13, 2013.
[147] *European Commission v Editions Odile Jacob* (C-404/10 P) [2012] 5 C.M.L.R. 8, judgment of June 28, 2012.
[148] *Netherlands* (T-380/08), September 13, 2013 at [30]–[31].
[149] *Netherlands* (T-380/08), September 13, 2013 at [42].
[150] *Netherlands* (T-380/08), September 13, 2013 at [47]–[48].
[151] *Pergan Hilfsstoffe für Industrielle Prozesse v Commission of the European Communities* (T-474/04) [2007] E.C.R. II-4225; [2008] 4 C.M.L.R. 4 at [72].
[152] *Netherlands* (T-380/08), September 13, 2013 at [51].
[153] *Netherlands* (T-380/08), September 13, 2013 at [52]–[55].

that the national judge ruling on a possible damages claim may request the EC's co-operation and that damages claims always represent a *private* interest.

The GC ruled that the *public* interest, consisting of the application of EU competition law to the bitumen cartel on the Dutch market, had already been pursued by the EC's decision and that the fact that the party seeking access is a Member State is irrelevant since the EU Transparency Regulation does not differentiate between different types of parties seeking access.[154]

Finally, the Dutch Government argued that the principle of sincere co-operation as laid down in art.4(3) TEU required the EC to disclose the confidential version of its decision.[155] The GC did not take this ground of appeal into account since the Dutch Government's request was only based on the EU Transparency Regulation and did not refer to art.4(3) TEU.[156] Interestingly, however, the EC argued that, in any event, even if the aim of the Dutch Government's request was considered to be a contribution to the enforcement of arts 101 and 102 TFEU, "the confidentiality of the information cannot be guaranteed and therefore the possibility exists that such request would not be granted".[157]

Other horizontal agreements

Groupement des Cartes Bancaires

In November 2012, the GC ruled on an appeal by the French bankcard group ("GCB") against the EC's decision in October 2007.[158] In that decision the EC prohibited certain GCB measures, stated by GCB to have the aim of promoting card acquisition activities by members of the system, who were more card issuers and to take financial account of the efforts of GCB's members, whose card acquisition activity was significant in comparison to their card issuing.[159]

The EC found, however, that the object of the tariff was to limit the activities of new market entrants in card issuing, notably banks of large retail chains and internet banks.[160] The EC found that anti-competitive object from the nature of the tariff itself, notably that it would result either in a surcharge on banks which issued a lot of cards, or it would discourage them from issuing cards.[161]

In its appeal, GCB contested the EC's finding of "restriction by object", arguing that its actions were designed to stop the market entrants free-riding on the investments and activities of those banks which had set up the system and therefore did more card acquisition. GCB argued that the EC should have taken that into account in its consideration as to whether (what was then) art.81(1) of the EC Treaty applied in the first place.

The GC disagreed, noting that, even if the tariff had a pro-competitive object, that did not prevent the EC finding that other aspects made it "restrictive by object". In such a case, any pro-competitive aspects fell to be considered under art.81(3) of the EC Treaty. The court recognised that the case law included rulings that art.81(1) of the EC Treaty had to be applied "flexibly", taking into account the legal and economic circumstances. However, the court also repeated the position in the case law that any balancing of positive and negative aspects of an activity fell to be assessed under art.81(3) of the EC Treaty.[162]

The GC also upheld the EC's finding that the tariff in question was "restrictive by object" based on its terms.[163]

Collecting Societies/CISAC

In April 2013, the GC issued some 22 similar judgments,[164] ruling on appeals by collecting societies ("CSs") and the Confederation of CSs ("CISAC"), against the EC's decision concerning the CSs' co-operation among themselves.

It may be recalled that these cases concern complex EC proceedings relating to agreements for royalty collection for satellite cable and internet broadcasting of copyright works.

The EC proceedings were prompted by complaints by RTL and Music Choice, which emphasised that monitoring is possible at a distance for the exploitation of rights on the internet and in satellite broadcasting. It was argued therefore that it should be possible to obtain licences to exploit rights for several countries from one CS, instead of having to obtain a licence by country and that this should lead to efficiencies and competition on management costs.

The EC took a decision in 2008[165] finding that a membership clause in the CISAC non-binding model contract was unlawful. This provided (at least until June 2004) that CSs as a rule could not accept as a member an author affiliated to another CS, or having the nationality of another country in which another CS was active.

The EC also found that an exclusivity clause in the CISAC model contract was unlawful (to the extent that it was continued after 1996). This clause provided that a CS would grant another CS, on a reciprocal basis, exclusive rights to monitor and collect royalties in the territory on which the second CS was active.

[154] *Netherlands* (T-380/08), September 13, 2013 at [77]–[86].
[155] *Netherlands* (T-380/08), September 13, 2013 at [102].
[156] *Netherlands* (T-380/08), September 13, 2013 at [107].
[157] *Netherlands* (T-380/08), September 13, 2013 at [104].
[158] *Groupement des Cartes Bancaires v Commission* (T-491/07), judgment of November 29, 2012. With thanks to Stéphanie Strievi for her assistance.
[159] Summarised in John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007: Part 2" [2008] I.C.C.L.R. 79, 87–88.
[160] *GCB*, November 29, 2012 at [32].
[161] *GCB*, November 29, 2012 at [35].
[162] *GCB*, November 29, 2012 at [73]–[77] and [85]–[88].
[163] See *GCB*, November 29, 2012 at [124]–[137] and [268]–[271].
[164] *AEPI and Others v Commission* (T-392/08), judgments of April 12, 2013; GC Press Release No.43/13, April 12, 2013. With thanks to Youenn Beaudouin for his assistance.
[165] Case COMP/38698, *CISAC*. See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 2" [2010] I.C.C.L.R. 149, 158–159.

The EC found a concerted practice ("CP") among the CSs as regards national territorial limitations, which could not be explained by autonomous conduct.

Most of the appeals focused on the finding of a CP and sought partial annulment of the EC's decision. These were successful. Some appeals sought full annulment.

The core argument on appeal was that the CP had not been proved, because the CSs' parallel conduct could be explained by reasons other than concertation.

The EC's position, relying on *PVC II*,[166] was that it did not have to show that there was no alternative explanation for the conduct, because various factors comparable to "documents" in the sense of that case law proved the CP.[167] Such "documents" included:

- Discussions re standardisation of reciprocal representation agreements ("RRAs") in CISAC.
- The way that the CSS reverted to RRAs, including national territorial restrictions, when the EC did not clear the Santiago Agreement allowing for multi-territorial licences.
- That there had been no change in behaviour after the removal of the exclusivity clause in 1996.

However, the GC was critical of the EC's approach, noting that the evidence had not been presented like this in the EC decision.[168]

First, the court looked at the "documents" concerned and found that they did not prove the CP.[169] The GC noted that because all RRAs had territorial provisions, that did not, by itself, mean that there was a concerted practice.

Secondly, the court considered the CSs' point that they needed a local presence for the fight against unauthorised exploitation of rights, so they needed to seek the assistance of the local CS. In other words, there was a plausible explanation for each CS to pursue representation agreements with other CSs. The GC also questioned how CSs *would* compete, given that, as noted, in practice, they might need each other for local enforcement in particular against unauthorised uses of copyright, if the local CS is better placed to carry out that enforcement.[170]

Thirdly, the court considered that the EC's arguments that: (1) technical solutions allowing for remote monitoring of licences; and (2) information on other models, which did not involve territorial limitations, were not enough to make the CSs' arguments implausible.

Finally, the GC rejected:

- The CSs' argument that the membership clause was not a restriction by object.
- The view that the EC decision should be annulled, because it did not indicate when the infringement started.[171]
- The argument by the Swedish CS that the EC decision was flawed, because it failed to take due account of the need for cultural diversity promoted by the RRA system.

Abuse of dominance

AstraZeneca

In December 2012, the CJEU ruled on AstraZeneca's ("AZ's") appeal against the GC's judgment of July 2010, in which the GC mainly rejected AZ's challenge to the EC's decision.[172]

It may be recalled that the EC fined AZ €60 million for two abuses, relating to its production of "Losec", a medicine used in the treatment of gastric ulcers.

The EC found that AZ:

- had made misleading representations to patent offices to extend the duration of patent protection for Losec through supplementary protection certificates ("SPC"); and
- had deregistered its marketing authorisations ("MA") for Losec capsules in Denmark, Sweden and Norway to hinder the marketing of generic medicines based thereon and to hinder parallel imports.

The GC essentially upheld the first abuse, although it found that the abuse started as AZ gave information to the relevant authorities, not when AZ gave instructions to its patent agents (as the EC had found).

As regards the second abuse, the GC upheld the essential reasoning of the EC decision, but annulled the EC's decision insofar as the EC had found that these actions were capable of restricting parallel imports in Denmark and Norway. The court considered that the EC had not shown this. As a result, the fine was reduced to €52.5 million.[173]

On appeal to the CJEU, AZ argued as regards market definition that the GC should have found that the EC erred in not considering the competitive relationship between certain existing products in the market (HZ blockers) as a significant competitive restraint on Losec (a Proton Pump Inhibitor ("PPI")) and, in particular, the gradual evolution of AZ's market share for Losec.

166 *Limburgse Vinyl Maatschappij NV (LVM) v Commission of the European Communities* (T-305/94) and [1999] E.C.R. II-931; [1999] 5 C.M.L.R. 303.
167 *Artisjus Magyar Szerzoi Jogvedo Iroda Egyesulet v European Commission* (T-411/08) [2013] 5 C.M.L.R. 2 at [63]–[65].
168 *AEPI and Others*, April 12, 2013 at [77].
169 *AEPI and Others*, April 12, 2013 at [81]–[108] and [157]–[158].
170 *AEPI and Others*, April 12, 2013 at [116]–[127].
171 *Performing Right Society Ltd v European Commission* (T-421/08) [2013] 5 C.M.L.R. 12 at [192]–[197].
172 *AstraZeneca AB v European Commission* (C-457/10 P) [2013] 4 C.M.L.R. 7, judgment of December 6, 2012. CJEU Press Release No.158/12, December 6, 2012. The GC ruling was *AstraZeneca AB v European Commission* (T-321/05) [2010] E.C.R. II-2805; [2010] 5 C.M.L.R. 28. With thanks to Youenn Beaudouin for his assistance.
173 See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009–2010: Part 1" [2011] I.C.C.L.R. 67, 81–83.

The CJEU rejected this, considering that the GC had fully reviewed the evidence for the relevant time period.[174] The key point was that the GC had upheld the finding of market definition mainly based on therapeutic use, in which HZ blockers were used for less severe conditions and could be distinguished from PPI's used for more severe cases.

As regards the first abuse, the CJEU upheld the GC's findings that AZ's "consistent and linear conduct" of notifying patent offices of "highly misleading representations" and by a "manifest lack of transparency" through which AZ "deliberately" attempted to mislead the patent offices and judicial authorities in order to keep, for as long as possible, its monopoly on the PPI market, fell outside the scope of competition on the merits.[175]

The fact that AZ argued that it should be entitled to apply for SPCs based on a later date than the first MA did not change things. AZ argued that the relevant date was only when the price was set. In particular, the court held that AZ's belief in that interpretation as legally defensible did not entitle AZ to make "highly misleading representations with the aim of leading public authorities into error".[176]

As regards the second abuse, the CJEU also found that the GC had correctly found an abuse. Deregistration, without objective justification, after the expiry of the exclusive right to market Losec capsules and in order to hinder the introduction of generic products and parallel imports, was not competition on the merits.[177]

That view was also not affected by the fact that AZ had the right under other rules than competition law to request the withdrawal of the MAs for Losec capsules. The court noted that the illegality of abusive conduct is unrelated to its compliance or non-compliance with other legal rules.[178] Nor was a denial of the right to deregister a MA tantamount to compulsory licensing, or denial of a property right. It was a "straightforward restriction of the options available under European Union Law" and not an exceptional case.[179]

AZ also argued that the fines were excessive, because the abuses here were novel. The CJEU disagreed. Even though the EC and the EU courts had not ruled before specifically on conduct such as that in issue here, the court considered that AZ had been aware of the highly anti-competitive nature of its conduct and should have expected it to be illegal.

The CJEU considered that the GC could find the conduct "manifestly contrary to competition on the merits".[180] The GC was also entitled to find that factors relating to the *object* of a course of conduct may be more significant for the setting of fines than those related to *effects*.[181]

The EC cross-appealed as regards the GC's findings that it had not shown that deregistering the MAs for Losec capsules was capable of restricting parallel imports in Denmark and Norway. The CJEU disagreed. The EC had to show that the authorities there were liable to withdraw or did usually withdraw parallel import licences following deregistration, so, for example, the fact that AZ had expected that, did not suffice to prove that Denmark objectively would do so.[182]

Complaint rejections

In five judgments in 2013 the EU courts rejected challenges to EC complaint rejection decisions, emphasising the need for complainants to bring evidence of the alleged infringement and endorsing the EC's discretionary power to set its own priorities as to the complaints which it pursues in the EU interest.[183]

Omnis

In May 2013 the GC dismissed an appeal by the Romanian software company Omnis against an EC decision rejecting its complaint for lack of evidence, in particular that Microsoft held a dominant position on business management software markets.[184]

Among other things, the complainant argued that the EC's rejection was contrary to the judgment in *Microsoft*,[185] in which Microsoft's market share on the market for business management software was not relevant, inasmuch as Microsoft held a dominant position on the market for operating systems ("OS") for personal computers.

The EC relied on the studies of three consultancies, confirming the small market share of Microsoft for the period concerned on the business management software market and deduced from the large number of competitors on the market and their relatively small market shares that entry barriers were low.[186]

The GC noted that the fact that Microsoft held a dominant position on the OS market was not sufficient, since the existence of particular circumstances justifying

174 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [38], [40]–[41].
175 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [93]–[95].
176 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [98].
177 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [130].
178 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [132].
179 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [148]–[150].
180 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [164].
181 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [165].
182 *AstraZeneca* [2013] 4 C.M.L.R. 7 at [195]–[203].
183 With thanks to Svetlana Chobanova for her assistance with this section.
184 *Omnis Group v Commission* (T-74/11), judgment of May 30, 2013.
185 *Microsoft Corp v Commission of the European Communities* (T-201/04) [2007] E.C.R. II-3601; [2007] 5 C.M.L.R. 11.
186 *Microsoft* [2007] E.C.R. II-3601; [2007] 5 C.M.L.R. 11 at [53].

the application of art.102 TFEU to a behaviour on a market distinct from the one dominated (i.e. here the business software market), such as in *Tetra Pak*,[187] was not demonstrated.[188]

EFIM

In September 2013 the CJEU dismissed the appeal by EFIM against a GC judgment[189] which confirmed an EC complaint rejection decision in 2009 regarding the ink cartridge market.[190] EFIM is the European Federation of Ink and Ink Cartridge Manufacturers.

The CJEU upheld the finding that the EC had not committed a manifest error of appreciation. The existence of a dominant position on the ink cartridges market could be excluded if sufficient competition existed on the printers' market and if the two markets were closely linked.[191]

The CJEU also confirmed that the complainant had the burden of proof as regards its claim, in particular as to the evidence that the two markets were not linked.[192]

The EC was not required to take into account the gravity of the alleged infringement in order to determine whether there was EU interest or not.[193] The EC had also sufficiently reasoned its conclusion concerning the complexity of the case and the necessity for substantial resources in order to find sufficient evidence and reconsider its position on the links between the two markets here, which was based on previous decisions.[194]

Vivendi

In October 2013 the GC dismissed an action for annulment against an EC complaint rejection decision, brought by Vivendi which owns the majority of SFR, a rival mobile and fixed telecoms operator to France Télécom/Orange.[195] The complaint concerned France Télécom's alleged excessive pricing practice in the provision of its wholesale services relating to access to the local loop on the markets for high-speed internet access and for telephone subscription.[196]

The EC considered that pursuing the inquiry would not be in the EU interest.[197]

Interestingly, the court noted that the integration of the former France Télécom retail subsidiary Wanadoo Interactive had been closely monitored by the EC and the French authorities. The EC had regularly verified that its wholesale and retail prices left sufficient margin to its competitors and the decision of the national regulator, ARCEP, had also established certain obligations on the operator.[198]

The GC underlined that it was not an error in law if, when reviewing compliance with the competition rules, the EC took into account the results of its own investigations in the framework of another procedure, or of the monitoring carried out by national authorities and of their regulatory activities.[199]

The court also found that the EC was entitled to rely on the obligation imposed by the French regulator regarding the costs for use of the local loop and to conclude that the most appropriate method for calculating these costs was that of "current economic costs": a method assessing the actual historical investments made by France Télécom in its infrastructure to the benefit of the alternative operators.[200]

There was also no evidence that the incorrect information communicated by France Télécom relating to these investments affected the calculation method.[201]

The court also found that the EC had correctly concluded that the effects of France Télécom's contested practices had only limited effects on the functioning of the retail markets for access to broadband multi-service offers and for fixed telephony.[202]

Rough Diamonds

In July 2013, the GC also dismissed two appeals against the EC's decision to reject complaints by *Diamanthandel Spira* and by the Belgian Association of Dealers, Importers and Exporters of Polished Diamonds ("*BVGD*"), against De Beers' supplier of choice distribution system.[203]

European Commission decisions

Cartels—new

Box 5	
New Cartel Fines	
(November 2012 – October 2013)	
Total Fines	**Highest company fine(s)**

[187] *Tetra Pak International SA v Commission of the European Communities* (C-333/94 P) [1996] E.C.R. I-5951; [1997] 4 C.M.L.R. 662.
[188] *Microsoft* [2007] E.C.R. II-3601; [2007] 5 C.M.L.R. 11 at [59]–[63].
[189] *EFIM v Commission* (T-296/09), judgment of November 24, 2011.
[190] *EFIM v Commission* (C-56/12 P), judgment of September 19, 2013. Rejection decision summarised in Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 2" [2010] I.C.C.L.R. 149, 169.
[191] *EFIM*, September 19, 2013 at [36]–[37].
[192] *EFIM*, September 19, 2013 at [57]–[61] and [69]–[72].
[193] *EFIM*, September 19, 2013 at [82]–[90].
[194] *EFIM*, September 19, 2013 at [97]–[98].
[195] With thanks to Takeshige Sugimoto and Svetlana Chobanova for their assistance.
[196] *Vivendi v Commission* (T-432/10), judgment of October 16, 2013. See GC Press Release 129/13, October 16, 2013.
[197] *Vivendi*, October 16, 2013 at [127].
[198] *Vivendi*, October 16, 2013 at [33]–[39].
[199] *Vivendi*, October 16, 2013 at [44]–[47].
[200] *Vivendi*, October 16, 2013 at [59]–[62].
[201] *Vivendi*, October 16, 2013 at [65]–[67].
[202] *Vivendi*, October 16, 2013 at [94]–[99].
[203] *Diamanthandel Spira and BVGD v European Commission* (T-108/07 and T-354/08), both judgments of July 11, 2013.

Cathode Ray Tubes	€1.5 billion	*Philips + LG Electronics*	€391.9 million
Wire Harnesses	€141.8 million	*Yazaki*	€125.3 million
TOTAL	*€1,612.3 billion*		

Cathode Ray Tubes

In December 2012, the EC announced that it had imposed fines of some €1.47 billion on seven groups of companies producing cathode ray tubes, for their participation in one or both of two distinct worldwide cartels.[204]

In October 2013, the EC published a summary of its decision.[205] Cathode ray tubes are glass envelopes containing an electron gun and a fluorescent screen. There are two types of tubes, display tubes used in computer monitors and picture tubes used for colour televisions. They have now mostly been replaced by LCD and plasma displays.

The companies concerned are: Chunghwa, LG Electronics, Philips and Samsung SDI, which participated in both cartels. Panasonic, Toshiba, MTPD (now a Panasonic subsidiary) and Technicolor participated in the cartel for television tubes only.

The EC states that both cartels lasted for almost 10 years, from 1996 to 2006, and that they were among the most organised cartels the EC has investigated. The companies fixed prices, shared markets and allocated customers. They organised top management level meetings, called "green meetings", and lower level meetings, denominated "glass meetings", on a quarterly, monthly or even weekly basis. Meetings were organised in various locations in Asia and Europe.

The participants are reported to have monitored the implementation of the arrangements. It appears that the EC also found documents requiring secrecy regarding the meetings and asking for destruction of any compromising documents.

Chunghwa revealed the existence of the two cartels and was therefore not fined. Fines ranged from €7.9 million for Panasonic and MTPD, jointly and severally liable for their participation in the television tubes cartel to €391.9 million imposed on Philips and LG Electronics, also jointly and severally liable but for their participation in both cartels.

The EC granted between 10 and 40 per cent reductions in fines to Samsung SDI, Philips, and Technicolor for their co-operation during the investigation. One company invoked its inability to pay and the EC therefore reduced its fine.

Wire Harnesses

In July 2013, the EC announced that it had settled five cartels with producers of wire harnesses used in the automobile industry.[206] Wire harnesses conduct electricity, for example to open windows or start a car's motor.

In September 2013, the EC published a summary of its decision.[207] The companies concerned were: Sumitomo, Yazaki, Furukawa, S-Y Systems Technologies ("SYS"), and Leoni.

The overall fine was €141.8 million. Sumitomo was granted immunity. All companies received between 20 and 50 per cent fine reductions for their co-operation. The EC also reduced the fines by 10 per cent under the Settlement Notice since the companies acknowledged their participation in the cartels and thus their liability. The highest fine was €125.3 million on Yazaki. Others ranged from €11.1 million to €1.4 million.

It appears that the cartels involved the co-ordination of prices and allocation of supplies to Toyota, Honda, Nissan and Renault. The EC found that the cartels concerned Japan and the whole EEA. The duration of the cartels varied. The cartels overall lasted from March 2000 to December 2009.

Cartels—old

Freight Forwarding

In December 2012, the EC published a summary of its March 2012 decision addressed to 14 international groups of companies, which participated in four cartels co-ordinating surcharge and charging mechanisms for freight forwarding.[208] It may be recalled that Deutsche Post revealed the cartels and received full immunity as well as its subsidiaries DHL and Excel and that the other cartel participants were fined a total of €169 million.

Water Management

During the course of the year the EC published its non-confidential decision from June 2012 concerning this cartel on the water management products market.[209] It may be recalled that the cartel involved bilateral contacts and was found to have operated on the German market from June 2006 to May 2008 and for three months in 13 other Member States. Pneumatex was granted immunity, whereas Flamco and Reflex were fined respectively €3.9 million and €9.8 million. All fines were reduced by 10 per cent following a settlement procedure in which the companies acknowledged participation in the cartel and liability.

[204] IP/12/1317, December 5, 2012. Case COMP/39437. With thanks to Katrin Guéna for her assistance.
[205] [2013] OJ C303/13.
[206] IP/13/673, July 10, 2013. Case COMP/39748. With thanks to Katrin Guéna for her assistance.
[207] [2013] OJ C283/5.
[208] OJ C375/7, December 5, 2012. Case COMP/39462. With thanks to Katrin Guéna for her assistance.
[209] OJ C335/4, November 1, 2012. Case COMP/39611. The text of the decision is on the EC's website.

The product comprised pressurisation systems (pressure maintenance and water make-up systems) and products for quality assurance (degassing systems, air vents, separators and safety valves).

All three companies were found to have operated the cartel on the German market and Reflex and Pneumatex exchanged information on price increases in other Member States for a limited time. The EC considered that the period between December 2006 and April 2008 was one of limited cartel activity, but found that the anti-competitive object of the infringement remained the same before, during and after this period. Therefore, that period was not taken into account for the purposes of calculating the fines.

Gas Insulated Switchgear

In March 2013 the EC published a summary concerning its 2012 amendment of its 2007 decision as regards Melco and Toshiba.[210] This was to correct the reference year for the fine after the GC's rulings in 2011 that the EC should have used the same reference year as for the European undertakings.[211]

Other horizontal agreements

Box 6

- *Other horizontal agreements*
  - *Telefonica/Portuguese Telecom*
    - When is a bilateral non-compete clause "to the extent permitted by law" empty of content?
    - Context of tense negotiations for the acquisition of a stake in a Brazilian mobile JV.
    - Only 2% of value of sales taken by EC for fine in the specific circumstances.
    - 20% reduction for fast termination of alleged infringement (30 days after the EC first requested information on the issue and because the clause was not secret).

Telefonica/Portuguese Telecom

In January 2013 the EC took a decision in an unusual case concerning alleged market-sharing between these companies as regards electric communications services. The fines imposed were some €66.8 million on Telefonica and €12.2 million on Portuguese Telecom ("PT").[212]

This was in the context of changes as regards these two companies' holdings in a Brazilian joint venture offering mobile services, VIVO.[213]

It appears that Telefonica launched a first hostile takeover bid for PT's 50 per cent stake in VIVO, which was rejected. There was then a tense relationship between the two companies, in which PT stated that Telefonica had "not excluded" to launch a hostile takeover bid for PT itself, if PT did not sell its stake in VIVO to Telefonica.[214]

In further negotiations related to a second offer, it appears that a non-compete clause was introduced by PT after a meeting between the parties,[215] as part of an acquisition agreement for the stake. This involved each party undertaking not to engage or invest in any telecoms project in competition with the other in the Iberian market, until consummation of the transfer of shares or a specified cut-off date approximately 18 months later.

Then Telefonica made a third increased offer, which the majority of the PT General Assembly accepted, but the Portuguese Government blocked using its "golden share".

The CJEU then ruled that Portugal had failed in its obligations as regards free movement of capital because of its special rights under the "golden share". However, Telefonica stated that the Portuguese Government still said they would block the offer, unless it was increased. It appears that there was then a further round of tense negotiations in which Telefonica suggested to add to the "non-compete" clause the words "To the extent permitted by law".[216]

Telefonica stated this was to change the clause from being an effective non-compete to being an obligation to "self-assess" the extent to which such a clause could be retained. The clause was also given a final end date of December 31, 2011.

Telefonica stated it had not been possible to remove the wording because of the sensitive negotiations, but they thought this was enough to nullify it as a non-compete. PT also confirmed that, in the rush of concluding the deal, the parties focused on the main terms, considering the clause valid only to the extent permitted by law.[217]

Subsequently the relevant agreements were made public, including the non-compete clause.[218]

The EC then became aware of the clause and found that it was not, as Telefonica argued "empty of content because of its terms, i.e. the wording to the extent permitted by law",[219] but rather considered that it was a manifestly unlawful restriction by object.

[210] [2013] OJ C70/12. Case COMP/39966. The amending decision is on the EC's website.
[211] See Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 86.
[212] Case AT.39839, available on the EC's website. See also IP/13/39, January 23, 2013, and the EC summary in [2013] OJ C140/11.
[213] AT.39839 at [33]–[64].
[214] AT.39839 at [37].
[215] AT.39839 at [38].
[216] AT.39839 at [53].
[217] AT.39839 at [93].
[218] AT.39839 at [128]–[130].
[219] AT.39839 at [77].

The EC considered, in particular, that its bilateral nature showed that it was not just ancillary to the VIVO acquisition.[220] Further, the EC rejected the view that it was justified or ancillary because of the Portuguese Government's position against the VIVO deal.[221]

It appears that when challenged about the clause, the parties then issued a form of confirmatory termination agreement stating that the clause "had not conferred any rights or obligations on them".[222] However, the EC interpreted this as meaning that something *had* existed, which had to be terminated. In any event, it appears that the duration of the clause was considered short as a result, some four months.[223]

The EC also rejected the view that the clause was meant at most to be a self-assessment obligation[224] and considered that, if it were, the parties should have done so shortly after signing the agreement and before the agreement closing.

Overall, it appears that the EC would not let the clause go and accept that the words "to the extent permitted by law" emptied it of content, worried as to whether that would lead to a problem "from the law enforcement perspective". The EC stated:

> "Moreover, accepting the disclaimer '*To the extent permitted by law*' would mean that any undertaking entering into agreements contrary to Article 101 of the Treaty could simply agree on these types of caveats as safe harbours to avoid liability."

For the EC, the clause was a market-sharing agreement.[225]

Thereafter, it appears that the EC sought to reduce the amount of fine but, given the size of the markets concerned, still ended up with high figures. Interestingly here, the EC decided to set the proportion of value of sales to be taken into account at only 2 per cent.[226] Further, since the EC found that the parties terminated the clause only 30 days after the EC sent its first request for information and that the clause was not secret, the EC reduced the fines by 20 per cent for mitigation.[227]

So this is a somewhat special case. A stark reminder both as to the limits of what wording may be "left in" in sensitive negotiations and again that the fines now are very high. Nevertheless, it is also important to see that the EC is deciding that not all restrictions by object deserve fines with high percentages for value of sales. The companies are appealing.

E-Books

Box 7

- *Article 101 TFEU*
  - — E-Books (Apple and, now, five e-publishers)
    - * EC alleged a concerted practice, whereby publishers all moved in a "joint switch" from a wholesale sales model to an agency model, in light of Amazon's lowering of prices for e-books (US$9.99 prices).
    - * Same MFN clauses, maximum retail prices and Apple commission of 30%.
    - * Perceived as having horizontal and vertical (rpm) effects.
    - * Restriction by object.
    - * The companies concerned agreed (without prejudice): to a "competitive reset"!
      - Terminated agency agreements
      - Retailer to have ability to discount
      - No MFNs for 5 years
    - * N.B. EC saw retail MFN as a "joint commitment device", incentivising the publishers to force other retailers (i.e. Amazon) onto the same model.

The E-Books investigation has been high profile on both sides of the Atlantic.[228] In the last year, the EC adopted art.9 commitment decisions against five publishers and Apple while, in the United States, the DOJ prosecuted Apple and the publishers in court.

The EC's investigation centred on whether Apple and the publishers had engaged in a concerted practice to increase the retail price of e-books.[229] The EC market tested draft commitments in September 2012 and, following some minor revisions, adopted a decision making these binding on Apple, Hachette, Harper Collins, Simon & Schuster and Verlaggruppe Georg von Holtzbrinck in December 2013.[230] The fifth publisher, Penguin, was not party to the original proceedings but, following a market test, the EC adopted a similar commitment decision concerning Penguin in July 2013.[231]

The EC's preliminary assessment was that the publishers knowingly, in parallel, all entered agency agreements containing substantially the same terms, at around the same time, with Apple.[232] Formerly the publishers all used a wholesale model under which e-book retailers set sales prices, unlike in an agency model.

[220] AT.39839 at [81], [82] and [333].
[221] AT.39839 at [367]–[388].
[222] AT.39839 at [125]–[126].
[223] AT.39839 at [465].
[224] AT.39839 at [248].
[225] AT.39839 at [262] and [350]–[356].
[226] AT.39839 at [493].
[227] AT.39839 at [500]–[501].
[228] With thanks to Cormac O'Daly for his assistance.
[229] John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2011–2012: Part 2" [2013] I.C.C.L.R. 129, 143–144.
[230] Case COMP/39847, December 12, 2012, available on the EC's website. The EC summary is available at OJ C73/17, March 13, 2013. See also MEMO/12/983, December 13, 2012.
[231] IP/13/746, July 25, 2013. The art.27(4) Notice is at [2013] OJ C112/9. The text of the decision concerning Penguin has not yet been published. Therefore references to paragraph numbers are to the decision concerning the other four publishers.
[232] Case COMP/39847, December 12, 2012 at [33].

In particular, the EC decision describes how the agency agreements contained the same most favoured nation ("MFN") clause, which concerned prices, maximum retail price grids and Apple's commission.[233] The EC reasoned that, given the way this clause was drafted, a publisher would want to prevent other e-book retailers from discounting, since this would reduce the price that it would receive from Apple. This would incentivise all the five publishers to force other e-book retailers to switch to an agency model.[234]

To address the EC's concerns, Apple and the publishers have committed to terminate their agency agreements.[235] The publishers must also offer to terminate other agency agreements with other e-book retailers which contain similar "price" MFN clauses to the Apple agreements, or which restrict the retailer's ability to set prices or offer discounts.[236]

In addition, subject to a defined cap, for two years, none of the publishers will restrict a retailers' ability to set or reduce prices or discount.[237] For the next five years, neither Apple nor the publishers will enter into new agreements containing clauses similar to the price MFN.[238] Finally, Apple committed not to enforce any similar MFNs against any publisher for five years.[239]

Lundbeck and Others

In June 2013, the EC imposed a fine of €93.8 million on Lundbeck, a Danish pharmaceutical company and some €52.2 million in fines on generic producers, for agreements delaying market entry of generic versions of Citalopram, a leading anti-depressant.[240] Notably, Merck was fined some €21.4 million, the Arrow group €9.9 million, Zoetis and Xellia €10.5 million and Ranbaxy Laboratories €10.3 million.

It appears that Lundbeck's basic patent for Citaloprom had expired and that it only had certain related process patents left. In 2002, the EC found that the generic producers agreed with Lundbeck not to enter the market in return for substantial payments. Lundbeck is also reported to have purchased generics stock to destroy it and to have offered guaranteed profits in a distribution agreement.

European Mini-Bulk and Container Feeder Co-operatives

In January 2013 the EC closed an investigation into two co-operation schemes of ship owners.[241] It appears that the EC was concerned that a compensation system set up for the owners laying-up their vessels would give them an incentive to withdraw capacity from the market. The EC was also concerned that there would be charter rate recommendations to vessel owners, based on information collected from them on their charter rates. The concern was possible co-ordination of rates, resulting in charter rate increases. The EC dropped its investigation after the co-operatives agreed to abandon these two aspects of their co-operation before they had been implemented.

MasterCard and VISA

In April 2013, the EC indicated that it had opened proceedings into certain MasterCard practices: (1) interbank fees in relation to payments made by cardholders from non-EEA countries; (2) rules on cross-border acquiring; and (3) related business rules or practices such as the "honour all cards rule" which obliges a merchant to accept all types of MasterCard cards.[242]

In June 2013, the EC invited comments on commitments offered by VISA, in relation to their multilateral interchange fees case ("MIF").[243] These relate to the EC proceedings on consumer credit card MIFs. The commitments include a cap on intra-EEA credit MIFs for consumer credit cards at 0.3 per cent, which cap would also apply to domestic credit MIFs which VISA directly sets in certain EEA countries.

VISA also proposed to apply that cap from January 1, 2015 to MIFs regarding transactions with merchants within the EEA, with VISA consumer credit cards issued in non-EEA countries in VISA Europe's territory.

The 0.2 per cent debit card MIF cap would also be applied in a similar way.

VISA would also undertake to break out in its merchant contracts the MIF, other applicable payment system fees and the acquirer's fee. A monitory trustee is to be appointed and the commitments are to be effective for four years from the EC's commitment decision.

European Payments Council

In June 2013, the EC announced that it had closed its investigation into the European Payments Council's ("EPC") proposed e-payments framework for standards in relation to payments over the internet.[244] It appears the EC was concerned that the work on standards would exclude new entrants not linked to a bank from the e-payments market. The EPC announced that it would stop development of that standards framework and a complainant withdrew its complaint.

[233] Case COMP/39847, December 12, 2012 at [31]–[32].
[234] Case COMP/39847, December 12, 2012 at [38]–[39].
[235] Case COMP/39847, December 12, 2012 at [97], [98], [104]–[105].
[236] Case COMP/39847, December 12, 2012 at [98].
[237] Case COMP/39847, December 12, 2012 at [99]–[100].
[238] Case COMP/39847, December 12, 2012 at [101]–[102]. On the scope of the prohibition on MFN clauses, see in particular [102]; the third-party comments are summarised at [113]–[118] and [138]–[139].
[239] Case COMP/39847, December 12, 2012 at [106]–[107].
[240] IP/13/563, June 19, 2013, Case COMP/AT.39226.
[241] IP/13/82, January 31, 2013.
[242] IP/13/314, April 9, 2013, Case COMP/40049.
[243] OJ C168/22, June 14, 2013, Case COMP/AT.39398.
[244] MEMO/13/553, June 13, 2013.

Air Canada, Lufthansa, United

Box 8

- *Air Canada/Lufthansa/United*
  - — Price of transatlantic JV co-operation was measures to reduce barriers to entry on Frankfurt-New York route.
  - — EC took a broadened efficiency test, considering efficiencies in the market concerned and out of the market on related behind and beyond routes.
  - — But emphasised it would not trade efficiencies out of market for harm in the market. The efficiencies also had to benefit consumers in the market.

In December 2012, the EC published commitments proposed by these airlines to address concerns that their joint venture co-operation (the "A^{++} Agreement"), which involves revenue sharing and joint management of schedules, pricing and capacity, could result in higher prices for premium passengers between Frankfurt and New York.[245] (Premium passengers are those travelling in first, business or flexible economy classes.)

The parties offered to make landing and take-off slots available at Frankfurt and/or New York airports to facilitate the entry of competitors on the route and other measures designed to reduce barriers to entry.

The proposals involved: seven additional frequencies a week (and more if existing competitors' services should be withdrawn); agreements allowing such passengers to combine fares with competitors' services; special pro-rate agreements for traffic in Europe/Israel, or North America, the Caribbean and Central America, with part of the journey on the Frankfurt/New York route; and agreement to open up their frequent flyer programmes to competitors in certain circumstances. A monitoring trustee is to be appointed.

Then in May 2013, the EC took a decision making the commitments legally binding with some revisions in the pro-rate agreements to cover more routes.[246]

The EC explains that the parties argued that their co-operation created efficiencies on related behind and beyond routes to Frankfurt-New York (e.g. from/to Prague and/or from/to Seattle). However, the EC found that the efficiencies produced would not outweigh the negative effects on the Frankfurt-New York route, hence the need for measures to increase competition.

The EC also stated that it was willing to broaden the efficiencies test under para.43 of the Article 101(3) Guidelines to consider out of market efficiencies. This paragraph provides that, where two markets are related, the efficiencies achieved on separate markets can be taken into account provided that the group of customers affected by the restriction and benefitting from the efficiency gains are substantially the same.

Under the broadened test the parties have to show that:

- the route of concern and the behind and beyond routes to/from that route are related;
- considerable commonality in the consumer groups that travel on those routes; and
- a two-way flow of efficiencies across the routes.

The parties also have to quantify the efficiencies on related behind and beyond routes that accrue to those consumers who also travel on the route of concern.

However, the EC will not weigh up the "harm" suffered by one customer group against benefits perceived by another customer group. The EC only takes into account out-of-market efficiencies that accrue to the consumer group in the relevant market at issue (i.e. behind and beyond route efficiencies which also benefit passengers on the Frankfurt-New York route). Both have to benefit from the efficiencies projected.[247] The decision is binding for 10 years.

CEZ

In April 2013 the EC took a decision accepting the commitments offered by CEZ and made them binding.[248] It may be recalled that the EC was concerned that CEZ, the Czech electricity incumbent which is considered to be dominant, had reserved capacity in the transmission market which it did not need, in order to prevent competitors from entering the market. CEZ proposed to divest 800–1,000 MW of its generation capacity to address these concerns, selling one of three generation assets. The sale is to be carried out under the supervision of a monitoring trustee.

Articles 102/106 TFEU

Box 9

- *Articles 102/106 TFEU*
  - — *Microsoft Browser Choice commitments*
    - * €561 million fine for failing to offer browser choice in Windows 7 Service Pack 1 from May 2011 to July 2012.
    - * The first fine for breach of commitments.
    - * Microsoft was found to have been negligent.
    - * Infringement treated as "serious".
    - * Number of affected users approx. €15.3 million.
    - * Microsoft admitted errors and omissions.
  - — Proposed commitments on applications for injunctive relief re alleged infringements of standard essential patents by *Samsung*.
  - — Proposed commitments offered by *Google* re web search and search advertising.
  - — *Deutsche Bahn*: Proposed commitments to prevent margin squeezing in relation to traction current.

245 IP/12/1445, December 21, 2012. The Article 27(4) Notice is at [2012] OJ C396/21, with the commitments on the EC website.
246 IP/13/456, May 23, 2013. The EC summary is at [2013] OJ C201/8, and the EC decision is available on its website. Case COMP/AT.39595.
247 EC summary [2013] OJ C201/8 at [9]–11] and EC decision, Case COMP/AT.39595 at [57]–[61].
248 IP/13/320, April 10, 2013, Case COMP/AT.39727. The EC summary is available at [2013] OJ C251/4.

Technology Cases

This has been another busy year as regards art.102 TFEU and technology.[249] Microsoft was fined €561 million for failing to implement the commitments which it agreed to end the EC's browser investigation. As regards standards essential patents ("SEPs"), the EC has issued two SOs, market tested a proposed commitment from Samsung and held an oral hearing in the *Motorola* case. The EC also continued to discuss a remedy with Google. In April 2013 the EC published the text of a draft commitment for market consultation and in late October consulted certain parties on a revised commitment.

Microsoft

In March 2013, the EC adopted a decision fining Microsoft €561 million for failing to implement a commitment to offer users a browser choice screen.[250] In its earlier decision, adopted under art.9 of Regulation 1/2003 in December 2009, the EC had reached the preliminary view that Microsoft's tying of its browser, Internet Explorer, to its dominant Windows PC operating system infringed art.102 TFEU.[251]

The EC's decision, which is the first to find that a company has failed to comply with a commitment under art.9 of Regulation 1/2003, states that Microsoft had not provided 15.3 million EEA users a browser choice screen with its Windows 7 Service Pack 1 from May 2011 to July 2012.[252] Microsoft admitted that, owing to technical errors and omissions, the browser choice screen was not offered during the relevant time.[253] The EC considered that Microsoft's infringement was negligent and that, given its resources and know-how, it should have been able to avoid these errors.[254]

Under art.23(2)(c) of Regulation 1/2003, failure to comply with a commitment can lead to a fine of up to 10 per cent of an undertaking's global consolidated turnover. In its decision, the EC took into account, the gravity of Microsoft's infringement, noting that failure to comply with a commitment is, in principle, a serious infringement[255]; and that here Microsoft had failed to implement the core of its commitment[256]; the infringement's 14-month duration, which was significant relative to the commitment's overall duration[257]; Microsoft's co-operation with the EC during the investigation[258]; and the need for deterrence.[259]

Among the factors that the EC did *not* consider as valid mitigating circumstances were the infringement having resulted from negligence and that this was the first case of a fine for breach of a commitment.[260]

Google

It may be recalled that the EC opened its investigation into certain of Google's practices in November 2010.

In April 2013, the EC market tested a draft commitment intended to address the practices that the EC has been investigating as a matter of priority. It appears that recently, the EC has sent a questionnaire on a revised commitment to complainants and other selected third parties.

The April 2013 market test summarised the EC's preliminary assessment regarding four Google business practices that may abuse Google's alleged dominance in web search and search advertising contrary to art.102 TFEU[261]:

First, it is alleged that, within its "horizontal web search" results, Google grants favourable treatment to its own "vertical web search" services compared to the treatment it grants to competing vertical web search services. "Horizontal web search" services allow users to search the web for any information, regardless of that information's source. "Vertical web search" services only allow for searching within pre-defined categories of information.[262] The EC believes that this practice may unfairly discourage consumers from using more relevant competing search services.[263]

Secondly, Google is accused of using third parties' content in Google vertical web search services without their consent (this is known as "scraping"). The EC is concerned that this may reduce third parties' incentives to develop original content, which would be to consumers' detriment.[264]

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[249] With thanks to Cormac O'Daly for his assistance on all the technology cases in this section.
[250] EC Decision in Case AT.39530, *Microsoft (Tying)*, March 6, 2013, available on the EC's website. IP/13/196, March 6, 2013. The EC summary is available at [2013] OJ C120/15.
[251] Summarised in Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009–2010: Part 2" [2011] I.C.C.L.R. 113, 129; see also Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 2" [2010] I.C.C.L.R. 149, 167.
[252] *Microsoft (Tying)* Decision at [21]–[30]. See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2011–2012: Part 2" [2013] I.C.C.L.R. 129, 146.
[253] *Microsoft (Tying)* Decision at [26]–[30] and [39].
[254] *Microsoft (Tying)* Decision at [49]–[54].
[255] *Microsoft (Tying)* Decision at [56].
[256] *Microsoft (Tying)* Decision at [59].
[257] *Microsoft (Tying)* Decision at [65].
[258] *Microsoft (Tying)* Decision at [66].
[259] *Microsoft (Tying)* Decision at [77]–[78].
[260] *Microsoft (Tying)* Decision at [67]–[76].
[261] IP/13/371, April 25, 2013 and the accompanying MEMO/13/383. Case COMP/39.740. Draft commitments are available on the EC's website. The Article 27(4) Notice is at [2012] OJ C120/22. See, in particular, Google Market Test Notice, at para.3.
[262] Examples of Google's vertical web search services include Google News; Google Flights; and Google Shopping.
[263] MEMO/13/383, p.2.
[264] MEMO/13/383, p.2.

Thirdly, it is alleged that Google has obliged third-party websites to obtain most or all of their online search advertisements from Google. This could foreclose competing providers of online search advertising and reduce incentives to innovate.[265]

Fourthly, it is alleged that Google contractually restricts management and transferability of online search advertising campaigns across search advertising platforms. This could create artificial switching costs.[266]

To address these four concerns, Google proposed the following:

- Searches: Google would label and distinguish links to its own vertical web search services that have received favourable treatment in horizontal web search results.[267] In certain circumstances Google would also provide links to three relevant competing vertical web search services.[268]
- Scraping: Google would allow third parties, via a web-based opt-out, to prevent Google from using their content in Google vertical web search services. This would not affect the ranking of these third-party websites in horizontal web search results.[269]
- Exclusivity: Google would no longer require de facto or de jure exclusivity in relation to online search advertisements.[270]
- Management of advertising on various platforms: Google would not impose any conditions limiting advertisers from managing search advertising campaigns across different services or platforms.[271]

The proposed commitments would last for five years and three months.[272] Those intended to address search results and scraping would apply regardless of whether a Google vertical web search service exists today or will be introduced during the commitments' duration.[273] A monitoring trustee would be appointed.[274]

The commitments received "very negative" feedback and Google was asked "to improve significantly its proposals".[275]

Google apparently has done this and, in the second half of October 2013, it appears that the EC sent a questionnaire to complainants and other selected third parties concerning the revised proposals. Certain groups have objected to this procedure and would have preferred the EC to initiate a second formal market test.

The EC has announced certain details of the revised commitments. These include widening the scope of the commitments related to search (e.g. it would cover voice search); making links to rivals' services more prominent in search results; and general tightening of non-circumvention provisions.

Standards essential patents/FRAND

The EC has three ongoing formal investigations against two companies, Samsung and Motorola, which have allegedly infringed art.102 TFEU by failing to abide by their commitments to standard-setting organisations ("SSOs") to license standards essential patents ("SEPs") on fair, reasonable and non-discriminatory ("FRAND") terms.

In addition to the EC's action in this area, it is noteworthy that, in March 2013, the Landgericht Düsseldorf referred a request for a preliminary ruling to the CJEU in a dispute between Huawei and ZTE.[276] The questions referred touch on many of the issues that the EC has been investigating (such as what constitutes a "willing licensee").

Samsung

It may be recalled that in January 2012, the EC opened an investigation into Samsung's seeking of injunctive relief, notably against Apple, in a number of Member States, claiming infringement of patents that Samsung had declared essential to European Telecommunications Standards Institute ("ETSI") mobile telephony standards and which Samsung had promised to license on FRAND terms.

In December 2012, the EC sent Samsung a SO.[277] The press release outlined the EC's preliminary conclusion that Samsung had infringed its dominant position on the technology markets for each of its SEPs by seeking

[265] MEMO/13/383, p.2.
[266] MEMO/13/383, p.3.
[267] Google Market Test Notice, paras 6–7 and draft Commitments, Section I.A and Annex 1.
[268] Google Market Test Notice, para.8.
[269] Google Market Test Notice, para.9 and draft Commitments, Section I.B. See additional proposals concerning the prevention of indexing of certain material by Google and provisions regarding appearance of newspapers in Google News in paras 10 and 11 and draft Commitments, Annex 2.
[270] Google Market Test Notice, para.13 and draft Commitments, Section II.
[271] Google Market Test Notice, para.14 and draft Commitments, Section III.
[272] Google Market Test Notice, para.15 and draft Commitments, Section V.
[273] Google Market Test Notice, para.12 and draft Commitments, Section 3.
[274] Google Market Test Notice, para.15 and draft Commitments, Section VI and Annex 4.
[275] SPEECH/13/768, October 1, 2013, available on the EC's website.
[276] *Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH* (C-170/13).
[277] IP/12/1448, December 21, 2012.

injunctions on the basis of its SEPs in circumstances where Apple had shown itself to be willing to license the SEPs on FRAND terms.

In October 2013, the EC published draft commitments proposed by Samsung to end the investigation.[278] Under the draft commitments, which would last for five years,[279] Samsung would not seek injunctive relief based on its "Mobile SEPs"[280] against a licensee that agrees to a defined "licensing framework"[281] unless the prospective licensee risks becoming insolvent or seeks an injunction against Samsung based on its own Mobile SEPs.[282] The proposal would not affect Samsung's ability to request an injunction against an "unwilling licensee".

The licensing framework requires the potential licensee to agree to a 12-month negotiation period (for a unilateral licence, this period can be shortened to six months).[283] If no agreement on FRAND terms has been reached in 12 months, the parties must agree either to arbitration or court adjudication (before either the High Court of England and Wales, Patents Division, or the future Unified Patent Court) on a FRAND rate.[284] Failing agreement on whether to choose arbitration or court adjudication, the parties must arbitrate.[285] The draft commitment provides a number of details on the form and extent of the arbitration.[286] While there are differences, the draft commitment is somewhat similar to the US FTC's Google/Motorola Mobility consent decree.[287]

The draft commitment contains a non-circumvention provision, which, for example, provides that a future acquirer of Samsung Mobile SEPs must agree to be bound by Samsung's FRAND commitments.[288] If Samsung retains a financial interest in revenues from its SEPs following their sale, the third party must agree to the terms of the settlement with the EC. A monitoring trustee would be appointed to report on Samsung's compliance with the settlement.[289]

The EC would commit to re-opening its investigation and potentially re-assessing the commitment in light of any relevant judgment from the CJEU, including the *Huawei v ZTE* preliminary reference case noted above.[290]

Third parties could comment on the proposed commitments until November 18, 2013.

Motorola

It may be recalled that in April 2012, the EC opened two investigations against Motorola, which has been acquired by Google. In May 2013, the EC sent a SO to Motorola.[291] Similar to the Samsung SO, the EC has reached the preliminary view that Motorola's pursuit of injunctive relief against Apple in Germany on the basis of its ETSI GPRS SEPs is an abuse of its dominant position. The EC is reported to have held an oral hearing in September 2013.

E5

Finally, in March 2013, the EC closed its preliminary investigation into certain standards issues as regards future mobile communications services involving the "E5" telecom operators (Deutsche Telecom, France Télécom, Telefónica, Telecom Italia and Vodafone).[292] The EC's concern was that the E5 would use future standards to foreclose competitors. The press release indicates that this concern had been alleviated because the relevant standardisation process has been taken over by the GSMA trade association, which ensures wider industry participation.

Thomson Reuters

Another case that was brought to a close this year was the long-running investigation into Thomson Reuters' licensing of Reuters Instruments Codes ("RICs"), which are used to identify securities for real-time market data feeds and to retrieve information from those feeds. This has been discussed in previous reviews. In July 2012, the EC had sought third-party comments on a second set of proposed commitments.

In December 2012, the EC adopted a decision rendering slightly revised commitments binding on Thomson Reuters.[293] The investigation centred on customers' inability: (1) to use RICs to retrieve data from other providers' consolidated real-time data-feeds; and (2) to translate the RICs to other suppliers' identification codes.[294]

[278] IP/13/971, October 17, 2013 and the accompanying MEMO/13/910. The draft commitments are available on the EC's website. The EC summary is at [2013] OJ C302/14.
[279] Draft commitment, Section D.
[280] The proposed settlement applies to Samsung's Mobile SEPs used in smartphones and tablets. It only extends to the EEA. Mobile SEPs are defined as present or future SSO standards including ETSI/3GPP GSM, GPRS, EDGE, UMTS and LTE standards and IEEE's 802.11 standard. Draft Commitment, Section G.
[281] Draft commitment, Section A.1.
[282] Draft commitment, Section A.2.
[283] Draft commitment, Section A.1.a.
[284] Draft commitment, Section A.1.b and Section B.
[285] Draft commitment, Section B.6.
[286] Draft commitment, Section B.9.
[287] See *http://ftc.gov/opa/2013/07/google.shtm* [Accessed January 30, 2014].
[288] Draft commitment, Section E, and compare MEMO/09/549, December 10, 2009.
[289] Draft commitment, Section F.
[290] Draft commitment, Section C.13.
[291] IP/13/406, May 6, 2013.
[292] IP/13/208, March 7, 2013.
[293] EC Decision in Case COMP/39.654, *Reuters Instrument Codes*, December 20, 2012, available on the EC's website and IP/12/1433, December 20, 2012.
[294] *Reuters Instrument Codes*, December 20, 2012, at [37]–[45].

The final commitments oblige Thomson Reuters to license additional rights to customers and are considered a substantial improvement on what was offered in the first commitment. Notably, Thomson Reuters widened the scope of the commitment, lowered the applicable royalty rates, simplified the fee structure and will offer a worldwide licence where this is shown to be necessary.[295] Third-party developers can also conclude a licence, which it is hoped will ease switching.[296] The final commitment largely mirrors what was proposed in the July 2012 market test, except that a monitoring trustee has been imposed and Thomson Reuters has accepted additional Quality of Service obligations.[297]

Rio Tinto Alcan

It will be recalled that in August 2012, the EC published an Article 27(4) Notice concerning commitments offered by Rio Tinto Alcan ("RTA"). In its preliminary assessment, the EC had expressed concerns that RTA may have been infringing arts 101 and 102 TFEU by contractually tying the licences of its leading AP aluminium smelting technology to the purchase of certain speciality cranes for aluminium reduction plants, so-called "pot tending assemblies" ("PTAs"), supplied by RTA's subsidiary, ECL SASU.

The EC suggested that RTA had a dominant position on the market for the licensing of aluminium smelting technology. Further, that the contractual tie between RTA's licences of the dominant aluminium smelting technology with the handling equipment for aluminium smelters could produce negative effects on innovation and prices and result in anti-competitive foreclosure on the relevant PTA market.

While denying the EC's claims, RTA offered to modify the terms of its technology transfer agreements entered into after the entry into force of the commitments. Any licensee of the AP aluminium smelting technology would be entitled to purchase PTAs from ECL SASU or from any recommended PTA supplier.

In order to become a recommended PTA supplier, a third-party PTA supplier would have to meet certain technical specifications for the relevant AP technology family and go through an objective and non-discriminatory pre-qualification process set up by RTA.

The commitments would apply to all requests for tender related to the licensing of AP aluminium smelting technology addressed to RTA within five years from the commitments becoming effective.[298]

In December 2012, revised commitments were accepted by EC decision.[299]

Deutsche Bahn

In August 2013, the EC published an Article 27(4) Notice as regards commitments offered by Deutsche Bahn ("DB").[300] In its preliminary assessment, the EC had expressed concerns that DB's pricing system for traction current may have infringed art.102 TFEU. (This is the case related to inspections above.)

Traction current is the electricity used to power rail locomotives. In Germany, 16.7 Hertz electricity is used. The EC found that DB Energie, a DB subsidiary, is the only current traction supplier in Germany and thus holds a dominant position. In June 2013, the EC expressed its doubts about DB's pricing system, in particular the discounts it provides, which may only be fully achieved by railway companies part of the DB Group. The EC also appears to have alleged margin squeezing.

DB has offered to introduce a new pricing system which would apply uniformly to all railway companies and permit other electricity companies to supply traction current. The new pricing system would include separate prices for electricity and for access to DB's traction current grid. Interestingly, the electricity price would be a single price, without discounts for volume or contract duration. The access fee would have to be approved by the German regulator.

DB also proposed to pay railway companies which are not part of its group a refund of 4 per cent of their latest traction current invoice and to transmit to the EC all necessary data to evaluate its new price levels.

If accepted, the commitments will apply as of 2014 for five years.

Other EC/ECN initiatives

Revised ECN Model Leniency Programme

The first *European Competition Network ("ECN") Model Leniency Programme* ("MLP") was launched in September 2006 as a non-binding tool for harmonisation of the leniency programmes of the EU Member States.[301]

The overall aim was to increase predictability and to set a minimum standard for Member States to follow.[302] One of the main benefits of the MLP was introduction of a system of summary applications in cases where the EC is particularly well placed to deal with a case. The system

295 *Reuters Instrument Codes*, December 20, 2012 at [60].
296 *Reuters Instrument Codes*, December 20, 2012 at [63]–[65].
297 *Reuters Instrument Codes*, December 20, 2012 at [68]–[72] and [81]–[83].
298 *Rio Tinto Alcan*, EC's decision at [133].
299 IP/12/1434, December 20, 2012. *Rio Tinto Alcan*, Case AT.39230. The EC summary of its decision is available at [2013] OJ C89/5. The EC's decision is available on the EC's website.
300 IP/13/780, August 15, 2013. *Deutsche Bahn*, Case COMP/39678. The Article 27(4) Notice is available at [2013] OJ C237/28. The proposed commitments are available on the EC's website. With thanks to Katrin Guéna for her assistance.
301 With thanks to Ivana Kreizelova for her assistance.
302 26 Member States now operate a leniency programme.

of summary applications was to alleviate the burden on leniency applicants and NCAs in cases of multiple leniency applications.

In November 2012, the ECN published a revised version of the MLP.[303] The main change is the extension of summary applications to all leniency applicants. While the previous MLP allowed only immunity applicants to submit summary applications, the new version of the MLP explicitly recognises that all leniency applicants, including those who apply for reduction of fines, are allowed to submit leniency applications to NCAs in cases where the EC is particularly well placed.

In addition, the MLP has introduced a standard template for summary applications which has been published on the DG Comp website, together with a list of NCAs accepting summary applications in English. Upon receipt of the summary application, the leniency applicant receives confirmation from the NCA and is granted a summary application marker in order to secure its position vis-à-vis the respective NCA and its leniency programme.

The Explanatory Notes accompanying the MLP make clear that the same level of protection against discovery is guaranteed for oral and written statements made under the leniency programme.

Further, the Explanatory Notes state that cartels with vertical elements may also benefit from the leniency programme, which is welcome after recent issues in ABC hub and spoke cases between suppliers and retailers.

The Explanatory Notes also state that, although the leniency programme applies only to secret cartels, that does not mean that all aspects of a cartel must be secret. Again, a welcome confirmation.

Finally, more guidance has been provided on non-disclosure of any fact or any of the content of leniency applications. Unless explicitly authorised by the NCA, leniency applicants are not allowed to reveal any fact or any of the content of the leniency application. Such a duty is not breached if other NCAs are informed in cases of multiple leniency applications and if external legal counsel is involved in order to provide the leniency applicant with legal advice.

Investigative powers and decision-making powers reports

In October/November 2013, the ECN also issued two extensive reports on NCAs' investigative powers and on their decision-making powers. The reports, which were made available on the ECN's website, provide an overview of the enforcement procedures in the Member States. They give insight into the degree of convergence achieved to date and are meant to serve as a basis for debate about the need for further procedural convergence.

Other

It may also be useful to note that the ECN has published four reports on ECN members' activities this year, accessible on the EC's website.

Current policy issues

This year's policy section has been trimmed to give space for the large volume of important European Court cases and the fact that the EC's damages promotion policy has led finally to a Proposal for a Damages Directive, summarised in Part 1, in last month's journal.

However, it may be useful to offer a few comments on what appear to be the other ongoing policy issues in the EC, as this Commission approaches the end of its mandate:

- First, the EC is still focusing on residual issues from the Energy Sector Inquiry, with various cases coming through, such as *Gazprom*.
- Secondly, the EC is also focusing on the wake of the 2007 financial crisis, with cases on issues such as the Libor and Euribor benchmark coming through; and ongoing procedures involving credit default swaps.
- Thirdly, it appears DG Comp is very busy with many cartel cases, revealing once again the depressing fact that there are still many coming forward seeking immunity/leniency.
- Fourthly, we are seeing a new interest in MFNs after the *E-Books* case and some NCA actions.[304]
- Finally, there are still complex issues on the table on price transparency, the internet and practices facilitating collusion.

[303] ECN Model Leniency Programme (as revised in November 2012), *http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf* [Accessed January 30, 2014].

[304] See, e.g., MLex, "Watch out for action on pricing clauses in Europe …" (April 10, 2013); ABA "Antitrust Magazine", Spring 2013, Vol.27, No.2: "MFNs, Assessing the Anti-trust Risk".