Major Events and Policy Issues in EU Competition Law, 2014–2015 (Part 1)

John Ratliff
WilmerHale, Brussels

Competition law; EU law

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 2014 until the end of October 2015.[2] (Merger control is dealt with in a separate text.) The article is divided into an overview of:

- legislative/EC practice developments;
- European Court judgments;
- European Commission decisions;
- specific inquiries; and
- current policy issues.

Legislative/EC practice developments and European Court judgments on general issues and most of cartel appeals are included in Part 1. The remaining European Court judgments and the other sections will be included in Part 2, which 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 2014/15:*
  - — Damages Directive in force;
  - — pay-for-delay decisions:
    - * *Citalopram* (patent dispute context);
    - * *Fentanyl* (co-promotion context);
    - * restriction by object in "non-obvious" cases or just market exclusion agreements?
  - — *Guardian*: intragroup sales included in fine.
  - — *Innolux*: intragroup sales of products outside EEA, transformed into goods and then sold in the EEA by same undertaking not extraterritorial.
  - — *Post Danmark II*:
    - * leveraging issues in rebate system (linking statutory monopoly to liberalised market);
    - * orthodox approach on exclusionary rebates;
    - * "as-efficient competitor" test not relevant.
  - — *Dole*: exchange of pre-pricing communications unlawful.
  - — *Timab/Roullier*: first hybrid settlement/standard procedure case.

Legislative/EC practice developments

Box 2

- *Legislative/practice developments:*
  - — Damages Directive in force;
    - * wording added to Regulation 773/2004 and various EC Notices to strengthen protections for leniency statements and settlement submissions.
  - — Best Practices on Data Rooms.
  - — Draft Guidelines on Joint Organisations for Agricultural Products.
  - — EU–Swiss Cooperation Agreement entered into force:
    - * NB. Allows for exchange of evidence under defined conditions.

Damages Directive

In December 2014 the Damages Directive (Directive 2014/104) entered into force.[3] This has been described extensively in the last two years' articles.[4] Member States have to implement it by 27 December 2016.

Related amendments

In August 2015 the European Commission (EC) adopted amendments to Regulation 773/2004 (the Procedural Regulation) and to its Notices relating to the conduct of

* With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this article; and to my other Brussels, London and Frankfurt colleagues for their more specific contributions, which are indicated with the appropriate section.

[1] "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", "ECJ" for the "European Court of Justice" and "CJEU" for the overall "Court of Justice of the EU"; "NCA" is the abbreviation for "National Competition Authority"; "SO" is the abbreviation for "Statement of Objections"; "BE" is the abbreviation for "Block Exemption"; "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. Available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 15 December 2015]. 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] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU [2014] OJ L349/1, *http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html* [Accessed 15 December 2015].

[4] J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 1)" [2015] I.C.C.L.R. 73, 73–74; and J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2012–2013 (Part 1)" [2014] I.C.C.L.R. 77.

competition proceedings.[5] These modifications were introduced to reflect the new Damages Directive and concern the use of evidence in the EC's file.

The EC has now introduced the basic concepts of the EC's leniency and settlement programmes into Regulation 773/2004. Previously, these provisions were contained only in EC Notices.

Leniency programme

For example, a new art.4(a) has been added to the Procedural Regulation, which provides that undertakings can provide leniency statements orally, with the possibility to record and transcribe them at the EC's premises. Such statements are covered by the leniency statements provisions of the Procedural Regulation. They do not include pre-existing evidence, i.e. information submitted by an immunity applicant to the EC in support of its leniency application.

Leniency corporate statements cannot be transmitted by the EC for use in competition damages actions before national courts. However, a claimant can request a national court to review whether such a statement can be considered to be a "leniency statement".

Settlement procedure

For example, through the amendment of art.10(a) of the Procedural Regulation, it is stated that settlement submissions are drawn up by undertakings as a formal request to the EC to adopt a decision in their case following the settlement procedure and can be provided orally.

The Notice on Settlements has been amended to provide that settlement submissions cannot be withdrawn unilaterally by the parties. It is also stated that the EC retains the right to adopt a Statement of Objections (SO) which does not reflect the parties' settlement submission.[6]

The Notice also confirms that the EC will not transmit settlement submissions to national courts for use in damages cases.

Access to file

Articles 15 and 16 of the Procedural Regulation have been amended to include specific rules regarding access to and use of settlement submissions and leniency corporate statements which are part of the EC's file. This includes a provision stating that access shall only be granted for the purpose of exercising the rights of defence in proceedings before the EC. Access to the EC's file in damages actions before national courts is therefore prohibited.

In addition, the Notice on Access to File now states that misuse of information obtained during access to file may be subject to penalties under national law.[7] The Notice also states that documents from the file which are unrelated to the investigation can be returned to the parties. Access to leniency corporate statements and settlement submissions can only take place at the EC's premises and such statements may not be copied.

Co-operation with national courts

Finally, the Notice on Cooperation with National Courts was amended to align the EC's procedures with the new Damages Directive. Accordingly, the EC shall now only disclose information to national courts where this will not "unduly affect" the effectiveness of its enforcement activities, in particular concerning pending investigations, leniency and settlement programmes.[8]

Draft Guidelines on Joint Selling of Agricultural Products

In January 2015, the EC issued Draft Guidelines on the application of competition rules to the agricultural sector.[9] It may be recalled that in January 2014, a new Common Agricultural Policy entered into force, in particular with new rules for the sale of olive oil, beef and veal livestock and arable crops. Those rules allow producers to sell their products jointly under certain conditions.

The conditions include that joint organisations of farmers have to be more efficient than individual farmers by providing common storage facilities, distribution and transport services; and that the quantity of products sold would not exceed certain thresholds (e.g. for beef, veal and arable crops 15% of national production for those sectors).

The Draft Guidelines provide examples of services that joint organisations should provide to become more efficient, explain how to verify that quantities are not exceeded and describe situations which could lead competition authorities to re-open or cancel contracts applied by joint organisations.

The EC consulted the NCAs before publishing the Draft Guidelines and then asked interested parties to comment. The EC is expected to issue final guidelines by the end of 2015.

[5] With thanks to Maude Vonderau. Commission Regulation 2015/1348 amending Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to arts 81 and 82 of the EC Treaty, [2015] OJ L208/3; Commission, "Amendments to the Commission Notice on the rules for access to the Commission file" [2015] OJ C256/3; Amendments to the Commission Notice on immunity from fines and reduction of fines in cartel cases [2015] OJ C256/1; Amendments to the Commission Notice on the conduct of settlement procedures re. Decisions pursuant to arts 7 and 23 of Regulation 1/2003 in cartel cases [2015] OJ C256/2; and Amendments to the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of arts 81 and 82 EC [2015] OJ C256/5. All these texts are available at: *http://ec.europa.eu/competition/antitrust/actionsdamages/evidence_en.html* [Accessed 15 December 2015].

[6] Notice, paras 22, 27 and 29.

[7] Notice, para.48.

[8] Notice, para.26.

[9] With thanks to Katrin Guéna. IP/15/3322, 15 January 2015. The text of the draft guidelines is available on the DG Comp website *http://ec.europa.eu/competition/consultations/2015_cmo_regulation/index_en.html* [Accessed 15 December 2015]. See speech by A. Italianer, "Cooperating to Compete—The New Agricultural Antitrust Guidelines" (4 March 2015), also available on the EC website.

Other practical guidance

Best Practices on Data Rooms

In June 2015, the EC published its "Best Practices on the disclosure of information in data rooms" on its website.[10] These apply to both competition and merger control proceedings.

The purpose of the Best Practices is to provide practical guidance on when and how to use data rooms to disclose business secrets in a restricted manner and other confidential information obtained during such proceedings.

The EC has a discretion to decide whether a data room is appropriate. The EC takes into account the circumstances of the case at hand, the nature and degree of sensitivity of the information, the progress of the case, the resource implications of operating data rooms, the risk of information leaks and the need for speed.

Data rooms are used for the disclosure of quantitative data (e.g. individual sales data, price data, cost data, margins, etc) and, exceptionally, of strategic data (e.g. internal strategic documents). Depending on the specific circumstances of the case, the EC may anonymise certain data included, for example, by translating all documents into the same language, removing their document IDs, changing the currency of economic values, redacting countries and territories, partially aggregating figures, etc.

Data rooms are limited to a predefined number of external legal counsel and economic advisers of the addressees of a SO.

The EC provides practical guidance on the data room rules, which must be accepted by the addressees of a SO and signed by the external advisers prior to obtaining access to the data room. External advisers must also sign a non-disclosure agreement. In essence, external advisers cannot remove data, information or documents from the data room, nor disclose confidential information obtained within the framework of a data room procedure to the addressees of a SO or any third party.

External advisers can take notes, copy the data and print documents. However, all printouts and notes can be reviewed by the EC and no copy or note can be taken out of the data room. Everything must be destroyed at the end of the procedure. Similarly, no external communication is allowed and external advisers cannot carry any electronic device while they are in the data room.

External advisers may prepare a data room report, which is the only means through which they may communicate to and discuss the data in the data room with the addressees of the SO. The data room report contains the findings and conclusions of the external advisers regarding their assessment of data relevant for the exercise of their client's rights of defence. This report must only contain non-confidential information.

If any of the rules or obligations under the data room rules and the non-disclosure agreement are not respected by *any* of the external advisers, *all* of the relevant party's external advisers will be requested to leave the data room immediately. The EC states that it may also take damage actions and/or inform the relevant associations in case of violation of deontological or professional conduct rules.

In case of persistent disagreement between the EC and the addressees of a SO in relation to the disclosure of confidential information, the matter may be brought before the Hearing Officer, who may order the disclosure of confidential information in a data room.

Explanatory Note on Inspections

In September 2015, the EC amended its 2013 Note explaining how it conducts inspections related to competition investigations.[11] The 2013 Note provided that EC officials are authorised to search a company's IT environment and all storage media during inspections. The updated Note now provides that this also applies to private devices used for business purposes, external hard drives and cloud-computing services.

The Note also provides extensive indications on how the EC handles data copied at companies' premises and the way it will review such data at EC locations. The Note states, among other things, that data is collected in its "technical entirety"—meaning that email attachments will be seized together with the cover email and any other data items.

The EC clarifies also that personal data, i.e. names, telephone numbers and email addresses of employees, although they are not the target of the investigation, may be copied and obtained by officials if they are included in business documents.

EU–Swiss Competition Agreement

In December 2014, the EC published the Agreement on Cooperation in Competition Matters with Switzerland.[12] The Agreement had been signed in May 2013 and entered into force in December 2014.

It will be recalled that the EU previously signed bilateral co-operation agreements with the US, Canada, Japan and South Korea. The Agreement provides for: (1) regular contacts between officials of the respective competition authorities to discuss policy issues, enforcement efforts and priorities; and (2) the mutual notification of enforcement activities. Under the Agreement, the EC may also ask its Swiss counterpart to start enforcement actions on the Swiss territory and vice versa.

[10] With thanks to Itsiq Benizri.
[11] With thanks to Katrin Guéna. The text of the explanatory note is available on the DG Comp website. Available at: *http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf* [Accessed 15 December 2015].
[12] With thanks to Katrin Guéna. [2014] OJ L347/3.

The Agreement on Cooperation is innovative compared to other existing agreements, since it provides, in addition, that *the competition authorities may exchange evidence which they obtained during investigations*.[13] Strict conditions are attached to such an exchange to protect business secrets and personal data. The receiving authority may only use the evidence obtained for competition proceedings regarding the same case. Also, evidence may not be used to impose sanctions on natural persons.[14]

European Court judgments

General Principles (1)

Box 3

- *Court cases—General Principles (1):*
  - — *ING Pensii*:
    - * agreements between private pension funds in Romania;
    - * these aimed to filter and allocate double applications between the funds concerned, before they went to a statutory system, which would allocate them proportionately by market share;
    - * restriction by object, even though only 1.5% of "the market" affected;
    - * review of terms, objectives, economic and legal context post-*Cartes Bancaires*.
  - — *Cartel Damages Claims/Akzo*:
    - * damages actions can continue versus multiple defendants even if the "anchor defendant" settles (unless collusion);
    - * plaintiff can sue where damage suffered (among other options);
    - * courts excluded in favour of arbitration only if consent given, so explicit wording re. competition law required.

ING Pensii

In July 2015, the ECJ ruled on a reference from the *Romanian Cour de Cassation*, relating to an appeal of a decision of the Romanian Competition Authority (RCA).

It appears that Romania required by law that persons be affiliated to a private pension fund, setting a four-month period in which they could apply, but stipulating that they could only apply to one fund. If a person did not apply, or applied to more than one fund, the law provided that such applications were invalid and that the citizen would be allocated on a "random" basis to a fund. In doing so, however, the Romanian authorities allocated citizens on a basis directly proportional to the number of participants in a pension fund at the date of allocation.[15] It appears from the Opinion of A.G. Wahl that the proportional rule was established to promote competition between the funds for members and a competitive market structure.[16]

Fourteen of the 18 pension funds on the market decided to avoid the allocation mechanism set out in the law and agreed that, if a person applied to two funds, they would allocate the applications on an equal basis. So, in practice, the 14 funds concerned applied a sort of filter system allocating the cases where there had been double applications, instead of leaving those applications to fall through to the overall allocation on a proportional basis provided for by the law.

However, the referring court indicated that the number of duplications concerned was only 1.5% of the market.[17]

The RCA intervened and fined the pension funds for an infringement contrary to art.101 TFEU and the Romanian equivalent.

On appeal, the *Romanian Cour de Cassation* asked if the number of persons affected by the agreement is relevant in deciding whether a restriction of competition is significant. This was treated by the ECJ as a request to rule on whether this agreement was a restriction "by object".[18]

Following the Opinion of A.G. Wahl, the court found that the agreement was a restriction by object. The ECJ recalled the *Société Technique Minière*,[19] *Irish Beef*[20] and *Cartes Bancaires*[21] cases and considered the content of the agreement, its objectives and economic/legal context.[22]

The court looked at the *terms* of the agreement and noted that it predated the implementing procedures under the relevant Romanian law. The agreement therefore addressed an indeterminate number of persons, anticipated to be a great number of people who would affiliate not to one fund, but to several funds.[23] The court found that the *object* of the agreements was to affiliate the duplications to a limited group of operators, contrary to the statutory rules and to the detriment of the other companies in the sector, which were not participating in the collusion.[24]

As regards the *context*, the court noted that the new obligatory private pension fund market was established over a limited time, at the end of which the market structure was essentially set for at least an opening period of two years, until switching was possible without significant changes. As a result, the purpose of the collusion was to influence the structure and conditions

[13] EU–Swiss Competition Agreement art.7.
[14] EU–Swiss Competition Agreement art.8.4.
[15] *ING Pensii—Societate de Administrare a unui Fond de Pensii Administrat Privat SA v Consiliul Concurentei* (C-172/14) EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [6]–[9].
[16] *ING Pensii—Societate de Administrare a unui Fond de Pensii Administrat Privat SA v Consiliul Concurentei* (C-172/14) EU:C:2015:272, Opinion of A.G. Wahl at [49].
[17] *ING Pensii* EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [21].
[18] *ING Pensii* EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [25]–[27].
[19] *Société Technique Minière v Maschinenbau Ulm GmbH* (56/65) [1966] E.C.R. 235; [1966] C.M.L.R. 357.
[20] *Competition Authority v Beef Industry Development Society Ltd (BIDS)* (C-209/07) [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6.
[21] *Groupement des cartes bancaires (CB) v European Commission* (C-67/13 P) EU:C:2014:2204; [2014] 5 C.M.L.R. 22.
[22] *ING Pensii* EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [30]–[33].
[23] *ING Pensii* EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [36].
[24] *ING Pensii* EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [37].

of that market at a key stage in its formation. The agreement was also concerned with the whole Romanian territory.[25]

So, overall, the agreement was found to be a restriction by object and the number of persons concerned was irrelevant.[26]

FNV Kunsten Informatie en Media

In December 2014, the ECJ ruled on a question from a Dutch court concerning whether collective labour agreements which extended to both employed musicians and self-employed musicians were caught by competition law.[27]

The background was as follows: in Dutch law, collective labour agreements can be agreed not only between associations of employers and associations of employees, but also as regards contractors for the performance of specific work and contractors for professional services.

In 2006 and 2007, a collective labour agreement was entered into between two trade unions (the FNV and NMU) and an employer's association (the SDA). This related to musicians substituting for members of an orchestra. The FNV and NMU had both employees and self-employed substitutes among their members. The relevant agreement laid down minimum fees payable to employed substitutes, but also for self-employed substitutes carrying on their activities under a professional services contract.

In December 2007, the Dutch Competition Authority (the NMa) published a "reflection document" stating that a collective labour agreement laying down minimum fees for self-employed substitutes was not excluded from the scope of application of competition law. As a result the SDA and NMU terminated their collective labour agreement, while the FNV brought an action before the Dutch courts, seeking an order that the Dutch State should rectify the NMa's position.

The court at first instance, the District Court in The Hague (*Rechtbank*, *Den Haag*) ruled that a collective labour agreement concerning self-employed substitutes did not contribute directly to improve a worker's employment and working conditions (one of the two conditions set out in the *Albany*[28] case law). The FNV appealed, emphasising that self-employed service providers carry out the same activity as the employed workers.

The appeal court then referred to the ECJ the question as to whether such agreements should fall outside the scope of art.101 TFEU.

The ECJ noted the settled case law in this area, notably *Albany*. In other words, rulings that the social policy objectives pursued by collective labour agreements would be seriously compromised if management and labour were subject to art.101(1) TFEU when seeking jointly to adopt measures to improve conditions of work and employment. Such agreements therefore fall outside the scope of art.101(1) TFEU.[29]

The court then noted that the collective labour agreement in question was the result of negotiations between employers' and employees' organisations which also represented self-employed substitutes. However, self-employed substitutes are "undertakings" within the meaning of art.101(1) TFEU because they offer their services for remuneration on a given market and perform their activities as independent economic operators.[30]

The court held therefore that in such a situation the organisation does not act as a trade union association, but as an association of undertakings.[31] The net result was that, insofar as the collective labour agreement was concluded in the name and on behalf of self-employed service providers, the collective labour agreement could not be excluded from the scope of art.101(1) TFEU.[32]

This is not a surprising result on the case law. However, it is interesting to note that the court then addressed the point that, in fact, the self-employed substitutes might be working in a similar way to employees. Notably, the court went on to say that, if the service providers are, in fact, "false self-employed" and they are in a situation comparable to that of employees, then the collective labour agreement can be excluded from the scope of art.101(1) TFEU.[33]

The court also indicated that the classification of a "self-employed person" under national law did not prevent that person from being qualified as an employee within the meaning of EU law, if his or her independence is merely notional, thereby disguising an employment relationship.[34] The court noted that an employee acts under the direction of an employer as regards freedom to choose time, place and content of work; he or she does not share in the employer's commercial risk; and he or she forms an integral part of the employer's undertaking.[35]

It was therefore for the national court to assess whether the self-employed substitutes were to be considered "workers" (and therefore "false self-employed") or not.[36] If the substitutes were to be considered "false

[25] *ING Pensii* EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [40]–[48].
[26] *ING Pensii* EU:C:2015:484; [2015] 5 C.M.L.R. 15 at [53-]–[55].
[27] With thanks to Philippe Claessens. *FNV Kunsten Informatie en Media v Netherlands* (C-413/13) EU:C:2014:2411; [2015] 4 C.M.L.R. 1. See also the Opinion of A.G. Wahl, EU:C:2014:2215.
[28] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) [1999] E.C.R. I-5751; [2000] 4 C.M.L.R. 446.
[29] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [22]–[23].
[30] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [26]–[27].
[31] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [28].
[32] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [30].
[33] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [31].
[34] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [35].
[35] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [36].
[36] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [37].

self-employed", then the minimum fee scheme directly contributes to the improvement of employment and working conditions of those substitutes and the collective labour agreement would be excluded from the scope of art.101(1) TFEU.[37]

Cartel Damage Claims—Akzo

In May 2015, there was an interesting judgment by the ECJ dealing with various practical issues going to the jurisdiction of damages claims.[38] The matter arose on a reference from the *Landgericht Dortmund*.

The first issue raised was what happens if a so-called "anchor defendant" (the locally based defendant "anchoring" the jurisdiction in the case) for a multi-party claim settles with the plaintiff. It may be recalled that the Brussels I Regulation[39] allows an action for damages to be brought before the courts of one Member State against several defendants which are domiciled in different Member States. In this ruling, the court stated that this is valid even where the plaintiff withdraws his action against the anchor defendant, unless the other defendants provide firm evidence that, at the time that proceedings were instituted, the parties concerned had colluded to artificially fulfil or prolong the fulfilment of the relevant provisions in the Brussels Regulation (art.6(1)).[40]

What had happened was that Cartel Damage Claims (CDC) had brought the claim in Germany with Evonik as the anchor defendant, but had then settled with Evonik. The other parties argued that should mean that the German court would no longer have jurisdiction.

The ECJ disagreed, provided that there was no conspiracy to bring the claim into the German courts between the plaintiff and the anchor defendant. To raise such a claim, there would also need to be "firm evidence". The court stated that the simple existence of negotiations between CDC and Evonik before the suit was brought was not enough to show the sort of collusion mentioned.

The second issue raised was where a cartel victim may bring its claim. The court confirmed that each cartel victim may choose between the following jurisdictions in order to bring a damage claim:

- the place where the cartel was concluded;
- where an agreement was concluded which caused the loss suffered (the sole causal event); or
- the place where the loss took place, i.e. the victim's registered office.[41]

However, the court added that an applicant like CDC, which consolidated several undertakings' potential claims for damages, would need to bring separate actions for the loss of each undertaking before the courts with jurisdiction for the registered offices concerned. Earlier in the judgment the court had emphasised that the transfer of claims to CDC could not affect the determination of the court having jurisdiction.[42]

The third issue raised was whether certain arbitration provisions in related contracts were effective to exclude the jurisdiction of the courts.

Interestingly, here the court said that a general clause, which "abstractly refers to all disputes arising from contractual relationships", was not sufficient to extend to a dispute relating to a tortious liability that one party allegedly incurred as a result of the other's participation in an unlawful cartel.[43] The court added that a jurisdiction clause of this type would only be effective if the clause referred to disputes concerning liability as a result of an infringement of competition law, because in a case of tortious liability it had to be shown that the injured party had consented.

In any event, this issue arises where there is a contract which can be invoked. There are also issues as to the nature of the liability in the claim insofar as, in some contexts, litigators argue that the relevant conduct is a breach of contract/misrepresentation, whereas in others a tortious claim is preferred.

General Principles (2)

Box 4

- *Court cases—General Principles (2):*
  - — *Pozuelo 4SL/GALP:*
    - * a long-term purchase obligation can escape art.101(1) TFEU for lack of appreciability if:
      - (i) the supplier has only 3% market share, while the 3 leading suppliers have 70%; and
      - (ii) the term of the contract is not manifestly excessive to contracts generally concluded in the market.
    - * petrol station contract here for 30–45 years; GALP argued market range was 20–31.6 years;
    - * 3% less than 5% cumulated network effects threshold in EC De Minimis Notice.
  - — *Orange*:
    - * EC not prevented from carrying out inspections about a matter which had been investigated already by a NCA;
    - * parallel proceedings not contrary to *ne bis in idem*, because NCA rulings do not prevent EC action.
  - — *Deutsche Bahn*:
    - * EC cannot claim it just found documents on an inspection when the inspection team were briefed on a related complaint before going;
    - * relevant documents unlawfully obtained.

[37] *FNV Kunsten Informatie en Media* EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [39] and [41].
[38] *Cartel Damage Claims (CDC) v Akzo* (C-352/13) EU:C:2015:335; [2015] 5 C.M.L.R. 4. ECJ Press Release 58/15, 21 May 2015. With thanks to Geoffroy Barthet.
[39] Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments [2001] OJ L12/1.
[40] *CDC v Akzo* EU:C:2015:335; [2015] 5 C.M.L.R. 4 at [29] and [33].
[41] *CDC v Akzo* EU:C:2015:335; [2015] 5 C.M.L.R. 4 at [56].
[42] *CDC v Akzo* EU:C:2015:335; [2015] 5 C.M.L.R. 4 at [36] and [55].
[43] *CDC v Akzo* EU:C:2015:335; [2015] 5 C.M.L.R. 4 at [68]–[72].

Pozuelo 4 SL/GALP

In December 2014, the ECJ ruled on de minimis in the context of a request for a preliminary ruling from the Spanish Supreme Court (the *Tribunal Supremo Español*), concerning a long-term exclusive purchase obligation imposed on a petrol station.[44]

The context was an action for annulment of a set of agreements entered into by GALP, a supplier of petrol owning the relevant petrol station, and Pozuelo 4, the tenant of the petrol station, which owned the land but not the petrol station itself. By these agreements, GALP acquired the right to build a petrol station on the land and to make use of the land for that purpose for a term of 45 years. The petrol station was then leased to Pozuelo 4 for 30 years, with a right of extension for another 15 years, accepting a related exclusive purchase obligation. In practice, it appears that the obligation may have therefore been for 30 years.[45]

Pozuelo 4 sought annulment of these agreements before the Spanish courts. However, its claim was rejected on account of the insignificance of the effects of the exclusive purchase obligation on competition, both at first instance and upon appeal. Among other things, it was noted that 3% was *less* than the 5% threshold for appreciability in para.8 of the 2001 EC De Minimis Notice in the event that competition in a market is restricted by the cumulative effect of parallel networks.[46]

In its preliminary ruling, the ECJ stated that the fact that GALP is a minor player in the Spanish market, having only a 3% market share, while the three leading players hold a combined market share of 70%, had to be taken into account in the appreciation of all the circumstances.

As for the length of the exclusive purchase obligation, the ECJ added that a comparison should be drawn between the length of the contract concerned and the average term of the agreements concluded on the Spanish market.[47] Notably, GALP stated that such agreements were between 20 and 31.6 years.[48]

Accordingly, the court ruled that a long-term purchase obligation imposed on a petrol station escapes the prohibition of art.101(1) TFEU on account of lack of appreciability of its restrictive effects when two conditions are met:

1. the supplier has a market share not exceeding 3%, while the combined market share of the three leading suppliers amounts to 70%; and
2. the term of the contract is not manifestly excessive in comparison with the contracts generally concluded in the relevant market.[49]

An interesting point was that the referring court also argued that the long-term exclusive purchasing obligation here might facilitate market penetration by GALP. While noting that the referring court had not sent evidence to support that finding, the ECJ noted that, if shown, that would go to the national court's appreciation as to whether the restriction in question was significant/appreciable in the circumstances.[50]

The ECJ then left the national court to verify the facts and apply such principles. Notably, to ascertain the exact duration of the contract in question; and the average duration of such contracts on the market.[51]

Inspections

Orange In November 2014, the GC ruled on the legality of an EC inspection concerning a matter which had been investigated already by the French Competition Authority (FCA).[52]

It appears that in 2011 Cogent, a competitor of Orange (previously France Telecom) filed a complaint with the FCA, alleging abuses of dominant position as regards interconnection services. The FCA investigated and found no abuse, although it raised issues concerning possible margin squeezing. As a result, Orange gave certain undertakings to the FCA.

Then in 2013, having sent information requests to Orange in France and Poland, the EC ordered inspections of Orange in France. It appears that the issues investigated were essentially the same, although the EC's investigation also concerned Poland and a wider period of time.

Orange complained on appeal that this was unlawful. Notably, Orange argued that:

- to order inspections was unlawful and disproportionate, when the EC already had been informed of the French investigation under art.11 of Regulation 1/2003 and could have asked the FCA for further information under art.11(4);
- to open another proceeding on the same matter was an infringement of *ne bis in idem* (double jeopardy) because the FCA had ruled already on the case; and
- to pursue two proceedings was also disproportionate because during the art.11 ECN co-ordination the EC could have overruled the FCA and taken the case under art.11(6).

[44] With thanks to Mercedes Segoviano. *Estación de Servicio Pozuelo 4, SL v GALP Energia España* (C-384/13), EU:C:2014:2425.
[45] *Pozuelo 4 v GALP* EU:C:2014:2425 at [39].
[46] EC De Minimis Notice [2001] OJ C368/13.
[47] *Pozuelo 4 v GALP* EU:C:2014:2425 at [37].
[48] *Pozuelo 4 v GALP* EU:C:2014:2425 at [39].
[49] *Pozuelo 4 v GALP* EU:C:2014:2425 at [42].
[50] *Pozuelo 4 v GALP* EU:C:2014:2425 at [38], [40] and [41].
[51] *Pozuelo 4 v GALP* EU:C:2014:2425 at [39. Applying *Neste Markkinointi Oy v Yotuuli Ky* (C-214/99) [2000] E.C.R. I-11121; [2001] 4 C.M.L.R. 27.
[52] *Orange v Commission* (T-402/13) EU:T:2014:991; GC Press Release 160/14, 25 November 2014. With thanks to Geoffroy Barthet.

Orange also argued that the inspection was arbitrary given that the EC already had the relevant information available via the FCA and asked the court to review the evidence justifying the inspection.

The GC rejected these arguments. The main points are as follows.

First, the EC could still open parallel proceedings because a NCA cannot rule that there is no infringement of art.102 TFEU, applying *Tele2 Polska*[53]; and the EC is not bound by national court or NCA decisions on the application of arts 101(1) and 102 TFEU, applying *Masterfoods*[54] and subsequent case law.[55] This also meant that there was no infringement of *ne bis in idem*.

Secondly, the court noted that it was "at least regrettable" that the EC had not sought further information from the FCA before ordering the inspections.[56]

However, the court also accepted that the information obtained by the FCA had been obtained voluntarily from Orange, whereas the point of an inspection is to go and see what is available on the issues in question. Here, the EC stated that it was looking for documents going to the commercial strategy of Orange. In such circumstances, the GC ruled that an inspection was not unlawful.[57]

The court also considered that the EC was not *obliged* to use art.11(6), or barred from investigating later, by the ECN co-ordination under art.11(4).[58]

Thirdly, the court confirmed the importance of the statement in the EC's decision as regards what it is investigating.[59] The court would verify the arbitrary nature of a decision ordering an inspection first by reference to that statement, notably to see if it was sufficiently precise and justified. The court found that to be the case here, the decision having outlined five particular practices being investigated as well as that an infringement of art.102 TFEU was in issue.[60]

However, if an applicant could present elements raising doubts as to the seriousness of the evidence the EC had to order an inspection, the court could also decide to review that evidence, applying *Nexans*.[61] The EC had to have sufficient information in its possession to justify the interference in the private affairs of an undertaking which occurs when an inspection takes place.

EPH In November 2014, the GC dismissed the appeal by *Energeticky a prumyslovy holding* (EPH) against the EC's decision imposing a fine of €2.5 million on that company and its subsidiary in relation to IT issues during an EC inspection.[62]

It may be recalled that this was a rather unusual case where, during an EC inspection, two things happened: first, having changed the passwords of four email accounts, someone handling IT for EPH *rechanged* a password at the request of the account holder, who was working remotely (and who, as a result, may not have been aware of the inspection). Secondly, one of EPH's employees told the IT service provider to stop the flow of incoming emails to the four accounts, while holding them on the server.

The EC considered the first act as a denial of exclusive access to the IT account in question and therefore a negligent refusal to submit to the inspection, even if no emails had been manipulated. The GC agreed.[63]

The EC considered the second act as an intentional infringement. Again, the GC agreed.[64]

Otherwise, EPH argued that the EC had shown prejudice as regards EPH, since there had been a report in the Czech press about the threat of an inspection just before it occurred. The court rejected this, noting that the EC had not suggested that EPH was responsible for the leak, nor were the fines disproportionate in the circumstances.[65]

Deutsche Bahn In June 2015 the ECJ ruled on an appeal from the GC's judgment upholding certain EC inspection decisions as regards *Deutsche Bahn* (DB).[66] Interestingly, the ECJ annulled the GC's judgment and two of the three inspection decisions.

The background was as follows: in March 2011, the EC took a first inspection decision related to alleged preferential treatment given by a subsidiary of DB, DB Energie, to other DB subsidiaries in the form of a rebate system for electric traction energy. That inspection decision was without judicial authorisation and, in the course of the inspection, the EC found documents which it considered related to a possible different infringement about which the EC had received a complaint previously.

Shortly before the end of the inspection, the EC took an inspection decision relating to these other aspects revealed during its inspection. The issue was an alleged

[53] *Prezes Urzedu Ochrony Konkurencji i Konsumentow v Tele2 Polska* (C-375/09) EU:C:2011:270; [2011] 5 C.M.L.R. 2.
[54] *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* (C-344/98) [2000] E.C.R. I-11369; [2001] 4 C.M.L.R. 14.
[55] *Orange v Commission* EU:T:2014:991 at [26]–[32].
[56] *Orange v Commission* EU:T:2014:991 at [55].
[57] *Orange v Commission* EU:T:2014:991 at [56]–[58] and [64].
[58] *Orange v Commission* EU:T:2014:991 at [36]–[40].
[59] *Orange v Commission* EU:T:2014:991 at [80].
[60] *Orange v Commission* EU:T:2014:991 at [92] with paras [3]–[10].
[61] *Nexans France SAS v European Commission* (T-135/09) EU:T:2012:596 ; [2013] 4 C.M.L.R. 6.
[62] *Energeticky a prumyslovy holding as v Commission* (T-272/12) EU:T:2014:995; [2015] 4 C.M.L.R. 2. With thanks to Mercedes Segoviano.
[63] *EPH* EU:T:2014:995; [2015] 4 C.M.L.R. 2 at [38].
[64] *EPH* EU:T:2014:995; [2015] 4 C.M.L.R. 2 at [49]–[62].
[65] *EPH* EU:T:2014:995; [2015] 4 C.M.L.R. 2 at [88]–[89].
[66] With thanks to Geoffroy Barthet. *Deutsche Bahn v Commission* (C-583/13 P) EU:C:2015:404; [2015] 5 C.M.L.R. 5.

infringement by another subsidiary of DB, DUSS, taking the form of making terminal access more difficult for third parties and/or otherwise discriminating against them.

Then a few months later in July 2011, the EC issued a third inspection decision, again related to the DB/DUSS issue, described as relating to the alleged strategic use of DB infrastructure to increase the costs of the group's competitors and otherwise to make it more difficult for them to compete with DB.[67]

However, importantly, it was revealed before the GC that the EC had informed the officials carrying out the first inspection, immediately before they did so, that there was another complaint against DB concerning its subsidiary DUSS.[68]

When DB appealed to the GC, the latter upheld the inspection decisions, notably confirming that the EC did not have to obtain judicial authorisation prior to making an inspection. The court also considered that, applying *Dow Benelux*,[69] if documents which related to a separate infringement were discovered by accident during an inspection, they could be used as evidence of that infringement as long as the relevant procedural requirements for the second procedure were respected.

Moreover, the GC considered that the fact that the EC had briefed inspectors on the second possible infringement just before the inspection was just background.

DB challenged these points before the ECJ.

First, the ECJ rejected DB's claims about the need for prior judicial authorisation before an inspection. Notably, the ECJ confirmed that such an inspection was not contrary to the fundamental right to the inviolability of private premises, as protected by art.8 of the European Convention of Human Rights (ECHR) and art.7 of the EU Charter of Fundamental Rights (CFR). The court noted that, on the case law, the absence of such prior judicial authorisation could be counterbalanced by a post-inspection review covering both questions of fact and of law.[70] Further, the court stated that the EU legal system is premised on that basis and its legality under the ECHR is ensured by the fact that the EU courts carry out an in-depth review of law and fact.[71]

Secondly, the ECJ, following A.G. Wahl's Opinion,[72] considered that the inspections were fundamentally flawed by virtue of the briefing to the EC officials concerning the second possible infringement.

The court recalled that, on the *Dow Benelux* case law, the EC could start new investigations if it came across new evidence purely by accident (as regards information "which it happened to obtain" during a previous investigation).[73]

However, legal protection against unjustified searches means in this context that the EC had to comply with art.20(4) of Regulation 1/2003, which states that an inspection decision "shall specify the subject matter and purpose of the inspection". Equally, the EC is required under art.28(1) of Regulation 1/2003 only to use information obtained during an investigation for the purposes indicated in the inspection decision.[74]

If therefore the EC chose to brief its inspection team on a range of issues, that information had to be reflected in the inspection decision. Accordingly, the lack of information in the EC's first inspection decision as regards the second possible infringement, of which the EC had informed its inspectors, went too far and infringed the obligation of the EC to state reasons and the rights of defence of DB.[75]

This meant that the first inspection was vitiated by irregularity, since the EC's agents, being previously in possession of information unrelated to the subject matter of that inspection, had seized documents falling outside the scope of the inspections as circumscribed by the first decision.[76]

It will be recalled that the second and third inspections were linked to the discovery of the documents unlawfully in the first inspection. The court therefore set aside the GC's ruling insofar as it dismissed actions against the second and the third inspections in application of the *Roquette Frères* case law.[77]

Court cases—ECN

Box 5

- *Court cases—ECN:*
  - — *Unión de Almacenistas de Hierros de España* (Spanish Iron Wholesalers Union):
    - * EC not required to disclose intra-ECN documents (NCA draft decisions, summaries of case notes EC/ECN of conversations) re. Spanish cartel case under EU Transparency Regulation.
  - — *Si.mobil/easyJet*:
    - * EC entitled to reject a complaint on basis that NCA "dealing with" it;
    - * EC not required to assess whether NCA approach well founded.

[67] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [4]–[7].
[68] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [61].
[69] *Dow Benelux NV v Commission* (85/87) [1989] E.C.R. 3137 at [19].
[70] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [25]–[26].
[71] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [32]–[39].
[72] *Deutsche Bahn v Commission* (C-583/13 P) EU:C:2015:92, Opinion of A.G. Wahl.
[73] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [59].
[74] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [56]–[57].
[75] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [62]–[64].
[76] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [65]–[67].
[77] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5 at [45]; see *Roquette Frères SA v Directeur General de la Concurrence, de la Consommation et de la Repression des Fraudes* (C-94/00) [2002] E.C.R. I-9011; [2003] 4 C.M.L.R. 1 at [49].

Unión de Almacenistas de Hierros de España

In May 2015, the GC ruled on an issue concerning the EU Transparency Regulation[78] and documents transferred within the ECN.[79]

In 2010 and 2012, the *Unión de Almacenistas de Hierros de España* (the Union of Iron Wholesalers of Spain, UAHE) was fined for price-fixing by the Spanish Competition Authority (the *Comisión Nacional de Competencia*, CNC) in two decisions. In the proceedings there was correspondence exchanged between the CNC and the EC, pursuant to art.11(4) of Regulation 1/2003. It may be recalled that, under that provision, when a NCA envisages to take a decision applying art.101 TFEU it is obliged to send to the EC a summary of the case, the proposed decision and any other documents necessary to assess the case.

In 2013, the UAHE requested access to all the correspondence exchanged. The EC gave the receipts, indicated that it had not replied to the CNC's communication, but refused access to the draft decisions, the draft English summaries of the CNC and the EC's notes of conversations on the case.[80]

The EC based its refusal on: (1) protection of the commercial interests of the undertakings concerned; (2) protection of the purpose of the investigations; and (3) protection of the exchange mechanism among the ECN. The EC also did not carry out a specific and concrete review of the documents, but claimed they were covered by a general presumption against disclosure.[81]

The GC agreed,[82] ruling partly by analogy with its judgments in *Odile Jacob*[83] and *EnBW*[84] and partly by reference to art.27(2) of Regulation 1/2003—which specifically states that the parties to an EC procedure cannot have access to documents exchanged under art.11. The court stated that the latter rule applies to documents created by the EC *and other authorities* and exchanged under this provision as part of the enforcement of the EU competition rules.[85] Moreover, the fact that the Spanish procedure was over made no difference, since the information remained confidential and its disclosure might undermine investigations.[86]

Finally, the court ruled that any transparency application in support of a claim for compensation could have been addressed to the CNC, as the authority which took the relevant decisions, not the EC.[87]

This is an important practical issue, since often those involved in NCA proceedings would like to know more about the influence of the EC/ECN on decisions and the exchanges concerned.

Si.mobil

In December 2014, the GC upheld an EC decision rejecting Si.mobil's complaint against Mobitel.[88] The GC ruled (for the first time) that the EC was entitled to reject a complaint on the ground that a Member State competition authority was already investigating the same matter.

Si.mobil is a mobile telephone company in Slovenia. Si.mobil had lodged a complaint in 2009 with the EC, which was rejected in 2011 on the basis that the Slovenian Competition Authority (the UVK) had started proceedings earlier in 2009.[89]

In its complaint, Si.mobil alleged that Mobitel, the incumbent on the mobile telephone market in Slovenia, which was indirectly partly owned by the Slovenian State, and noted that Si.mobil had pursued an exclusionary strategy. Mobitel allegedly had cornered the retail mobile phone market by creating a margin squeeze through the sale of low-priced phones. Further, Mobitel had allegedly charged extremely low prices for wholesale mobile access and call origination services in order to make entry to the market difficult or impossible for competitors.[90]

The EC rejected Si.mobil's complaint on two grounds: first, concerning the retail mobile phone market, the EC found that under art.13(1) of Regulation 1/2003 the EC could reject a complaint on the ground that a competition authority of a Member State is "dealing with" the case.[91] Secondly, as regards the wholesale market allegations, the EC refused to investigate Si.mobil's complaint on the ground that there was not sufficient EU interest in conducting a further investigation of the case.[92]

On appeal, the GC found that the EC was entitled to reject the complaint, since it fulfilled the two conditions laid down in art.13(1) of Regulation 1/2003.[93]

[78] Regulation 1049/2001 [2001] OJ L145/43.
[79] *Unión de Almacenistas de Hierros de España v Commission* (T-623/13) EU:T:2015:268; GC Press Release 52/15, 12 May 2015. With thanks to Virginia del Pozo.
[80] *Unión de Almacenistas de Hierros* (T-623/13) EU:T:2015:268 at [11]–[13].
[81] *Unión de Almacenistas de Hierros* (T-623/13) EU:T:2015:268 at [14]–[17].
[82] *Unión de Almacenistas de Hierros* (T-623/13) EU:T:2015:268 at [46]–[47] and [52]–[64].
[83] *Commission v Editions Odile Jacob SAS* (C-404/10 P) EU:C:2012:393; [2012] 5 C.M.L.R. 8.
[84] *Commission v EnBW Energie Baden-Wurttemberg AG* (C-365/12 P) EU:C:2014:112; [2014] 4 C.M.L.R. 30.
[85] *Unión de Almacenistas de Hierros* (T-623/13) EU:T:2015:268 at [44].
[86] *Unión de Almacenistas de Hierros* (T-623/13) EU:T:2015:268 at [71]–[73] and [78].
[87] *Unión de Almacenistas de Hierros* (T-623/13) EU:T:2015:268 at [82]–[83].
[88] With thanks to Takeshige Sugimoto. *Si.mobil telekomunikacijske storitve dd v Commission* (T-201/11) EU:T:2014:1096 [2015] 4 C.M.L.R. 8. GC Press Release 179/14, 17 December 2014.
[89] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [3].
[90] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [4].
[91] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [9].
[92] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [10].
[93] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [67].

The first condition was that a competition authority of a Member State is already dealing with the case that has been referred to the EC. Here, the GC noted that the EC had shown that it was in regular contact with the UVK and the EC had received assurances that the UVK was actively investigating the matter. That was enough.[94] Notably, the EC was not required to assess whether the approach being taken by a NCA was well founded.

The second condition was that the case related to the same agreement, decision of an association or practice.[95] The GC found that the procedure before the UVK concerned the same infringements, was on the same market and within the same timeframe as those referred to in the complaint submitted to the EC by Si.mobil.[96]

Si.mobil also alleged that the EC made a manifest error in considering the degree of EU interest.[97] Noting that the EC had a discretion on the issue governed by the *Automec* case law,[98] the GC stated that it could not replace the EC's assessment of the EU interest with its own, by considering whether criteria other than those applied by the EC in the contested decision should have led the EC to the conclusion that there was an EU interest.[99] However, the court still reviewed whether the EC had erred in its consideration of the *Automec* criteria and found that it had not.[100]

easyJet

In January 2015, the GC upheld the EC's decision to reject a complaint lodged by easyJet against the Dutch Airport of Schiphol.[101] easyJet had submitted three complaints in 2008 to the Dutch Competition Authority (the NMa) against Schiphol Airport, in relation to the security and passenger service charges that were imposed.[102] The NMa rejected the three claims, partly on aviation law grounds and partly on priority grounds (that it could decide on its priorities in individual cases).

Then in January 2011, easyJet lodged a complaint with the EC. It submitted that the charges set by Schiphol were discriminatory and excessive and amounted to an abuse of dominant position.[103] It referred to the complaints lodged with the NMa and maintained that the NMa had not taken any final decision on the merits of easyJet's complaint under competition law.

However, in May 2013, the EC rejected the complaint on the basis that the NMa had already "dealt with" it.[104]Article 13(2) of Regulation 1/2003 provides for such a ruling.

easyJet appealed on the ground that the EC had applied art.13(2) of Regulation 1/2003 incorrectly. Essentially, easyJet claimed that the NMa had not "dealt with" the case in the circumstances. The court disagreed, however, considering that what is important is not *the outcome* of the NCA review of a complaint, but the fact that the complaint has been reviewed by that authority.[105]

easyJet claimed that the EC is prohibited from rejecting a complaint in a case where a complaint has not been the subject of a decision of a NCA and the NMa's decision on its second complaint did not constitute a decision, as the NMa had not established whether the conditions for a prohibition were met.[106] However, the GC found that art.13(2), in providing that a case has to be "dealt with" by another competition authority, does not necessarily require that a decision must have been reached in relation to that complaint.[107]

easyJet also alleged that the NMa failed to reject the complaint after an investigation applying EU competition law, because it also considered aviation law and such an investigation is a prerequisite for the application of art.13(2) of Regulation 1/2003.[108]

The GC agreed that the EC may reject a complaint on the basis of art.13(2) only where it has been the subject of a review carried out in the light of the EU competition law rules.[109] However, the GC found that the NMa's decision was reviewed in the light of art.102 TFEU, albeit using certain findings under national aviation law and noted that certain rulings under the two types of law were similar.[110] That was enough.

Kendrion/Gascogne/Aalberts

It may be recalled that in November 2013, in the *Gascogne* and *Kendrion* judgments, the Grand Chamber of the ECJ ruled that excessive length of proceedings before the GC breaches an applicant's right to a hearing within a reasonable time and is contrary to art.47 of the EU's Charter of Fundamental Rights.[111] The ECJ ruled

[94] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [46]–[67].
[95] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [33].
[96] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [68]–[78].
[97] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [79].
[98] *Automec Srl v Commission* (T-24/90) [1992] E.C.R. II-2223; [1992] 5 C.M.L.R. 431.
[99] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [89].
[100] *Si.mobil* EU:T:2014:1096 [2015] 4 C.M.L.R. 8 at [90]–[108].
[101] With thanks to Takeshige Sugimoto. *easyJet Airline Co Ltd v Commission* (T-355/13) EU:T:2015:36; [2015] 4 C.M.L.R. 9. GC Press Release 7/15, 21 January 2015.
[102] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [2]–[6].
[103] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [7].
[104] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [9].
[105] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [26]–[27].
[106] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [31].
[107] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [33].
[108] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [43].
[109] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [44].
[110] *easyJet* EU:T:2015:36; [2015] 4 C.M.L.R. 9 at [47]–[49].
[111] With thanks to Cormac O'Daly. *Gascogne Sack Deutschland GmbH v Commission* (C-40/12 P) EU:C:2013:768, [2014] 4 C.M.L.R. 14; *Kendrion v Commission* (C-50/12 P) EU:C:2013:771, [2014] 4 C.M.L.R. 13; and *Groupe Gascogne v Commission* (C-58/12 P) EU:C:2013:770, [2014] 4 C.M.L.R. 14. The cases concerned appeals of the EC's *Industrial Bags* decision.

that an action for damages *before the GC* is the correct remedy for damage resulting from this unreasonable delay.

Since then, there have been rather complex practical issues on who should be the proper defendant. In 2014, Gascogne, Kendrion and Aalberts[112] lodged actions for damages before the GC. In January and February 2015, the GC issued orders ruling that the correct defendant in these actions is the CJEU (the European Court as a whole) and not, as the ECJ contended, the EC.[113] The ECJ had sought to have the GC declare the actions inadmissible insofar as they were addressed to it or, in the alternative, declare that the correct defendant should be the EC, rather than the CJEU/ECJ.[114]

The GC rejected the CJEU's application, ruling that the CJEU was the correct institution to represent the EU. The GC recalled that, under a consistent line of case law, the EU should be represented by the institution that is alleged to have been responsible for the loss caused to the applicant.[115] Here, the GC was responsible for any such loss so, since under the TEU the CJEU is one of the EU's institutions and the CJEU includes the GC, the CJEU is the correct representative of the EU.[116]

The GC rejected a number of objections raised by the CJEU. For example, it rejected that there was a general principle that the EC represents the EU in litigation.[117] It also rejected arguments based on the correct budgetary line from which any award of damages would be awarded and indicated that, if damages ultimately were awarded, then these should come from the CJEU's budget.[118] Finally, the GC rejected arguments relating to the GC's lack of independence and impartiality.[119]

The CJEU initially appealed the GC's orders (to itself as in the ECJ); however, it is reported that these have been withdrawn now.[120] In the meantime, given all the uncertainties, those bringing such claims may have to cover their options and sue the EU represented by the CJEU *and/or* the EC.

Cartel appeals

Box 6

- *Cartel appeals (1):*
  - — General:
    - * many judgments on the *Concrete Reinforcing Bars*, *Pre-stressing Steel*, *Paraffin Waxes*, *Heat Stabilisers* and *LCD Panels cartels* (among others).
  - — Flat Glass — *Guardian*:
    - * EC obliged to take into account intragroup sales when fining;
    - * if not, discrimination in favour of vertically-integrated undertakings;
    - * this was the case here, where the company with smallest market share had the largest fine;
    - * proof of actual effect through intragroup sales not required: effect inferred from possible passing-on or competitive advantage if not passed-on.

Flat Glass—Guardian

At the beginning of our reference period, in November 2014, the ECJ ruled on an appeal against a GC judgment, by which that court upheld the fine imposed by the EC on Guardian in the *Flat Glass* cartel. The ECJ found that the EC had discriminated against Guardian in its decision. Notably, the EC had excluded intragroup "captive sales" when calculating fines. Unlike other addressees, Guardian did not have any captive sales.

The court noted that this gave an inevitable advantage to vertically-integrated firms. The court stated that a distinction between internal and external sales, which excluded internal sales, would reduce the relative weight of the vertically-integrated undertaking in the infringement to the detriment of others and not reflect the real economic importance of that undertaking to the infringement.[121]

This was also surprising here insofar as Guardian, which had the smallest market share, received the largest fine.

The EC's previous practice was to include internal sales for the purpose of fining where it had evidence of a cartel's effect on such internal prices. However, the court noted that the EC was not required to prove actual effect. The court found that the vertically-integrated undertaking could benefit by captive sales to related companies, passing on the unlawful cartelised price, or by a price advantage in comparison to competitors if they did not pass the unlawful price on.[122] Since the GC had failed to apply these principles, Guardian's appeal was upheld.[123]

The court then used its unlimited jurisdiction to substitute its appraisal for that of the EC and reduced the fine of Guardian by 30% from €148 million to €103.6 million.

Overall, this means that now there is a ruling that the EC *must* take into account the internal sales of products which are covered by a cartel. That ruling has been

[112] *Aalberts Industries v Commission* (T-385/06) [2011] E.C.R. II-1223, [2011] 4 C.M.L.R. 33. This related to the EC's *Copper Fittings* decision.
[113] *Kendrion v EU* (T-479/14) EU:T:2015:2, Order of 6 January 2015; *Gascogne v EU* (T-577/14), Order of 2 February 2015; *Aalberts Industries v EU* (T-725/14). References to paragraph numbers are to the *Kendrion* Order.
[114] *Kendrion v EU* (T-479/14) EU:T:2015:2 at [9].
[115] *Kendrion v EU* (T-479/14) EU:T:2015:2 at [15].
[116] *Kendrion v EU* (T-479/14) EU:T:2015:2 at [17]–[19].
[117] *Kendrion v EU* (T-479/14) EU:T:2015:2 at [26]–[31].
[118] *Kendrion v EU* (T-479/14) EU:T:2015:2 at [39]–[41].
[119] *Kendrion v EU* (T-479/14) EU:T:2015:2 at [42]–[54].
[120] *Court of Justice v Kendrion* (C-71/15 P); *Court of Justice v Groupe Gascogne* (C-125/15 P); *Court of Justice v Aalberts Industries* (C-132/15 P). MLex (12 November 2015), "*EC Court Drops challenges to damage claims from kendrion, Aalberts*".
[121] *Guardian Industries Corp v Commission* (C-580/12 P) EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [51]–[80], especially [59] and [63].
[122] *Guardian v Commission* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [60].
[123] *Guardian v Commission* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [65]–[66].

applied already to other cases this year. That is controversial, although it should be said that the EC's previous practice was also a source of controversy, because it was not clear when the EC would take into account internal sales or not.

Power Transformers—Alstom

In November 2014, the GC ruled on an appeal by Alstom against the EC's decision in the *Power Transformers* cartel case, holding it liable for the activities of its indirect subsidiary Alstom T&D.[124] Alstom was fined €16.5 million, of which Areva T&D was found to be jointly and severally liable for €13.35 million.

The main issue of interest here is that the GC annulled the decision, insofar as the court considered that the EC had relied on the presumption of decisive influence over a 100%-owned subsidiary, but not adequately explained why Alstom had not successfully rebutted that presumption. Alstom had put forward eight specific arguments to do so.[125] The core idea was that the Alstom group was based on decentralised operations, with key decisions being taken at subsidiary level.

The court found that most of the EC's reasoning had not been directed to these arguments. The EC had stated very succinctly that these arguments had not reversed the presumption and had not shown that the subsidiary acted independently.[126] Otherwise, the EC had noted that it did not have to show that the directors of a parent company knew of an infringement.[127]

This was not enough for the GC. The court considered that the EC had given the *conclusion* of its review of the arguments raised, but not its *reasons* for doing so. In particular, the EC had not responded to whether the fact of a subsidiary behaving independently on the market indicated an absence of the required organisational links with the parent.[128] Nor were Alstom's arguments manifestly inapplicable, not requiring a reply.[129]

Power Transformers—Alstom Grid

In November 2014, the GC rejected the parallel appeal by Alstom Grid (formerly Areva T&D), alleging a breach of the principles of respect for legitimate expectations and legal certainty insofar as the EC had refused Areva T&D immunity from fines.[130] It may be recalled that when the EC took its decision in this case, the EC had fined Areva T&D €13.5 million, taking into account an 18% reduction for co-operation.

The relevant events were broadly as follows: first, the EC carried out inspections in relation to gas insulated switchgear, seizing documents from Hitachi.

Then, Areva made three leniency applications in relation to power transformers, the first two not being effective, one not being accepted by the EC and the other being withdrawn. In October 2006, Areva was granted conditional immunity for its third application as regards anti-competitive practices in relation to power transformers in Germany, Austria, France and the Netherlands. In the process, Areva mentioned a gentlemen's agreement in some other EU markets (Spain, Italy).

Then, in early 2007 the EC carried out dawn raids on producers of power transformers in Germany, Austria and France, but not Areva.

Then, Siemens applied for leniency as regards a gentlemen's agreement between European and Japanese producers of power transformers in which each had agreed to respect each other's home markets. Siemens was granted conditional immunity for that in December 2007.

Subsequently, Areva was told that the EC would only pursue the gentlemen's agreement case between Europe and Japan and that its conditional immunity did not therefore apply.

Areva argued that this was unlawful and it should have had immunity, since before its application in 2006, the EC did not have enough evidence concerning the gentlemen's agreement to justify its inspection in early 2007, so Areva's application had led to the subsequent inspections. However, the court rejected this, finding that the EC had found sufficient evidence to suspect a power transformers infringement from the Hitachi inspections.[131]

Areva also argued that the EC was not entitled to use those documents because they came from a different procedure. However, the court stated that, even if that inspection did not cover power transformers, the EC could use the documents found to take a decision for new inspections.[132] In fact, they had also been supplied by Hitachi in September 2004 in the gas insulated switchgear case and the EC could also have used them to order an inspection into power transformers.[133]

Areva also argued that there was a "clear causal link" between its application and the EC's inspections and the subsequent immunity application of Siemens. The court noted that there is a risk of a "snowball effect" in any case, i.e. that an immunity application on one product leads to investigations by the EC, prompting other

[124] With thanks to Virginia del Pozo. *Alstom v Commission* (T-517/09) EU:T:2014:999.
[125] *Alstom v Commission* EU:T:2014:999 at [81]–[90].
[126] *Alstom* EU:T:2014:999 at [94].
[127] *Alstom* EU:T:2014:999 at [95].
[128] *Alstom* EU:T:2014:999 at [98]–[99].
[129] *Alstom* EU:T:2014:999 at [100]–[104].
[130] With thanks to Virginia del Pozo. *Alstom Grid SAS v Commission* (T-521/09) EU:T:2014:1000.
[131] *Alstom Grid* EU:T:2014:1000 at [51]–[59].
[132] *Alstom Grid* EU:T:2014:1000 at [71]–73].
[133] *Alstom Grid* EU:T:2014:1000 at [75].

applications on other markets. However, even if that effect were established, the court noted that it was not enough for immunity.[134]

As regards legitimate expectations, the court noted that Areva had been given conditional immunity in October 2006 in relation to the alleged agreement in the Netherlands, Germany and Austria, not the gentlemen's agreement.[135] Since these agreements were distinct, the court considered that there should have been no legitimate expectation of immunity.

Box 7

- *Cartel appeals (2):*
  - — Concrete Reinforcing Bars:
    - * confirmation that the EC could fine for "an ECSC infringement" after expiry of the ECSC Treaty, based on Regulation 1/2003;
    - * small adjustments in fines.
  - — Paraffin Waxes:
    - * *Eni*: Recidivist fine increase annulled on basis that Eni had not had the opportunity to rebut the presumption of control of infringing subsidiary in *the first proceedings* and could not be expected to do so in the *second proceedings* given passage of time;
    - * note now ECJ in *Chloroprene Rubber Versalis/Eni*, where the ECJ states that the key issue is whether an undertaking is given sufficient opportunity in the *second proceedings* to rebut the presumption that it controlled the infringing subsidiary in the first, taking into account all circumstances, including the passage of time since first proceedings
  - — Bananas: *Dole*:
    - * ECJ upheld finding that exchange of "pre-pricing" communications through bilateral contacts was a restriction by object.

Concrete Reinforcing Bars

In December 2014, the GC ruled on 11 appeals by companies involved in the *Concrete Reinforcing Bars* cartel case. In eight cases the appeals were dismissed. In three others fines were adjusted or overturned.[136]

It may be recalled that in December 2002 the EC took a decision fining several Italian companies which were found to have: (1) fixed various elements of the price of reinforcing bars (which are used for strengthening columns and other concrete structures in buildings); and (2) to have limited or controlled their output and sales. The infringement was found to have lasted from December 1989 to May 2000.

In 2007, the GC annulled that decision on the basis that the EC lacked competence to establish an infringement of the ECSC Treaty when the decision was adopted after July 2002; the date of expiry of the ECSC Treaty. As a consequence, art.65 of the ECSC Treaty was no longer in force when the decision was adopted.[137] The EC argued that Regulation 17/62 applied, but the court noted that the EC had not based its decision thereon.

In September 2009, the EC readopted the decision, relying on art.65 of the ECSC Treaty as to the substance and arts 7(1) and 23(2) of Regulation 1/2003 for the enforcement basis. Certain charts illustrating the price changes were omitted, but later sent to the defendants after an amending decision in December 2009.

In general, the GC upheld the EC's decision,[138] confirming the EC's enforcement basis, and rejected the appeals. However, the court annulled or partially annulled the fines on SP, Riva Fire and Ferriere Nord.

As regards *SP*, the GC annulled the EC's finding that SP formed a single undertaking with Lucchini when the EC adopted its decision,[139] having reviewed changes in ownership since the EC's 2002 decision. As a result, the court considered that the EC should have applied the 10% of turnover fine ceiling to SP individually. Moreover, it appeared that in 2007, the last business year preceding the EC's revised decision, SP had no turnover. As a result, SP's liability for the fine of €14.35 million imposed on Lucchini was annulled.

As regards *Riva Fire*,[140] the GC found that Riva Fire had suspended its participation in the part of the cartel which related to the limitation or control of production or sales for one year. This had not been recognised in the EC decision. As a result, the GC, in its unlimited jurisdiction, reduced the amount of the fine by 3%[141] (i.e. €807,000) resulting in a reduction from €26.9 million to €26.1 million.

As regards *Ferriere Nord*,[142] the GC found that the EC should have taken into account in its fine that Ferriere Nord also had not participated in the part of the cartel dealing with the limitation or control of production or sales.[143] In the exercise of its unlimited jurisdiction, the court therefore reduced the amount of the fine by 6%[144] (from €3.57 million to €3.42 million).

[134] *Alstom Grid* EU:T:2014:1000 at [90]–[94].
[135] *Alstom Grid* EU:T:2014:1000 at [96]–[101].
[136] With thanks to Geoffroy Barthet.
[137] See, e.g. *Riva Acciaio v Commission* (T-45/03) [2007] E.C.R. II-138. See also J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007: Part 1" [2008] I.C.C.L.R. 29, 56–57.
[138] See, e.g. *SP SpA v Commission* (T-472/09 and T-55/10) EU:T:2014:1040 at [116]–[148].
[139] *SP* EU:T:2014:1040 at [304]–[325]. With thanks to Maria Koliasta.
[140] *Riva Fire SpA v Commission* (T-83/10) EU:T:2014:1034.
[141] *Riva Fire* EU:T:2014:1034 at [219]–[220].
[142] *Ferriere Nord SpA v Commission* (T-90/10) EU:T:2014:1035.
[143] *Ferriere Nord* EU:T:2014:1035 at [322].
[144] *Ferriere Nord* EU:T:2014:1035 at [324]–[325].

Paraffin Waxes

In the course of the year the European Courts have issued seven judgments in relation to the *Paraffin Waxes (Candle and Slack Waxes)* cartel: first, in December 2014 the GC ruled on five appeals; then in September 2015 the ECJ ruled on two further appeals.[145]

The GC judgments

In December 2014, the GC ruled on five appeals by Eni,[146] Repsol,[147] H&R ChemPharm,[148] Tudapetrol[149] and Hansen & Rosenthal.[150] In general the appeals were dismissed.

Two points are of particular interest.

First, in *Eni* the GC reduced the fine imposed by the EC by some €10.9 million from €29.1 million to €18.2 million, because the GC considered that the 60% fine increase imposed on Eni for recidivism was unlawful. As in other cases, the EC had considered, based on *Michelin*,[151] that where a subsidiary formed a single economic unit (undertaking) with its parent then, in the event of a second infringement by the undertaking, the parent's fine could be increased for recidivism.

Eni argued that was wrong because there had been no finding of infringement against it in the earlier proceedings (which concerned the PVC and polypropylene cartels). It had not even faced a SO. The proceedings concerned Anic and EniChem respectively. The earlier infringements were also committed by companies that were part of groups that only became part of Eni later.

The GC agreed with Eni, noting that, in the circumstances, Eni had not had the opportunity to rebut the presumption that it controlled the infringing subsidiary in the earlier proceeding and, given the passage of time (some 14 years), Eni could hardly be expected to do so at the time of the later proceedings.[152] Moreover, the GC also noted that the *Michelin* judgment turned on its particular facts.[153]

Secondly, in *H&R ChemPharm* it may be of interest to note that the court effectively sanctioned that company for not providing accurate information to the court.

H&R ChemPharm had stated to the court, in response to a court request for information, that it did not have a shareholding in certain other companies. However, when challenged about this at the hearing, the company accepted that it did have those holdings. As a result, the court required H&R ChemPharm to pay €10,000 for the "avoidable costs" which the GC incurred as a result.[154]

The ECJ judgments

In October 2015, the ECJ ruled on two appeals, one by Total SA[155] and the other by Total Marketing Services.[156]

The main points are as follows.

First, in the *Total SA* case the ECJ reduced Total SA's (Total's) fine by some €2.7 million from €128.16 million to €125.46 million. The issue was that the GC had reduced the fine of Total's subsidiary (Total Raffinage Marketing) to this extent, but not that of its parent, even though the latter's liability was based on that of its subsidiary (i.e. was "purely derivative" of that of its subsidiary). Applying the *Tomkins*[157] case law, the ECJ considered that the GC should have reduced the parent company's liability.[158]

Secondly, in the *Total Marketing Services* case (formerly Total Raffinage Marketing—Total Raffinage), that subsidiary appealed against the GC's judgment, arguing that (1) it had ceased to participate in the cartel in May 2004, but had been held to have continued until April 2005; and (2) that it had interrupted its participation in the cartel for a period (May 2000–June 2001).

As regards the period after May 2004, the issue was that Total Raffinage had not attended meetings. The GC considered that since Total Raffinage had not publicly distanced itself from the cartel, Total Raffinage could not be considered to have ceased its participation.[159]

The ECJ disagreed, noting that the absence of public distancing was only one factor to be considered[160] (applying *Verhuizingen Coppens*[161]). The court stated:

> "The absence of public distancing forms a factual situation on which the EC can rely in order to prove that an undertaking's anti-competitive conduct has continued. However, in a case where, over the course of a significant period of time, several collusive meetings have taken place without the participation of the representatives of the undertaking at issue, the EC must also base its findings on other evidence."[162]

[145] With thanks to Geoffroy Barthet and Adélaïde Nys.
[146] *Eni SpA v Commission* (T-558/08) EU:T:2014:1080. All the GC judgments were issued on 2 December 2014.
[147] *Repsol Lubricantes y Especialidades SA v Commission* (T-562/08) EU:T:2014:1078.
[148] *H&R ChemPharm GmbH v Commission* (T-551/08) EU:T:2014:1081.
[149] *Tudapetrol Mineralölerzeugnisse Nils Hansen KG v Commission* (T-550/08) EU:T:2014:1079.
[150] *Hansen & Rosenthal KG v Commission* (T-544/08) EU:T:2014:1075.
[151] *Michelin v Commission* (T-203/01) [2003] E.C.R. II-4071; [2004] 4 C.M.L.R. 18 at [290].
[152] *Eni* EU:T:2014:1080 at [290]–[299].
[153] *Eni* EU:T:2014:1080 at [289].
[154] Applying art.90(a) of the Court's Rules of Procedure. See *H&R ChemPharm* EU:T:2014:1081 at [262] and [352].
[155] *Total SA v Commission* (C-597/13 P) EU:C:2015:613.
[156] *Total Marketing Services v Commission* (C-634/13 P) EU:C:2015:614. See generally ECJ Press Release 104/15, 17 September 2015. With thanks to Adélaïde Nys.
[157] *Commission v Tomkins* (C-286/11 P) EU:C:2013:29; [2013] 4 C.M.L.R. 15.
[158] *Total SA* EU:C:2015:613 at [37]–[48].
[159] *Total Marketing Services* EU:C:2015:614 at [18]–[19].
[160] *Total Marketing Services* EU:C:2015:614 at [23]–[24].
[161] *Commission v Verhuizingen Coppens NV* (C-441/11 P) EU:C:2012:778; [2013] 4 C.M.L.R. 8 at [75].
[162] *Total Marketing Services* EU:C:2015:614 at [28].

On the facts, the ECJ concluded that there were other facts which, taken with the lack of public distancing, were enough to conclude that Total Raffinage had continued to participate in the cartel.[163]

As regards the May 2000–June 2001 period, the issue was similar. It appeared that Total Raffinage's representative at a meeting had left in anger ("stormed out … in a state of exasperation" as the company put it) and Total Raffinage had not attended the following three meetings. However, a new representative had then attended the next one.[164]

The GC found that the angry nature of the departure did not amount to public distancing from the anti-competitive practice. The ECJ noted that it could not review such a factual assessment. However, the court considered that the GC had erred in finding that Total Raffinage had to show that it had publicly distanced itself from the cartel, despite the fact that it had not participated in the following three meetings.[165]

Nevertheless, the ECJ considered that there was other evidence which pointed to Total Raffinage's continued involvement, notably that the representative had left the meeting for personal reasons, not because Total wanted to distance itself from the cartel and that, after a new representative had been found, Total started to participate in the collusive meetings again.[166]

Thirdly, Total Raffinage argued that the GC had distorted the evidence.[167] Both Total Raffinage and Repsol had received invitations to attend certain meetings. Yet the GC had incorrectly found that Repsol had *not* received such invitations and had ceased to participate in the infringement.

The ECJ agreed that there had been a distortion of evidence by the GC and that the two companies had been assessed according to different requirements of proof as regards public distancing. As a result, there was an inequality of treatment.[168]

However, since Total Raffinage's participation in the cartel had been upheld on the evidence, the court held that "the possibly unjustified favourable treatment limited to Repsol cannot bring about a reduction in the length of [Total Raffinage's] participation".[169]

Bananas

Dole

In June 2015, the ECJ upheld the GC's ruling on Dole's appeal in the *Bananas* cartel case.[170] It may be recalled that this case concerned weekly, bilateral pre-pricing communications between bananas suppliers in North-West Europe. Dole was in the middle, with contacts on both sides to Chiquita and Del Monte/Weichert. During the calls, these suppliers discussed factors relevant to the quotation price for the forthcoming week, disclosed price trends, or gave indications of quotation prices.[171]

The main issue on appeal was whether such contacts amounted to a restriction of competition by object. The ECJ found that the information concerned (the quotation prices) could be relevant to market signals, market trends, or indications as to the intended development of the banana trade and the information was therefore important for the banana trade and the prices obtained.[172] The court also noted that actual prices were directly linked to the quotation prices in some transactions.[173] The employees of the suppliers who were involved in the pre-pricing communications were also involved in internal pricing meetings.[174]

In such circumstances, the ECJ upheld the GC's ruling that the EC was entitled to treat this as a restriction by object and rely on the presumption that the companies took the information into account in their market behaviour. The discussions reduced uncertainty for each participant as to the foreseeable conduct of competitors, so the EC could conclude that the pre-pricing communications had the object of creating conditions of competition which were not normal and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of art.81 of the EC Treaty.[175]

EC/Del Monte/Weichert

In June 2015, the ECJ also ruled on an appeal by the EC against the GC's judgment reducing the fine on Weichert by 10% in the *Bananas* cartel case; and a further appeal by Del Monte against the same GC judgment, contesting that it formed a single economic unit with Weichert.[176]

Two points are of interest: first, the GC had given Weichert a reduction in its fine on the basis of its co-operation in response to an EC request for information

[163] *Total Marketing Services* EU:C:2015:614 at [31].
[164] *Total Marketing Services* EU:C:2015:614 at [34]–[36].
[165] *Total Marketing Services* EU:C:2015:614 at [40]–[41].
[166] *Total Marketing Services* EU:C:2015:614 at [43]–[45].
[167] See generally, *Total Marketing Services* EU:C:2015:614 at [47]–[55].
[168] *Total Marketing Services* EU:C:2015:614 at [53].
[169] *Total Marketing Services* EU:C:2015:614 at [55].
[170] *Dole Food Co Inc v Commission* (C-286/13 P) EU:C:2015:184; [2015] 4 C.M.L.R. 16.
[171] *Dole* EU:C:2015:184; [2015] 4 C.M.L.R. 16 at [129].
[172] *Dole* EU:C:2015:184; [2015] 4 C.M.L.R. 16 at [130].
[173] *Dole* EU:C:2015:184; [2015] 4 C.M.L.R. 16 at [130].
[174] *Dole* EU:C:2015:184; [2015] 4 C.M.L.R. 16 at [131].
[175] *Dole* EU:C:2015:184; [2015] 4 C.M.L.R. 16 at [134].
[176] *Fresh Del Monte Produce Inc v Commission* (C-293/13 P and C-294/13 P) EU:C:2015:416; [2015] 5 C.M.L.R. 7.

pursuant to art.18(2) of Regulation 1/2003. The court considered that Weichert did not have to reply to that request, whereas the EC considered that it did have to do so, even if the request was not a formal decision requiring that. The ECJ agreed with the EC and reversed the fine reduction.[177]

Secondly, Del Monte argued that Weichert could not be considered to have participated in a single and continuous infringement with Dole and Chiquita, if Weichert was not aware of the bilateral contacts between those two companies, having only exchanged information with Dole.

The ECJ disagreed, finding that in such circumstances a finding of single and continuous infringement could be made, but the liability to be attributed to Weichert had to be limited to that part of the infringement in which it participated.[178] It may be useful to note that the EC did not consider Weichert to be responsible for the single and continuous infringement *as a whole*. Weichert was held responsible only for the collusion with Dole.[179]

Car Glass

Pilkington

In December 2014, the GC upheld the fine of €357 million which was imposed on Pilkington for its role in the *Car Glass* cartel.[180] It may be recalled that in its decision the EC had imposed a fine of €370 million. However, in the course of the court proceedings, Pilkington had pointed out errors in the calculations produced by the EC. This led to the amending decision reducing Pilkington's fine to €357 million.[181]

On appeal, Pilkington argued that the practices concerned should not be considered a single continuous infringement. The GC disagreed.[182] The court also rejected various arguments going to the calculation of the fine. The main points of interest are as follows.

First, the EC had "calibrated" its fining approach into three different phases, a "roll-out period" (as the cartel started), a "central (main) phase" when most of the market was concerned and a "decline phase". Pilkington argued that the fine should have been set based on the last business year of the infringement.

Secondly, Pilkington argued that the EC should not have included sales made under contracts concluded before the infringement period, which were not renegotiated during that period and sales made in the context of car glass supply contracts not shown to have been the subject of collusion.[183]

The GC disagreed. As regards the "calibrated" approach, the court accepted the EC's arguments that its departure from the normal rule was justified in the circumstances because it resulted in a fine which more accurately reflected the characteristics of the cartel.[184]

As regards the sales figures included, the court also agreed with the EC.[185] While the EC could not take into account sales which did not fall within the scope of the cartel, the EC did not have to limit itself only to sales in respect of which it is established that they were actually affected by the cartel.[186] A key point was that the cartel was found to have the objective of stabilising market shares, so it was not necessary to collude on each supply contract.

Marine Hose

Box 8

- *Cartel appeals (3):*
  - — Marine Hose: *EC/Parker Hannifin*:
    - * In May 2013, the GC reduced the fine on Parker Hannifin (PH) which had acquired ITR's marine hose business (ITR Rubber);
    - * the GC found that economic continuity between PH and the acquired business (with the infringement) was not shown, so PH was not responsible for the earlier period of infringement;
    - * ITR had transferred the relevant business into a subsidiary, ITR Rubber, which for some seven months had not had any business activity.
    - * In December 2014, the ECJ overturned that ruling, considering that the GC had not taken into account that ITR controlled ITR Rubber before it was sold to PH and that, as a result, there were structural links between the acquirer and the seller.

EC/Parker Hannifin

This is a judgment on an appeal by the EC.[187] It relates to liability for a subsidiary, which was created as a sales vehicle for the transfer of the marine hose business of ITR to Parker Hannifin.

It may be recalled that in May 2013, the GC ruled that Parker Hannifin was not liable for the unlawful activities of the business transferred, since there had not been the necessary structural links between the parent company involved in the cartel, ITR and the sales vehicle. The GC

[177] *Del Monte* EU:C:2015:416; [2015] 5 C.M.L.R. 7 at [180]–[188] and [202].
[178] *Del Monte* EU:C:2015:416; [2015] 5 C.M.L.R. 7 at [156]–[160].
[179] See *Fresh Del Monte Produce Inc v Commission* (C-293/13 P and C-294/13 P) EU:C:2014:2439, Opinion of A.G. Kokott at [171]–[179].
[180] *Pilkington Group Ltd v Commission* (T-72/09) EU:T:2014:1094; [2015] 4 C.M.L.R. 7. GC Press Release 177/14, 17 December 2014. With thanks to Geoffroy Barthet.
[181] *Pilkington* EU:T:2014:1094; [2015] 4 C.M.L.R. 7 at [36] and [448]. The GC ruled that the EC should pay 10% of Pilkington's costs as a result.
[182] *Pilkington* EU:T:2014:1094; [2015] 4 C.M.L.R. 7 at [128].
[183] *Pilkington* EU:T:2014:1094; [2015] 4 C.M.L.R. 7 at [20].
[184] *Pilkington* EU:T:2014:1094; [2015] 4 C.M.L.R. 7 at [207]–[216].
[185] *Pilkington* EU:T:2014:1094; [2015] 4 C.M.L.R. 7 at [218].
[186] *Pilkington* EU:T:2014:1094; [2015] 4 C.M.L.R. 7 at [221]–[226].
[187] With thanks to Tomasz Koziel. *Commission v Parker Hannifin Manufacturing Srl* (C-434/13 P) EU:C:2014:2456; [2015] 4 C.M.L.R. 6.

had found that the sales vehicle had not pursued any business activity for some seven months, that activity being run by ITR itself in that period.[188] As a result, the GC found that there had not been economic continuity of the business with the unlawful activity to the purchaser.

This result attracted attention as competition and corporate lawyers saw a possible way to insulate purchasers from potential cartel liability.

However, in December 2014, the ECJ annulled that judgment, finding that the GC had not examined whether sufficient economic, legal and organisational links existed between the sales vehicle and ITR so as to pass to the subsidiary the liability for its parent's past conduct. In particular, the GC did not verify if such structural links could have existed between the two companies by virtue of ITR's sole control over the sales vehicle.[189]

The ECJ found that, even if the company that was originally involved in the infringement continues to exist after the sale of assets implicated in a cartel, the liability may follow those assets to another entity.[190] A condition for such transfer of liability is the existence of structural links between the transferor and the transferee at a certain point in time during the infringement. However, the court stressed that no specific, minimum period of time is required during which such links need to exist.[191]

The finding of economic continuity meant that the purchaser was liable for the earlier unlawful activity of the business acquired. It also meant that the ECJ quashed the GC's findings that ITR's fine should not be increased, insofar as it had been a ringleader in the infringement.[192]

Otherwise, the court rejected a claim that the GC had exceeded the scope of Parker Hannifin's appeal by reducing the part of the liability for which the purchaser was jointly and severally liable in its unlimited jurisdiction. However, the ECJ found that the GC had failed to provide sufficient explanations as to how the reduced fine was calculated. As a result, the ECJ annulled that part of the judgment also.[193] This is important because it suggests that the court's exercise of unlimited jurisdiction is still subject to a duty to give adequate reasons.

Overall, the ECJ sent the case back to the GC, so that the lower court could assess if the ITR had exercised decisive influence over the sales vehicle and thus, whether sufficient links existed between the two companies for the cartel liability to be passed on.

LCD Panels

Box 9

- *Cartel appeals (4):*
  - — LCD-Panels: *InnoLux*:
    - * InnoLux's fine after the GC's review was €288 million, based on direct sales to the EEA and a proportion of the value of direct sales to the EEA of transformed goods.
    - * InnoLux argued that it was wrong to take into account intragroup sales *outside* the EEA.
    - * ECJ rejected this, applying *Guardian*: the InnoLux group as a single economic unit sold to the EEA (so there was no extraterritoriality).
    - * NB. A.G. Wathelet strongly disagreed on extraterritoriality (as contrary to *WoodPulp*).

LG Display

In April 2015 the ECJ ruled on an appeal by LG Display against the GC's judgment which essentially upheld the EC's decision in the *LCD Panels* cartel, but reduced it by €5 million.[194] The ECJ rejected LG Display's appeal and confirmed the fine of €210 million imposed on it.

The main issue was that LG Display, a JV owned by LG Electronics and Philips, claimed that the EC and the GC erred in calculating the fine based on the sales of LCD panels, *which LG Display made to its parent companies*, when those sales were made at a preferential (i.e. non-cartelised) price.

LG Display also claimed that the sales to its parent companies were internal sales. However, the ECJ rejected this, noting that the GC had found that the JV was not vertically integrated with its parents, a point not contested by LG Display. Those sales were therefore external sales to independent third parties, not internal sales.[195]

The ECJ then applied *Guardian*[196] and *Team Relocations*,[197] and held that the fines were correctly based on the value of sales in the cartelised market. In that respect, it did not matter whether it had been shown that the sales were actually influenced by the cartel. The mere fact that the sales were made in the affected market was sufficient. Ignoring sales to "structurally linked undertakings" would downplay the economic importance of LG Display in the cartel.[198]

[188] *Parker ITR Srl v Commission* (T-146/09) EU:T:2013:258; [2013] 5 C.M.L.R. 21; see J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2012-2013: Part 1" [2014] I.C.C.L.R. 75, 88–89.
[189] *Parker* EU:T:2013:258; [2013] 5 C.M.L.R. 21 at [49], [54] and [63]–[65].
[190] *Parker* EU:T:2013:258; [2013] 5 C.M.L.R. 21 at [54].
[191] *Parker* EU:T:2013:258; [2013] 5 C.M.L.R. 21 at [51]–[52].
[192] *Parker* EU:T:2013:258; [2013] 5 C.M.L.R. 21 at [67].
[193] *Parker* EU:T:2013:258; [2013] 5 C.M.L.R. 21 at [83]–[85].
[194] With thanks to Tobias Henn. *LG Display Co Ltd v Commission* (C-227/14 P) EU:C:2015:258; [2015] 4 C.M.L.R. 21; ECJ Press Release 41/15, 23 April 2015.
[195] *LG Display* EU:C:2015:258; [2015] 4 C.M.L.R. 21 at [46].
[196] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5.
[197] *Team Relocations NV v Commission* (C-444/11 P) EU:C:2013:464; [2013] 5 C.M.L.R. 38.
[198] *LG Display* EU:C:2015:258; [2015] 4 C.M.L.R. 21 at [53]–[64].

InnoLux

In July 2015, the ECJ also gave an important ruling as regards an appeal by InnoLux against the GC's judgment by which it upheld the EC's decision in the *LCD Panels* cartel case.[199]

This case is essentially about extraterritoriality. The main issue was that the EC had imposed a fine on InnoLux based on its direct sales of the panels to the EEA and a proportion of the value of its direct sales to the EEA of transformed goods (including the panels). After the GC's review the fine was €288 million.[200]

On appeal, InnoLux argued that it was wrong to take into account its intragroup sales outside the EEA.

Interestingly, A.G. Wathelet suggested in his Opinion that the decision should be annulled as contrary to *WoodPulp*.[201] He considered that the GC's judgment was wrong, as was the EC's decision. The critical issue was whether there had been any implementation of the cartel in the EEA, which was not the case as regards the internal sales of panels. There had been no indirect sales of LCDs in Europe; on the contrary, there had been only the sale of finished goods which were not the subject of the cartel.

The Advocate General argued that the EC and GC's approach involved a risk of double jeopardy insofar as the relevant cartel could be subjected to fines and proceedings both in the Far East and in Europe. He also considered that it was wrong to assume that there had been an effect of the cartel on internal sales of InnoLux when the EC had not presented any evidence of that.

However, the ECJ disagreed in an important ruling. The court noted simply that the InnoLux group as a single economic unit/undertaking sold either the cartelised goods or transformed goods including the cartelised products to the EEA. Therefore, the court considered that there was no extraterritoriality.[202]

Then, applying *Guardian*,[203] the court noted that internal sales could be affected, because of passing on of the cartelised price, or if not applied, a downstream advantage to the group.[204] Not to take into account such internal sales would also give an artificial, misleading picture of the economic impact of the infringement.[205]

Animal Feed Phosphates

Box 10

- *Cartel appeals (5):*
  - — Animal Feed Phosphates: *Timab/Roullier*:
    - * EC's first hybrid settlement decision. Timab decided to opt out of the settlement procedure. EC pursued the standard infringement procedure.
    - * During the settlement negotiations Timab was facing a €41–44 million fine (with reductions for settlement, leniency and mitigation included).
    - * In the standard procedure, Timab was fined some €60 million despite the reduction of the duration of its participation in the cartel from 26 to 11 years.
    - * Timab appealed, arguing that it was being penalised for not settling.
    - * GC rejected this: the EC was not bound by the fine range in the settlement procedure.
    - * There were specific reasons for the different fine, notably Timab lost:
      - (i) a fine reduction, because it contested the early period of infringement;
      - and leniency value to the later period;
      - (iii) a reduction for settlement;
      - and the value of its average annual sales used for fining were also higher.

Timab/Roullier

In May 2015, the GC ruled on the appeal by Timab, in the Roullier/CF&R group (Timab) against the EC's decision imposing a fine of €59.8 million in the *Animal Feed Phosphates* cartel case.[206] It may be recalled that in 2010, the EC found that six groups of producers had taken part in a price-fixing and market sharing cartel. As part of that cartel, the EC found that the undertakings allocated sales quotas by region and customer; and co-ordinated prices and, in some cases, the conditions of sales. The cartel was found to have lasted for more than 30 years, between January 1969 and September 2004.

What is interesting about the *Timab* case is that it was the first so-called "hybrid" cartel settlement case. In other words, all of the participants chose to settle the case with the EC save Timab, which decided to pursue its defence, after initially considering settlement. As a result, there was a settlement procedure and a standard infringement procedure in the same case.

The key issue was that during settlement discussions, the EC proposed a fine of between €41 and €44 million, whereas the fine ultimately imposed on Timab amounted to €59.8 million, even though the duration of the infringement was reduced from 26 to 11 years.

Timab argued that this was unlawful in various ways and, in particular, claimed that it was being penalised by the EC for not settling. The GC rejected this.[207]

The main points are as follows.

[199] *InnoLux Corp v Commission* (C-231/14 P) EU:C:2015:451; [2015] 5 C.M.L.R. 13.
[200] *InnoLux Corp v Commission* (T-91/11) EU:T:2014:92; [2014] 4 C.M.L.R. 23. See Ratliff, "Major events and policy issues in EU competition law, 2013–2014 (Part 1)" [2015] I.C.C.L.R. 73, 92–93.
[201] *InnoLux Corp v Commission* (C-231/14 P) EU:C:2015:292, Opinion of A.G. Wathelet; *WoodPulp I: Ahlström v Commission* (C-89/85) [1993] E.C.R. I-1307; [1993] 4 C.M.L.R. 407.
[202] *InnoLux* EU:C:2015:451; [2015] 5 C.M.L.R. 13 at [55], [57] and [70].
[203] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5.
[204] *InnoLux* EU:C:2015:451; [2015] 5 C.M.L.R. 13 at [56].
[205] *InnoLux* EU:C:2015:451; [2015] 5 C.M.L.R. 13 at [62]–[63].
[206] With thanks to Mercedes Segoivano. *Timab Industries v Commission* (T-456/10) EU:T:2015:296; [2015] 5 C.M.L.R. 1; GC Press Release 57/15, 20 May 2015.
[207] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [26].

First, the court held that the EC is not bound by the range indicated as part of the settlement procedure, as that range is an instrument solely and specifically related to procedure.[208] It would also be illogical that the EC would be required to apply a range of fines falling within the scope of a procedure which had been abandoned.[209] That could lead to differences in approach, which is what had happened here.

Secondly, the GC stated that, even in a hybrid case, the principle of equal treatment had to be respected as between those settling and those not.[210] However, the EC had applied the same method to calculate the fine during the settlement procedure and during the standard procedure, so there was no infringement of the principle of equal treatment.[211]

Thirdly, the GC noted that, during the standard procedure, the EC has to consider all new arguments and evidence.[212]

Fourthly, the difference between the fine range presented in the settlement procedure and the ultimate fine imposed was explained by several things, notably the fact that during the settlement proceedings, Timab had offered evidence of an infringement for an earlier period, whereas in the standard procedure Timab had argued that the earlier period was separate to the later period of infringement and time-barred.[213]

As a result, the EC had withdrawn or reduced certain credits given to Timab for its co-operation: 35% for mitigating circumstances and 10% for settling the case. The EC had also given a lesser fine reduction for leniency co-operation (from 17 to 5%) on the basis that Timab's contribution had less value to the later period of infringement. Timab had been the fourth company to approach the EC to co-operate (after an EC inspection and several RFIs).[214]

A key point was also that when you took away Timab's contribution to the evidence in the case, which concerned the earlier years of the cartel, the EC considered that it could only fine Timab for a shorter period, but one in which Timab's average annual sales had been higher. This meant that the basic amount of Timab's fine was also higher.[215]

Finally, it may be of interest to note that Timab argued, among other things, that competition was no longer one of the objectives of the EU, being only mentioned in Protocol 27 on the internal market and competition.[216] That meant the EC should have taken into account, more than ever, the situation of individual undertakings and their specificities (financial, economic and social).

However, the court stated in response that art.3 of the Treaty on European Union, read in conjunction with Protocol 27, "has neither changed the purpose of Article 101 TFEU nor the rules for the imposition of fines". The EC had not erred therefore in not taking into account the economic and social constraints of Timab and a significant drop in its turnover.[217]

Cathode Ray Tubes

In September 2015, the GC issued several judgments in relation to the *Cathode Ray Tubes* cartels case.[218] The GC dismissed the appeals by Samsung, LG Electronics and Philips in their entirety. However, the court upheld pleas by Toshiba and Panasonic, reducing fines on both companies.

Toshiba

It may be recalled that the EC found that Toshiba and others had participated in two separate infringements, each constituting a single and continuous infringement: one for colour display tubes for computer monitors (CDTs) and another for colour picture tubes for television sets (CPTs).

The appeal related to the CPT cartel.[219] The EC found that Toshiba had participated in meetings in Asia from 1999. There were also meetings in Europe and then, in 2002–2003, the structure changed and there were some meetings on medium and extra-large CPTs, with others on small and medium-sized CPTs. The EC considered these meetings to be interconnected.

Toshiba was found to have participated *directly*, by maintaining bilateral contacts from 2000 to 2002 with undertakings forming the core of the cartel and by participating in 2002 in some meetings.

The EC also considered that Toshiba was *indirectly* involved, insofar as it exercised decisive influence over a joint venture called Matshushita Toshiba Picture Display (MTPD), together with Matshushita (later called Panasonic) to which it transferred its cathode ray tubes business in 2003. MTPD was found to have participated in the cartel thereafter.

The EC fined the participants based on their direct sales to customers in the EEA and sales within the same group, where the CPT was incorporated into a finished product sold by one of the addressees of the decision to customers in the EEA. In the case of Toshiba therefore, part of its fine was based on sales *from MTFD to Toshiba*, treating the latter as in the same group as the JV.

[208] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [96].
[209] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [105].
[210] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [72].
[211] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [82].
[212] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [107].
[213] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [78] and [113].
[214] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [86]–[88], [90]–[95] and [182]–[193].
[215] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [177].
[216] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [211].
[217] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [212].
[218] GC Press Release 97/15, 9 September 2015.
[219] *Toshiba Corp v Commission* (T-104/13) EU:T:2015:610; GC Press Release 97/15, 9 September 2015.

The EC had separate fines for the direct and indirect periods of liability.

As regards the period of *direct liability* between 2000 and 2002, Toshiba was found to have had bilateral contacts with Samsung, Thomson and Philips. However, Toshiba claimed on appeal that the EC had not shown that Toshiba was aware of the alleged single and continuous infringement.[220]

Interestingly, noting the *Soliver* judgment[221] and reviewing the evidence, the court agreed with *Toshiba*.[222] The mere fact that there was an identity of object between the meetings in which Toshiba participated and the overall CPT cartel and that Toshiba had contacts with others who participated in that cartel was not sufficient to show that it was aware of the cartel.[223]

The court reviewed the evidence and agreed with Toshiba that the contacts relied upon by the EC to show Toshiba's awareness involved another (unnamed) entity.[224] Other evidence relied on by the EC concerned the CDT cartel, not the CPT cartel,[225] or disclosed exchanges of confidential information, but not that Toshiba was aware of the wider cartel.[226] Or the evidence relied on was found not to be sufficiently clear to be probative.[227]

As regards the period of *direct liability* between 2002 and 2003 (before MTFD was established), Toshiba's claim was similar, namely that, even if it had participated in certain meetings, the EC was wrong to treat that as participation in a single and continuous infringement with various other meetings. Here again the court agreed and found that the EC had not shown that Toshiba was aware of the wider unlawful conduct, or that it intended by its conduct to contribute to the common objectives of those in that cartel.[228]

However, as regards Toshiba's *indirect liability* the court upheld the EC's findings: Toshiba exercised decisive influence with Panasonic over MTPD's conduct on the CPT market and therefore was part of the same undertaking for purposes of art.101 TFEU. As a result, both were jointly and severally liable for MTFD's conduct from 2003 to 2006.[229]

The net result was that Toshiba's fine was reduced by some €28 million, while its liability with Panasonic for the fine of MTFD was upheld. That liability was reduced however, in light of the judgment in the parallel Panasonic and MTPD appeal (from €86.7 million to €82.8 million).[230]

Panasonic

As regards Panasonic's appeal, the main point of interest related to calculation of the fine.[231] In calculating the fine the EC had asked the defendants to provide specific data on their direct EEA sales and direct EEA sales through transformed products. In doing so, the EC recommended calculation based on the average of the value of direct sales in the same period, multiplied by the number of colour picture tubes concerned.

However, the EC also indicated that if this was not representative, the defendant could suggest an alternative basis.[232] This is what Panasonic did; presenting an economicly Panasonic report with the specific data.[233] The method suggested involved taking the *weighted* average of the CPTs associated with transformed products, in terms of size and period concerned.

It then appears that the EC did *not* take those figures into account, because it was concerned this would be challenged as contrary to the principle of equal treatment (if others used the other recommended method).

Interestingly, before the GC, the EC stated that if the court found that the alternative method was more accurate, it did not object to the court using Panasonic's figures (i.e. in its unlimited jurisdiction).[234] This the court did, noting that in the EU courts' unlimited jurisdiction, they could consider the situations before them case-by-case. As a result, the GC reduced three fines, including that on Panasonic from €157 million to €128 million (for parts of which it was jointly liable with others also in reduced amounts).[235]

Exotic Fruit (Bananas)

In June 2015, the GC ruled on appeals by FSL Holdings and its subsidiaries, Pacific Fruit and Firma Leon Van Parys, against the EC's *Exotic Fruit* decision and partially upheld the appeal.[236] It may be recalled that this case involved an EC decision finding the existence of a price-fixing agreement between Chiquita and several other companies involved in the supply of bananas in Greece, Italy and Portugal between 2004 and 2005.

The EC held that the agreement restricted competition by object based on submissions made by the leniency applicant, Chiquita and on documents transmitted by the

[220] *Toshiba* EU:T:2015:610 at [46].
[221] *Soliver NV v Commission* (T-68/09) EU:T:2014:867; [2014] 5 C.M.L.R. 24.
[222] *Toshiba* EU:T:2015:610 at [52]–[56].
[223] *Toshiba* EU:T:2015:610 at [56].
[224] *Toshiba* EU:T:2015:610 at [57]–[63].
[225] *Toshiba* EU:T:2015:610 at [64].
[226] *Toshiba* EU:T:2015:610 at [65].
[227] e.g. *Toshiba* EU:T:2015:610 at [76]–[77].
[228] *Toshiba* EU:T:2015:610 at [84]–[87].
[229] *Toshiba* EU:T:2015:610 at [122] and [136].
[230] *Toshiba* EU:T:2015:610 at [146]–[148] and [235].
[231] *Panasonic Corp v Commission* (T-82/13) EU:T:2015:612. With thanks to Maria Koliasta.
[232] *Panasonic* EU:T:2015:612 at [164].
[233] *Panasonic* EU:T:2015:612 at [153] and [165].
[234] *Panasonic* EU:T:2015:612 at [163].
[235] *Panasonic* EU:T:2015:612 at [152]–[169] and [189]–[190].
[236] With thanks to Adélaïde Nys. *FSL Holdings v Commission* (T-655/11) EU:T:2015:383; [2015] 5 C.M.L.R. 6.

Italian tax authority to the EC. The EC fined Pacific Fruit €8.9 million for its involvement and held FSL and Firma Léon Van Parys jointly and severally liable.

There are two main points of interest.

First, the GC ruled that the evidence obtained from the Italian tax authority was admissible and rejected Pacific Fruit's claim that the EC breached Pacific Fruit's rights of defence by failing to inform the company of this evidence before issuing the SO.[237]

The court noted that art.12 of Regulation 1/2003, which requires that information exchanged within the ECN shall not be used for other purposes, could not be used to infer a general prohibition on the EC using evidence obtained *by another national authority* in the exercise of its tasks.[238]

The court noted that the lawfulness of transmission of evidence to the EC by a national authority is a matter of national law. Since the evidence transmitted in the present case had not been declared unlawful by a national court, it could not be regarded as inadmissible evidence.[239]

The GC also found that the EC was not required to inform the claimants of the transmission of documents by a national authority before the notification of the SO.[240]

Secondly, Pacific Fruit challenged the EC's finding of a single and continuous infringement.

Interestingly, here the court found that there was a "single" infringement, since the various manifestations of the cartel concerned the same object and the same subjects.

However, the GC agreed with Pacific Fruit that the EC had not provided sufficient evidence of facts "sufficiently proximate in time" in part of the alleged cartel duration.[241] In the specific market characteristics of the banana business in which price negotiations occur every week, an absence of evidence for a period of some five months from an infringement period of a little over eight months suggested an interruption of the infringement. The infringement was therefore "single and repeated", not "single and continuous".[242] The GC therefore reduced the fine from €8.9 million to €6.6 million.[243]

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

- Other European court rulings, including:
  - Other cartel appeals on the *Heat Stabilisers*, *Pre-stressing Steel* and *Chloroprene Rubber* cases; and
  - Article 102 TFEU rulings on exclusionary rebates (*Post Danmark II*) and injunctions related to standard essential patents (*Huawei*);
- European Commission decisions on:
  - Cartels (including the *North Sea Shrimps* decision and various new cases);
  - "pay-for delay" (*Fentanyl* and *Citalopram*); and
- Recent ECN/policy issues, such as regards online hotel bookings.

[237] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [41].
[238] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [77].
[239] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [45]–[46].
[240] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [97].
[241] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [494] and [496].
[242] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [497].
[243] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [500] and [564].