Major Events and Policy Issues in EU Competition Law, 2014–2015 (Part 2)

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Abuse of dominant position; Anti-competitive practices; Cartels; Discounts; EU law; Injunctions; Standard-essential patents

This is the second and final part of the overview of "Major Events and Policy Issues in EU Competition Law, 2014–2015", following on from Part 1 published in last month's journal.[1] The reference period is from November 2014 until the end of October 2015.[2]

The first part of the article summarises the remaining European Court rulings on: (1) cartel appeals, including the *Heat Stabilisers*, *Pre-Stressing Steel* and *Chloroprene Rubber* cases[3]; and (2) art.102 TFEU rulings on exclusionary rebates (*Post Danmark II*) and injunctions related to standard essential patents (*Huawei*).

The second part is devoted to the EC's recent decisions and settlements: (1) those on cartels, including various new cases and the older *North Sea Shrimps* decision which has been published this year (with the issue of taped conversations as evidence); (2) those on "pay-for delay", including the important *Fentanyl* and *Citalopram* cases (with the issues of competition law and, in particular, restriction by object in the context of patent settlements); and (3) other settlements and proceedings on arts 101 and 102 TFEU, including *Skyteam*, *Bulgarian Energy*, *Google* and *Gazprom*.

Finally, we outline the EC's new sectoral inquiry into e-commerce, the ECJ's Opinion on EU accession to the ECHR, and ECN activity as regards online hotel bookings.

European court judgments (cont'd)

Cartel appeals (cont'd)

Heat Stabilisers

Box 1

- *Cartel appeals—(6)*
  - — Heat Stabilisers
    - * *Akzo*:
      - ▪ consequences of ECJ ruling that appeals do not have *erga omnes* effects;
      - ▪ EC could not give Akzo four working days to comment on a letter and three working days to comment on an email modifying joint and several liability;
      - ▪ similar point in *GEA* suggesting that the EC should have given GEA the right to be heard before amending decision.
    - * *AC-Treuhand*:
      - ▪ facilitator of cartel considered liable as having participated in cartel;
      - ▪ question of ensuring full effectiveness of art.101 TFEU;
      - ▪ EC fine relying on para.37 of the Fining Guidelines upheld, even though not linked to fees concerned.
  - — Pre-Stressing Steel:
    - * many judgments (10), many appeals (28);
    - * most upheld EC decision;
    - * *Voestalpine and Voestalpine Austria Draht (VAD)*:
      - ▪ VAD liable for actions of its agent with which it formed a single economic unit, where the agent acted in the scope of its authority (Italy), even though agent also in another single economic unit with another cartel participant.

Akzo

In July 2015, the GC ruled on appeals by *Akzo* (and related subsidiaries) against the EC's decision in the *Heat Stabilisers* cartel.[4] It may be recalled that the EC took this decision in November 2009. Then, in March 2011 in the *ArcelorMittal* case,[5] the ECJ ruled that the lodging of an appeal only has the effect of suspending the running of

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[1] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page: *http://ec.europa.eu/competition/index_en.html* [Accessed 25 January 2016]. References to "I.C.C.L.R" are to previous articles in the series, "Major Events and Policy Issues in (formerly EC) EU Competition Law", published in the *International Company and Commercial Law Review*.

[2] "TFEU" is the abbreviation for "Treaty on the Functioning of the European Union"; "EC" for "European Commission" (not "European Community", as before the Lisbon Treaty); "GC" is the abbreviation for "General Court", "ECJ" for the "European Court of Justice" and "CJEU" for the overall "Court of Justice of the European Union"; "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".

[3] This year we have not dealt with Transparency Regulation/confidentiality cases, such as *Axa Versicherung* (T-677/13) EU:T:2015:473, judgment of 7 July 2015; *Evonik* (T-341/12) and *Akzo* (T-345/12) EU:T:2015:51 and EU:T:2015:50, judgments of 28 January 2015; *Pilkington* (T-462/12) and *AGC Glass* (T-465/12) EU:T:2015:508 and EU:T:2015:505, judgments of 15 July 2015.

[4] *Akzo Nobel NV v European Commission* (T-47/10) EU:T:2015:506; [2015] 5 C.M.L.R. 9; and *Akzo Nobel NV v European Commission* (T-485/11) EU:T:2015:517; [2015] 5 C.M.L.R. 10, judgments of 15 July 2015.

[5] *ArcelorMittal Luxembourg SA v European Commission* (C-201/09 P and C-216/09 P), EU:C:2011:190; [2011] E.C.R I-2239; [2011] 4 C.M.L.R. 21.

the limitation period for the company which actually appeals, not "*erga omnes*" as regards all those in the proceedings concerned.

As a result, in June 2011 the EC accepted that its decision imposing fines on Ciba/BASF and Elementis was taken outside the limitation period and "repealed" its decision accordingly. In the decision, the Akzo group companies were therefore held jointly and severally liable for the fines previously shared with Elementis.

Akzo and its subsidiaries appealed.

In Case T-485/11,[6] the GC agreed with their claim, finding that the EC had denied the companies' rights of the defence, notably their right to defend themselves better.[7] Akzo argued that its companies should have been sent a new or supplementary SO as regards the EC's amendment decision in June 2011,[8] whereas it had just been sent a letter and then later an email, informing them of the EC's proposed amendment of its decision and inviting them to make their views known.

Akzo had replied, stating that the proposed amendment would mean that Akzo would be required to pay all of the fine which previously they had been ordered to pay jointly and severally with Elementis, even though the amount of the fine would not change. Further, the companies indicated that they were not in a position to make a correct assessment of their legal situation and "reserved their rights".[9]

Without ruling on whether the Akzo group companies should have been sent a new SO before the EC adopted the amendment decision, the GC ruled that the EC had not given the companies long enough to make their views known. The EC had given the companies only four working days in which to reply to the EC's letter and then three working days to reply to the subsequent email. The court stated that "[s]uch short periods are not compatible with respect for the rights of the defence".[10]

As a result the amendment decision had to be annulled; if this procedural irregularity denied Akzo the ability to defend itself better. The court then considered that issue and concluded that was the case since, at the time, the issue of joint and several liability between companies which formed a single undertaking was a matter of debate[11]; and the companies might also have been better able to defend themselves on the issue as to how the *ArcelorMittal* case applied to the facts of joint and several liability with Elementis,[12] if they had had sufficient time to make their views known.

In Case T-47/10,[13] four Akzo companies including the group parent appealed against the fines imposed in the EC's 2009 decision. The main issues were: what were the consequences of the length of the EC proceedings, insofar as these had been extended by Akzo's challenge to the inspection on legal privilege issues[14]; and again questions going to joint and several liability.

As regards the *length of proceedings*, the EC had defined a first infringement period ending in June 1993, but had only taken its first actions for the purpose of the investigation at the beginning of 2003. The GC therefore agreed with Akzo and found that the EC was time-barred from imposing a fine on the Akzo companies concerned for that period under art.25(1) of Regulation 1/2003, which sets a five-year period of limitation.

It appears that the EC's essential position was that the running of time for limitation purposes (as a result of the legal privilege proceedings) did not apply to the Akzo undertaking as a whole.[15] However, the court noted that the procedural safeguard of the limitation period applies to each *legal person* separately.[16] Action against subsidiaries in a group might therefore be time-barred, while action against a parent company would not be. As a result two Akzo subsidiaries could legitimately invoke the time-bar, even though the parent itself could not do so.[17]

A second issue of interest was that the EC had itself reduced the fines in its decision by 1% for all concerned, on account of the length of the proceedings, *but not for Akzo Nobel*. The EC argued that Akzo was responsible for instigating the Akzo procedural proceedings which led to the extended duration of the case, so it could not benefit.[18]

The court disagreed, finding that the EC's approach "marred [the EC's 2009] decision with unjustified unequal treatment".[19] Akzo Nobel's fine was therefore also reduced by 1% in the court's unlimited jurisdiction.[20]

As regards *joint and several liability*, there were two main points.

First, Akzo argued that the EC should not have found it jointly and severally liable for the actions of a partnership which the EC had considered independent and full-function in merger control.[21] The GC disagreed.

[6] *Akzo Nobel* EU:T:2015:517; [2015] 5 C.M.L.R. 10.
[7] *Akzo Nobel* EU:T:2015:517; [2015] 5 C.M.L.R. 10 at [72], [77] and [82].
[8] *Akzo Nobel* EU:T:2015:517; [2015] 5 C.M.L.R. 10 at [60]–[62].
[9] *Akzo Nobel* EU:T:2015:517; [2015] 5 C.M.L.R. 10 at [23]–[26].
[10] *Akzo Nobel* EU:T:2015:517; [2015] 5 C.M.L.R. 10 at [69]–[71].
[11] *Akzo Nobel* EU:T:2015:517; [2015] 5 C.M.L.R. 10 at [73]–[77].
[12] *Akzo Nobel* EU:T:2015:517; [2015] 5 C.M.L.R. 10 at [82].
[13] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9.
[14] *Akzo Nobel Chemicals Ltd v European Commission* (C-550/07 P) EU:C:2012:512; [2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19.
[15] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [115].
[16] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [126], applying *Bolloré* (T-372/10) EU:T:2012:325.
[17] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [124]–[129].
[18] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [326].
[19] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [329].
[20] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [330].
[21] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [389]–[390].

The EC's merger control ruling did not prevent the EC from subsequently finding that the parent companies actually exercised decisive influence on the partnership.[22]

Secondly, Akzo argued that, at most, it should have been liable for half of the liability of the partnership, whereas the EC held it responsible for all of the fine—the claim against Elementis, the other parent, being time-barred.

The GC disagreed. The EC was entitled to hold companies in a single economic unit jointly and severally liable in order to ensure recovery of the fines. However, the court noted that the EC was not entitled to determine the shares payable as between the companies concerned "in the context of their internal relationship".[23] That issue fell to be determined at a later stage by the national courts.[24]

The net result was that the fines on two Akzo subsidiaries were annulled and the total amount of fines on Akzo Nobel was reduced from €40.6 million to €40.19 million and on Akcros Chemicals from €12 million to €11.88 million. The other claims were dismissed.

GEA Group

In July 2015, the ECJ ruled on a similar point on the rights of the defence on an appeal by the GEA Group.[25] In the *Heat Stabilisers* cartel decision, the GEA Group had been held jointly responsible with another company, ACW, for two fines by virtue of direct or indirect ownership.

Then, in December 2009, ACW contacted the EC explaining that the fine imposed exceeded 10% of its turnover, contrary to art.23(2) of Regulation 1/2003. As a result, the EC took a new decision in February 2010, reducing the amount payable by ACW, but stating that the amounts payable by GEA Group (and another company jointly responsible for part of the fine) remained unchanged.

GEA appealed, noting that neither had it been heard on the issue, nor had it had access to file before the EC's modifying decision. Further, GEA argued that the decision modified its rights to recover from one of its co-debtors, ACW and varied to its detriment the allocation of the fine in the EC's 2009 decision.[26]

The GC agreed and annulled the EC's second decision.[27] In particular, the court noted that at the time of that decision, there was scope to debate various issues of joint liability, so the GEA Group had been denied the ability to better conduct its defence.[28] In addition, the EC's second decision had resulted in a situation where GEA's liability as parent company was greater than that of its subsidiary, although derived from the latter's liability. The court's case law since the EC's decision made it clear that this is unlawful.[29]

Otherwise, the GC rejected the GEA Group's appeal against the EC's decision in November 2009.[30]

AC-Treuhand

It may be recalled that in 2009 the EC found that AC-Treuhand, a Swiss consultancy, had *participated* in the *Heat Stabilisers* cartel, among other things, by organising and actively participating in meetings, collecting and transferring data, and offering to act as a moderator of disagreements between cartel members.[31]

In its decision, the EC held AC-Treuhand liable for setting up and facilitating the cartel meetings, although AC-Treuhand was *not active* in the markets affected by the cartels. The EC imposed two fines of €174,000 on AC-Treuhand; one for each infringement. AC-Treuhand appealed first before the GC, which dismissed the action in its entirety in 2014[32] and then before the ECJ.

In October 2015, the ECJ upheld the judgment of the GC.[33] The court stated that art.81 of the EC Treaty also applied to cartel facilitators, which were not present on the cartelised markets.

The main points of interest in the ECJ judgment are as follows.

First, AC-Treuhand argued that the GC had wrongly found that "the conduct of a consultancy firm which provides assistance to a cartel by supplying services falls within the scope of Art. 81(1) (of the EC Treaty)", and "that interpretation was reasonably foreseeable at the time the infringements were committed".[34]

The ECJ disagreed, stating that there was nothing in the wording of art.81(1) of the EC Treaty that indicated that only parties active in the relevant markets are caught.[35] On the contrary, the EC (only) had to show that the undertaking concerned intended to contribute through its conduct to the common objectives of the cartelists and that it was aware or could reasonably have foreseen the conduct foreseen.[36] AC-Treuhand did not have to be participating in the market in question.[37]

The court then referred to the full effectiveness (*effet utile*) of art.81 of the EC Treaty:

[22] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [402]–[404] and [407]–[408].
[23] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [424]–[431].
[24] Applying *European Commission v Siemens AG Österreich* (C-231/11 P) EU:C:2014:256; [2014] 5 C.M.L.R. 1.
[25] With thanks to Maude Vonderau; *GEA Group AG v Commission* (T-189/10) EU:T:2015:504, judgment of 15 July 2015.
[26] *GEA Group* EU:T:2015:504 at [60]–[63].
[27] *GEA Group* EU:T:2015:504 at [71]–[72].
[28] *GEA Group* EU:T:2015:504 at [77].
[29] *GEA Group* EU:T:2015:504 at [78]–[82].
[30] *GEA Group AG v Commission* (T-45/10) EU:T:2015:507, judgment of 15 July 2015.
[31] With thanks to Maude Vonderau.
[32] *AC-Treuhand AG v European Commission* (T-27/10) EU:T:2014:59, judgment of 6 February 2014.
[33] *AC-Treuhand AG v European Commission* (C-194/14 P), EU:C:2015:717; [2015] 5 C.M.L.R. 26.
[34] *AC-Treuhand* EU:C:2015:717; [2015] 5 C.M.L.R. 26 at [17].
[35] *AC-Treuhand* EU:C:2015:717; [2015] 5 C.M.L.R. 26 at [27].
[36] *AC-Treuhand* EU:C:2015:717; [2015] 5 C.M.L.R. 26 at [30].
[37] *AC-Treuhand* EU:C:2015:717; [2015] 5 C.M.L.R. 26 at [33]–[35].

> "[AC-Treuhand's interpretation of art.81] would mean that it would not be possible to put a stop to the active contribution of an undertaking to a restriction of competition simply because that contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about."[38]

Secondly, AC-Treuhand argued that it was not "reasonably foreseeable" that its conduct would fall within art.81(1) of the EC Treaty. The court disagreed. Even though at the time of the infringements the EU courts had not specifically ruled on the conduct of a consultancy firm, AC-Treuhand should have expected, if necessary after taking appropriate legal advice, that its conduct would be considered incompatible with the EU competition rules, especially in the light of the broad scope of the terms "agreement" and "concerted practice" in the court's case law.[39]

Thirdly, AC-Treuhand claimed that the imposition of a lump sum fine by the EC was unlawful. AC-Treuhand's concern here was with the way that the EC had applied para.37 of the 2006 Fining Guidelines, insofar as the EC considered that it was not appropriate simply to look at AC-Treuhand's fees for its services. The court disagreed, noting that a fine linked to the remuneration received by the consultancy would not accurately reflect the economic importance of the infringements in question, or the extent of AC-Treuhand's individual participation in those infringements.[40]

Pre-Stressing Steel

In June 2010, the EC took a decision against a cartel in the market for pre-stressing steel.[41] Between 2010 and 2014, 28 actions were brought before the GC against the decision. In July 2015, the GC gave 10 judgments, which represent 12 out of the 28 actions.[42] The court dismissed most of them. In some judgments, the GC found and considered fine reductions appropriate. However, only two companies benefited because some reductions did not take the fines below the 10% of turnover cap which the EC had already applied.

The most interesting judgment is *voestalpine and voestalpine Alpine Draht* (VAD), insofar as it involves a company liable as in a single economic unit with its agent, while that agent also acted for another company.

voestalpine and voestalpine Austria Draht

In this case, the GC confirmed VAD's liability for its agent's unlawful participation in the cartel.[43]

VAD argued mainly that this should not be the case because the agent also acted for another cartel member, CB.[44] However, the court held that, even so, VAD was liable since the agent had to be regarded as forming part of an undertaking with VAD.[45]

First, the court considered the commercial relationship between VAD and the agent, noting that the latter took little financial risk. The court then considered whether the relationship with CB made the agent independent vis-à-vis VAD and concluded that it did not. The court found that the agent was, in fact, in a single economic unit with VAD *and* a single economic unit with CB (save in each case when the agent was acting for the other principal) and held VAD liable for the agent's acts to the extent that it was acting within its authority for VAD, i.e. here in Italy.[46]

Interestingly, as far as the court was concerned the key point was not whether the agent acted exclusively for a principal, but whether a second representation meant that the agent would act independently in the first representation.[47]

VAD also argued that the EC had failed to establish that it had participated in the essential aspects of the wider European cartel which were outside Italy. The GC agreed, finding that the agent's anti-competitive actions outside the Italian market could not be imputed to VAD.[48] However, VAD could be considered to have had sporadic contacts with cartel members from whom it might have learned of the wider European cartel.[49]

Taking all this into account, the GC reduced the fine, in its unlimited jurisdiction, from €22 million to €7.5 million.[50]

SLM and Ori Martin

A regards these companies, the court upheld various claims of lesser participation on the evidence and reduced SLM's fine from €19.8 million to €19 million, while reducing the part of the fine for which its parent Ori Martin was liable from €14 million to €13.3 million.[51] However, in practice the ruling had no impact, since the fine had been reduced to €1.9 million already by virtue of the 10% of turnover ceiling cap.

[38] *AC-Treuhand* EU:C:2015:717; [2015] 5 C.M.L.R. 26 at [36]
[39] *AC-Treuhand* EU:C:2015:717; [2015] 5 C.M.L.R. 26 at [43].
[40] *AC-Treuhand* EU:C:2015:717; [2015] 5 C.M.L.R. 26 at [64]–[67].
[41] With thanks to Geoffroy Barthet, Itsiq Benizri, Maria Koliasta and Adélaïde Nys.
[42] GC Press Release 83/15, 15 July 2015.
[43] *voestalpine and voestalpine Wire Rod Austria v Commission* (T-418/10) EU:T:2015:516, judgment of 15 July 2015.
[44] *voestalpine* EU:T:2015:516 at [130]–[163].
[45] *voestalpine* EU:T:2015:516 at [148] and [288].
[46] *voestalpine* EU:T:2015:516 at [160].
[47] *voestalpine* EU:T:2015:516 at [153]–[157].
[48] *voestalpine* EU:T:2015:516 at [180] and [379]–[395].
[49] *voestalpine* EU:T:2015:516 at [396]–[398].
[50] *voestalpine* EU:T:2015:516 at [442]–[447] and [450]–[469].
[51] *SLM v Commission* (T-389/10 and T-419/10) EU:T:2015:513, judgment of 15 July 2015 at [452].

Fapricela

As regards Fapricela,[52] the court found that the EC had not shown that Fapricela was aware of the existence of the European cartel as a whole. The court considered that Fapricela was only aware of and involved in the Spanish part.[53] As a result, the GC reduced the fine from €18.4 million to €17 million. However, since this was not lower than the fine imposed already as a result of the 10% of turnover cap, €8.9 million, the ultimate fine remained unchanged.[54]

Trafilerie

In July 2015, the GC ruled on an appeal by Trafilerie. The court confirmed that the EC may reduce fines for mitigating circumstances that are not mentioned in the 2006 Fining Guidelines and that the EC must take into account the different degrees of involvement of cartel participants.[55]

However, the court considered that the reduction applied by the EC did not sufficiently take into account the circumstances which the EC raised itself—namely that Trafilerie operated "on the edge of the cartel", only in the Italian part of the cartel, did not export from Italy and had attended only a limited number of meetings.[56] As a result, the GC, in its unlimited jurisdiction, reduced the fine on Trafilerie from €9.5 million to €5 million.[57] In practice, this did not change the fine, as it was still above the 10% ceiling of Trafilerie's worldwide turnover and had been limited to €3.2 million already.

WDI and others

The court also considered the issue of inability to pay as regards several companies and found that the EC had erred in its assessments.[58] The court then assessed that issue itself and rejected the claims, concluding that the companies concerned had not shown that the fine imposed on them would result in their assets losing all value.[59]

Chloroprene Rubber

EC, Versalis and ENI In March 2015, the ECJ ruled on an appeal by Versalis and Eni and a cross-appeal by the EC against the GC's judgments in the *Chloroprene Rubber* cartel case.[60]

The ECJ dismissed the appeals, save that, as regards the GC's ruling on recidivism, it substituted new reasoning. The issue was (again) that the EC had increased the fine on Eni for recidivism by 60%, noting that Eni's subsidiary Anic had participated in the *polypropylene* cartel and another Eni subsidiary, Enichem, had participated in the *PVC* cartel (and Versalis was a repeat offender also).[61] The EC's view was that this was enough, since Eni formed "an undertaking" with its subsidiaries.

The GC found that recidivism could not be found as regards Eni and reduced the fine increase from 60 to 50% (for Versalis).[62] The court found that the EC had not shown that the subsidiaries formed a single economic unit with Eni, noting that Eni had not been sent an SO indicating the objections against it, or in which capacity it was called upon to answer the allegations. Then the GC continued:

> "[I]t cannot be accepted that … the Commission is entitled to decide that Eni should be held liable for a previous infringement *in relation to which it was not penalised and in which it was not the addressee of a statement of objections*, with the result [that it could not dispute whether it was in a single economic unit with Anic and Enichem at the time of the earlier infringement]."[63] (Emphasis added.)

The EC argued that this went too far, while Eni considered the judgment correct because it had not been the addressee of SOs in the two earlier cartels.

The ECJ disagreed with the GC's approach and presented a new formulation of the recidivism rule here, focusing on the *second* proceedings, not the first.

First, the court agreed with the EC that for recidivism, it was not necessary for Eni to have been the subject of previous legal proceedings giving rise to an SO and a decision. What matters is a finding of infringement by a subsidiary in previous proceedings, with which the parent company in the second infringement formed a "single undertaking".[64]

Secondly, the court stated that respect for the rights of the defence did not require that the legal person in the second infringement had been able to dispute in the proceedings as regards the first infringement that it formed a single economic unit with other entities against which proceedings were also brought: "What matters is

[52] *Fapricela v Commission* (T-398/10) EU:T:2015:498, judgment of 15 July 2015.
[53] *Fapricela* EU:T:2015:498 at [139]–[143].
[54] *Fapricela* EU:T:2015:498 at [434]–[436].
[55] *Trafilerie Meridionali SpA v European Commission* (T-422/10) EU:T:2015:512, judgment of 15 July 2015.
[56] *Trafilerie* EU:T:2015:512 at [302]–[329].
[57] *Trafilerie* EU:T:2015:512 at [400]–[406].
[58] See, e.g. *Westfälische Drahtindustrie (WDI) v Commission* (T-393/10) EU:T:2015:515, judgment of 15 July 2015, at [304]–[324] and [331]–[332].
[59] *WDI* EU:T:2015:515 at [333]–[358].
[60] *European Commission v Versalis SpA* (C-93/13 P and C-123/13 P) EU:C:2015:150; [2015] 4 C.M.L.R. 11.
[61] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [20].
[62] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [29].
[63] Quoted at [77] of the ECJ's judgment in *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11.
[64] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [91].

simply that that *legal person must be able to defend itself at the time when the repeated infringement is alleged against it*."[65] (Emphasis added.)

Thirdly, the court stated that, in a case such as this one (i.e. where the parent faced no SO in the first proceedings), the SO in the second proceedings had to contain information showing that the conditions for recidivism were satisfied, in particular proving that Eni formed at the time of the first infringement a single undertaking with the company found to have committed the first infringement. In other words, that Eni already exercised decisive influence over the subsidiaries at the time of the first infringements.[66]

Fourthly, the EU Courts had to take into account all the circumstances, including possible difficulties of proof resulting from the time elapsed since the first infringement, structural changes in the undertaking or the evolution of the competition rules.[67]

Fifthly, in its decision the EC had to prove that the conditions for recidivism were shown and provide the court with a statement of reasons enabling it and the company concerned to understand in what capacity and to what extent that company was alleged to have been involved in the earlier infringement—in particular, that the EC alleged that the company was part of the undertaking to which the earlier decision was addressed.[68]

However, the ECJ did not overturn the GC's ruling. The court noted that, without even examining the SO (in the second infringement case), the EC had only mentioned in the decision that Enichem had been the addressee of previous cartel activities already, referring to a footnote citing the *Polypropylene* case, where the EC had found that Anic, a subsidiary of the Eni Group, participated in the cartel and to the *PVC II* decision, where the EC found that Enichem participated in the cartel. The EC also stated that Eni was a repeat offender, without further explanation.[69]

Since the *Polypropylene* and *PVC* decisions had been addressed to Anic and Enichem respectively, this did "not at all enable it to be understood in what capacity and to what extent" Eni was involved in these infringements.[70] This did not allow Eni to defend itself, nor the court to carry out its review and was not enough.

The result was that the ECJ upheld the GC's ruling that Eni's fine could not be increased for its recidivism, although the ECJ substituted these grounds for those of the GC. (Versalis' recidivism was otherwise upheld.)[71]

Article 101 TFEU

Ordre National des Pharmaciens

In December 2014, the GC upheld the EC's decision that the French *Ordre National des Pharmaciens* (ONP) had restricted competition on the clinical biology analysis market. However, the court reduced the fine imposed from €5 million to €4.75 million.[72]

It may be recalled that the EC had found that the ONP had restricted competition: (1) by preventing groups of laboratories from developing; and (2) by attempting to impose a minimum price on the French market for clinical biology analysis.

On appeal ONP argued that its actions were those of a public authority to which the competition rules did not apply. However, the court rejected this, noting that ONP did not have regulatory powers and brought together pharmacists, at least some of whom carried on an economic activity and could be regarded as undertakings. At least as regards the conduct complained of, the ONP could not claim to be acting merely as an extension of the public authorities.

The court upheld the EC's finding that the ONP had attempted to prevent the participation by groups in the capital of laboratories—with the aim of reducing the threat of the development of groups of laboratories—competing with the numerous smaller laboratories active on the market. The GC also confirmed the EC's assessment that ONP's conduct had the object of imposing a minimum market price by prohibiting laboratories from 2005 onwards from granting discounts above a ceiling of 10%.

So, in general, the GC upheld the EC's decision. However, the GC decided to reduce the fine imposed on ONP from €5 million to €4.75 million, because there was a French government circular in existence which could have led the ONP to think that prefectural approval was required in certain cases of structural changes to companies' operating laboratories. The court considered that the EC should have recognised that this was a mitigating circumstance, although that circumstance would only apply to part of ONP's conduct. In the circumstances, the GC considered that it was therefore appropriate to reduce the fine by €250,000.[73]

Article 102 TFEU

Box 2

- *Article 102 TFEU (1)*
  - *— Post Danmark II*

[65] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [93].
[66] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [96].
[67] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [97].
[68] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [98].
[69] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [99].
[70] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [100].
[71] *Versalis* EU:C:2015:150; [2015] 4 C.M.L.R. 11 at [101]–[102].
[72] *ONP v Commission* (T-90/11) EU:T:2014:1049, judgment of 10 December 2014; GC Press Release 168/14, 10 December 2014.
[73] *ONP v European Commission* EU:T:2014:1049 at [155] and [377]–[382].

* Post Danmark (PD) had a statutory monopoly including some bulk advertising mail; and applied conditional rebates on yearly agreed targets retroactively;
* considered very dominant in a market where entry barriers were high and economies of scale significant;
* ECJ found the rebate exclusionary given its retroactive nature, based on a year reference period;
* the Danish Competition Authority had found that for half of the market, two-thirds of customers could not switch without adverse loss of rebate;
* important that the rebate applied both to PD's monopoly on some sizes of bulk mail and the contestable part of demand;
* regard to the "as-efficient competitor" (AEC) test in the EC Guidance on its Enforcement priorities under art.82 EC is not necessary:
    - irrelevant here given the structure of the market; and
    - "one tool amongst others".
* A rebate had to have an actual or likely/probable effect on competition, but there is no appreciability (de minimis) threshold since, "by its nature" such a rebate is considered abusive. No need to show that it is "serious or appreciable".

Post Danmark II

In October 2015, the ECJ considered whether a retroactive rebate scheme implemented by Post Danmark (PD) in 2007 and 2008 as regards bulk advertising mail was contrary to art.82 of the EC Treaty.[74]

The background was as follows: the rebate applied over a certain *volume or value* threshold per year with a scale from 6 to 16% (i.e. it was conditional on meeting these thresholds). It was standardised in the sense that all customers were entitled to obtain rebates on that scale, as appropriate. PD and a customer would estimate a quantity of mailing for a year and then settle up at year end, either with PD paying more rebate, or the customer paying PD back.

Importantly, PD had a statutory monopoly for letters, including bulk advertising mail below a certain weight, to fund a universal service obligation for letters and parcels. The rebate applied to all advertising mail with PD, including that covered by its monopoly or in areas not covered by other operators.

A subsidiary of Poste Norge, Bring Citymail, sought to enter the market in Denmark, but withdrew after three years with losses. Bring Citymail then complained to the Danish Competition Authority (DCA) that PD had abused its dominant position with this rebate scheme.

The DCA agreed, finding that PD was an "unavoidable trading partner" for bulk mail, with 95% market access, in a market characterised by high barriers to entry and significant economies of scale.[75] The DCA also found that PD had structural advantages through its statutory monopoly which carried over 70% of all bulk mail in Denmark. So, in its area of coverage, Bring Citymail could only compete on 30% of mail.

The DCA also found that for 25 of PD's customers, representing approximately one half of the transactions in the relevant market, some two-thirds of direct advertising mail could *not* be transferred from PD to Bring Citymail, without an adverse effect on the scale of rebates.[76]

The DCA found the rebate exclusionary. It considered that it did not have to base its assessment on the "as-efficient" competitor test referred to in the EC's Guidance on its Enforcement Priorities as regards art.82 EC.[77]

On appeal in the Danish courts, the Maritime and Commercial Court asked the ECJ for guidance on assessing whether this was an exclusionary rebate contrary to art.82 EC and the relevance of the "as-efficient competitor" test. Further, the court asked how "probable and serious" an anti-competitive effect did such a rebate need to have, and whether the foreclosure effect had to be appreciable.[78]

As regards *guidance*, the ECJ took an orthodox approach. The court noted that the rebate was standardised, conditional and retroactive over a year, and recalled the *Michelin I*,[79] *British Airways*[80] and *Tomra*[81] cases. The court found that the rebate was not a "simple" one (linked to an order), or a loyalty rebate (linked to exclusivity or fixed requirements of purchase).[82]

The court then focussed on whether the rebate was capable of having an exclusionary effect, and concluded that it was, given that its retroactive nature was over a year, which was considered to be a "relatively long reference period".[83] The related "suction effect" on demand was enhanced by the fact that the rebates applied *both* to the contestable part of demand *and* to the non-contestable part (covered by the statutory monopoly).[84]

[74] *Post Danmark A/S (Post Danmark II) v Konkurrenceradet* (C-23/14) EU:C:2015:651; [2010] Bus. L.R. 1304; [2015] 5 C.M.L.R. 25.
[75] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [39].
[76] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [36].
[77] Article 82 of the EC Treaty [2009] OJ C45/7.
[78] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [20].
[79] *Nederlandsche Banden Industrie Michelin NV v Commission of the European Communities* (C-322/81) [1983] E.C.R. 3461; [1985] 1 C.M.L.R. 282; [1985] F.S.R. 250.
[80] *British Airways Plc v Commission of the European Communities* (C-95/04 P) [2007] E.C.R. I-2331; [2007] 4 C.M.L.R. 22; [2007] C.E.C. 607.
[81] *Tomra Systems ASA v European Commission* (C-549/10 P) EU:C:2012:221; [2012] 4 C.M.L.R. 27; [2012] C.E.C. 1336.
[82] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [28].
[83] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [32]–[34].
[84] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [35].

The court also noted the effect found by the DCA as regards some of PD's customers, and emphasised that, even if a rebate is not discriminatory (because standardised), it can still be exclusionary.[85] Noting the strength of PD's dominance, the court focussed on the particular difficulty for competitors to outbid PD in the face of discounts based on volume. In such circumstances, the court considered that the rebate had an anti-competitive exclusionary effect.[86]

The court also stated that the fact that the rebate concerned a large proportion of customers on the market did not make it abusive in itself. However, if the rebate scheme applied to a majority of customers in the market, that might "bear out" the likelihood of an exclusionary effect.[87]

Lastly, the court noted that a dominant company was entitled to show that such an effect was counterbalanced or outweighed by efficiencies which also benefit the customer.[88]

As regards *the relevance of the "as-efficient competitor"* test, the ECJ noted first that the EC's Guidance was not binding on NCAs or national courts.[89] Then, the court noted that although the courts had applied the test as regards selective or predatory prices, there was no *requirement* to do so when assessing rebate schemes operated by a dominant company.[90]

Moreover, the court considered that in a case such as this, where the structure of the market made the emergence of an as-efficient competitor practically impossible, applying the test was of "no relevance".[91] Even a less efficient competitor might intensify competition, so the test would not be decisive. The test was therefore just "one tool amongst others" for assessing an abuse in the context of a rebate scheme.[92]

As regards *foreseeability of effect*, the court followed its position in *TeliaSonera*.[93] In other words, the court noted that the anti-competitive effect required here must not be purely hypothetical, but does not "necessarily have to be concrete". It is enough to show that it "may" potentially exclude competitors who are at least as efficient[94] (an actual or likely exclusionary effect).[95]

Finally, the court stated that the fixing of an appreciability threshold for an abuse of dominant position is not justified: "That anti-competitive practice is, by its very nature liable to give rise to not insignificant restrictions of competition." It is enough if the effect is "probable", there being no need to show that it is of a serious or appreciable nature.[96]

The judgment is therefore rather different from the more liberal *Post Danmark I*.[97] However, in *Post Danmark I*, AG Mengozzi had noted already that his suggested more flexible approach was on the basis that PD was not cross-subsidising its prices from its statutory monopoly.[98] If that had been found then, the result might have been similar to *Post Danmark II*.

In May 2015, AG Kokott gave a similarly orthodox Opinion, which was closely followed by the court.[99]

Huawei

Box 3

- *Article 102 TFEU (2)*
  - *Huawei*:
    - * standard essential patent (SEP) holder entitled to seek injunction for infringement of IP rights, provided:
      - willing to license on FRAND terms;
      - reasonable, prompt offers and exchanges pre-action with alleged infringer to try and resolve terms;
      - willing to submit issue to independent ruling by court or arbitrator, if required.
    - * ECJ judgment follows AG Wathelet in explaining these key steps;
    - * however, the ruling leaves the issue as to whether an alleged infringer should make a cash offer or can offer a cross-licence instead;
    - * for national court to assess, depending on recognised commercial practices in the field; and
    - * N.B. SEP context seen as special, because injunction could foreclose competition generally.

In July 2015, the ECJ ruled on a preliminary reference from the *Landgericht* Düsseldorf in *Huawei v ZTE*,[100] concerning the application of art.102 TFEU to an injunction proceeding brought by Huawei, a Chinese telecommunications company and owner of a standard essential patent (SEP), against ZTE, another Chinese telecommunications company.

[85] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [38].
[86] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [42].
[87] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [44]–[47].
[88] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [48].
[89] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [52].
[90] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [57] and [62].
[91] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [59].
[92] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [61].
[93] *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) EU:C:2011:83; [2011] 4 C.M.L.R. 18.
[94] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [66].
[95] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [69].
[96] *Post Danmark II* EU:C:2015:651; [2015] 5 C.M.L.R. 25 at [73]–[74].
[97] *Post Danmark A/S (Post Danmark I) v Konkurrenceradet* (C-209/10) EU:C:2012:172; [2012] 4 C.M.L.R. 23. See J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2011–2012 (Part 2)" [2013] I.C.C.L.R. 129, 131.
[98] *Post Danmark I* EU:C:2011:342, Opinion of AG Mengozzi of 24 May 2011 at [123].
[99] *Post Danmark II* EU:C:2015:343, Opinion of AG Kokott of 21 May 2015.
[100] With thanks to Roberto Grasso. *Huawei Technologies Co Ltd v ZTE Corp* (C-170/13) EU:C:2015:477; [2015] Bus. L.R. 1261; [2015] 5 C.M.L.R. 14.

The background was as follows: Huawei holds a European patent regarded as “essential” to LTE (long term evolution) software. Huawei made a commitment to ETSI to license on FRAND terms. ZTE sold base stations with LTE software without paying Huawei a royalty. Huawei brought an action for infringement against ZTE before the Landgericht Düsseldorf, seeking an injunction against ZTE’s sales and an account for its related sales/damages.

The main question referred by the Landgericht Düsseldorf was whether it was abusive for an undertaking in a dominant position, which held an SEP, to seek an injunction prohibiting the infringement of that SEP, or seeking the recall of products for the manufacture of which the SEP has been used, in particular insofar as that undertaking has agreed to license its SEP to third parties on FRAND terms.[101]

At the time of the preliminary reference there was no clear precedent or guidance on the SEP holder’s pursuit of such an injunction against an alleged infringer.

At EU level, the only guidance came from the EC’s Press Release and MEMO, announcing that it had issued an SO against *Samsung*.[102] The Press Release stated that recourse to injunctions could amount to an abuse of dominance contrary to art.102 TFEU, where the SEP holder had committed to license SEPs on FRAND terms and the alleged infringer had shown itself “to be willing to negotiate” a licence on FRAND terms.

In Germany, on the other hand, the German *Bundesgerichtshof* had ruled in the *Orange-Book-Standard* case[103] that an SEP holder seeking an injunction based on a de facto SEP would abuse its dominance only if: (1) the alleged infringer had offered unconditionally to take a licence at a rate that is so high that the SEP holder cannot reasonably refuse, or at a rate to be determined by the SEP holder, but subject to court review; and (2) the alleged infringer had agreed to pay royalties into an escrow account and render accounts for past use.

The *Landgericht* Düsseldorf considered that the application of *Orange-Book-Standard* would prompt it to grant the injunction because: (1) ZTE’s licensing offers were not “unconditional”; and (2) ZTE had not paid Huawei the amount of the royalty that it had itself calculated, or provided Huawei with an exhaustive account of past acts of use. On the other hand, the court considered that the application of the principles set out in the EC Samsung Press Release would lead it to qualify Huawei’s pursuit of an injunction as an abuse, depending on whether ZTE qualified as a willing licensee.

The main points in the ECJ’s ruling are as follows. First, the court distinguished this case from previous case law (cases such as *IMS Health*[104]) in light of the standard-setting context and Huawei’s commitment to license its SEP on FRAND terms and conditions.[105] The other key point was that general competition on the market was in issue.[106]

Secondly, the court held that since an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP in fact will grant licences on such terms, a refusal by the proprietor of the SEP to do so in principle may constitute an abuse within the meaning of art.102 TFEU.[107]

Thirdly, building on AG Wathelet’s Opinion,[108] the court went on to clarify, practically, when an abuse should be found[109]:

- the ECJ stated that a SEP holder which believes that its SEP has been infringed cannot seek an injunction against the alleged infringer, without alerting the alleged infringer of the infringement of which it complains, designating the infringed SEP and specifying the way in which it has been infringed[110];
- if the alleged infringer has expressed its willingness to conclude a licence, the SEP holder must present a written offer for a FRAND licence, specifying the amount of the royalty and the way that royalty is to be calculated[111];
- on the other hand, the alleged infringer then must respond diligently to that offer, in accordance with recognised commercial practices in the field and in good faith, which implies that there are no delaying tactics[112]; and
- if the alleged infringer rejects the SEP holder’s licence offer, it must also promptly present its own counter-offer on FRAND terms.[113]

Fourthly, if the alleged infringer was already using the SEP and the SEP holder rejected its counter-offer, the alleged infringer must provide appropriate security, in

[101] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [44].
[102] IP/12/1448 and MEMO/12/1021, 21 December 2012.
[103] See *Orange-Book-Standard*, Case *KZR* 39/06 (2009) 180 BGHZ 312 at 316.
[104] *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C-418/01) [2004] E.C.R. I-5039; [2004] 4 C.M.L.R. 28; [2004] E.C.D.R. 23.
[105] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [51].
[106] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [46]–[48].
[107] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [53].
[108] *Huawei* EU:C:2014:2391, Opinion of AG Wathelet of 13 January 2015.
[109] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [71].
[110] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [61].
[111] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [63].
[112] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [65].
[113] *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [66].

line with recognised commercial practices in the field, from the point at which its counter-offer is rejected (e.g. a bank guarantee or funds in escrow). The calculation of that security must include, inter alia, the number of past acts of use of the SEP and accounts, if requested by the SEP holder.[114]

Fifthly, if no agreement is reached on the details of the FRAND terms, the parties may request, by common agreement, that the amount of the royalty be determined by an independent third party[115] (a court or an arbitrator).

Sixthly, the ECJ confirmed that the alleged infringer cannot be criticised for challenging, in parallel to negotiations relating to the grant of a licence, the validity of those patents and/or the essential nature of those patents to the standard concerned, or for reserving the right to do so in the future. The exercise of such a right cannot be interpreted as a sign of unwillingness.[116]

Finally, the ECJ held that art.102 TFEU does not prevent a SEP holder from bringing an action for infringement to obtain the rendering of accounts or an award of damages, in relation to past acts of use of that patent—since that would not hinder competition by denying the alleged infringer's product access to the market.[117]

All of this is clearly interesting, given, as the ECJ noted, the need to balance IP rights, competition law and the right to effective judicial protection.[118] However, it has still left some work for the Düsseldorf Court, insofar as it appears that ZTE wanted to offer a cross-licence to its own technology, whereas *Huawei* sought a "cash offer". As AG Wathelet noted,[119] it is a pity that those involved in defining FRAND had not addressed this sort of issue, so that it came up as an issue of competition law.

Slovenská pošta

In March 2015, the GC upheld the EC's decision finding that the Slovak Republic had unlawfully remonopolised certain hybrid mail services to the advantage of the state-owned undertaking, *Slovenská pošta* (SP), contrary to arts 86 and 82 of the EC Treaty.[120]

The appeal was brought by SP. Essentially, SP argued that the Slovak Republic had not extended SP's postal monopoly to hybrid mail services because the Slovak Republic had always reserved those services to SP. The EC had not accepted that position both legally and factually, noting, among other things, that private operators had started to offer such services before the Slovak Republic sought to bring them back to SP. The court agreed with the EC.

It appears that the underlying issue was financing SP's universal service obligations. SP claimed that including hybrid mail services in its monopoly was justified to that end. However, the EC had not accepted the related costs reports presented by SP, essentially considering that the liberalisation of hybrid mail services had not been shown to be incompatible with the universal service on the facts. The court reviewed the justifications offered by SP in detail and agreed with the EC.[121]

Two particular points may be noted.

First, the GC's reasoning as to why the remonopolisation was contrary to arts 86 and 82 of the EC Treaty (now arts 106(1) and 102 TFEU), which was based on the *Connect Austria*[122] case law, that a state measure is unlawful "if *inequality of opportunity* between economic operators and therefore distorted competition, results from a State measure".[123] (Emphasis added.)

Secondly, on the facts, the GC also found that the *Höfner and Elser*[124] principles applied.[125] In other words, the EC had found that there was also a more specific issue, insofar as the monopolised service did not offer certain services which the private sector had offered ("track and trace" services). The re-extension of the monopoly therefore meant that the demand for such services was not met. The GC upheld that position.[126]

European Commission decisions

Cartels—old

Box 4

- *Cartels—old*
  - — *Dutch Shrimps*:
    - 2013 case; decision published this year;
    - admissibility of taped conversations/transcripts indicating contacts with competitors found during EC inspections; and
    - no fine increase for recidivism (after earlier NMa case).

North Sea Shrimps

In December 2014, the EC placed its decision as regards the shrimps cartel case on its website. The summary of its decision was also published.[127]

114 *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [67].
115 *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [68].
116 *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [69].
117 *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [76].
118 *Huawei* EU:C:2015:477; [2015] 5 C.M.L.R. 14 at [57]–[59].
119 *Huawei* EU:C:2014:2391, Opinion of AG Wathelet at [9]. ECJ Press Release 155/14, 20 November 2014.
120 *Slovenska posta v European Commission* (T-556/08) EU:T:2015:189; [2015] 4 C.M.L.R. 17. With thanks to Roberto Grasso for his assistance.
121 *Slovenska posta* EU:T:2015:189; [2015] 4 C.M.L.R. 17 at [363]–[424].
122 *Connect Austria Gesellschaft fur Telekommunikation GmbH v Telekom-Control-Kommission* (C-462/99) [2003] E.C.R. I-5197; [2005] 5 C.M.L.R. 6.
123 *Slovenska posta* EU:T:2015:189; [2015] 4 C.M.L.R. 17 at [95]–[100].
124 *Höfner v Macrotron GmbH* (C-41/90) [1991] E.C.R. I-1979; [1993] 4 C.M.L.R. 306; (1991) 135 S.J.L.B. 54 at [19]–[31].
125 *Slovenska posta* EU:T:2015:189; [2015] 4 C.M.L.R. 17 at [325].
126 *Slovenska posta* EU:T:2015:189; [2015] 4 C.M.L.R. 17 at [350].
127 [2014] OJ C453/16, Case AT.39633.

It appears that the case started as a result of a leniency application by a Dutch shrimp trader, Klaas Puul. There were inspections in Belgium, the Netherlands and Denmark, in the course of which the EC found audio recordings and transcripts of telephone conversations related to contacts between companies implicated in the cartel. The EC sent an SO to four companies, three in the Netherlands and one in Germany, and ultimately imposed fines of €28.7 million.

The products concerned are the small grey shrimps which are popular notably in Belgium.

The EC found the scope of the cartel to be EU-wide, but in particular in Belgium, France, Germany and the Netherlands. Two traders, Heiploeg and Klaas Puul, were found to have participated for eight and a half years; another, Stührk, for four years and seven months and the last, Kok Seafood, for three years and 11 months. The relevant period was between 2000 and 2009 at its longest.

The EC found a single and continuous infringement concerning price fixing, market sharing and exchange of confidential information.

The EC accepted that the role of Kok Seafood was specific,[128] mainly because it had a supply agreement with Heiploeg with its supply price linked to Heiploeg's sales price and (the EC found) a "hidden clause" that Kok Seafood would not enter the market separately.[129] The EC also accepted that the activities of the German company Stührk related to Germany only.[130] It appears that the relevant contacts were bilateral.

Given the variable roles of the different participants, the EC has a specific section in the decision dealing with the "awareness" of the participants of the overall plan.[131]

A core issue in the case is whether the evidence found at Kok Seafood is inadmissible, because the recordings (and related transcripts) were made without the consent of the person recorded.[132] Kok Seafood also claimed that the recordings were inadmissible because they were related to privileged correspondence with a lawyer.[133]

The EC rejected the first claim (by Heiploeg) on the basis that[134]: (1) the conversations were recorded in the Netherlands and under Dutch law such a recording is not criminal; (2) there is no provision prohibiting the use of evidence unlawfully obtained by private parties and the ECHR has confirmed that to do so is not, in itself, a breach of fundamental rights; and (3) neither the EC, nor a NCA was involved in the recording of the conversations.

As regards Kok Seafood's claim, the EC: (1) again noted that it did not unlawfully obtain the recordings[135]; (2) challenged that the recordings were privileged, given that they did not relate *exclusively* to seeking legal advice from a lawyer in exercise of the rights of the defence; and (3) stated that Kok Seafood had waived any privilege in the EC's proceedings.

It is not clear why Kok Seafood was making the recordings. There are suggestions that Kok Seafood did so to use them in relation to conflicts with Heiploeg and Klaus Puul.[136]

As regards fines, the EC took the average value of sales of the participants to assess the basic amount.[137] Intra-cartel sales were deducted to avoid double counting, save as regards the supply between Heiploeg and Kok Seafood, where the EC split the value of sales on a 50/50 basis.[138]

The EC decided not to increase the fine for recidivism as regards Heiploeg and Klaus Puul because of the previous Dutch case in 2003, on the basis that the fines reached the legal maximum already.[139] Klaas Puul's fine was reduced to zero for immunity. Stührk's fine was reduced because its activity related to Germany and it admitted the infringement and corroborated events.[140] Kok Seafood was given a fine decrease owing to its specific circumstances. In addition, the EC adjusted fines because all parties mainly operated on a single (product) market and therefore all fines could reach the 10% of turnover maximum.[141] All these figures are treated as confidential in the EC decision.

As a result, the fines on the Heiploeg group were €14.26 million and €12.82 million (with variations in joint and several liability). The fine on Stührk was €1.13 million and on Kok Seafood the fine was €502,000.

Other old decisions

In December 2014, the EC published its summary in the *(Canned) Mushrooms* case.[142] The EC has also placed its decision on the EC's website. It may be recalled that this related to a non-aggression pact with a compensation scheme, which related to private label sales via tenders to retailers and food wholesalers and processors. The companies concerned settled. Other proceedings are continuing.

[128] Case AT.39633 [2014] OJ C453/16 at [366].
[129] Case AT.39633 [2014] OJ C453/16 at [54]–[57] and [201].
[130] Case AT.39633 [2014] OJ C453/16 at [525].
[131] Case AT.39633 [2014] OJ C453/16 at [384]–[407].
[132] Case AT.39633 [2014] OJ C453/16 at [262].
[133] Case AT.39633 [2014] OJ C453/16 at [263].
[134] Case AT.39633 [2014] OJ C453/16 at [264]–[268].
[135] Case AT.39633 [2014] OJ C453/16 at [267]–[271].
[136] Case AT.39633 [2014] OJ C453/16 at [271].
[137] Case AT.39633 [2014] OJ C453/16 at [491].
[138] Case AT.39633 [2014] OJ C453/16 at [492].
[139] Case AT.39633 [2014] OJ C453/16 at [506] and [507].
[140] Case AT.39633 [2014] OJ C453/16 at [528]–[529].
[141] Case AT.39633 [2014] OJ C453/16 at [538]–[542].
[142] [2014] OJ C453/21, Case AT.39965.

In February 2015, the EC published its summary decisions in the Swiss Franc Interest Rate Derivatives cases (*Swiss Franc Libor* and *Bid Ask Spread Infringement*).[143] The two related settlement decisions have also been placed on the EC's website.

It may be recalled that the EC found in the *Swiss Franc Libor* case that there had been conversations between a RBS trader and a JP Morgan trader about forthcoming Swiss Franc Libor submissions, on the basis that this might be beneficial to the derivatives trading position of at least one of the traders. JP Morgan was fined some €61 million. RBS was the immunity applicant.

In the *Bid Ask Spread* case, it may be recalled that the EC found that traders in four banks had agreed to quote wider, fixed bid/ask spreads on certain derivative trades with third parties, while maintaining narrower spreads for trades amongst themselves. The spread relates to the difference between the price a trader is willing to buy a particular contract and the price a trader is willing to sell a particular contract. The EC found that the aim was to lower the banks' transaction costs and maintain liquidity between the banks, while seeking to impose wider spreads on third parties.

The EC has now also placed its *Steel Abrasives* cartel decision on the EC's website.[144] It may be recalled that this related to co-ordination on a uniform calculation model for a common scrap surcharge, an energy surcharge and price competition as regards individual customers. The companies concerned settled. Other proceedings are continuing.

Cartels—new

Box 5

New cartel fines

(November 2014–October 2015)

Total fines		*Highest company fine(s)*	
Envelopes	€19.5 million	*Hamelin*	€5 million
YIRD (ICAP only)	€15 million	*ICAP (as facilitator of UBS/DB)*	€8.2 million
Parking Heaters	€68.2 million	*Eberspächer*	€68.2 million
Retail Food Packaging	€115.9 million	*Sirap-Gema*	€35.9 million
Blocktrains	€49.2 million	*Schenker*	€31.8 million
Optical Disk Drives	€116 million	*Toshiba Samsung*	€41.3 million
TOTAL	*€ 383.6 million*		

Envelopes

In December 2014,[145] the EC announced that it had fined five envelope producers some €19.4 million for co-ordinating prices and allocating customers in Denmark, France, Germany, Norway, Sweden and the UK.[146] It appears that the infringement lasted some four years. The companies involved were: Bong, GPV, Hamelin, Mayer-Kuvest and Tompla.

Unusually, the investigation was started by the EC on its own initiative after information from an informant (without an immunity applicant). However, there were leniency applications after the EC's inspections, and the parties settled.

The EC reduced two fines for inability to pay. The EC has also placed its settlement decision on the EC website.

Yen interest rate derivatives

In February 2015, the EC announced that it had imposed a fine totalling just under €15 million on the broker ICAP for having *facilitated* six out of seven cartels in the yen interest rate derivatives (YIRD) sector.[147]

It may be recalled that in December 2013, the EC issued a settlement decision imposing fines totalling €669.7 million on several banks and on the broker RP Martin, which had admitted their involvement in multiple cartels operating in the YIRD sector. The banks involved were Deutsche Bank, RBS, UBS and Citigroup. ICAP decided not to settle, and proceedings therefore continued under the standard procedure.

It appears that the EC found that ICAP contributed to the infringements in two main ways: (1) by disseminating misleading information to certain panel banks not participating in the cartels; and (2) by using its contacts with those banks to lead them to submit LIBOR rates in line with predictions or expectations adjusted by the banks participating in the cartels. The EC also found that ICAP played the role of a communications channel between Citigroup and a trader from RBS to facilitate their participation in the infringement.

The EC imposed separate fines on ICAP for each of the six cartels in which it was involved, ranging from €720,000 to some €8.2 million.

Parking heaters

In June 2015, the EC announced that it issued a decision addressed to Eberspächer and Webasto—two German producers of fuel-operated parking heaters and fuel-operated auxiliary heaters—following a settlement procedure. Fuel-operated parking heaters are used to heat parked trucks and cars. Auxiliary heaters are used to

143 [2015] OJ C72/9; and [2015] OJ C72/14, Case AT.39924.
144 Case AT.39792. See, further, J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 2)" [2015] I.C.C.L.R. 115, 130.
145 With thanks to Katrin Guéna for her assistance with all of this new cartel section.
146 IP/14/2583, 11 December 2014. The EC's summary is in [2015] OJ C74/5, Case AT.39780.
147 IP/15/4104, 4 February 2015.

support the heating system of a running car or truck which does not produce enough waste heat to keep a running car or truck warm. [148]

The EC undertook an unannounced inspection at Eberspächer's premises in July 2013, which ultimately led to the EC's decision, as part of a large investigation in the automotive parts sector in the EEA.

The EC states that its investigation revealed that the cartel lasted for 10 years, from September 2001 to September 2011 and covered the whole EEA. The companies were found to have co-ordinated prices, allocated customers and exchanged sensitive information. The EC states that they discussed which company would submit the lower bid when asked for price quotations from car and truck producers. They also harmonised their price lists and available discounts.

The EC fined Eberspächer €68.2 million. Eberspächer received a 45% reduction for its co-operation under the leniency rules and an additional 10% reduction because it settled the case. Webasto revealed the existence of the cartel and therefore had immunity, avoiding a fine which the EC indicated would have been €222.2 million.

Retail food packaging

In June 2015, the EC also fined eight European producers and two distributors of retail food packaging material a total of some €115.9 million for having participated in at least one of five separate cartels.[149] Food packaging material comes in the form of polystyrene plastic trays ("foam trays") or polypropylene plastic trays ("rigid trays"). It is used to wrap up products like cheese, meat, fish and cakes in shops and supermarkets.

The producing companies involved are: Huhtamäki from Finland; Nespak and Vitembal of France; Silver Plastics from Germany; Coopbox, Magic Pack and Sirap-Gema from Italy; and Linpac from the UK. The distributors are Ovarpack from Portugal and Propack from the UK.

The EC found evidence of five separate cartels. Each cartel was different owing to its geographic coverage and the duration of the infringement. The EC stated that evidence linking the anti-competitive behaviour of the parties was not sufficient to prove that they pursued an overall plan covering the whole EEA.

Only one cartel concerned foam trays and rigid trays. It was active in North-West Europe, i.e. Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands, Norway and Sweden. The EC found that the cartel lasted from June 2002 to October 2007.

The other cartels, for foam trays only, were organised in: (1) Central and Eastern Europe, i.e. the Czech Republic, Hungary, Poland, and Slovakia; (2) Portugal and Spain; (3) France; and (4) Italy. They lasted for different periods ranging from just over a year to eight years between March 2000 and February 2008.

The EC found that the companies fixed prices, allocated customers, exchanged sensitive information and co-ordinated behaviour for bids. They had bilateral and multilateral contacts, during normal industry meetings, or via email or telephone.

Linpac was the first to come forward and received full immunity, according to the EC avoiding a fine of €145 million. Some of the other participants received fine reductions under the EC's Leniency Guidelines, ranging from 10 to 50%. The distributors Ovarpack and Propack were found only to be involved in the cartel covering Spain and Portugal and in the Central-Eastern Europe cartel respectively. Since Magic Pack was also only active in one cartel and to a lesser extent, the EC considered that its fine should be smaller. The EC took a similar position for Silver Plastic's participation in the cartel active in France. Both received an additional 5% reduction.

The EC also granted a 5% reduction to all participants because of the length of the proceedings.

The highest fines were imposed on Sirap-Gema (€29.7 million) and on Coopbox (€22.1 million) for their participation in the Italian cartel. The other companies were fined between €11,000 and €20.3 million.

The EC granted fine reductions to two companies which invoked their inability to pay and rejected one other application.

Blocktrains

In July 2015, the EC imposed a fine of some €49 million on Express Interfracht (EXIF) and Schenker, for operating a cartel in the market for cargo blocktrain services between Central and South-Eastern Europe. The services concerned are called "Balkantrain and Soptrain".[150] EXIF is an ÖBB (Austrian Railways) subsidiary; Schenker is a Deutsche Bahn subsidiary.

Blocktrains are a rail cargo shipping method whereby all the wagons are shipped from one hub to another without being split up or stored en route. Blocktrains are economically more efficient, in particular for high-volume customers, because they avoid assembly and disassembly of trains at different rail stations.

It appears that Kühne + Nagel, a large transport and logistics company, applied for and obtained immunity. According to the EC, it avoided a fine of some €62 million.

Both Schenker and EXIF applied for leniency after EC inspections and settled.

[148] IP/15/5214, 17 June 2015, Case AT.40055.
[149] IP/15/5253, 24 June 2015. The text of the decision is available on the EC's website: Case AT.39563.
[150] With thanks to Itsiq Benizri. IP/15/5376, 15 July 2015. The EC's summary is in [2015] OJ C351/5. The EC has also placed its settlement decision on the EC's website: Case AT.40098.

The cartel members were found to have allocated customers, exchanged confidential information, shared transport volumes and co-ordinated prices by providing each other with cover bids and discussing prices for specific customers.

The cartel duration was found to be from July 2004 until June 2012. The EC assessed the gravity of the infringement at 17%.

Optical disk drives

In October 2015, the EC issued a decision imposing a fine of some €116 million on eight suppliers of optical disk drives for having co-ordinated their replies to calls for tender from Dell and Hewlett Packard.[151] Optical disk drives read and record data on DVDs, CDs or Blu-ray and are a component of personal computers, DVD and CD players and game consoles.

The companies involved are: Philips, Lite-On, Philips and Lite-On Digital Solutions, Hitachi-LG Data Storage, Toshiba Samsung Storage Technology, Sony, Sony Optiarc and Quanta Storage. Philips, Lite-On and their joint venture Digital Solutions were the first to come forward and received full immunity from fines.

The EC found that the suppliers exchanged bidding strategies, shared the results of tender procedures and communicated other sensitive commercial information to each other. The cartel participants organised a network of bilateral contacts to avoid competition in tender procedures. The headquarters of all the companies involved are located in Asia, except for Philips. The contacts took place outside the EEA, but the EC considers that the anti-competitive behaviour was implemented worldwide.

The cartel was found to have lasted in total from June 2004 to November 2008. The suppliers' involvement varied in duration, from less than a year to over four years.

The EC found that the cartel participants were aware of the illegal conduct. They avoided face-to-face meetings or met in car parks and cinemas. They also did not name their competitors and used abbreviations or generic terms in internal correspondence.

Fines ranged from €7.1 million for Quanta Storage to €41.3 for Toshiba Samsung. According to the EC, without their immunity, Philips, Lite-On and their joint venture would have received a fine of €63.5 million. The EC granted a 50% reduction in fines to Hitachi-LG Data Storage for co-operation, and took into account that Philips, Sony and Sony Optiarc only colluded as regards tender procedures organised by Dell.

Other horizontal agreements

SkyTeam

In May 2015, the EC adopted a decision accepting the commitments submitted by Air France/KLM, Alitalia and Delta to obtain the EC's approval of their TransAtlantic co-operation agreement.[152] It will be recalled that the EC asked interested parties for comments in the autumn of 2014.[153]

The airlines are all members of the so-called "SkyTeam Alliance", which involves profit-sharing and the joint management of schedules, pricing and capacity. The EC was concerned that the agreement could have reduced competition on the Paris–New York route for premium passengers and on the Amsterdam–New York and Rome–New York routes for all categories of passengers.

By accepting the commitments, the EC rendered them legally binding for a period of 10 years. The commitments provide that the parties: (1) make available slots for competitors to operate Amsterdam–New York and Rome–New York routes; (2) agree that competitors may offer tickets on the parties' flights for those routes; (3) facilitate access to the parties' connecting flights; (4) permit participation in their frequent flyer programmes; and (5) submit data on their co-operation to allow the evaluation of the Alliance's impact in the future. The EC decided that an independent trustee should monitor the parties' compliance with those commitments.

Articles 102/106 TFEU

Bulgarian Energy Holding

In June 2015, the EC published an art.27(4) Notice asking interested parties for their comments on commitments submitted by Bulgarian Energy Holding (BEH) to address the EC's concerns about BEH's behaviour on the non-regulated wholesale electricity market in Bulgaria.[154]

The EC had expressed concerns that BEH, the incumbent energy supplier, might have abused its dominant position, in particular by imposing destination clauses amounting to territorial restrictions and thus preventing the resale of electricity.

BEH therefore proposed that it would: (1) create a power exchange in Bulgaria with the help of an independent, experienced third party; (2) offer on the power exchange predetermined volumes of electricity on the day-ahead market to be sold anonymously; and (3) transfer the control of the exchange to the Bulgarian Ministry of Finance to ensure its independence.

Interested parties were requested to submit their comments before 19 July 2015.

[151] IP/15/5885, 21 October 2015, Case AT.39639.

[152] With thanks to Katrin Guéna. IP/15/4966, 12 May 2015. The EC's summary of the decision is in [2015] OJ C212/5, Case AT.39964. The text of the decision and the commitments are also available on the EC's website.

[153] See J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 2)" [2015] I.C.C.L.R. 115, 131.

[154] With thanks to Katrin Guéna. IP/15/5234, 19 June 2015. The EC's summary decision is in *Bulgarian Energy Holding* [2015] OJ C202/2, Case AT.39767. The proposed commitments are available on the EC's website.

Google

In April 2015, the EC issued an SO to Google regarding the display and ranking of shopping results, and opened a separate investigation into Google's conduct concerning its mobile operating system Android.[155]

As regards the shopping issue, it appears that the EC alleged that Google had abused its dominant position in the markets for general internet search services in the EEA by systematically favouring its own comparison shopping product in its general search results pages. According to the EC, users do not necessarily see the most relevant results in response to queries.

The SO comes after some five years of investigations and the rejection of several commitment proposals. Comparison shopping products allow consumers to search for a product in online shops and compare prices between different shops. The EC's preliminary view is that Google systematically favours its "Google Shopping" product in its general search results pages, e.g. by showing Google Shopping more prominently on the computer screen. This practice would therefore divert users from competing comparison shopping services and hinder their ability to compete on the market.

Concerning a possible remedy, the EC's preliminary view is that Google should treat its own comparison shopping service and those of rivals in the same way.

As regards Google Android, the EC is investigating whether Google entered into anti-competitive agreements or abused a possible dominant position in the operating systems, applications and services for smart mobile devices.

Gazprom

In April 2015, the EC sent an SO to Gazprom for allegedly abusing its dominant position in parts of the Central and Eastern European gas market.[156] It will be recalled that the EC opened its investigations concerning Gazprom in August 2012.

The EC's preliminary findings include that:

- Gazprom imposed territorial restrictions in its supply agreements with wholesalers and some industrial customers, which prevented the cross-border flow of gas;
- those restrictions, combined with Gazprom's price formulae—indexing gas prices according to a basket of oil product prices—may result in gas prices significantly higher than Gazprom's costs or benchmark prices, in particular in Bulgaria, Estonia, Latvia, Lithuania and Poland; and
- Gazprom allegedly made gas supplies to Bulgaria and Poland conditional upon investments in transport infrastructure projects.

Other

In September 2015, the EC published a summary of its decision in *Slovak Telekom*.[157]

Sectoral inquiries

Pharma

Patent settlement monitoring

It will be recalled that the EC started monitoring patent settlement agreements in 2010, following a sector inquiry which concerned the years 2000–2008. In December 2014, the EC issued its fifth monitoring report,[158] covering the period between January and December 2013. The EC concluded that the number of "unproblematic" settlements, i.e. settlements involving no restriction on generic entry or those limiting generic entry, but with no value transfer, generally increased over the last five years. The EC noted, however, that new legal provisions in Portugal had an influence on that increase.

The EC also concluded that the number of "problematic" settlements from a competition point of view "stabilised at a low level". During the years covered by the sector inquiry, those settlements counted for 22% of all settlements reported, while during the last monitoring period which led to the fifth report, those settlements only represented 8% of all settlements, or 11% when taking into account the new Portuguese rules.

Regarding the "problematic" settlements, the EC stated that those figures demonstrate that, although it announced during the previous years that it would continue to closely scrutinise such agreements, companies still chose to settle their disputes, instead of litigating them.

"Pay-for-delay" decisions

Box 6

- *"Pay-for-delay" decisions (1)*
  - — *Fentanyl*:
    - * 2013 case; decision published this year;
    - * Sandoz/Hexal found to have signed a "co-promotion agreement" with Johnson & Johnson instead of market entry with generic product;
    - * was this a restriction by object?
      - EC looked at nature of agreement, objectives, economic and legal context and noted *Irish Beef* (law and ruling).

[155] With thanks to Roberto Grasso. IP/15/4780, MEMO 15/4781 and MEMO 15/4782, 15 April 2015.
[156] With thanks to Katrin Guéna. IP/15/4828, 22 April 2015.
[157] *Slovak Telekom* [2015] OJ C314/7, Case AT.39523.
[158] The Report is available on the EC's website and was published on 5 December 2014.

- EC assessed whether the generic company was a potential competitor, which had limited its efforts to enter the market for a transfer of value;
- detailed reviews of internal documents;
- EC noted payment linked to anticipated return for generic company and no real service in return;
- EC concluded that the agreement provided for market exclusion;
- both the originator and the generic were fined. EC set the gravity at 16%.

Fentanyl In March 2015, the EC published its decision in the *Fentanyl* case on its website, followed by a summary in April.[159]

It may be recalled that the EC fined Johnson & Johnson (J&J) some €10.8 million and Novartis Sandoz €5.5 million in December 2013, for having delayed market entry in the Netherlands of the generic version of Fentanyl, a strong painkiller, in the form of transdermal patches used for chronic pain conditions (cancer, low back pain and osteoarthritis).[160]

The EC found that in 2005, when the legal data exclusivity protection of J&J's Fentanyl was about to expire in the Netherlands, a company called Hexal started to prepare the commercialisation of a generic version of the painkiller. Hexal was then acquired by Sandoz, a subsidiary of Novartis. Instead of putting the painkiller on the market, Sandoz/Hexal then signed a so-called "co-promotion agreement" with J&J's Dutch subsidiary, Janssen-Cilag.

That agreement provided that Hexal would carry out certain promotional activities for J&J, although the EC noted that they were not specified, nor was it clear that much was done. On the other hand, Hexal received just under €5 million. The agreement was also conditional on Hexal/Sandoz's "non-entry" to the market. The co-promotion agreement lasted for 17 months, i.e. first for a year, with an extension which lasted until a third party launched a competing generic Fentanyl patch.

The EC found that the agreement was designed to delay Hexal/Sandoz's entry to the market, offering a payment which was more than Hexal expected to earn, but only part of what J&J stood to lose in terms of price decrease and loss of market share. In its decision, the EC outlines various internal documents showing the nature of the agreement.

Then the EC reviews in detail why it considers that the co-promotion agreement amounted to a "restriction by object".[161]

First, the EC referred to the *Irish Beef* case[162] insofar as it involved an agreement that certain companies would receive financial compensation for leaving the market.[163]

Secondly, the EC noted three factors that it would take into account to decide whether the agreement had the potential to restrict competition by its very nature:

1. were the generic undertaking (Hexal/Sandoz) and the originator undertaking (J&J) at least potential competitors?
2. had the generic undertaking limited its independent efforts to enter the market with its generic product owing to the co-promotion agreement? and
3. did the co-promotion agreement involve a transfer of value from the originator undertaking which substantially reduced the incentives of the generic undertaking to independently pursue its efforts to enter the market with its generic product?[164]

Applying these principles to the case, the EC then considered the economic and legal context of the co-promotion agreement, the content and objectives of the agreement and the intentions of the parties in relation thereto.[165]

The EC considered that the agreement might affect trade between Member States, justifying the application of art.101(1) TFEU essentially on two grounds: (1) since the agreement concerned the entire territory of a Member State[166]; and (2) since the patches in question were, in fact, made in another Member State by Novartis Sandoz.[167]

It may be noted that the fine on Novartis Sandoz was assessed under para.37 of the 2006 Fining Guidelines.[168] Since Novartis Sandoz did not have sales, the EC took the value transfer to it as the basis for calculating the fine.[169]

Box 7

- *"Pay for delay" decisions (2)*
  - — *Citalopram*:
    - Lundbeck and several generic producers fined for entering into what the EC again considered to be market exclusion agreements;
    - detailed discussion of patent settlements and competition law;
    - EC finds a settlement to be a restriction by object where limitations on entry are not achieved through the strength of the patent, but through inducements, in particular if the limitations exceed the scope of the patent;

159 With thanks to Katrin Guéna and Geoffroy Barthet. The EC summary of decision is in *Fentanyl* [2015] OJ C142/21, Case AT.39685.
160 See J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 2)" [2015] I.C.C.L.R. 115, 128.
161 *Fentanyl*, Case AT.39685 [2015] OJ C142/21 at [216]–[372].
162 *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; [2009] C.E.C. 591.
163 *BIDS* [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6 at [217]–[218].
164 *BIDS* [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6 at [219].
165 *BIDS* [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6 at [221]–[223], [256], [333], [359] and [360]–[372].
166 For example, see *BIDS* [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6 at [378].
167 *BIDS* [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6 at [382], referring to *Stichting Sigarettenindustrie v Commission* (240/82) [1985] E.C.R. 3831; [1987] 3 C.M.L.R. 661.
168 [2006] OJ C210/2.
169 *Fentanyl*, Case AT.39685 [2015] OJ C142/21 at [507].

* similar approach otherwise to Fentanyl re restriction by object and potential competition;
* detailed review of documents/context;
* Lundbeck found to be delaying generic entry, while it launched an improved version of its product;
* EC set the gravity of the fine at 11/10%;
* Lundbeck was fined €93.8 million; the generics between €9.9 million and €21.4 million.

Citalopram

Overview In 2015, the EC published its decision in what is often called the *Lundbeck* case on its website and its summary of the case.[170] The decision is 464 pages long. It is an interesting decision.

It may be recalled that in June 2013, the EC fined Lundbeck, a Danish pharmaceutical company and four generics groups as regards six agreements, which it found had prevented the market entry of citalopram—a leading anti-depressant medicine in 2002–2003. The generics companies involved were Merck, Arrow, Alpharma and Ranbaxy. The geographic markets concerned were the entire EEA, but in particular the UK and Denmark. The EC found that the six agreements constituted four infringements.

The Danish Competition Authority had informed the EC about the agreements in 2003. In October 2005, the EC carried out its first inspections at Lundbeck's premises, followed by further inspections in 2009, after the EC had started in its sector inquiry in the pharmaceutical industry. In January 2010, the EC opened formal proceedings against Lundbeck and, in July 2012, against the generics companies. At the same time, the EC sent an SO to Lundbeck.

The EC notes that Lundbeck's basic patent for the citalopram compound and the two original production processes had expired at the time the agreements were concluded. This could have allowed generics companies freely to enter the market. The agreements were thus concluded in the context of potential patent disputes (notably about whether process patents may have been infringed)[171] but, except for one, they were actually concluded before any litigation started.

The EC summarised that the agreements infringed the competition rules because:

- Lundbeck and the generics producers were at least potentially competitors;
- the agreements provided for a transfer of value from Lundbeck to the other party to avoid the latter's entry into a specific geographic market for citalopram for a certain duration;
- they did not resolve any patent disputes, but postponed them as long as the agreements were applicable;
- Lundbeck did not provide any commitment not to start infringement proceedings if any generics producer entered the market for citalopram once the agreement expired; and
- they prevented the generics companies from producing and selling citalopram, even if their production would not have infringed Lundbeck's patents, a result which Lundbeck would never have obtained from a court's ruling.

The EC fined Lundbeck €93.8 million and the generics producers a total of some €52.2 million. Merck was fined €21.4 million, Arrow €9.9 million, and Zoetis and Xellia, Alpharma's successor companies, €10.5 million.

Since the generics producers had very limited sales of citalopram in the geographic area concerned, the EC applied para.37 of the 2006 Fining Guidelines, allowing the EC to depart from the general methodology of the Guidelines according to the particularities of a given case. The value transferred to each generics company owing to the agreement(s) constituted therefore the basic amount for the calculation of the fine imposed.

Restriction by object So how did the EC come to write 464 pages about this in its decision?

- the EC explains its general approach to patent settlements and sets out what it considers lawful and what not;
- the EC sets out in detail why it considers that the agreements in question were essentially market exclusion agreements and restrictions by object, rather than some special novel case (notably, considering the parties' internal documents);
- the EC works through each of the six agreements in question, considering the economic and legal context, the terms of the agreement, the objectives and aims pursued and the intentions of the parties (in the account below we focus on one agreement, that between Lundbeck/Merck for the UK);
- the EC also considers defence arguments in detail; and
- the EC also sets out the specific considerations of fines in the circumstances.

The main points of interest are as follows.

First, the story which the EC sets out is that Lundbeck, the "originator" of the medicine concerned, citalopram (mainly sold as Cipramil or Seropram) sought to delay the generic entry of citalopram, while it launched and established a new version of the drug escitalopram (Ciprolex).[172] There are sections of the decision where the EC notes that Lundbeck purchased a manufacturer of

[170] *Lundbeck* [2015] OJ C80/13.
[171] See, e.g. *Lundbeck* [2015] OJ C80/13 at [150] and [163]–[164].
[172] *Lundbeck* [2015] OJ C80/13 at [141] and [202].

generic citalopram,[173] or focused on possible patent disputes/litigation and/or "deals" with the generics producers concerned in order to delay entry.[174]

The EC also highlights that timing is critical in this "off-patent/generic" interplay. When a generic product is introduced there is a first price drop, so there is something of a race by generics producers to be the first in while margins are higher, before they fall further with further generic competition.

Secondly, the EC found that an originator and a generic company may have aligned incentives,[175] insofar as the generic company achieves profit without the uncertainties and efforts of market entry. As the EC sees it, there is a "rent-sharing agreement".[176] The EC found in the case of the Lundbeck/Merck UK agreement that Lundbeck paid Merck: (1) for a stock of product which it had purchased from an Indian supplier; (2) plus a guaranteed profit, even if Merck did not sell products supplied from Lundbeck over a year; and (3) an increased guaranteed profit for an additional period. The "value transfer" to Merck was some €19.4 million.[177] While Lundbeck would benefit, because prices did not fall, it maintained sales volume for its products,[178] and, as noted above, launched escitalopram.

It appears that part of the generics' thinking was that if they did a deal with Lundbeck, they could enter the market earlier (and without the difficulties of litigation).[179] Part of Lundbeck's thinking was also that it was "settling" to avoid litigation on process patents which was "quite legitimate".[180]

Thirdly, the EC emphasises that it is not challenging patent dispute settlements as such. What the EC is challenging is *agreements delaying market entry which do not resolve a patent dispute*.[181]

An important section in the decision discusses patent settlements and competition law.[182] The EC states that its issue with transfers of value to resolve disputes concerning a potentially infringing product is that *they lead to market exclusion and may lead to no further clarification as to whether there is an infringement, or whether the originator's patent is invalid*.[183] The settlement agreement may also induce the generic company to accept wider restrictions on its conduct than it would have otherwise.

The EC regards litigation between originators and generics as just part of the competitive process, and considers that agreements which restrict that process for transfers of value therefore restrict potential competition.[184]

Later in the decision, the EC also sets out which patent settlements it considers to be lawful and which it does not.[185] The critical points for present purposes are as follows:

- "when an agreement is concluded in which the generic undertaking accepts to exit or not to enter the market for a certain period of time but instead the originator pays a considerable sum of money to the generic undertaking, then such an agreement, whether referred to as a patent settlement or not, merits the full scrutiny of competition law …";
- "the danger is that such payments, in the light of the specific circumstances of the case, may actually constitute 'exclusion' payments …";
- "patent law does not provide for the right to pay actual or potential competitors to stay out of the market or to refrain from challenging a patent prior to entering the market. The means used by patent holders to defend their rights matter…";
- "… *if the limitations on the generic undertaking's commercial autonomy do not go beyond the material scope of the patent, they are likely to breach Article 101 … when those limitations cannot be justified and do not result from the parties' assessment of the merits of the exclusive right itself, but in particular from a transfer of value overshadowing this assessment* …" (emphasis added); and
- "such restrictions are all the more likely to be illegal when the restrictions agreed do go beyond the substantive scope of the patent, in the sense that, the same restrictions could not have been obtained by the patentee's right to oppose possible infringement before the court …".

[173] *Lundbeck* [2015] OJ C80/13 at [175]–[176].
[174] *Lundbeck* [2015] OJ C80/13 at [127], [131], [172]–[217] and [623].
[175] *Lundbeck* [2015] OJ C80/13 at [643]–[644].
[176] See *Lundbeck* [2015] OJ C80/13 at [812].
[177] *Lundbeck* [2015] OJ C80/13 at [307].
[178] *Lundbeck* [2015] OJ C80/13 at [198].
[179] *Lundbeck* [2015] OJ C80/13 at [223] and [228].
[180] *Lundbeck* [2015] OJ C80/13 at [250].
[181] *Lundbeck* [2015] OJ C80/13, Recital 6 and [80] and [194].
[182] *Lundbeck* [2015] OJ C80/13 at [600] and [603]–[605].
[183] *Lundbeck* [2015] OJ C80/13 at [604].
[184] *Lundbeck* [2015] OJ C80/13 at [625]–[626].
[185] *Lundbeck* [2015] OJ C80/13 at [637]–[646].

Fourthly, the EC considers the agreements concerned to be restrictions *by object*, despite the background, because it considers them to be essentially market exclusion agreements.[186] The EC bases its approach on several cases, notably *Allianz Hungaria*,[187] the *"Irish Beef"* case (*BIDS*)[188] and *Société Technique Minière*.[189]

Part of what is interesting here is that the EC challenges the notion that restrictions by object are just restrictions which are "obviously" or "patently" restrictions of competition, because the EC notes that there is no restriction by object without individual and specific examination of the content and the objective of the agreement and the legal and economic context of which it forms a part.[190] All this was pre-*Cartes Bancaires* in the ECJ, as was the parallel *Fentanyl* decision.

The EC states:

> "If … the limitations on entry in question are not achieved through the strength of the patent, but through inducements from the originator to the generic undertaking aligning previously competing interests, then a restriction of competition by object may exist, including in particular, when the limitations in question exceed the substantive scope of the patent."[191]

The EC then took the same approach as indicated in the *Fentanyl* case, looking at whether each agreement had the potential to restrict competition by nature,[192] and, as indicated in the general section above, whether the transfer of value was linked to the expected profits of the generic, whether the agreement actually settled the patent dispute and whether the obligations on the generic were wider than could have been achieved in the patent litigation.[193] The assessment is agreement by agreement.[194]

Fifthly, as regards fines, the defendants argued that the issues were novel and/or a new interpretation of "restriction by object" and should not be the subject of fines. The EC rejected this on the basis that the illegality of market exclusion agreements is not new.

As noted above, the EC found four separate infringements. This was challenged by Lundbeck. The EC disagreed considering that separation was correct, but the EC applied a 48% reduction to avoid a disproportionate fine for multiple fines in parallel.[195]

Interestingly, the EC also set the gravity percentages at 11% for three of the agreements concerned and 10% for the remaining one, given the specific circumstances of the case.[196] The additional amount was also set at 10% and only applied to Lundbeck for one of the first infringing agreements.[197]

Sixthly, the EC applied a 10% reduction of the basic amount in view of the long duration of the proceedings.[198]

Finally, the fines on the generic companies were linked to the value transferred to each generic in each infringement (as noted above, applying para.37 of the 2006 Fining Guidelines).[199] In the case of two generics this was also reduced by 10% of turnover for their distribution costs.[200]

E-commerce sector inquiry

In May 2015, the EC launched a competition inquiry into the e-commerce sector in the EU. According to the EC, the investigation goes together with actions launched within the framework of the Digital Single Market Strategy adopted this year.[201]

The EC has noted that cross-border online sales are only growing slowly. Statistics indicate that e-commerce takes place mainly nationally, as only 15% of online consumers make cross-border purchases.

The inquiry is designed to take a close look at potential non-contractual and contractual barriers by companies, particularly as regards cross-border online trade in goods and services. The businesses targeted are manufacturers and merchants (hybrid and e-tailers), online content service providers and online platforms (market places and price comparison tools).[202]

The EC notes that Member States may also have different views and/or issues as regards cross-border trade, and the sector inquiry aims to facilitate consistency between Member State authorities regarding restrictions in e-commerce.

The EC is understood to have sent out detailed questionnaires and stated that the inquiry could complement legislative action or, at least, allow the EC to provide appropriate guidance for the companies active in the e-commerce sector. The EC is aiming for a preliminary report for consultation in mid-2016, with a final report in 2017.

186 *Lundbeck* [2015] OJ C80/13 at [658].
187 *Allianz Hungaria Biztosito Zrt v Gazdasagi Versenyhivatal* (C-32/11) EU:C:2013:160; [2013] R.T.R. 19; [2013] 4 C.M.L.R. 25.
188 *BIDS* [2009] 4 C.M.L.R. 6.
189 *Société Technique Minière v Maschinenbau Ulm GmbH* (56/65) [1966] E.C.R. 235; [1966] C.M.L.R. 357.
190 *Lundbeck* [2015] OJ C80/13 at [651]–[652].
191 *Lundbeck* [2015] OJ C80/13 at [659].
192 *Lundbeck* [2015] OJ C80/13 at [661] and [734]–[735].
193 *Lundbeck* [2015] OJ C80/13 at [662].
194 The conclusion that the Lundbeck/Merck UK agreement constituted a restriction by object is in *Lundbeck* [2015] OJ C80/13 at [819]–[824].
195 *Lundbeck* [2015] OJ C80/13 at [1329].
196 *Lundbeck* [2015] OJ C80/13 at [1332].
197 *Lundbeck* [2015] OJ C80/13 at [1340].
198 *Lundbeck* [2015] OJ C80/13 at [1349] and [1380].
199 *Lundbeck* [2015] OJ C80/13 at [1359] and [1361].
200 *Lundbeck* [2015] OJ C80/13 at [1373].
201 EC Press Releases, IP/15/4701, 26 March 2015 and IP/15/4921, 6 May 2015.
202 With thanks to Geoffroy Barthet.

Current policy issues

Box 8
- *Policy issues*
  - — ECJ Opinion against EU accession to ECHR; and
  - — variations in *online booking* cases: ECN co-ordination (or lack of!).

Many of the more important policy issues of the year have been described already in specific contexts: questions of restrictions by object in the courts' case law and EC practice; the EC's focus on the internet through its Google cases and the new e-commerce inquiry; and the EC's pursuit of "pay-for-delay" cases further to the pharma sector inquiry.

In this section we propose to note two final things: (1) the ECJ's Opinion on EU accession to the ECHR; and (2) questions of divergence in ECN activity on hotel online booking issues.

ECJ Opinion on EU accession to the ECHR

In December 2014, the ECJ delivered its Opinion on whether the Draft Agreement on Accession to the ECHR (the Draft Agreement) is compatible with EU law. Put shortly, the court found that the Draft Agreement did not sufficiently take into account the specific nature of the EU and that, in various ways, it conflicted with the "autonomy" of the EU legal order.[203]

The ECJ found, notably, that the Draft Agreement failed to remove the effects of art.53 ECHR, which allows the parties to set higher human rights standards than those provided for in the ECHR.[204] Such a possibility would contradict the previous ECJ judgment in *Melloni*,[205] where the court ruled that human rights standards are now fully harmonised at EU level, which means that Member States can no longer implement higher standards.[206]

The court also found that Protocol No.16 to the Draft Agreement would have allowed the Member States to request non-binding advisory opinions from the European Court of Human Rights, therefore by-passing the preliminary ruling procedure of the CJEU.[207]

The ECJ also considered that the Draft Agreement failed to take into account art.344 TFEU, which grants exclusive jurisdiction to the ECJ over all disputes regarding EU law among Member States and between EU institutions and Member States.[208] The Draft Agreement failed to rule out the possible competence of the European Court of Human Rights to hear such matters.

Following the seminal decision in *Van Gend and Loos*,[209] the court also recalled the importance of the autonomy of EU law and that the rules of its internal order displace the principles and mechanisms of international law.[210]

Online hotel bookings/MFNs

It may also be of interest to note developments in recent online hotel bookings cases, insofar as they raise ECN co-ordination issues.

It may be recalled that competition authorities in more than 10 EU jurisdictions have been investigating most favoured nation (MFN) clauses in the online hotel booking sector over the past five years.[211]

The core issue is whether an online travel agent (OTA) can require hotels to give it the same or better room rates and terms than any other channel, including competing platforms (so-called "broad MFNs"), or parity in respect of rates and terms with the hotel's direct online channels (so-called "narrow MFNs"), or not even that, on the basis that such "best prices" practices are anti-competitive. During 2015 most of these investigations have ended, but some are continuing.

Italy, France and Sweden

Interestingly, it appears that three NCAs, the competition authorities of Italy, France and Sweden, worked together during the year, with co-ordination from the EC, to investigate and accept commitments from *Booking.com* concerning narrow MFNs.[212]

Not too long after the commitment decisions, however, France's *Assemblée Nationale* adopted legislation allowing hotels to set lower prices both on their websites and on the telephone with customers, thus making illegal even "narrow MFN" clauses allowed under *Booking.com*'s commitments.[213] The Italian Government has also been considering similar legislation.[214]

203 With thanks to Adélaïde Nys.
204 Opinion 2/13 of 18 December 2014 at para.189. The Opinion is available on the European Court's website.
205 *Melloni v Ministerio Fiscal* (C-399/11) EU:C:2013:107; [2013] Q.B. 1067; [2013] 3 W.L.R. 717; [2013] 2 C.M.L.R. 43 at [60].
206 Opinion 2/13, para.188.
207 Opinion 2/13, paras 196–199.
208 Opinion 2/13, paras 201–214.
209 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) [1963] E.C.R. 1; [1963] C.M.L.R. 105.
210 Opinion 2/13, para.157.
211 With thanks to Roberto Grasso. See generally for a fuller account, R. Grasso and G. Accardo "'No more drama' in the online hotel booking saga?" (2015) 1(3) *Competition Law & Policy Debate* 53.
212 The commitments are available on their respective websites at: *http://www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf* (France); *http://www.agcm.it/trasp-statistiche/doc_download/4810-i779-impegni.html* (Italy); and *http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom-commitment.pdf* (Sweden) [All accessed 26 January 2016]. Further information is also available in the ECN Briefs available on the EC website, notably concerning a simultaneous market test by the three authorities in December 2014.
213 The French Parliament passed the *Loi Macron* on 9 July 2015. The text of the new law is available at: *http://www.assemblee-nationale.fr/14/ta/ta0565.asp* [Accessed 26 January 2016].
214 See "Booking.com settlement may be further undermined by Italian bill", *MLex*, 21 October 2015.

UK

The UK has been pursuing a different approach. In January 2014, the OFT (Office of Fair Trading) closed a three-year investigation into alleged anti-competitive conduct by *Booking.com*, Expedia, and InterContinental Hotels Group (IHG) and Hotel Inter-Continental London Ltd (IH London).[215] The investigation was prompted by complaints filed by certain OTAs in the UK and elsewhere in Europe and the US. The core of these complaints was the allegation that various hotel chains had prevented them from offering discounted prices for room-only hotel accommodation.

The OFT's investigation focussed *on the use of retail price maintenance (RPM)* in contracts between the OTAs and the hotel chain. The OFT did not rule on the parity clause as a possible stand-alone restriction. Rather, it analysed MFN clauses only in connection with the RPM clause, to the extent that they strengthened the anti-competitive effects of the RPM. The OFT found that the use of RPM clauses constituted an infringement by object, since it effectively prevented OTAs from discounting the room price.

After rejecting a first set of commitments by *Booking.com*, Expedia, IHG and IH London, the OFT ultimately accepted amended commitments that allow OTAs and hotels that deal with *Booking.com*, Expedia, IHG and IH London to offer reductions off the headline room-only rates, up to the level of their commission or margin, as long as customers became members of a "closed group"—i.e. as long as they (1) enrolled in one of the membership programmes offered by OTAs and hotels; and (2) made at least one undiscounted booking with the OTA or hotel in question.

However, the OFT decision was short lived. In September 2014, the UK's Competition Appeal Tribunal (CAT) annulled the OFT decision. It appears that the OFT had failed to take into account that in addition to the hotel's website, OTAs, and generic search engines such as Google, consumers looking for a hotel room rely also on meta-search sites, such as Skyscanner, Skoosh International and TripAdvisor.

The CAT sent the case back to what was then the CMA, which in September 2015 closed the investigation on administrative priority grounds, with a commitment to watch market developments both in the UK and across Europe, in co-ordination with other NCAs and the EC.[216]

Germany

While the Italian, French and Swedish competition authorities were finalising their investigations into *Booking.com*'s practices with EC co-ordination, the *Bundeskartellamt* (BKA) *rejected* the company's settlement proposal and pressed formal charges on the use of "best price" clauses in its contracts with hotels in Germany.[217]

The BKA stated that the SO against *Booking.com* was necessary because the OTA had continued to use its best price clauses despite the regulator's prohibition of similar clauses in a previous investigation against Hotel Reservation Systems (HRS) in Germany.[218]

In January 2015, the Düsseldorf Higher Regional Court had upheld the BKA's decision. The court confirmed that HRS's "best price" clauses restricted competition and that they could not be exempted under the Vertical Restraints Block Exemption Regulation or by individual exemption.

Ireland, Denmark and Greece

The competition authorities of Ireland, Denmark and Greece have also recently closed their investigations into *Booking.com*'s contractual clauses, with hotels accepting the same commitments which led the competition authorities of Italy, France and Sweden to close their investigations.

All this has prompted much discussion about ECN co-ordination and consistency. Notably, it is argued that the EC should have intervened earlier to achieve better co-ordination among NCAs; and it appears that in future the EC may do so.[219]

[215] The OFT decision is available at: *http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/ca-and-cartels/oft1514dec.pdf* [Accessed 26 January 2016]. The UK Competition and Markets Authority (CMA) replaced the Office of Fair Trading on 1 April 2014.
[216] CMA Press Release, 16 September 2015.
[217] See the Press Release of the *Bundeskartellamt*, announcing the statement of objections. Available at: *http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Booking.html* [Accessed 26 January 2016].
[218] *Bundeskartellamt* Decision B9-66/10 of 20 December 2013, *HRS*. Available at: *http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?__blob=publicationFile&v=3* [Accessed 26 January 2016].
[219] See "Vestager says Booking.com case shows EU should intervene earlier in new markets", *MLex*, 15 June 2015.