Major Events and Policy Issues in EU Competition Law 2015–2016: Part 2

John Ratliff
WilmerHale, Brussels

Competition law; European Union

This is the second and final part of the overview of "Major Events and Policy issues in EU Competition Law 2015–2016", following on from Part 1 published in last month's issue of this journal.[1] The reference period is from November 2015 until the end of October 2016.[2]

This article was edited by John Ratliff and written by: Itsiq Benizri, Philippe Claessens, Virginia Del Pozo, Roberto Grasso, Katrin Guéna, Tomasz Koziel, Adélaïde Nys, Cormac O'Daly, Inés Pérez Fernández, John Ratliff, Mercedes Segoviano Guilarte, Lukas Šimas, Takeshige Sugimoto, Georgia Tzifa and Maude Vonderau.

The first part of this article: (1) summarises the remaining European Court rulings on art.101 TFEU issues, notably the GC's further review of *Cartes Bancaires* from a restriction by effect perspective; (2) discusses the GC rulings on art.102 TFEU issues, including the EC's acceptance of remedies in the *Reuters Instrument Codes* Decision; and (3) outlines AG Wahl's Opinion on the further appeal in the *Intel* rebates case. We also note the ECJ's interesting ruling that the EC's requests for information in its *Cement* investigation were not sufficiently reasoned, given their scope and stage in the proceedings.

The second part summarises the EC's recent decisions and settlements: (1) various cartel decisions, including the EC's *Freight Forwarding* Decision and the EC's huge fine in the *Truck Producers* case (even with a settlement *after* the SO); and (2) EC settlements, including the *Container Shipping* price signalling decision, as regards territorial restrictions in film broadcasting (*Paramount Pictures*); the licensing of data and indices for credit default swap trading (*ISDA/Markit*); and territorial restrictions in Bulgarian energy supply. We also note the EC's *Slovak Telecom* Decision and the interesting development of a settlement in an art.102 TFEU case with a reduced fine for co-operation, involving waste collection (*ARA*).

Finally, we outline: (1) the EC's important reports on geo-blocking and e-commerce; (2) the EC's decision in the *Perindopril (Servier)* (pay-for-delay) case; (3) the EC's initiative to strengthen the powers and independence of NCAs; and (4) the EC Opinion on disclosure of documents obtained in access to file before the UK Courts (*Sainsbury's/MasterCard*).

Article 101 TFEU

Box 13

- **Article 101 TFEU**
  - — *Cartes Bancaires*:
    - * on *renvoi* to the GC, that Court considered whether the GC had correctly assessed *the effects* of the GCB system;
    - * held "yes";
    - * EC entitled to look at card emissions market (albeit taking into account the two-sided nature and the acquiring market in such a network payment system);
    - * balancing issues (whether payment from card emission side of network to acquiring side was justified) had been correctly reviewed by the EC; and
    - * GC underlined that balancing issues went to art.101(3), not the application of art.101(1) "in context".

Cartes Bancaires

In June 2016, the GC ruled on the appeal by Groupement des Cartes Bancaires (GCB) against a decision of the EC finding that it had breached what is now art.101 TFEU by adopting practices that hinder the issue of bank cards by new entrants in France.[3] This was the second GC judgment, after the ECJ had overturned the GC's first ruling that the practices were a restriction "by object" and referred the matter back to the GC.[4]

Background

It may be recalled that the GCB is an economic interest grouping of more than 140 banks, managed by the largest French banks.[5] They operate a card system in France.

In 2007, the EC found that the GCB had breached art.101 TFEU by adopting measures (fees) having the object *and* effect of restricting the competitive advantage of the new entrants (primarily, banking arms of large

* With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this article.
[1] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2015–2016: Part 1" [2017] I.C.C.L.R. 75. "TFEU" is the abbreviation for "Treaty on the Functioning of the European Union"; "TEU" is "Treaty on 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"; "AG" for Advocate General; "NCA" is the abbreviation for "National Competition Authority"; "SO" is the abbreviation for "Statement of Objections"; "BE" is the abbreviation for "Block Exemption"; "Article 27(4) Notice" refers to the EC's Communications under that article of Regulation 1/2003 [2003] OJ L1/1. References to the "ECHR" are to the "European Convention of Human Rights" and references to the "CFR" are to the EU "Charter of Fundamental Rights".
[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 30 January 2017]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in EU Competition Law", published in the *International Company and Commercial Law Review*.
[3] With thanks to Roberto Grasso. *Cartes Bancaires v European Commission* (T-491/07 RENV) EU:T:2016:379
[4] The first GC judgment was in 2012: *Cartes Bancaires v European Commission* (T-491/07) EU:T:2012:633.
[5] *Cartes Bancaires* EU:T:2016:379 at [3].

retailers and online banks), in the market for issuing bank cards in France, to the benefit of the "main" members of the GCB.[6]

The key issue was a payment system among GCB members, known by the French acronym "MERFA", which involved a fee of up to €11 per card issued by banks that were less active in acquiring merchants or providing cash machines: usually online banks and retailers' banking arms. Two other fees, each of €12 per card, applied to "sleeping members" and to members issuing cards above a limit set by the GCB. The proceeds of the MERFA were redistributed among the members of the GCB not subject to it, in proportion to each member's overall contribution to the acquiring activity.

According to the GCB, these fees were designed to take into greater account the investments made by its members and the immediate advantages for new entrants as a result of those investments. The EC, however, found that these fees de facto applied only to recent or new members of the GCB and restricted their ability to issue cheaper cards. The EC required the GCB to bring the infringement to an end and to refrain from adopting in the future any measure or behaviour with the same, or similar, object or effect.

In 2012, the GCB lost its first appeal at the GC, which found that the fees restricted competition "by object". However, in 2014, the ECJ annulled that judgment and referred the case back to the GC so that it could examine whether the fees should be condemned because of their anti-competitive effects. The ECJ found that the GC was wrong to conclude that the pricing measures had the "object" of restricting competition.[7]

The GC's second judgment

In this second ruling, the GC rejected all but one of the GCB's pleas as unfounded. The main points were as follows:

First, the GCB argued that the EC had not proved the alleged anti-competitive effects of the additional fees. GCB argued that the EC's review of the effects of the system was flawed because the EC had not considered the real framework applicable to the system (above all, its two-sided nature and role in supporting the CB payment system).[8]

This the Court rejected, noting that the EC had looked at the issue, albeit focusing on the impact of the card emission market and the effects on the related acquisition market.[9]

The GC considered the relevance of the two-sided nature of the GCB card payment system in defining the relevant market(s) and assessing the anti-competitive nature of the measures under art.101(1) TFEU.

The GC confirmed that the existence of interactions between two markets or aspects of a broader system (such as, here, the GCB card payment system) did not mean that these form a single, wider market (and noted that the EC had considered the two-sided nature of the markets in its decision).

The GC recalled that the competitive assessment of a certain conduct must be carried out on the same market as that on which the EC has identified the anti-competitive effects.[10] The Court also found that the EC had taken into account the competitive situation in the absence of the measures on the market of payment systems in its assessment of the effects of these measures under what is now art.101(1) TFEU.[11]

Secondly, the GC rejected the GCB's pleas, finding that the EC had correctly concluded that the measures had restrictive effects on competition.[12] In particular, the GC upheld the EC's conclusions that the additional fees:

- de facto applied only to new entrants[13];
- were unavoidable[14];
- put the new entrants at a competitive disadvantage vis-à-vis the existing members of the GCB[15];
- had actual[16] and potential[17] effects on the price of the cards issued by the new entrants;
- had effects on the volume of cards they could issue[18] because, if the new entrants did not limit the volume of cards issued, they incurred the additional fees, the cost of which would be recouped through an increase of the price of the cards or the service fee for the use of the cards; and
- discouraged the existing members of the GCB from lowering their prices.[19]

[6] *Cartes Bancaires* EU:T:2016:379 at [18]–[28].
[7] *Groupement des cartes bancaires (CB) v European Commission* (C-67/13 P) EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [58].
[8] *Cartes Bancaires* EU:T:2016:379 at [157]–[360].
[9] *Cartes Bancaires* EU:T:2016:379 at [77], [86] and [92].
[10] *Cartes Bancaires* EU:T:2016:379 at [119].
[11] *Cartes Bancaires* EU:T:2016:379 at [123].
[12] *Cartes Bancaires* EU:T:2016:379 at [356]–[359].
[13] *Cartes Bancaires* EU:T:2016:379 at [172] and [218]–[241].
[14] *Cartes Bancaires* EU:T:2016:379 at [174]–[209].
[15] *Cartes Bancaires* EU:T:2016:379 at [210]–[217].
[16] *Cartes Bancaires* EU:T:2016:379 at [261]–[281].
[17] *Cartes Bancaires* EU:T:2016:379 at [242]–[260].
[18] *Cartes Bancaires* EU:T:2016:379 at [282]–[309].
[19] *Cartes Bancaires* EU:T:2016:379 at [310]–[322].

Thirdly, the GCB argued that the EC infringed art.101(3) TFEU in examining its applicability here, in particular in rejecting the GCB's argument that the system should be considered to promote economic and technical progress.[20]

The GC rejected GCB's arguments,[21] in particular the arguments relied on by GCB to show that the fees were necessary to avoid free-riding on the investment made by the existing members or on the value derived from using the system[22]; and were critical to encourage members that were mostly issuers to develop their own acquiring activity.[23]

Here, the Court noted that the GCB estimated that its members had invested some €4 billion in the system, but the EC had found that figure too high because it had included investments which were old and amortised—specific investments by individual banks and merchants in their use of the system—and had not taken account of interbank commissions.[24] The Court noted that the GCB had not provided new arguments contesting the EC's findings.[25]

The Court also noted that the EC had questioned GCB's assertion that there was a "value in the use" of the system, insofar as it was based on estimates and put at the difference between a private card and a GCB card.[26] Again, the Court found that GCB had offered no new argument to rebut the findings of the EC.

Fourthly, the EC had also challenged an economic report prepared for the GCB suggesting that the externalities of the acquisition activity were greater than those of card emission, thereby finding that the GCB had not shown that the fee structure requiring payments by those banks doing more card emission than acquiring was justified.[27] Equally, the EC had challenged the notion that the fee system promoted an optimal balance of card emission and acquisition, given that, among other things, it was based on the position of the main banks in the system.[28] The Court noted that the GCB offered no new argument contesting the EC's findings.[29]

The Court upheld the EC's view, therefore, that the GCB had not shown the need to encourage card acquisition more than card emission.[30]

Fifthly, the GC also upheld the EC's findings that the measures had a negative economic effect as they limited the supply of GCB cards, increased the price of cards for consumers, or at least encouraged the big banks not to lower their prices of the cards, and restricted the supply of cards with new functions (e.g. cards which combine payment and loyalty or cash-back functions).[31]

Sixthly, the GC noted several times that the balancing between the possible pro-competitive effects on the card acquiring market and the anti-competitive effects on the relevant market here (for the issue of cards), must be carried out under art.101(3) TFEU,[32] i.e. it is *not* part of the "context" which must be taken into account in the assessment of a restriction *by object*.

Finally, the GC upheld the GCB's argument that the EC's order not to adopt future measures or behaviour having an identical or similar object to that prohibited by the EC decision was no longer valid, as the ECJ had already found that the measures in question were not anti-competitive by object.[33]

Article 102 TFEU

Box 14

- **Article 102 TFEU**
  - — *Morningstar* appeal:
    - * GC upheld EC position that Thomson Reuters did not have to license Reuters Instruments Codes to competitors, considering that would go beyond what was necessary to address EC concerns.
  - — *Intel* AG Wahl's Opinion:
    - * advocating that the GC's judgment upholding the EC *Intel* Decision be set aside;
    - * what circumstances/effects have to be assessed in the case of an exclusionary rebate?
    - * should there be a different test for exclusionary rebate cases and other price-related abuses? and
    - * what is the jurisdictional test for the abusive conduct?
      - - implementation or immediate, substantial and foreseeable anti-competitive effect in the EEA?

Orange Polska

It may be recalled that, in June 2011, the EC fined Orange Polska €127.5 million for market foreclosure as regards wholesale broadband internet access in Poland, in particular limiting alternative operators' access to its

[20] *Cartes Bancaires* EU:T:2016:379 at [361]–[366].
[21] *Cartes Bancaires* EU:T:2016:379 at [433]–[434].
[22] *Cartes Bancaires* EU:T:2016:379 at [370]–[398].
[23] *Cartes Bancaires* EU:T:2016:379 at [399]–[426].
[24] *Cartes Bancaires* EU:T:2016:379 at [373]–[374], [386] and [391].
[25] *Cartes Bancaires* EU:T:2016:379 at [377].
[26] *Cartes Bancaires* EU:T:2016:379 at [380].
[27] *Cartes Bancaires* EU:T:2016:379 at [402].
[28] *Cartes Bancaires* EU:T:2016:379 at [403].
[29] *Cartes Bancaires* EU:T:2016:379 at [404].
[30] *Cartes Bancaires* EU:T:2016:379 at [421].
[31] *Cartes Bancaires* EU:T:2016:379 at [430]–[432].
[32] For example, *Cartes Bancaires* EU:T:2016:379 at [100], [109] and [126]–[127].
[33] *Cartes Bancaires* EU:T:2016:379 at [477] and [179].

network, proposing unreasonable terms in agreements with them, delaying negotiations of such agreements and limiting access to subscriber lines.[34]

In December 2015, the GC ruled on Orange Polska's appeal, rejecting the claims raised.[35] The main points of interest were as follows:

First, Orange Polska claimed that, pursuant to art.7(1) of Regulation 1/2003,[36] the EC should have demonstrated a legitimate interest in finding a past infringement. The GC rejected this, clarifying that art.7(1) applies to violations of competition rules for which the period of limitation has already lapsed. However, this was not the case in the EC's decision.[37]

Secondly, Orange Polska argued that the EC should have taken into account its €761 million investment in the network and infrastructure, and the immediate termination of the conduct as attenuating circumstances.

However, the GC did not view investments by Orange Polska in its infrastructure as a mitigation factor. The Court distinguished between investment in a company's own assets and compensating potential victims of an infringement.[38] In addition, the GC doubted the voluntary nature of the investments made by Orange Polska, noting that the improvements were largely carried out as part of an attempt to avoid functional separation of its downstream and upstream businesses by the Polish telecommunications regulatory authority.[39]

As regards the immediate termination of the infringement following the EC's unannounced inspections, the GC recalled that the EC's intervention could not be the sole reason for cessation of unlawful practices, if cessation was to be considered an attenuating circumstance.[40]

Morningstar

In September 2016, the GC upheld an EC decision making commitments binding on Thomson Reuters (TR) under art.9 of Regulation 1/2003.[41]

Background

It may be recalled that, in 2011, in its preliminary assessment, the EC considered that TR might have abused its alleged dominant position in the worldwide market for consolidated real-time datafeeds[42] by imposing restrictions on licences regarding the use of Reuters Instrument Codes (RICs).

RICs are short, alphanumerical codes used by financial institutions to identify securities and their trading locations by retrieving information from the TR database. TR had developed those codes and claimed copyright over them.

In particular, TR did not allow its customers to use RICs to retrieve data from *other providers'* consolidated real-time datafeeds. It also did not allow third parties to develop switching tools ("mapping tables") using RICs in order to make the TR system interoperable with competing consolidated real-time datafeeds.

The EC found that RICs were often embedded in the customers' server-based IT applications, meaning that customers would have to go through a long process of removing those codes and recoding their applications when switching provider. The EC therefore preliminarily concluded that these practices created substantial barriers to switching providers and were liable to foreclose competition.[43]

In order to address the EC's concerns, TR offered various sets of commitments, which the EC accepted in 2012. TR committed, notably:

- to allow its *customers* to enter into extended licence agreements concerning RICs (ERLs). These agreements would allow customers, upon payment of a monthly fee, to use RICs to retrieve data from consolidated real-time datafeeds of competing providers. These obligations were for five years with a possibility to extend a further two years; and
- to offer licences to *third-party developers* (TPDLs) to maintain and develop mapping tables, which would allow TR's customers to easily switch providers.

Competitors were not allowed to obtain such licences, which meant that they could not gain access to RICs in order to develop mapping tables. However, third-party developers were allowed to co-operate with TR's competitors in creating such tables and, in particular, to provide competitors with descriptive data related to RICs (although not the RICs themselves) in the context of that co-operation.[44]

[34] With thanks to Tomasz Koziel. Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (COMP/39.525-*Telekomunikacja Polska*). See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 2" [2012] I.C.C.L.R. 127, 135. Telekomunikacja Polska was acquired by Orange in 2013 and changed its name to Orange Polska.
[35] *Orange Polska SA v European Commission* (T-486/11) EU:T:2015:1002; [2016] 4 C.M.L.R. 20.
[36] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[37] *Orange Polska* EU:T:2015:1002; [2016] 4 C.M.L.R. 20 at [77]–[78].
[38] *Orange Polska* EU:T:2015:1002; [2016] 4 C.M.L.R. 20 at [193].
[39] *Orange Polska* EU:T:2015:1002; [2016] 4 C.M.L.R. 20 at [202].
[40] *Orange Polska* EU:T:2015:1002; [2016] 4 C.M.L.R. 20 at [213].
[41] With thanks to Georgia Tzifa. *Morningstar Inc v European Commission* (T-76/14) EU:T:2016:481. GC Press Release 100/16, 15 September 2016.
[42] Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.654-*Reuters Instrument Codes (RICs)*). A real-time datafeed is a virtual pipeline that supplies continually updated market information. These datafeeds can be used in applications developed by banks and financial institutions, for example, to allow for electronic or algorithmic trading. See *RICs* Decision at [24], available on the DG Competition's website.
[43] *RICs* Decision at [37]–[45].
[44] *RICs* Decision at [77]–[80].

The EC took the view that those commitments were sufficient to address the competition concerns identified because they allowed customers to retrieve data from other providers without being obliged to rewrite their applications.[45]

GC judgment

Morningstar is a competing consolidated real-time datafeed provider. Morningstar argued that the EC had committed a manifest error of assessment in accepting the commitments. In its view, the commitments should also have given *competing providers* the right to handle RICs so that they could offer fully integrated competing services.[46]

First, Morningstar stressed the fact that the EC decision excludes competing providers from both types of licences referred to above and also does not allow them to handle RICs themselves on behalf of eligible licensees in order to create mapping tables. Thus, companies which, like Morningstar, had the capacity, knowledge and incentive needed to offer a competing service were directly excluded from doing so.

Morningstar noted that the commitments envisaged granting licences only to customers or third-party developers. However, it argued that the likelihood of third parties developing the mapping tables required was theoretical and extremely remote.

Secondly, Morningstar claimed that TR's customers were unlikely to switch because of the cost and complexity involved. TR's customers were also unlikely to work with a conversion tool developed by a third party since these tools require a high degree of speed and reliability.

Thirdly, Morningstar argued that, whilst the commitments allowed for the possibility of collaboration between competitors and third-party developers in the design of mapping tables, that would also be ineffective, given the impossibility of exchanging the required information regarding RICs.

The GC disagreed.[47]

First, the Court noted that the issue on review was to assess whether the proposed commitments were sufficient to respond adequately to the identified competition concerns and that the review by the EU courts is limited to establishing whether the EC's assessment is manifestly wrong.

That meant that the EC did not have to accept commitments *more favourable to competition*. The EC merely had to consider whether the commitments served to dispel its concerns; an assessment for which the EC had some discretion.[48] Moreover, the GC noted that the EC had considered that granting TR's competitors access to RICs would go beyond what was necessary to address its concerns.[49]

Secondly, the GC reviewed the EC's approach and each of Morningstar's claims. The Court noted that the EC's concerns related to the locking in of TR's customers by barriers to switching providers. The EC took the view that these concerns could be resolved by requiring behavioural remedies *via customers and third parties*. In other words, the EC took the view that including TR's competitors in the licence terms would go beyond what was necessary to address its concerns. The GC considered that that approach was not manifestly wrong having regard to the circumstances.

Thirdly, the GC found that this approach was not undermined by Morningstar's claim that no switch of provider had taken place by the time it appealed (just over a year later), given that the EC's assessment is a prospective one. At the point in time at which the contested decision was adopted, the commitments were sufficient to remove the competition concerns which had been identified.[50] It was also possible that customers might still be satisfied with TR's services.

In short, the GC approved the EC's approach, which had been to *facilitate* competition here, removing barriers to switching, not to force switching.[51]

This is an interesting case, partly because of the GC's approach to review the EC's commitments decision after *Alrosa*[52] and partly because of its endorsement of the EC's decision to open the door to competition, but not require licensing of TR's RICs to competitors.

Trajektna Luka Split

In September 2016, the GC ruled on the EC's decision to reject a complaint about alleged abuse of dominance by the Split Port Authority (SPA) in Croatia. The GC held that the EC had been right to dismiss the complaint and rejected the appeal.[53]

Background

Trajektna Luka Split (TLS) is a private operator of the passenger terminal at the port of Split. Its core activities concern passenger terminal operations for domestic and international traffic, including the mooring and unmooring of ships, and the embarkation and disembarkation of passengers and vehicles.[54]

[45] *Morningstar* EU:T:2016:481 at [50].
[46] *Morningstar* EU:T:2016:481 at [49].
[47] *Morningstar* EU:T:2016:481 at [61]–[64].
[48] *Morningstar* EU:T:2016:481 at [40]–[46] and [56]–[59] following *European Commission v Alrosa Co Ltd* (C-441/07 P) EU:C:2010:377; [2010] 5 C.M.L.R. 11.
[49] *Morningstar* EU:T:2016:481 at [63] and [99].
[50] *Morningstar* EU:T:2016:481 at [72]–[73].
[51] *Morningstar* EU:T:2016:481 at [4].
[52] *European Commission v Alrosa Co Ltd* (C-441/07 P) EU:C:2010:377; [2010] 5 C.M.L.R. 11.
[53] With thanks to Lukas Šimas. *Trajektna Luka Split dd v European Commission (TLS)* (T-70/15) EU:T:2016:592; [2016] 5 C.M.L.R. 22.
[54] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [1].

After its privatisation in 2003, TLS was granted a concession for a period of 12 years. For its services, TLS charges port users, such as ferry operators, fees which cannot exceed the amounts fixed by the SPA, in accordance with the Croatian regulations for ports.[55]

In March 2013, TLS submitted a complaint to the Croatian National Competition Authority (CNCA) and then, in August 2013, TLS submitted a complaint to the EC. TLS complained that the SPA had abused its dominant position under art.102 TFEU by fixing port-services fees at *prohibitively low maximum levels*, thus preventing TLS from managing its business profitably.[56] In September 2013, the CNCA took a decision rejecting TLS's complaint.[57] Then, in November 2014, the EC adopted a decision rejecting TLS's complaint.[58] TLS then appealed against the EC decision.[59]

The EC rejected TLS's complaint on three grounds: (1) the likelihood of establishing the existence of an infringement was limited; (2) the national courts and authorities appeared best placed to decide on the issues raised; and (3) the impact on the functioning of the Internal Market appeared to be limited.[60]

GC judgment

On appeal, TLS argued, first, that the EC did not carry out its own assessment but relied solely on the wording of the CNCA decision without asking TLS for any explanations.[61]

This argument was rejected by the GC, which considered that the EC had reviewed the situation before concluding that there were insufficient grounds for it to conduct a more detailed investigation.[62] Notably, before arriving at that conclusion, TLS had been given an opportunity to show how the SPA, which was not in competition with it, could have an interest in its exit from the market.[63] TLS had also been invited to explain how the alleged abuse of a dominant position could have lasted for several years, without having led to its exit from the market, despite its supposedly precarious financial position.[64]

The GC also stated that the EC was not precluded from considering that the CNCA had already dealt with the case.[65] The Court considered that the EC could adopt the reasoning followed by the CNCA, without itself repeating a similar analysis, since the provisions of national Croatian law on which the dispute was based were equivalent to arts 101 and 102 TFEU.[66]

Secondly, TLS argued that the EC was wrong to conclude that the national courts and authorities were well placed to handle the questions raised.[67]

Again, the Court disagreed, noting that the fact that TLS itself brought a complaint before the CNCA showed that TLS appeared to think that the CNCA was well placed. TLS could not call into question its own choice based on dissatisfaction with the CNCA's decision.[68] In addition, the Court stated that TLS had not put forward any evidence to show that the Croatian national courts and authorities were unable to assess the case.[69]

Thirdly, TLS argued that the EC did not take into account the various conflicts of interest involving some of the members of the SPA's governing council.[70] However, the Court stated that arts 101 and 102 TFEU were not intended to ensure compliance with the principles of good administration in the decisions taken by national administrative bodies.[71]

Fourthly, TLS disputed the argument put forward by the EC that the concession granted to TLS was due to expire in 2015 and that the EC risked finding itself in a situation where it was investigating a practice which had ceased. TLS stated that its concession did not expire until June 2016.[72] However, the GC stated that the EC did not have to take into account facts which had not been brought to its notice.[73] Further, TLS had not demonstrated how, if the concession was so extended, that would have changed the EC's assessment.[74]

Intel AG's Opinion

In October 2016, AG Wahl gave his Opinion in the *Intel* case.[75] In his view, the GC was wrong to conclude that Intel's exclusive rebates were abusive in themselves

[55] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [2]–[3].
[56] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [4]–[5].
[57] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [6].
[58] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [11].
[59] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [13].
[60] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [12].
[61] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [22].
[62] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [23].
[63] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [24].
[64] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [24].
[65] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [26]–[27].
[66] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [32].
[67] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [41].
[68] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [42].
[69] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [50].
[70] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [56].
[71] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [57].
[72] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [62].
[73] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [63].
[74] *TLS* EU:T:2016:592; [2016] 5 C.M.L.R. 22 at [64].
[75] With thanks to Georgia Tzifa. Opinion of AG Wahl in *Intel Corp Inc v European Commission* (C-413/14 P) EU:C:2016:788.

without analysing their *capacity to restrict competition* depending on the circumstances of the case. He was also critical on certain procedural issues.

It may be recalled that, in June 2009, the EC found that Intel had abused its dominant position on the x86 central processing unit (CPU) market.[76] The EC identified two types of abuse:

- conditional rebates (hidden rebates granted to original equipment manufacturers (OEMs) on condition that they bought all, or almost all, of their CPU requirements from Intel); and
- "naked restrictions" (direct payments made to OEMs in order to halt or delay the launch of specific products containing a competitor's x86 CPUs).

In light of those findings, the EC imposed a fine of €1.6 billion on Intel.

That decision was upheld by the GC in June 2014.[77]

Intel appealed. The first ground, which had to do with the determination of the correct legal test to be applied to "exclusivity rebates", was the object of much debate and represented the bulk of the AG's Opinion. The procedural issues raised by the case were also examined in detail.

The main points are as follows:

First, the AG addressed the legal standard to be applied to "exclusivity rebates". In its judgment, the GC found that the rebates granted by Intel were such "exclusivity rebates".[78] The GC then held that these rebates, when granted by a dominant company, were "by their very nature" capable of restricting competition and foreclosing competitors. Consequently, the EC was not required to carry out an analysis of all the circumstances of the case in order to verify that the conduct was capable of restricting competition.[79]

The AG disagreed with that assessment. In his view, the GC had relied on what the Court had said in *Hoffman La Roche*,[80] rather than examining *how* the Court had actually decided that case.[81] Had the GC done so, it would have found that the conclusion of *Hoffman La Roche* was nevertheless based on a thorough analysis of the conditions surrounding the grant of the rebates and the related market coverage. It was on the basis of that assessment that the Court had held that the rebates in question were anti-competitive.[82]

The AG argued that this position was confirmed by the subsequent case law, which, even if relating to other pricing practices, has consistently taken into account "all the circumstances" in ascertaining whether the challenged conduct was contrary to art.102 TFEU. In this view, a consistent interpretation of that case law led to the conclusion that an examination of "all the circumstances" of the case was necessary, even in the case of presumptively unlawful practices, such as loyalty rebates.[83]

Owing to its reading of the *Hoffman La Roche* judgment, the AG argued, therefore, that the GC had wrongly created a sub-category of loyalty rebates, unlawful because of their form, which it termed "exclusivity rebates" and for which consideration of all the circumstances is not necessary in order to establish a breach of art.102 TFEU.[84]

However, that approach did not appear convincing to the AG for the following reasons:

- the assumption of unlawfulness of these "exclusivity rebates" by virtue of form would not be rebuttable[85];
- creating this special sub-category of rebates would be warranted only if there could be no redeeming features to them, however, that was not clear[86];
- contemporary economic literature commonly emphasises that the effects of exclusivity are context-dependent[87]; and
- the case law on pricing and margin squeeze practices requires consideration of all the circumstances to determine whether the company in question has abused its dominant position.[88]

The AG also considered that "it is of the utmost importance that legal tests applied to one category of conduct are coherent with those applied to comparable practices".[89] In other words, the AG relied on cases like *Post Danmark*,[90] *Deutsche Telekom*[91] and *TeliaSonera Sverige*,[92] in contrast to the GC, which had found that a

[76] Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990-*Intel*). See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 2" [2010] I.C.C.L.R. 149, 161.
[77] *Intel Corp v European Commission* (T-286/09) EU:T:2017:547; [2014] 5 C.M.L.R. 9. See also John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 123–125.
[78] *Intel* EU:C:2016:788 at [79].
[79] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [46]–[47].
[80] *F Hoffmann La Roche & Co AG v Commission of the European Communities* (85/76) EU:C:1979:36; [1979] 3 C.M.L.R. 211.
[81] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [70].
[82] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [66] and [75].
[83] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [68]–[76].
[84] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [81]–[84].
[85] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [86]–[88].
[86] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [89]–[93].
[87] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [94]–[100].
[88] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [101]–[105].
[89] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [103]. For the GC's approach, see [99] of the judgment; and also John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 125.
[90] *Post Danmark A/S v Konkurrenceradet* (C-209/10) EU:C:2012:172; [2012] 4 C.M.L.R. 23.
[91] *Deutsche Telekom AG v European Commission* (C-280/08 P) EU:C:2010:603; [2010] 5 C.M.L.R. 27.
[92] *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) EU:C:2011:83; [2011] 4 C.M.L.R. 18.

distinction should be drawn between those cases and the *Intel* case since a particular price cannot be abusive in and of itself, unlike an incentive to exclusive supply.

Based on this, the AG reached the intermediate conclusion that the GC had erred in law in considering that "exclusivity rebates" can be categorised as abusive without an assessment of "all the circumstances" of the case.

Secondly, since the GC *had* carried out such an assessment in the alternative, the AG then went on to examine it.[93] The AG first rejected the view that it is enough to show that the conduct in question is *capable* of restricting competition. The correct legal test, in his view, is to ascertain the "*likelihood*" of the challenged conduct having an anti-competitive foreclosure effect, which "must be considerably more than a mere possibility that certain behaviour may restrict competition".[94]

Then the AG considered the different factors on which the GC had based its finding, in the alternative, that Intel's rebates were capable of restricting competition: their market coverage and duration, the market performance of AMD, Intel's competitor, and the declining prices of x86 CPUs, as well as the as-efficient-competitor (AEC) test carried out by the EC.

In his view, the GC's evaluation of these factors did not establish that the rebates and payments were likely to have an anti-competitive foreclosure effect.[95] The AG therefore concluded that the GC's alternative assessment was vitiated by an error of law and advised the Court to uphold Intel's claim in this respect.[96]

Thirdly, the AG looked at the market coverage criterion in abuse of dominance cases. Intel argued that the GC had wrongly held that the finding of an infringement for the years *2006 and 2007*, rather than being based on the market coverage in the two years in question, could be based on the *average market coverage for the years 2002–07*; a period for which the EC had made a finding of a single and continuous infringement.[97]

The AG agreed with that argument. He considered that the concept of a "single and continuous infringement" constitutes a procedural rule, recourse to which cannot "extend the ambit of the prohibitions under the Treaties".[98] In his view, the GC had therefore been wrong not to apply the criterion of sufficient market coverage.[99]

Fourthly, in the event that the Court would hold that "exclusivity rebates" must be distinguished from other types of rebates, the AG advised it to uphold Intel's claim that the GC should not have classified the rebates offered to HP and Lenovo as exclusive.

For the purposes of determining whether the challenged conduct constitutes an exclusionary abuse contrary to art.102 TFEU, the AG observed that it was necessary to examine the *overall percentage* of OEM requirements that were tied as a result of Intel's rebates and payments, and not just the restrictions in *one segment of the market*. In his view, therefore, the GC was wrong to conclude that it is irrelevant whether the condition that the customer purchases "all or most" of its requirements from the dominant undertaking relates to the whole market or a particular segment thereof.[100]

Fifthly, the AG disagreed with the way that the GC had dealt with certain procedural grounds, specifically as regards the handling of a meeting with a Dell executive for which it appears a full note had not been made. The AG stated that since

> "no adequate record of the meeting exists, it is not possible to tell with certainty what was discussed and to what extent that might have been exculpatory, inculpatory, or indeed neutral".

The AG therefore considered that the GC had been wrong to find that the EC had not infringed art.19 of Regulation 1/2003 (giving the EC the power to take statements) and that its failure to record the meeting in question was cured by making available to Intel a partially redacted note and inviting Intel's comments.[101]

Sixthly, Intel claimed that the GC had been wrong to hold that the EC had jurisdiction to apply art.102 TFEU to Intel's agreements with Lenovo, given that they were neither implemented in the EEA, nor had they any foreseeable, immediate or substantial effect in that area.[102]

After discussing the relevant case law, in particular *Wood Pulp*,[103] the AG examined the question whether the correct jurisdictional criterion is the implementation or the effects of the agreement in question.[104] While he considered the implementation criterion to be a decisive factor, the AG did not consider that it could be met only by taking into account direct sales into the EU.[105] He considered that a case-by-case assessment of conduct would be required, taking into account various factors.[106]

[93] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [106]–108].
[94] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [113]–[114] and [117].
[95] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [134]–[174].
[96] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [173]–[174].
[97] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [175].
[98] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [180]–[184].
[99] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [189]–[194].
[100] Opinion of AG Wahl in *Intel* EU:C:2016:788 in particular at [204]–[211].
[101] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [242] and [258]–[268].
[102] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [278].
[103] *A Ahlström Osakeyhtiö v Commission of the European Communities* sub nom. *Re Wood Pulp Cartel* (C-89/85) EU:C:1993:120; [1993] 4 C.M.L.R. 407.
[104] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [280]–[287].
[105] Opinion of AG Wahl in *Intel* EU:C:2016:788 at [290] and [292].
[106] Opinion of AG Wahl in *Intel* EU:C:2016:788, in particular at [292].

The AG then referred to the GC's judgment in *Gencor*,[107] stressing that EU competition law is triggered when conduct has "foreseeable, immediate and substantial effects in the internal market", and arguing for the application of the same principle to arts 101 and 102 TFEU. He stated, further, that such a "criterion of 'qualified' effects" (meaning that the effects are sufficiently significant to justify asserting jurisdiction) is not satisfied where the effect in the EU is merely hypothetical or, in any event, of minor significance. It is also not satisfied where the distortion of competition within the Internal Market cannot be imputed to the undertaking in question since those harmful effects were not foreseeable to it.[108]

In the present case, the AG stated that it was necessary to show that Intel's unilateral conduct, not just the Lenovo agreements, was implemented in the EEA in order to establish the EC's jurisdiction under art.102 TFEU.[109]

As for the effects of Intel's conduct in the EEA, the AG suggested that they had not been properly assessed by the GC. Instead of looking at whether the exclusivity rebates and the naked restrictions were *each* capable of appreciably restricting competition in the internal market, the GC held that they formed part of *a single and continuous infringement* and, in that way, fell under art.102 TFEU.[110]

For these reasons, the AG concluded that the GC had been wrong as regards its application of both the implementation criterion and the "qualified effects" criterion, and advised the Court to uphold Intel's claim.[111]

It will be interesting to see what the ECJ decides on these highly topical and controversial issues.

Other

In June 2016, the ECJ dismissed an appeal by Slovenska Posta against the GC's ruling[112] upholding the EC's decision[113] as manifestly unfounded.[114]

Procedure

Cement requests for information

In March 2016, the ECJ set aside the GC's judgments which dismissed the appeals of six cement manufacturers seeking the annulment of a 2011 Commission Decision[115] requesting extensive information from eight members of the cement industry.[116]

Having sent informal requests for information (RFIs), the EC adopted the contested Decision[117] in March 2011 under art.18(3) of Regulation 1/2003, opening proceedings against a number of cement manufacturers in relation to alleged breaches of art.101 TFEU.

The 94 page Annex to the Decision requested information from these cement companies, asking for extremely extensive and detailed data over a long period of time. In particular, the information related to a considerable number of transactions, both domestic and international, in relation to 12 Member States, over a period of 10 years. The companies were given 12 weeks to provide the answers to the first 10 sets of questions and two weeks to reply to the 11th set concerning contacts and meetings.[118]

The cement manufacturers lodged various actions with the GC seeking annulment of the EC's Decision, which were dismissed in March 2014. The GC dismissed the appeals in their entirety, except in the appeal of Schwenk Zement, where the GC found that the EC had imposed a disproportionately short two-week deadline for the provision of the 11th set of information.

Five of the cement companies then decided to bring further appeals to the ECJ.

In October 2015, AG Wahl gave his Opinion on the appeals, concluding that they should be allowed and the GC's judgments set aside. In particular, AG Wahl considered that there were errors in the GC's review of the EC Decision, namely that the purpose of the request for information was unclear and ambiguous,[119] and that there was an error in its review of the necessity and proportionality of the request.[120]

Then, in March 2016, the ECJ agreed with the AG and held that the GC's judgments had to be set aside. In particular, the Court found that the GC erred in finding that the EC had provided an adequate statement of reasons

[107] *Gencor Ltd v Commission of the European Communities* (T-102/96) EU:T:1999:65; [1999] 4 C.M.L.R. 971.
[108] *Gencor* EU:T:1999:65; [1999] 4 C.M.L.R. 971 at [301]–[302].
[109] *Gencor* EU:T:1999:65; [1999] 4 C.M.L.R. 971 at [308]–[310].
[110] See *Gencor* EU:T:1999:65; [1999] 4 C.M.L.R. 971, in particular at [319]–[322].
[111] *Gencor* EU:T:1999:65; [1999] 4 C.M.L.R. 971 at [344]–[348].
[112] See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015: Part 2" [2016] I.C.C.L.R. 99, 108.
[113] See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 2" [2010] I.C.C.L.R. 149, 169.
[114] *Slovenska posta AS v European Commission* (C-293/15 P) EU:C:2016:511.
[115] Decision concerning a proceeding pursuant to Article 18(3) of Regulation 1/2003 (Case COMP/39.520-*Cement and related products*).
[116] With thanks to Mercedes Segoviano Guilarte. *HeidelbergCement AG v European Commission* (C-247/14 P) EU:C:2016:149; [2016] 4 C.M.L.R. 28; *Schwenk Zement KG v European Commission* (C-248/14 P) EU:C:2016:150; *Buzzi Unicem SpA v European Commission* (C-267/14 P) EU:C:2016:151; and *Italmobiliare SpA v European Commission* (C-268/14 P) EU:C:2016:152. ECJ Press Release 27/16, 10 March 2016. Paragraph numbers here refer to the *HeidelbergCement* judgment.
[117] *Cement* Decision. See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 117.
[118] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [27].
[119] AG Wahl's Opinion in *HeidelbergCement AG v European Commission* (C-247/14 P) EU:C:2015:694 at [48].
[120] AG Wahl's Opinion in *HeidelbergCement* EU:C:2015:694 at [93]–[94].

which, according to art.296 TFEU, must be appropriate to the measure at issue and must disclose, clearly and unequivocally, the reasoning followed.

The ECJ confirmed that the obligation to state specific reasons is a fundamental requirement, designed not merely to show that the request for information is justified but also to enable the undertakings concerned to assess the scope of their duty to co-operate, whilst at the same time safeguarding their rights of defence.[121]

The Court found that the Decision did not disclose, clearly and unequivocally, the suspicions of infringement, which justified the Decision.[122] The Recitals of the Decision only set out an "excessively brief statement of reasons which [was] vague and generic, having regard in particular to the considerable length of the questionnaire appended to Annex I to that decision".[123]

The Court noted that the Decision was not clear as regards the products concerned referring just to "cement, cement-based products and other materials used to produce, directly or indirectly, cement products". More details were given but only as examples.[124]

Similarly, the Decision indicated that the infringement extended to the EU or the EEA and, whilst the decision to initiate proceedings referred to 10 Member States, the questionnaire related to 12 Member States.[125] All this was too ambiguous for the Court.

The Court also noted that, whereas the EC might not be so precise in an inspection decision coming at the beginning of an investigation, this RFI came more than two years after the first inspections; after the EC had sent a number of RFIs and several months after the EC had decided to initiate proceedings. In such circumstances, the EC already had information which would have allowed it to be more precise.[126]

European Commission decisions

Cartels—old

Freight Forwarding Decision

In December 2015, the EC published its decision from March 2012 concerning the freight forwarding cartel.[127] The Decision is 262 pages long. It will be recalled that the EC fined 14 groups of companies for participating in four infringements, which involved the co-ordination of surcharges and other aspects of price setting for freight forwarding services. (See Part 1 of this article in last month's issue of this journal[128] for the EU Court appeals.)

The main points of interest are as follows:

First, some of the undertakings contested the EC's jurisdiction to apply art.101 TFEU to their conduct on the basis of lack of effect in the EU/EEA. The EC dismissed these arguments. The EC noted that the various infringements related to: (1) export of goods from the UK (but where the anti-competitive conduct took place/was implemented in the EEA); (2) export of goods to the US from, among other places, the EEA (but where, again, the anti-competitive conduct took place in the EEA); and (3) imports of goods into the EEA (where the agreement/concerted practice was implemented in the EEA).[129] The EC based its jurisdiction on implementation and the *Wood Pulp* case.[130]

Secondly, the EC concluded that there was an appreciable effect on intra-EU/EEA trade in the circumstances (even if some of the cartels were export-related or concerned one Member State), in particular in view of the likely effect on the patterns of trade.[131]

Thirdly, Deutsche Bahn objected to the same law firm having acted both for the leniency applicant (Deutsche Post) and the relevant industry association, arguing that this alleged dual representation infringed Brussels Bar rules and contract law.[132]

The EC dismissed these objections. First, it noted that the anti-competitive conduct infringed art.101 TFEU and its divulgence could not be precluded by contract law. The EC also noted that it was not competent to rule on the alleged breach of the Bar rules or contract law. Further, the EC considered that there was no credible evidence to suggest that the information in the immunity application had been irregularly obtained, nor would any ruling on these matters have affected the legality of the immunity application.

Fourthly, the EC departed from its normal method of calculating fines as set out in its 2006 Fining Guidelines.[133] Three of the infringements were of short duration, so, instead of using actual annual sales figures as the basis for calculating the fines, the EC used the turnover generated by the undertakings during the months of the infringement to calculate a representative full business year of turnover.[134] Similarly, the other infringement

[121] AG Wahl's Opinion in *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [19].
[122] AG Wahl's Opinion in *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [27].
[123] AG Wahl's Opinion in *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [28].
[124] AG Wahl's Opinion in *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [35].
[125] AG Wahl's Opinion in *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [36].
[126] AG Wahl's Opinion in *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [39].
[127] With thanks to Cormac O'Daly. Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39462-*Freight Forwarding*), available on the EC's website. See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2011–2012: Part 2" [2013] I.C.C.L.R. 129, 138; and John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2012–2013: Part 2" [2014] I.C.C.L.R. 113, 129.
[128] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2015–2016: Part 1" [2017] I.C.C.L.R. 75.
[129] *Freight Forwarding* Decision at [391]–[427].
[130] *Wood Pulp* EU:C:1993:120; [1993] 4 C.M.L.R. 407.
[131] *Freight Forwarding* Decision at [593]–[628].
[132] *Freight Forwarding* Decision at [655]–[658].
[133] EC's *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003* (2006 Fining Guidelines) [2006] OJ C210/2.
[134] *Freight Forwarding* Decision at [860]–[862].

related to a surcharge that was only imposed during a so-called "peak season" (before Christmas), so the EC based its fine on the average value of the undertakings' sales in the peak season.[135]

Fifthly, when calculating the multiplier for the duration of each undertaking's participation in the infringements, the EC took account of the actual number of months of each infringement but rounded down this figure to the number of full months (i.e. a period of 3 months and 25 days would be considered to be 3 months).[136]

With respect to UTi, two UTi subsidiaries were involved in one of the infringements at different periods of time. However, the EC considered that UTi itself was involved in the infringement for the entire period.[137] This resulted in the subsidiaries benefiting from the rounding down of the duration of their participation without UTi as a whole benefiting from a similar rounding down. As noted as regards the appeals in Part 1 of this article, the GC later found that this methodology infringed EU law and reduced UTi's fine by €103,000.[138]

Sixthly, as became a major issue in the appeals, the EC fined on the basis that freight forwarding services *as a whole* were related to the infringement because they were offered as a package of services.[139] Arguments that the relevant turnover should only have been as regards services to which the surcharge applied were rejected.

Other

During the reference period, the EC has published: (1) a non-confidential version of the *Parking Heaters* decision on its website and a summary of its decision[140]; (2) a summary of its *Retail Food Packaging* decision[141]; and (3) provisional confidential versions of the *Yen* and *Euro Interest Rate Derivatives* decisions on its website, together with a summary of the *Yen* case.[142]

In April 2016, the EC also modified the fine on Société Générale in the *Euro Interest Rate Derivatives* case, reducing it from some €445.8 million to €227.7 million. It appears that there were errors in the sales data previously supplied to the EC, which had been corrected by Société Générale.[143]

The EC also closed its proceedings in the *LCD panels* case,[144] and indicated that it was not pursuing its investigation into *potential manipulation of oil price benchmarks*.[145]

Cartels—new

Box 15

- **New cartel fines (November 2015–October 2016)**

Total fines		**Highest company fine(s)**	
Alternators and Starters	*€137.8 million*	*Melco*	*€110.9 million*
Mushrooms	*€5.2 million*	*Ribere-bro*	*€5.2 million*
Steel Abrasives	*€6.2 million*	*Pometon*	*€6.2 million*
Truck Producers	*€2.9* **billion**	*Daimler*	*€1* **billion**
TOTAL	**€3.1 billion**		

Note: huge fines in the *Truck Producers* case, which was settled *after* the SO.

Alternators and starters

In January 2016, the EC issued a decision imposing a fine of some €137.8 million on three suppliers of alternators and starters to car manufacturers (referred to as Original Equipment Manufacturers (OEMs)) for the co-ordination of prices and the allocation of customers/projects.[146]

The companies involved were: Denso, Mitsubishi Electric ("Melco"), Hitachi and Hitachi Automotive Systems (together referred to as "Hitachi"). Denso was the first to come forward and received full immunity from fines.

The EC found that the suppliers: (1) co-ordinated responses to certain requests for quotations (RFQs) issued by OEMs, in particular with respect to determining the price which they would quote; (2) allocated certain OEMs or projects relating to the supply of alternators and starters; and (3) exchanged commercially sensitive information, such as price elements and market strategies. It appears the idea was to respect each other's "vested supply rights" with regard to certain OEMs. The meetings were in Japan.

The cartel was found to have lasted from September 2004 to February 2010. The scope of the cartel subsequently evolved differently for Denso and Melco, and for Hitachi, depending on the car part (alternator or starter) and on the OEM concerned.

[135] *Freight Forwarding* Decision at [863].
[136] *Freight Forwarding* Decision at [950].
[137] *Freight Forwarding* Decision at [949].
[138] *UTi Worldwide Inc v European Commission* (T-264/12) EU:T:2016:112; [2016] 4 C.M.L.R. 24.
[139] *Freight Forwarding* Decision at [867]–[880].
[140] Decision relating to a proceeding under Article 101 of Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40055-*Parking heaters*) [2015] OJ C425/14.
[141] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39563-*Retail food packaging*) [2015] OJ C402/8.
[142] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.39861-*Yen Interest Rate Derivatives*) [2016] OJ C348/14; and (AT.39914-*Euro Interest Rate Derivatives*), respectively.
[143] EC, "Daily News", *Midday Express*, 6 April 2016 available at: *http://europa.eu/rapid/midday-express-06-04-2016.htm* [Accessed 6 March 2017].
[144] Lewis Crofts and Matthew Newman, "LCD makers escape EU probe into mobile screens", *Mlex*, 18 December 2015.
[145] Matthew Newman, "EU drops probe into oil benchmarks", *Mlex*, 7 December 2015.
[146] With thanks to Takeshige Sugimoto. IP/16/173, 27 January 2016. The EC's summary is at [2016] OJ C137/6. The EC has also placed its settlement decision on the EC's website: Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40028-*Alternators and Starters*) [2016] OJ C137/6.

The EC found that the collusion between Denso, Melco and Hitachi was in pursuit of an identical object, which remained the same throughout the entire period of the infringement, namely to avoid price decline and to maintain the parties' market shares in the EEA. To that end, the cartel parties had engaged to varying degrees in customer or project allocation and price co-ordination.

Fines ranged from €26.8 million for Hitachi to €110.9 for Melco. According to the EC, without its immunity, Denso would have received a fine of €157 million. Both Melco and Hitachi had 50% fine increases for recidivism. The EC granted a 30% reduction in fines to Hitachi and a 28% reduction in fines to Melco for co-operation, with a further 10% for both undertakings for settling. Hitachi also had a 15% fine reduction for limited participation in the cartel.

Canned mushrooms

In April 2016, the EC announced that it had imposed a fine of some €5.19 million on the Spanish company, Riberebro, for having participated in a cartel on the European canned mushrooms market.[147] In setting the fine, the EC applied a 50% reduction under the Leniency Notice.[148]

It may be recalled that, in June 2014, the EC issued a settlement decision imposing fines totalling €32.2 million on Bonduelle, Lutèce and Prochamps,[149] which had admitted their involvement in the cartel. Riberebro had decided not to settle and proceedings therefore continued under the normal procedure.

The EC found that Riberebro participated in the cartel from September 2010 to February 2012. The EC found that Riberebro and others exchanged confidential information on tenders, set minimum prices, agreed on target volumes and agreed on the allocation of customers. There was also a non-aggression pact with a compensation scheme to deal with customer transfers and common minimum prices. (Riberebro has appealed.)

Steel Abrasives

In May 2016, the EC announced that it issued a decision addressed to the Italian abrasives producer, Pometon, on its participation in the steel abrasives cartel.[150] The EC imposed a fine of €6.19 million on Pometon.

Steel abrasives are loose steel particles used for cleaning and enhancing metal surfaces in various industries and are also used to cut hard stones. It may be recalled that the EC previously imposed fines totalling €30.7 million on Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth for their participation in the same cartel, following a settlement procedure.[151] Pometon had decided not to settle and proceedings therefore continued under the normal procedure.

The EC found that, for almost four years, Pometon and others co-ordinated prices and had bilateral and multilateral contacts. Since the market for metal scrap, the main raw material used for abrasives, is very volatile, Pometon and others applied a specific surcharge (the scrap surcharge) to compensate for important price fluctuations and for price differences between EEA Member States. (Pometon has appealed.)

Heat stabilisers

In June 2016, the EC announced that it had re-adopted two decisions[152] regarding the heat stabilisers cartel to comply with two separate GC rulings from 2015. It may be recalled that the EC had imposed fines in 2009, among others, on ACW, Chemson and GEA, which were held jointly and severally liable for their participation in the cartel. In 2010, the EC issued an amended decision to correct an error made in the calculation of the fine imposed on ACW.[153] In 2015, the GC found that the EC did not provide GEA with the opportunity to submit its views beforehand and thus annulled the 2010 Decision.[154]

The EC then gave all the companies involved the opportunity to submit their views and it has now re-adopted the 2010 Decision, without changes.

In the 2009 Decision, Akzo Nobel, Akcros and Elementis were also considered jointly and severally liable. Since the Court had ruled in a different case that the infringement was time-barred for Elementis, the EC repealed the 2009 Decision as regards Elementis and adopted a new decision in 2011 with regard to Akzo Nobel and Akcros, without changing the total amount of fines on the two companies. The 2011 Decision was then annulled by the GC in 2015. The Court found that the parties had not had enough time to present their views.[155]

The EC then gave Akzo Nobel and Akcros the opportunity to make their views known and re-adopted its 2011 Decision. In the re-adopted Decision, the EC reduced the fines imposed on both parties by 1% to take account of a separate GC judgment concerning Akzo Nobel's appeal against the original 2009 Decision.[156]

[147] With thanks to Katrin Guéna. IP/16/1261, 6 April 2016.
[148] Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.
[149] See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 130.
[150] With thanks to Katrin Guéna. IP/16/1907, 25 May 2016. The EC's summary in the *Steel Abrasives* case has also been published: see Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39792-*Steel Abrasives*) [2016] OJ C366/6.
[151] See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 130.
[152] With thanks to Katrin Guéna. EC, "Daily News", *Midday Express*, 29 June 2016 available at: *http://europa.eu/rapid/midday-express-29-06-2016.htm* [Accessed 6 March 2017].
[153] Decision C(2010)727 of 8 February 2010 (2010 Decision).
[154] John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015: Part 2" [2016] I.C.C.L.R. 99, 101.
[155] John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015: Part 2" [2016] I.C.C.L.R. 99, 99.
[156] *Akzo Nobel NV v European Commission* (T-47/10) EU:T:2015:506; [2015] 5 C.M.L.R. 9.

Truck producers

In July 2016, the EC fined producers of medium and heavy trucks a total of €2.93 billion for their participation in a cartel, which lasted 14 years and covered the whole EEA market.[157] The companies involved were MAN, Volvo/Renault, Daimler, Iveco and DAF. The EC has indicated that proceedings continue under the normal procedure regarding Scania.

The EC found that the producers: (1) co-ordinated prices at so-called "gross list" level (i.e. at the level of the factory price); (2) agreed on the timing for the introduction of new emission technologies; and (3) agreed on the part of the costs for those technologies to be passed on to customers. For some seven years, between 1997 and 2004, the companies' senior managers organised meetings and had telephone conversations to co-ordinate prices and exchange information. From 2004–11, the cartel was organised via the truck producers' German subsidiaries. The cartel participants then generally contacted each other electronically.

The EC noted that its investigation did *not* reveal any collusion on how to avoid or manipulate the producers' compliance with emission standards.

MAN was the first to come forward and received full immunity. The EC indicated that MAN thereby avoided a fine of some €1.2 billion. The other participants all received a 10% reduction in fines under the settlement procedure. Interestingly, it appears that the companies agreed to settle the case *after* the EC had sent the companies an SO. Iveco, Daimler and Volvo/Renault received, in addition, reductions between 10 and 40% for their co-operation during the investigation.

Daimler received the highest fine, slightly exceeding €1 billion. DAF was fined €7.5 million. Volvo/Renault and Iveco were fined respectively €6.7 million and €4.9 million.

Other horizontal agreements

Liner shipping

This case relates to a longstanding investigation into General Rate Increase (GRI) announcements by liner shipping companies offering services between routes from Far East Asia to Northern Europe and the Mediterranean (westbound). The EC carried out onsite inspections in May 2011. Proceedings were opened in November 2013 and November 2015.

In February 2016, the EC published draft commitments, which the companies concerned each offered individually to settle the case.[158] There are 14 companies involved, including CMA CGM (France), Hapag-Lloyd (Germany), Maersk (Denmark) and China Shipping (China), Hanjin (South Korea), MOL and NYK (Japan).

The EC's stated concern was that the companies were making regular announcements of their intended (future) price increases for containerised shipping services by sea. The companies were indicating the amount of the increase in US dollars per transported container unit, by the affected trade route and with the date of implementation, typically three–five weeks before implementation. During that time, some or all of the companies then announced the same or similar route increases.

Interestingly, the EC's concern was that these announcements were *not detailed, binding offers* on which customers could rely. Rather, the EC saw the practice as a way for the parties to *explore each other's pricing intentions* and to co-ordinate their behaviour, i.e. a concerted practice.

In the draft commitments:

- the parties would each individually agree with the EC to stop publishing and communicating GRI announcements (i.e. changes to prices expressed as the percentage amount of change);
- the parties are not obliged to publish or communicate their prices but, if they do so for all or some of the routes that they serve, the announcements must enable purchasers to understand *and rely* on them. In other words, they must contain the five main elements of the total price (base rate, bunker charges, security charges, terminal handling charges and high demand/peak season charges);
- announcements are not to be made more than 31 days before implementation;
- the parties are to be *bound* by their price announcements, for the period stated, as maximum prices but may offer lower prices; and
- there are two exceptions:
  - (1) communications with purchasers which have a rate agreement in force on the route concerned;
  - (2) communications during bilateral negotiations or communications tailored to identified purchasers (save that the parties remain bound by the maximum prices in the more general communications).

The commitments would be for three years from the EC's Decision on all routes to and from the EEA.[159]

[157] With thanks to Katrin Guéna. IP/16/2582, 19 July 2016. Decision of 19 July 2016 (Case AT.39824-*Trucks*) (referred to in this article as the *Truck Producers* case).
[158] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39850-*Container Shipping*) [2016] OJ C327/4. The EC's Press Release is IP/16/317, 16 February 2016. The EC's Article 27(4) Notice is published in [2016] OJ C60/7. The draft commitments are available on the EC's website.
[159] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39850-*Container Shipping*) [2016] OJ C327/4.

As usual, there is no admission of liability, nor finding of infringement.

In July 2016, the EC accepted the commitments offered.[160] The commitments were binding from 7 December 2016.

All this is interesting insofar as price signalling has been highly topical for some time now, notably since the publication of an OECD Roundtable on the subject.[161]

The EC's position reflects what it says in the EC Horizontal Guidelines, namely that if a company indicates their prices in advance, then: (1) the offer should be sufficiently defined to be capable of being accepted; and (2) a binding offer for the same reason. If not, it may be inferred that what the company was doing was announcing prices to test the waters and see if others would follow, i.e. a collusive practice to agree on a price change.[162]

It is also interesting to see the exceptions. It may be that significant parts of the market were not affected but the EC still pursued the case for the remainder and the principle.

Paramount Pictures

This case involved an EC investigation into clauses in contracts between several major film studios and Sky UK (Sky).[163] The case started in January 2014, leading to an SO in July 2015.

The EC's stated concern was that, when studios licensed their film output to Sky, Sky was contractually prevented or limited from giving EU consumers elsewhere access to retail pay-TV services in the UK and Ireland *via satellite broadcast or online* (i.e. could not meet *unsolicited* requests). Similarly, some agreements required Paramount to ensure that, in their agreements with *other broadcasters* than Sky, broadcasters were prevented or limited from making their retail pay-TV services available in the UK and Ireland (i.e. meeting *unsolicited* requests).

The EC's position was that these clauses amounted to absolute territorial protection for Sky and/or other broadcasters and restrictions by object.

In April 2016, Paramount offered draft commitments, which the EC market tested in April 2016. Paramount would undertake: (1) when licensing its film output for pay-TV to an EEA broadcaster, not to (re)introduce obligations on broadcasters which restrict meeting such unsolicited requests from customers within the EEA; and (2) not to seek to enforce the related existing obligations on broadcasters in the EEA, nor honour the obligation on Paramount in existing licence agreements.

This did not affect obligations on a broadcaster to apply geo-filtering technology that prevents or limits supply of retail pay-TV or pay on-demand services *outside* the EEA. It also did not affect any obligation on the broadcaster to focus its efforts on the exclusive territory licensed to that broadcaster and not to market, solicit or otherwise actively sell outside that territory.

The commitments would be for five years from the EC's Decision.[164] A monitoring trustee would be appointed. As usual, these commitments were offered with no admission of liability, nor does the EC make a finding of infringement.

The final commitments were accepted in July 2016.[165]

The case continues as regards Disney, NBC Universal, Sony, Twentieth Century Fox, Warner Brothers and Sky UK.

ISDA/Markit/Credit Default Swaps

It may be recalled that in July 2013, the EC issued an SO against the International Swaps and Derivatives Association (ISDA), Markit and 13 investment banks.[166] The SO concerned an alleged infringement of art.101 TFEU and art.53 EEA Agreement in relation to credit derivatives. More precisely, it set out the EC's concerns relating to the licensing of data and indices on credit default swaps (CDSs) for the purpose of exchange trading.

In December 2015, the EC decided to continue its investigation regarding ISDA and Markit and to close its investigation regarding the banks.[167]

ISDA is a trade association representing the financial derivative industry. It has a broad membership including CDSs dealers. In 2003, ISDA developed so-called "Credit Derivatives Definitions", which incorporate, in particular, a methodology to determine the price of CDS after the default of a reference entity (the Final Price).

Markit is a financial information and services company, collecting and monetising data on credit derivatives. In 2008, Markit owned all the rights for the iTraxx and CDX indices, baskets of the most commonly traded CDS.

A CDS is a derivative contract designed to transfer the credit risk, or risk of default, linked to a debt obligation. Its buying and selling can be carried out in two different ways: (1) over the counter (OTC), i.e. privately and

[160] IP/16/2446, 7 July 2016. The EC's summary of the *Container Shipping* Decision is available in [2016] OJ C327/4. The commitments decision is also available on the EC's website.
[161] See OECD, *Unilateral Disclosure of Information with Anticompetitive Effects* DAF/COMP(2012)17 available at: *http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf* [Accessed 30 January 2017], where the EC contribution is p.179.
[162] See generally, the EC Horizontal Guidelines (*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements* [2011] OJ C11/1), paras 61–63, 73–74.
[163] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40023-*Cross-border access to pay-TV*) (*Paramount Pictures* case); IP/16/1530, 22 April 2016. The EC's Article 27(4) Notice is published in [2016] OJ C141/7, and the draft commitments are available on the EC's website.
[164] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40023-*Cross-border access to pay-TV*).
[165] IP/16/2645, 26 July 2016. The EC's decision and the final commitments are available on the EC's website.
[166] With thanks to Inés Pérez Fernández.
[167] EC, "Daily News", *Midday Express*, 4 December 2015 available at: *http://europa.eu/rapid/midday-express-04-12-2015.htm* [Accessed 6 March 2017].

through market makers; or (2) on an exchange trading platform, in which case supply and demand is matched anonymously on a so-called "all-to-all trading platform".

As regards the latter, the EC found that exchange trading platforms wishing to offer trading for CDS indices needed access to the Final Price, over which ISDA claimed proprietary rights, and to CDS indices, such as the iTraxx and CDX indices owned by Markit in order to attract liquidity.

It appears that the EC had concerns that ISDA and Markit refused to license these inputs to exchange trading platforms and that this may have blocked the emergence of exchange trading of credit derivatives, which would enable effective competition with investment banks which dominate the OTC trading of CDSs.

In order to address the EC's concerns, ISDA proposed the following commitments:

- to license its rights in the Final Price for the purpose of exchange trading, clearing and/or settling of credit derivatives on fair, reasonable and non-discriminatory (FRAND) terms[168] (although ISDA is relieved of those obligations in certain circumstances, such as an applicant facing imminent default and may terminate a licence if it shows that auction participants manipulate a credit event auction owing to the features of a derivative licensed by ISDA);
- to submit to a third-party arbitration procedure with binding effect in the event of a disagreement on the FRAND terms and conditions[169]; and
- to prevent investment banks from influencing ISDA's decisions on licensing the Final Price by transferring the responsibility for the decision to license from ISDA's Board of Directors to the chief executive officer who must not seek the views of the banks.[170]

The commitments proposed by Markit were very similar:

- to license its rights in the iTraxx and CDX indices on FRAND terms for exchange traded financial products based on the indices[171] (with certain situations where Markit may decline the request for an index licence);
- to submit to binding third-party arbitration in the event of a disagreement on the FRAND terms and conditions[172];
- to prevent investment banks from influencing Markit's management in taking individual licensing decisions, in particular by reducing their influence in Markit's advisory committees and by precluding them from discussing the merits of individual licensing requests.[173]

The commitments would be implemented for 10 years with a monitoring trustee.

In April 2016, the EC published the proposed commitments and invited comments.[174]

Then, in July 2016, after accepting some modifications offered by Markit, the EC adopted a decision accepting the commitments and making them binding for 10 years.[175]

The EC's settlement decisions are also available on the EC's website.

Articles 102/106 TFEU

Bulgarian Energy

It may be recalled that Bulgarian Energy Holding (BEH) was alleged by the EC to be dominant in the market for wholesale electricity supply in Bulgaria (as the "State-owned incumbent"). BEH was alleged to have abused that dominant position through *destination clauses*, which amounted to territorial restrictions on the resale of electricity via wholesale contracts between its subsidiaries and various customers.[176] An SO was sent in August 2014.

Then, in June 2015, the EC market tested draft commitments from BEH to settle the case. The concept of those commitments was: (1) the establishment of a "Day-Ahead Market" (DAM), where the seller does not control who buys, so cannot restrict the destination where the electricity goes; (2) BEH's supply of increasing volumes of electricity to the platform over five years; and (3) BEH and its subsidiaries would cease and desist destination clauses, or any equivalent measure, in their bilateral electricity supply contracts.

More specifically:

- BEH would establish a DAM platform with an independent third party with expertise in the operation of a power exchange;

[168] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39745-*CDS Information Market*) [2016] OJ C378/5, Draft commitments of the ISDA, para.12.
[169] *CDS Information Market* Decision, Draft commitments of the ISDA, para.15.
[170] *CDS Information Market* Decision, Draft commitments of the ISDA, para.9. There are more elements in the Article 27(4) Notice.
[171] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39745-CDS Information Market) [2016] OJ 378/3, Draft commitments of Markit, para.2.1.
[172] *CDS Information Market* Decision, Draft commitments of Markit, para.2.8.
[173] *CDS Information Market* Decision, Draft commitments of Markit, para.1.4. There are more elements in the Article 27(4) Notice.
[174] IP/16/1610, 28 April 2016. The Article 27(4) Notices are published in [2016] OJ C153/7 and [2016] C153/10, and the draft commitments are available on the EC's website.
[175] IP/16/2586, 20 July 2016. Summaries of the EC's *CDS Information Market* Decisions are in the *Official Journal of the European Union* (OJ)—for ISDA at [2016] OJ C378/7 and for Markit at [2016] OJ C378/3. The decisions are available on the EC's website.
[176] Communication from the Commission published pursuant to Article 27(4) of Regulation 1/2003 in Case AT.39767-*BEH Electricity*. The Article 27(4) Notice is in [2015] OJ C202/2.

- BEH would undertake that its subsidiaries would provide increasing amounts of electricity on the platform (called IBEX—Independent Bulgarian Power Exchange) over five years (293 MW in Year 1 to 807 MW in Year 5);
- electricity would be supplied to IBEX by BEH with a maximum price offer based on the marginal costs of BEH's production subsidiaries;
- IBEX would be transferred to the Bulgarian Ministry of Finance within six months of the EC's decision accepting the commitments, in order to ensure independence (although IBEX could be sold on afterwards);
- a monitoring trustee would be appointed; and
- BEH and its subsidiaries would cease and desist destination clauses, or measures of equivalent effect, in their bilateral electricity supply contracts.

As usual, there would be no admission of liability or finding of infringement.

Revised commitments were offered in October 2015 after third-party comments on the draft ones. As a result, BEH committed to offer only hourly products on the DAM and to ensure that sufficient volumes would be made available to third parties by BEH and its subsidiaries.

In December 2015, the EC indicated that the commitments had been accepted.[177]

Slovak Telekom Decision

In November 2015, the EC published a public version of its decision to fine Slovak Telekom (ST) and its parent, Deutsche Telekom AG (DT), jointly and severally €38.8 million for abuse of dominant position in the Slovak broadband market.[178] The EC imposed an additional fine of €31 million on DT for deterrence and recidivism. The Decision is some 400 pages long.

ST is the incumbent telecom operator in Slovakia. It owns the national telephone metallic access network and supplies wholesale access to its unbundled local loops (ULLs) in the Slovak Republic. In June 2005, the Slovak telecommunications regulator (TUSR) required ST to give access to the local loops within its legacy telephone network. In August 2005, ST published its terms and conditions under which alternative operators could access its ULLs.

The EC case was initiated by the EC itself. The EC conducted unannounced inspections at ST's premises in January 2009 and opened formal proceedings in April 2009. In December 2010, the EC extended the scope of its investigation in order to establish whether DT might have been involved in one or more of the suspected infringements, or might be held liable for one or more of them.

In its Decision, the EC found that, for some five years, ST and DT foreclosed competition in the Slovak market for broadband services. In particular, the EC found that ST engaged in two separate, but related, violations of art.102 TFEU, i.e. a refusal to supply and a margin squeeze.

As regards the *refusal to supply*, the EC found that the terms and conditions imposed by ST were such as to render competitors' access to ULLs in the Slovak Republic unacceptable.[179] These terms and conditions included:

- withholding network information necessary for the unbundling of the local loops, e.g. information relating to the availability of the local loops, and delaying or providing incomplete information on the physical access sites and their coverage areas[180];
- unilaterally reducing the scope of its regulatory obligation to unbundle, e.g. ST reserved to itself potential xDSL customers, inter alia, by not making available the local loops over which no service was provided and limiting the access to only 25% of the lines included in a cable with no technical justification[181]; and
- imposing other unfair terms and conditions in relation to each of the steps that competitors needed to obtain access to its ULLs, including a burdensome co-location process through which its competitors placed their equipment within ST's cabinets and mandatory qualification procedures for assessing whether local loops were suitable for unbundling.[182]

In the EC's view, this conduct unreasonably delayed or prevented competitors' entry in the retail broadband services market in Slovakia, in violation of art.102 TFEU.[183]

[177] IP/15/6289, 10 December 2015. The commitments described here are based on the draft version published in June 2015. Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.39767-*BEH Electricity*). The EC's summary of the decision is in [2016] OJ C334/6. The settlement decision is also available on the EC's website.

[178] With thanks to Roberto Grasso. See Decision relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (AT.39523-*Slovak Telekom*). The EC's summary decision is published in [2015] OJ C314/7. The Decision is available on the EC's website (the *Slovak Telekom* Decision has been appealed: see *Deutsche Telekom AG v European Commission* (T-827/14) 6 March 2015).

[179] *Slovak Telekom* Decision at [355]–[821].

[180] *Slovak Telekom* Decision at [431]–[534].

[181] *Slovak Telekom* Decision at [535]–[651].

[182] *Slovak Telekom* Decision at [652]–[819].

[183] *Slovak Telekom* Decision at [364].

The EC rejected ST's argument that the conditions in *Bronner*[184] applied and that, in order to establish the abuse, the EC had to show that ST's network was *indispensable*, i.e. that if there are no alternative products or services, it is impossible or at least unreasonably difficult for competitors to develop a network that allows them to compete on the downstream market.[185]

Relying on *TeliaSonera*,[186] the EC stated that the *Bronner* conditions, including that of indispensability, do not necessarily apply

> "where an undertaking is accused of imposing unfair trading conditions on its competitors, which do not fall into any specific category of abusive conduct and which are said to amount to a (constructive) refusal to supply".[187]

ST's interpretation of *Bronner*, the EC stated, would undermine the effectiveness of art.102 TFEU.[188]

As regards the *margin squeeze*, the EC found that the prices imposed by ST for access to its ULLs and its retail prices would force equally efficient operators to incur a loss if they decided to sell broadband services to retail customers at retail prices matching those offered by ST.[189] In the instances where a competitor managed to launch its own networks, the EC added, market entry was delayed and geographically limited.

In line with the ECJ judgment in *Telefónica*,[190] the EC found that ST had pursued a margin squeeze, which it treated as a standalone violation of art.102 TFEU, related to the *unfairness* of the terms and conditions imposed by a dominant undertaking.[191] The EC also reiterated that such *unfairness* is not linked to a precise spread between the price charged to competitors upstream and the price charged to the dominant undertaking's own customers downstream. It is therefore not necessary to establish whether "the wholesale prices for input services to operators or the retail prices for services to end users are in themselves abusive on account of their excessive or predatory nature".[192]

DT was held liable for ST's infringement on the basis that it was able to exercise decisive influence over ST and did actually do so.[193] The EC looked at various factors. Notably, the EC found that, whilst DT was the majority shareholder with 51% of ST's shares, the minority shareholder (i.e. the Slovak Government) had no specific minority rights and DT could nominate the majority of directors on ST's board. Moreover, DT had influence over the decision-making process in ST's management board as it nominated some of its members. There was also a reporting process from ST to its parent DT.

The EC increased DT's fine by 50% for recidivism, insofar as DT had already been fined in 2003 for another margin squeeze in the market for access to its ULLs in Germany.[194] DT's fine was further increased by 20% to account for its size (a worldwide turnover of more than €60 billion in 2013) and ensure that the fine had a sufficiently deterrent effect.

Deutsche Bahn

In April 2016, the EC relieved Deutsche Bahn (DB) of the commitments which DB gave in relation to the German railway traction case.[195] The commitments were given in December 2013 and were due to apply for five years. However, they could end earlier if, in a year, more than 25% of the total traction current demand of non-DB railways would be supplied by alternative energy providers. This had occurred in 2015.

E.ON

In July 2016, the EC released E.ON from its commitments to reduce its long-term booking on the German gas grid, some five years before they were due to expire, in view of changed market circumstances. It appears that E.ON applied for this and reviews by the EC, the Bundeskartellamt and the German energy regulator showed that the facts had materially changed: competitors had entered the market, transport capacity was available and there had been a move towards short-term bookings.[196]

Alstoff Recycling Austria

In September 2016, the EC applied its settlement procedure to an abuse of dominant position for the first time since the adoption of Regulation 1/2003. The EC found that Alstoff Recycling Austria (ARA) had prevented competitors from entering the Austrian market

[184] *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* (C-7/97) EU:C:1998:569; [1999] 4 C.M.L.R. 112.
[185] *Slovak Telekom* Decision at [361]–[371]. The EC stressed that, whilst *Bronner* related to a specific situation where the application of art.102 TFEU would impose an obligation to supply an asset in which the undertaking has invested with a view to reserving it for itself, in the present case, the telecom infrastructure owned by ST was developed by the government under a monopolistic regime and ST was already bound by an obligation to give access to its ULL.
[186] *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) EU:C:2011:83; [2011] 4 C.M.L.R. 18.
[187] *Slovak Telekom* Decision at [364]–[365].
[188] *Slovak Telekom* Decision at [366], and *TeliaSonera* EU:C:2011:83; [2011] 4 C.M.L.R. 18 at [58].
[189] *Slovak Telekom* Decision at [922]–[998].
[190] *Telefónica SA and Telefónica de España SAU v European Commission* (C-295/12 P) EU:C:2014:2062 at [74]–[75], [96] and [150].
[191] *Slovak Telekom* Decision at [822].
[192] *Slovak Telekom* Decision at [824].
[193] *Slovak Telekom* Decision at [1200] and [1482]–[1483].
[194] Decision relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451-*Deutsche Telekom AG*) [2003] OJ L263/9.
[195] IP/16/1322, 8 April 2016, Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (Case COMP/AT.39678-*Deutsche Bahn I*). The Decision is available on the EC's website. See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014: Part 2" [2015] I.C.C.L.R. 115, 132.
[196] IP/16/2646, 26 July 2016, Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.317-*E.ON Gas*). See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2009–2010: Part 2" [2011] I.C.C.L.R. 113, 126.

for management of household packaging waste from 2008–12.[197] In exchange for its co-operation in the proceedings, the fine imposed on ARA was reduced by 30% to €6 million.[198]

In Austria, producers of goods have to collect and recycle the packaging waste resulting from the use of their products. This task can be transferred to a company in return for a licence fee. Traditionally, the nationwide collection infrastructure was partly controlled and owned by ARA and could not be duplicated, making competitors dependent on ARA to grant them access to this existing infrastructure. The EC found that, between March 2008 and April 2012, the company abused its dominant position by refusing to give access to this infrastructure and blocking the entry of new competitors in this market.

During the investigation, ARA acknowledged the infringement and co-operated with the EC. Moreover, ARA offered to divest the part of the household collection infrastructure that it owned. This structural remedy addressed the foreclosure of the Austrian market for the management of household packaging waste.

With its Press Release, the EC published a note on the *reduction of antitrust fines for co-operation*.[199] In this note, interestingly, the EC stated that the settlement procedure used in the *ARA* case is applicable to other antitrust cases leading to a prohibition decision. When determining the level of the fine reduction for co-operation, the EC will consider the extent and timing of the co-operation, the specific case and the resulting benefits in terms of efficient procedure and effective enforcement.

Sectoral inquiries

Geo-blocking and e-commerce

Box 16

- **Sectoral inquiries—geo-blocking and e-commerce**
  - — Two initial reports, full report in 2017.
  - — Focus on application of competition law to online restrictions re consumer goods and in the digital context.
  - — Various proposed pieces of regulation, including one prohibiting unjustified geo-blocking by reason of a customer's nationality, residence or place of establishment.
  - — Complex and controversial balances in play:
    - * EU Single Market v de facto regional/national markets; and
    - * "High Street" real, physical shopping v online shopping.
  - — More enforcement action and/or proposed changes re vertical restraints?

Background

In May 2015, in the context of the EU Digital Single Market Strategy, the EC decided to launch a sector inquiry into e-commerce of consumer goods and digital content in the EU.[200] In both cases, "geo-blocking" appears at the forefront of the EC's agenda (i.e. practices restricting internet sales outside defined areas: see further below). The aim of the inquiry was to gather data on the functioning of e-commerce markets in the EU and to identify possible restrictions of competition in relation to cross-border e-commerce.

In March 2016, the EC published its initial findings on "geo-blocking".[201] Then, in September 2016, the EC published a wider assessment on e-commerce in general.[202] It is 290 pages long. The EC invited those concerned to submit their comments by 18 November 2016. The final report is scheduled for the first quarter of 2017.

In May 2016, the EC also announced that it has already undertaken and will soon undertake actions in various areas, including legislative proposals against unjustified geo-blocking[203] and copyright modernisation.[204] The EC also undertook to assess the role of online platforms and intermediaries.[205]

As regards geo-blocking, importantly, the EC intends to prohibit four practices under a Proposed Regulation[206]:

- first, traders must not block or limit customers' access to online interfaces because of a customer's nationality, residence or place of establishment[207];
- secondly, traders must not redirect a customer to a version of their online interface that is different from the one he or she sought to access, unless he or she gives his or her explicit consent. In that

[197] IP/16/3116, with the EC's Note, "Antitrust: Reduction of fines for cooperation" (20 September 2016) available at: *http://ec.europa.eu/competition/antitrust/ara_factsheet_en.pdf* [Accessed 31 January 2017]. Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (AT.39759-*ARA Foreclosure*) [2014] OJ C86/4 (referred to in this article as the *ARA* case).
[198] See Point 37 of the 2006 Fining Guidelines [2006] OJ C210/2.
[199] See the EC's Note, "Antitrust: Reduction of fines for cooperation" (20 September 2016).
[200] With thanks to Itsiq Benizri and Lukas Šimas. Decision initiating an inquiry into the e-commerce sector pursuant to Article 17 of Regulation 1/2003 (HT.4607) C(2015)3026 final. Available on the EC's website.
[201] IP/16/922, 18 March 2016 and EC *Staff Working Document on Geo-blocking practices in e-commerce* SWD(2016)70 final (the Initial Report), available on the EC's website.
[202] IP/16/3017, with related factsheet (15 September 2016) and EC *Staff Working Document on Preliminary Report on the E-commerce Inquiry* SWD(2016)312 final (the Report), again available on the EC's website.
[203] IP/16/1887, 25 May 2016; Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation 2006/2004 and Directive 2009/22 COM(2016)289 final.
[204] Communication towards a modern, more European copyright framework COM(2015)626 final; Proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market COM(2015)627 final, available on the EC's website.
[205] Communication on Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe COM(2016)288 final.
[206] Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation 2006/2004 and Directive 2009/22 COM(2016)289 final (the Proposed Regulation).
[207] Proposed Regulation art.3(1).

case, the customer should be able to easily return to the interface he or she originally sought to access[208];

- thirdly, traders cannot apply different terms and conditions for reasons related to the nationality, place of residence or place of establishment of the customer (1) where the trader sells goods that are not delivered cross-border to the Member State of the customer; (2) where the trader electronically supplies services other than services providing access to copyright protected works (e.g. cloud services); and (3) where the trader provides other services to a customer in the premises of the trader or in a physical location where the trader operates (e.g. hotel accommodation)[209]; and
- fourthly, traders cannot apply different conditions of payment based on the nationality, residence or place of establishment of the customer, or for any reasons based on the location of the payment account, payment service provider or the country in which the payment instrument is issued.[210]

E-commerce in consumer goods

The focus of the inquiry regarding consumer goods was wide: on clothing and shoes, consumer electronics, electrical household appliances, computer games and software, toys and childcare articles, media (books, e-books, CDs, DVDs and Blu-ray discs), cosmetic and healthcare products, sports and outdoor equipment, and house and garden.[211]

The EC sent requests for information to online retailers, online marketplace providers, price comparison tools providers, payment service providers and manufacturers.[212] The EC received answers from some 1,453 respondents.[213]

The EC identified a number of potential barriers to competition with regard to e-commerce in consumer goods: (1) geo-blocking; (2) selective distribution; (3) market place restrictions; (4) price comparison tools restrictions; and (5) pricing restrictions.

Geo-blocking

A major concern of the EC is geo-blocking, i.e. commercial practices whereby online providers prevent users from accessing and purchasing consumer goods or digital content services offered on their website based on the location of the user in a Member State different from that of the provider.[214]

The notion of geo-blocking includes:

- blocking access to websites to users located in another Member State (e.g. where a user located in Paris might want to buy a product via a German website and is prevented from doing so because the website has been blocked on the basis of the French IP address);
- automatic re-routing of users to another website of the same or a different service provider (e.g. where a user located in Paris might seek to access a German website and is directly re-routed to the company's French website without the possibility to revert to its initial choice); and
- delivery and/or payment refusals based on the location/place of residence of the user (e.g. the payment is refused because the credit card used is linked to an address in France or the delivery to France is denied based on the user's location).[215]

Cross-border e-commerce in the EU and potential competition issues

The EC noted that cross-border e-commerce remains limited in the EU. In 2015, 53% of the EU population shopped online but only 15% did so from a seller based in another EU Member State.[216] However, the EC noted that this does not necessarily result from anti-competitive behaviour. Retailers simply may not want to sell cross-border because of language differences, higher logistics and distribution costs for cross-border sales of goods, as well as compliance costs with different legal frameworks in Member States.[217]

The EC considers that geo-blocking falls within the scope of EU competition law, where a retailer has to implement geo-blocking practices as a result of a contractual obligation that does not allow it to sell cross-border to users outside of an allocated territory or as a result of commercial pressure[218]—in other words, where there is an agreement or concerted practice *outside* a single economic unit/group.

The EC considered that geo-blocking may raise five issues with regard to EU competition law:

[208] Proposed Regulation art.3(2).
[209] Proposed Regulation art.4(1).
[210] Proposed Regulation art.5(1).
[211] Report (2016), para.49.
[212] Report (2016), para.46.
[213] Report (2016), Table A.1.
[214] Initial Report (2016), para.32.
[215] Report (2016), para.340.
[216] Report (2016), paras 6, 9.
[217] Report (2016), para.14.
[218] Report (2016), para.386.

First, agreements or concerted practices that aim at partitioning national markets or at making interpenetration of national markets more difficult, in particular those which aim at preventing or restricting parallel exports, which have as their *object* the restriction of competition pursuant to art.101(1) TFEU.[219]

Secondly, a contractual restriction that prohibits the internet as a method of marketing which may amount to a restriction *by object* within the meaning of art.101(1) TFEU[220] and be a hard core restriction under the Vertical Block Exemption Regulation (VBER).[221] The EC notes that hard core restrictions are presumed to be caught under art.101(1) TFEU, irrespective of the market shares of the undertakings.[222] Other hard core restrictions include restrictions that require a distributor to apply different geo-blocking practices, such as blocking access to its website to customers located in another Member State or re-routing customers to an alternative website.

Thirdly, save limited exceptions, a contractual restriction of the territory into which, or the customers to whom, a distributor may sell the contract goods or services, which may amount to a hard core restriction under the VBER.[223]

Fourthly, an agreement that directly or indirectly restricts active or passive sales to end users by members of a selective distribution system, which may amount to a hard core restriction.[224]

Fifthly, where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, which may be considered a restriction of competition by object, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.[225]

EC findings

38% of retailers replied that they use geo-blocking regarding consumer goods.[226] 12% of retailers reported contractual restrictions to sell cross-border.[227] The restrictions reported ranged from outright bans to sell cross-border to requirements whereby approval by the manufacturer is needed before doing so.[228]

The EC found that some territorial restrictions might raise concerns regarding their compatibility with art.101 TFEU[229]:

- first, the EC noted that certain manufacturers/suppliers restrict the ability of retailers to sell cross-border either in a general way or to users located in certain Member States;
- secondly, certain manufacturers/suppliers restrict active sales by retailers outside a *designated* territory, irrespective of whether other territories have been exclusively allocated to other retailers or reserved to the manufacturer/supplier;
- thirdly, certain manufacturers/suppliers restrict both active and passive sales into territories that have been exclusively allocated to other distributors or reserved for the manufacturer/supplier; and
- fourthly, certain manufacturers/suppliers operating a selective distribution system across several Member States limit the ability of authorised retailers to sell to all end users within those Member States.

The EC indicated that it would further analyse these territorial restrictions in order to evaluate whether any follow-up enforcement action is required.[230]

Selective distribution

The EC also found that changes to selective distribution systems represent one of the most frequent reactions of manufacturers over the last 10 years to the growth of e-commerce. During this period, 19% of manufacturers introduced a selective distribution system where they did not apply selective distribution beforehand, and 67% of the respondent manufacturers that already used selective distribution introduced new selection criteria.[231]

Based on the inquiry findings, the EC stated that the use of certain clauses in selective distribution agreements, depending on the products for which they are used, may go beyond what is necessary to achieve the goals of selective distribution and thus require closer scrutiny.

For example, the EC stated that the requirements for retailers to operate at least one brick-and-mortar shop (thereby excluding all pure online players from selective distribution), whilst generally covered by the VBER, may need further assessment in individual cases when used

[219] Report (2016), para.387; see *Football Association Premier League Ltd v QC Leisure* (C-403/08) EU:C:2011:631; [2012] 1 C.M.L.R. 29.
[220] Report (2016), para.468; see *Pierre Fabre Dermo-Cosmetique SAS v President de l'Autorite de la Concurrence* (C-439/09) EU:C:2011:649, [2011] 5 C.M.L.R. 31.
[221] Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1 art.4(c).
[222] Although the EC noted that undertakings could still plead an efficiency defence under art.101(3) TFEU.
[223] VBER art.4(b).
[224] VBER art.4(c).
[225] Report (2016), para.387; judgment in *Football Association* EU:C:2011:631; [2012] 1 C.M.L.R. 29.
[226] Report (2016), para.342.
[227] Report (2016), para.368.
[228] Report (2016), para.373.
[229] Report (2016), paras 401–405.
[230] Report (2016), p.136.
[231] Report (2016), para.200.

for certain product categories or certain lines of products which pure online retailers might be equally qualified to sell. [232]

The EC further stated that it may investigate possible anti-competitive clauses in selective distribution agreements restricting online sales.[233]

Marketplace restrictions

18% of retailers reported to have agreements with their suppliers containing marketplace (i.e. third-party websites) restrictions.[234]

Manufacturers put forward the following reasons to restrict sales via all or some of the marketplaces: protecting the image and positioning of the brand; combatting the sale of counterfeit products; ensuring sufficient pre- and post-sale services; protecting existing distribution channels from free-riding; and addressing concerns about the market position of certain marketplaces and the lack of relationship with customers.[235]

There is currently a debate as to whether marketplace restrictions which are not linked to qualitative criteria (i.e. absolute or per se marketplace bans) amount to hard core restrictions in the form of restrictions of "passive sales" within the meaning of the VBER.[236] A reference for a preliminary ruling is currently pending on this at the ECJ.[237]

Based on the preliminary findings of the sector inquiry, the EC indicated that it does not consider (absolute) marketplace bans to constitute hard core restrictions within the meaning of the VBER, as they concern the question of *how* the distributor can sell the products over the internet and do not have the object to restrict *where or to whom* distributors can sell the products.[238]

However, the EC or NCAs may decide to scrutinise marketplace bans in agreements which fall outside the application of the VBER, either because the market share held by both the buyer and the supplier exceeds 30%[239] or because the agreements contain any of the listed hard core restrictions in VBER art.4.[240]

Price comparison tools restrictions

Price comparison tools allow consumers to compare prices with limited effort across retailers that offer certain products and call up the offers they consider suitable.[241]

9% of respondent retailers reported that they have agreements with manufacturers which contain some form of restriction in their ability to use price comparison tools.[242] The price comparison tool restrictions encountered in the sector inquiry range from absolute bans to restrictions based on certain quality criteria.[243]

The EC noted that manufacturers operating selective distribution systems are, in principle, allowed to require quality standards in relation to the promotion of their products on the internet.[244] However, absolute or per se price comparison tool bans, which are not linked to quality criteria, may make it more difficult for (potential) customers to find the retailer's website and may thereby limit the (authorised) distributor's freedom to promote its online offer.

Such bans may make it more difficult to attract (potential) customers outside the physical trading area of the retailer via online promotion. While such general bans may be a cost effective way to prohibit the use of a promotion channel deemed not fit for the product in question, they may also exclude an effective method for retailers to generate traffic to their website, which is providing (potential) customers with increased price transparency across a range of different retailers.[245]

Pricing restrictions

38% of retailers reported that manufacturers recommend resale prices. Less than 10% reported being provided with a discount range or receiving indications from manufacturers to apply the same retail price online and offline.[246] Almost a third of retailers reported that they normally comply with price indications given by the manufacturers, whilst slightly more than a quarter would not comply.[247] Manufacturers reported a widespread use of recommended retail prices: four out of five manufacturers use price recommendations to distributors.[248]

[232] Report (2016), para.228.
[233] Report (2016), para.232.
[234] Report (2016), para.429.
[235] Report (2016), paras 443–453.
[236] Report (2016), para.465.
[237] *Coty Germany GmbH v Parfümerie Akzente GmbH* (C-230/16) 25 April 2016.
[238] Report (2016), para.472.
[239] VBER art.3.
[240] Report (2016), para.473.
[241] Report (2016), para.475.
[242] Report (2016), para.485.
[243] Report (2016), para.487.
[244] Report (2016), para.503.
[245] Report (2016), para.502.
[246] Report (2016), para.509.
[247] Report (2016), para.533.
[248] Report (2016), para.511.

The EC noted that the practice of recommending a resale price or requiring the retailer to respect a maximum resale price is covered by the VBER, provided that the market share held by both the buyer and the supplier does not exceed 30%.[249] However, interfering with the freedom of retailers to set their final prices by making the recommended or maximum retail price equivalent to a minimum or fixed price is a restriction by object under art.101(1) TFEU and a hard core restriction within the meaning of art.4 VBER.[250]

In this respect, the EC stated that increased price transparency through price monitoring software may facilitate or strengthen collusion between retailers by making the detection of deviations from the collusive agreement easier and more immediate.[251]

The EC also noted that setting different wholesale prices between online and offline sales channels was rarely considered as a viable option owing to the risk that such a dual strategy could be in breach of art.101(1) TFEU.[252]

The EC concluded that certain pricing arrangements between manufacturers and their retailers may thus merit further investigation on a case-by-case basis.[253]

E-commerce in digital content

The EC also investigated online distribution of digital content at the retail level, i.e. audio-visual or music services delivered via the internet,[254] in order to identify potential restrictions originating from the contractual relationships between suppliers (right holders) and providers of online digital content services (licensees).[255]

To that end, the EC sent requests for information to the most important market operators, potential new entrants, a number of local players, companies that host digital content on behalf of such service providers, and to VPN and IP routing services.[256] The EC relied on the answers provided by 287 respondents[257] and stated that it received more than 6,800 licensing agreements from both digital content providers and right holders.[258]

The EC identified the following issues in relation to the licensing of rights in digital content: (1) geo-blocking; (2) duration of licensing agreements; and (3) payment structure.[259]

Geo-blocking

70% of providers replied that they geo-block users located in other EU Member States.[260] 59% of the responding content providers indicated that they are contractually required by right holders to geo-block.[261] In addition, 74% of the licensing agreements submitted by digital content providers enable right holders to monitor digital content providers' use of geo-blocking measures or compliance with territorial restrictions,[262] and 63% of these agreements impose sanctions and ask for compensation where such measures or territorial restrictions are not complied with.[263]

Duration of licensing agreements

The EC stated that a substantial number of licensing agreements are concluded for rather long durations and include clauses that facilitate prolongation of the agreements, such as automatic renewal clauses, and clauses providing for a right of first negotiation, a right of first refusal or a matching offer right.[264]

The EC stated that such clauses lead to long-term contractual relationships, which are likely to make it more difficult for new players to enter the market or for existing operators to expand their current commercial activities.[265]

Payment structures

The EC also noted that the widespread use of minimum guarantees and fixed/flat fees in licensing agreements, often in conjunction with advance payments, might make it more difficult for new entrants to gain a foothold in the market.[266]

Comment

These findings have been described in such detail in view of their topicality and potential significance. To some extent, the findings were surprising, notably insofar as it appears that there may be appreciable numbers of vertical restrictions occurring which may be caught by the EU competition rules. On the other hand, some aspects are unsurprising, notably that restrictions based on copyright licensing are still organised on national lines.

It will be apparent that much of what is being discussed is highly controversial.

[249] Report (2016), para.506.
[250] Report (2016), para.507. See also the judgment in *Louis Erauw Jacquery Sprl v La Hesbignonne Societe Cooperative* (C27/87) EU:C:1988:183; [1988] 4 C.M.L.R. 576 at [15].
[251] Report (2016), para.555.
[252] Report (2016), paras 545–546.
[253] Report (2016), p.176 (boxed text).
[254] Report (2016), para.58.
[255] Report (2016), para.598.
[256] Report (2016), paras 53, 57.
[257] Report (2016), Table A.2.
[258] Report (2016), para.633.
[259] Report (2016), para.928.
[260] Report (2016), fig.C.38.
[261] Report (2016), para.766.
[262] Report (2016), para.785.
[263] Report (2016), para.795.
[264] Report (2016), paras 850–860.
[265] Report (2016), p.268 (boxed text).
[266] Report (2016), paras 863–864, p.279 (boxed text).

First, as noted above, the EC has raised the prospect of legislation to stop geo-blocking *within* single economic units/groups, based on the view that this represents discrimination within the Single Market. While one can understand that the EC may think the related differential pricing does not reflect the EU Single Market, many groups still think it necessary and reasonable to *reflect* different price levels and product characteristics in different regions of the EU/EEA and sell that way accordingly. In other words, their practices reflect market differences, rather than creating them. A similar point was made as regards broadcasting in the EC's Hearing on E-Commerce in October 2016.

Secondly, many companies only target their own Member State and may not be interested in organising a cross-border offering (or at least not yet). It would go very far to *oblige* them to do so, if that is what the EC is suggesting.

Thirdly, the issue of changes to selective distribution also remains controversial. In recent years, many companies have adopted the format, using qualitative systems, not to block e-commerce but to add value and compete on that value proposition.

As Commissioner Vestager herself noted at the EC's Hearing in October 2016, there are also issues about free-riding between physical shops and online trading. This is a complex area where the balance is controversial because of its impact on different types of competition: the "High Street", "real physical" shopping, as compared to "anywhere anytime online" shopping. Questions not only of free-riding but also related to whether and to what extent one type of competition can survive alongside the other. Clearly, many suppliers and customers would like to do both, but how should one achieve a balance which keeps both channels viable and open?

Fourthly, if the EC is contemplating interference with contractual freedom on licensing duration, that would also be controversial.

It will be very interesting to see how this develops. For the moment, the key point is a compliance one: companies should review their practices and ensure they are in line with the EU competition rules since one may expect renewed EC and ECN enforcement action on vertical restraints.

Pharma settlements

Patent settlement monitoring

In December 2015, the EC issued its sixth report[267] monitoring patent settlement agreements for the period between January and December 2014. The EC started its monitoring exercise following a sector inquiry covering the years 2000–08.

The Report confirmed that pharmaceutical companies continue to settle their patent-related disputes, although the EC had announced during the previous years that it would continue to closely scrutinise so-called "problematic" agreements, i.e. agreements that limit market entry for generic companies and involve a transfer of value.

The EC recalled that during the years covered by the sector inquiry, "problematic" agreements counted for 22% of all settlements reported, whilst during the last monitoring period, which led to the sixth report, those settlements only represented 12% of all settlements (which is a slight increase from the 8% noted in the fifth report[268]). Settlements limiting market entry but without any value transfer, on the contrary, decreased from 47 to 39% between 2013 and 2014.

The EC announced that it may decide to continue its monitoring exercise to follow any future developments regarding patent settlements.

Box 17

- **Pay for delay—Servier/perindopril**
  - — Huge decision published by EC:
    - * applies to art.102 TFEU conduct (acquisition of technology) as well as settlement agreements; and
    - * is more than 800 pages!

Servier/Perindopril

In July 2014, the EC imposed fines totalling €427.7 million on the pharmaceutical company Servier and five generic companies (Niche/Unichem, Matrix (now part of Mylan), Teva, Krka and Lupin) for entering into a number of agreements which the EC found protected Servier's product perindopril from competition by generic producers in the EU.[269] Servier was fined €330.9 million. In September 2016, the EC published the non-confidential version of its Decision, which is some 813 pages long, on its website.

The main features of the Decision are outlined below.

The EC found that Servier implemented a strategy to exclude competitors and delay the entry of cheaper generic medicines through a technology acquisition and five patent settlements between Servier and five generic producers, contrary to arts 101 and 102 TFEU.

Background

Perindopril is an "angiotensin converting enzyme" (ACE) inhibitor, used primarily for the treatment of cardiovascular diseases, such as hypertension and heart failure. Perindopril is a medicine originally developed by Servier/Adir. Servier's global sales exceeded US $1 billion in 2006 and 2007.[270]

[267] EC, *6th Report on the Monitoring of Patent Settlements* (period: January–December 2014) (2 December 2015) is available on the EC's website.
[268] EC, *5th Report on the Monitoring of Patent Settlements* (period: January–December 2013) (5 December 2014); see John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015: Part 2" [2016] I.C.C.L.R. 113.
[269] With thanks to Lukas Šimas. Decision relating to a proceeding under Article 101 and Article 102 of the Treaty on the Functioning of the European Union (AT.39612-*Perindopril (Servier)*). The summary is in [2016] OJ C393/7.
[270] *Perindopril (Servier)* Decision at [1]–[2].

Servier's patents for the perindopril molecule expired for the most part in 2003, although Servier still held a number of "secondary" process patents.[271] Servier filed a patent application for a crystalline form of perindopril in July 2001. The European patent (the '947 Patent) was granted by the EPO in February 2004 and, in principle, would have continued until 2021 but the EPO revoked the patent in May 2009. [272]

Patent settlement agreements under article 101 TFEU

The EC underlined that the vast majority of patent settlement agreements between competitors do not raise antitrust concerns and there is no presumption that patent settlements between competitors are antitrust infringements. However, the EC stated that, where patent settlements comprise a value transfer from the brand pharmaceutical company ("the originator" of the product) to the generic company, this value transfer must be examined on a case-by-case basis to see if it is caught by the competition rules.[273]

In order to identify whether each agreement covered by the Decision had the potential to restrict competition by its very nature (i.e. is restrictive by object), the EC considered whether:

- the generic undertaking and the originator undertaking were at least potential competitors;
- the generic undertaking committed itself in the agreement to limit, for the duration of the agreement, its independent efforts to enter one or more EU markets with a generic product; and
- the agreement was related to a transfer of value from the originator undertaking, as a significant inducement which substantially reduced the incentives of the generic undertaking to independently pursue its efforts to enter one or more EU markets with the generic product.[274]

The EC stated that it took into account the economic and legal context leading up to the agreement's conclusion, the actual content and objectives of the agreement, and each party's subjective intentions, as evidenced by the facts of the case.[275]

Niche/Unichem and Matrix settlement agreements

The EC found that Niche/Unichem and Matrix entered into agreements whereby Niche/Unichem and Matrix limited their ability to compete through non-challenge and non-compete obligations.[276] In exchange for these commitments, Niche and Matrix each received a payment of £11.8 million.[277]

The EC noted that Matrix, whose joint perindopril project with Niche/Unichem represented the most imminent challenge to Servier's patent position, was thereby eliminated as a competitive threat, both as a potential direct supplier of generic perindopril (formulations or active pharmaceutical ingredients) or as a source of supplies for other generic companies. Matrix was also removed as a co-operation partner for Niche/Unichem, which settled with Servier on the same day as Matrix. [278]

The restrictions were found to have extended for at least three and a half years, i.e. until the expiry of the process patents in September 2008 and possibly until the expected expiry of the '947 Patent in 2021 (EPO revoked the patent in May 2009).[279]

The EC noted that, if the payments were not deemed necessary to reach the negotiating outcome, it was reasonable to assume that Servier would have behaved as any profit maximising economic operator and not paid such a significant amount of money. Equally, Niche and Matrix would have either insisted on more favourable settlement terms, allowing for earlier market entry, or continued litigation and become an actual competitor with generic perindopril.[280]

The EC thus held that the Niche/Unichem and Matrix settlement agreements consisted of payments by Servier for the withdrawal of close potential competitors from the market which had the object to restrict competition.[281] These were a restriction of competition "by object" and also likely to produce restrictive effects on competition.

Teva settlement agreement

Under the Teva settlement agreement, Teva agreed to refrain from selling any perindopril not supplied by Servier in the UK and from challenging Servier's patents in return for the payment by Servier of £5 million.

In addition, Teva agreed to purchase perindopril for distribution in the UK exclusively from Servier from August 2006 for a period of three years.[282] Liquidated damages were agreed in case of non-supply by Servier

[271] *Perindopril (Servier)* Decision at [114].
[272] *Perindopril (Servier)* Decision at [124]–[125].
[273] *Perindopril (Servier)* Decision at [1102].
[274] *Perindopril (Servier)* Decision at [1154].
[275] *Perindopril (Servier)* Decision at [1701].
[276] *Perindopril (Servier)* Decision at [1303] and [1475].
[277] *Perindopril (Servier)* Decision at [1369] and [1475].
[278] *Perindopril (Servier)* Decision at [1476].
[279] *Perindopril (Servier)* Decision at [1370] and [1476].
[280] *Perindopril (Servier)* Decision at [1372] and [1476].
[281] *Perindopril (Servier)* Decision at [1407] and [1513].
[282] *Perindopril (Servier)* Decision at [1516].

of its perindopril product to Teva. However, Teva waived its right to terminate the settlement agreement in the case of "non-supply" by Servier. In return for such non-supply, Teva received compensation of £5.5 million from Servier. This led to an aggregated payment of £10.5 million from Servier to Teva.

The EC found that the Teva settlement agreement limited Teva's ability to compete through non-challenge and non-compete obligations. The payment represented a substantial sum of money, which served as a significant inducement to refrain from competing on the perindopril market.[283] The EC found that the agreement constituted a restriction of competition by object, which was also likely to produce restrictive effects on competition.[284]

Krka settlement agreement and the licence agreement

Krka and Servier concluded a settlement agreement and licence agreement in October 2006, as well as an assignment and licence agreement (ALA) in January 2007. The EC found that, through these agreements, Krka committed to withdraw from competition with Servier in 18/20 Member States with its existing product in exchange for a licence in the remaining seven Member States. Krka also stopped competing by transferring its technology to Servier for €30 million.[285]

The EC considered the Krka settlement agreement to be an agreement akin to market sharing whereby Krka essentially renounced its ability to compete through non-challenge and non-compete obligations in 18/20 Member States, including Servier's two biggest worldwide markets: the UK and France. As an economic inducement to accept these commitments, Krka had received a sole licence for the '947 Patent in seven Central and Eastern European Member States. The EC noted that the licensing arrangement preserved Servier's market exclusivity for perindopril in 18/20 Member State markets, whilst it allowed for a de facto duopoly by Servier and Krka in the remaining seven Member States.[286]

Krka and Servier also concluded an ALA for the acquisition by Servier of Krka's competing technology to produce perindopril.[287] The ALA was analysed in the context of the other settlement agreement.[288]

The EC noted that, whilst the Krka settlement agreement prevented Krka from contesting the validity or enforceability of Servier's patents and from supplying perindopril in the restricted markets, Servier was not fully protected against Krka, at least for the 18/20 markets where Krka withdrew from competition with its existing perindopril formulations. The threat came from the possibility that generics would obtain access to Krka's technology to produce perindopril API and formulations for the restricted markets in the 18/20 Member States.[289]

The ALA therefore closed the gap. By the acquisition of Krka's technology, Servier ensured that Krka no longer had the ability to license out or assign its technology to other generic companies. At the same time, Krka was granted a licence back for its own technology, allowing it to continue producing generic perindopril for the seven licensed territories under the Krka settlement agreement.[290]

The EC noted that the significant payment of €30 million for Krka's technology was disconnected from Servier's expected or actual earnings from the commercial exploitation of the '947 Patent, which remained marginal, if any. Instead, the magnitude of the payment suggested that it formed part of the market-sharing arrangement between Servier and Krka. The EC stated that the payment was significantly less than the loss of earnings that Servier could suffer following an effective generic entry in the 20 restricted markets.[291]

It appears that Servier contended that the aim of the ALA was to acquire technology to improve its perindopril production processes. The EC considered that there was no evidence to support that Servier had expected any efficiencies, achieved them or attempted to achieve them.[292] The Krka agreements were found to constitute a "single and continuous restriction" of competition by object.[293]

Lupin settlement agreement

Under the Lupin settlement agreement, Lupin refrained from selling generic perindopril and from challenging a number of Servier's patents, in return for a payment by Servier of €40 million for a staggered purchase of Lupin's three patent applications for perindopril and an option for a future distribution arrangement.[294]

The EC found that[295]:

- Lupin was at least a potential competitor of Servier;
- Lupin committed to limit its ability to compete through non-compete and non-challenge obligations—Lupin was precluded from selling any perindopril independently of Servier, as the non-compete obligation covered not only

[283] *Perindopril (Servier)* Decision at [1622].
[284] *Perindopril (Servier)* Decision at [1668].
[285] *Perindopril (Servier)* Decision at [1670].
[286] *Perindopril (Servier)* Decision at [1763].
[287] *Perindopril (Servier)* Decision at [1764].
[288] *Perindopril (Servier)* Decision at [1804].
[289] *Perindopril (Servier)* Decision at [1805].
[290] *Perindopril (Servier)* Decision at [1806].
[291] *Perindopril (Servier)* Decision at [1807].
[292] *Perindopril (Servier)* Decision at [1808].
[293] *Perindopril (Servier)* Decision at [1857].
[294] *Perindopril (Servier)* Decision at [1861].
[295] *Perindopril (Servier)* Decision at [1994].

the various perindopril forms protected by Servier's patents but also any other forms; and
- in the context of the same settlement agreement, Servier transferred €40 million for three patent applications assigned by Lupin.

The EC also noted that the restrictions went beyond the scope of the underlying litigation concerning the validity of the '947 Patent and extended to a number of patents for which, concerning the actual Lupin product, there was no apparent or alleged blocking patent position.[296]

In the EC's view, the economic context of this assignment established that the payment significantly exceeded the expected or inherent value of the patent applications for the parties.[297] Both parties to the settlement, Servier and Lupin, were better off by agreeing the settlement than in an alternative scenario of generic entry and resulting competition.[298] Lupin discontinued its competitive challenge to Servier's market position and, in return, received a payment, which the EC stated effectively amounted to rent sharing. The Lupin settlement agreement was therefore a restriction by object.[299]

In addition to considering these agreements from the perspective of restriction by object, the EC also looked at the likely restrictive effects on competition.

Application of article 101(3) TFEU

It appears that Servier and the other companies raised various efficiency gains:

- avoiding litigation costs;
- improving Servier's perindopril production processes by acquiring technology from generic companies;
- improving distribution of Servier's products (Krka in seven Central and Eastern European markets and Teva for the UK);
- a claim by Teva that the agreement facilitated and expedited Teva's early entry;
- Krka's licence for seven Central and Eastern European markets;
- Niche's continued commercial existence and investment into development of new generic products other than perindopril; and
- a claim by Teva that reverse payment patent settlement agreements secure the incentives to challenge patents and favour generic entry.[300]

However, the EC rejected these claims.[301]

Technology acquisitions and patent settlement agreements under article 102 TFEU

The EC found that perindopril constituted separate relevant markets in the UK, France, the Netherlands and Poland.[302] Servier was found to be dominant on the markets for perindopril there for the period starting in 2000 and ending between 2007 and 2009 (depending on the specific national market).[303]

The EC found that Servier had abused those positions in two ways:

First, Servier's acquisition of the most advanced API technology, which belonged to a Swiss company Azad, distorted the emerging competitive structure of the market for perindopril API technology and of the potential supply of non-infringing perindopril API. It was therefore capable of contributing to the foreclosure effects from November 2004.[304]

The EC considered that the acquisition directly affected the development of generic perindopril formulations. Since the Azad technology (and the resulting API) was rendered inaccessible as an input to other generic companies, a number of generic projects were excluded at an advanced stage and had to be started anew, disabling generic launch by 2007 of generic perindopril not covered by Servier's patents.[305]

The EC also noted that the Azad technology had a significant time lead over other technologies and was being relied on by at least one generic producer. The EC found, therefore, that the Azad Technology Acquisition contributed to Servier's "overall single and continuous exclusionary strategy", which the EC considered an infringement of art.102 TFEU.[306]

Secondly, the EC also found that, by pursuing the five reverse payment patent settlements, Servier induced almost all of its immediate generic challengers to withdraw from competition. The agreements, which the EC found formed part of an overall strategy, were mutually reinforcing in delaying generic entry.[307]

The EC concluded that Servier's acquisition of API technology, combined with its conclusion of reverse payment patent settlements, amounted to an abuse of

[296] *Perindopril (Servier)* Decision at [1995].
[297] *Perindopril (Servier)* Decision at [1996].
[298] *Perindopril (Servier)* Decision at [1998].
[299] *Perindopril (Servier)* Decision at [2059].
[300] *Perindopril (Servier)* Decision at [2069].
[301] *Perindopril (Servier)* Decision at [2122].
[302] *Perindopril (Servier)* Decision at [2549].
[303] *Perindopril (Servier)* Decision at [2593].
[304] *Perindopril (Servier)* Decision at [2917].
[305] *Perindopril (Servier)* Decision at [2917].
[306] *Perindopril (Servier)* Decision at [2917].
[307] *Perindopril (Servier)* Decision at [2960].

Servier's dominant position in the market for perindopril formulations in France, Poland, the UK and the Netherlands, and on the market for perindopril API technology. This constituted a single and continuous infringement of art.102 TFEU.[308]

Servier has appealed.

Current policy issues

Box 18

- **Policy issues**
  - — ECN+:
    - * action to ensure NCAs have sufficient powers and can sanction effectively;
    - * concern also to ensure NCA independence; and
    - * directive and/or non-legislative action?

ECN+ EC Consultation on NCA powers and independence

In November 2015, the EC launched a consultation inviting comments on whether the NCAs in EU Member States should be given additional tools to enforce the EU competition rules.[309]

The EC noted that Regulation 1/2003 already gave a key role to NCAs and national courts in applying the EU competition rules. However, the EC also noted that it had identified a number of areas for improvement in its Communication after the "Ten Year Review" of enforcement since Regulation 1/2003.[310] That Communication identified three main improvement areas:

(1) the design of NCA regimes should grant sufficient autonomy in order to guarantee impartiality and independence[311];
(2) there is a need for greater convergence of procedures as the NCAs still apply the EU competition rules on the basis of different procedures[312]; and
(3) the effectiveness of sanctions should be enhanced.[313]

With regard to fines, this would entail the alignment of the determination, the definition of an undertaking and turnover thresholds.[314] For the leniency programmes, it was suggested that there should be greater alignment of national leniency programmes to the ECN Model Leniency Programme.[315] Finally, it was also suggested that individual employees should be protected if they co-operate under a corporate leniency programme since that would also achieve more effectiveness.[316]

Using the Communication as background, the EC set three aims for the consultation and the measures to come: (1) to grant the right tools to detect and sanction the EU competition rules; (2) to ensure the existence of effective leniency programmes; and (3) to safeguard the independence and resources of NCAs.[317]

The consultation was some 88 pages long and was split into two parts: (1) general questions; and (2) more specific questions regarding the resources and independence of the NCAs, the NCAs "enforcement toolbox", the NCAs' fining powers and the national leniency programmes.[318]

Main findings

These were as follows:

A significant majority of the 181 respondents agreed that action should be taken to grant *more powers to NCAs* in order for them to be more effective enforcers.

With regard to *NCAs' independence and resources*, most respondents thought that guaranteeing adequate and stable human and financial resources, as well as the independence of NCAs' top management, was important. Other types of measures were also supported, such as guaranteeing that the dismissal of top management was not related to its decision making, the adoption of rules on conflict of interests, and rules on public information and accountability of NCAs.

One of the obstacles identified by respondents to effective enforcement of EU competition law was a *lack of effective powers for NCAs*. They supported the grant of powers to inspect business and non-business premises, to issue requests for information, to gather digital evidence, to carry out or assist in inspections carried out by another NCA, to conduct interviews and to conduct sector inquiries.[319]

As regards *fines*, a majority of respondents favoured action on fines, but only a minority favoured the introduction of a pure administrative system (as opposed to a civil/criminal one). There was also support for EU-wide application of the concepts of undertaking and parental liability, and for the adoption of common rules or methodologies about the fixing of fines.

A majority of respondents supported the view that an EU legal basis should be introduced for leniency programmes (although many considered that the ECN

[308] *Perindopril (Servier)* Decision at [2997].
[309] With thanks to Adélaïde Nys. IP/15/5998, 4 November 2015. EC Consultation, ECN Plus: Empowering the national competition authorities to be more effective enforcers (2015) is available at: *http://ec.europa.eu/competition/consultations/2015_effective_enforcers/strategy_en.pdf* [Accessed 3 March 2017].
[310] See Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Perspectives COM(2014) 453 (Communication), available on the EC's website.
[311] Communication, paras 26–29.
[312] Communication, paras 30–34.
[313] Communication, paras 35–42.
[314] Communication, paras 35–38.
[315] Communication, paras 39–40.
[316] Communication, paras 41–42.
[317] IP/15/5998, 4 November 2015.
[318] See EC, *Summary Report to the Public Consultation on Empowering the national competition authorities to be more effective enforces* available at: *http://ec.europa.eu/competition/consultations/2015_effective_enforcers/Summary_report_of_replies.pdf* [Accessed 31 January 2017].
[319] Although it may be noted that many Member States have introduced powers like this in recent years.

Model Leniency Programme already aligned national programmes sufficiently). There was also support for the protection of leniency materials in civil damages proceedings, as well as for the protection of employees from individual criminal or civil sanctions.

Finally, as regards possible EU legislative action, most respondents thought that action should be taken through a combination of EU and Member State action, combining legislation and soft law initiatives.

Comment

The EC closed the consultation in February 2016 and was expected to issue an exhaustive report with a set of suggested measures later in 2016.

In considering these findings, it should be noted that many public authorities answered as well as the private sector. The consultation has also coincided with some controversy as regards the removal of NCA officials in some Member States.

It will be interesting to see what the EC proposes, since measures in these areas clearly raise sensitive issues in terms of subsidiarity, even if they may make sense to those most affected: officials, companies and practitioners seeking impartial and consistent enforcement across the EU.

It has since been reported that the EC may propose a directive as a follow-up.[320]

Hi-tech cases

Google investigation

In July 2016, the EC issued two SOs against Google: a supplementary SO concerning *Google's comparison service* and a new SO concerning a potential abuse of dominant position in *the advertising business*.[321]

In its supplementary SO, it appears that the EC offered additional evidence and data in support of its preliminary view that Google abused its dominant position by systematically favouring its own comparison shopping service in its general search results. The EC also continues to consider that the services offered by merchant platforms, such as Amazon and eBay and comparison shopping services, are not part of the market affected by Google's practices.[322]

With the new SO, the EC communicated its preliminary view that Google abused its dominant position in online advertising by artificially restricting the possibility of third-party websites to display search advertisements from Google's competitors.[323]

Google places search ads both directly (on the Google search website) and indirectly, on third-party websites such as online retailers, telecoms operators and newspapers, through its "AdSense for Search" platform. In this case, Google acts as intermediary.

The EC's preliminary view is that Google abused its dominant position on the market for search advertising intermediation in the EEA by imposing contractual conditions on a limited number of large third parties (so-called "Direct Partners"), such as:

- requiring third parties not to source search ads from Google's competitors;
- requiring third parties to take a minimum number of search ads from Google and reserve the most prominent space on their search results pages to Google search ads; and
- requiring third parties to obtain Google's approval before making any change to the display of competing search ads.

In the meantime, it appears that Google decided to change the conditions in its AdSense contracts with Direct Partners to give them more freedom to display competing search ads. The EC took note of Google's action and has been monitoring how these changes will impact the market.[324]

In April 2016, the EC issued an SO in its *Google Android investigation*. The EC's preliminary view is that Google is dominant on the markets for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system and that it may have abused its dominance by imposing certain anti-competitive restrictions in its licensing agreements with mobile device manufacturers.[325]

It appears that the EC alleged that Google obliged manufacturers who wish to pre-install Google's Play Store on their devices to also pre-install Google's Chrome and Google Search (and set the latter as the default search service). In the EC's view, this condition limited the manufacturers' freedom to choose the most appropriate apps to pre-install on their devices. It also may have protected and strengthened Google's dominance in general internet searches, whilst adversely affecting competition on the market for mobile browsers.

The EC also noted that, whilst Google offers Android as an open-source system, it imposes conditions for use of Google's proprietary apps and services on Android devices that are not open source. Specifically, if a manufacturer intends to pre-install Google proprietary apps, such as Google Play Store and Google Search, on any of its devices, Google requires it to accept a so-called "Anti-Fragmentation Agreement", whereby the

[320] Lewis Crofts, "New EU law on antitrust powers scheduled for first half of next year", *Mlex*, 25 October 2016.
[321] With thanks to Roberto Grasso. IP/16/2532, 14 July 2016.
[322] IP/16/2532, 14 July 2016.
[323] IP/16/2532, 14 July 2016.
[324] IP/16/2532, 14 July 2016.
[325] MEMO/16/1484, 20 April 2016.

manufacturer commits not to sell mobile devices using the Android modified mobile operating system (the so-called "Android fork").

It appears that the EC considers that Google's anti-fragmentation requirements prevent consumers from accessing innovative mobile devices based on alternative, potentially superior, versions of the Android operating system; and competitors from introducing apps and services that could be pre-installed on Android forks.

It appears that the EC also takes the preliminary view that Google granted financial incentives to certain large smartphone and tablet manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices. The EC is concerned not with the financial incentives but with the conditions attached to them.

Qualcom investigation

In December 2015, the EC sent two SOs to the US chipmaker Qualcomm. The EC took the preliminary view that the company may have abused its dominant position in the worldwide markets for 3G and 4G baseband chipsets, in breach of art.102 TFEU.[326] Specifically, the SO focused on Qualcomm's exclusivity payments to mobile devices manufacturers and predatory pricing.

It appears that the EC considers that Qualcomm paid significant amounts to a major smartphone and tablet manufacturer on condition that it exclusively uses Qualcomm baseband chipsets in its smartphones and tablets.

The EC also considers that, between 2009 and 2011, Qualcomm may have engaged in predatory pricing by selling certain quantities of its UMTS baseband chipsets to two of its customers at prices that did not cover Qualcomm's costs. This would have been Qualcomm's reaction to the growing threats posed by Icera (a complainant, now a subsidiary of NVidia) and an attempt to force Icera out of the market.

Co-operation with courts

Sainsbury's/MasterCard Opinion

During the reference period, the EC put on its website an opinion on disclosure of documents obtained in access to file.[327]

The background was as follows. The UK retailer, Sainsbury's, sought damages from MasterCard for illegally high multilateral interchange fees (MIFs)[328] on card transactions in the UK. The lawsuit was based on the EC Decision finding that MasterCard's MIFs system infringed the competition rules and led to excessive charges for consumers and retailers on cross-border card transactions.[329] In this context, the UK High Court ordered the parties to disclose documents relevant to the issues in litigation, other than documents created for the EC or the UK's OFT investigations.[330]

During access to file in *MasterCard II*,[331] MasterCard received information about surveys carried out by consulting companies in relation to the EC's "Cost of Payments Survey".[332] MasterCard considered that some of this data was relevant for the UK litigation and wanted, under standard English procedural rules, to disclose this information to Sainsbury's.

The Court decided that this data should be disclosed, subject to "appropriate safeguards to protect confidential information", and requested the EC's view on the issue.[333]

The EC's opinion focused on two main points.

First, the EC recalled that, under Regulation 773/2004,[334] the use of information from documents obtained through access to file is limited and conditioned. These documents shall only be used for judicial or administrative proceedings for the application of arts 101–102 TFEU. The information specifically prepared for EC proceedings, either by other natural and legal persons or by the EC and sent to the parties, shall not be used by parties before national courts until the EC has terminated its proceedings. Doing otherwise could seriously undermine a pending investigation.[335]

In this respect, the EC stated that the documents obtained by MasterCard in the access to file in *MasterCard II* Decision were prepared for the EC's investigation and, as such, were part of the investigative file in cases still pending before the EC, even if they were

[326] IP/15/6271, 8 December 2015.
[327] With thanks to Maude Vonderau. Opinion in application of Article 15(1) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union) (CT.00928-*Interchange fee litigation before the High Court of Justice, Chancery Division: Sainsbury's Supermarkets Ltd v MasterCard Inc* (Claim No.HC 2012-000063), available on the EC's website.
[328] i.e. charges between a customer's bank and a retailer.
[329] Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/34.579-*MasterCard*). The EC's summary decision is published in [2009] OJ 264/8.
[330] *Interchange fee litigation* Opinion at [5]. The case was later transferred to the Competition Appeal Tribunal following the entry into force of new procedural rules.
[331] Case AT.40049-*MasterCard II*.
[332] i.e. a study of the cost of different payment methods: *MasterCard II* Decision at [6].
[333] *MasterCard II* Decision at [7].
[334] Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.
[335] *MasterCard II* Decision at [8].

prepared with the help of external consulting companies.[336] The EC also noted that MasterCard had obtained these documents only through this access to file.[337]

Referring to the UK court's formal request for an opinion, the EC acknowledged that the EU Damages Directive[338] did not apply to the litigation before the court, as the litigation was initiated before the adoption of the Directive, which in any event was not yet implemented in the UK. However, based on the principle of sincere co-operation,[339] the EC sated that national courts are required to take into account the content of the EU Damages Directive, even if the latter is not applicable to the cases before them.[340]

The EC added that *Donau Chemie*[341] also applied. When ordering disclosure of evidence included in the file of a competition authority, national courts must consider the damage to the claimant's interest in obtaining access to the relevant documents to prepare its action for damages. However, national courts must also consider the actual harmful consequences of this access with regard to the legitimate interest of other parties or public interests. The effectiveness of anti-infringement policies in competition law must be ensured so as not to deter parties involved in this type of infringement from co-operating with competition authorities. As a consequence, the EC requested the UK court to reconsider ordering the disclosure of the documents in question.[342]

Secondly, the EC considered the confidential nature of the information. The EC referred to the GC's *Postbank* judgment.[343] Part of the information to which MasterCard had access through access to file was confidential and non-confidential versions of it were created for their disclosure to MasterCard only. Third parties who provided the information might therefore object to sharing that information with Sainsbury's and their interests should be preserved.[344]

[336] *MasterCard II* Decision at [11].
[337] *MasterCard II* Decision at [12].
[338] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.
[339] Article 4(3) TEU.
[340] *MasterCard II* Decision at [9], [13] and [16].
[341] *Bundeswettbewerbsbehörde v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [33] and [44]–[45].
[342] *MasterCard II* Decision at [14]–[15] and [17].
[343] *Postbank NV v Commission of the European Communities* (T353/94) EU:T:1996:119; [1997] 4 C.M.L.R. 33 at [86]–[87].
[344] *MasterCard II* at [18]–[23].