THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Ninth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. We also see evolution and refinement of approaches to competition law enforcement in several jurisdictions.

Cartel enforcement remains robust. In the pages that follow, we read of the continued – and, in some cases, revised or expanded – use of leniency programmes in several jurisdictions, including Belgium, Finland, Switzerland and the United States. Developments in Australia include the first ever criminal prosecution of a cartel: a case involving the shipping of vehicles to the country. This past year, Brazilian authorities concluded investigations in cartel cases involving dynamic random access memory (DRAM) and optical disc drives, among others. Elsewhere, French and Italian authorities investigated alleged cartels among model agencies, while Cypriot authorities initiated an investigation into an alleged cement cartel. Other cartel enforcement actions have been quite varied: from bicycles in South Africa, to online sales of posters in the United Kingdom and the United States, to luxury cosmetic retail companies in Greece, to alleged pharmaceutical cartels in China and the United States.

In the areas of restrictive agreements and abuse of dominance, several jurisdictions were quite active in investigating firms in the pharmaceutical industry. The chapters from Argentina, Australia, China, Italy, Sweden, the United Kingdom and the United States describe these enforcement efforts. Several jurisdictions – including Argentina, France and South Africa – conducted investigations concerning alleged predatory pricing in various industries. And several jurisdictions, including Finland, Germany and Sweden, undertook investigations regarding companies' use of user or purchaser data. Of particular note is the report from China, which describes a novel approach to a case there involving loyalty discounts. In that case, the Chinese authorities 'used concepts that were new to the Chinese antitrust enforcement regime'.

Merger review and enforcement activity remains robust, with a noted significant increase in reviews undertaken by Chinese authorities. The chapters that follow note activity in many sectors: ranging from food retail mergers in Germany and Belgium, to telecommunications mergers in France. The merger of AB InBev and SABMiller attracted regulatory scrutiny in several jurisdictions, including Australia, China, South Africa and the United States. We also see several reports of deals that were abandoned after regulatory scrutiny, including proposed mergers in Brazil, Germany and the United States. The report from Argentina indicates that the Antitrust Commission there is speeding its review of mergers, with a significant decrease in the average time that deals spend under review; and in Portugal, the competition authority

has announced an initiative to streamline merger control proceedings. Finally, the reports from Brazil, China and India note enforcement activities arising out of merger process violations, such as the failure properly to report transactions.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2017

Chapter 1

EU OVERVIEW

Frédéric Louis and Anne Vallery[1]

I THE YEAR IN REVIEW – A BUSY YEAR ON ALL FRONTS

It would be impossible to cover all of the significant developments, touching upon all aspects of European Commission enforcement of the TFEU antitrust rules, under the supervision of the EU courts in Luxembourg, that took place over the past year.[2] Instead, we have chosen to briefly highlight a few, while discussing in greater detail below two issues relating to Article 101 TFEU enforcement, namely the concept of infringement by object and what it means for the Commission's burden of proof, and the limits of the single continuous complex infringement (SCCI) concept as it applies to fringe participants in a cartel.

i Duty to provide adequate reasoning in support of requests for information

In March 2016, the Commission suffered a rare defeat on the extent of its investigative powers. The Court of Justice (ECJ) held that the Commission's requests for information to various cement producers were insufficiently reasoned and relied on 'vague and generic' reasoning.[3] The Court's ruling was influenced both by the sheer length of the questionnaires the Commission had sent and by the fact that the requests had come several years into the Commission's investigation: by that time, the Commission should have had enough information to draft more precise requests.

ii Price signalling

The Commission ended its long-running investigation into alleged container liner shipping price signalling in July 2016, by accepting commitments from container liner shipping companies (carriers) to stop making general rate increase announcements with price changes expressed as a percentage increase.[4] Among other commitments, price increase announcements to customers will be binding on the carriers.

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1 Frédéric Louis is a partner and Anne Vallery is a special counsel at Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale). The present contribution would not have been possible without the invaluable discussion of developments in John Ratliff's yearly review of 'Major Events and Policy Issues in EU Competition Law' 2015–2016, to be published in the *International Company and Commercial Law Review*.

2 Including the publication by the Commission of the full text of decisions rendered in previous years, which provide insight into the Commission's reasoning and add to the limited information available in the Commission press releases published at the time of adoption.

3 C-247/14 P, *HeidelbergCement, Schwenk Zement*, C-267/14 P, *Buzzi Unicem*, and C-268/14 P, *Italmobiliare*, judgments of 14 March 2016. See in particular *HeidelbergCement*, para. 28.

4 See Commission press release IP/16/2446, 7 July 2016. The settlement decision is available on the European Commission's website. This rare policy statement on price signalling should be compared with the UK

iii Settlements

Despite initial concerns that Commissioner Vestager may not entirely share her predecessor's enthusiasm for ending investigations with a settlement, the Commission continues to attempt settlements in many cases. This includes the *Trucks* cartel, where producers of medium and heavy trucks accepted liability for the highest total fine (€2.93 billion) ever imposed by the Commission.[5] This settlement is all the more remarkable for having apparently been accepted after the Commission had addressed a full statement of objections (SO) to the cartel participants. The Commission is generally reluctant to consider a post-SO settlement as most of its investigative work is done by then. The Commission also adopted 'regular' decisions against holdouts having refused to settle the *Canned Mushrooms*[6] and *Steel Abrasives*[7] cartel investigations. Such 'mixed' cases, where some cartel participants settle while others decide to fight it out with the Commission, may become more of a rarity in the future. DG Competition seems to have adopted a policy whereby it will not accept to enter into settlement discussions where any one of the companies under investigation refuses such discussions. Mixed cases may still occur if one or more of the companies under investigation pulls out of settlement discussions and the Commission decides to continue discussions with the others.

Current rules on settlements give the Commission ample discretion in determining which cases go to settlement. Yet, in rejecting mixed settlements, the Commission may hold too narrow a view of the advantages deriving from such cases. In both *Canned Mushrooms* and *Steel Abrasives*, it took the Commission two more years to reach a decision against the holdouts than it took to reach a settlement with the other cartel participants. Also, the Commission draws significant benefits from fewer court challenges, as companies will only seek an annulment of a settlement in extreme circumstances.[8]

iv Sector inquiry into e-commerce of consumer goods and digital content

The Commission continued its sector inquiry with the publication of an issue paper laying down initial findings on 'geo-blocking' in March 2016[9] and a wider preliminary report in September 2016.[10] The final report is expected sometime in 2017.[11]

CMA's April 2016 order and acceptance of undertakings concerning price announcements in the cement market (see www.gov.uk/cma-cases/aggregates-cement-and-ready-mix-concrete-market-investigation).

5 See Commission press release IP/16/2582 of 19 July 2016. The immunity applicant, MAN, escaped a €1.2 billion fine by self-reporting the conduct.

6 Press release IP/16/121 of 6 April 2016.

7 Press release IP/16/1907 of 25 May 2016.

8 The success of the settlement procedure in reducing the number of EU court appeals (18 new cases were filed in 2016, compared with 80 in 2010) prompted the President of the General Court, in his speech at the 12th annual conference of Global Competition Law Center of the College of Europe in Brussels on 27 January 2017, to urge companies and practitioners to challenge Commission enforcement decisions.

9 http://ec.europa.eu/competition/antitrust/ecommerce_swd_en.pdf. Geo-blocking refers to practices whereby retailers and service providers prevent online shoppers from purchasing consumer goods or accessing digital content services because of the shopper's location or country of residence. The e-commerce enquiry was launched on 6 May 2015 as part of the Commission's Digital Single Market strategy.

10 http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf.

11 Initially, the Commission had announced the report for the first quarter of 2017. This has in the meantime slipped to the first half of 2017.

As regards physical goods, the Commission's current findings acknowledge the free rider issue and take a more balanced view than could have been feared initially, insisting on the need to carry out case-by-case analyses for most issues, such as the growth of selective distribution, restrictions on the ability to sell through marketplaces or to use price comparison tools and pricing restrictions.[12] The Commission also acknowledges the inherent difficulty in challenging non-dominant companies' intra-group geo-blocking decisions, prompting it to propose an internal market regulation that would outlaw most geo-blocking practices, without the need to conduct complex competition analyses.[13]

As regards digital content, competition enforcement is inherently harder given the traditional division of copyright law along national lines, which helps explain why the Commission is also contemplating regulatory intervention.[14] The sector inquiry has shown that geo-blocking prevails for most content providers and the Commission found that licensing agreements tended to be long and with automatic prolongation clauses making it hard for new players to access content, with the same holding true for payment structures including flat fees and advance payments.

The sector inquiry's findings on cross-border access to digital content should be seen against the enforcement action currently under way regarding agreements between major movie studios and Sky UK, where the Commission accepted commitments from Paramount to stop preventing broadcasters from responding positively to unsolicited requests from consumers in other EU countries wanting to access pay-TV films available through satellite broadcasts or online.[15]

The interplay between competition law and the Commission's Digital Single Market policies will continue to generate enforcement questions. The challenges will be complex, as illustrated by a recent initiative in Germany that seeks to create a separate domestic regulator to monitor digital markets, reporting to the country's antitrust and telecoms regulators.[16]

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12 Regarding price restrictions, the preliminary report, at para. 555, notes that price monitoring software may not only facilitate supplier monitoring of retailers' adherence to resale price maintenance policies but also facilitate collusion between retailers by increasing detection of deviations from collusive practices. Commissioner Vestager raised a related concern as to the use of algorithms to generate automated responses to rivals' online prices, in her speech at the Bundeskartellamt IKK Conference in Berlin on 16 March 2017 (https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en).

13 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, COM(2016)289 final. This use of regulation to side-step the difficulty in proving an antitrust violation is not new, as veterans of the Commission's investigations into mobile operators cross-border roaming charges will recall.

14 Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, COM(2015)627 final. This regulation covers the right for subscribers to paid online content in the EU to access and use the services, when temporarily present in another Member State. It does not cover straightforward arbitrage by EU users wanting to access content offered at cheaper prices by providers resident in another Member State.

15 Commission press release IP/16/2545 of 26 July 2015. The case continues as regards the other movie studios.

16 The German Ministry of the Economy's white paper can be found at www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/weissbuch-digitale-plattformen.pdf;jsessionid=1498375200965E339170BF776987A90E?__blob=publicationFile&v=12. The paper proposes modifications to German antitrust and merger control law.

v Pay-for-delay saga

Enforcement against pay-for-delay arrangements in the pharma sector found favour with the General Court (GC), which dismissed Lundbeck's appeal of the Commission's June 2013 fining decision.[17] Lundbeck brought numerous arguments in support of its challenge, which were all rejected. The Commission also published in September 2016 the full text of its July 2014 *Servier* decision, which imposed a €330.9 million fine on Servier, with a further €97 million fine on five generic producers. It runs to more than 800 pages.[18]

vi Intel appeal – towards a modernisation of the law on abusive rebates?

The ECJ is yet to rule upon Intel's appeal of the GC's dismissal of its challenge of the Commission's 2009 decision imposing a €1.6 billion fine for exclusionary pricing practices. In October 2016, Advocate General Wahl gave his non-binding opinion, suggesting that the Court set aside the GC's judgment.[19] The opinion would do away with the GC's formalistic attempt to reconcile the ECJ's decades-old case law on fidelity rebates with more recent rulings on different types of rebates, to promote a more economics-based approach in all cases.

vii Major ongoing abuse of dominance investigations

The Commission failed to reach a conclusion in its long-standing investigations into Google, Qualcomm and Gazprom, although the latter now appears to be headed for an agreed resolution.

viii Release from commitments

Both E.ON[20] and Deutsche Bahn[21] were released from their commitments ahead of time as the Commission accepted that circumstances had changed.

ix Reward for cooperation in an abuse of dominance investigation

In a move that confirms that companies can benefit from cooperation with the Commission outside of the leniency notice applicable to cartel cases, the Commission granted a 30 per cent reduction for cooperation to Alstoff Recycling Austria, noting that 'the company has cooperated with the Commission by acknowledging the infringement and ensuring that the decision could benefit from administrative efficiencies, as well as by providing a structural remedy. Other factors that can be taken into account include cooperation by a company through the disclosure of evidence.'[22]

17 Case T-472/13, *Lundbeck*, judgment of 8 September 2016 (appeal pending Case C-591/16P). Lundbeck had been fined €93.7 million. There were also fines on the generics ranging from €19.8 million to €31.9 million, which were appealed as well. These appeals were all dismissed (Case T-460/13, *Sun Pharmaceutical Industries*, Case T-467/13, *Arrow Group and Arrow Generics*, Case T-469/13, *Generics (UK)*, Case T470/13, *Merck* and Case T-471/13, *Xellia Pharmaceuticals and Alpharma*).

18 Servier's appeal, which relies on 17 pleas, is pending (Case T-691/14).

19 Opinion of AG Wahl in Case C-413/14P, *Intel Corporation v. Commission*.

20 Press release IP/16/2646 of 26 July 2016. The case is AT.39317.

21 Press release IP/16/1322 of 8 April 2016. The case is AT.39678.

22 http://ec.europa.eu/competition/antitrust/ara_factsheet_en.pdf.

II INFRINGEMENTS BY OBJECT AND POTENTIAL COMPETITION – RECONCILING CARTES BANCAIRES AND T-MOBILE?

In 2016, the European courts had several occasions to confirm the trend of the now settled *Cartes bancaires* case law[23] on the concept of restriction by object.

i Background

Pursuant to settled case law,[24] anticompetitive restrictions by object entail a sufficient degree of harm to competition for the examination of their effects to be unnecessary. By its very nature, such conduct can be regarded as harmful, injurious to the proper functioning of normal competition.

Traditionally, to assess the by object anticompetitive nature of the conduct, regard must be had to its content, its objectives and the economic and legal context of which it forms a part, including the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market(s) in question. The parties' intentions can also play a role.

Prior to *Cartes bancaires*, cases such as *T-Mobile* or *Allianz Hungaria* appeared to promote a broad interpretation of the category of restrictions by object. In *Cartes bancaires*, the ECJ confirmed that the notion of restriction by object must be interpreted restrictively. This drew praise from the antitrust community, as an attempt 'to focus on a more realistic approach'[25] or 'a more reliable approach'.[26] In *T-Mobile*, an exchange of information between competitors is seen as tainted with an anticompetitive object where it is deemed capable of removing uncertainties concerning the intended conduct of the participants, which is presumed to be the case where participants remained active on the market, even if the exchange was limited to a single statement during one meeting. Similarly, in *Allianz Hungaria*, without taking a definitive position on the categorisation of the conduct at stake, the ECJ adopted a far-reaching interpretation of the elements it considered relevant to qualify a conduct as a restriction by object. In *Cartes bancaires*, however, the ECJ held that the concept of restriction by object must be restricted to truly harmful conduct, failing which the Commission would be exempted from the obligation to prove the actual market effects of agreements which are in no way established to be, by their very nature, sufficiently harmful to the proper functioning of normal competition. The ECJ then exercised a very severe control of the elements identified by the Commission and the GC and concluded that the measures at stake were wrongly categorised as restrictions of competition by object.

In *Dole*,[27] the ECJ may appear to have returned to its earlier case law, as it rigorously followed the theoretical steps of *T-Mobile* to assess an information exchange. A closer looks shows that it subjected the assessment of the exchange as a restriction by object to a thorough and strict control, highlighting the GC's extremely detailed findings on multiple bilateral pre-pricing, quotation prices and price trends communications exchanged between

23 Case C-67/13 P, *Groupement des cartes bancaires*, judgment of 11 September 2014.

24 E.g., Case C-501/06 P a.o., *GSK*; Case C-8/08, *T-Mobile*; Case C-32/11, *Allianz Hungaria*; Case 67/13 P, *Groupement des cartes bancaires*; Case C-345/14, *SIA 'Maxima Latvia'*.

25 Mlex, Cartes Bancaires ruling sets 'more realistic' approach to antitrust conduct, AG Wahl says, 19 November 2015.

26 Mlex, Cartes Bancaires ruling may offer 'more reliable' approach to antitrust conduct, Forrester says, 22 March 2016.

27 Case C-286/13 P, *Dole*, judgment of 19 March 2015.

competitors, which were relevant to the market concerned and could therefore reduce the uncertainty of participants as to the foreseeable conduct of competitors. In line with *Cartes bancaires*, the ECJ assessed, based on the factual analysis performed by the GC, whether the information exchange was, in view of the content and objectives of the conduct, its legal and economic context, sufficiently harmful to competition and concluded that the actual object of the exchange was to distort normal market conditions.[28]

Recent cases confirm the higher scrutiny to which findings of restriction by object must be subjected. In *Lundbeck*,[29] however, the GC attempted to reconcile *Cartes bancaires* with earlier rulings, by arguing that the ECJ did not call into question the basic principles concerning the concept of restriction by object set out in earlier case law, but simply indicated that the concept of restriction by object must be interpreted in a restrictive manner. The GC added that it is not necessary for a finding of restriction by object that the conduct has already been censured by the Commission in previous cases.

ii No predefined categories

Following Toshiba's appeal against the GC's judgment in the power transformers market sharing cartel, the ECJ appears to confirm that no category of restriction can be pre-labelled as always constitutive of a restriction by object.[30] A case-by-case analysis of the nature and the objectives of the agreement and of the economic and legal context of which it forms a part is always required. This analysis is limited to what is strictly necessary in order to establish the existence of a restriction by object.

In *Portugal Telecom*,[31] the GC examined the legal and economic context of the market sharing agreement at stake, but accepted a limited analysis of the markets concerned and of the potential competition between the parties, in light of the fact that the agreement pursued in itself an anticompetitive objective.

This case-by-case analysis, even for restrictions traditionally seen as hard-core, was already apparent from *Dole*, where the ECJ highlighted the rationale behind what seemed to be an exchange of future pricing intentions, the actual conduct as well as its legal and economic context.

iii Potential competition

As to the analysis and interpretation of the legal and economic context of the conduct, the ECJ clarified in *Toshiba* that, in order to characterise a market sharing agreement between Japanese and European producers as a restriction by object, it was sufficient to verify the existence of potential competition between the participants. The ECJ upheld the legal criterion applied by the GC (i.e., whether insurmountable barriers to entry to the European market existed that ruled out any potential competition from Japanese producers). The fact that one of the Japanese producers would accept projects coming from EU customers was an element taken into account to conclude that there were no insurmountable barriers. The

28 In view of these developments, the ECJ may well have found differently if the *T-Mobile* facts had been presented to it now.

29 Case T-472/13, *Lundbeck*.

30 Case C-373/14 P, *Toshiba*, judgment of 20 January 2016.

31 Case T-208/13, *Portugal Telecom*, judgment of 28 June 2016.

ECJ also confirmed that another element of the relevant legal and economic context is the existence of the agreement itself, which represented a strong indication that a competitive relationship did exist.

The GC, explicitly referring to *Toshiba*, apparently applied a similar – although less clear – reasoning in *Portugal Telecom*. One of the arguments developed by Portugal Telecom appears to have been focused on the absence of potential competition with Telefónica, which the Commission should have examined before qualifying the non-compete clause as a restriction by object. The GC determined that the elements identified by the Commission (i.e., the existence of the non-compete clause itself, its very broad scope and the context of the liberalisation of electronic communication services) were sufficient, so that a detailed analysis of the potential competition between the parties was not necessary. In the interpretation of the context of an agreement, regard must be had to the actual conditions of the functioning and of the structure of the market(s) concerned. However, this does not mean that the Commission must define the market(s) precisely or perform a detailed analysis of the market(s), as the agreement at stake is a market sharing agreement which has an anticompetitive object in itself. The relevant issue is whether there existed insurmountable barriers to entry that ruled out any potential competition. The parties' intention is only one of the potentially relevant elements for this assessment.

In *Lundbeck*, the GC confirmed the Commission's analysis that the patent settlement, accompanied by a transfer of value from the patent holder to the generic and a commitment from the generic not to enter the market, was a restriction by object. The GC confirmed that such pay-for-delay agreements are comparable to a market exclusion agreement (i.e., among the most serious restrictions of competition). The anticompetitive rationale behind the agreement, which the GC, following the Commission, found to be to delay the market entry of generics, seems to have played an important role. As the Commission had established that the generics were at least potential competitors and had real concrete possibilities to enter the market at the time of the controversial agreement, it was not necessary for the Commission to examine whether, in the absence of the agreement, the generic undertakings would have entered the market without infringing one of Lundbeck's patents.

iv Relevance of defining a counterfactual scenario to assess an alleged restriction by object

As established long ago in *Société Technique Minière*,[32] the assessment of the existence of a restriction of competition requires assessing the competition that would have existed in the absence of the agreement (i.e., a counterfactual analysis).

The GC rejected the argument developed by Lundbeck pursuant to which the counterfactual scenario precluded a finding of a restriction of competition by object. Lundbeck argued that the Commission should have examined how competition would have unfolded in the absence of the agreement. The GC concluded that the:

> *[…] examination of a hypothetical counterfactual scenario – besides being impracticable since it requires the Commission to reconstruct the events that would have occurred in the absence of the agreements at issue, whereas the very purpose of those agreements was to delay the market entry of the generic undertakings […] – is more an examination of the effects of agreements at issue on the*

32 Case 56/65, *Société Technique Minière*, judgment of 30 June 1966.

market than an objective examination of whether they are sufficiently harmful to competition. Such an examination of effects is not required in the context of an analysis based on the existence of a restriction of competition by object.[33]

III A CORRECTION FOR THE OVERUSE OF THE SCCI CONCEPT – FINE REDUCTIONS FOR LESSER INVOLVEMENT

Ever since the concept was formalised in the seminal *Cement* case,[34] the Commission has made extensive use of the SCCI notion to capture different instances of cartel conduct, often spread over several years and geographies, based on a link – the overall plan revealing the one single anticompetitive aim of the conduct – that has often proved to be quite tenuous. Thanks to this concept, the Commission can spare the effort of having to repeat the analysis for each separate instance, and can avoid statute of limitation issues raised by periods of cartel inactivity.[35]

Cartel participants sometimes found that the Commission's reliance on an SCCI was artificial and could lead to evidentiary shortcuts. However, they often benefited from the concept as it meant only receiving one fine, to which the maximum turnover fining cap applied. The benefits of the concept grew with the Commission's practice of basing the fine of an SCCI participant on the sales of the products concerned, in the geographies concerned.[36]

With the rise of follow-on cartel civil damages actions in the EU, addressees of cartel decisions have increasingly found that participation in an SCCI can have significant ramifications for their joint and several liability for any damages caused by such SCCI. Fringe players can in particular suffer severe consequences from a finding that they participated in a broader SCCI despite their limited involvement. This has led to increased questioning of the Commission's rather broad use of the SCCI concept.

In *Del Monte*, the GC recalled that, to find a company liable for participation in an SCCI, it is necessary 'for the Commission to establish that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.'[37] The GC held that 'the fact that an undertaking has not taken part […] in all aspects of an anticompetitive scheme or that it played only a minor role

33 Case T-472/13, para. 473.

34 Joined Cases T-25/95 and others, *Cimenteries CBR and others*, judgment of 15 March 2000; confirmed on appeal, Joined Cases C-204/00 P and others, *Aalborg Portland and others*, judgment of 7 January 2004.

35 This tactic has drawbacks, as the Commission found in the *Air Cargo* case, where the GC annulled its decision which had found one SCCI and yet appeared to condemn different airlines for participation in four different infringements, Case T-43/11, *Singapore Airlines*, judgment of 16 December 2015. See also judgments in Cases T-9/11, *Air Canada*; T-28/11, *Koninklijke Luchtvaart Maatschappij*; T-36/11, *Japan Airlines*; T-38/11, *Cathay Pacific Airways*; T-39/11, *Cargolux Airlines International*; T-40/11, *Latam Airlines Group and Others*; T-46/11, *Deutsche Lufthansa and Others*; T-48/11, *British Airways*; T-56/11, *SAS Cargo Group and Others*; T-62/11, *Air France-KLM*; T-63/11, *Société Air France* and T-67/11, *Martinair Holland*.

36 A good example of this practice is the *Bathroom Fittings and Fixtures* case, COMP/39.092, OJ C348/12 of 29 November 2011.

37 Case T-587/08, *Fresh Del Monte Produce*, judgment of 14 March 2013, para. 639.

in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Such a factor must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine.'[38]

On appeal, the ECJ confirmed that a fringe player may be found liable for an SCCI, despite being unaware of what other participants did or intended, although this liability is then partial:

> *[…] the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk.*[39]

If the Commission fails to demonstrate that the fringe player had the subjective intent to participate in the common objective pursued by the SCCI, then it can only be found guilty of a separate infringement relating to its own conduct. In the event the Commission only finds it guilty of participation in the SCCI, without warning that its conduct could also constitute a separate infringement, then the decision against the fringe player will be annulled.[40]

Kevin Coates has suggested that the Commission faces two alternatives when considering the role of fringe players.[41] It can either define multiple infringements, where the fringe player is only held liable for the separate infringement it participated in, or find an SCCI while clarifying that the fringe player can only be held liable for part of it. He believes that the first alternative should be rejected because, from the point of view of the main players, it could lead to multiple fines for both the main and ancillary infringements.

This is not particularly convincing as the fringe conduct, if it is part of the main players' overall plan (of which the fringe player is unaware), could be part of the SCCI for them, while for the fringe player it is a separate infringement. Also, even if the Commission finds two separate infringements, it could fine the main players only once, in consideration of the links between the main and fringe conducts, from the main players' perspective.

The recent judgment in *Infineon* illustrates the perils of the second alternative from the perspective of the fringe player: it was only by reading the operative part of the decision together with some recitals in the Commission decision that the GC was able to conclude that the Commission only held Infineon liable for parts of the SCCI.[42] This leaves fringe players exposed to the vagaries of Member State courts' decisions on civil liability.

If the Commission's practice, as validated by the EU Courts, continues to favour the second alternative, then two things need to happen.

First, the Commission must tighten the drafting of the decisions, so that it is clear from the operative part of the decision what parts of the SCCI the fringe player is held liable for.

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38 Ibidem, para. 648.

39 Joined Cases C-293-13P and C-294/13 P, judgment of 24 June 2015, para. 159.

40 Contrast Case C-441/11 P, *Verhuizingen Coppens*, judgment of 6 December 2012, and Case T-68/09, *Soliver*, judgment of 10 October 2014, with Case C-287/11 P, *Aalberts*, judgment of 4 July 2013. These rulings were commented by former DG Competition official Kevin Coates in his 21st Century Competition blog entry, 'Defining a single and continuous infringement in cases with asymmetrical participation'.

41 Coates, 21st Century Competition blog entry, op. cit.

42 Case T-758/14, *Infineon*, judgment of 15 December 2016, para. 231.

Second, the Commission must properly take into account, when assessing the fine, the fringe player's limited liability. Nowadays, the Commission's setting of the basic fining amount remains very close to the Fining Guidelines' lower limit of 15 per cent of the yearly value of sales. The only way for the Commission to properly account for the limited liability of the fringe player is therefore to grant a specific fine reduction as a 'mitigating' circumstance. Curiously, while past Commission practice was often to grant substantial reductions (25 to 50 per cent) for having played a 'minor role' in the cartel, more recent cases have seen the Commission grant paltry reductions (5 to 10 per cent[43]) or even no reduction at all (holding that limited liability was sufficiently taken into account for players who only participated in limited geographies, by only taking into account their sales in these geographies for the determination of the value of sales for fining purposes) for limited participation in an SCCI.

43 In *Infineon*, the Commission had granted a bigger 20 per cent reduction, which the General Court found satisfactory. In *Del Monte*, the Court increased the reduction from 10 to 20 per cent. In other cases, the Court increased the reduction by a few percentage points (e.g., Case T-462/07, *Galp*, or Case T-482/07, *Nynäs Petroleum*). On appeal, the ECJ found that the GC had wrongly attributed liability to Galp for parts of the SCCI and therefore increased by another 10 per cent the fining reduction of 10 per cent granted by the Commission (which the GC's set-aside judgment had increased to 14 per cent), Case C-603/13 P, judgment of 21 January 2016, para. 93.

Appendix 1

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Frédéric Louis focuses on all aspects of EU competition law, including cartel, parallel imports and abuse of dominance investigations (including internal investigations and leniency applications); complaints and litigation; merger clearance; state aid investigations; and complaints and counselling. He advises clients across a wide variety of industry sectors, from basic industries (construction materials, chemicals) to consumer goods, including service industries (telecommunications, banking, media and sports).

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Mr Louis's litigation experience before the EU courts ranges over various aspects (including freedom of commerce and constitutional issues) with a focus on competition litigation. Mr Louis has argued cases before the Grand Chamber of both the General Court and the Court of Justice of the EU.

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