

# Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 1)

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☞ Block exemptions; Cartels; Competition policy; Damages; EU law; Private enforcement; Technology transfer agreements

This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU<sup>1</sup> from November 2013 until the end of October 2014.<sup>2</sup> The article is divided into five sections:

- legislative developments;
- European Court judgments;
- European Commission decisions and settlements;
- patent settlement monitoring; and
- current policy issues.

Legislative developments and European Court judgments on general issues and cartel appeals are included in Part 1. The remaining European Court judgments and the other sections will be included in Part 2, which will be published in the next issue of the I.C.C.L.R.

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

## Box 1

- *Major themes/issues in 2013/14*
  - Adoption of the Damages Directive (albeit deferred).
  - *Kone*:
    - \* “Umbrella pricing” damages claim possible.
    - \* Effectiveness principle and national law.
  - *Gascogne/Kendrion*:
    - \* No reductions for GC delay at ECJ

- \* ECJ findings (for now?) but damages actions to the same court (the GC).

— *EnBW* at the ECJ:

- \* EC can deny a (competition related) Transparency Regulation application by category of documents (generally).

— *Cartes Bancaires*:

- \* What is a “restriction by object”?
- \* ECJ clarification of *Allianz Hungaria*.
- \* Look at nature of restriction in its actual context, but do not look at economic effect (compare *Power Transformers*?).
- \* See A.G. Wahl’s Opinion also.

— *Greek Lignite*:

- \* ECJ overrules GC ruling.
- \* State measures preventing equality of opportunity unlawful.
- \* Wide ruling.

— *Intel*:

- \* ECJ followed *Tomra* and old case law approach; not the new economic approach.
- \* Exclusive rebates unlawful unless objective justification.
- \* *Post Danmark I* also distinguished.
- \* Margin squeezing, predatory pricing cases distinguished.

## Legislative developments

### Box 2

- *Legislative developments*
  - Proposed Damages Directive (now adopted but not yet published officially).
  - Revised Transfer of Technology Block Exemption and Guidelines.
  - Revised *De Minimis* Notice, with Guidance on “Restriction by Object”.
  - Renewal of Consortia Shipping BE.
  - Consultation on the Insurance BE.

## Proposed Damages Directive

In April 2014 the European Parliament adopted the Proposed Damages Directive.<sup>3</sup> The text was agreed with the Council,<sup>4</sup> but then its final adoption was deferred and occurred in November 2014. At the time of writing it was still not in the Official Journal. A “Corrigendum Text” was adopted on October 21, 2014 and is now available on the EC website.

\* With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this article; and to my Brussels and London colleagues for their assistance, which is indicated within the appropriate section.

<sup>1</sup> “TFEU” is the abbreviation for “Treaty on the Functioning of the European Union”; “EC” for “European Commission” (not “European Community”, as before the Lisbon Treaty); “GC” is the abbreviation for “General Court”, “ECJ” for the “European Court of Justice” and “CJEU” for the overall “Court of Justice of the European Union”; “NCA” is the abbreviation for “National Competition Authority”; “SO” is the abbreviation for “Statement of Objections”; “BE” is the abbreviation for “Block Exemption”; “Article 27(4) Notice” refers to the EC’s Communications under that article of Regulation 1/2003 [2003] OJ L1/1. References to the “ECHR” are to the “European Convention of Human Rights” and references to the “CFR” are to the EU “Charter of Fundamental Rights”.

<sup>2</sup> The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC’s website are to DG Competition’s specific competition “page”: [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html) [Accessed December 29, 2014]. References to “I.C.C.L.R.” are to previous articles in the series “Major Events and Policy Issues in (formerly EC) EU Competition Law” published in the International Company and Commercial Law Review.

<sup>3</sup> With thanks to Hanna Pettersson for her assistance with this section.

<sup>4</sup> Amendments by the European Parliament to the Commission, Proposed Directive of the European Parliament and of the Council 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, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> [Accessed December 29, 2014].

Last year's article dealt extensively with the proposal. This year, we propose therefore just to focus on the main changes reported as made to the Proposal. Reference is made to last year's issue for a more detailed account.<sup>5</sup>

First, the provision dealing with disclosure of evidence has been heavily revised and now includes a list of criteria which national courts must consider in assessing the proportionality of an order to disclose information.

The national courts will be obliged to consider whether the request is sufficiently specific, whether the request is made in relation to an action for damages before a national court, as well as the need to safeguard the effectiveness of the public enforcement of competition law.<sup>6</sup> The categories of evidence which can be disclosed only after a competition authority has closed its proceedings have also been extended to include settlement submissions that have been withdrawn.<sup>7</sup>

Finally, while the revised article still does not allow national courts to disclose leniency statements or settlement submissions, it does allow claimants to present a justified request that a national court access leniency statements and settlement submissions, solely for the purpose of ensuring that their content is such as to justify them being defined as leniency statements or settlement decisions. The parts of the documents that are not covered by the definition of leniency statement or settlement submission should be disclosed.<sup>8</sup>

Secondly, the original proposal provided that decisions of national competition authorities ("NCAs") finding an infringement should constitute proof of the infringement in all Member States. This has changed. The revised text requires that the decision by a NCA should constitute proof of the infringement before the courts of the same Member State.<sup>9</sup> As for decisions taken in other Member States, these should constitute prima facie evidence of an infringement and may be assessed with other evidence brought by the parties.<sup>10</sup>

Thirdly, the revised text has an addition to the rule on limitation periods. The limitation period may not begin to run before the infringement has ceased and the claimant knows or can reasonably be expected to know: (1) of the behaviour and the fact that it constitutes an infringement of competition law; (2) that the infringement caused harm to him; and (3) the identity of the infringing undertaking.<sup>11</sup>

Fourthly, a new article has been inserted in the chapter on passing-on. The Proposed Directive now explicitly states that the application of its provisions may not lead

to overcompensation<sup>12</sup> and, in order to avoid this, Member States must put in place rules to ensure that compensation for actual loss does not exceed the overcharge harm suffered.<sup>13</sup> The provisions on the passing-on defence and indirect purchasers remain the same as in the original proposal, with only minor alterations.

Fifthly, national courts will be obliged to take into account relevant information in the public domain resulting from public enforcement cases, in addition to other actions and judgments relating to the same infringement, when assessing a claim for damages.<sup>14</sup>

Sixthly, a new article has been included in the revised text stating that the EC shall issue guidelines to national courts on how to estimate the share of the overcharge passed on to an indirect purchaser.<sup>15</sup>

Seventhly, NCAs will be able to assist national courts on the determination of the quantum of damages.<sup>16</sup>

Eighthly, the revised proposal lists factors which the EC review of the Proposed Directive must include. The EC will have to report on: (1) the impact of the paying of fines on the possibility for claimants to obtain full compensation; (2) to what extent claimants have been unable to prove an infringement before a national court where the infringement decision was adopted by a competition authority in another Member State; and (3) to what extent compensation for actual loss has exceeded the overcharge harm. If appropriate, the EC's review shall be accompanied by a legislative proposal.<sup>17</sup>

Finally, it is stated that the national transposition measures may not apply retroactively, i.e. to actions for damages brought before the entry into force of the Directive.<sup>18</sup>

### *Transfer of Technology BE and Guidelines*

In March 2014, the EC published the final version of its revised Block Exemption Regulation and Guidelines on the application of Art.101(3) of the Treaty on the Functioning of the European Union ("TFEU") to categories of technology transfer agreements.<sup>19</sup> The new documents amend the 2004 Technology Transfer ("TT") Block Exemption Regulation and Guidelines and have been the subject of detailed consultation.<sup>20</sup>

The revised Technology Transfer Block Exemption ("the 2014 TT BE") came into force on May 1, 2014.

The main changes are as follows:

<sup>5</sup> John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2012–2013" [2014] I.C.C.L.R. 75, 77–79.

<sup>6</sup> Revised Proposal art.6.4.

<sup>7</sup> Revised Proposal art.6.5(c).

<sup>8</sup> Revised Proposal art.6.7–6.8.

<sup>9</sup> Revised Proposal art.9.1.

<sup>10</sup> Revised Proposal art.9.2.

<sup>11</sup> Revised Proposal art.10.2.

<sup>12</sup> Revised Proposal art.3.3.

<sup>13</sup> Revised Proposal art.12.2.

<sup>14</sup> Revised Proposal art.15.1.

<sup>15</sup> Revised Proposal art.16.

<sup>16</sup> Revised Proposal art.17.3.

<sup>17</sup> Revised Proposal art.20.

<sup>18</sup> Revised Proposal art.22.

<sup>19</sup> With thanks to Cormac O'Daly for this section. The texts are in [2014] OJ L93/17 and [2014] OJ C89/3 respectively.

<sup>20</sup> See <http://ec.europa.eu/competition/antitrust/legislation/transfer.html> [Accessed December 29, 2014].

First, the new rules provide for the Research and Development Block Exemption (“R&D BE”) to take precedence in the event of overlapping application with the TT BE. Intellectual property rights are often licensed in the context of R&D collaborations. The previous rules did not provide clear guidance on whether the R&D BE or the technology transfer block exemption applied to these arrangements. This has now been clarified: if the R&D BE applies, the 2014 TT BE will not.<sup>21</sup> In practice, therefore, parties should first consider whether their agreements fall within the sphere of the R&D BE and, only if they do not, consider them under the 2014 TT BE.

Secondly, the TT Guidelines express increased scepticism towards some settlement agreements. The 2014 TT Guidelines introduce two new paragraphs on “pay-for-delay” settlements.<sup>22</sup> However, they do not go so far as to indicate how the EC will assess these agreements in practice. The Guidelines state that the EC will be “particularly attentive to the risk of market allocation/sharing” if the parties are actual or potential competitors and there is a “significant value transfer from the licensor to the licensee” in exchange for the licensee delaying or limiting launching a product. It would appear that the EC preferred to let its more detailed position come out through specific decisions.

Thirdly, additional guidance on patent pools is set out. The 2014 TT BE does not cover patent pools, but they are discussed in the 2014 TT Guidelines. The main innovation is a “safe harbour” for pools which have the following characteristics<sup>23</sup>:

- The pool must be open to all interested parties.
- The pool must implement safeguards to ensure that only essential technologies are pooled. The guidance on what constitutes “essential” technology has been (helpfully) revised to cover not only technology that is essential to making a product, but also technology that is essential to complying with a standard.<sup>24</sup>
- The pool must implement safeguards to limit exchange of sensitive information to what is necessary.
- Licensing of the pooled technologies into the pool must be non-exclusive.
- Licensing of the pooled technologies to third parties must be on FRAND terms.
- Contributors and licensees must be allowed to challenge pooled technologies’ validity and “essentiality”.

- Contributors and licensees must be allowed to develop competing products and technology.

The 2014 TT Guidelines also expand the guidance on pools that are outside the safe harbour. For example, they recognise that sometimes it can be pro-competitive to include non-essential technologies in a pool, when the number of potentially essential technologies would make it prohibitively expensive to determine whether patents are essential.<sup>25</sup>

Fourthly, the changes involve modified treatment of certain provisions that may need reviewing in existing agreements. Existing licences which comply with the 2004 TT Block Exemption (which expired on April 30, 2014) benefit from a grace period until April 30, 2015, but from then they will be assessed under the 2014 TT BE.<sup>26</sup> Notably, the treatment of the following clauses is changing:

It is no longer possible automatically to prohibit passive sales in licences between non-competitors during a start-up period. The 2004 TT Block Exemption treated as outside art.101 TFEU agreements between non-competitors restricting the licensee from making passive/unsolicited sales into another licensee’s exclusive territory, or to another licensee’s exclusive customer group, during the first two years of the agreement. By contrast, the 2014 TT BE treats such a provision as a hardcore restraint which takes the whole agreement outside the BE. However, the 2014 TT Guidelines recognise that temporary restrictions on passive sales may be “objectively necessary” for a licensee “to penetrate a new market”.<sup>27</sup> The onus is on the parties to substantiate this objective necessity.

Fifthly, there is heightened scrutiny for exclusive grant-back provisions. Under the 2004 Block Exemption, clauses requiring exclusive grant-backs of “non-severable” improvements to the licensed technology fell within the exemption. The 2014 TT BE excludes all exclusive grant-backs from the exemption, regardless of whether the improvement is severable or non-severable from the licensed technology.<sup>28</sup> Instead, any exclusive grant-backs will have to be reviewed separately for compliance with art.101 TFEU, taking account of all relevant factual and economic circumstances.

Sixthly, there is also heightened scrutiny for clauses providing for termination following challenge to the licensed technology’s validity. The 2004 Block Exemption allows a licensor to terminate the agreement if the licensee challenges the licensed technology’s validity. The 2014 TT BE alters this significantly: while parties can continue to include such termination clauses

<sup>21</sup> 2014 TT BE Recital 7 and art.9; and 2014 TT Guidelines paras 73 and 74.

<sup>22</sup> 2014 TT Guidelines, paras 238 and 239.

<sup>23</sup> 2014 TT Guidelines, para.261.

<sup>24</sup> 2014 TT Guidelines, para.252.

<sup>25</sup> 2014 TT Guidelines, para.264(a).

<sup>26</sup> 2014 TT BE art.10.

<sup>27</sup> 2014 TT Guidelines, para.126.

<sup>28</sup> 2014 TT BE art.5(1)(a).

in exclusive licences, it is no longer possible to do this in non-exclusive licences.<sup>29</sup> In non-exclusive licences, therefore, termination clauses will have to be assessed separately for compliance with EU competition law.

Finally, it may be useful to note what has *not* changed. The 2014 TT BE and Guidelines do not radically change the existing framework for analysing the compatibility of licences with EU competition law. For example, none of the provisions regarding the BE's market share thresholds has changed.<sup>30</sup> For agreements between competitors to fall under the 2014 TT BE, the parties' combined market share on all relevant product and technology markets will have to be below 20 per cent. For agreements between non-competitors to fall under the 2014 TT BE, each party's individual market share on all relevant product and technology markets will have to be below 30 per cent.

The 2013 draft versions of the TT BE and Guidelines proposed applying the 20 per cent market share threshold, which is normally applicable only to agreements between competitors, to some licences between non-competitors, but this proposal has not been retained in the final version of the 2014 TT BE.

Apart from removing the right to restrict temporarily passive sales in agreements between non-competitors, none of the hardcore restrictions of competition that would render the 2014 TT BE inapplicable have changed compared with the 2004 texts. The wording of the article concerning hardcore restrictions in licences between competitors has been somewhat simplified,<sup>31</sup> but the EC states in its Frequently Asked Questions document that this does not result in any substantive change.

### Revised De Minimis Notice

In June 2014 the EC published the revised version of the *De Minimis* Notice.<sup>32</sup> Interestingly, the Notice is accompanied by a Staff Working Document which sets out "guidance" on what types of restrictions have been considered "restrictions by object".<sup>33</sup>

The main change in the Notice is the clarification that it no longer covers "by object" agreements.<sup>34</sup> It is said, in accordance with *Expedia*,<sup>35</sup> that such agreements cannot be considered *de minimis*, but are instead always

considered to constitute an appreciable restriction of competition under art.101 TFEU.<sup>36</sup> As a consequence, the EC will not apply the safe harbour rules set out in the Notice to "by object" agreements.<sup>37</sup>

That said, cases like *Power Transformers*, outlined below, are still confirming that an agreement has to be considered in its economic context, including whether it is *capable* of affecting competition.<sup>38</sup>

The Staff Working Document accompanying the new Notice is intended to assist companies by setting out in what circumstances an agreement qualifies as a restriction by object.<sup>39</sup> The Document offers a list of agreements between competitors and non-competitors, listing price-fixing, market-sharing, output restrictions, bid rigging, collective boycott agreements, information sharing, R&D restrictions and sales restrictions as examples of "by object" infringements.

While the EC's effort to make all this clear is very welcome, we may not be entirely there yet, notably in the light of the ECJ's recent *Cartes Bancaires* case outlined below.<sup>40</sup>

### Consortia Shipping BE

In February 2014 the EC launched a public consultation on a proposal to prolong the existing BE for Liner Shipping Consortia.<sup>41</sup> The BE allows shipping lines with a combined market share below 30 per cent to enter into co-operation agreements to provide joint cargo transport services, or consortia.<sup>42</sup>

The EC has now stated that, as the responses to the public consultation showed that the main tenets of the EC's approach towards consortia agreements are still valid, the EC has decided to extend the validity of the BE for another five years, until April 2020.<sup>43</sup>

### Consultation on Insurance BE

In August 2014, the EC announced that it published a questionnaire to obtain comments from stakeholders on the current insurance block exemption ("IBE"), Regulation 267/2010,<sup>44</sup> ultimately to decide if the IBE

<sup>29</sup> 2014 TT BE art.5(1)(b).

<sup>30</sup> 2014 TT BE art.3.

<sup>31</sup> 2014 TT BE art.4(1).

<sup>32</sup> Communication from the Commission, "Agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice) of 25 June 2014 OJ C291/1" (August 30, 2014). See also IP/14/728 (June 25, 2014). With thanks to Hanna Pettersson for her help with this section.

<sup>33</sup> Commission Staff Working Document, "Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the *De Minimis* Notice of 25 June 2014", SWD(2014)198 final.

<sup>34</sup> Notice, paras 2 and 13.

<sup>35</sup> *Expedia Inc v Autorité de la concurrence* (C-226/11) EU:C:2012:795; [2013] 4 C.M.L.R. 14.

<sup>36</sup> Notice, para.2.

<sup>37</sup> Notice, para.13.

<sup>38</sup> See *Toshiba Corp v European Commission* (T-519/09) EU:T:2014:263; [2014] 5 C.M.L.R. 8 at [230]–[234].

<sup>39</sup> Staff Working Document, p.5.

<sup>40</sup> *Groupement des cartes Bancaires* (C-67/13 P) EU:C:2014:2204; [2014] 5 C.M.L.R. 22.

<sup>41</sup> IP/14/196 (February 27, 2014). With thanks to Hanna Pettersson for her help with this section.

<sup>42</sup> Regulation 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L256/31.

<sup>43</sup> IP/14/196 (February 27, 2014).

<sup>44</sup> Regulation 267/2010 [2010] OJ L83/1. With thanks to Katrin Guéna for her help this section.

should be completely or partially renewed or not be renewed.<sup>45</sup> The current Regulation will expire in March 2017.

It may be recalled that the current BE covers two types of agreements between insurance and reinsurance companies: agreements on joint compilations, joint tables and studies; and agreements covering certain types of risks. Those agreements are exempted from the general prohibition on anti-competitive practices laid down in art.101 TFEU, under certain conditions specified in the IBE.

The EC emphasised that a BE is an exceptional legal act, only justified if the sector it applies to differs sufficiently from other sectors not covered by BE's. This is also why BE's have to be reviewed on regular basis.

Interested parties had until November 4, 2014 to make their submissions. The EC will then address a report to the Council and the Parliament by the end of March 2016.

## European Court judgments

### General

#### Box 3

- Court cases—general principles
  - *Kone*:
    - \* “Umbrella pricing” claim cannot be excluded in national law dealing with EU compensation for competition infringements.
    - \* That would put the effectiveness of art.101 TFEU at risk.

### Kone

In June 2014, the ECJ ruled on a request for a preliminary ruling from the Austrian Supreme Court (“*Oberster Gerichtshof*”) concerning “umbrella pricing”, in the context of the elevators cartel.<sup>46</sup> The issue was whether damages could be recovered from cartellists as a result of buying from third-party undertakings at a higher price than otherwise would have been paid, insofar as those undertakings would have taken into account the cartelised prices.

In Austrian law such damages could *not* be recovered. The claim would be considered too remote and causation broken by the decision of the third party, who was not in the cartel. However, both A.G. Kokott<sup>47</sup> and the ECJ held that the EU principle of effectiveness required that such a claim for compensation for violation of EU law should not be categorically excluded by national law.

The main points of interest are as follows:

First, the court held that umbrella pricing is a possible effect which members of a cartel cannot disregard. The market price is one of the main factors when undertakings set the price at which they offer their goods. Even if the determination of an offer price by an undertaking not party to a cartel is a purely autonomous decision, it has been able to be taken by reference to a market price distorted by the cartel and therefore contrary to competition rules.<sup>48</sup>

Secondly, the court held that the effectiveness of art.101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link, while excluding the right because the individual concerned had no contractual obligations with the cartel member, but with a third party whose pricing policy was, however, a result of the cartel.<sup>49</sup>

Thirdly, the ECJ stated that the victim of umbrella pricing may obtain compensation for loss caused by the cartel members, even in the absence of contractual links with them, if: (1) the cartel was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently; and (2) the cartel members could not be unaware of those circumstances and specific aspects.<sup>50</sup> However, the ECJ noted that it is for the national court to determine whether those conditions are satisfied.

So, the court's answer is that art.101 TFEU precludes national law which excludes the civil liability of undertakings belonging to a cartel for loss, resulting from the fact that an undertaking not party to the cartel set its prices higher than it would have under competitive conditions.<sup>51</sup>

Predictably, already this has been a source of much attention. This is yet another example of the way that the EU principle of effectiveness can affect national law significantly. The ruling goes further than US law, where it appears that the right to claim compensation for umbrella pricing is not yet settled.

### SOA Nazionale Costruttori

In December 2013, the ECJ ruled on a reference from the Italian *Consiglio di Stato* concerning an Italian law which sets compulsory minimum tariffs for certain certification activities.<sup>52</sup>

The essential issue was that an Italian law had repealed certain compulsory minimum tariffs, but left in place such a tariff for the activities of Italian “attestation organisations”. These are undertakings which certify that

<sup>45</sup> IP/14/905 (August 5, 2014).

<sup>46</sup> *Kone AG v OBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5. With thanks to Roberto Grasso and Svetlana Chobanova for their assistance with this section.

<sup>47</sup> *Kone* EU:C:2014:1958; [2014] 5 C.M.L.R. 5 (Opinion of January 30, 2014).

<sup>48</sup> *Kone* EU:C:2014:1317; [2014] 5 C.M.L.R. 5 (Judgment) at [29]–[30].

<sup>49</sup> *Kone* EU:C:2014:1317; [2014] 5 C.M.L.R. 5 at [33].

<sup>50</sup> *Kone* EU:C:2014:1317; [2014] 5 C.M.L.R. 5 at [34].

<sup>51</sup> *Kone* EU:C:2014:1317; [2014] 5 C.M.L.R. 5 at [37].

<sup>52</sup> *Ministero dello Sviluppo economico v SOA Nazionale Costruttori* (C-327/12) EU:C:2013:827; [2014] P.T.S.R. D10.

companies bidding for public works are properly run, supervised, etc., and give certificates accordingly. It appears that one company, SOA Nazionale Costruttori, applied to offer its customers discounts on fees. However, the relevant Italian Ministry decided not to allow this.

On appeal the matter went ultimately to the Italian *Consiglio di Stato*, which referred a question to the European Court as to whether the Italian legislation was contrary to EU law (arts 101, 102 and 106 TFEU).

The ECJ found that the attestation organisations were undertakings in EU competition law insofar as they competed among themselves.<sup>53</sup>

The court then considered whether the competition rules applied, given that the rules on the minimum tariffs concerned were set by the State. The court held that this was *not* the case since Italy was: (1) not requiring or encouraging the adoption of unlawful agreements; or (2) reinforcing their effects; or (3) delegating its legislative powers to private parties.<sup>54</sup> The court also found that Italy had not given the undertakings' special or exclusive rights, insofar as *all* the SOAs had the same rights and competences.<sup>55</sup> So, overall, the court found that arts 101, 102 and 106 TFEU did not preclude national legislation of this type.

It may be useful to note that the court also considered whether the legislation was contrary to art.49 TFEU, insofar as it restricted freedom of establishment. The court held that there *was* such a restriction insofar as the compulsory tariff might make it more difficult for companies established in other Member States to compete with those in Italy.<sup>56</sup> However, the court noted that the Italian State justified the restriction on pricing to ensure the independence of SOAs and the quality of certification services. The Italian State wanted to ensure that no commercial or financial interest would result in impartial or discriminatory behaviour by SOAs in certification.<sup>57</sup> The court also noted that SOAs were not allowed to have other commercial activities.

The court therefore accepted the Italian position and considered that the setting of minimum tariffs was suitable for attaining the objective of ensuring the quality of certification services. However, the ECJ left the national court to assess whether the legislation was proportionate to that objective, in terms of the method of calculating minimum tariffs.<sup>58</sup>

## flyLAL-Lithuanian Airlines

In October 2014, the ECJ delivered a judgment following a request for a preliminary ruling brought by the Latvian Supreme Court (*Augstākās Tiesas Senāts*).<sup>59</sup> In the main

proceedings, flyLAL is seeking compensation for damages resulting from a claimed abuse of a dominant position by Air Baltic and from an anti-competitive agreement between Air Baltic and Starptautiskā lidosta Rīga. FlyLAL sought the recognition and enforcement of a Lithuanian judgment ordering provision and protective measures against the defendants.

In the judgment, the ECJ ruled that actions seeking legal redress for damage resulting from alleged infringements of EU competition law fall within the definition and meaning of “civil and commercial matters” of art.1(1) of Regulation 44/2001<sup>60</sup> on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>61</sup> Therefore, such actions fall within the scope of this Regulation.

In addition, the ECJ held that the recognition and enforcement in a Member State of a judgment coming from another Member State cannot be refused on the mere ground that the judgment will have serious economic consequences.<sup>62</sup>

## Cartel appeals

### Box 4

#### • Cartel appeals—general

- Some fine reductions, often linked to the way a fine is set for a specific company in a group, given changes overtime.
  - \* e.g. *Fasteners* (10% ceiling on acquired subsidiary), *Degussa*, *AlzChem* (no recidivism for subsidiary).
  - \* Or in a joint venture context (e.g. *Sasol*).
- Importance of argument that a company may not have been shown to have been aware of full scheme of an infringement (e.g. *Soliver-Carglass*).
- EC rounding practice unlawful if leads to unequal treatment.

## Dutch Bitumen

### Ballast

In April 2014, the ECJ ruled on a further appeal by Ballast Nedam against the GC's ruling that Ballast Nedam should be liable for an alleged infringement by its subsidiary Ballast Nedam Grond en Wegen (“BNGW”) in the *Dutch Bitumen* cartel case.<sup>63</sup>

The EC had imposed a fine of €4.65 million on Ballast Nedam (the parent of the Ballast Nedam group). This was on the basis that Ballast Nedam owned Ballast Nedam Infra (“BN Infra”), which in turned owned BNGW. Between 1995 and 2000, the road construction activities of the group were carried out by BNGW. In 2000, BN

<sup>53</sup> *SOA Nazionale Costruttori* EU:C:2013:827; [2014] P.T.S.R. D10 at [33]–[35].

<sup>54</sup> *SOA Nazionale Costruttori* EU:C:2013:827; [2014] P.T.S.R. D10 at [37]–[40].

<sup>55</sup> *SOA Nazionale Costruttori* EU:C:2013:827; [2014] P.T.S.R. D10 at [40]–[43].

<sup>56</sup> *SOA Nazionale Costruttori* EU:C:2013:827; [2014] P.T.S.R. D10 at [56]–[58].

<sup>57</sup> *SOA Nazionale Costruttori* EU:C:2013:827; [2014] P.T.S.R. D10 at [62].

<sup>58</sup> *SOA Nazionale Costruttori* EU:C:2013:827; [2014] P.T.S.R. D10 at [63]–[68].

<sup>59</sup> *flyLAL-Lithuanian Airlines AS v Starptautiska lidosta Riga VAS* (C-302/13) EU:C:2014:2319; [2014] 5 C.M.L.R. 27. With thanks to Virginia del Pozo for her assistance.

<sup>60</sup> Regulation 44/2001 [2001] OJ L12/1 (“The Brussels I Regulation”).

<sup>61</sup> *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [38].

<sup>62</sup> *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [59].

<sup>63</sup> *Ballast Nedam NV v Commission* (C-612/12 P) EU:C:2014:193; [2014] 4 C.M.L.R. 26; ECJ Press Release 42/14 (March 27, 2014).

Infra, another subsidiary of Ballast Nedam, took over that business. The EC had held Ballast Nedam and BN Infra liable for the infringement from June 1996 to April 2002.

The EC did not address the Statement of Objections (“SO”) in the case to BNGW. In the SO addressed to Ballast Nedam and BN Infra, the EC stated that Ballast Nedam had participated in the cartel through the managing director of BNGW, but did not specifically state that it considered Ballast Nedam responsible for BNGW’s infringement by virtue of its control of the capital of BN Infra (previously BNGW).

Nevertheless, the GC held that, although the SO could have been clearer, the way it had been set out was sufficient to allow Ballast Nedam to be aware that it was likely to be held liable for BNGW as parent.

The ECJ disagreed, noting that a SO must indicate in which capacity an undertaking is called upon to answer allegations. The court disagreed that, in these circumstances, Ballast Nedam could *not* have been unaware that the EC was likely to hold it liable for BNGW as its parent.

The ECJ then itself reduced Ballast Nedam’s joint and several liability to €3.45 million, amounting to its liability for BN Infra, from when BN Infra took over the infringing business.

## Koninklijke Wegenbouw Stevin

In December 2013, the ECJ rejected a further appeal by *Koninklijke Wegenbouw Stevin* (“KWS”) in the *Dutch Bitumen* cartel case.<sup>64</sup>

KWS argued two points:

First, KWS claimed that, since the GC had ruled that KWS, through its subsidiary Shell Nederland Verkoopmaatschappij SNV, was not both an instigator and a leader of the cartel, it should have reduced the 50 per cent fine increase which the EC had applied for this. The GC had decided, in its unlimited jurisdiction, to keep the fine increase at that level, despite finding that KWS was only a leader.

The ECJ rejected KWS’s claim, on the basis that it could only substitute its view for the GC’s equitable assessment of the fine in its unlimited jurisdiction, if the level of fine was shown to be not only inappropriate, but excessive to the point of being disproportionate. The court considered that had not been shown, so it had no jurisdiction to review the GC’s finding.

Secondly, KWS claimed that the GC had erred insofar as, in its ruling in the appeal by Shell against the EC’s *Dutch Bitumen* cartel decision, the court had found that KWS’s subsidiary, SNV, had not been shown to be leader of the cartel; while in its ruling on KWS’s appeal, it had

found the opposite.<sup>65</sup> The ECJ found again that it did not have jurisdiction, insofar as, KWS did not show that the GC had manifestly distorted the evidence before it. The court did not have general jurisdiction to review the GC’s assessment of evidence.<sup>66</sup>

While the ECJ’s reasoning is understandable on the rules as stated, this is a somewhat strange result. All the more so given the GC’s modern approach of dealing with most appeals separately, albeit in the same Chamber. One might think that the alleged lack of consistency might have been viewed as raising an issue of manifest distortion of evidence, justifying the ECJ reviewing the matter on the substance.

## Industrial Bags

In the reference period, the ECJ has given judgment in seven cases related to the *Industrial Bags* cartel.

### Box 5

- *Cartel appeals—Gascogne/Kendrion*
  - Change of position by ECJ.
  - Used to allow a claim before it, alleging unreasonable delay in the GC (*Baustahlgewerbe*).
  - Now, the court considers an action for damages must be brought *before the GC* (a different Chamber!).
  - Yet more delay.
  - A.G. Sharpston for; A.G. Wathelet in *Guardian* critical.
  - ECJ making rulings, but remitting in transitional period?
  - Politics of GC enlargement.

## Gascogne/Kendrion

In November 2013, sitting as a Grand Chamber, the ECJ ruled that excessive length of proceedings before the GC breaches an applicant’s right to a hearing within a reasonable time under the second paragraph of art.47 of the Charter of Fundamental Rights (“CFR”).<sup>67</sup>

However, the court held that an action for damages before the GC is the appropriate remedy for such unreasonable delay, rather than the approach adopted previously by the court in *Baustahlgewerbe*,<sup>68</sup> where the ECJ granted a reduction in the fine, in the interests of procedural economy and to give an effective, immediate remedy.

It may be recalled that, in November 2005, the EC found a cartel between 16 companies active on the plastic industrial bags market in Germany, Spain, France and the Benelux.<sup>69</sup> A total of €290 million in fines was

<sup>64</sup> *KWS v Commission* (C-586/12 P) EU:C:2013:863.

<sup>65</sup> *KWS* EU:C:2013:863 at [22]–[23].

<sup>66</sup> *KWS* EU:C:2013:863 at [26]–[28].

<sup>67</sup> *Gascogne Sack Deutschland GmbH v Commission* (C-40/12 P) EU:C:2013:768, [2014] 4 C.M.L.R. 12; *Kendrion v Commission* (C-50/12 P) EU:C:2013:771, [2014] 4 C.M.L.R. 13; and *Groupe Gascogne* (C-58/12 P) EU:C:2013:770, [2014] 4 C.M.L.R. 14. ECJ Press Release 150/13 (November 26, 2013). Paragraph numbering below is taken from *Groupe Gascogne* unless specified otherwise. With thanks to Cormac O’Daly for his assistance.

<sup>68</sup> *Baustahlgewerbe GmbH v Commission* (C-185/95 P) [1998] E.C.R. I-8417; [1999] 4 C.M.L.R. 1203 ECJ.

<sup>69</sup> See J. Ratliff, “Major Events and Policy Issues in EC Competition Law, 2009–2010 (Part 1)” [2010] I.C.C.L.R. 67, 94; and J. Ratliff, “Major Events and Policy Issues in EU Competition Law, 2011–2012 (Part 1)” [2013] I.C.C.L.R. 81, 88.

imposed, with Kendrion liable for €34 million, Gascogne Deutschland liable for €13.3 million and Group Gascogne liable for €9.9 million.

All three companies appealed to the GC in February 2006 and the GC rendered its judgments in November 2011.<sup>70</sup> The GC dismissed all three actions in their entirety. The length of time between the lodging of the applications and the date of the judgments was therefore five years and nine months in all three cases. In all three, the delay between the closing of the written procedure and the opening of the oral procedure was three years and ten months.

The main points in the judgments before the ECJ are as follows:

First, the ECJ held that, regardless of whether the parties had raised the issue before the GC, the question as to whether unreasonable delay should entitle appellants to a reduction in fines was admissible. The court found that it has jurisdiction to verify whether a breach of procedure before the GC has occurred, which adversely affected the appellants' interests.<sup>71</sup> Although a party must be entitled to raise a breach of procedure before the GC when it considers that there has been a breach of the applicable rules, a party cannot be *required* to do so when the full effects of that breach are not yet known.<sup>72</sup>

Secondly, although it was not obliged to do so, the ECJ stated that, in the cases before it, the duration of proceedings and, in particular, the period between the end of the written procedure and the opening of the oral procedure (here approximately 3 years and 10 months) could not be explained by the complexity of the dispute, the conduct of the parties or particular procedural matters.<sup>73</sup> Therefore the ECJ concluded that the GC had failed to adjudicate within a reasonable time.<sup>74</sup>

Thirdly, the ECJ, citing its previous judgment in *Baustahlgewebe*, acknowledged that it had reduced the applicable fine "when first faced" with the issue of excessive delay, so as "to ensure an immediate and effective remedy regarding a procedural irregularity".<sup>75</sup> However, the ECJ noted, citing its judgment in *Der Grüne Punkt*,<sup>76</sup> that it had also held that excessive delay could give rise to a claim for damages against the EU before the GC.

While accepting that the cases were similar to the situation in *Baustahlgewebe*, the ECJ concluded that a claim for damages against the EU constitutes an effective remedy for such a breach.<sup>77</sup> However, the court stated that such a claim may not be made *directly* to the ECJ in the context of an appeal, but must be brought before the GC itself, in a new action.

This ruling is clearly controversial.<sup>78</sup> It follows the suggested approach of A.G. Sharpston, who had noted that these delays appeared to be the result of too few judges in the GC.<sup>79</sup> She argued that, despite the attraction of *Baustahlgewebe*, there was something fundamentally wrong in reducing a fine for a cartel, for delay in the court.<sup>80</sup>

However, it may be interesting to note that A.G. Wathelet has already voiced his dissent in *Guardian*,<sup>81</sup> noting that to expect a new ruling by the General Court on its own delay (even if that would be by another Chamber) looks wrong; and that it appears odd to add yet more delay by requiring a new action.<sup>82</sup>

One senses that the ECJ did not want to go on receiving further appeals because of this issue and a certain political element, insofar as the court is campaigning for more judges in the GC, precisely to remove these delays.

Since then, there have been several similar rulings of GC delay by the ECJ, while rejecting such claims.

## FL Smidth

In April 2014, the ECJ ruled on FL Smidth's ("FLS") further appeal of the GC judgment upholding the EC's decision, in which the EC found FLS jointly and severally liable for the *Industrial Bags* infringement with its former subsidiary Silvallac (which since had become Trioplast Wittenheim ("TW")).<sup>83</sup> The ECJ rejected FLS's appeal.

FLS had bought Silvallac/TW from Cellulose du Pin and then later resold it to Trioplast. TW's fine was set at €17.85 million. FLS was held jointly and severally liable as to €15.3 million of the fine with TW and its intermediate subsidiary FLS Plast ("FLSP"). Trioplast, the new owner, was held jointly and severally liable with TW as to €7.3 million. TW's fine (and that of Trioplast) had been reduced by 30 per cent because of their leniency application after Trioplast acquired TW.

<sup>70</sup> *Sachsa Verpackung* (T-79/06) [2011] E.C.R. II-406; *Kendrion* (T-54/06) [2011] E.C.R. II-393; *Groupe Gascogne* (T-72/06) [2011] E.C.R. II-400 (November 16, 2011).

<sup>71</sup> *Groupe Gascogne* EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [66].

<sup>72</sup> *Groupe Gascogne* EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [70].

<sup>73</sup> See the Opinion of A.G. Sharpston in *Groupe Gascogne* EU:C:2013:360; [2014] 4 C.M.L.R. 14 at [92]–[94], in which she considered that after a delay of 18 months, without any active case management, from closing of the written procedure "alarm bells should be ringing" and that a delay of a further six months generally should be regarded as excessive.

<sup>74</sup> *Groupe Gascogne* EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [93]–[96].

<sup>75</sup> *Groupe Gascogne* EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [80].

<sup>76</sup> *Der Grüne Punkt-Duales System Deutschland* (C-385/07 P) [2009] E.C.R. I-6155; [2009] 5 C.M.L.R. 19.

<sup>77</sup> *Groupe Gascogne* EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [82].

<sup>78</sup> Interestingly, she also noted that the ECJ had invited the (then) 27 Member States, the Parliament and Council to indicate their views on the correct remedy in writing. Seven Member States and the Council had favoured the *Baustahlgewebe* approach; three Member States and Parliament favoured the *Der Grüne Punkt* approach. See her Opinion in *Groupe Gascogne* EU:C:2013:360; [2014] 4 C.M.L.R. 14 at [119].

<sup>79</sup> Referring to a passage on a similar point in the Preface to Charles Dickens's *Bleak House*: see Opinion of A.G. Sharpston in *Groupe Gascogne* EU:C:2013:360; [2014] 4 C.M.L.R. 14 at [70].

<sup>80</sup> See Opinion of A.G. Sharpston in *Groupe Gascogne* EU:C:2013:360; [2014] 4 C.M.L.R. 14 at [125].

<sup>81</sup> Opinion of A.G. Wathelet in *Guardian Industries Corp v Commission* (C-580/12 P) EU:C:2014:272 at [110]–[116].

<sup>82</sup> Opinion of A.G. Wathelet in *Guardian* EU:C:2014:272 at [108]–[112].

<sup>83</sup> *FLSmidth & Co A/S v Commission* (C-238/12 P) EU:C:2014:284; [2014] 4 C.M.L.R. 32.



Subsequently, TW went into liquidation and the liability of Trioplast was reduced by €2.73 million by the GC, so that FLS's and FLSP's share of the liability shared with TW was in practice higher.

FLS appealed, arguing that it should not be liable, even if it was 100 per cent shareholder of FLSP, which in turn owned TW, because TW had been acting on its own, without FLS's knowledge, as shown by an arbitral award to that effect. The GC disagreed, finding that such a lack of knowledge did not suffice to rebut the liability.

FLS also argued that it should benefit from TW's leniency reduction because, if it had the burden of being liable as parent of TW, it should have the benefit as parent. The GC rejected this, stating that TW should not have had a leniency reduction and FLS could not benefit from an unlawful act of a third party.

However, the GC reduced FLS' liability to €14.45 million, insofar as in an initial period it had not owned 100 per cent of Silvallac and had not been shown to control the company.

On further appeal to the ECJ, the main points of interest are as follows:

First, the court agreed with the GC that FLS could not benefit from TW's leniency reduction, but for different reasons. The court substituted the reasoning that FLS could not benefit because it was not a single undertaking with TW at the time of the leniency application.<sup>84</sup>

Secondly, FLS argued that its liability should be less, because there should be mitigation for its lack of knowledge of TW's conduct. The ECJ disagreed, stating that the liability was that of the undertaking as a whole (FLS, FLSP and TW), not FLS as ultimate parent.<sup>85</sup> This is noted here, partly because companies often argue that, in practice, lack of knowledge like this should be at least mitigation.

Thirdly, the ECJ found that the procedure before the GC had been excessively long (six years, with four years and four months between the end of the written procedure and the opening of the oral procedure). However, following *Gascogne* and *Kendrion*, the court ruled that any claim for damage had to be brought before the GC.<sup>86</sup>

## Other

In May 2014, the ECJ rejected two further appeals by Spanish companies involved in the *Industrial Bags* cartel, *Plásticos Españoles*<sup>87</sup> and *Armando Alvarez*.<sup>88</sup>

Then in June 2014, the ECJ rejected the further appeal by *FLS Plast*, the subsidiary of FL Smidth.<sup>89</sup> This ruling overlaps in part with the *FLS* judgment noted above. FLS

Plast's fine also had been reduced by the GC to €14.85 million, on the basis that it did not control Silvallac/Trioplast Wittenheim for the period alleged by the EC.

It may be useful to note that the ECJ rejected the argument of *FLS Plast* (and FLS) that a parent should be regarded as the *guarantor* of the fine imposed on its subsidiary which participated in the cartel, rather than *deemed liable* as part of a single undertaking.<sup>90</sup> This is noted here, since again it is a frequent argument by parent companies, in particular where they state that they had no knowledge of the subsidiary's involvement in a cartel.

Otherwise the ECJ reiterated its new position on delay before the GC.

## Hydrogen Peroxide/Sodium Perborate

In December 2013, the ECJ gave five judgments in relation to this cartel.<sup>91</sup>

## SNIA

In December 2013, the ECJ ruled on the appeal by SNIA against the GC's ruling, confirming its liability for Caffaro in the *Hydrogen Peroxides and Sodium Perborate* ("Hydrogen Peroxide") cartel.<sup>92</sup>

It may be recalled that SNIA held some 53 to 59 per cent of the shares of a company, called for present purposes "Ex-Caffaro", which owned 100 per cent of another company, called for present purposes Caffaro. Caffaro participated in the infringement.

After the infringement, but before the EC's decision, SNIA acquired 100 per cent of the shares of "Ex-Caffaro". The EC then decided that, at the time of the infringement "Ex-Caffaro" and Caffaro formed an undertaking responsible for infringement, but that, since SNIA had acquired and absorbed "Ex-Caffaro", SNIA was liable for the infringement with Caffaro.<sup>93</sup>

On appeal to the GC, SNIA argued that the business in question had been taken over by Caffaro and SNIA should not be liable. However, the GC agreed with the EC that the principle of "economic continuity" meant that the liability of "Ex-Caffaro" had been transferred to SNIA.

On further appeal, the ECJ agreed with the GC and rejected SNIA's claim.<sup>94</sup>

## Caffaro

A related appeal was brought by Caffaro contesting the GC's ruling.<sup>95</sup> The main points of interest are as follows:

<sup>84</sup> *FLSmidth* EU:C:2014:284; [2014] 4 C.M.L.R. 32 at [81]–[89].

<sup>85</sup> *FLSmidth* EU:C:2014:284; [2014] 4 C.M.L.R. 32 at [70]–[71].

<sup>86</sup> *FLSmidth* EU:C:2014:284; [2014] 4 C.M.L.R. 32 at [111]–[123].

<sup>87</sup> *Plásticos Españoles SA v Commission* (C-35/12 P) EU:C:2014:348; [2014] 5 C.M.L.R. 3.

<sup>88</sup> *Armando Álvarez v Commission* (C-36/12 P) EU:C:2014:349; [2014] 5 C.M.L.R. 4.

<sup>89</sup> *FLS Plast A/S v Commission* (C-243/12 P) EU:C:2014:2006; [2014] 5 C.M.L.R. 14.

<sup>90</sup> *FLS Plast* EU:C:2014:2006; [2014] 5 C.M.L.R. 14 at [106]–[107].

<sup>91</sup> ECJ Press Release 154/13 (December 5, 2013).

<sup>92</sup> *SNIA v Commission* (C-448/11 P) EU:C:2013:80. With thanks to Philippe Claessens for his assistance.

<sup>93</sup> *SNIA* EU:C:2013:80 at [4]–[8] and [26].

<sup>94</sup> *SNIA* EU:C:2013:80 at [27]–[29].

<sup>95</sup> *Caffaro v Commission* (C-447/11 P) EU:C:2013:797.

First, Caffaro argued that the GC should have accepted that its claimed economic dependence on other cartel members should have led to a different assessment of the facts (of its “participation”). The ECJ disagreed, noting that, as the GC had stated, this did not change the seriousness of the acts concerned.<sup>96</sup>

Secondly, Caffaro argued that the fact that it had left the market concerned meant that any fine would have no useful effect. The ECJ disagreed, noting that this would be too easy a way for an infringer to avoid a fine.<sup>97</sup>

Thirdly, Caffaro argued that it should not have been fined on the basis of a different reference year to the other companies. However, the court noted that such a differentiation was not in itself unlawful, where it was an application of the same principles as had been applied to others. That was the case here. (The EC’s reasoning had been that Caffaro’s turnover in that reference year was not a reliable indicator of its economic situation during the infringement.<sup>98</sup>)

It may be useful to note also that both SNIA and Caffaro were “under administration” as they appealed.

## Edison

In December 2013, the ECJ also ruled on the EC’s appeal of the GC’s ruling, by which it annulled the EC’s decision holding Edison liable for the infringement of Ausimont (which, after the infringement, had been sold to Solvay and renamed Solvay Solexis).<sup>99</sup>

It may be recalled that Edison argued before the GC that the EC had not sufficiently reasoned its decision, rejecting Edison’s arguments and specific evidence to the effect that Edison did not control Ausimont. Edison had stated that, faced with a financial crisis in 1993, it had taken reorganisation measures giving companies in the group the right to behave independently and this had been supported by detailed evidence.<sup>100</sup>

The GC considered that the EC had not sufficiently explained why these elements did not reverse the presumption of control based on Edison’s 100 per cent control of an intermediate company, which in turn owned 100 per cent of Ausimont.

The EC appealed, arguing that the elements in question would not have reversed the presumption anyway.

The ECJ rejected this, noting that the EC’s obligation to explain in detail why the elements concerned did not reverse the presumption, followed from the rebuttable nature of that presumption.<sup>101</sup>

The EC also argued that the GC had been wrong to deny it the possibility to rely on other elements, one (that a director of Edison was also a director in the intermediate parent of Ausimont) on the basis that it had not been put to Edison in the SO, the other (overlapping board membership and Edison’s involvement in one of Ausimont’s projects) on the basis that it had not been mentioned in the EC decision.<sup>102</sup> The EC argued that it had to be allowed to raise such points in its pleadings before the court.<sup>103</sup>

The court disagreed,<sup>104</sup> applying *Papierfabrik August Koehler*<sup>105</sup>: an element which had not been put to Edison in the SO, giving it the opportunity to respond in the administrative procedure could not be raised against Edison before the court.<sup>106</sup> Similarly, applying *Elf Aquitaine*,<sup>107</sup> a lack of reasoning in an EC decision could not be rectified by explaining the reasoning to the party concerned in procedures before the European Courts.<sup>108</sup>

## Solvay Solexis

In December 2013, the ECJ also ruled on the appeal of Solvay Solexis (as noted above, formerly Ausimont until acquired by Solvay, after the *Hydrogen Peroxide* infringement).<sup>109</sup> The ECJ rejected the appeal.

The underlying issue here was somewhat different. Part of the EC’s case had been that market participants had met in an initial period in order to discuss if they *could* share the production capacity available. It was argued unsuccessfully before the GC that these discussions were “pre-cartel”, rather than in the cartel, since the parties had not yet agreed to do so. The court also found that there had been unlawful exchanges of information.

The main points of interest before the ECJ are as follows:

First, Solvay Solexis argued that the initial period discussion had not constituted a concerted practice. The court disagreed, noting that there had been an exchange of volume and price information and that Solvay Solexis had not shown that such exchanges had no influence on its own market conduct (as presumed where competitors exchange information and remain on the market).<sup>110</sup>

<sup>96</sup> *Caffaro* EU:C:2013:797 at [30].

<sup>97</sup> *Caffaro* EU:C:2013:797 at [38]–[41].

<sup>98</sup> *Caffaro* EU:C:2013:797 at [54].

<sup>99</sup> *Commission v Edison* (C-446/11 P) EU:C:2013:798. With thanks to Svetlana Chobanova for her assistance.

<sup>100</sup> *Edison* (C-446/11 P) EU:C:2013:798 at [29]–[30].

<sup>101</sup> *Edison* (C-446/11 P) EU:C:2013:798 at [24]–[25] and [31].

<sup>102</sup> *Edison* (C-446/11 P) EU:C:2013:798 at [46]–[47].

<sup>103</sup> *Edison* (C-446/11 P) EU:C:2013:798 at [49]–[50].

<sup>104</sup> *Edison* (C-446/11 P) EU:C:2013:798 at [57].

<sup>105</sup> *Papierfabrik August Koehler AG v Commission* (C-322/07 P) [2009] E.C.R. I-7191; [2009] 5 C.M.L.R. 20 at [34]–[37].

<sup>106</sup> *Papierfabrik August Koehler* [2009] E.C.R. I-7191; [2009] 5 C.M.L.R. 20 at [54].

<sup>107</sup> *Elf Aquitaine* (C-524/09 P) [2011] E.C.R. I-5947 at [148]–[149].

<sup>108</sup> *Papierfabrik August Koehler* [2009] E.C.R. I-7191; [2009] 5 C.M.L.R. 20 at [55].

<sup>109</sup> *Solvay Solexis v Commission* (C-449/11 P) EU:C:2013:802. With thanks to Svetlana Chobanova for her assistance.

<sup>110</sup> *Solvay Solexis* EU:C:2013:802 at [37]–[39].

Secondly, Solvay Solexis argued that there had been no agreement to stabilise the market in the face of the new production capacity put in place by Ausimont and two other undertakings.<sup>111</sup> The court stated that did not matter, because, even if there was no agreement, the GC had found correctly that there was a concerted practice in the relevant period.<sup>112</sup>

Thirdly, Solvay Solexis argued that Ausimont had never participated in the capacity-sharing agreement and this should have been reflected in the gravity assessment for its infringement or, at least as a mitigating circumstance in its fine.<sup>113</sup>

The ECJ disagreed, noting that it was for the GC to review the EC's assessment of "gravity", which involves a wide range of elements and that the court could decide whether to treat a factor as relevant to gravity or mitigating circumstances.<sup>114</sup> Here the court had considered Ausimont's non-participation in capacity-sharing under mitigating circumstances, albeit that it had held that for non-participation in the infringement to qualify as such a circumstance, it was necessary for Solvay Solexis to show that it had not participated in the cartel at all, not just some of its elements (which Solvay Solexis had not done).<sup>115</sup>

## Solvay

In December 2013, the ECJ also ruled on *Solvay SA's* further appeal and a cross-appeal by the EC.<sup>116</sup>

It may be recalled that Solvay had been fined €167 million. However, on appeal the GC had reduced the fine to €139 million, considering that the EC had undervalued Solvay's co-operation and increased the percentage reduction to 20 per cent.

Most of Solvay's claims overlap with those of Solvay Solexis, noted above, and were rejected. However, Solvay also contested the GC's review as to whether it or Arkema had provided "significant added value" first.<sup>117</sup> The ECJ rejected this, noting that the court had carried out an in-depth review of the related evidence, as it had to, since the issue was related to the level of fines.<sup>118</sup> Further, it was not obvious from the court's file that in doing so the GC had distorted the evidence.<sup>119</sup>

Interestingly, in its cross-appeal, the EC argued that the GC had gone too far in reviewing the EC's decision in its discretion as to the value to give Solvay's co-operation.<sup>120</sup> The ECJ rejected that also, noting again

that the GC had carried out the in-depth review required. The court could *not* use the EC's margin of discretion as a basis for not dispensing with the conduct of an in-depth review of the law and of the facts.<sup>121</sup> Nor could the ECJ substitute its own appraisal of the evidence for that of the GC,<sup>122</sup> or the GC's assessment of the correct fine in its unlimited jurisdiction.<sup>123</sup>

## Calcium Carbide

### Box 6

#### • Cartel appeals—Calcium Carbide

##### —Arques/Gigaset:

- \* Investor company liable for infringement if it had control of business concerned.
- \* EC rounding practice in 2006 Fining Guidelines led to unequal treatment.
- \* GC adjusted fine on Gigaset so that more proportionate as compared to the fine on SKW.

##### —Evonik Degussa/AlzChem:

- \* Fact of compliance instructions (ignored by subsidiary) did not show lack of decisive influence for liability purposes.
- \* Intermediate subsidiary AlzChem, acquired after Degussa's *Methionine* infringement, could not have its fine increased for recidivism: not part of earlier infringements.
- \* Degussa fine reduction for co-operation adjusted by GC from 20% to 28%.
- Degussa's information had been relevant to the magnesium reagents part of the SCI, although its own infringing sales were calcium carbide.
- GC found no rule that a fine reduction had to be relevant to a company's own activity; the issue was relevance to proving the infringement as a whole.
- \* EC rounding practice led to disproportionate fine, so adjusted.

##### —Donau Chemie:

- \* Similar fine reduction adjustment to *Degussa* case.
- \* Donau Chemie's fine reduction increased to 43.5% from 35% because its co-operation value did not only have to be relevant to the sales related to its own infringement.
- \* Donau Chemie had also assisted the EC's case on other aspects of the SCI.

In the course of the year, the GC has issued several judgments as regards appeals against the EC's *Calcium carbide and magnesium reagents* cartel decision.<sup>124</sup> This is the second set of judgments.<sup>125</sup> The GC rejected the

<sup>111</sup> *Solvay Solexis* EU:C:2013:802 at [48].

<sup>112</sup> *Solvay Solexis* EU:C:2013:802 at [53].

<sup>113</sup> *Solvay Solexis* EU:C:2013:802 at [69]–[70].

<sup>114</sup> *Solvay Solexis* EU:C:2013:802 at [78]–[79].

<sup>115</sup> *Solvay Solexis* EU:C:2013:802 at [80]–[83].

<sup>116</sup> *Solvay v Commission* (C-455/11 P) EU:C:2013:796. With thanks to Takeshige Sugimoto for his assistance.

<sup>117</sup> *Solvay* EU:C:2013:796 at [62].

<sup>118</sup> *Solvay* EU:C:2013:796 at [64]–[68].

<sup>119</sup> *Solvay* EU:C:2013:796 at [70].

<sup>120</sup> *Solvay* EU:C:2013:796 at [114].

<sup>121</sup> *Solvay* EU:C:2013:796 at [116] and [119].

<sup>122</sup> *Solvay* EU:C:2013:796 at [120].

<sup>123</sup> *Solvay* EU:C:2013:796 at [121].

<sup>124</sup> *Holding Slovenske elektrarne v Commission (HSE)* (T-399/09) EU:T:2013:647, [2014] 4 C.M.L.R. 21; *Gigaset AG v Commission* (T-395/09) EU:T:2014:23; *SKW v Commission* (T-384/09) EU:T:2014:27; *Evonik Degussa and AlzChem v Commission* (T-391/09) EU:T:2014:22.

<sup>125</sup> The first set was issued in December 2012. See Ratliff, "Major Events and Policy Issues in EU Competition Law, 2012–2013 (Part 1)" [2014] I.C.C.L.R. 75, 85.

appeal by Holding Slovenske elektrarne (“HSE”), reduced the fines imposed on Gigaset by €1 million and on Evonik Degussa by €950,000 and dismissed the appeal brought by SKW Stahl-Metallurgie (“SKW”). The court also reduced the fine on Donau Chemie.

There are several important points in these judgments.

It may be useful to recall that the EC had found a market-sharing and price-fixing cartel, operating throughout the EEA, save in Spain and Portugal and the UK and Ireland, which had been in place from April 2004 to January 2007. The products concerned, calcium carbide and magnesium reagents, are used in the steel and gas industries. There were three products, two types of calcium carbide, plus magnesium reagents. The EC found a single and continuous infringement (“SCI”) covering the three products.

## HSE

HSE was the parent of a company actually involved in the infringement, TDR Metalurgija (“TDR”), owning a 74.4 per cent shareholding therein.<sup>126</sup> Before the EC decision, TDR was ruled bankrupt, so the EC only fined HSE. HSE was fined €9.1 million for the infringement.

HSE then appealed. HSE argued that it could not be presumed to control TDR with a 74 per cent stake and that TDR had been “parked” with HSE,<sup>127</sup> as part of a Slovenian state reorganisation. Therefore, HSE should not be held liable for TDR’s activities, or at most it should be found “negligent” in failing to stop TDR’s activities (and fined less).<sup>128</sup> HSE was an electricity company, whereas TDR was in steel-related business.

The GC rejected all these points. The court found that the key issue was whether HSE actually had decisive influence over TDR.<sup>129</sup> The court noted that the EC had established this on the basis of specific *indicia*, not the 100 per cent shareholding control presumption.<sup>130</sup> If so, HSE and TDR were an economic unit and HSE was liable on that account,<sup>131</sup> not for negligence in not detecting its subsidiaries’ infringement.

The court reviewed the evidence of HSE’s influence over TDR at length and agreed with the EC’s findings. The court also noted that the infringement found was after HSE became responsible for TDR in 2002.<sup>132</sup> Even if HSE had been just a holding company, HSE was liable if it was a single economic unit with TDR.

## Gigaset

As background to this case, it should be noted that several judgments re this cartel relate to owners of SKW Stahl-Metallurgie (“SKW”).<sup>133</sup> SKW was owned by various different companies during the relevant period of the infringement. It was first owned by Evonik Degussa and then by Arques (which became Gigaset) through a holding company called SKW Holding, which had been established as an acquisition vehicle (Arques and Gigaset will be termed “Gigaset” for present purposes).

SKW Holding was 100 per cent owned by Gigaset until November 2006. Then, from November 2006 to January 2007, Gigaset owned 57 per cent of SKW Holding, having listed the company on the stock exchange.

The main points of interest in this case are as follows:

First, Gigaset accepted that the 100 per cent shareholding liability presumption applied for the first period of its ownership of SKW, via SKW Holding, but argued that it should not be found to have exercised decisive influence in the second, while it only held 57 per cent of SKW Holding.

Further, Gigaset argued that, as it is a company which, in its words, has “restructuring expertise which focuses on the acquisition of companies in special situations”, it only had a strategic control of the business concerned, not an operative one. As a result, Gigaset argued that it had not been involved in the infringement and should not be held liable.

The GC rejected this. The court noted that, even if Gigaset was only involved in strategic operations, that did not prevent it from exercising a decisive influence over SKW, or from forming, along with its subsidiary, a single economic unit.<sup>134</sup> Furthermore, the GC noted that the whole concept of Gigaset’s investment was that it would control the SKW business to achieve a better price for it on resale.<sup>135</sup> Gigaset had appointed directors in SKW Holding and SKW itself.

Even after its holding was reduced to 57 per cent, the court found that Gigaset continued to control SKW, the other shares being widely held.<sup>136</sup> Moreover, Gigaset had not shown that such a change in shareholding changed its decisive influence over SKW.<sup>137</sup> In short, the court upheld the EC’s finding of decisive influence, based on the *Avebe/Knauf Gips* case law.<sup>138</sup>

Secondly, Gigaset argued that the EC’s application of the duration multiplier was contrary to the principle of equal treatment and proportionality. SKW had been found

<sup>126</sup> With thanks to Tomek Koziel and Hanna Pettersson for their help with this section.

<sup>127</sup> *HSE* EU:T:2013:647; [2014] 4 C.M.L.R. 21 at [59].

<sup>128</sup> *HSE* EU:T:2013:647; [2014] 4 C.M.L.R. 21 at [134].

<sup>129</sup> *HSE* EU:T:2013:647; [2014] 4 C.M.L.R. 21 at [49].

<sup>130</sup> *HSE* EU:T:2013:647; [2014] 4 C.M.L.R. 21 at [22].

<sup>131</sup> See *HSE* EU:T:2013:647; [2014] 4 C.M.L.R. 21 at [100], [140] and [142].

<sup>132</sup> *HSE* EU:T:2013:647; [2014] 4 C.M.L.R. 21 at [147].

<sup>133</sup> With thanks to Thomas Jones for his help with this section.

<sup>134</sup> *Gigaset* EU:T:2014:23 at [44].

<sup>135</sup> *Gigaset* EU:T:2014:23 at [38] and [43].

<sup>136</sup> *Gigaset* EU:T:2014:23 at [70].

<sup>137</sup> *Gigaset* EU:T:2014:23 at [70].

<sup>138</sup> *Avebe v Commission* (T-314/01) [2006] E.C.R. II-3085, [2007] 4 C.M.L.R. 1; and *Knauf Gips v Commission* (C-407/08 P) [2010] E.C.R. I-6375.

liable for the infringement for two years and eight months. Gigaset was found to have been liable for the infringement for two years and four months. Yet the EC applied a multiplier of 2.5 to both SKW and Gigaset.<sup>139</sup>

According to the 2006 Fining Guidelines, a duration of less than one year, but more than six months, should count as one year, and a duration of less than six months should count as half a year.<sup>140</sup>

The EC argued in its defence that it did not have to follow its Guidelines strictly. Fines should not be just a question of mechanical arithmetic. Interestingly, the EC also noted that it had decided to apply a multiplier of 0.5 after a supplementary three months of participation. Therefore, a company participating in an infringement for two years and three months would have a multiplier of 2.5, whereas a company participating in an infringement for two years and nine months would have a multiplier of 3.<sup>141</sup>

The court found that deviations from the Fining Guidelines were permitted, yet they had to be in accordance with the general principles of law. In this case the rounding practice was in breach of the principle of equal treatment.<sup>142</sup>

Thirdly, the EC argued that Gigaset should not have its fine reduced as it should not benefit from an illegality committed in favour of SKW. The idea was that the correct multiplier of 2.5 was applied to Gigaset, whereas an incorrect multiplier was applied to SKW, namely 2.5, whereas it should have been 3. The GC disagreed, noting that a deviation from the Fining Guidelines did not amount to illegality.<sup>143</sup> The EC *did* have the right to deviate from its Guidelines. However, not if that led to equal treatment, which would be unlawful, as here.

The court then considered how it could resolve the issue.<sup>144</sup> SKW had appealed to the GC, but had not challenged the duration multiplier applied in its fine. The GC also noted that the court did not raise arguments of its own motion.

As a result, the court decided that it should not increase the fine on SKW, but should leave it and adjust the fine on Gigaset, so as to make it more “exact” and “proportionate”. The court then recalculated the amount of duration multiplier increase on Gigaset vis-à-vis that on SKW and held that it should be reduced by €1 million.

## Evonik Degussa

Evonik Degussa (“Degussa”) and AlzChem were held liable as parents of SKW for a four-month period before it was sold to SKW Holding/Gigaset. They were fined €1.04 million jointly with SKW and €3.64 million, *not* with SKW. Both appealed, succeeding on a number of points.

The following are the main points of interest in the GC’s judgment<sup>145</sup>:

First, Degussa argued that it should not be held liable, because it did not have a decisive influence over SKW. In particular, Degussa had instructed SKW not to violate the competition rules and employees of SKW had confirmed that they ignored these instructions.

However, the GC held that this was *not* sufficient to rebut the presumption.<sup>146</sup> The court noted that Degussa held 100 per cent of AlzChem, which held 100 per cent of SKW. There were also other factors indicating control of SKW. Moreover, Degussa’s compliance instructions did not show the contrary. Rather, the court considered that they showed that Degussa and AlzChem *were* directing SKW, even though their instructions were not followed.<sup>147</sup> The court also found that a decisive influence over a company is not incompatible with a “diversity of behaviour”, or “diversity of interest”, between the parent company and its subsidiary.<sup>148</sup>

Secondly, AlzChem claimed that it should not have had a fine increase for recidivism. The fine of both Degussa and AlzChem had been increased because Degussa had been an addressee of the *Methionine* decision.<sup>149</sup> AlzChem had not been an addressee of that decision. The EC argued that did not matter, relying on *Michelin*.<sup>150</sup> However, the GC disagreed and held that since AlzChem had not been an addressee of the previous decision, it could not have its fine increased for recidivism.<sup>151</sup>

Thirdly, Degussa and AlzChem argued that if AkzoNobel had been given a 100 per cent fine increase for four infringements, they should have had 25 per cent for one, not 50 per cent. However, the court agreed with the EC that it was not required to have a “linear” recidivist increase approach. The EC could decide to increase more for a first repeat offence and then less per offence thereafter.<sup>152</sup>

Fourthly, Degussa argued that the EC should have applied a higher percentage reduction to Degussa and AlzChem for co-operation under the Leniency Notice. The EC had granted a 20 per cent reduction for

<sup>139</sup> *Gigaset* EU:T:2014:23 at [153]–[154].

<sup>140</sup> See Fining Guidelines, para.24.

<sup>141</sup> *Gigaset* EU:T:2014:23 at [156].

<sup>142</sup> *Gigaset* EU:T:2014:23 at [173]–[177] and [181].

<sup>143</sup> *Gigaset* EU:T:2014:23 at [162]–[164], [170] and [179]–[180].

<sup>144</sup> *Gigaset* EU:T:2014:23 at [181]–[186] and [189]–[192].

<sup>145</sup> *Evonik Degussa and AlzChem AG v Commission* (T-391/09) EU:T:2014:22. With thanks to Tomek Koziel and Hanna Pettersson for their help with this section.

<sup>146</sup> *Evonik Degussa* EU:T:2014:22 at [106]–[107], [114]–[117] and [119].

<sup>147</sup> *Evonik Degussa* EU:T:2014:22 at [90]–[92].

<sup>148</sup> *Evonik Degussa* EU:T:2014:22 at [115].

<sup>149</sup> C.37.519-*Methionine*, OJ L255/1, October 8, 2003.

<sup>150</sup> *Michelin v Commission* (T-203/01) [2003] E.C.R. II-4071; [2004] 4 C.M.L.R. 18.

<sup>151</sup> *Evonik Degussa* EU:T:2014:22 at [153].

<sup>152</sup> *Evonik Degussa* EU:T:2014:22 at [163]–[164].

co-operation, but they argued that their co-operation should have justified more. (The EC could grant up to 30 per cent.)

The EC's argument was that Degussa's information was relevant to the magnesium reagents side of the cartel, whereas Degussa's fine here, on the facts, was based on its calcium carbide sales. Degussa argued that this was inconsistent with the EC's finding of a single and continuous infringement.

The GC found for Degussa and AlzChem. There was no rule in the Leniency Notice that the proof of infringement offered had to be relevant to the infringement of the company which provided it.<sup>153</sup> As a result, the court found that the EC had not complied with the Leniency Notice and, in its unlimited jurisdiction, the GC set Degussa's leniency reduction at 28 per cent.<sup>154</sup>

Fifthly, the court again considered whether the rounding-up practice applied by the EC violated the principle of proportionality. The EC had applied a multiplier of 0.5, although Degussa and AlzChem, via SKW, had only participated in the infringement for four months. The GC held that this was disproportionate and applied a multiplier of one-third.<sup>155</sup>

After the various adjustments the fine on Degussa was reduced to €2.49 million (jointly with SKW) and €1.24 million for Degussa alone.

## SKW

In January 2014, the GC also gave judgment on the appeal by SKW Holding and SKW itself.<sup>156</sup> The GC rejected the appeal.

The main points of interest are as follows:

First, SKW Holding and SKW argued that they should have been allowed a confidential hearing in order to explain how Degussa had controlled SKW "from a distance", even after it had sold SKW to Arques/Gigaset. It was argued that this was a breach of their rights of defence. Interestingly, the Hearing Officer had denied the request on the basis that such a defence or claim of mitigation would involve an allegation as regards the behaviour of Degussa which it should have the opportunity to rebut.

The GC agreed with the Hearing Officer and went further. The court noted that SKW Holding and SKW did not deny that certain other employees of SKW had been involved in the cartel and that, if an employee of Degussa had been seconded to SKW and involved in such activities, he was still working for SKW and SKW Holding had a 100 per cent shareholding of SKW.<sup>157</sup> On that basis, SKW and SKW Holding were still liable.

Secondly, SKW Holding argued that it was just an intermediate acquisition vehicle owned by Arques/Gigaset and should not therefore be liable. Again the GC rejected this, noting that intermediate shareholding companies are also responsible for their subsidiaries and SKW Holding had not reversed the 100 per cent shareholding control presumption.<sup>158</sup>

Thirdly, SKW argued that it had been discriminated against in comparison with Almamet. Among other things, that company had not been fined on the basis of sales for which it acted as sales agent with a fixed commission for NCHZ.

SKW argued that it was in the same situation as regards supplies from Degussa. The court disagreed, noting that the reduced value of sales attributed to Almamet had been taken by the EC to avoid double counting, since NCHZ, Almamet's principal, had been fined for its unlawful acts as regards those same supplies.<sup>159</sup>

The court noted that the position of SKW and Degussa was different. SKW was an agent, but also received a percentage of the resale price, whereas Almamet was on a fixed commission. The EC had also not alleged a direct participation in the cartel by Degussa or its employees. Degussa's and AlzChem's liability was as the owner of SKW, before it was sold to SKW Holding and Arques/Gigaset.<sup>160</sup> In such circumstances, SKW's sales as agent for Degussa could lawfully be taken into account for SKW's basic amount of fine and SKW's and Almamet's situations were different.

Finally, SKW complained that the EC departed from its Fining Guidelines and had held it liable for two fines (one while owned by Degussa; another while owned by SKW Holding), amounting to €14.34 million, although the EC had stipulated in its decision that the most it should pay was €13.3 million.

The court noted that this arose from the EC's rounding practice applied to the duration multiplier and, in fact, SKW's fine should have been higher based on the EC's Fining Guidelines. In other words, the higher figure, not the lower one was, in fact, legally correct. However, the court did not increase SKW's fine. It just rejected the claim.<sup>161</sup>

## Donau Chemie

Donau Chemie is an Austrian chemical company found to have participated in the SCI concerning calcium carbide powder and granulates and magnesium reagents.<sup>162</sup> Donau Chemie did not produce magnesium reagents, but produced both calcium carbide powder and granulates.

<sup>153</sup> *Evonik Degussa* EU:T:2014:22 at [210].

<sup>154</sup> *Evonik Degussa* EU:T:2014:22 at [209]–[211].

<sup>155</sup> *Evonik Degussa* EU:T:2014:22 at [236].

<sup>156</sup> With thanks to Thomas Jones for his assistance.

<sup>157</sup> *SKW* EU:T:2014:27 at [46]–[47], [51], [57]–[58] and [62]–[63].

<sup>158</sup> *SKW* EU:T:2014:27 at [100].

<sup>159</sup> *SKW* EU:T:2014:27 at [155]–[157].

<sup>160</sup> *SKW* EU:T:2014:27 at [158]–[159].

<sup>161</sup> *SKW* EU:T:2014:27 at [197]–[202].

<sup>162</sup> Case COMP/39.396, *Calcium carbide and magnesium based reagents for the steel and gas industries*, EC Decision of July 22, 2009, C(2009) 5791 final.

The main point of interest in this case is the EC's assessment of the value of evidence furnished by Donau Chemie under the 2002 Leniency Notice. In its decision, the EC found that the information provided voluntarily by Donau Chemie constituted significant added value only with respect to one of the three products under investigation, calcium carbide granulates.

Although Donau Chemie had been the first to inform the EC of the infringement on magnesium reagents, it had not been the first to provide proof of that part of the infringement. Donau Chemie's information also did not provide significant added value as regards the calcium carbide powder infringement.<sup>163</sup> The EC therefore gave Donau Chemie a fine reduction of 35 per cent (out of a range of 30 to 50 per cent; Donau Chemie had been the second company to seek leniency).

The EC reasoned that, despite the existence of a SCI, it could differentiate according to the added value of information provided as regards different elements of the infringement.<sup>164</sup>

On appeal to the GC, the court rejected that argument (as it had in the cases of *Degussa* and *AlzChem*),<sup>165</sup> pointing out that the 2002 Leniency Notice did not provide that proof supplied had to be relevant to the part of the infringement in which the undertaking was involved. This was not a reason to limit the fine reduction. In the case of a SCI, if a company provides significant added value, that value has to be assessed in relation to the infringement as a whole and not just certain aspects.<sup>166</sup>

The court noted that some 45 to 50 per cent of the sales concerned in the infringement were for calcium carbide powder, 30 to 35 per cent were for granulates and 20 per cent for magnesium reagents. Donau Chemie had given the EC evidence to prove 30 to 35 per cent of the infringement and brought the magnesium reagents infringement to the EC's attention. The GC therefore assessed the added value of evidence provided by Donau Chemie and, in its unlimited jurisdiction, decided to increase the leniency discount by 8.5 per cent, from 35 to 43.5 per cent.<sup>167</sup>

## Other

In May 2014, the ECJ also rejected a further appeal by *I.garantovaná* against the GC's ruling that the EC had been entitled to take 2007, rather than 2008 as the relevant business year for application of the 10 per cent of turnover fining ceiling, on the basis that 2008 did not appear to be a year of normal commercial activity.<sup>168</sup>

## Gas Insulated Switchgear

### Box 7

#### • Cartel appeals—Gas Insulated Switchgear

##### — Siemens, Mitsubishi Electric, Toshiba:

- \* If the EC finds a clear agreement (by non-documentary evidence), no need to look at alternative plausible explanation.
- \* A restrictive object cannot be justified by economic context.
- \* For a single infringement, what matters is adherence to an overall plan, not “complementarity” of conduct.
- \* (Although that concept is still used in various other judgments this year.)

##### — Areva/Alstom:

- \* EC must fix separately and individually the amount of fines for which different undertakings are liable, as a result of successive ownership.
- \* EC also cannot determine joint and several liability within a group.
- \* That was a question of national law.
- \* No default principle of equal shares of liability.

##### — EC/Siemens/Schneider:

- \* GC not entitled to vary a fine, to the prejudice of a party, if that issue is not raised before it, by that party.

## Siemens, Mitsubishi Electric, Toshiba

In December 2013, the ECJ dismissed appeals brought by Siemens, Mitsubishi Electric and Toshiba<sup>169</sup> as regards the GC's judgments concerning their participation in the cartel for gas insulated switchgear (“GIS”).<sup>170</sup>

It may be recalled that the GC had upheld the fine on Siemens of €397 million, but annulled that on Mitsubishi Electric and Toshiba insofar as the EC had set their fine by reference to an earlier year of the cartel than for others, before they had formed a joint venture. The EC has since retaken those decisions with a new fine, which is also being appealed.

The focus of these appeals was on other aspects.

The following are the main points of interest in the ECJ judgment:

First, the ECJ confirmed the existence of an “unwritten common understanding” for the Japanese undertakings not to enter the European market. The court noted that, where the GC is satisfied that the EC has shown the existence of an agreement of an anti-competitive nature, there is no need to examine the question as to whether there is a plausible alternative explanation for the conduct complained of.

<sup>163</sup> COMP/39.396 *Calcium carbide*, EC Decision of July 22, 2009, C(2009) 5791 final at [223].

<sup>164</sup> COMP/39.396 *Calcium carbide*, EC Decision of July 22, 2009, C(2009) 5791 final at [226].

<sup>165</sup> *Donau Chemie v Commission* (T-406/09) EU:T:2014:254. With thanks to Tomek Koziel for his help with this section.

<sup>166</sup> *Donau Chemie* EU:T:2014:254 at [226]–[230].

<sup>167</sup> *Donau Chemie* EU:T:2014:254 at [231].

<sup>168</sup> *I.garantovaná v Commission* (C-90/13 P) EU:C:2014:326.

<sup>169</sup> *Siemens* (C-239/11 P), *Mitsubishi Electric* (C-489/11 P) and *Toshiba v Commission* (C-498/11 P) EU:C:2013:866, [2014] 5 C.M.L.R. 1; ECJ Press Release 161/13 (December 19, 2013). With thanks to Thomas Jones for his assistance.

<sup>170</sup> *Siemens v Commission* (T-110/07) [2011] E.C.R. II-477, [2011] 4 C.M.L.R. 25; *Mitsubishi Electric v Commission* (T-133/07) [2011] E.C.R. II-4219, [2011] 5 C.M.L.R. 22; and *Toshiba v Commission* (T-113/07) [2011] E.C.R. II-3989, [2011] 5 C.M.L.R. 20.

This was so, even though the evidence might not be “documentary” evidence, if it was sufficiently clear.<sup>171</sup> The court therefore clarified *Coats*,<sup>172</sup> which appeared to suggest that, in cases other than those proved by documentary evidence, alternative plausible explanations had to be examined.

Secondly, the court stated that in the case of a “restriction by object” (here a market-sharing agreement), economic evidence also could not be used to justify the agreement.<sup>173</sup> The court noted that a restrictive “*object* cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned” (emphasis added), referring to the *Sumitomo Metal Industries* case.<sup>174</sup> So, in practice the GC had not erred in refusing to consider the argument that there were economic and technical barriers to entry for the Japanese producers.

Thirdly, Mitsubishi and Toshiba both argued that the GC should have assessed whether the elements of the infringement, which was found to have a single objective, were “complementary”, relying on statements in *Aalberts Industries*<sup>175</sup> suggesting that this was required.

The court stated that the GC does not have to examine the additional condition of *complementarity*, but should focus: (1) on whether the conduct concerned forms part of an “overall plan”; and (2) whether there were any elements of the case which suggested otherwise, i.e. did not appear to fit that plan.<sup>176</sup>

## Areva and Others

In April 2014, the ECJ gave judgment in two complex joined cases relating to appeals by Siemens, Areva and Alstom and the EC itself.<sup>177</sup>

Somewhat simplified, the factual background to the first case was that the Alstom group (“Alstom”) had sold its GIS subsidiary to the Areva group (“Areva”) after the start of the EC’s investigation, but before both the end of the infringement and the adoption of the final decision.<sup>178</sup> In its decision, the EC had held Alstom jointly and severally liable with its subsidiary for a fine of €53.5 million, of which €25.5 million was to be paid by the subsidiary, jointly and severally with Areva.

On appeal, the GC upheld the decision, but lowered the amount for which Alstom was liable to €48.98 million, jointly and severally with its subsidiary and set the sum payable jointly and severally by the subsidiary with Areva at €20.4 million.

The main points of interest were as follows:

First, Alstom argued that the GC had failed to criticise the EC for not giving specific reasons for making Alstom and its subsidiary jointly and severally liable, even though they no longer formed part of the same undertaking at the time the decision was adopted.

The ECJ confirmed that the EC was entitled to hold a parent company liable for the unlawful conduct of its subsidiary during an infringement period. The court also held that the GC had been correct to find that the fact that the companies did not form a single undertaking when the decision was adopted could not prevent the EC from holding the companies jointly and severally liable.<sup>179</sup> The EC had stated in its decision why it imputed liability in this way.<sup>180</sup>

Secondly, Alstom argued that the GC had substituted its reasoning for that of the EC. The court stated first that the EU Courts are not allowed to substitute their own reasoning for that of the author of a contested act. However, if a GC judgment is based on evidence relied on by the applicants before that court, it cannot be criticised for having examined that evidence in its review of the legality of the decision.

In this case the court found that the argument was based on the premise that the EC had not duly considered the evidence set out by Alstom in its response to the SO. As the court had found that the EC had provided adequate reasoning, that premise could not be accepted and the claim was rejected. The fact that the GC had given a more detailed account of the reasoning in the contested decision did not mean it had substituted its own reasoning for that of the EC.<sup>181</sup>

Another aspect of this plea was that the parties argued that the GC had added two new factors to the reasoning of the contested decision. The court held that the GC had not added any new factors, but simply answered in detail the arguments raised before it.<sup>182</sup>

Thirdly, Areva and Alstom claimed that the EC and the GC had unlawfully imposed de facto joint and several liability on them, since the sum payable by Areva was incorporated in the sum payable by Alstom.

The court agreed and held that this was at odds with the principle that the penalty must be specific to the offender and the offence.<sup>183</sup> The EC could not oblige an undertaking to bear the risk of insolvency of another undertaking, where those undertakings have never formed a single economic entity. The EC must fix separately, for each undertaking involved, the amount of the fine for which the undertakings are jointly and severally liable.

<sup>171</sup> *Siemens, Mitsubishi Electric and Toshiba* EU:C:2013:866, [2014] 5 C.M.L.R. 1 at [222]–[224].

<sup>172</sup> *Coats Holdings Ltd v Commission* (T-36/05) [2007] E.C.R. II-110; [2008] 4 C.M.L.R. 2.

<sup>173</sup> *Siemens, Mitsubishi Electric and Toshiba* EU:C:2013:866; [2014] 5 C.M.L.R. 1 at [218]–[220].

<sup>174</sup> *Sumitomo Metal Industries v Commission* (C-403/04 P and C-405/04 P) [2007] E.C.R. I-729; [2007] 4 C.M.L.R. 16 at [43].

<sup>175</sup> *Aalberts Industries NV v Commission* (T-385/06) [2011] E.C.R. II-1223; [2011] 4 C.M.L.R. 33 at [88].

<sup>176</sup> *Siemens, Mitsubishi Electric and Toshiba* EU:C:2013:866; [2014] 5 C.M.L.R. 1 at [248].

<sup>177</sup> *Areva v Commission* (C-247/11 P and C-253/11 P) EU:C:2014:257; ECJ Press Release 60/14 (April 10, 2014); *Commission v Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256.

<sup>178</sup> With thanks to Hanna Pettersson for her assistance with this section.

<sup>179</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [49]–[53].

<sup>180</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [51].

<sup>181</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [56]–[61].

<sup>182</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [73]–[75] and [77].

<sup>183</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [121]–[139].



Each successive parent must be in a position to infer its share of liability, which must correspond to the part of the fine imposed on the subsidiary.

In this case, since the liability of Areva and Alstom was derived from the liability of the subsidiary, the total amount payable by the parents could not be higher than the total amount payable by the subsidiary. In addition to infringing the principle that a penalty must be specific to the offender and the offence, the court also found that the EC's and GC's approach was an infringement of the principle of legal certainty, insofar as it did not allow parent companies to ascertain precisely the amount they would be required to pay.

Fourthly, the ECJ considered the issue as to whether the EC was entitled to determine the internal allocation of a fine liability within a group. Here, the court held that the EC did *not* have such power. Rather its power is confined to determining the amount of the payment for which the legal entities forming part of the same undertaking are severally and jointly liable. It is for the national courts to determine how the allocation of that liability should be made.<sup>184</sup>

Nor was the GC entitled to find that, in the absence of such an EC finding, the applicable default principle was that the companies concerned should pay an equal share.<sup>185</sup>

Finally, the ECJ, in its unlimited jurisdiction, set the fine for Alstom at €27,795,000, payable jointly and severally with its subsidiary and for Areva at €20,400,000, payable jointly and severally with the same subsidiary.<sup>186</sup>

## EC/Siemens and Others

Turning to the *EC/Siemens* case,<sup>187</sup> it may be useful first again to offer some simplified background as to the changing structure of the companies involved.

Reyrolle was a subsidiary of Rolls-Royce, which was acquired by VA Technologie (“VA Tech”) in 1998. Subsequently, in 2001, VA Tech transferred Reyrolle into a new company VA Tech Schneider, in which VA Tech held 60 per cent of the shares and Schneider 40 per cent. Schneider transferred into VA Tech Schneider two subsidiaries, one which later became Siemens Transmission & Distribution (“SEHV”) and the other called Magrini. In 2004, VA Tech acquired all of Schneider's shares in VA Tech Schneider and in 2005, Siemens acquired exclusive control of the group, whose parent company was VA Tech, through a public bid. Following the takeover, VA Tech and VA Tech Schneider were merged with Siemens Österreich.<sup>188</sup>

The EC started its investigation in 2004 and took its decision in 2007 finding a cartel for GIS supply involving these various companies and others for different durations between 1988 and 2004.

The appeals related to the fines imposed by the EC, given these changes in ownership (and then the GC's related rulings).

In the EC decision, Schneider was held liable for a fine of €3.6 million. It was also held jointly and severally liable with SEHV and Magrini for a fine of €4.5 million. Reyrolle was held liable for a fine of €22 million, of which it was jointly and severally liable for €17.5 million with SEHV and Magrini and jointly and severally liable with Siemens Österreich and another VA Tech company for a fine of €12.6 million.<sup>189</sup>

Then, before the GC, SEHV and Magrini were held jointly and severally liable with Schneider for an increased fine of €8.1 million. Reyrolle was held jointly and severally liable with Siemens Österreich, SEHV and Magrini (and another VA Tech company) for €10.3 million. Reyrolle was held jointly and severally liable with Siemens Österreich (and the other VA Tech company) for €2.3 million. Reyrolle itself was liable for €9.4 million.<sup>190</sup>

Before the ECJ there were three separate appeals, one by the EC, another by Reyrolle and a third by SEHV and Magrini. There are three main points of interest:

First, as regards the EC's appeal, there was an overlap with the *Areva* case. The GC had held that the EC was responsible for determining the respective shares of the fines imposed on the various companies jointly and severally and held that this task could not be left to the national courts.<sup>191</sup> The EC appealed that.

The ECJ agreed with the EC and held that the EC could not determine the shares of the fine of those held jointly and severally liable, beyond the determination of joint and several liability “from an external perspective”, meaning as between undertakings, as opposed to internally within a group.<sup>192</sup> Neither EU law generally, nor Regulation 1/2003, contains rules regulating a dispute concerning internal allocation of debt.<sup>193</sup>

Moreover, as in the *Areva* case, the court considered that the GC was wrong to state that it must be presumed that companies in an undertaking share equal responsibility and accordingly must pay an equal share of the fine.<sup>194</sup> EU law does not lay down rules imposing liability in equal shares which are applicable by default. The shares to be paid by those held jointly and severally

<sup>184</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [149]–[156].

<sup>185</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [153].

<sup>186</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [196]–[197].

<sup>187</sup> With thanks to Thomas Jones for his assistance with this section.

<sup>188</sup> A more detailed summary of the company structure is available in *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [6].

<sup>189</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [13].

<sup>190</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [22].

<sup>191</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [40].

<sup>192</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [64] and [83].

<sup>193</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [58]–[61].

<sup>194</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [69].

liable must be determined in accordance with national law.<sup>195</sup> The ECJ therefore decided to set aside that part of the judgment.

Secondly, concerning Reyrolle's appeal, Reyrolle argued that the GC should not have calculated a single starting amount in its case, based on the turnover and market share of the group which was formed later. Instead, two separate starting amounts should have been established for Reyrolle, one when it was owned by Rolls-Royce and another when it was part of VA Tech.<sup>196</sup>

This was rejected by the ECJ.<sup>197</sup> The court held that the GC was entitled to establish a single starting amount for the undertaking formed by the VA Tech group on the basis of turnover for 2003, the last full year of infringement and then to apportion liability for the infringement committed by the various companies accordingly. The reasoning was that Reyrolle alone had been held responsible for the earlier period (not Rolls-Royce). Then Reyrolle had continued to participate in the infringement in VA Tech.<sup>198</sup>

Thirdly, as regards the appeal by SEHV and Magrini, it may be recalled that the GC had varied the fine imposed jointly and severally on SEHV, Magrini and Schneider, increasing it from €4.5 million to €8.1 million. The GC annulled the fine to be paid by Schneider alone (€3.6 million) and incorporated that amount into the fine for which Schneider, SEHV and Magrini were jointly and severally liable. The GC had also noted that the fine did not increase for Schneider as they had not contested the EC decision and were therefore not before the court.<sup>199</sup>

The ECJ held that the GC had exceeded its powers in varying the fine. The ECJ stated that the EU Courts are empowered to exercise unlimited jurisdiction where the question of the amount of the fine is raised before them.<sup>200</sup> However, since the fine imposed on Schneider had not been submitted to the General Court for its appraisal, it could not form part of the subject-matter of the appeal vis-à-vis SEHV and Magrini.<sup>201</sup>

The court ruled therefore that the GC had ruled *ultra petita* in bundling the fine imposed specifically on Schneider with those fines for which SEHV and Magrini were held jointly and severally liable.<sup>202</sup>

## Heat Stabilisers

### Box 8

- *Cartel appeals—Heat Stabilisers*
  - Cartels re tin stabilisers and ESBO/esters used in PVC production.
  - Meetings in Switzerland “animated” by someone in AC-Treuhand.
    - \* GC established core description of infringement which was then applied to reject various appeals.
  - Questions of prescription:
    - \* Had EC ruled in time? (EC had thought time stopped “*erga omnes*” during *Akzo/Akeros* appeal, but European Court had said no.)
    - \* The GC said yes on facts. Claims rejected by GC.
  - Questions of individuality of fines on companies:
    - \* e.g. *Elf Aquitaine*: Fine for deterrence only on parent; having sold Arkema/CECA subsidiaries.
  - “Real” fine on AC-Treuhand for facilitating cartel upheld.
  - EC entitled to find two infringements.
    - \* Meetings of two cartels separate.
    - \* Members of one cartel were in fact purchasers of the other, so could not argue the two cartels were part of an overall plan.

In February 2014, the GC delivered three rulings rejecting appeals relating to the *Heat Stabilisers* cartel.<sup>203</sup> This was followed by further judgments in March and May 2014.<sup>204</sup> The EC decision, adopted in November 2009, found two infringements, one regarding tin stabilisers and another regarding ESBO/esters.

The main cases of interest are as follows:

### Elf Aquitaine

Elf Aquitaine was not itself a participant in the cartel, but was held liable as the parent company of Arkema France at the time of the infringement, which in turn was the parent company of CECA, which directly participated in the infringement.<sup>205</sup> The GC rejected Elf Aquitaine's appeal.

First, Elf Aquitaine argued that the EC could not impose fines in the case, because of prescription. Elf Aquitaine argued that the evidence did not show that the cartels extended beyond November 1999 (the EC's decision was in November 2009). After a detailed review, the court rejected those claims.<sup>206</sup>

<sup>195</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [70].

<sup>196</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [87].

<sup>197</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [95].

<sup>198</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [92]–[93].

<sup>199</sup> See *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [116] and [117] for a summary of the GC judgment.

<sup>200</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [126].

<sup>201</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [128].

<sup>202</sup> *Siemens* (C-231/11 P to C-233/11 P) EU:C:2014:256 at [129]–[131].

<sup>203</sup> With thanks to Hanna Pettersson for her assistance with this section.

<sup>204</sup> See also *Faci SpA v Commission* (T-46/10) EU:T:2014:138; and *Reagens SpA v Commission* (T-30/10) EU:T:2014:253.

<sup>205</sup> See *Elf Aquitaine SA v Commission* (T-40/10) EU:T:2014:61; and *Arkema France and CECA SA v Commission* (T-23/10 and T-24/10) EU:T:2014:62.

<sup>206</sup> *Elf Aquitaine* EU:T:2014:61 at [225]–[273].

Secondly, Elf Aquitaine argued that the fact that it had been informed of the investigation first in July 2008, more than two years after Arkema had left the Elf Aquitaine/Total Group had infringed its defence rights, because it did not have access to all the elements necessary to show the full autonomy of Arkema on the market.<sup>207</sup>

However, the court rejected those claims on the basis that they were just affirmations not supported by concrete elements.<sup>208</sup> Further, the EC had been entitled to send a request for information in July 2008, rather than in 2003 as the EC carried out its inspections of Elf Aquitaine's subsidiary. The EC was not required to inform all parties to an enquiry as soon as it started.<sup>209</sup>

Thirdly, Elf Aquitaine argued that the administrative procedure (from the inspections in 2003 to the EC decision in 2009) had been too long, denying its defence rights. The court disagreed, noting that the period of investigation for Elf Aquitaine was only one year and four months (from the request for information in July 2008 until the decision in November 2009) and that Elf Aquitaine had not shown, even if the proceedings were taken from 2003, how that had concretely affected its defence rights.<sup>210</sup>

Fourthly, Elf Aquitaine argued that the EC had been wrong to take into account the worldwide turnover of Elf Aquitaine and increase its fines in order to ensure a deterrent effect. This had not been done with either of its subsidiaries, Arkema or CECA. Elf Aquitaine complained that, if it was considered to constitute one undertaking with Arkema and CECA, the EC could not increase only the fine on Elf Aquitaine and not that on the other two undertakings.

The court disagreed, noting that Arkema and CECA had ceased to be in the same undertaking as Elf Aquitaine in May 2006, after the infringement, but before the decision. In such circumstances, assessment of their size for purposes of the deterrent effect of the fine was different.<sup>211</sup>

The court also noted that it was quite possible for such a fine increase only to be applied to one of the companies in a single undertaking and for the liability of companies in a single undertaking to be specified.<sup>212</sup>

Fifthly, Elf Aquitaine objected to the fact that the EC had imposed three different fines on the three companies, claiming that this was contrary to the notion of a single undertaking. Again the court rejected this claim, recalling

that the imposition of different fines on the different companies in a group does not constitute a violation of the notion of a single undertaking.<sup>213</sup>

Finally, Elf Aquitaine argued that the EC had no legitimate interest in finding an infringement in the past. The EC had made a finding in its decision that Arkema/CECA had been part of the tin stabilisers cartel between 1994 and 1996, then left the cartel, only later to rejoin the same cartel, participating in it until the end in the year 2000. The EC had not fined Arkema/CECA for this earlier period, however.

The EC stated that the finding was appropriate with a view to discouraging repeat infringements by Arkema/CECA and in the interest of enabling any injured parties to bring matters before national civil courts. The court agreed and held that when an undertaking has rejoined the same cartel, this is, in itself, a sufficient ground for a legitimate interest in finding that an infringement has been committed in the past.<sup>214</sup>

## AC-Treuhand

It may be recalled that AC-Treuhand is a Swiss consultancy, which was formerly Fides. In its decision the EC held AC-Treuhand liable for organising and facilitating the cartel meetings of the members in the heat stabiliser cartels. The EC imposed two fines of €174,000, one for each infringement. AC-Treuhand appealed.

In February 2014, the GC rejected that appeal.<sup>215</sup> There is much overlap with the *Elf Aquitaine* and *Arkema* judgments. The main points of interest, relating to AC-Treuhand's position, are set out below:

First, AC-Treuhand argued (as it had done as regards the *Organic Peroxides* cartel<sup>216</sup>), that the EC had breached art.101 TFEU and the principle of legality by holding AC-Treuhand liable for the cartel, even though it had not participated in the anti-competitive agreement. The court held that its previous finding in *AC-Treuhand I*<sup>217</sup> applied, and that it was clear that art.101 TFEU applies also to AC-Treuhand's conduct, contributing actively and intentionally to a cartel between producers active on a different market to the service market on which AC-Treuhand operated.<sup>218</sup>

Secondly, AC-Treuhand claimed that the EC should have imposed only a symbolic fine on AC-Treuhand, such as it had previously in the *Organic Peroxides* case.

It would appear that AC-Treuhand's idea was that the conduct in question was before the EC's *Organic Peroxides* decision and therefore, in *both* cases, the court

<sup>207</sup> *Elf Aquitaine* EU:T:2014:61 at [43].

<sup>208</sup> *Elf Aquitaine* EU:T:2014:61 at [43] and [75]–[83].

<sup>209</sup> *Elf Aquitaine* EU:T:2014:61 at [70].

<sup>210</sup> *Elf Aquitaine* EU:T:2014:61 at [104]–[115].

<sup>211</sup> *Elf Aquitaine* EU:T:2014:61 at [305], [350] and [355]–[357].

<sup>212</sup> *Elf Aquitaine* EU:T:2014:61 at [317]–[318].

<sup>213</sup> *Elf Aquitaine* EU:T:2014:61 at [376]–[378].

<sup>214</sup> *Elf Aquitaine* EU:T:2014:61 at [392]–[394].

<sup>215</sup> *AC-Treuhand AG v Commission* (T-27/10) EU:T:2014:59.

<sup>216</sup> COMP/E-2/37.857 *Organic Peroxides*, EC Decision of December 10, 2003.

<sup>217</sup> *AC-Treuhand v Commission* (T-99/04) [2008] E.C.R. II-1501; [2008] 5 C.M.L.R. 13.

<sup>218</sup> *AC-Treuhand* EU:T:2014:59 at [43]–[44].

should have only imposed a symbolic fine, only fining for conduct after that decision. However, the court disagreed, noting that, while the 2006 Fining Guidelines allow the EC to impose only a symbolic fine (on the basis of art.36 thereof), they do not *oblige* the EC to do so.<sup>219</sup> The fact that the EC had imposed only a symbolic fine on AC-Treuhand in the *Organic Peroxides* case did not mean it was obliged to do so again.<sup>220</sup>

Thirdly, AC-Treuhand argued that the EC had been wrong in deviating from the methodology in the 2006 Fining Guidelines (using art.37 thereof), when it refused to take into account in the calculation of the fines only the value of the sales of the services specifically related to the infringements.

The court disagreed, finding that if the EC only had taken into account the values of the sales of the services directly related to the infringements, the amount of the fine would not have been representative of the impact of the cartel on the heat stabilisers markets and of the participation of AC-Treuhand in the cartels. The specific circumstances of the case, thus allowed, even *obliged*, the EC to deviate from the methodology in the 2006 Fining Guidelines.<sup>221</sup>

Fourthly, AC-Treuhand argued that the EC had been wrong in considering that there were two separate infringements and not one single and continuous infringement. AC-Treuhand claimed that there was only one infringement and that the two fines imposed violated art.23(2) of Regulation 1/2003, since they exceeded the 10 per cent cap provided for in that provision.

The court rejected this after a detailed review.<sup>222</sup> What appears to have been a decisive point was that certain companies were suppliers of tin stabilisers (in one cartel), yet purchasers of ESBO/esters stabilisers (in the other cartel).<sup>223</sup> The court noted that, in such circumstances (amongst others), it was not possible to see the two infringements as part of an overall plan, with complementary links.

## LCD Panels

In February 2014, the GC ruled on two appeals related to the *LCD Panel* cartel case.<sup>224</sup> It may be recalled that in December 2010 the EC adopted a decision addressed to six international manufacturers of LCD panels.<sup>225</sup> The decision related to LCD panels equal or greater than 12 inches in size and included LCD panels for information technology (LCD-IT) and LCD panels for televisions (LCD-TV). The manufacturers were found to have participated in a single and continuous infringement, having held multilateral meetings known as the “Crystal

meetings”, where they fixed prices. The manufacturers were also found to have engaged in bilateral exchanges of information.

For the purposes of calculating the fine, and more particularly the value of sales, the EC established three categories of sales made by the cartel participants:

1. “Direct EEA sales”: sales of cartelised LCD panels to another undertaking in the EEA.
2. “Direct EEA sales through transformed products”: sales of cartelised panels incorporated into finished products, within the group to which the producer belongs, which were then sold to another undertaking within the EEA.
3. “Indirect sales”: sales of cartelised LCD panels to another undertaking outside the EEA, which then incorporates the panels into finished products which it sells within the EEA.

The EC then stated that it only needed to take into account the first two categories, as the inclusion of the third category was not necessary for the fines imposed to achieve a sufficient level of deterrence. (It will be apparent that the latter also raises issues of extra-territorial jurisdiction.)

The addressees of the decision were Korean and Taiwanese manufacturers of LCD panels. Japanese undertakings which had participated in the cartel were not included in the decision since the EC found that it lacked sufficient evidence to hold them liable for an infringement. However, the EC stated that the investigation against those undertakings continued after the decision against the Korean and Taiwanese undertakings was adopted.

## InnoLux Corp

One of the two judgments related to an appeal by InnoLux Corp, formerly Chi Mei Optoelectronics of Taiwan.<sup>226</sup> The main points of interest are as follows:

First, InnoLux claimed that the EC was wrong to take into account sales of finished products, such as televisions or tablets, even though the established infringement related only to LCD panels. The court disagreed, noting that the EC was entitled on the 2006 Fining Guidelines to take into account sales in the relevant market, which is the market concerned by the infringement.

The court noted that the EC did not take into account the full value of the finished products, but only the proportion which corresponded to the value of the cartelised LCD panels.<sup>227</sup> Moreover, the court stated that

<sup>219</sup> *AC-Treuhand* EU:T:2014:59 at [287]–[288].

<sup>220</sup> *AC-Treuhand* EU:T:2014:59 at [290].

<sup>221</sup> *AC-Treuhand* EU:T:2014:59 at [302]–[304].

<sup>222</sup> *AC-Treuhand* EU:T:2014:59 at [246]–[259].

<sup>223</sup> *AC-Treuhand* EU:T:2014:59 at [253], [257]–[258].

<sup>224</sup> GC Press Release 29/14 (February 27, 2014).

<sup>225</sup> Case COMP/39.309, *Liquid Crystal Displays*, EC Decision of December 8, 2010, C(2010)8761 final. With thanks to Hanna Pettersson for her assistance.

<sup>226</sup> *InnoLux Corp v Commission* (T-91/11) EU:T:2014:92; [2014] 4 C.M.L.R. 23.

<sup>227</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [45].

if the EC had not made use of the concept “direct EEA sales through transformed products”, it would not have been able to take into account, in the calculation of the fine, of a considerable proportion of the sales of cartelised LCD panels made by cartel participants, which belonged to vertically integrated undertakings although those sales were harmful to competition within the EEA.<sup>228</sup> The court also noted that the internal sales of cartelised LCD panels to undertakings participating in the cartel were made at prices affected by the cartel.<sup>229</sup>

Secondly, InnoLux argued that the EC’s use of the concept “direct EEA sales through transformed products” allowed the EC to exceed the limits of its territorial jurisdiction. The court again disagreed, holding that the cartel had been implemented in the EU through the sale of products in the EEA by the undertaking concerned.<sup>230</sup> When the cartelised LCD panels made by InnoLux were incorporated into finished products by companies belonging to the same undertaking and those products were sold in the EEA by that undertaking, the cartel affected transactions which took place up to and including the moment of that sale.<sup>231</sup>

Thirdly, InnoLux argued that the use of the concept “direct EEA sales through transformed products” exposed InnoLux to discriminatory treatment in comparison to other participants in the cartel.

InnoLux claimed that it had been discriminated against as compared with Samsung. When Samsung delivered cartelised LCD panels to its subsidiaries within the EEA, which incorporated these panels into finished products, these sales were taken into account as “direct EEA sales through transformed products” only when the finished products were sold in the EEA. By contrast, when InnoLux sold cartelised LCD panels to the same Samsung European subsidiaries, they were taken into account as “direct EEA sales”, even if the finished products were sold outside the EEA.

InnoLux argued that the sales therefore had not left the “circle of cartel members” and had then left the EEA.<sup>232</sup> The court rejected this, noting that the key point was that InnoLux had sold to Samsung, a separate undertaking in the EEA.<sup>233</sup>

Fourthly, InnoLux had also claimed that it had been treated less favourably than the cartel participants AU Optronics and LG Display, because the EC applied only the concept of “direct EEA sales” to them. However, the court rejected this, noting that the key difference in their

cases was that they had sold LCD panels to related undertakings outside the EEA which were not within the same undertaking.<sup>234</sup>

The court’s point here was also that the same rules were applied to all the companies concerned, albeit that they had a different impact, given the nature of each companies’ sales structures.<sup>235</sup>

Fifthly, InnoLux argued that the EC had been wrong to conclude that the infringement extended to LCD-TV panels. However, the court reviewed the evidence and noted that there was a “link of complementarity” between the cartel participants’ behaviour as regards the two categories of cartelised LCD panels.<sup>236</sup>

The court concluded that the decisions taken and the exchanges of data concerning LCD-TV panels were part of the same overall plan as the exchanges relating to LCD-IT panels and, consequently, part of the same single and continuous infringement.<sup>237</sup>

This is quite a wide ruling, because InnoLux was not even making LCD-TVs when data on them was first exchanged in the “Crystal meetings”. However, the court found it could take advantage of such exchanges when it expanded its business to such screens.<sup>238</sup>

Sixthly, InnoLux explained to the court that it had mistakenly submitted an inaccurate value of sales, as it had included sales relating to categories of LCD panels other than those covered by the contested decision.<sup>239</sup> InnoLux therefore requested the court to reduce its fine accordingly.

The EC agreed that there should be a reduction. However, the EC indicated that it had rounded down the cartel participants’ fines, while ensuring that the gain was not more than 2 per cent.<sup>240</sup>

The EC proposed that the same approach be applied to the original fine amount, when making the correction, not that already rounded down, if not there would be “double rounding”. The court agreed and followed the EC’s method, reducing InnoLux’s fine from €300 million to €288 million.<sup>241</sup> The court noted that the approach had benefitted those concerned “admittedly to a differing degree”, but considered it appropriate to avoid unequal treatment here.<sup>242</sup>

<sup>228</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [46].

<sup>229</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [48].

<sup>230</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [66].

<sup>231</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [70]–[75].

<sup>232</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [81].

<sup>233</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [84]–[85].

<sup>234</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [90].

<sup>235</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [80].

<sup>236</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [118].

<sup>237</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [123].

<sup>238</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [126].

<sup>239</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [155].

<sup>240</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [160].

<sup>241</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [173].

<sup>242</sup> *InnoLux Corp* EU:T:2014:92; [2014] 4 C.M.L.R. 23 at [166].

## LG Display

The second judgment related to the appeal by LG Display, a group established in Korea and Taiwan.<sup>243</sup> The main points of interest are as follows:

First, LG Display (“LGD”) argued that the EC had wrongly included sales between LGD, a joint venture between LG Electronics and Philips and its parents. The joint venture was owned initially 50 per cent each, with their shareholdings reduced to 37.9 and 32.87 per cent in 2004. The infringement had been found from 2001 to at least February 2006. LGD’s sales had been included as “direct sales to the EEA”.

In the SO, the EC had treated LGE and Philips as jointly and severally liable for LGD. However, in its decision the EC found only LGD liable.<sup>244</sup> The EC therefore treated the sales as to independent third parties.

Further, in order to show that the sales to LGE and Philips were linked to the cartel, the EC had relied on the fact that: (1) sales of cartelised LCD panels to customers were part of the cartel discussions; and (2) that prices for sales to those customers were influenced by the existence of cartelised prices.<sup>245</sup>

The court reviewed those elements and agreed with the EC. The GC found that LGD’s sales of cartelised LCD panels to LGE and Philips were made on the market concerned by the infringement.<sup>246</sup> The EC also had proof that sales to such related companies had been part of the cartel discussions. The court also found that the EC had shown that LGD’s sales to LGE and Philips were affected by the cartel.<sup>247</sup>

Secondly, LGD claimed that the EC had been wrong in refusing to grant the applicants partial immunity from fines pursuant to the final paragraph of point 23(b) of the 2002 Leniency Notice. Notably insofar as the EC had relied on many of the documents which LGD produced in its decision.

However, the court disagreed, noting that the criterion for this provision is that a company gives the EC new information, meaning evidence, allowing it to make new findings as to the gravity or the duration of the infringement.<sup>248</sup> In this case, LGD had not been the first to provide such evidence, so it could not obtain immunity, although it had been rewarded for its co-operation otherwise under the 2002 Leniency Notice.<sup>249</sup>

Thirdly, LGD argued that the EC had been wrong in not taking into account the partial immunity granted when calculating the average sales for the basic amount of fine. The EC had granted LGD partial immunity for January 2006 and therefore had applied to it a lower multiplier

for duration than for the other participants of the cartel. However, the EC had calculated the average sales over the whole infringement period, including January 2006.

The court agreed with LGD that its sales in that month should not have been taken into account.<sup>250</sup> As a result, the court reduced LGD’s fine from €215 million to €210 million.

Fourthly, LGD argued that the EC should have also brought proceedings against Japanese suppliers of LCD panels (InnoLux made a similar claim). The court disagreed. Essentially, the court found that the EC was entitled to focus in its action on the “Crystal meetings” in which the Japanese had not been involved. If there had been complementary action by Japanese suppliers, the EC could have sought to show a single and continuous infringement. However, if the EC did not have evidence of such an overall plan and common methods, it was not prevented from acting on what it did have.<sup>251</sup>

## Car Glass

### Box 9

#### • Cartel appeals—Car Glass:

##### — Saint-Gobain:

\* GC ruled that recidivism could be found 13 years and 8 months after first infringement decision, if it was the same business unit and the same type of infringement.

\* BUT no recidivism if parent company not previously sanctioned.

##### — Soliver:

\* Bilateral contacts of an anti-competitive nature found, but no participation in the overall plan of the single and continuous car glass infringement.

\* Decision annulled.

## Saint-Gobain

In November 2008, the EC adopted its decision in the car glass cartel, which it found to involve the sharing of deliveries among car glass producers by co-ordinating their bids. Saint-Gobain and its parent company (“the Compagnie”) were found to have participated in the cartel from March 1998 until March 2003 and were held jointly and severally liable for a fine of €896 million. In February 2009, the EC lowered the fine to €880 million because the sales which it had taken into account for the calculation of Saint-Gobain’s fine were too high.

In March 2014, the GC ruled on the appeals by Saint-Gobain and the Compagnie against the EC’s decision.<sup>252</sup>

<sup>243</sup> *LG Display Co Ltd v Commission* (T-128/11) EU:T:2014:88; [2014] 4 C.M.L.R. 24.

<sup>244</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [18].

<sup>245</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [63].

<sup>246</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [69].

<sup>247</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [89].

<sup>248</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [165]–[167].

<sup>249</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [189]–[190].

<sup>250</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [203].

<sup>251</sup> *LG Display* EU:T:2014:88; [2014] 4 C.M.L.R. 24 at [222]–[231].

<sup>252</sup> *Saint-Gobain Glass France SA v Commission* (T-56/09 and T-73/09) EU:T:2014:160. With thanks to Philip Claessens for his help with this section.

The main interest in the cases relates to the only successful ground of appeal, which concerned the EC's finding of recidivism. In its decision, the EC had increased the basic amount of the fine by 60 per cent (i.e. two times 30 per cent) in order to account for the Saint-Gobain group's participation in two previous infringements: the *Benelux Flat Glass* cartel (an EC decision from 1984<sup>253</sup>) and the *Italian Flat Glass* cartel (an EC decision from 1988<sup>254</sup>). Crucially, the *Benelux* decision was addressed to, among others, the Compagnie, whereas the Italian decision was neither addressed to the Compagnie, nor to Saint-Gobain (but instead to Fabbrica Pisana, a subsidiary of the Compagnie).

The GC ruled that a finding of recidivism requires the same person to commit a new infringement, after having been previously sanctioned for a similar infringement and that the Italian decision therefore should not have been taken into account in a finding of recidivism vis-à-vis the Compagnie, because the Compagnie was not among the addressees of that decision.<sup>255</sup>

The GC rejected the EC's arguments that the Compagnie constituted a single economic unit with Fabbrica Pisana at the time of the Italian decision in 1988 (based on the presumption of decisive influence in case of a 100 per cent shareholding), that the EC could have fined it then had it so wished and that the Compagnie was given the opportunity to rebut that presumption in the proceedings leading to the 2008 decision.

The GC noted that it is fundamental that a parent should have the right to rebut the presumption of control/liability, that many years may have passed between the finding of an infringement and the subsequent finding of a single economic unit, in which case it is more difficult, if not impossible, for the parent company to contest the existence of a single economic unit.<sup>256</sup>

The EC is therefore not allowed to apply the presumption of control ex post, after the adoption of the decision in which it found an infringement. It is also fundamental that a finding of infringement be addressed to a specific undertaking. Since these conditions had not been met, the parents could not be held liable for recidivism.

As regards the claims by Saint-Gobain and the Compagnie that there could not be a finding of recidivism, where more than 10 years have elapsed between a previous finding of an infringement and the beginning of the repeated infringement, the GC noted that the EC is not bound by any such time-limit and the appreciation of

a company's propensity to reoffend, the basis for a recidivism increase, is something which the EC has to assess in all the circumstances.<sup>257</sup>

The court then itself considered whether the *Benelux* decision, which was 13 years and 8 months before the beginning of the *Car Glass* infringement, should be the basis for recidivism. It held that *was* the case because the same business unit was involved and it was the same type of infringement.<sup>258</sup>

In view of the reduced scope of the recidivism, with only the *Benelux* decision being taken into account, the increase in the basic amount of the fine was reduced from 60 to 30 per cent, leading to a reduced fine of €715 million.

## Soliver

It may be useful to recap that in its decision in November 2008, the EC fined four car glass producers a total of €1.384 billion for a cartel in the car glass sector.<sup>259</sup> The EC found that, during various periods between March 1998 and March 2003, the companies had discussed target prices, shared markets and allocated customers. Soliver was fined some €4.39 million.

The EC identified 37 meetings and 52 other contacts between the three larger car glass producers (Saint-Gobain, Pilkington and Asahi) from 1998 to 2003, deciding that there was single and continuous collusion covering the entire EEA. The EC found that Soliver (the smallest competitor of this group) only took part in some of these discussions between November 2001 and March 2003. Nevertheless, Soliver was still found to have participated in the whole infringement.

Soliver appealed. In October 2014 the GC issued its judgment annulling the EC's decision as regards Soliver.<sup>260</sup>

This is an interesting judgment. Despite evidence of certain anti-competitive bilateral contacts between Soliver and two of its competitors, the court found that the EC had failed to show that Soliver knew, or should have known, that these collusive contacts were framed within a wider cartel covering the entire EEA car glass market.

The GC recalled that the EC had to show not only the anti-competitive nature of Soliver's contacts with the two competitors, but also that Soliver was aware that those contacts were intended to contribute to the overall plan of the cartel and the general scope and essential characteristics of the cartel.<sup>261</sup>

The court reviewed first the evidence of Soliver's infringement and then the evidence of Soliver's participation in the overall cartel.<sup>262</sup>

<sup>253</sup> EC Decision 84/388 relating to a proceeding under Article [81 EC] (Case IV/30.988 — Agreements and concerted practices in the flat-glass sector in the Benelux countries) [1984] OJ L212/13.

<sup>254</sup> EC Decision 89/93 relating to a proceeding under Articles [81 EC] and [82 EC] (Case IV/31. 906, flat glass) [1989] OJ L33/44.

<sup>255</sup> *Saint-Gobain* EU:T:2014:160 at [305] and [314]–[315].

<sup>256</sup> *Saint-Gobain* EU:T:2014:160 at [318]–[319].

<sup>257</sup> *Saint-Gobain* EU:T:2014:160 at [325]–[326].

<sup>258</sup> *Saint-Gobain* EU:T:2014:160 at [331]–[334].

<sup>259</sup> Case COMP/39.125, *Carglass*, EC Decision of November 12, 2008, as amended by Decision C(2009)863, final of February 11, 2009.

<sup>260</sup> *Soliver NV v Commission* (T-68/09) EU:T:2014:867; [2014] 5 C.M.L.R. 24. With thanks to Geoffrey Barthelet for his assistance.

<sup>261</sup> *Soliver* EU:T:2014:867; [2014] 5 C.M.L.R. 24 at [67].

<sup>262</sup> *Soliver* EU:T:2014:867; [2014] 5 C.M.L.R. 24 at [82]–[106].

The court noted that Soliver did not participate in two meetings where the other larger competitors assessed the operation of the cartel. The applicant was also not mentioned in the draft market share tables drawn up by the big three producers of car glass in those meetings. The GC reviewed the documents seized during a dawn raid in the applicant's premises (internal notes, records of telephone conversations, handwritten notes). The court also considered a passage in a leniency statement suggesting that Soliver was a third party to the cartel and not involved in a compensation system between the three larger suppliers.

The implication of all this was that, although Soliver may have participated in certain anti-competitive conduct, it was not proved that it was a party to the overall plan of the collusion between the three larger car glass producers.

The court then considered whether it could partially annul the EC's decision. However, since the decision was formulated only as a single and continuous infringement, the court found it could not do so (and therefore could not still find more specific separate infringements).<sup>263</sup>

### *Italian Raw Tobacco*

In June 2014, the ECJ ruled on a further appeal by *Deltafina* against the GC's judgment upholding a fine of €30 million on *Deltafina*.<sup>264</sup>

It will be recalled that *Deltafina* was one of several processors of raw tobacco on the Italian market. In March 2002, *Deltafina* sought immunity from the EC, disclosing a cartel. However, shortly after, *Deltafina* also told the EC that it would have to divulge its immunity application at an association meeting, before the EC undertook planned inspections in the case. *Deltafina* argued that in its meeting with the EC and a subsequent call the EC accepted that *Deltafina* would have to disclose its application. The EC denied any authorisation.

Subsequently, *Deltafina* disclosed its application, but did not inform the EC that it had done so. It came out only later at the hearing of the case.

The EC then found that *Deltafina* had breached its obligation to co-operate with the EC by divulging the application and not informing it of that. The EC therefore only granted *Deltafina* a 50 per cent fine reduction for its co-operation.

On appeal, the GC upheld the EC's approach. Notably, the court took the view that voluntary and unsolicited disclosure of the application was sufficient to show breach of the duty to co-operate, unless *Deltafina* could establish that the EC had expressly authorised the disclosure (which the court found not to be the case).

Before the ECJ, *Deltafina* argued that the way the court had reached that conclusion was flawed. Notably, the court had ex post reconstructed the facts in question and, at the hearing, the GC had taken oral testimony from *Deltafina*'s lawyer and the EC official in charge of the case, without proper witness statements.

The ECJ agreed that the taking of evidence in that way was wrong, since the questions concerned facts which were contentious and in dispute between the parties<sup>265</sup> but found that, in any event, based on the written evidence, the GC was entitled to find that *Deltafina* had not expressly communicated that it planned voluntarily to disclose its co-operation, or that the EC had authorised it.<sup>266</sup>

*Deltafina* also argued unreasonable delay before the GC. Again the ECJ agreed, noting that three years and seven months had elapsed between the end of the written procedure and the hearing and that the overall proceedings before the GC had lasted five years and eight months. However, again the court stated that a related claim for damages had to be brought before the GC.<sup>267</sup>

### *Carbonless Paper*

In May 2014, the ECJ ruled on a further appeal by *Bolloré* in the *Carbonless Paper* cartel case.<sup>268</sup> It may be recalled that this is the second round of judicial review in this case for *Bolloré*. *Bolloré* succeeded in the first round, insofar as it challenged the way that the EC had decided that *Bolloré* was directly liable for an infringement, although it had been implicated in the SO only as parent of an infringing subsidiary.

However, the EC then reissued a new SO and took a new decision, dealing with its direct liability. *Bolloré*'s arguments here centred mainly on the length of the overall proceedings and whether that had affected the exercise of its rights of defence. The ECJ rejected its claims.

### *Power Transformers*

In May 2014, the GC ruled on an appeal by *Toshiba* against the EC's decision in October 2009, imposing a fine of €13.2 million on *Toshiba*.<sup>269</sup>

The underlying decision related to a gentleman's agreement between various European and Japanese producers, to respect each other's home markets. *Toshiba* was found to have participated at least from June 1999 until May 2003. Power transformers are used to reduce or increase the voltage in an electrical circuit and are used in power stations.

The court rejected all *Toshiba*'s arguments. The main points of interest were:

<sup>263</sup> *Soliver* EU:T:2014:867; [2014] 5 C.M.L.R. 24 at [107]–[114].

<sup>264</sup> *Deltafina SpA v Commission* (C-578/11 P) EU:C:2014:1742; [2014] 5 C.M.L.R. 12. With thanks to Svetlana Chobanova for her assistance.

<sup>265</sup> *Deltafina* EU:C:2014:1742; [2014] 5 C.M.L.R. 12 at [62]. A.G. Sharpston's Opinion in the case was published in March 2014, giving a fuller account as to what happened at the hearing. See Opinion of A.G. Sharpston, *Deltafina SpA v Commission* (C-578/11 P) EU:C:2014:199; [2014] 5 C.M.L.R. 12 esp. [102]–[121].

<sup>266</sup> *Deltafina* EU:C:2014:1742; [2014] 5 C.M.L.R. 12 at [63]–[66].

<sup>267</sup> *Deltafina* EU:C:2014:1742; [2014] 5 C.M.L.R. 12 at [90]–[92].

<sup>268</sup> *Bolloré v Commission* (C-414/12 P) EU:C:2014:301. With thanks to Virginia del Pozo for her assistance.

<sup>269</sup> *Toshiba Corp v Commission* (T-519/09) EU:T:2014:263.



First, the bulk of the judgment is taken up with evidentiary issues. Had the EC proved various elements of the infringement? The court said yes.

Secondly, it appears that Toshiba raised the issue as to whether it would continue in the agreement in a cartel meeting in September 2002, because it was forming a joint venture with another company. However, that was not found to be effective distancing from the cartel, so Toshiba was found to have continued therein, until the cartel was wound up in another meeting in May 2003.

The GC found that Toshiba could not say that it had ceased to participate in October 2002, as the joint venture was established, because it had not informed the other participants that it was withdrawing before the meeting of May 2003. Nor had it informed the others that the joint venture would not participate.<sup>270</sup>

Thirdly, Toshiba argued that the EC had not shown a restriction on competition, insofar as it claimed insurmountable barriers precluded the entry of Japanese producers on to the European market. The court rejected this, noting, as the EC had, that the infringement concerned was a restriction by object. As a result, the EC did not have to show effect.

Interestingly, Toshiba's response was that, even if the gentleman's agreement was unlawful by nature, it could not be caught by art.101 TFEU, if it was not capable of appreciably restricting competition in the EU, which, it argued, was the case here because the Japanese producers were not competitors of the European producers in the European market.

The court noted that, "admittedly", an agreement had to be examined not only for its content, but also in its economic context, referring to the *Irish Beef* case.<sup>271</sup> However, the court then did so and noted that there was evidence, not only of potential competition by Japanese producers, but even actual competition, a sale of power transformers to European customers by Hitachi.<sup>272</sup>

Fourthly, Toshiba objected to the way that the EC had used para.18 of the 2006 Fining Guidelines to establish its fine. The point was that Japanese producers had no sales in the EU. The EU therefore took the market shares of the undertakings on the worldwide market and applied that to the aggregate sales of the undertakings in the EEA. Toshiba argued that the EC should have looked at its sales in Europe and Japan, since that was the geographic scope of the gentleman's agreement. The GC upheld the EC's approach, based on the wording and object of para.18.<sup>273</sup>

## Candle Wax

### Box 10

#### • Cartel appeals—Candle Wax

##### — Sasol:

- \* Fine reduced from €318 to €150 million.
- \* *Avebe* applied: Assessing liability in a joint venture has to be based on factual assessment, not review of the corporate documents as in merger control.
- \* Part of fine reduced because of unequal treatment (in a first infringement period): those controlling not found liable, whereas later Sasol was found liable for its control (in a third infringement period). (Sasol still liable as economic successor for the first period, but fined less.)
- \* Fine also reduced (in a second infringement period) because EC found Sasol controlled a joint venture when GC considered that was not the case.
- \* GC then reset fine in its unlimited jurisdiction

##### — RWE:

- \* *Avebe* again applied: RWE not shown to have joint control of joint venture with Shell.

##### — Esso:

- \* If A merges with B and AB is then fined, A not having infringed before the merger, but B has done so, AB's fine has to be split in time, including only B's sales for the earlier period, before the merger.

## Sasol

In July 2014, the GC gave its judgment in *Sasol*.<sup>274</sup> In the EC's decision, Sasol was fined €318 million for its participation in the *Paraffin Waxes* and *Slack Wax* cartel. The GC reduced the fine to €150 million.

It may be useful to start by noting the structure of the Sasol group over the period of the infringement, as set out in the EC's decision. The EC distinguished three periods: first, the period from September 1992 until April 2002 (the so-called "Schumann period"), the period from May 1995 until December 2002 ("the joint venture period") and the period from January 2003 until April 2005 ("the Sasol period").

During the Schumann period, the relevant business involved in the infringement, Hans-Otto Schumann ("HOS"), was controlled by a Mr Schumann personally through a holding company, Vara. In the EC Decision, however, neither Vara nor Mr Schumann was held liable for the infringement. Instead Sasol, which later acquired the business, was held responsible, as owner of that business.

During the joint venture period, Sasol acquired two-thirds of HOS (and the latter was renamed Schumann Sasol, then Sasol Wax). Schumann Sasol was a 99.9 per cent subsidiary of the parent company, Schumann Sasol

<sup>270</sup> *Toshiba* EU:T:2014:263 at [205]–[221].

<sup>271</sup> *Competition Authority v Beef Industry Development Society* (C-209/07) [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6 at [16].

<sup>272</sup> *Toshiba* EU:T:2014:263 at [225]–[235].

<sup>273</sup> *Toshiba* EU:T:2014:263 at [270]–[277].

<sup>274</sup> *Sasol v Commission* (T-541/08) EU:T:2014:628; [2014] 5 C.M.L.R. 16. With thanks to Thomas Jones for his assistance.

International. One-third of Schumann Sasol International was held by Vara and two-thirds were held by Sasol Holding in Germany.

During the joint venture period, various Sasol companies were held jointly and severally liable. They were also found to exercise decisive influence over Schumann Sasol. Vara (which held one-third of Schumann Sasol International) and the Schumann family (which owned Vara) were *not* held liable for the infringement.

During the Sasol period, the Sasol group had acquired the remaining one-third of Schumann Sasol International, which had been owned previously by Vara. During this period, various Sasol companies were held liable.

On appeal, Sasol made various claims, but the main point was to argue that it should not be liable for the Schumann period and not solely liable for the joint venture period. The GC agreed, in an interesting judgment.

The main points are as follows:

First, the GC accepted that the EC wrongly concluded that Sasol Ltd and Sasol Holding in Germany were liable for the joint venture period.<sup>275</sup> The GC found that the organisational, financial and legal relationships between Schumann Sasol, on the one hand, and Sasol Ltd and Sasol Holding in Germany, on the other, did not support such a finding of decisive influence.

The court found that the EC had based its decision on an “abstract analysis of the documents” based on the EU merger clearance rules,<sup>276</sup> whereas it should have considered what influence was exercised by the powers of the joint venture in fact.<sup>277</sup> The court noted that, where the EC finds only one of the parent companies of a joint venture liable for a joint venture’s conduct, it must show that the decisive influence on the joint venture’s commercial conduct was exercised unilaterally by that parent company.<sup>278</sup>

However, the court considered that the EC had not demonstrated this. The court found that the EC had incorrectly assessed the evidence in concluding that the chairman of Schumann Sasol International’s management board did not represent Vara.

The EC had also not shown that Sasol alone could determine all the strategic commercial decisions of the joint venture. Rather, the most important decisions had to be adopted jointly by Sasol Holding in Germany and

Vara.<sup>279</sup> Accordingly, the GC annulled the EC’s decision as regards Sasol Holding in Germany and Sasol Ltd prior to July 2002.<sup>280</sup>

Secondly, the GC ruled that the EC had breached the principle of equal treatment in not finding Vara jointly and severally liable for the Schumann period, even though HOS was controlled by Vara and ultimately by Mr Schumann personally<sup>281</sup> while finding Sasol group companies jointly and severally liable for the infringement in the later Sasol period.

As such, the EC had treated two comparable situations differently. Moreover, the GC did not accept that limitation rules prevented bringing an equal treatment argument against Vara and Mr Schumann,<sup>282</sup> or that the EC could rely on its discretion in deciding which entities of an undertaking it finds liable for an infringement.<sup>283</sup>

Thirdly, the GC upheld the EC’s finding that Sasol played a leading role in relation to paraffin waxes.<sup>284</sup> Among other things, the GC considered it significant that Sasol was considered to be the leader by the other participants: notably Exxon sent an email expressing its desire to bring an end to its participation in the infringement *only* to Sasol.<sup>285</sup> Nor was the imposition of a 50 per cent increase in the basic amount of the fine considered excessive, disproportionate or discriminatory.<sup>286</sup>

Finally, in exercise of its unlimited jurisdiction, the court limited the part of the fine imposed on Sasol Wax in respect of the infringement during the Schumann period to 10 per cent of its turnover in 2007. Therefore, that part of the fine imposed amounted to €30.9 million.<sup>287</sup> Similarly, the GC limited the fine imposed on Sasol Wax and Schumann Sasol International during the joint venture period to 10 per cent of the turnover of Schumann Sasol International in 2007. Therefore, that part of the fine imposed on Sasol Wax and Sasol Wax International amounted to €48 million.<sup>288</sup>

Interestingly, the EC has since applied for rectification of the GC’s fine assessment, arguing that it departed from the EC’s 2006 Fining Guidelines and was therefore too low. The GC has rejected this, stating:

“[T]he difference between the amounts proposed by the Commission and by the applicants and the amount set in the judgment at issue results not from an error in calculation, but from the Court’s choice of a methodology that diverges on purpose from the methodology laid down in the 2006 Guidelines.”<sup>289</sup>

<sup>275</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [124]–[127].

<sup>276</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [47].

<sup>277</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [50].

<sup>278</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [56].

<sup>279</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [121].

<sup>280</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [128].

<sup>281</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [187].

<sup>282</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [191].

<sup>283</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [192]–[194].

<sup>284</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [413].

<sup>285</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [367] and [381].

<sup>286</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [411].

<sup>287</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [453].

<sup>288</sup> *Sasol* EU:T:2014:628; [2014] 5 C.M.L.R. 16 at [462].

<sup>289</sup> Order of September 18, 2014, *Sasol v Commission* (T-541/08 REC) EU:T:2014:823 at [5] (MLex, September 30, 2014).

## RWE

In July 2014, the GC gave its judgment in the *RWE* case.<sup>290</sup> It may be recalled that RWE was fined €37.4 million. The EC found that RWE, as the owner of Dea Mineraloel (“DEA”) was liable for the infringement from 1992 to 2002 and then for a further period of some six months when Shell had bought DEA, before taking full control.

The main issue of interest was whether RWE should be considered jointly liable for the period when DEA was a joint venture. RWE argued that it should not, because, in fact, Shell had already taken control then, whereas the EC appears to have relied on its merger control decision at the time that the joint venture was established, finding joint control.

The GC ruled that the EC had not proved joint control in fact and annulled that part of the EC decision, reducing the fine by 4.1 per cent to €35.8 million. As in *Sasol*, the GC found that the EC had conducted only an “abstract analysis”, i.e. on the basis of the agreements signed by the parents before the joint business started, whereas the court considered that in a number of ways Shell controlled the management in the period concerned. Notably, decision-making and reporting to the parents was done in accordance with Shell’s existing structures and the chairman of the management board, who was appointed by Shell, had a casting vote.

The GC stressed that an imputation of liability was not the same as merger control. Here a closer assessment of the actual facts was required. The GC found that the EC had not shown joint action as had been found in *Avebe*.<sup>291</sup> The EC was entitled to rely on the provisions of the joint venture agreement being applied. However, the factual assessment may override that (and in this case, it led to a different result).<sup>292</sup>

## Esso France

In July 2014, the GC gave its judgment in the *Esso* case.<sup>293</sup> It may be recalled that the EC had imposed a fine of €83 million on Esso France, for which ExxonMobil was held jointly and severally liable for €34 million. On appeal the GC reduced Esso France’s fine to €63 million.

There are two points of interest arising from the GC’s judgment:

First, the GC accepted Esso’s argument that the EC should have taken into account the fact that Exxon had not participated in the infringement before the Exxon/Mobil merger in November 1999 when calculating the amount of Esso France’s fine.

In its decision, the EC had calculated Esso France’s fine, taking into account for the basic amount the value of sales after the merger of the ExxonMobil group and multiplying that value by the number of years in which Mobil participated in the cartel, when Exxon was not a member.

The applicants objected to this for the period from September 1992 to November 1999, when Mobil France alone participated in the cartel.<sup>294</sup>

The GC agreed, finding that that was a breach of the principle of equal treatment,<sup>295</sup> art.23(3) of Regulation 1/2003 and the principle of proportionality.<sup>296</sup> The court held that where there has been a merger during the course of a cartel and only one of the parties participated before the merger, the value of sales, during the last full year, of the entity resulting from the merger, multiplied by the number of years of the participation not only of that entity, but also of the party which participated alone in the cartel before the merger, could not constitute an “appropriate proxy to reflect the economic importance of the infringement” for the entire duration of the participation (as it should).

By multiplying the value of sales of the entity resulting from the merger also by the number of years in which only one of the parties to the merger participated in the infringement, the EC had artificially increased the basic amount of the fine in a manner which did not reflect the economic reality during the years preceding the merger.<sup>297</sup>

As a result, the GC reset the fines, taking Mobil France’s sales in 2000 as the basic amount (1999 not being available) with a multiplier for its period of infringement (1992–1999); and ExxonMobil’s sales thereafter, for ExxonMobil’s basic amount for the period it was responsible for the infringement (1999–2003).<sup>298</sup>

Secondly, practitioners may be interested in an evidentiary issue.<sup>299</sup> It appears that, faced with a claim in Exxon’s defence before the court that Exxon was not aware of the infringement before a certain date the EC produced evidence attached to its rejoinder. Exxon was not invited to comment thereon by the court, but offered comments, when the GC asked written questions on other issues.

The parties then sought to have each other’s material ruled inadmissible and/or excluded from the file. Interestingly, the court rejected both requests. The court found that the evidence was relevant to rebut allegations raised in the defence and had been available to Exxon in the administrative proceeding, so it was not new before the court.<sup>300</sup>

<sup>290</sup> *RWE AG v Commission* (T-543/08) EU:T:2014:62. With thanks to Hanna Pettersson for her assistance with this section.

<sup>291</sup> *RWE* EU:T:2014:62 at [100]–[104]. See *Avebe* [2006] E.C.R. II-3085; [2007] 4 C.M.L.R. 1.

<sup>292</sup> *RWE* EU:T:2014:62 at [112]–[116].

<sup>293</sup> *Esso Société Anonyme Française v Commission* (T-540/08) EU:T:2014:627; [2014] 5 C.M.L.R. 15. With thanks to Thomas Jones for his assistance.

<sup>294</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [97].

<sup>295</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [103].

<sup>296</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [114].

<sup>297</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [112].

<sup>298</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [134]–[136].

<sup>299</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [56]–[66] and [77]–[79].

<sup>300</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [79].

Equally, Exxon's comments thereon were relevant and the court had not ruled on their admissibility, or asked Exxon to comment on the EC's evidence before the hearing. Having regard to the right to a fair hearing and economy of procedure, the court preferred that Exxon's comments remain in the file.<sup>301</sup> An interesting result, since the issue as to what to do with apparently new evidence in the proceedings comes up quite often.

### Fasteners

It may be recalled that in September 2007, the EC adopted its decision in the *Fasteners* cartel case, imposing a total fine of €303.5 million on seven companies for their participation in four different cartels. The YKK group, which had participated in three out of the four infringements, was fined a total of €150 million.<sup>302</sup>

As regards one aspect of the cartel, the so-called "BWA coordination", YKK Stocko was held to have participated from 1991 until 2001 and was fined €68.25 million. Its ultimate parent undertaking, YKK Corp, and its intermediate parent undertaking, YKK Holding, were held jointly and severally liable for €49 million of the €68.25 million, because they had acquired YKK Stocko in 1997. YKK Stocko was thus solely liable for a fine of €19.25 million, which corresponded to the 1991–1997 period. In June 2012, the GC dismissed YKK's appeal and upheld their fine.<sup>303</sup>

In September 2014, the ECJ partially upheld YKK's appeal against the GC's judgment.<sup>304</sup>

There were two main issues before the ECJ. First, YKK argued that the EC and the GC had infringed art.23(2) of Regulation 1/2003, the principle of proportionality, the principle of equal treatment and the principle that penalties must be specific to the individual by applying the 10 per cent ceiling of art.23(2) to the YKK group as a whole for the entire fine, including the part of the fine relating to the 1991–1997 period, for which only YKK Stocko was liable.

YKK argued that YKK Stocko was the only entity that was liable for the fine relating to the 1991–1997 period and that therefore the 10 per cent ceiling had to be applied to YKK Stocko's turnover for that part of the fine and not to the entire YKK group's turnover. The amount of €19.25 million, which related to the 1991–1997 period and for which only YKK Stocko was liable, amounted to 55 per cent of YKK Stocko's 2006 turnover.

The ECJ agreed with YKK. The court indicated that the notion of "undertaking participating in the infringement" for the purposes of that provision must have the same meaning as for the application of art.101

TFEU.<sup>305</sup> Where an undertaking responsible for an infringement of art.101 TFEU is acquired by another undertaking, but remains a distinct economic entity, the EC must take account of the specific turnover of each of those economic entities when applying the 10 per cent ceiling.<sup>306</sup>

The ECJ therefore reduced YKK Stocko's fine for the 1991–1997 period from €19.25 million to €2.8 million, which corresponded to 10 per cent of YKK Stocko's 2006 turnover, less a 20 per cent leniency reduction (in line with the reduction YKK as a group had benefited from).<sup>307</sup>

Secondly, YKK challenged the application of a deterrence multiplier to YKK Stocko for the 1991–1997 period. The EC had applied a deterrence multiplier to the YKK group as a whole because of its greater financial resources as compared with YKK's competitors.

YKK argued that the EC erred in applying that multiplier to YKK Stocko for the 1991–1997 period because of its size and limited resources, arguing that only the resources and means of the undertaking responsible for the infringement had to be taken into account.

The ECJ disagreed, stating that, whereas the purpose of the 10 per cent ceiling is to adjust the fine to the economic capacity of the responsible undertaking, the purpose of the deterrence multiplier is to deter the undertaking from infringing competition rules in the future. In order to produce a deterrent effect on the undertaking as it exists at the time of adoption of the decision, account must be taken of the size and the resources of that undertaking at that time.<sup>308</sup> The court therefore ruled that the EC rightly applied the deterrence multiplier to the YKK group as a whole for the entire fine.

### Aluminium Fluoride

In October 2014, the ECJ dismissed the appeal brought by ICF<sup>309</sup> against the GC's judgment upholding the EC decision to fine ICF for agreeing on target price increases, on the world market in aluminium fluoride. We note simply that ICF argued that the GC had failed to adjudicate within a reasonable time (five years). As in the *Industrial Bags* cases, the ECJ agreed that there had been unreasonable delay, notably insofar there was some three years between the end of the written procedure and the hearing.<sup>310</sup> However, again the court stated that the sanction for a breach of this obligation must be an action for damages brought before the GC.<sup>311</sup>

<sup>301</sup> *Esso France* EU:T:2014:627; [2014] 5 C.M.L.R. 15 at [62].

<sup>302</sup> With thanks to Philippe Claessens for his assistance.

<sup>303</sup> *YKK Corp v Commission* (T-448/07) EU:T:2012:322; [2012] 5 C.M.L.R. 12.

<sup>304</sup> *YKK Corp v Commission* (C-408/12 P) EU:C:2014:2153; [2014] 5 C.M.L.R. 26.

<sup>305</sup> *YKK Corp* EU:C:2014:2153; [2014] 5 C.M.L.R. 26 at [59].

<sup>306</sup> *YKK Corp* EU:C:2014:2153; [2014] 5 C.M.L.R. 26 at [60].

<sup>307</sup> *YKK Corp* EU:C:2014:2153; [2014] 5 C.M.L.R. 26 at [97]–[99].

<sup>308</sup> *YKK Corp* EU:C:2014:2153; [2014] 5 C.M.L.R. 26 at [86], [90] and [91].

<sup>309</sup> *Industries Chimiques du Fluor v Commission* (C-467/13 P) EU:C:2014:2274. With thanks to Geoffroy Barthet for his assistance.

<sup>310</sup> *ICF* EU:C:2014:2274 at [59]–[60].

<sup>311</sup> *ICF* EU:C:2014:2274 at [57].

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

Other court rulings:

- on access to file, including *EnBW* in the ECJ;
- on EC requests for information, in the *Cement* investigation;

- a new leading judgment of the ECJ on restrictions by object (*Cartes Bancaires*); and
- on art.102 TFEU issues, notably the *Intel* appeal before the GC and the *Greek Lignite* and *Telefónica* cases before the ECJ.

The author also summarises the EC decisions and settlements on cartels and other infringement issues, including the *Motorola—Standard Essential Patent* case.

# Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 2)

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☞ Abuse of dominant position; Anti-competitive practices; Cartels; Confidential information; EU law; Fines; Horizontal agreements; Private enforcement

This is the second and final part of the overview of “Major Events and Policy Issues in EU Competition Law, 2013–2014”, following on from Part 1 published in last month’s journal.<sup>1</sup> It may be recalled that the reference period is from November 2013 until the end of October 2014.

The first part of the article summarises the remaining European Courts’ rulings on: (1) access to file, such as the *EnBW* case; (2) the EC’s<sup>2</sup> *Cement Cartel* request for information; (3) art.101 TFEU, including important cases such as *Cartes Bancaires* and *MasterCard*; and (4) arts 102 and 106 TFEU, including important cases such as *Greek Lignite*, *Intel* and *Telefónica*.

The second part is devoted to the EC’s recent decisions and settlements: first, those on cartels, both those new for 2013–2014 and those which are older, where the non-confidential texts have now been published by the EC. Then we summarise the EC’s other cases on horizontal agreements and settlements in relation to arts 102 and 106 TFEU, including the EC’s *Motorola* and *Samsung* standards essential patents cases.

Finally we outline the results of the EC’s patent settlement monitoring and current policy issues such as the EC’s report *Ten Years of Antitrust Enforcement under Regulation 1/2003*, also noting certain developing issues on decentralised enforcement under Regulation 1/2003.

## European Court judgments (cont’d)

### Access to file

#### Box 1

- Access to file
  - *EnBW* at the ECJ:
    - \* EC entitled to rely on general presumptions/exceptions to deny access to third parties under EU Transparency Regulation.
    - \* Unless case for specific disclosure made out.
    - \* By analogy to *Odile Jacob* and *Technische Glaswerke Ilmenau*.
    - \* EC proceedings considered not “closed” during ECJ appeal.
  - *Reagens*:
    - \* Application for documents re other parties’ cases on inability to pay assessed specifically (and denied where confidential).
    - \* i.e. targeted EC questionnaires and undertaking replies.
  - *Schenker*:
    - \* *EnBW* applied, but an applicant could obtain a non-confidential version of an EC cartel decision.

## EnBW

In January 2007, the EC adopted its decision in the *Gas Insulated Switchgear* cartel. In order to claim damages, EnBW, a German energy distribution company, which claimed to be a victim of the cartel, applied for access to most of the EC’s file based on the EU Transparency Regulation 1049/2001.<sup>3</sup>

In June 2008, the EC rejected EnBW’s application, essentially relying on a general presumption that the documents in its file were all covered by the exceptions to the right of access provided for in art.4 of the EU Transparency Regulation (i.e. protection of commercial interests, protection of the purpose of the EC’s investigation and protection of the EC’s decision-making process).

In May 2012, the GC annulled the EC’s decision.<sup>4</sup> The GC held that the EC could not rely on such a general presumption without carrying out a specific, individual analysis of each document to which access was requested. The court considered that the access systems in Regulations 1/2003 and 773/2004 were also no longer applicable, when that procedure was no longer in progress. Regulations 1/2003 and 773/2004 did not create any general presumption that documents in cartel proceedings were not to be disclosed. The court also found that the EC’s proceedings were no longer “open” during the appeal period, so non-disclosure was not justified in that period on that account.

<sup>\*</sup> With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this article; and to my Brussels and London colleagues for their assistance, which is indicated within the appropriate section.

<sup>1</sup> The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC’s website are to DG Competition’s specific competition page: [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html) [Accessed January 15, 2015]. References to “I.C.C.L.R.” are to previous articles in the series, “Major Events and Policy Issues in (formerly EC) EU Competition Law”, published in the *International Company and Commercial Law Review*.

<sup>2</sup> The abbreviations used are: “EC” for “European Commission” (not “European Community”, as before the Lisbon Treaty); “TFEU” is the abbreviation for “Treaty on the Functioning of the European Union”; “GC” is the abbreviation for “General Court”; “ECJ” for the “European Court of Justice” and “CJEU” for the overall “Court of Justice of the European Union”; “NCA” is the abbreviation for “National Competition Authority”; “SO” is the abbreviation for “Statement of Objections”; “BE” is the abbreviation for “Block Exemption”; “Article 27(4) Notice” refers to the EC’s Communications under that article of Regulation 1/2003 [2003] OJ L1/1. “RFI” is “Request for Information”. 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”.

<sup>3</sup> Transparency Regulation 1049/2001 [2001] OJ L145/43, p.43.

<sup>4</sup> *EnBW Energie Baden-Württemberg AG v Commission* (T-344/08) EU:T:2012:242; [2012] 5 C.M.L.R. 4.

The EC appealed. In February 2014, the ECJ set aside the GC's judgment in an important ruling.<sup>5</sup> The ECJ held that the general presumption does not only apply in state aid or merger cases, but also in cartel cases, essentially because the EU Transparency Regulation and Regulations 1/2003 and 773/2004 must be applied in a manner whereby each is compatible with the other and which enables them to be applied consistently.<sup>6</sup>

The ECJ noted that even in the EU Transparency Regulation access is not unlimited. In Regulations 1/2003 and 773/2004, parties to cartel proceedings do not enjoy an unlimited right of access and third parties (other than complainants) do not have *any* right of access. Therefore, generalised access on the basis of the EU Transparency Regulation would jeopardise the balance sought by the EU legislature in Regulations 1/2003 and 773/2004 between the undertakings' obligations to submit possibly sensitive information to the EC and the guarantee of increased protection for the information so provided to the EC.<sup>7</sup>

The EC was therefore entitled to *presume* in a cartel case, without carrying out a specific, individual examination of each of the file's documents, that disclosure of such documents, in principle, will be covered by the EU Transparency Regulation exceptions.<sup>8</sup>

However, the ECJ stated that the general presumption does not rule out the possibility of demonstrating that disclosure of a *specific* document is not covered by that presumption, or that there is an overriding public interest in disclosure.

Generally, the EC is entitled to reply to global requests for access, such as EnBW's, in a manner which is also global and is therefore not under an obligation to examine individually all documents to which access was requested.<sup>9</sup> Only as regards the specific documents for which the applicant has established that disclosure is *strictly necessary* (i.e. the evidence cannot be obtained in any other way), must the EC weigh up, on a case-by-case basis, the respective interests in favour of disclosure and in favour of protection, taking into account all relevant factors of the case.<sup>10</sup>

The ECJ therefore aligned access to the file under the EU Transparency Regulation cases with its approach in state aid and merger cases, repeatedly stating in its judgment that it was applying that case law "by analogy".<sup>11</sup>

It is a good question where this case law will stand once the Proposed Damages Directive enters into force, giving another legislative basis for non-disclosure.

## Reagens

In the context of the *Heat Stabilisers* cartel case, three companies, including Reagens, claimed inability to pay.<sup>12</sup> The EC reduced the fine for one company, but not for Reagens. Reagens requested access to documents relating to the other companies' claims under the EU Transparency Regulation. The EC rejected the application and Reagens appealed.

The main points of interest are as follows.

First, the GC noted the EC had undertaken a concrete, individual examination of the documents requested.<sup>13</sup> The EC had grouped the documents to which access was requested into three groups: undertakings' requests, EC questionnaires and undertakings' replies to the questionnaires. The EC had found that, while all these documents were covered by the exception of protection of commercial interests, certain documents within the three categories were also covered by the need to protect the purpose of inspections, investigations and audits.<sup>14</sup>

Secondly, Reagens claimed that the EC had infringed the EU Transparency Regulation by finding that the documents came within the scope of the exception on protection of commercial interests.

The GC held, with respect to the non-confidential versions of the undertakings' requests for inability to pay relief, that there was no risk that the creditors of those undertakings would withdraw after a claim of inability to pay.<sup>15</sup> Furthermore, these requests could not contain detailed, specific and sensitive information on the financial situation of the undertakings concerned.<sup>16</sup> Even if they did contain such information, it was still open to the EC to redact such information, since the request concerned only the non-confidential versions of the documents.<sup>17</sup> Consequently, the EC was *not* allowed to refuse access to the undertakings' requests.<sup>18</sup>

The GC also found that the EC was wrong to refuse access to the EC's first questionnaires, as these were standard and did not contain confidential information.<sup>19</sup>

However, the GC upheld the EC's decision not to disclose the undertaking's replies to the EC's questionnaires or the EC's second round of targeted questionnaires based on the undertaking's replies.<sup>20</sup>

<sup>5</sup> *Commission v EnBW* (C-365/12 P) EU:C:2014:112; [2014] 4 C.M.L.R. 30. With thanks to Philippe Claessens for his help with this section.

<sup>6</sup> *EnBW* EU:C:2014:112; [2014] 4 C.M.L.R. 30 at [81]–[84].

<sup>7</sup> *EnBW* EU:C:2014:112; [2014] 4 C.M.L.R. 30 at [85]–[88].

<sup>8</sup> *EnBW* EU:C:2014:112; [2014] 4 C.M.L.R. 30 at [93].

<sup>9</sup> *EnBW* EU:C:2014:112; [2014] 4 C.M.L.R. 30 at [100]–[101].

<sup>10</sup> *EnBW* EU:C:2014:112; [2014] 4 C.M.L.R. 30 at [107]–[108] and [132].

<sup>11</sup> i.e. *Commission v Editions Odile Jacob SAS* (C-404/10 P) EU:C:2012:393; [2012] 5 C.M.L.R. 8; and *Commission v Technische Glaswerke Ilmenau GmbH* (C-139/07 P) [2010] E.C.R. I-5885; [2011] 1 C.M.L.R. 3.

<sup>12</sup> *Reagens SpA v Commission* (T-181/10) EU:T:2014:139; [2014] 4 C.M.L.R. 28. With thanks to Tomek Koziel and Hanna Pettersson for their help with this section.

<sup>13</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [65].

<sup>14</sup> See Regulation 1049/2001 art.4(2) first and third indent.

<sup>15</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [89].

<sup>16</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [93].

<sup>17</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [94].

<sup>18</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [89]–[95].

<sup>19</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [101].

<sup>20</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [104]–[106].

Thirdly, Reagens claimed that the EC had infringed the EU Transparency Regulation by finding that the documents came within the scope of the exception on protecting the purpose of the investigation. The GC held that the refusal to grant access on this basis was not justified with respect to the EC's second questionnaires. These questionnaires could not affect current or future EC investigations.<sup>21</sup> (However, this refusal of access was justified on the basis of the need to protect the commercial interests of the undertakings, as noted above.<sup>22</sup>)

With respect to the EC's first questionnaires, the GC also found that the refusal could not be justified with reference to the need to protect the purpose of the investigation, in view of the "standard" content of those questionnaires.<sup>23</sup> The EC had argued that disclosing the questionnaires would have revealed its approach and risked strategic behaviour by other undertakings in future cases. The court was unconvinced, since it considered the EC had the means to counter such behaviour.<sup>24</sup>

Fourthly, Reagens claimed that, in this case, there was an overriding public interest disallowing the application of the exceptions relied on by the EC.<sup>25</sup>

The GC held that the purpose of better preparing an action against a decision does not constitute such an overriding public interest.<sup>26</sup> In a confirmation of its initial request, Reagens had stated that the overriding public interest lay in the principles of good administration, transparency and the proper implementation of EU competition policy. The GC rejected this and held that such considerations could only be valid to the extent that the information requested reflected EC policy and was not specific to the undertaking at issue. This was not the case as regards the undertaking's replies to the first or second questionnaires,<sup>27</sup> or to the EC's second questionnaire.<sup>28</sup>

Finally, the EC was entitled to consider that granting *partial* access would be pointless in this case.<sup>29</sup>

The net result was that Reagens could obtain access to a non-confidential version of the undertaking's applications and the EC's standard questionnaires, but no more.

## Schenker

Following the EC *Air Cargo* cartel decision, Schenker initiated damages actions against various airlines in the cartel. For that purpose, Schenker requested from the EC

access to the EC files in the proceedings that led to the adoption of that decision. The EC rejected the request and Schenker appealed.

In October 2014, the GC rejected most of the appeal,<sup>30</sup> in terms very similar to the *EnBW* judgment noted above. The pleas are almost identical. Similarly, the GC relied some 20 times on the *EnBW* judgment to reject Schenker's request to have access to the files.

However, the GC ruled that there was nothing that prevented the EC from communicating the *non-confidential* part of the decision, which was not the subject of any request for confidentiality, since there was no indication that such version would be incomprehensible.<sup>31</sup>

Accordingly, the GC concluded that the EC had breached art.4 of the EU Transparency Regulation, as it should have provided Schenker with a non-confidential version of the decision, without waiting for all requests for confidential treatment to have been finally settled.<sup>32</sup> As a result, the GC annulled the EC's decision refusing access to such a non-confidential version.

## Cement cartel RFI

In March 2014, the GC generally upheld the legality of requests for information sent by the EC to seven companies involved in an ongoing cement cartel investigation.<sup>33</sup> The challenges were brought by Cemex, Holcim, Cementos Portland Valderrivas, Buzzi Unicem, Heidelberg Cement, Italmobiliare and Schwenk Zement. However, in the *Schwenk Zement* case, the GC held that the two-week deadline given to answer a series of questions was too short.

The EC carried out inspections at the premises of various cement firms in October and November 2008 and September 2009, following which it sent out simple requests for information (i.e. without a formal decision).

Then, in November 2010, the EC sent the parties the draft of a further questionnaire and requested comments on it. In December 2010, the EC informed the cement firms of its intention to open formal antitrust proceedings relating to "restrictions on imports in the EEA coming from countries outside the EEA, market-sharing, price co-ordination and related anti-competitive practices in the cement market".<sup>34</sup>

<sup>21</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [117]–[118].

<sup>22</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [119].

<sup>23</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [126].

<sup>24</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [128].

<sup>25</sup> See Regulation 1049/2001 art.4(2), last clause.

<sup>26</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [142].

<sup>27</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [150]–[151].

<sup>28</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [153].

<sup>29</sup> *Reagens* EU:T:2014:139; [2014] 4 C.M.L.R. 28 at [172].

<sup>30</sup> *Schenker AG v Commission* (T-534/11) EU:T:2014:854. With thanks to Geoffroy Barthet for his assistance.

<sup>31</sup> *Schenker* EU:T:2014:854 at [136]–[137].

<sup>32</sup> *Schenker* EU:T:2014:854 at [141].

<sup>33</sup> *Cemex* (T-292/11) EU:T:2014:125, *Holcim* (T-293/11) EU:T:2014:127, *Cementos Portland Valderrivas* (T-296/11) EU:T:2014:121, *Buzzi Unicem* (T-297/11) EU:T:2014:122, *HeidelbergCement* (T-302/11) EU:T:2014:128, *Italmobiliare* (T-305/11) EU:T:2014:126, *Schwenk Zement v Commission* (T-306/11) EU:T:2014:123. With thanks to Thomas Jones for his assistance. See also GC Press Release 35/14 (March 14, 2014).

<sup>34</sup> *Buzzi* EU:T:2014:122 at [3]–[5].



Subsequently, in March 2011, the EC sent out the requests for information on which it had sought comments in draft, this time by formal decision. Annexed to the requests were questionnaires, which were some 70–90 pages in length, to be completed by the addressees in a stipulated format within 12 weeks, save for Question 11 of those questionnaires, which was to be completed within two weeks. It appears that later there were some requests for extensions granted up to 17 weeks.

In June 2011, the parties lodged seven actions for annulment challenging the legality of the requests. Shortly after, they also requested that the requirement to provide this information be suspended pending a decision in these cases. However, this was rejected by the court.

It appears from explanations in the judgments that many of the questions were very far-reaching. For example, in *Cementos Portland Valderrivas*, that company said it was asked to supply information on its national purchases of five products over 10 years, split out on the basis of 37 parameters.<sup>35</sup> One senses therefore an economic reconstruction of the market, as much as simple requests as to who met whom when (which appears to have been the target in the Question 11).

The main points of interest are as follows.

First, the GC held that the requirement to submit the answers to the first 10 questions to the EC within a 12-week deadline was compatible with Regulation 1/2003 and the principle of proportionality.

Secondly, the GC did not accept that the information should have been requested by way of a simple request for information by virtue of art.18(2) Regulation 1/2003, given the volume of the information. The court noted that the proportionality of using a decision as opposed to a simple request was subject to judicial review.<sup>36</sup> However, the GC considered that, here, issuing the request by way of a decision which allowed the EC to impose financial penalties if the information was not submitted or submitted late, ensured that the information would be sent to the EC as complete as possible and within the deadline.<sup>37</sup> It was therefore justified.

Thirdly, the GC also did not accept that the requirement to submit the information in a stipulated format was a violation of art.18 of Regulation 1/2003, regardless of whether this was the first time the parties had worked with this format. Similarly, the format requirement was

held not to be contrary to the principle of proportionality. The imposition of a format requirement was considered reasonable for purposes of comparison.<sup>38</sup>

That said, in *Buzzi*, the court stated that if the EC already has information, it should not simply ask the companies to resubmit it in a new format.<sup>39</sup> The court considered it reasonable, however, that the EC asks a company to give more precise answers or supplementary answers.<sup>40</sup>

Fourthly, the GC held that the information requested by the EC, although requiring a heavy workload for the companies, was not disproportionate given the nature of the allegations concerned. The GC accepted that the workload for the parties was substantial, but that workload was not considered disproportionate given the broad nature of the investigation.<sup>41</sup> Similarly, the GC held that, given the technical nature of the industry, a further request to clarify and obtain more detailed information was understandable.<sup>42</sup> Nevertheless, the court underlined that companies could not be required to answer questions which forced it to admit an infringement.<sup>43</sup>

Fifthly, however, the GC held in the *Schwenk Cement* case that a two-week deadline to reply to Question 11 of the questionnaire on “Contacts and Meetings” was incompatible with the principle of proportionality. According to the GC, the time-limit set by the EC should allow the addressee to assure itself that it was responding in a way which was “complete, exact and undistorted”<sup>44</sup> (since a company could be fined for an inaccurate answer, as much as a late one).

The parties were required to submit information concerning the role, function and responsibilities of certain employees and those who received instructions, a list of oral and written contacts and meetings between parties and cement producers (dates, participants, companies) and documents relating to contacts (emails, agendas, minutes, travel documents etc.).<sup>45</sup> The GC held that two weeks to collect, organise and verify this extensive information was not justified<sup>46</sup> and that the deadline was disproportionate.<sup>47</sup>

Sixthly, interestingly, *Cementos Portland Valderrivas* directly challenged the request for information as arbitrary and exploratory in nature (a “fishing expedition”).<sup>48</sup> While stating that the EC was not obliged to indicate the information on which it was relying to justify the request

<sup>35</sup> *Cementos Portland Valderrivas* EU:T:2014:121 at [87].

<sup>36</sup> *Buzzi* EU:T:2014:122 at [120].

<sup>37</sup> *Buzzi* EU:T:2014:122 at [123]–[124].

<sup>38</sup> *Holcim* EU:T:2014:127 at [102].

<sup>39</sup> *Buzzi* EU:T:2014:122 at [99].

<sup>40</sup> *Buzzi* EU:T:2014:122 at [102]–[104].

<sup>41</sup> *Holcim* EU:T:2014:127 at [100]–[101].

<sup>42</sup> *Holcim* EU:T:2014:127 at [103].

<sup>43</sup> *Buzzi* EU:T:2014:122 at [57].

<sup>44</sup> *Schwenk Zement* EU:T:2014:123 at [73].

<sup>45</sup> *Schwenk Zement* EU:T:2014:123 at [80].

<sup>46</sup> *Schwenk Zement* EU:T:2014:123 at [84] and [86].

<sup>47</sup> *Schwenk Zement* EU:T:2014:123 at [82] and [87].

<sup>48</sup> See *Cementos Portland Valderrivas* EU:T:2014:121.

for information, the court noted that the EC did have to have in its possession sufficiently serious evidence to raise a reasonable suspicion of an infringement.

The court required the EC to produce a summary and list of that information to which counsel for Cementos Portland Valderrivas was given access on a confidential basis.<sup>49</sup> The court then reviewed the issue and decided that the EC had such evidence.

Finally, the court criticised the EC's explanation as to the reason for the information request, noting that it was very general and should have been more precise.<sup>50</sup>

## Article 101 TFEU

### *Cartes Bancaires*

#### Box 2

- *Article 101 TFEU (and general)—Cartes Bancaires*
  - French banking system provision requiring balance between issuing and acquiring activities. If not observed, a fee was payable or card issuing limited.
    - \* Was that a restriction by object on the card payments market?
    - \* Or the economic context of the system, given that issuing and acquiring interact?
  - The EC and GC found restriction *by object*. The ECJ (and AG Wahl) said *no*.
    - \* GC had looked at potential effects (incorrectly).
    - \* Test for restriction by object is nature of the restriction and the economic context.
    - \* System ambiguous; not restrictive by nature.
  - If *Allianz Hungaria* interpreted (in part) as meaning one should look at effect, to assess a restriction *by object*, that is wrong.

In September 2014, the ECJ overturned the GC's ruling which upheld the EC's position that the French *Cartes Bancaires* system involved a restriction by object.<sup>51</sup>

It may be recalled that this case involved an EC decision finding that the *Cartes Bancaires* system was contrary to art.81(1) of the EC Treaty (now art.101(1) TFEU). The key point was that the EC found that the system, whereby a bank which did not observe a certain ratio between its card issuing and acquisition activities had either to pay a fee or limit the number of cards that it was issuing, was an anti-competitive restriction by object.

This was controversial since *Cartes Bancaires* argued that its system was designed to prevent free-riding by card issuing banks on the card acquisition activities of other banks and to encourage network expansion by requiring all banks to participate in both activities.

The core issue appears to have been how to deal with the fact that the system *could* restrict access to the market. Was that in itself a restriction by object? Or did it have to be considered together with CB's wider objectives, insofar as they are built into the restriction itself?

The ECJ decided the latter, finding that the GC had not examined whether the measures in question revealed in themselves a sufficient degree of harm to competition, contrary to the case law, notably the *LTM*,<sup>52</sup> *BIDS*<sup>53</sup> and *Allianz Hungaria*<sup>54</sup> judgments.<sup>55</sup> The court considered that the GC had looked at whether the measures in question were *capable* of restricting competition, but had not established that they were restrictive "by object".<sup>56</sup>

The court also held that the GC had been wrong to rule that the concept of "restriction by object" was *not* something to be interpreted restrictively. On the contrary, the ECJ considered that the concept is limited.<sup>57</sup>

More specifically, the ECJ considered that it was not clear that the fee structure in question was restrictive by object and the court found that the GC could not find a restriction by object, while finding that card issuing and acquisition interacted.

The simple requirement of a financial contribution to the CB network was not restrictive by object, i.e. by its nature, harmful to normal competition. Moreover, requiring a balance between card issuing and acquisition activities had to be taken into account in assessing *the context* for the application of art.81(1) EC.<sup>58</sup> It was not something only relevant to a different market, for payment cards. In particular, when there were interactions between the payment cards market, a different related (payments systems) market and when there were interactions between two facets of a two-sided system, as was the case here.<sup>59</sup> So that aspect was not restrictive "by object".

The court found that the GC had wrongly inferred a restrictive object from an assessment of the potential effects of the system which the ECJ found, in itself, to indicate that the measures could not be considered "by their nature", harmful to competition.<sup>60</sup>

The ECJ also confirmed that statements of intent by company employees are not sufficient to establish an anti-competitive object.<sup>61</sup>

<sup>49</sup> *Cementos Portland Valderrivas* EU:T:2014:121 at [23]–[24].

<sup>50</sup> *Buzzi* EU:T:2014:122 at [36].

<sup>51</sup> *Groupement des cartes bancaires (CB) v Commission* (C-67/13 P) EU:C:2014:2204, [2014] 5 C.M.L.R. 22; ECJ Press Release 123/14 (September 11, 2014).

<sup>52</sup> *La Technique Minière v Maschinenbau Ulm GmbH* (56/65) [1966] E.C.R. 235; [1966] C.M.L.R. 357.

<sup>53</sup> *Competition Authority v Beef Industry Development Society Ltd* (C-209/07) [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6.

<sup>54</sup> *Allianz Hungaria Biztosító Zrt v Gazdasági Versenyhivatal* (C-32/11) EU:C:2013:160; [2013] 4 C.M.L.R. 25. See J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2012–2013" [2014] I.C.C.L.R. 75, 82–83.

<sup>55</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [48]–[58] and [65]–[71].

<sup>56</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [65] and [69]–[71].

<sup>57</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [58].

<sup>58</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [74]–[75].

<sup>59</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [76]–[79].

<sup>60</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [80]–[82].

<sup>61</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [88].

The judgment of the court appears strongly influenced by the Opinion of A.G. Wahl of March 24, 2014.

Overall therefore the ECJ also considered that the GC had not observed the required standard of review in its assessment, because it had not looked closely enough into the practice itself and the context.<sup>62</sup>

This is an important judgment.

First, immediately, it has opened debate as to whether the EC (and NCAs) are taking too wide a reading of “restriction by object”.

Secondly, the judgment addresses an uncertainty after *Allianz Hungaria*, insofar as it emphasises that what is a restriction “by object” is to be assessed from a detailed review of the wording of the agreement and/or the nature of the practice and the context, but not the potential effects of the agreement.

In general, the ECJ said that in *Allianz Hungaria*, but there was scope for some debate, insofar as the court there appeared to suggest that the structural effects of certain practices should be assessed in determining whether there was a restriction by object.

As a result, some argued that, in order to show a complex “restriction by object”, the EC or a NCA should assess the effects, while others countered that the whole point of the concept of restriction “by object” is *not* to do that.

What the ECJ is clarifying here is that the EC and NCAs should *not* be looking at effects to establish a restriction by object; rather they should be carefully examining the specific terms of the agreement or practice and the context alone.

Thirdly, the judgment confirms that some wider context is relevant to an assessment of restriction “by object”, even if it is not full balancing under art.101(3) TFEU.

In general, it is to be expected that there will be three types of case now:

- First, blatant classic infringements by object (price-fixing and market-sharing).
- Secondly, a category of possibly less classic findings of restrictions by object, taking to account the context, where the facts may be more complex, but the authority or court concerned still considers that the serious anti-competitive nature is clear from the *wording* of the agreement or from the practice concerned *in its context* (e.g. *Allianz Hungaria*).
- Thirdly, more complex restrictions, where the anti-competitive object is *not* clear, so the case should be dealt with as a restriction by effect (e.g. likely *Cartes Bancaires*), insofar as the relevant fee system there

appears to have been ambivalent in nature, or to have positive aspects, but also some negative consequences.

The case has been remitted to the GC now. It will be interesting to see what happens.

One can only have sympathy, however, for *Cartes Bancaires*, who actually notified the system when that was still possible in January 2002, probably expecting an art.81(3) EC Treaty exemption with conditions. Twelve years later it is still uncertain how the EC/GC will deal with this.

## MasterCard

In September 2014, the ECJ also ruled on appeals by *MasterCard* (and others) against the GC’s ruling, which upheld the EC’s decision against the system.<sup>63</sup>

It may be recalled that “MasterCard” is a payment system in which the parties involved in each purchase using the bank cards concerned are, besides the owner of the payment system, the cardholder, the financial institution which issues that card (the “issuing bank”), the merchant and the financial institution providing that merchant with services enabling him to accept the card as a means of settling the transaction concerned (the “acquiring bank”).

There are two groups of consumers in the payment cards industry: cardholders and merchants. Two-sided demand is therefore a fundamental feature of this market.

The MasterCard system involves “multilateral interchange fees” (“MIFs”). These are, in principle, fall-back fees, based on a proportion of the price of a payment card transaction, which is retained by the issuing bank. The cost of the MIF is charged to merchants in the general costs which they are charged for the use of payment cards by the acquiring bank which handles their transactions.

In December 2007,<sup>64</sup> the EC held that the MIFs applied under the MasterCard card payment system were contrary to the EC Competition rules. Notably insofar as, by setting a MIF, MasterCard was found to have set a *minimum* charge which acquiring banks would charge merchants. The MIFs were found therefore to have distorted competition in the market in which acquiring banks compete for merchants’ business.

Part of the EC’s reasoning was that the MIFs have the effect of inflating the base of the merchant service charge, while the latter would be lower if there were no MIFs and if there were a prohibition of *ex post* pricing of transactions by issuing and acquiring banks.<sup>65</sup>

MasterCard then appealed to the GC, which rejected its arguments.<sup>66</sup> MasterCard then appealed to the ECJ.

It is an interesting judgment. Five main points are noted here:

<sup>62</sup> *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [89]–[91].

<sup>63</sup> *MasterCard Inc v Commission* (C-382/12 P) EU:C:2014:2201; [2014] 5 C.M.L.R. 23. With thanks to Geoffroy Barthet for his assistance.

<sup>64</sup> Case COMP/34.579 *MasterCard I*.

<sup>65</sup> Case COMP/34.579 *MasterCard I* at [11].

<sup>66</sup> *MasterCard v Commission* (T-111/08) EU:T:2012:260; [2012] 5 C.M.L.R. 5.

First, the ECJ upheld the EC's characterisation of MasterCard as an association of undertakings. The court recalled that the concepts of "agreement", "concerted practice" and "decision by an association of undertakings" in art.101(1) TFEU are intended to catch all collusion between undertakings, which tends to restrict competition, irrespective of the form which it takes.<sup>67</sup> Undertakings could not avoid art.101(1) TFEU just by entrusting such co-ordination to a body that is independent in form.

The ECJ noted that MasterCard was owned by banking institutions until May 2006, when MasterCard Inc was floated in an "initial public offering" ("IPO") on the New York Stock Exchange, which modified its structure and governance.

Until the IPO, the MIFs were set by MasterCard's European Board, composed of representatives of the banks established throughout the EEA. After the IPO, the Board did not include any representative from the banks, yet remained competent as regards the decisions in relation to MIFs. The parties argued therefore that MasterCard had not been an association of undertakings since 2006, when it became a publicly listed company and therefore its arrangement could not fall within the scope of art.101 TFEU.

However, the ECJ disagreed, upholding the GC's finding that the MasterCard MIF still could be qualified as a decision of association of undertakings after MasterCard was incorporated and listed on the Stock Exchange for two reasons<sup>68</sup>: (1) the continued collective decision-making powers held by the banks after the IPO (even though these were not over the MIF)<sup>69</sup>; and (2) the commonality of interests between MasterCard and the banks, even after the IPO, as shareholders.<sup>70</sup>

In such circumstances, the court found that the GC was entitled to find that the setting of the MIF by MasterCard continued to operate as an institutionalised form of co-ordination of the conduct of the banks. Given that MasterCard's interests and those of the shareholders of MasterCard Inc converged with regard to the setting of the MIF, the participating banks were in a position to delegate the setting of those fees, while retaining decision-making powers in other respects.

Secondly, MasterCard argued that the GC wrongly determined that the MIF was not ancillary, as objectively necessary, to the operation of card payment scheme.

The ECJ noted here that for a restraint to be ancillary, it had to be objectively necessary and proportionate to the main operation in a system, so that the operation had to be impossible to carry out without the restraint in

question.<sup>71</sup> All other restraints, those that reduce the costs of the main operation or make it easier to implement, could only be accepted within the framework of art.101(3) TFEU.<sup>72</sup>

The essential question was therefore whether the main operation in MasterCard, a functioning credit card payment scheme, would work without the MIF interchange fee scheme. The court found that this was the approach which the GC had taken and therefore rejected Mastercard's claim.<sup>73</sup>

Thirdly, the ECJ was asked to rule on the GC's acceptance of the EC's use of "counterfactuals". The "counterfactual" in MasterCard was a prohibition of ex post pricing. Essentially, MasterCard argued that the counterfactual would never, in fact, occur and therefore was not relevant.<sup>74</sup>

The ECJ held that, both for the application of the ancillary restraints test and in the context of establishing anti-competitive effects produced by certain conduct, the EC could employ a "counterfactual" test.

However, the court held that, irrespective of the context in which it is used, the counterfactual hypothesis had to be appropriate to the issue it is supposed to clarify and based on an assumption which is realistic.<sup>75</sup> The court then found that the GC was correct to find that the EC's counterfactual hypothesis *could* be taken into account, insofar as it was "realistic" and "economically viable".<sup>76</sup>

However, the court emphasised that the assessment of the competition in question had to be done within the "actual context" in which it would occur in the absence of the MIF fees,<sup>77</sup> and was critical that the GC did not address the likelihood, or even plausibility, of the prohibition of ex post pricing if there were no MIF, in assessing the restrictive effects of those fees.

In particular, the GC did not address the issue as to how, taking into account the obligations to which merchants and acquiring banks are subject under the Honour All Cards Rule, entailing the honouring of all transactions carried out with a MasterCard card, the issuing banks could be encouraged, in the absence of MIFs, to refrain from demanding fees for the settlement of bank card transactions.<sup>78</sup>

In those circumstances, the ECJ found that the GC had made an error of law. The GC had been wrong when it considered that it could rely only on the single criterion of economic viability of the counterfactual hypothesis to justify its consideration in order to analyse the effects of

<sup>67</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [63].

<sup>68</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [72] and [76].

<sup>69</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [69].

<sup>70</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [71].

<sup>71</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [89]–[91].

<sup>72</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [91]–[93].

<sup>73</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [94].

<sup>74</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [96] and [106].

<sup>75</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [108].

<sup>76</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [111].

<sup>77</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [164].

<sup>78</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [167].

the MIFs on competition. The GC should have also explained whether it was likely that the prohibition of ex post pricing would occur in the absence of such fees.<sup>79</sup>

However, notwithstanding this, the court found that the GC *could* rely on the prohibition of ex post pricing counterfactual for other reasons. Notably, the prohibition of ex post pricing was the only other possible option raised for the MasterCard system to work without the MIFs. Without the MIFs and without the hypothetical prohibition of ex post pricing, the MasterCard system would have collapsed. Moreover, as the court put it, the parties did not claim before the GC that MasterCard would have preferred to let its system collapse rather than adopt the other solution, that is to say, the prohibition of ex post pricing.<sup>80</sup>

Therefore, the ECJ found that the GC was entitled to rely on the relevant counterfactual, albeit for reasons other than those stated by the GC.<sup>81</sup>

Fourthly, the ECJ rejected a claim that the GC had undertaken a “short-form analysis”, as if this were a restriction by object case. The court noted that the GC had reviewed extensively the EC’s case, based on restriction by effect.<sup>82</sup>

Fifthly, Lloyds Banking Group argued that the GC had erred in determining that no exemption under art.101(3) TFEU applied. In particular, the GC had considered only benefits to merchants and not the benefits of the MasterCard payment system in general.<sup>83</sup>

The ECJ rejected this. The court held that it was the advantages of the MIF itself which had to be assessed, not those resulting from the general MasterCard payment scheme. In the framework of a two-sided market, the GC considered that, since the merchants constituted one of the group of consumers affected by payment cards, it was necessary, in order for art.101(3) TFEU to be applicable, for the existence of appreciable objective advantages attributable to that measure to apply to the merchants.

If restrictive effects were found on only one market of a two-sided system, the acquiring market, then the advantages of the restrictive measure on the other side of the two-sided market, the issuing market, could not, in themselves, compensate for the disadvantages resulting from that measure, in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the acquiring market, in particular where the consumers on those markets were not substantially the same, as merchants and cardholders in MasterCard.<sup>84</sup>

## Articles 102/106 TFEU

### Box 3

#### Articles 102/106 TFEU

##### — Greek Lignite

- \* ECJ overturned GC appeal finding that EC had not indicated what abuse would follow from the Greek State measures.
- \* ECJ said agreed with EC that State measures which create an “inequality of opportunity” on a related market were, as such, abusive.

##### — Intel

- \* Exclusive rebates by a dominant company are abusive by nature.
- \* No need to look at new economic tests: whether an “as efficient” competitor could compete.
- \* *Hoffman-La Roche* and *Tomra* applied.
- \* Margin squeezing and other pricing practices cases distinguished (*Post Danmark I*, *Deutsche Telekom*, *TeliaSonera Sverige*).

## Greek Lignite

It may be recalled that in 2008 the EC adopted a decision<sup>85</sup> finding that the grant and maintenance of exclusive rights to explore and exploit lignite deposits by the Greek Government to the former monopoly and currently dominant electricity company in Greece infringed art.106(1) TFEU read in conjunction with art.102 TFEU.

The EC held that the exclusive rights created a situation of “inequality of opportunity” between economic operators regarding access to such rights, and allowed DEI to maintain or reinforce its dominant position on the Greek wholesale electricity market.

Before the GC,<sup>86</sup> DEI argued that the case law required the EC to show precisely how DEI would abuse its dominant position.

Interestingly, the GC agreed and held that the EC had not shown that privileged access to lignite was capable of creating a situation in which DEI could commit abuses. The finding that Greece had conferred privileged access to lignite to DEI and that this created inequality of opportunity on the market was not enough to establish to what abuse the State measure could lead.<sup>87</sup>

However, in July 2014 the ECJ overturned the GC’s judgment,<sup>88</sup> agreeing with the EC’s original approach.

First, the ECJ noted that a Member State is in breach of art.106(1) TFEU read in conjunction with art.102 TFEU, if it confers preferential rights on a dominant company and thereby creates a situation where that

<sup>79</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [169].

<sup>80</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [173].

<sup>81</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [174].

<sup>82</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [183] and [192]–[193].

<sup>83</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [220].

<sup>84</sup> *MasterCard* EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [234] and [242].

<sup>85</sup> Commission Decision on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite C(2008)824 final (March 5, 2008). With thanks to Hanna Pettersson for her assistance.

<sup>86</sup> *Dimosia Epicheirisi Ilektrismou AE (DEI) v Commission* (T-169/08) EU:T:2012:448; [2012] 5 C.M.L.R. 21.

<sup>87</sup> *DEI* EU:T:2012:448; [2012] 5 C.M.L.R. 21 at [92]–[93].

<sup>88</sup> *Dimosia Epicheirisi Ilektrismou AE (DEI) v Commission* (C-553/12 P) EU:C:2014:2083; [2014] 5 C.M.L.R. 19. See also *Commission v DEI* (C-554/12 P) EU:C:2014:2085.

company would abuse or be led to abuse its position, merely by exercising those rights.<sup>89</sup> It is enough where a State measure creates the *risk* of abuse.<sup>90</sup> The court found that where a State measure institutes “inequality of opportunity” between economic operators, this constitutes an infringement.<sup>91</sup>

Accordingly, the ECJ held that there was an infringement of art.106(1) read in conjunction with art.102 TFEU irrespective of whether any abuse actually exists.

The EC is only obliged to identify a potential or actual anti-competitive consequence which is liable to result from the State measure in question. An infringement may be established where the State measure affects the structure of the market through creating unequal conditions of competition between companies, by enabling the dominant undertaking to maintain, strengthen or extend its dominant position over another market. It is not necessary to prove the existence of *actual* abuse.<sup>92</sup>

Secondly, the ECJ referred the case back to the GC, but gave its own ruling on two pleas which had been raised before the GC.

Under the first plea DEI claimed that the EC, in order to apply the theory that the dominant undertaking extends its position from one market to another, must show that the measure grants or reinforces exclusive or special rights. The ECJ disagreed and held that it is sufficient that the State measure creates a situation in which the dominant undertaking is led to abuse its dominant position.<sup>93</sup> There was no limitation to cases where exclusive or special rights had been conferred.

Under the second plea, DEI claimed that the exercise of the lignite exploitation did not have the effect of extending DEI’s dominant position from the lignite supply market to the wholesale electricity market. The ECJ stated that the extension of a dominant position to a neighbouring, but separate, market amounts to an abuse under art.102 TFEU.<sup>94</sup> The court held that when the extension results from a State measure, it is “as such” abusive.<sup>95</sup>

This is an important ruling, because the test for an art.102/106 TFEU infringement is wide. A.G. Wathelet’s Opinion is also very useful, insofar as he sets out how, in his view, the court’s case law shows that no abuse has to be spelled out. It is enough if the State measures create a situation in which the State-owned dominant company has a competitive advantage which its rivals cannot match.<sup>96</sup>

## Intel

In June 2014, the GC ruled on Intel’s appeal against the EC’s decision in June 2009, imposing a huge fine of €1.6 billion.<sup>97</sup>

It may be recalled that the EC found that Intel had abused its dominant position on the x86 central processing unit (“CPU”) market.<sup>98</sup> The EC found 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).

The GC upheld the EC decision in its entirety, in a huge judgment of some 1,650 paragraphs.

The main points are as follows.

First, the court stated its general position on the law and considered whether the level of the rebates had been conditional upon the OEMs purchasing all or almost all of their x86 CPU requirements from Intel. The GC began by drawing a distinction between three categories of rebate systems:

1. **Quantity rebates:** rebates linked solely to the volume of purchases made from the dominant undertaking. The court stated that these rebates generally do not have a foreclosure effect.<sup>99</sup>
2. **Exclusivity rebates (including quasi-exclusive rebates):** rebates that are conditional upon the customer obtaining all or most of their requirements from the dominant undertaking. The court stated that because such rebates are designed to remove or restrict the purchaser’s freedom to choose his sources of supply and to deny other producers access to the market, they are usually unlawful.<sup>100</sup>
3. **Rebates falling “within the third category”:** other rebate systems, where the mechanism for granting the rebate may also have a fidelity-building effect, even if the rebate is not linked to exclusive or quasi-exclusive supply. When assessing the abusive nature of rebates falling in this category, it is necessary to consider all the circumstances in order to assess whether the rebate tends to restrict the buyer’s freedom to choose his sources of supply,

<sup>89</sup> *DEI* EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [41].

<sup>90</sup> *DEI* EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [42].

<sup>91</sup> *DEI* EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [44].

<sup>92</sup> *DEI* EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [46].

<sup>93</sup> *DEI* EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [59].

<sup>94</sup> *DEI* EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [66].

<sup>95</sup> *DEI* EU:C:2014:2083; [2014] 5 C.M.L.R. 19 at [67].

<sup>96</sup> Opinion of A.G. Wathelet in *Dei* EU:C:2013:807; [2014] 5 C.M.L.R. 19.

<sup>97</sup> *Intel Corp* (T-286/09) EU:T:2014:547; [2014] 5 C.M.L.R. 9. With thanks to Hanna Pettersson for her assistance.

<sup>98</sup> Case COMP/C-3 /37.990 *Intel*, Commission Decision C(2009) 3726 final (May 13, 2009).

<sup>99</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [75].

<sup>100</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [76]–[77].

to deny producers access to the market, or to strengthen the dominant position by distorting competition.<sup>101</sup>

The GC concluded that the rebates granted by Intel were exclusivity rebates.<sup>102</sup> The court then held that exclusivity rebates granted by a dominant undertaking are “by their very nature” capable of restricting competition, foreclosing competitors and making access to the market more difficult for competitors (applying cases such as *Hoffmann-La Roche*).<sup>103</sup>

Consequently, the EC is not required to carry out an analysis of the circumstances of the case, nor to prove actual foreclosure effects or to establish a causal link between the practices and actual effects on the market.<sup>104</sup>

Secondly, the court ruled on the relevance of the “as-efficient-competitor” test (“AEC” test). In the decision the EC had carried out an extensive AEC assessment in relation to the conditional rebates. The GC held that the EC is *not* required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis, so it did not have to carry out such tests.<sup>105</sup>

Moreover, the GC held that it is not essential to carry out an AEC test even for rebates falling within the third category.<sup>106</sup> The court stated that, even if an AEC test gives a positive result, foreclosure cannot be ruled out, as exclusivity rebates could still make competitors’ access to the market more difficult, even if the competitor can cover its costs.<sup>107</sup>

Thirdly, the court rejected arguments raised by Intel based on the low amount of the rebate, the short duration of its supply contracts, the small part of the market concerned, the coverage of the exclusivity rebates in relation to certain OEM requirements and the customer’s buying power.<sup>108</sup>

This is wide and controversial. Intel argued, for example, that its practices only concerned certain segments of the market. The court stated that was irrelevant, if there was a “loyalty-mechanism”, a “conditionality” of a rebate on exclusivity or quasi-exclusivity. Any such effect was enough, applying *Tomra*.<sup>109</sup>

Fourthly, the court considered whether the “naked restrictions” were abusive. The EC had found that Intel had paid OEMs in order that they delay, cancel or in some

other way restrict the marketing of certain competing AMD-based products. The GC found that such restrictions were capable of making access to the market more difficult<sup>110</sup> and that they showed an anti-competitive object, which was liable to have an anti-competitive effect.<sup>111</sup> Therefore, the restrictions were abusive.<sup>112</sup>

Fifthly, there was an issue as to whether an unrecorded meeting between the EC and a senior executive at one of the OEMs should have been treated as a formal interview under Regulation 1/2003 with, therefore, a written note included in documents available on access to file.

The issue had been raised by Intel with the Ombudsman, who had ruled that there *should* have been a formal note.<sup>113</sup>

The GC held that the EC has discretion to decide whether a meeting is a formal interview or not and that there is no general duty for the EC to establish a record of all discussions for inclusion in its file.<sup>114</sup> However, the principle of good administration requires the EC to record information “of a certain importance and which bears an objective link with the subject matter of an investigation, irrespective of whether it is incriminating or exculpatory”.<sup>115</sup>

In this case, the GC found that a record of the meeting *should* have been made and that the EC had infringed the principle of good administration.<sup>116</sup> (It appears that the meeting had lasted five hours and had been with Dell, a major customer.)

Nevertheless, the court found that this omission had been remedied insofar as in the administrative proceedings the EC gave Intel a partially redacted note and invited Intel’s comments.<sup>117</sup>

Sixthly, the court found that the refusal by the EC to obtain certain documents from Intel’s competitor AMD was not unlawful. The GC ruled that Intel should have attempted to obtain the documents itself and that it was not likely that the documents were sufficiently important to Intel for the EC to be obliged to obtain them. The GC also found that Intel’s request was disproportionate.<sup>118</sup> (These were documents revealed in US proceedings.)

<sup>101</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [78].

<sup>102</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [79].

<sup>103</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [85] and [87]–[88]. *Hoffman-La Roche v Commission* (85/76) [1979] E.C.R. 461; [1979] 3 C.M.L.R. 211.

<sup>104</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [95]–[101] and [104]–[105].

<sup>105</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [143].

<sup>106</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [144] and [146].

<sup>107</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [149]–[151].

<sup>108</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [107]–[139].

<sup>109</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [116]–[117] and [132]–[134].

<sup>110</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [201].

<sup>111</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [202]–[204].

<sup>112</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [206].

<sup>113</sup> Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission on July 14, 2009; Ombudsman Press Release 19/2009.

<sup>114</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [612]–[617] and [619].

<sup>115</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [620].

<sup>116</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [621].

<sup>117</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [622]–[625].

<sup>118</sup> *Intel Corp* EU:T:2014:547; [2014] 5 C.M.L.R. 9 at [340]–[436].

Clearly, all this is highly controversial. In effect, the court reiterated the classic positions of the earlier case law and *Tomra*<sup>119</sup> and applied a classic “abuse by object” concept, in which it focused on the nature of the practice concerned, rather than the assessment of economic effects.

Importantly, the GC also distinguished the ECJ’s case law on price discrimination and margin squeezing, in which a more effect-based assessment has been made (e.g. cases like *Post Danmark*,<sup>120</sup> *Deutsche Telekom*<sup>121</sup> and *TeliaSonera Sverige*<sup>122</sup>).

Intel has appealed.

## Telefónica

It may be recalled that in 2007, the EC found that Telefónica had abused its dominant position, through margin squeezing between retail broadband access prices to end-users and wholesale prices to competitors for the supply of broadband access during September 2001 and December 2006. The fine amounted to €151.8 million. (Fines were assessed under the 1998 Fining Guidelines.)<sup>123</sup>

The decision was appealed to the GC<sup>124</sup> and ultimately to the ECJ.<sup>125</sup>

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

First, Telefónica claimed that the GC had failed to exercise its unlimited jurisdiction to review the EC’s decision (both the infringement and the fine). The ECJ rejected this. The court noted that judicial review applied to all EC decisions, but the scope of the court’s unlimited jurisdiction is “confined to the parts of” such decisions that impose a fine or a periodic penalty payment.<sup>126</sup>

Insofar as Telefónica was arguing that the GC had only applied a “manifest error” test in its judicial review of legality, the ECJ recalled that the European Court’s standard of review is more than “manifest error” (applying *Tetra Laval*<sup>127</sup> and *Chalkor*<sup>128</sup>). The court then noted that Telefónica had only raised general assertions, rather than specific errors, as required if the ECJ was to consider the issue. The court considered that, in this case, the GC had carried out the sort of in-depth review on questions of fact and law required by that case law.<sup>129</sup> The GC’s review of the finding of an infringement was therefore upheld.

Secondly, Telefónica argued that the GC infringed the principle of subsidiarity by disregarding the fact that the objectives pursued by art.102 TFEU and the applicable telecoms regulatory framework are the same. The GC therefore should have reviewed whether the objectives of the EC’s intervention were compatible with those pursued by the Spanish Telecoms Regulator.

The ECJ rejected this, stating that the EC’s application of art.102 TFEU is “not subject to any prior consideration of action taken by national authorities”.<sup>130</sup>

Thirdly, Telefónica claimed that the GC was wrong to reject its argument that there was no evidence of any specific effects of the margin squeeze on the market.

The ECJ considered this claim to be unfounded, applying *TeliaSonera Sverige*.<sup>131</sup> The ECJ confirmed that, in order to establish that a practice, such as margin squeeze, is abusive, the EC has to show that it has an anti-competitive effect on the market, although the effect does not necessarily have to be concrete. In this situation, it would be sufficient for the EC to demonstrate that there is a potential anti-competitive effect, which may exclude competitors that are at least as efficient as the dominant undertaking.<sup>132</sup>

Fourthly, Telefónica claimed that the GC erred in law by classifying its conduct as a “very serious” infringement, even though the relevant geographic market was restricted to Spain, whereas in the *Deutsche Telekom*<sup>133</sup> and *Wanadoo* decisions<sup>134</sup> similar conducts were classified as “serious” infringements, with relevant geographic markets larger in size.<sup>135</sup>

The ECJ stated that the classification of an infringement as “serious” or “very serious” does not depend only on the size of the relevant geographic market, but also on other criteria which characterise the infringement.<sup>136</sup> Therefore, the ECJ held that the GC had not been wrong in rejecting Telefónica’s claim.

Fifthly, the ECJ held that the GC had not erred in finding that the EC had sufficiently reasoned its position on fines. Telefónica’s point was that the infringement lasted from 2001 to 2006. The *Deutsche Telekom* decision was in May 2003, i.e. in the middle of that period and was only published in the EC Official Journal in October

<sup>119</sup> *Tomra Systems ASA v Commission* (C-549/10 P) EU:C:2012:221; [2012] 4 C.M.L.R. 27.

<sup>120</sup> *Post Danmark A/S v Konkurrenceradet* (C-209/10) EU:C:2012:172; [2012] 4 C.M.L.R. 23. There has been a further reference to the European Court this year. See *Post Danmark* (C-23/14) [2014] OJ C78/5.

<sup>121</sup> *Deutsche Telekom AG v Commission* (C-280/08) [2010] E.C.R. I-9555; [2010] 5 C.M.L.R. 27.

<sup>122</sup> *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) [2011] E.C.R. I-527; [2011] 4 C.M.L.R. 18.

<sup>123</sup> EC Fining Guidelines [1998] OJ C9/3.

<sup>124</sup> *Telefónica v Commission* (T-336/07) EU:T:2012:172; [2012] 5 C.M.L.R. 20.

<sup>125</sup> *Telefónica v Commission* (C-295/12 P) EU:C:2014:2062; [2014] 5 C.M.L.R. 18. ECJ Press Release No.95/14 (July 10, 2014). With thanks to Svetlana Chobanova and Virginia del Pozo for their help with this section.

<sup>126</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [45].

<sup>127</sup> *Commission v Tetra Laval BV* (C-12/03 P) [2005] E.C.R. I-987; [2005] 4 C.M.L.R. 8 at [39].

<sup>128</sup> *Chalkor AE Epexergasias Metallon v Commission* (C-386/10 P) EU:C:2011:815; [2012] 4 C.M.L.R. 9.

<sup>129</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [58]–[59].

<sup>130</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [135] and [161].

<sup>131</sup> *TeliaSonera Sverige* [2011] E.C.R. I-527; [2011] 4 C.M.L.R. 18 at [64].

<sup>132</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [124].

<sup>133</sup> Case COMP/37.451, 37.578, 37.579 *Deutsche Telekom* [2003] OJ L263/9.

<sup>134</sup> Case COMP/38.233 *Wanadoo Interactive*, Commission Decision of July 16, 2003. The decision is available on the EC’s website.

<sup>135</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [177].

<sup>136</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [178].



2003. Telefónica argued therefore that the EC should have distinguished between the two periods, treating the period before 2003 as less serious.

However, in its decision, the EC had chosen not to do that and explained why it was treating the whole infringement period as “very serious”. The EC had also distinguished the *Deutsche Telekom* decision. The GC considered that sufficient.

The ECJ stated that, while it would have been preferable if the EC had included more reasoning on these issues, such as setting out the figures on the basis of which it took account of the varying degree of seriousness of the infringement, the reasoning provided was sufficient.<sup>137</sup>

Finally, Telefónica argued that the GC disregarded the principle of proportionality by considering the starting amount of the fine, €90 million, as proportionate. Telefónica pointed out that the final amount of the fine, €151 million, was 12.5 and 11.25 times higher than the fines imposed on *Deutsche Telekom* and *Wanadoo* for similar abusive conduct.<sup>138</sup>

Again the court rejected Telefónica’s claim, while noting that the EC had not given much information in its reasons for fining Telefónica so much more than *Deutsche Telekom* and *Wanadoo* and, in particular, insofar as the EC had not specified the methodology used to determine the starting amount.<sup>139</sup>

The court also noted that it was not for the ECJ to substitute, on the grounds of fairness, its own assessment for that of the GC exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law.<sup>140</sup>

Moreover, Telefónica had failed to show that the starting amount of the fine was “excessive to the point of being disproportionate” (the relevant jurisdictional test before the ECJ).<sup>141</sup>

## European Commission decisions

### *Cartels—old*

#### Automotive Wire Harnesses

In the course of the year, the EC published a provisional, non-confidential version of its July 2013 decision, by which the EC settled a cartel investigation with five car part suppliers.<sup>142</sup> The companies were fined a total of €141.8 million for operating five cartels for the supply of wire harnesses to different car manufacturers.

It may be recalled that wire harnesses are cables which transmit signals or electric power, linking computers to various components built into a motor vehicle.

The EC found five separate infringements. Two concerned allocation and prices of supplies of wire harnesses to Toyota and Honda.<sup>143</sup> The contacts took place in the framework of Requests for Quotations (“RFQs”) and Annual Price Reduction requests issued by the car manufacturers, covering supply of wire harnesses both inside and outside the EEA. As regards wire harnesses supplied outside the EEA, these were incorporated into motor vehicles manufactured outside the EEA and subsequently exported back into it.<sup>144</sup>

The collusive contacts were found to have consisted in allocation agreements and primarily took place in Japan. Certain contacts were also followed up by contacts in the EEA.<sup>145</sup> The guiding principle for these first two infringements was the “incumbent supplier” principle, i.e. the principle according to which each supplier was supposed to maintain the share of business it had for an old model with respect to new generations.<sup>146</sup>

The EC found that the infringements took place from March 2000 to August 2009 with respect to Toyota and from March 2001 to September 2009 for Honda.<sup>147</sup> They were considered to be single and continuous infringements.<sup>148</sup>

The remaining three infringements were all found to be separate infringements. They consisted in three or two wire harness suppliers, in different combinations, coming together to co-ordinate prices and allocate RFQs. The EC found that this took place for one Nissan RFQ, two Renault RFQs, and one Renault project.<sup>149</sup>

As regards the calculation of the fine, for the Toyota and Honda infringements, the EC calculated the annual value of Sumitomo’s and Yazaki’s sales, on the basis of their average sales in the EEA of wire harnesses for Toyota and Honda, for the last three business years of the infringements.<sup>150</sup> As Furukawa did not have any registered sales of wire harnesses to Toyota or Honda in the EEA, the EC calculated its value of sales on the basis of Furukawa’s percentage share on the equivalent model in Japan, applied to the average yearly value of sales by Sumitomo and Yazaki of the equivalent model produced in the EEA.<sup>151</sup>

### *Cartels—new*

<sup>137</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [182]–[183].

<sup>138</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [192].

<sup>139</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [194]–[195] and [203].

<sup>140</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [205].

<sup>141</sup> *Telefónica* EU:C:2014:2062; [2014] 5 C.M.L.R. 18 at [205]–[206].

<sup>142</sup> Case AT.39748 *Automotive Wire Harnesses*. The text is available on the EC’s website. With thanks to Philippe Claessens for his help with this section.

<sup>143</sup> Case AT.39748 *Automotive Wire Harnesses* at [36].

<sup>144</sup> Case AT.39748 *Automotive Wire Harnesses* at [37].

<sup>145</sup> Case AT.39748 *Automotive Wire Harnesses* at [39].

<sup>146</sup> Case AT.39748 *Automotive Wire Harnesses* at [38].

<sup>147</sup> Case AT.39748 *Automotive Wire Harnesses* at [42]–[45].

<sup>148</sup> Case AT.39748 *Automotive Wire Harnesses* at [71].

<sup>149</sup> Case AT.39748 *Automotive Wire Harnesses* at [47]–[48] and [52]–[55].

<sup>150</sup> Case AT.39748 *Automotive Wire Harnesses* at [129] and [132].

<sup>151</sup> Case AT.39748 *Automotive Wire Harnesses* at [130] and [133].

## Box 4

## New cartel fines

(November 2013 – October 2014)

Total fines		Highest company fine(s)	
<i>Fentanyl</i>	€16.3 million	<i>Johnson &amp; Johnson</i>	€10.8 million
<i>North Sea Shrimps</i>	€28.7 million	<i>Heiploeg</i>	€27.1 million
<i>Interest Rate Derivatives</i>	€1.7 billion	<i>Deutsche Bank</i>	€465.9 million
<i>Polyurethane Foam</i>	€114.1 million	<i>Carpenter</i>	€75 million
<i>Power Exchanges</i>	€6 million	<i>EPEX (France)</i>	€3.7 million
<i>Bearings</i>	€953.3 million	<i>Schaeffler</i>	€370.5 million
<i>High Voltage Power Cables</i>	€301.6 million	<i>Prysmian</i>	€104.6 million
<i>Steel Abrasives</i>	€30.7 million	<i>Winoa</i>	€27.6 million
<i>Canned Mushrooms</i>	€32.2 million	<i>Bonduelle</i>	€30.2 million
<i>Perindopril</i>	*€427.7 million	<i>Servier</i>	*€331 million
<i>Smart Card Chips</i>	€138 million	<i>Infineon</i>	€82.8 million
<i>Swiss Franc LIBOR</i>	€61.7 million	<i>JP Morgan</i>	€61.7 million
<i>Swiss Franc Derivatives</i>	€32.4 million	<i>UBS</i>	€12.7 million
<b>TOTAL</b>	<b>€3.8 billion</b>		

\* Also an art.102 TFEU infringement.

Sumitomo was the immunity applicant and did not receive a fine. The other companies received fine reductions ranging from 20 to 50 per cent.<sup>152</sup>

## Box 5

- *Cartels—main issues*
  - Huge fines again.
  - Financial sector, car parts, food, energy, pay-for-delay.
  - Most cases are settlements, but some are “hybrid” (with some companies not settling).
  - Société Générale has appealed a settlement on basis of inequality of treatment.
  - EC relied on “secretly recorded” conversations in *North Sea Shrimps*.
  - Extensive reference to para.37 of 2006 Fining Guidelines:
    - \* EC discretion to adjust fines in exceptional circumstances e.g. if hitting 10% fine cap too easily.
    - \* And/or company focused on product.
    - \* Or subsidiary acquired during infringement.
  - In *Smart Card Chips*, the EC reverted to a normal procedure after initial settlement discussions.

Germany. The EC stated that Heiploeg and Klaas Puul organised informal bilateral meetings from June 2000 to January 2009. Kok Seafood and Stührk were involved for a shorter period of time.

The EC found that the cartel affected markets in Belgium, Germany, France and the Netherlands. Klaas Puul was the immunity applicant and was therefore not fined.

The EC took into account that North Sea shrimps constitute a large part of the companies’ turnover. The EC stated that it therefore exercised its discretion under para.37 of the 2006 Fining Guidelines to reduce the fines, also considering the companies’ differences in participation in the infringement. The fines imposed on two companies are therefore substantially below the legal maximum. The highest fine was imposed on Heiploeg and amounted to €27.1 million. Stührk received a fine of €1.1 million and Kok Seafood of €502,000.

Although there has been a previous infringement, involving fines by (what was then) the NMa (the Dutch Competition Authority),<sup>154</sup> there is no reference to recidivism fine in the EC’s Press Release.

Interestingly, it appears that part of the evidence which the EC used was “secretly recorded audio recordings”.<sup>155</sup>

## North Sea Shrimps

In November 2013, the EC imposed fines of €28.7 million on four traders of North Sea shrimps for having co-ordinated purchase prices and shared sales volumes.<sup>153</sup> The companies concerned were Heiploeg, Klaas Puul and Kok Seafood from the Netherlands and Stührk from

<sup>152</sup> Case AT.39748 *Automotive Wire Harnesses* at [159], [162], [165], [168], [171] and [174].

<sup>153</sup> IP/13/1175 (November 27, 2013), Case AT.39633. With thanks to Katrin Guéna for her assistance with this section.

<sup>154</sup> See the NMa decision of January 14, 2003, and related press release on the NMa website.

<sup>155</sup> See the notice of the appeal by *Goldfish* (T-54/14), January 23, 2014 [2014] OJ C71/28.

## Interest Rate Derivatives

In December 2013, the EC fined eight international financial institutions €1.71 billion for having participated in two cartels related to the co-ordinated setting of benchmark interest rates,<sup>156</sup> following a settlement procedure.

The benchmark interest rates concerned were the London interbank offered rate (“LIBOR”), used, among other things, for the Japanese yen; and the euro interbank offered rate (“EURIBOR”). LIBOR and EURIBOR reflect the cost of interbank lending and are the basis for various financial derivatives. Interest rate derivatives are used to manage the risk of interest rate fluctuations.

The EC indicated that the participants and duration varied in each of the two cartels. The cartel in euro interest rate derivatives (“EIRD”) lasted from September 2005 to May 2008. Traders of the companies involved discussed their bank’s submissions for the EURIBOR calculation. They agreed also on their trading and pricing strategies. Barclays was the immunity applicant. Deutsche Bank, RBS and Société Générale received fine reductions for co-operation and settling the case.

It appears that the EC’s investigation is still ongoing as regards Crédit Agricole, HSBC and JP Morgan.

The cartel in yen interest rate derivatives (“YIRD”) lasted between 1 to 10 months during the years 2007 to 2010. The EC found seven distinct bilateral infringements. The companies concerned were found to have discussed certain yen LIBOR submissions and exchanged commercially sensitive information, including certain future submissions.

The banks involved in one or several infringements were: UBS, RBS, Deutsche Bank, Citigroup and JP Morgan. The broker RP Martin was also fined for having facilitated one infringement. UBS was the immunity applicant. All the banks and companies received fine reductions for their co-operation and an additional 10 per cent reduction for their decision to settle the case.

The EC has also opened proceedings against the broker ICAP, outside the settlement procedure.

The highest fine in the EIRD cartel was imposed on Deutsche Bank, amounting to €465.9 million. In the YIRD cartel, RBS received the highest fine of some €260 million. Other fines ranged from €70 million to €445.9 million for the banks. RP Martin was fined €247,000 for having participated in one infringement for one month.

Interestingly, although Société Générale settled, it has appealed the fine, arguing that the method to calculate the value of sales used by the EC did not reflect the respective positions of the banks.<sup>157</sup>

It is not yet clear whether the EC has taken into account the fines imposed by financial regulators to the extent that involved manipulation by collusion between banks/traders, as opposed to manipulation by a bank on

its own—a hot topic insofar as clearly the defence may argue that there should not be double jeopardy/fining for the same conduct.

## Fentanyl

In December 2013, the EC imposed a fine of some €10.8 million on Johnson & Johnson (“J&J”) and €5.5 million on Novartis. The companies were found to have delayed market entry of the generic version of fentanyl, a strong painkiller used notably for cancer treatment.<sup>158</sup>

It appears that in 2005, as J&J’s protection of Fentanyl was about to expire in the Netherlands, Novartis’ Dutch subsidiary Sandoz began to prepare to commercialise its generic version of the painkiller. However, instead of starting to sell its generic, in July 2005 Sandoz through its subsidiary Janssen-Cilag, entered into a “co-promotion” agreement with J&J’s Dutch subsidiary.

The EC found that the agreement provided for monthly payments exceeding the expected profits to be made to Sandoz for as long as there was no generic entry. The agreement remained in force for 17 months, until a third party was about to launch generic fentanyl.

## Polyurethane Foam

In January 2014, the EC fined four European producers of polyurethane foam €114.1 million for having co-ordinated prices.<sup>159</sup> Flexible polyurethane foam is mainly used for mattresses and sofas and, to a lesser extent, for car seats.

The EC stated that the cartel operated from October 2005 to July 2010 and involved Vita, Carpenter, Recticel and Eurofoam, a joint venture between Recticel and Greiner. The cartel concerned 10 Member States: Austria, Belgium, Estonia, France, Germany, Hungary, the Netherlands, Poland, Romania and the UK. The EC found that the undertakings organised price co-ordination meetings around European and national association meetings. They also had many telephone and other bilateral contacts. The object was to pass on raw material price increases to customers and to avoid aggressive price competition.

Vita was the immunity applicant and was not fined. Recticel, Greiner and Eurofoam received 50 per cent fine reductions for their co-operation. All the parties received an additional reduction in fines because they decided to settle.

The highest fine of €75 million was imposed on Carpenter. Recticel was fined €7.4 million for its participation and was held partly liable for Eurofoam’s participation.

<sup>156</sup> IP/13/1208 (December 4, 2013), Cases AT.39861 (YIRD) and AT.39914 (EIRD).

<sup>157</sup> See the notice of appeal, *Société Générale* (T-98/14), February 14, 2014; [2014] OJ C142/36.

<sup>158</sup> IP/13/1233 (December 10, 2013), Case AT.39685. With thanks to Hannah Pettersson for her assistance with this.

<sup>159</sup> IP/14/88 (January 29, 2014), Case AT.39801: the EC summary of the decision is in [2014] OJ C354/6, and the EC’s provisional non-confidential decision is available on the EC website.

Interestingly, it appears that the EC accepted a joint leniency application by Recticel, Greiner and Eurofoam after dawn raids on them.<sup>160</sup>

The EC used para.37 of the 2006 Fining Guidelines to limit the liability of certain entities, notably a Carpenter subsidiary which was only acquired by Carpenter in 2009.<sup>161</sup>

## Power Exchanges

In March 2014, the EC announced that it had taken a decision following a settlement procedure concerning two leading spot power exchanges, one from France and one from Norway, respectively called EPEX Spot (“EPEX”) and Nord Pool Spot (“NPS”).<sup>162</sup>

The EC found EPEX and NPS had agreed on the allocation of European markets between them and decided not to compete with each other. EPEX and NPS representatives met physically and had contact via telephone, videoconferences and emails. It appears that the discussions took place around contacts to explore technical systems for cross-border trade. The infringement was found to have lasted for seven months during the years 2011–2012. “Power” here means electricity.

The EC fined the two exchanges some €5.9 million overall, EPEX €3.65 million and NPS €2.3 million. The EC reduced the fines imposed on the participants by 10 per cent, since the companies settled.

## Automotive Bearings

In March 2014, the EC fined two European and three Japanese companies which produce automotive bearings for their participation in an EEA-wide cartel. The total amount of the fine was €953.3 million.<sup>163</sup> The companies fined were SKFond, Schaeffler, NSK, NFC and NTN. JTEKT also participated in the cartel but was not fined, because it was the immunity applicant (prompted into doing so, it appears, by dawn raids by the Japanese Fair Trade Commission).

Automotive bearings are used by car and truck manufacturers to reduce friction between moving parts within a vehicle. They are used, for example in wheels, transmission boxes and air conditioning systems.

The EC noted that to select their bearings suppliers, car, truck and car parts manufacturers issue so-called “Requests for Quotations” (“RFQs”), and usually ask for yearly discounts, called “Annual Price Reduction requests”. The EC found that the companies involved had colluded on both and exchanged other sensitive

information. The EC noted that this related to the passing-on of steel price increases to automotive customers.

The cartel was found to have lasted for more than seven years, between April 2004 and July 2011.

The highest fine was imposed on Schaeffler, amounting to €370.5 million. The other companies were fined between €315.1 million and €4 million. Schaeffler, SKF, NSK, and NFC received fine reductions for their co-operation. All the companies also obtained an additional 10 per cent fine reduction, since they settled the case.

Under para.37 of the 2006 Fining Guidelines, the EC limited the amount of the fine for which one entity, NTN-SNR Roulements, was solely liable, to 10 per cent of its turnover in the business year preceding the EC decision. This appears designed to deal with the point that the company was only acquired by NTK in April 2008.<sup>164</sup>

The EC did not take the last year of the infringement for the value of sales. Because of the cyclical nature of the parties’ sales during the cartel period, the basic amount was assessed based on the average sales of automotive bearings during the full six years of the infringement.<sup>165</sup>

It also appears that the EC only took 10 per cent of the value of sales for some two-and-a-half years because there was a period of limited cartel activity.<sup>166</sup>

The EC also granted NFC a 15 per cent fine reduction for limited participation in the infringement, insofar as it participated in discussions to a much lesser extent than the other parties.<sup>167</sup>

## High Voltage Power Cables

In April 2014, the EC issued a decision concerning 11 producers of underground and submarine high voltage power cables for having participated in a cartel for almost 10 years.<sup>168</sup> High voltage power cables are mainly used to connect generation capacity to the electricity grid or to interconnect grids between different countries.

The companies concerned were producers in Europe, Japan and Korea: ABB, Nexans, Prysmian, J-Power Systems, VISCAS, EXSYM, Brugg, NKT, Silec, LS Cable and Taihan. The EC also fined the producers’ parent companies, because they exercised decisive influence, including (controversially) the investment bank Goldman Sachs, which was the former owner of Prysmian.

<sup>160</sup> AT.39801, EC summary of the decision at [4].

<sup>161</sup> AT.39801, provisional non-confidential decision at [97]–[100].

<sup>162</sup> IP/14/215 (March 5, 2014), Case AT.39952: the EC summary of the decision is in [2014] OJ C334/5.

<sup>163</sup> IP/14/280 (March 19, 2014), Case AT.39922: the EC summary of the decision is in [2014] OJ C238/10; the non-confidential version of the EC decision is available on the EC website.

<sup>164</sup> AT.39922, non-confidential version of the decision at [99]–[101].

<sup>165</sup> AT.39922, non-confidential version of the decision at [77].

<sup>166</sup> AT.39922, non-confidential version of the decision at [36] and [79].

<sup>167</sup> AT.39922, non-confidential version of the decision at [95].

<sup>168</sup> IP/14/358 (April 2, 2014), Case AT.39610: the EC summary of the decision is in [2014] OJ C319/10.

The EC found that the companies involved had shared markets and allocated customers between themselves, almost on a worldwide level, since 1999. European producers agreed to submit higher offers than their Japanese or Korean counterparts or not to bid at all for projects on Asian markets, and vice-versa. As regards other markets than Europe and Asia, the EC found that the cartel participants divided up the markets among them. The cartellists also agreed on price levels to be applied.

The companies met regularly in Europe and South-East Asia and had contact via email, fax and telephone.

The EC imposed a total fine of €301.6 million. ABB was not fined because it was the immunity applicant. J-Power Systems and its parents Hitachi Metal and Sumitomo Electric received 45 per cent fine reductions for their co-operation. They also obtained immunity for the first two years of their participation, because they were the first ones to submit evidence on the cartel for that period. J-Power Systems' fine was €20.7 million. The other companies were fined between €104.6 million (Prysmian) and €750,000 (Mitsubishi).

It appears that the EC used para. 18 of the 2006 Fining Guidelines to assess the relevant sales for Asian companies, insofar as, owing to the market allocation in the cartel, they had few or no sales in Europe.<sup>169</sup>

The EC also reduced the fines by 5 per cent for some of the companies on account of their substantially limited involvement in the infringement; and by 10 per cent for others whose "level of involvement ... qualified them as fringe players".<sup>170</sup> Two companies were granted an additional 1 per cent reduction for their lack of awareness of and liability for parts of the single and continuous infringement.<sup>171</sup>

## Steel Abrasives

In April 2014, the EC announced that it issued a settlement decision concerning the participation of Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth in a steel abrasives cartel.<sup>172</sup> Steel abrasives are loose steel particles used for cleaning and enhancing metal surfaces used in the steel, automotive, metallurgy and petrochemical industries. Steel abrasives are also used to cut hard stones, for example, granite and marble.

The EC found that the companies agreed on a surcharge called "scrap surcharge" or "scrap cost variance", based on a common formula, which was added to their prices when the costs for metal scrap, the main steel raw material for steel abrasives, increased. When energy prices rose, they also introduced an "energy surcharge" or "energy complement" in a co-ordinated manner. The companies also refrained from competing against each other with respect to particular customers.

The EC found that the companies had co-ordinated prices from 2003 to June 2010, some six years, with varying intensity.

The EC imposed total fines of €30.7 million. Ervin was the immunity applicant. Winoa was fined €27.6 million, Metalltechnik Schmidt €2.1 million and Eisenwerk Würth €1.1 million. All cartel participants received a 10 per cent reduction in fines because they settled the case.

The EC also reduced the fines to take account of the companies' characteristics, i.e. that the companies mainly produce steel abrasives and the different levels of their participation in the cartel.

The EC indicated that it was continuing its proceedings regarding Pometon SpA.

## Canned Mushrooms

In June 2014, the EC issued a decision fining Lutèce, Prochamp and Bonduelle for a cartel involving private label canned mushrooms after a settlement procedure.<sup>173</sup> The EC found that the companies organised a cartel for the production and sale of private label canned mushrooms: from September 2010 until end December 2011 as regards Lutèce; and until February 2012 as regards Prochamps and Bonduelle.

The EC found that the companies had exchanged confidential information as regards tenders to supply retailers, food wholesalers and catering companies, set minimum prices, agreed on volume targets and allocated customers.

Lutèce was the immunity applicant. The EC imposed a fine of €2 million on Prochamp. Bonduelle was fined €30.2 million. Prochamp and Bonduelle received a 10 per cent reduction because they settled. Prochamp also obtained a 30 per cent reduction for its co-operation.

The investigation is ongoing for Reiberebro.

## Perindopril

In July 2014 the EC fined the French pharmaceutical company Servier, together with five generic producers (Niche/Unichem, Matrix Teva, KrKa and Lupin), a total of €427.7 million for several agreements designed to protect Servier's blood pressure medicine perindopril from generic competition.<sup>174</sup>

The EC indicated that perindopril had been Servier's best-selling product for a long time. Servier's main patent for perindopril expired in 2003, but it appears that generic entry was delayed through a number of secondary patents relating to processes and form. These secondary patents were challenged by some generics.

<sup>169</sup> See AT.39610, EC Summary of the decision at [13].

<sup>170</sup> AT.39610, EC Summary of the decision at [20].

<sup>171</sup> AT.39610, EC Summary of the decision at [21].

<sup>172</sup> IP/14/359 (April 2, 2014), Case AT.39792: the EC summary of the decision is in [2014] OJ C362/8.

<sup>173</sup> IP/14/727 (June 25, 2014), Case AT.39965.

<sup>174</sup> IP/14/799 (July 9, 2014), Case AT.39612. With thanks to Hanna Pettersson for her assistance.

In 2004, Servier acquired an advanced technology related to perindopril, which the EC stated it never used, but which effectively forced a number of generic projects to come to a halt. Again, generics challenged Servier's patents.

However, in the period between 2005 and 2007, when a generic came close to entering the market through challenging a patent, Servier and the generic settled the challenge. In the settlement, the generics agreed to abstain from competing with Servier in return for payments. The EC notes that this then occurred several more times in the two-year period between 2005 and 2007. In addition, Servier offered a licence for seven national markets to one generic, in exchange for it abandoning all other EU markets.

According to the EC, Servier misused the otherwise legitimate systems for applying for patents, transferring technologies and settling of patent litigations. The EC stated that such behaviour constituted an abuse of a dominant position under art.102 TFEU. Servier was also found to have entered into anti-competitive agreements with the generics contrary to art.101 TFEU. Servier's fine for these infringements combined was €331 million. Each generic received a fine ranging from €8 million and €40 million.

### Smart Card Chips

In September 2014, the EC imposed fines of some €138 million on producers of smart card chips.<sup>175</sup> Smart card chips are mainly used in mobile telephones, in bank and identity cards, passports and pay TV cards.

The EC found that Infineon, Philips, Samsung and Renesas colluded through a network of bilateral contacts as regards their responses to customer price requests. The companies also exchanged sensitive commercial information on pricing, customers, contracts, production capacity and their respective future conduct.

The EC found that the cartel lasted from September 2003 to September 2005.

The EC imposed the highest fine on Infineon, amounting to €82.8 million. Renesas was the immunity applicant and was not fined. Samsung received a 30 per cent fine reduction for its co-operation during the investigation and was fined €35.1 million. Philips stopped the production of smart card chips after the infringement period and was fined €20.1 million.

The EC initially started a settlement procedure, but changed to the normal procedure in 2012.

### Swiss Franc Benchmark Interest Rates

In October 2014, the EC announced a settlement decision regarding a bilateral cartel organised by two international banks, RBS and JP Morgan.<sup>176</sup> The EC found that the

cartel's aim was to influence the London interbank offered rate ("LIBOR") quoted in Swiss francs. The banks concerned were found to have discussed future LIBOR rate submissions and exchanged information on trading positions and intended prices.

The EC states that the cartel lasted from March 2008 to July 2009 and covered the whole EEA. RBS was the immunity applicant. JP Morgan was fined €61.68 million, with a 40 per cent fine reduction for its co-operation and a 10 per cent reduction for settling the case.

### Swiss Franc Interest Rate Derivatives

In October 2014, the EC also announced a settlement decision regarding a cartel on so-called "bid-ask spreads" of Swiss franc interest rate derivatives. The banks involved were RBS, JP Morgan, UBS and Crédit Suisse.<sup>177</sup> "Bid-ask spreads" are the difference between the price at which a market participant is willing to sell and to buy a given financial product.

The EC imposed total fines of €32.36 million. RBS was the immunity applicant and was not fined. UBS was fined €12.65 million, JP Morgan €10.53 million and Crédit Suisse €9.2 million. UBS and JP Morgan were given fine reductions for their co-operation during the investigation. All were also given 10 per cent fine reductions for settling the case.

The EC found that the cartel lasted from May to September 2007. The EC stated that the banks' aim was to lower their own transaction costs and to maintain liquidity by quoting to third parties wider fixed bid-ask spreads on certain categories of derivatives, while maintaining lower spreads for the trades among themselves. In addition, the EC stated that the cartel's intention was to prevent other market participants from competing effectively with the four banks involved.

### *Other horizontal agreements*

#### Skyteam

In October 2014, the EC published an art.27(4) Notice asking interested parties for their comments on the commitments submitted by Air France/KLM, Alitalia and Delta to obtain the EC's approval for their agreement on transatlantic co-operation.<sup>178</sup> The airlines are all members of the "Skyteam" alliance, which involves profit-sharing and the joint management of schedules, pricing and capacity.

The EC had expressed concerns that the agreement might reduce competition on the Paris-New York route for premium passengers and on the Amsterdam-New York and Rome-New York routes for all categories of passengers, resulting in higher prices.

<sup>175</sup> IP/14/960 (September 3, 2014), Case AT.39574.

<sup>176</sup> IP/14/1189 (October 21, 2014), Case AT.39924.

<sup>177</sup> IP/14/1190 (October 21, 2014), Case AT.39924.

<sup>178</sup> IP/14/1184 (October 21, 2014). The Article 27(4) Notice is in [2014] OJ C376/12, Case AT.39964. The proposed commitments are available on the EC's website. With thanks to Katrin Guéna for her assistance.

The parties have therefore proposed: (1) to release take-off and landing slots at airports in Amsterdam, New York and Rome to facilitate competitor entry on those routes; (2) to allow new competitors to sell their flight tickets and to provide easier access to connecting flights through the conclusion of fare combinability and special prorata agreements; for the Paris-New York route this would also apply to existing competitors; and (3) to allow the passengers of new entrants without a frequent flyer programme to participate in the alliance's frequent flyer programme on all three routes.

Interested parties were requested to submit their comments before November 23, 2014.

## Other

In December 2013, the EC published its summary of the *E-Books* case.<sup>179</sup>

In February 2014, the EC took a decision making binding *Visa Europe's* commitments to reduce its MIFs for credit card payments to 0.3 per cent of the value of the transaction.<sup>180</sup>

These cases have been outlined in previous reviews, so will not be discussed further here.

## Articles 102/106 TFEU

### Box 6

#### • Main new art.102 TFEU decisions

##### — OPCOM:

- \* Romanian Power Exchange fined €1 million for requiring EU traders outside Romania to register for VAT in Romania (even though established abroad and registered for VAT abroad).
- \* Treated as discrimination by nationality, raising competitors' costs.

##### — Servier:

- \* EC fine for payments to delay generic competition for perindopril *and* for other practices designed to achieve that (arts 102 and 101 TFEU).

##### — Motorola:

- \* Motorola found to have abused its dominant position on technology used in GPRS standard, by bringing injunctions against its use, when the potential licensee (Apple) had offered to pay royalties on FRAND conditions, subject to judicial review.
- \* No fine because novel issue.

##### — Samsung:

- \* Similar to *Motorola* case, but Samsung offered commitments to settle the EC proceedings, allowing for licences on such FRAND terms.

##### — Slovak Telecom/Deutsche Telekom:

- \* EC fine of €38.8 million for refusing unbundled access to local loops to competitors and margin squeezing by Slovak incumbent.
- \* DT, which owns 51% of ST, was held jointly liable and its fine was increased a further €31 million for deterrence and recidivism.

## Deutsche Bahn

In December 2013, the EC adopted a decision accepting commitments offered by DB Energie and DB Mobility Logistics, two subsidiaries of Deutsche Bahn.<sup>181</sup>

The EC found that DB Energie was the only supplier of traction current (the electricity used to power rail locomotives) in Germany and therefore held a dominant position. The EC found that DB Energie applied a pricing system which included discounts that, in practice, only railway companies belonging to the DB group could obtain. The EC expressed the preliminary view that this pricing system could involve a margin squeeze.

While not agreeing with the EC's position, DB offered several commitments to meet the EC's concerns. DB Energie agreed: (1) to introduce a new pricing system for traction current with separate prices for electricity and for access to the traction current grid; (2) to offer access to the traction current network to third-party energy providers; (3) no longer to give volume or duration-based discounts, but to charge the same price to all railway undertakings; and (4) to make a one-time payment to railway companies that do not belong to the DB Group. The payment would consist of 4 per cent of DB Energie's traction current invoice in the year before the entry into force of the new pricing system.

According to the EC, this aims to prevent the margin squeeze from being continued before third-party energy providers can enter the market.<sup>182</sup> DB Energie and DB Mobility Logistics also undertook to provide the EC with the data necessary to assess if the price levels for traction current and transport services could lead to margin squeeze; and to notify the EC of any changes in electricity pricing.

The duration of the commitments is five years, or until 25 per cent of traction current volumes purchased by DB's competitors are sourced from third party electricity providers.

## OPCOM

In March 2014, the EC imposed a fine of €1 million on OPCOM, the Romanian power exchange, together with its parent Transelectrica, because the EC found that OPCOM had discriminated against EU electricity traders based outside Romania for five years.<sup>183</sup>

<sup>179</sup> OJ C378/25 (December 24, 2013), Case AT.39847. The EC's decision is also available on its website.

<sup>180</sup> IP/14/197 and MEMO/14/138 (February 26, 2014), Case AT.39398. The EC summary of the decision is in [2014] OJ C147/7. The EC's decision is available on its website.

<sup>181</sup> IP/13/1289 (December 18, 2013), Cases AT.39678 and AT.39731. The EC summary of the decision is in [2014] OJ C86/4. The EC's decision and the commitments are available on the EC website in German, with a translation. With thanks to Takeshige Sugimoto and Hanna Pettersson for their help with this section.

<sup>182</sup> Commitment decision, para.92.

<sup>183</sup> IP/14/214 (March 5, 2014), Case AT.39984. The EC's decision is available on its website.

The core issue here was that OPCOM required traders to have a secondary establishment in Romania, together with VAT registration, in order to trade on the power exchange there. Insofar as EU traders established abroad would therefore face increased costs and the practice was not considered to be objectively justified, this was found to be abusive.

Much of the case is about whether the VAT “mismatch” which could appear in OPCOM’s VAT books was a good reason to require a local VAT registration. This was rejected by the EC.<sup>184</sup>

### Motorola

In April 2014, the EC adopted a decision against Motorola Mobility (“Motorola”), finding that the company had abused its dominant position by seeking and enforcing injunctions against Apple in Germany based on a patent declared essential to the GPRS standard (the so-called “Cudak” GPRS SEP).<sup>185</sup> Motorola was found to be dominant on the EEA market for the GPRS technology on which Motorola’s Cudak GPRS SEP reads.<sup>186</sup>

Motorola was ordered to terminate the infringement and to eliminate any resulting anti-competitive effects. No fine was imposed because of the lack of EU case law on this issue and because of the existence of conflicting decisions among national courts throughout the EU.

The EC found that

“a patent holder, including a holder of SEPs, is generally entitled to seek and enforce injunctions as part of the exercise of its IP rights. The seeking and enforcement of injunctions cannot therefore, in itself, constitute an abuse of a dominant position. The exercise of an exclusive right by its owner may, however, in exceptional circumstances and absent any objective justification involve abusive conduct.”<sup>187</sup>

Here, the EC found that Motorola’s seeking and enforcement of an injunction against Apple in Germany amounted to an abuse of a dominant position, as of the moment when it became clear that Apple was willing to take a licence to Motorola’s SEP on FRAND terms.

The EC relied on the case law of the European Courts in cases involving the refusal to license intellectual property rights, such as *Microsoft*,<sup>188</sup> where the courts established the criteria to identify the “exceptional

circumstances” under which a refusal to license an IPR for a de facto standard may be deemed contrary to art.102 TFEU.

The EC identified the exceptional circumstances as the GPRS standard-setting context and Motorola’s commitment to ETSI<sup>189</sup> to license its SEP on FRAND terms and conditions.<sup>190</sup>

The EC concluded that

“in the exceptional circumstances of this case and in the absence of an objective justification, Motorola abused its dominant position by seeking and enforcing an injunction against Apple on the basis of its Cudak GPRS SEP in Germany as from Apple’s Second Orange Book Offer”.

In other words, from the moment when Motorola could have set the royalties due in its equitable discretion and according to FRAND principles without any limitations save FRAND and art.102 TFEU, while allowing for judicial review of the FRAND royalties.<sup>191</sup> From that offer, there was no need for Motorola to pursue an injunction in order to be appropriately remunerated for the use of its SEPs.<sup>192</sup>

The absence of objective justification related to the fact that Apple was found to be willing to enter into a licence agreement on FRAND terms.<sup>193</sup>

The EC noted that Motorola had committed to license the Cudak patent on FRAND terms in April 2003, thus choosing to monetise its standard essential technology and “not to use it to exclude implementers of the GPRS standard provided that it is appropriately remunerated for the use of its technology”.<sup>194</sup> This commitment created a legitimate expectation that Motorola would make its SEPs available on FRAND terms and conditions to all implementers.

The EC also observed that the threat of an injunction might distort licensing negotiations and force the potential licensee to accept anti-competitive licensing terms that it would not have accepted without this threat. This anti-competitive outcome might deter innovation and ultimately harm consumers.

Here, Motorola’s threat to enforce an injunction against Apple had caused: a temporary ban on the online sale of Apple’s GPRS-compatible smartphones in Germany (albeit of short duration)<sup>195</sup>; the inclusion in the Settlement Agreement of licensing terms disadvantageous to Apple<sup>196</sup>; and a lack of confidence in the standard-setting process.<sup>197</sup>

<sup>184</sup> See AT.39984, EC decision at [67]–[70] and [196]–[227].

<sup>185</sup> IP/14/489 (April 29, 2014), Case AT.39985. The EC summary of the decision is in [2014] OJ C344/6. The EC’s non-confidential decision is available on the EC website.

With thanks to Roberto Grasso for his help with this section.

<sup>186</sup> AT.39985, EC decision at [269].

<sup>187</sup> AT.39985, EC decision at [278].

<sup>188</sup> *Microsoft v Commission* (T-201/04) [2007] E.C.R. II-3601; [2007] 5 C.M.L.R. 11 at [331].

<sup>189</sup> The European Telecommunications Standards Institute.

<sup>190</sup> AT.39985, EC decision at [281] and [300].

<sup>191</sup> AT.39985, EC summary of the decision at [13] and [24].

<sup>192</sup> AT.39985, EC decision at [495].

<sup>193</sup> AT.39985, EC decision at [433] and [495].

<sup>194</sup> AT.39985, EC decision at [294].

<sup>195</sup> The EC found that Motorola’s conduct caused a temporary ban on Apple’s online sales of a few hours: AT.39985, EC decision at [312]–[321].

<sup>196</sup> AT.39985, EC decision at [322] and [336].

<sup>197</sup> AT.39985, EC decision at [415]–[420].



The EC found that Apple accepted the following disadvantageous licensing terms: Motorola's entitlement to terminate the licence in case Apple challenged the validity of the SEPs covered by the Settlement Agreement; the inclusion of the iPhone 4S in the list of infringing products covered by the Settlement Agreement; and Apple's acknowledgment of Motorola's claims for past damages.

In its decision the EC explains that a SEP holder which has given a commitment to license on FRAND terms is entitled to take reasonable steps to protect its interests through an injunction against a potential licensee, for example if:

- the potential licensee is in financial distress and unable to pay its debts;
- the potential licensee's assets are located in jurisdictions which do not provide for adequate means of enforcement or damages; or
- the potential licensee is unwilling to enter into a licence agreement on FRAND terms and conditions.<sup>198</sup>

The assessment as to whether a potential licensee is a "willing licensee" is subject to a case-by-case analysis, taking into account all the relevant facts.<sup>199</sup>

Much of the decision is then concerned with assessing whether Apple had been a willing licensee and, if so, as of when. As noted above, the EC found that Apple had become such a licensee, as of the moment it was willing to accept FRAND terms and independent judicial review.<sup>200</sup>

The EC also emphasised that the potential licensee's initial refusal to agree on licensing terms that de facto would prevent it from challenging the validity and infringement of a declared-essential patent was not a sign of unwillingness to enter into a licence agreement on FRAND terms.<sup>201</sup>

Interestingly, the ECJ should shortly answer preliminary questions referred by the Regional Court of Düsseldorf in relation to the *Huawei/ZTE SEP* litigation, which cover similar issues.<sup>202</sup>

## Samsung

In April 2014, the EC also accepted revised commitments from Samsung, by which Samsung undertook not to seek any injunctions in the EEA for a period of five years on the basis of its SEPs relating to technologies implemented in smartphones and tablets against any company that agrees to license the SEPs on FRAND terms and conditions.<sup>203</sup>

The EC found in its preliminary assessment that Samsung might have abused its dominant position on the market for licensing technologies as specified in the UMTS standard specifications. The UMTS standard is a telecommunications standard for third-generation mobile and wireless communications systems, adopted by ETSI. In 1998, Samsung declared its UMTS patents to be essential to the standard, and undertook to license its patents on FRAND terms in accordance with ETSI's policy on intellectual property rights.<sup>204</sup>

From April 2011 onwards, Samsung sought preliminary and permanent injunctions against Apple on the basis of its UMTS SEPs before courts in several Member States. However, it withdrew these actions in December 2012.<sup>205</sup>

The EC followed a similar approach to its *Motorola* decision. Samsung was found to be dominant because it held a 100 per cent share in the relevant market and its patents were indispensable for manufacturers to comply with the UMTS standard. Also, industry players had made significant investments in UMTS infrastructure and were consequently "locked-in" to the UMTS standard.

According to the EC, the seeking of injunctions against Apple, while normally a legitimate exercise of IP rights, constituted an abuse in this case. The fact that Samsung had expressly committed to license its SEPs on FRAND terms and the UMTS standard-setting process constituted the "exceptional circumstance" allowing the EC to find, in the absence of any objective justification, an abuse of Samsung's dominant position.<sup>206</sup>

The EC held that there was no objective justification for Samsung's conduct, in particular because Apple was willing to enter into a licence agreement for Samsung's SEPs on FRAND terms.<sup>207</sup>

## Google

The EC's investigation into certain of Google's practices has been open since November 2010. The investigation was covered in some detail last year.<sup>208</sup>

<sup>198</sup> AT.39985, EC decision at [427].

<sup>199</sup> AT.39985, EC decision at [428].

<sup>200</sup> AT.39985, EC decision at [437].

<sup>201</sup> AT.39985, EC decision at [439].

<sup>202</sup> *Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH* (C-170/13) The hearing in this case was held in September 2014.

<sup>203</sup> IP/14/490 (April 29, 2014), Case AT.39939. The EC summary of the decision is in [2014] OJ C350/8. The EC's non-confidential decision and the commitments are available on the EC's website. With thanks to Hanna Pettersson for her assistance.

<sup>204</sup> AT.39939, EC decision at [60].

<sup>205</sup> AT.39939, EC decision at [54].

<sup>206</sup> AT.39939, EC decision at [56] and [60]–[61].

<sup>207</sup> AT.39939, EC decision at [68].

<sup>208</sup> See J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2012–2013 (Part 2)" [2014] I.C.C.L.R. 134. With thanks to Cormac O'Daly for his assistance.

In January 2014, Google submitted a revised commitment.<sup>209</sup> The EC did not submit this to a full market test, but instead indicated to the complainants that it considered that the revised commitment resolved the previously identified concerns.<sup>210</sup> However, complainants and third parties objected to numerous aspects of the revised commitment and the EC was unable to conclude the investigation prior to the end of the Barroso Commission.

It will be recalled that the principal allegation being investigated is that Google's horizontal web search results favour Google's vertical web search services compared with competing vertical web search services. Google's draft commitment in January 2014 improves on its earlier proposals to address the EC's concerns in that the size of the area in which rivals' results are displayed has been increased and the images and text for these rival results should now be the same as for Google's own vertical search results (previously Google had only proposed to display links to rivals' results).

There have also been complaints about other Google practices beyond searching, such as regarding aspects of the Android platform. Clearly how to resolve complaints against Google will be one of the main carry-over issues for the new Commissioner, Mrs Vestager.

### *Slovak Telecom/Deutsche Telekom*

In 2005, the Slovak Telecoms Regulator ("TUSR") ruled that Slovak Telekom ("ST"), as the only nation-wide metallic telephone access network and the only supplier of wholesale access to its unbundled local loops ("ULL") in Slovakia, had the obligation to grant alternative operators remunerated access to its network in order to allow for effective competition on the downstream markets.

Following the TUSR's decision, in August 2005, ST published the conditions under which it would allow alternative operators to access its ULLs.

In April 2009, following inspections carried out in January 2009, the EC decided to open formal proceedings against ST for suspected abusive practices.<sup>211</sup>

In October 2014, the EC then found that ST had: (1) refused to supply unbundled access to its local loops to competitors under fair conditions; and (2) imposed a margin squeeze on alternative operators.

The EC stated that the margin squeeze made it impossible for alternative operators to use ST's telephone network infrastructure without incurring losses. As a consequence, the EC stated that entry of alternative operators into the retail broadband services market in Slovakia was delayed or prevented for more than five years.<sup>212</sup> The EC considered that both types of behaviour constituted an abuse of dominant position by ST, contrary to art.102 TFEU.

The EC fined ST and its parent company Deutsche Telekom ("DT") €38.8 million.<sup>213</sup> (DT held a 51 per cent stake in ST and the EC states it exercised decisive influence over ST). DT was held jointly and severally liable for the €38.8 million fine.

In addition, the EC *increased* the fine to be paid by DT by 50 per cent on the basis of recidivism, insofar as the EC already had found DT to have engaged in margin squeezing in the market for access to its ULL in Germany in 2003.<sup>214</sup> The EC also increased DT's fine by 20 per cent for deterrence. The total fine imposed on DT was therefore €69.9 million (including the €38.8 million for which DT was held jointly and severally liable with ST).

DT has announced its intention to appeal.<sup>215</sup>

### *Other*

In November 2013, the EC published its summary decision re the *Reuters Instrument Codes* case.<sup>216</sup>

As noted above, in July 2014 *Servier* was also fined for abusive acts to shut out a competing technology and buying out a number of generic competitors in the *Perindopril* case (according to the EC Press Release).<sup>217</sup>

In July 2014 the EC also put a short statement on its website indicating that the EC had closed its (arts 102 and 101 TFEU) investigation into the sectors of spare parts and the provision of repair and maintenance services for luxury/prestige watches. It will be recalled that the EC was required to reopen its investigation after the *CEAHR* judgment.<sup>218</sup> The EC does not indicate more.

It appears that the confederation of independent watch repairers plan to appeal the decision.<sup>219</sup>

<sup>209</sup> IP/14/116 (February 5, 2014). The EC did not publish the revised commitment, but Google and others did. See [http://docs.dpaq.de/6448-google\\_commitments\\_full.pdf](http://docs.dpaq.de/6448-google_commitments_full.pdf) [Accessed January 15, 2015].

<sup>210</sup> Statement by Vice-President Almunia on the EC's investigation (February 5, 2014), [http://europa.eu/rapid/press-release\\_SPEECH-14-93\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm) [Accessed January 15, 2015].

<sup>211</sup> With thanks to Virginia del Pozo for her assistance. MEMO/09/203 (April 27, 2009).

<sup>212</sup> IP/14/1140 (October 15, 2014) and MEMO/14/590 (October 15, 2014), Case AT.39523.

<sup>213</sup> IP/14/1140 (October 15, 2014) and MEMO/14/590 (October 15, 2014).

<sup>214</sup> IP/03/717 (May 21, 2003).

<sup>215</sup> *Mlex Article* (October 15, 2014).

<sup>216</sup> [2013] OJ C326/4, Case AT.39654.

<sup>217</sup> IP/14/799 (July 9, 2014).

<sup>218</sup> *Confédération Européenne des Associations d'Horlogers-Réparateurs (CEAHR) v Commission* (T-427/08) [2011] 4 C.M.L.R. 14; [2011] C.E.C. 795.

<sup>219</sup> *Mlex Article* (September 22, 2014).

## Patent settlement monitoring

In December 2013, the EC published its Fourth Report on the Monitoring of Patent Settlements.<sup>220</sup> The monitoring covered the period from January 1, 2012 to December 31, 2012 and included submissions from 53 originators and 66 generic companies.<sup>221</sup>

The EC noted that the number of patent settlement agreements concluded grew from 120 agreements in 2011 to 183 agreements in 2012. This increase was described as being largely due to the introduction of new legal provisions in Portugal.<sup>222</sup> However, even without taking into account this change in legislation, there was still a slight increase.<sup>223</sup>

However, the EC noted that the number of settlement agreements raising competition concerns, i.e. settlements where generic entry is limited and where a value transfer from the originator to the generic company occurred, has *decreased* during 2012. Only 7 per cent of all settlements concluded in 2012 were of this type.<sup>224</sup>

## Current policy issues

### Box 7

- *Policy issues*
  - 10 Years of Enforcement under Regulation 1/2003 (EC Review Papers).
  - ECN: Two decentralised co-operation examples.
    - \* *North Sea Shrimps* (2003) NMa.
    - \* *Flour Mill* cases (succession of NCA enforcement cases with document exchange and action to adapt/reduce fines to allow overall settlement).
  - New Commission.

## “Ten Years of Antitrust Enforcement under Regulation 1/2003”

In July 2014, the EC published a review on the enforcement of EU Competition law 10 years after the entry into force of Regulation 1/2003. The review consists of a Communication,<sup>225</sup> accompanied by two Staff Working Documents, and sets out various interesting statistics. The following appears noteworthy<sup>226</sup>:

- According to the EC, between May 1, 2004 and December 31, 2013, a total of 780 cases were investigated by the EC and the NCAs.<sup>227</sup>
- It appears that 48 per cent of the EC’s enforcement activity was on cartels,<sup>228</sup> while, based on envisaged decisions sent to the EC, 27 per cent of NCAs’ activity was addressing cartels.
- The vast majority of EC cartel investigations that were launched followed leniency applications (75 per cent), while only one quarter of all investigations were initiated *ex officio*<sup>229</sup>; cartel investigations launched by NCAs were prompted by complaints in 29 per cent of the cases, while leniency applications accounted for 34 per cent. *Ex officio* investigations were initiated in 37 per cent of the cases.

The EC notes that it was very active in the information and communication technologies sector and the energy sector; and that the work it undertook in these sectors was proportionately higher than the relative importance of these sectors in the economy. The EC underlines that the focus on the IT sector mirrors the importance of these sectors for digital development, which is an element of both the EU Lisbon Strategy and the Europe 2020 Strategy. As for energy, the activity in this sector followed deregulation.<sup>230</sup>

The EC also states that neither the professional and scientific services sector nor the food or wholesale and retail trade sectors have been targeted to the degree that their relative importance to the economy would suggest. NCA activity in these sectors was higher than that of the EC. The EC comments that this is because these markets tend to be national in scope.<sup>231</sup>

The Staff Working Document contains an extensive section summarising the types of cases investigated in different economic sectors by both the EC and the NCAs. This section notably includes cases investigated in the IT, energy, pharmaceutical, financial services, telecommunications and food sectors.<sup>232</sup>

As for co-operation with national courts, the EC has provided 26 opinions under art.15 of Regulation 1/2003, and has intervened as *amicus curiae* on 13 occasions in

<sup>220</sup> The text of the Report is available on the EC website. See IP/13/1228 (December 9, 2013). With thanks to Katrin Guéna and Hanna Pettersson for their assistance with this section.

<sup>221</sup> Commission, “4th Report on the Monitoring of Patent Settlements” (December 2013), para.19.

<sup>222</sup> Commission, “4th Report on the Monitoring of Patent Settlements” (December 2013), paras 23 and 27.

<sup>223</sup> Commission, “4th Report on the Monitoring of Patent Settlements” (December 2013), para.48.

<sup>224</sup> Commission, “4th Report on the Monitoring of Patent Settlements” (December 2013), paras 45 and 49.

<sup>225</sup> IP/14/800 (July 9, 2014); Commission, to the European Parliament and the Council, “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, COM(2014) 453 (“Communication”) (available on the EC’s website.)

<sup>226</sup> Staff Working Document, “Ten Years of Antitrust Enforcement under Regulation 1/2003”, SWD(2014) 230/2 (“SWD”); and Staff Working Document, “Enhancing competition enforcement by the Member States competition authorities: institutional and procedural issues”, SWD(2014) 231 (“SWD on procedural issues”).

<sup>227</sup> Communication, paras 7–8.

<sup>228</sup> Communication, paras 11–12.

<sup>229</sup> SWD, para.17.

<sup>230</sup> SWD, para.84.2.

<sup>231</sup> SWD, para.84.3.

<sup>232</sup> See SWD Section B (pp.28–53).

eight Member States. In three cases this prompted the national court to ask the ECJ to provide a preliminary ruling.<sup>233</sup>

Although it does not contain any formal proposals, the EC also highlights certain areas at NCA level where it perceives room for future improvement. Notably, the EC notes that divergences still exist, mainly related to the institutional position of NCAs and national procedures and sanctions.<sup>234</sup>

For example, the EC states that there are weaknesses in the institutional position of the NCAs. The EC states that NCAs should be independent and have adequate resources. It also lists certain minimum guarantees that are needed to ensure the independence of the NCAs and that they have sufficient human and financial resources.<sup>235</sup>

The EC also notes that, while there has been much alignment of procedures, important differences subsist.<sup>236</sup> Within the ECN, the NCAs and the EC have identified certain key powers that all NCAs should have. These include the power of the NCAs to set their own priorities, a set of effective investigation tools, including the power to inspect business and non-business premises and the power to issue RFIs and core decision-making powers. This latter category would include the ability to take prohibition decisions, commitment decisions and interim measures and to have the competence to enforce decisions.<sup>237</sup>

The EC notes that divergences exist in relation to the effectiveness of sanctions, in particular in relation to fines. It states that it is necessary to ensure that all NCAs have effective powers to impose deterrent fines on undertakings as well as associations of undertakings. It will be apparent that in recent years various national systems have issued revised Fining Guidelines (e.g. see recently the Belgian and Italian Guidelines).<sup>238</sup>

The EC also suggests that it would be appropriate to consider possibilities to address the issue of interplay between *corporate* leniency programmes and sanctions on *individuals* that exist at Member State level.<sup>239</sup>

### **Decentralised enforcement under Regulation 1/2003—two examples**

It is clear that the ECN has developed into a vehicle for co-operation and convergence, although practitioners continue to be concerned about how cases can be “moved” from one enforcer to another, with material consequences, and to be interested in how NCAs are co-operating.

For present purposes it may be of interest to highlight two cases concerned with decentralised NCA enforcement: One is the *North Sea Shrimps* case,<sup>240</sup> not the EC’s recent decision,<sup>241</sup> but an older decision in 2003 by the Dutch authority, the NMa. The other concerns *flour production*, where there have been decisions in the Netherlands, France, Germany and Belgium (and there are other pending cases).

The main point about the 2003 *North Sea Shrimps* case is that the NMa investigated practices involving companies in the Netherlands, Denmark and Germany. The agreements concerned the maximum catch and minimum prices to be charged. Other agreements concerned market entry. The NMa fined those concerned, but only for the impact on the Dutch market. It appears that documents were provided to the *Bundeskartellamt* (“BKA”), but according to Mr Mundt, head of the BKA, speaking at the EC Competition Forum in 2014, only with some difficulty on the rules. It appears that neither the BKA nor the Danish Competition Authority has taken parallel decisions since.<sup>242</sup> (Recently, the EC case started differently in Brussels, insofar as an immunity applicant came in there first.)

The 2010 *flour* cases involved several authorities. In 2008, the BKA launched investigations in Germany. It appears that there were then leniency applications by several producers in Germany, Belgium and the Netherlands. In 2010, the NMa imposed a fine of €80 million on 15 Dutch, Belgian and German flour producers for a cartel involving customer allocation and exclusion of competitors.<sup>243</sup> The NMa stated that it had, during its investigation, co-operated with the German and Belgian NCAs.

Interestingly, it appears that the flour producers then entered into settlement talks with the BKA. One company, which had been fined by the NMa, claimed inability to pay before the BKA. It stated that since it would not be able to pay the fine, it could not settle with the BKA. This prompted the NMa to lower the fine it had imposed on the company, which meant that the BKA imposed a settlement fine on it.<sup>244</sup>

Then the Belgian Competition Authority fined five flour mills, of which some had already been fined by the NMa in 2010, for participating in a cartel on the Belgian flour market. In calculating the fine, the Belgian Authority took into account the Dutch fine already imposed and imposed a limited lump sum fine.

<sup>233</sup> *SWD*, paras 247–251.

<sup>234</sup> Communication, para.24.

<sup>235</sup> Communication, para.27.

<sup>236</sup> Communication, para.32.

<sup>237</sup> *SWD on procedural issues*, para.59.

<sup>238</sup> BMA-ABC Press Release 10/2014 (August 29, 2014) and AGCM Press Release of October 31, 2014.

<sup>239</sup> Communication, para.42.

<sup>240</sup> See <https://www.acm.nl/en/publications/publication/6044/NMa-Confirms-Prohibition-on-Cartel-Agreements-in-the-Shrimp-Fishery-Industry/> [Accessed January 15, 2015].

<sup>241</sup> See Case AT.39633, IP/13/1175 (November 27, 2013).

<sup>242</sup> See, e.g., *Annual Report of the BKA*, 2001–2002, p.124.

<sup>243</sup> See [http://ec.europa.eu/competition/ecn/brief/01\\_2011/nl\\_flour.pdf](http://ec.europa.eu/competition/ecn/brief/01_2011/nl_flour.pdf) [Accessed January 15, 2015].

<sup>244</sup> See [http://ec.europa.eu/competition/ecn/brief/01\\_2013/nl\\_de.pdf](http://ec.europa.eu/competition/ecn/brief/01_2013/nl_de.pdf) [Accessed January 15, 2015].

Then the French Competition Authority adopted a decision addressed to a number of German and French mills. While the French mills were accused of having participated in a domestic cartel, the Authority also found a cartel between German and French mills, aimed at avoiding cross-border competition. The French Authority obtained evidence collected by the BKA during its dawn raids in Germany and participated in BKA interviews of German millers.

Clearly, these are interesting cases for practitioners in various ways: partly because of the interaction between the NCAs and partly because the cases were not dealt with at EC level (unlike, for example, the Dutch and Spanish *Bitumen* cases<sup>245</sup>). The co-operative elements are also noteworthy (e.g. it is interesting to see NCAs adjusting fines downwards to help each other in the overall result).<sup>246</sup>

It may well be that this is an area where there is scope to elaborate the rules under Regulation 1/2003 and to provide greater clarity on the procedural rights of those concerned and co-ordination practices, in particular on fines.

### *New Commission*

In September 2014, the candidate for President of the European Commission, Mr Jean-Claude Juncker, proposed as the new Commissioner for Competition Margrethe Vestager, a former deputy Prime Minister in the Danish Government.

Mrs Vestager took office, together with the new Commission, in November 2014.<sup>247</sup> In the “Mission Letter” sent to Mrs Vestager, Mr Juncker asked her to focus her competition powers on supporting the EC’s

jobs and growth agenda, mainly in areas such as the “digital single market, energy policy, financial services, industrial policy and the fight against tax evasion”.<sup>248</sup>

This elicited a few raised eyebrows, because the tax point was not a well-known antitrust item! However, what Mr Juncker was referring to was the broader competition issue, which the EC is investigating, as to whether certain multinational companies had received a form of state aid, through preferential tax treatment (now a hot topic).

Another interesting feature of Mrs Vestager’s appointment was that she was asked to co-ordinate with Mr Jyrki Kaitainen, the Vice-President responsible for Jobs, Growth, Investment and Competitiveness, and the new Commissioners for the Digital Single Market and Energy, Mr Andrus Ansip and Mr Maroš Šefčovič respectively. It will be interesting to see how this works, but the message is clear and, in fact, not new: that competition policy is not to be applied in isolation, but in a regulatory context and in parallel with other EU policies. As Mrs Vestager put it during her EP hearing, “I do not see the competition portfolio as a lonely portfolio”.<sup>249</sup>

Apart from several cartel and financial services cases, Mrs Vestager inherits some very high-profile cases from Vice-President Almunia, including the EC investigations into Google’s potential abusive practices with regard to its search-advertising services and its use of Android and YouTube; and the Gazprom investigation.

Interestingly, during her approval hearing before the EP, she also expressed her intention to update the EC’s understanding of the role of personal data in competition law, another hot topic for practitioners.<sup>250</sup>

Practically, the upcoming EU Competition Agenda also includes the Directive on Antitrust Damages Actions, which was formally adopted in November 2014.<sup>251</sup>

<sup>245</sup> See [2007] OJ L196/40 and [2009] OJ C321/15.

<sup>246</sup> See also the German Belgian chemicals case referred to in the GCLC study at pp.460–461. It appears that both the BKA and the Belgian Competition Authority imposed fines with respect to an EC-wide chemical cartel (benzyl-buthyl-phtalat), in each case fining on the basis of activities in their territory.

<sup>247</sup> IP/14/984 (September 10, 2014), “The Juncker Commission: A strong and experienced team standing for change”.

<sup>248</sup> “Mission Letter: Margrethe Vestager, Commissioner for Competition” (November 6, 2014), [http://ec.europa.eu/about/juncker-commission/docs/vestager\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/vestager_en.pdf) [Accessed January 15, 2015].

<sup>249</sup> Opening Statement by Mrs Vestager to the European Parliament (October 2, 2014), reposted by Mlex (October 6, 2014).

<sup>250</sup> See, e.g., Mlex, “EU competition enforcers need ‘deeper understanding’ of personal-data markets, Vestager says” (October 2, 2014).

<sup>251</sup> Commission Press Release, Joaquin Almunia Speech: “Antitrust litigation — The way ahead” (October 23, 2014), [http://europa.eu/rapid/press-release\\_SPEECH-14-713\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-713_en.htm) [Accessed January 15, 2015].