Major Events and Policy Issues in EU Competition Law, 2010–2011 (Part 1)

By

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Major Events and Policy Issues in EU Competition Law, 2010–2011 (Part 1)

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Abuse of dominant position; Anti-competitive practices; Cartels; Damages; EU law; European Commission; Guidelines; Horizontal agreements; Private enforcement

This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU,[1] from November 2010 until the end of October 2011.[2] The article is divided into four sections:

- legislative developments;
- European Court judgments;
- European Commission (EC) decisions;
- current policy issues.

Legislative developments and European Court judgments are included in Part 1. The other sections will be included in Part 2, which will be published in the next issue of the I.C.C.L.R. Please note that the abbreviation "EC" is now generally used for "European Commission", not "European Community". That will be the practice here, unless the context indicates otherwise (i.e. a reference to old treaty articles.)

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 2010

- Rulings on decentralised enforcement
  — *VEBIC*, *Pfleiderer*, etc.
- Huge number of cartel appeal rulings from the ECJ/GC, with
  — fine reductions of some €947 million
  — much focus on burden of proof, evidence (e.g. of duration), the parent/subsidiary presumption, statements of reasons, joint and several liability and recidivism
  — Some clarifications on the 2006 Fining Guidelines
- Damages cases (>50 now?).
- Revised Best Practices/Hearing Officer powers in the investigative phase
- Annulment of *Solvay*
- Not that many new EC decisions, but some important (*ONP*, *Polish Telecom*, *Prym*, *Lyonnaise des Eaux/Suez Environnement*)
- Comments about fines (Vice-President Almunia, the General Court).

Legislative developments

Box 2

Legislation/Notices (adopted/proposed)

- Revised Horizontal Guidelines and related R & D/Specialisation BEs
  — New information exchange section
  — More on standard-setting
  — Specific environmental agreements section gone
  — "Paid for R & D" covered by the R & D BE
- Decision on Hearing Officer revised
  — Role in investigative phase anchored in Decision and Best Practices
  — LPP, PASI, time-limits
  — Reasoned recommendations
- Best Practices in Articles 101/102 TFEU Proceedings revised
  — More on fines in SO
- Best Practices on Economic Evidence revised
  — New material on large consumer surveys
- Guidance Paper on Assessment of Damages proposed.

Adopted

Revised Horizontal Guidelines

In January 2011, the EC published its revised Horizontal Guidelines.[3] The draft for these Guidelines was already summarised in detail last year.[4] It will be recalled that the main interest in the Guidelines is:

- a "re-casting" of the structure so that discussion is now centred on restrictions "by object" and restrictions "by effect", instead of statements as to whether restrictions are "almost always" caught by what is now art.101(1) TFEU or not;
- a new section on information exchanges;
- a much expanded section on standard-setting (which also deals with standard terms);
- deletion of the specific section on environmental agreements with, instead, text on the issue in various places in the Guidelines, notably under environmental standards;[5] and

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[1] Treaty on the Functioning of the European Union.

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition "page": *http://ec.europa.eu/comm/competition/index_en.html* [Accessed December 20, 2011]. References to "I.C.C.L.R." are to my previous articles in the series, "Major Events and Policy Issues in EC/EU Competition Law", published in the *International Company and Commercial Law Review*.

[3] [2011] OJ C11/1; IP/10/1702 and MEMO/10/676, December 14, 2010.

[4] [2011] I.C.C.L.R. 67, 74–77.

[5] Guidelines, para.329.

- in the related R & D BE a much expanded and welcome treatment of “research as business”, allowing investment co-operation with R & D companies for so-called “paid-for R & D” to benefit more clearly from the security of the block exemption.[6]

Revised R & D and Specialisation Block Exemptions

In December 2010, the EC also published the revised block exemptions on research and development[7] and specialisation agreements. These have also been reworked. It is not proposed to go into the detail here.

EC Best Practices and Hearing Officer Rules[8]

In October 2011, the EC published revised versions of its provisional Best Practices on Proceedings concerning Articles 101 and 102 TFEU (a Notice[9]) and Economic Evidence in Competition and Merger cases (a Staff Working Paper[10]). The President of the EC also adopted and published a new Decision on the Hearing Officer, updating the previous one and replacing the “Guidance” published last year.[11]

This is a welcome package of documents after the public consultation this year. The biggest change appears to be the way that supervision, or at least intervention, by the Hearing Officer has been provided for in proceedings before the Statement of Objections[12] (SO). To some extent this was happening before, based on the residual competence of the Hearing Officer. Now, reference to that residual competence appears to have gone, in exchange for a defined, wider list of situations where the Hearing Officer is to be involved.[13] One hopes that the concept of being able to turn to the Hearing Officer on any procedural issue remains in practice, because it may be useful for both sides.

The Hearing Officer is now to have an explicit role as regards:

- disputes on legal professional privilege;
- disputes on the privilege against self-incrimination in requests for information[14];
- timing issues (e.g. extensions in time for replies to requests for information and the SO).[15]

This is in addition to the existing role which the Hearing Officer has on confidentiality issues in the context of access to file.

Usually an issue should still be raised with DG Competition (DG Comp) first,[16] but then there may be review by the Hearing Officer with, in some cases, provision for a “reasoned recommendation” to the Director responsible or the Commissioner on the approach to be taken.[17] It would appear that otherwise the existing rules apply, with an ability to take the matter to court, as appropriate.

This is a major and welcome change because, for years, the EC has argued that the Hearing Officer’s role only starts with the SO, while defence counsel argued that key procedural rights need prompt, independent review all the way through, right from the start of proceedings. The Hearing Officer is also still not a “judge”, but it does now mean that the position of an official may be challenged independently and more clearly in the investigative phase.

Otherwise the Best Practices on Proceedings appear to have been reworked and revised in many ways. The most important points appear to be:

- The EC says it will put more information into the SO on fines, not only the value of sales and year taken, but it appears also on aggravating and attenuating circumstances.[18] This is welcome to avoid corrections to decisions; and to allow parties to be clearer as to what may be coming on issues such as “leadership” of a cartel and to address possible issues at the oral hearing.[19] The EC has said that it is hoping that this may provide for more dialogue on fines. This is again welcome.
- Coming back to the legal professional privilege point, there may be scope now for the Hearing Officer to open the sealed envelope with the contested document and then to give “reasoned recommendation” to the Competition Commissioner. This may not be favourable to the defence and may not be followed, so the parties may

[6] See arts 1.1(a)(iv)–(vi), 1(n), 1(p) and 2 of the revised block exemption.
[7] EC Regulations 1217/2010 and 1218/2010 [2010] OJ L335/36 and L335/43.
[8] With thanks to Svetlana Chobanova and Katarzyna Bojarojć for their assistance with this section.
[9] [2011] OJ C308/6.
[10] Best Practices, Proceedings [2011] OJ C308/6; Hearing Officer Decision [2011] OJ L275/29. The Best Practices on Economic Evidence are available on the EC’s website.
[11] [2011] OJ L275/29; see generally IP/11/1021 and MEMO/11/703, October 17, 2011 and the summary in John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2009-2010 (Part 1)", [2011] I.C.C.L.R. 67, 71–73.
[12] Decision, Ch.2.
[13] Decision, Recital (10) and art.1(2).
[14] Best Practices, para.36.
[15] See, e.g. Decision, Recital (15) and art.9; Best Practices, para.10.
[16] See, e.g. Decision, Art.3(7).
[17] Decision, art.3(6); Best Practices, para.36.
[18] Best Practices, paras 84–85.
[19] Best Practices, paras 90 and 107.

still go to court, but at least this additional phase may offer a solution in some cases, saving time and money for all.[20]

- The EC also appears to be going to offer access to "key submissions" of complainants or third parties more systematically, prior to the SO.[21]
- Again on disputes regarding the privilege of self-incrimination in a request for information, normally the matter would be raised with DG Comp first, but then can be referred to the Hearing Officer, who can make a "reasoned recommendation", which goes to the director responsible, with a copy to the addressee of the party contesting the request.[22]

The Best Practices and Decision apply from publication in the EU Official Journal, which has happened already, and even to existing procedures.

The EC also envisages a State of Play meeting in cartel cases (after the oral hearing); and such meetings in commitment proceedings and cases of rejection of complaint.[23]

The EC also continues to emphasise "inability-to-pay" claims, noting that greater clarifications on them will be included in the SO.[24]

Other interesting points are as follows:

- The EC states that it will inform a company sent a request for information whether it is potentially suspected of infringement.[25]
- The EC continues to emphasise that confidentiality claims must be raised with replies to requests for information and non-confidential versions provided or the EC may infer there are no such claims.[26]
- The EC has not offered more guidance on email/IT issues in inspections (apparently leaving that to another explanatory note on inspections).[27]
- If remedies are contemplated, the EC will set out what it has in mind in the SO.[28]
- The EC maintains useful sections about possible negotiated access procedures for confidential disclosure and data room access.[29]
- It appears that the EC is still planning to disclose replies to SOs, but still not necessarily on a systematic basis.[30]
- In line with the case law the EC has dropped its "estoppel" point, the argument that if the defence does not raise an issue or offer evidence in the administrative proceedings, it cannot do so before the General Court. (The fundamental right to do so has been confirmed several times this year.)

There are not many changes to the Staff Working Paper on Economic Evidence. Apart from technical quality points (e.g. on "robustness" checks), there is new material on large scale surveys of final consumers.[31]

Otherwise the Best Practices maintain the welcome position that the EC will itself aim to follow the targeted Best Practices (as one would expect[32]). The Best Practices set out a lot of useful principles designed to improve the quality and efficiency of economic assessments. In particular, the simple question, over which there is often much debate, namely how to formulate "the relevant question" itself![33] Also a number of common sense propositions on checking and presentation of results with which few would disagree, if feasible in the case circumstances concerned.

On the other hand many will continue to be daunted by the apparent assumption that extensive economic or economic studies will be generally required—for example, the statement "*Most* competition or merger investigations involve (1) collecting data; (2) analysing data and (3) drawing inferences from data"[34] (emphasis added). It is to be hoped that the EC will do so *only* where such data collection and review is strictly justified and proportionate for the issue concerned since, as the section on Best Practices on Responding to Requests for Quantitative Data serves to underline, these requests can be very demanding and costly. All the more so, as the EC may not just request "readily available data".[35]

Not only are third parties expected to comply with the Best Practices concerned, they are also "expected" to provide all underlying data and codes and allow data room procedure access.[36] The EC clearly will say that is just what is required for it to do its job properly. Nevertheless, for those concerned, who may not even be interested in

[20] Best Practices, paras 51–58.
[21] Best Practices, para.73.
[22] Best Practices, para.36.
[23] Best Practices, paras 61 and 65.
[24] Best Practices, paras 87–89.
[25] Best Practices, para.15.
[26] Best Practices, para.41.
[27] Best Practices, para.50. There are currently proceedings regarding an alleged obstruction of an inspection in the Czech Republic involving email issues: see IP/10/1748, December 20, 2010.
[28] Best Practices, para.83.
[29] Best Practices, paras 95–98.
[30] Best Practices, para.103.
[31] Best Practices, Economics, paras 30, 39 and 48.
[32] Best Practices, Economics, para.6.
[33] Best Practices, Economics, s.2.1.
[34] Best Practices, para.30.
[35] See, e.g. Best Practices, Economics, paras 58–62.
[36] Best Practices, Economics, paras 47–48.

or involved in the case in question, it is often a "tall order" and the number and extent of requests (whether for data or just questions) is becoming a regular complaint of in-house counsel.

Proposed

Damages Guidance—Draft Paper[37]

In June 2011, DG Comp launched a public consultation on a Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU Competition rules[38] (the Draft Paper). The paper is some 65 pages. The consultation ended in September 2011 and there are now some 35 submissions published on the EC's website.

It may be useful to highlight the main features of the Draft Paper:

The aim of the Draft Paper is to offer assistance to national courts and parties involved in actions for damages by making more widely available information relevant for quantifying the harm caused by competition infringements. The Draft Paper provides an overview and illustration of the main methods and techniques available to quantify such harm in practice.

The Draft Paper notes that in a number of ways the techniques of calculating damages in a particular case are a matter of national law and the EC offers no suggestions in this context as to the choice of the most suitable method.

The Draft Paper notes that the general approach to quantifying harm in competition cases is that compensation for harm suffered aims to place the injured party in the position in which it would have been had the infringement of arts 101 or 102 TFEU not occurred. Quantification of harm suffered therefore requires the actual position of the injured party to be compared with the position in which this party would have been but for the infringement (so-called "but-for analysis" to determine the "counterfactual").

The EC also notes that full compensation for the harm sustained must include the reparation of the adverse effects resulting from the lapse of time since the occurrence of the harm caused by the infringement.[39] The EC stipulates that national law may account for these effects in the form of statutory interest or other forms of interest, as long as they are in accordance with the principles of effectiveness and equivalence.

According to the Draft Paper, there are two principal methods to calculate damages:

- techniques that estimate the counterfactual scenario by looking at data from the time periods before or after the infringement or at markets that have not been affected by the infringement ("comparator-based methods");
- "economic simulation models" based on data from the actual market and estimates based on production costs.

Comparator-based methods[40] The Draft Paper outlines a number of methods which use comparable data to estimate what price would have been paid had there been no infringement and therefore to determine the amount of overcharge. These methods look at prices directly before or after the infringement period:

- on the same market at a time before and/or after the infringement; or
- on a different but similar geographic market; or
- on a different but similar product market; or
- a combination of all three.

The EC notes that the strength of all comparator-based methods lies in the fact that they use real-life data that are observed on the same or a similar market.[41] The comparator-based methods rely on the idea that the comparator scenario can be considered representative of the likely non-infringement scenario and that the difference between the infringement and counterfactual data is due to the infringement. Nevertheless, it depends on national systems whether the level of similarity between infringement and comparator markets or time periods is considered adequate in a particular case.

In addition, the Draft Paper describes advantages and disadvantages of each method. For instance, in comparisons over time it may be that some differences between the two data sets are not due to the infringement alone, but also other factors.[42] Also, comparing prices in different geographic markets can only be employed when geographic markets are local, regional, or national and no similar infringement occurred in them.[43] Likewise, the effectiveness of comparing prices of different products depends in large part on the degree of similarity between the products. Moreover, as the EC emphasises, in all cases, making an informed choice of reference period and type of data will usually require good knowledge of the

[37] With thanks to Katarzyna Bojarojć for her assistance with this section.
[38] The Draft Paper is available on the EC's website.
[39] *Marshall v Southampton and South West Hampshire AHA* (C-271/91) [1993] E.C.R. I-4367, [1993] 3 C.M.L.R.293 at [31]; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04 to C-298/04) [2006] E.C.R. I-6619, [2006) 5 C.M.L.R. 17 at [97]; see also *EC White Paper on Damages Actions for Breach of the EC Competition Rules*: COM(2008) 165, s.2.5 and the accompanying EC Staff Working Paper SEC(2008) 404, para.187.
[40] Draft Paper, Pt 2, s.IIA.
[41] The EC supports its position by the *Bundesgerichtshof* (Federal Supreme Court, Germany), decision of June 19, 2007, Case KRB 12/07, *Paper Wholesale Cartel*.
[42] According to the EC, "in such cases, it may be appropriate to make adjustments to the data observed in the comparator period to account for differences with the infringement period or to choose a different comparator period or market" (Draft Paper, para.35).
[43] As the EC states: "also neighbouring markets on which no similar infringement occurred may still have been influenced by the anti-competitive practices on the infringement market (e.g. because prices on the neighbouring market were raised in view of the increased prices on the infringement market and lesser competitive pressure emanating from this market)" (Draft Paper, para.47).

industry in question, the availability of data and the requirements of applicable rules regarding the standard and burden of proof.[44]

Based on the three types of comparator-based method, the Draft Paper presents various techniques available to implement this method in practice. The methods range from straightforward observations without adjustments, to simple adjustments including averaging, linear interpolation or extrapolation, to more intricate techniques, such as regression analysis.

Simple techniques: individual data observations, averages, interpolation and simple adjustments[45] Depending on the applicable national law and the characteristics of the case, especially the degree of similarity between the infringement market and the comparator market/period, the data observed may be compared directly, i.e. without further adjustments.[46]

In some instances, however, it may be appropriate to use the average price as an indicator when calculating damages, e.g. when little monthly price variation exists. It may also be the case that yearly data or other statistical data (e.g. aggregated industry data) are the only information available.

Another method for deriving a comparator value from a range of data observations is linear interpolation. It is noted that, where a comparison over time has produced price series from before and after the infringement, the "non-infringement" or "counterfactual" price during the infringement period can be estimated by drawing a line between the pre-infringement price and the post-infringement price. From this line, a comparator value can be read for each relevant point in time during the infringement period.

Compared with the calculation of a single average value for price during the entire infringement period, interpolation therefore allows to some degree to account for trends in price developments over time that are not due to the infringement. Reading comparator data from the interpolated line therefore will produce more accurate results than using an average value for the period, e.g. in cases where damages are claimed that result from transactions (or other events) which occurred only towards the beginning or the end of the infringement period.[47]

Regression analysis[48] The Draft Paper also explains that regression analysis may be used. This applies statistical techniques to examine relationship patterns between economic variables and to measure to what extent a certain variable of interest is influenced by other variables that are not affected by the infringement (examples given by the EC are raw material costs, variations in customer demand, product characteristics, the level of market concentration).

Such an approach makes it possible to assess whether, and by how much, factors other than the infringement have contributed to the difference between the value of the variable of interest observed on the infringement market during the infringement period and the value observed in a comparator market/period. Regression analysis is therefore a way to account for alternative causes for the difference between the compared data sets.

According to the EC, all comparator-based methods are arguably capable of being implemented through regression analysis, provided that sufficient data observations are available.[49] Nevertheless, carrying out a regression analysis requires knowledge of various statistical techniques to measure the relationship between variables, to construct an appropriate regression equation and to calculate the parameters in this equation.

The choice of an appropriate technique will usually depend on a range of aspects, such as the legal requirements (in particular the standard and burden of proof) and the factual circumstances of the case.

Simulation models and cost-based analysis[50] Apart from comparator-based methods, the Draft Paper outlines other methods to establish an estimate for the non-infringement situation. These methods include the simulation of market outcomes on the basis of economic models and the estimation of a likely non-infringement scenario on the basis of costs of production and a profit margin.

Simulation methods use economic models of market behaviour and take into account certain market characteristics such as the number of competitors, the way they compete with each other or the degree of product differentiation or entry barriers to predict likely price, production levels or profit margins.

The EC notes that industrial organisation has developed models of competition for various types of markets that can simulate such outcomes. These models range from monopoly models to perfect competition models. Intermediate models designed to reflect firm behaviour in oligopolistic markets are, in particular, those developed by the economists Cournot and Bertrand and a number of variations of their models. These models take into account the repeated interaction between firms in the market.

The EC also notes that although, because of their features, models rely on simplification of reality, even simple models may be useful when estimating the likely damages. Nevertheless, even very comprehensive models

[44] Draft Paper, para.42.
[45] Draft Paper, Pt 2, s.II.B (1).
[46] The EC explains that, for example, time-based comparison could be based on the simple observation of prices before and during the infringement (for the legal implications of such method see *Corte Suprema di Cassazione* (Supreme Court of Cassation, Italy), decision of February 2, 2007, Case No.2305 (*Fondiaria SAI SpA v Nigriello*)).
[47] Draft Paper, para.61.
[48] Draft Paper, Pt 2, s.II.B (2).
[49] Draft Paper, para.63.
[50] Draft Paper, Pt 2, s.III.

depend on the accuracy of the assumptions made; they can be technically demanding and are often time and cost intensive.

Cost-based methods consist of using some measure of production costs per unit, and adding a mark-up for a profit that would have been "reasonable" in the counterfactual scenario. The resulting estimate for a non-infringement price can be compared to the price actually charged by the infringing undertaking to estimate the overcharge. One of the disadvantages of these methods is that they suppose access to data that may be in the possession of the opponent or a third party. Nevertheless, the EC notes that, depending on the circumstances of the particular case and on the requirements under applicable legal rules, they may provide useful insights to support an estimation of the harm, especially when used in combination with one of the other quantification methods.

The EC stipulates that the methods described in the Draft Paper should not be considered as an exhaustive list, mainly because these methods could further evolve or others could be developed in practice.

Quantifying harm to consumers and competitors—specifics[51] The rest of the Draft Paper concentrates on specific characteristics of applying quantification methods to different categories of anti-competitive harm, i.e. exploitative and exclusionary violations.

There is discussion centred around some working examples over some 27 pages. In the case of customer harm (both direct and indirect), quantifying harm is focused on the overcharge paid or volume lost. On the other hand, in the case of competitor harm, the objective is to calculate the loss of profit (including future loss) suffered by the foreclosed competitors and customers of dominant undertakings.

Much of the Draft Paper is therefore not that new. Nevertheless, it may be useful to have such material to structure the debate, the critical issue being what the particular court will accept as useful in a given case under the relevant national rules. It may be also that several methods and /or others will have to be considered so as to evaluate the evidence.[52]

European Court judgments

General articles 101/102 TFEU

Box 3

Decentralised enforcement

- *VEBIC*
  - — Effective application of the EU competition rules requires that NCAs can participate in appeals against their decisions as defendant or respondent
- *Pfleiderer*
  - — National courts have to assess whether disclosure of leniency materials may be required, balancing a claimant's right to damages, with the public interest in protecting such submissions from disclosure
  - — A.G. Mazák Opinion: Emphasis on damages rights made possible through public enforcement
- *Tele2 Polska*
  - — A NCA may not rule that there has been no infringement of art.102 TFEU; just that there are no grounds for action on its part
  - — The exceptional right to make such a ruling is for the EC.

This year there have been three important judgments on the decentralisation of competition enforcement (*VEBIC*, *Pfleiderer* and *Tele2 Polska*); an important judgment on the rejection of complaints (Swiss luxury watches—*CEAHR*); upholding of the *E.ON* breach of seal decision and fine; general rulings on margin squeezing (*TeliaSonera*) and the prohibition of internet distribution (*Pierre Fabre-Cosmétique*). Last but not least, two of the longest running cases, concerned with soda ash, have been annulled by the European Court of Justice (ECJ) (*Solvay*).

VEBIC[53]

In December 2010, the ECJ ruled on an interesting question from the Brussels Court of Appeal (*Hof van beroep te Brussel*) concerning procedural rights in national proceedings relating to the enforcement of the EU competition rules.

The case concerned proceedings by the Belgian Competition Authorities (BCA) against an association of Flemish artisan bakers, in which the BCA found that prices had been fixed. VEBIC was fined some €29,000. More specifically, when bread prices in Belgium were deregulated in July 2004, the BCA found that VEBIC had infringed the Belgian Competition Act by publishing and distributing to its members a price index for bread, together with cost structures. The Belgian Competition Authorities are in practice multi-faceted, with an investigating team called the *Auditoraat* within the Competition Council and a Competition Service in the Belgian Economic Ministry.

On appeal, the Brussels Court of Appeal was concerned that, according to the relevant Belgian procedural rules, neither the Competition Council nor the *Auditoraat*, which was responsible for the investigation, could appear as a defendant or respondent, so that it only had the appellant and the actual decision to work with.

The Brussels Court therefore asked the ECJ whether this was compatible with Regulation 1/2003, insofar as that Regulation puts the burden of proof on the enforcing authority (art.2), allows national competition authorities (NCAs) to make observations in national court proceedings (art.13(3)) and requires Member States to

51 Draft Paper, Pts 3 and 4.
52 Draft Paper, paras 106–108.
53 *VEBIC v Raad voor de Mededinging* (C-439/08) [2011] 4 C.M.L.R. 12.

ensure that the Regulation is effectively complied with (art.35(1)). It also queried if this situation was compatible with the fundamental rights of the defence (here the BCA's rights).

The first issue was whether the questions were admissible if only Belgian competition law had been applied. The ECJ said yes, noting that whether to refer a question was for the national court to decide and the Brussels court clearly considered that the practices concerned could affect trade between Member States and therefore the practices might fall within art.101 TFEU.

On the main issue the ECJ held that neither arts 2 nor 15 of Regulation 1/2003 dealt with whether the NCA had a procedural right to appear as a defendant or respondent in appeals on its own decisions. However, art.35(1) was relevant because it requires that the procedural rules of domestic legal orders for proceedings against NCA decisions must not jeopardise the objective of ensuring that arts 101 and 102 TFEU are effectively applied.[54]

The ECJ noted that if the NCA is not given rights as a party to proceedings and cannot defend its decisions taken in the general interest "there is a risk that the [appeal] Court might be wholly captive to the pleas in law and arguments put forward by the undertakings bringing the proceedings". The very existence of such a risk was likely to compromise the exercise of the specific obligation on NCAs under the Regulation to ensure effective application of arts 101 TFEU and 102 TFEU.[55] An NCA's obligation to ensure that the EU competition rules are applied effectively therefore requires that the authority should be entitled to participate as a defendant or respondent in appeal proceedings against its decision.

The court went on to say that it was for the NCAs to gauge the extent to which their intervention is necessary and useful for the effective application of EU competition law. However, if these authorities were "almost as a matter of course, not to enter an appearance, the effectiveness of Articles 101 TFEU and 102 TFEU would be jeopardised".[56]

The NCAs under art.35(1) could include courts. It was for the Member States to decide in accordance with the principle of procedural autonomy (and in the absence of EU rules on the point) which NCA bodies should participate "while at the same time ensuring that fundamental rights are observed and that EU Competition Law is fully effective".[57]

So art.35(1) of Regulation 1/2003 precluded national rules which did not allow a NCA to participate as defendant or respondent in proceedings against its decisions (involving EU competition law).[58]

Insofar as this appears to materially change national procedural law, unsurprisingly this case has been the subject of widespread comment already.

Pfleiderer[59]

In June 2011, the ECJ made an important preliminary ruling on the question of access to leniency submissions, in the context of follow-on damages claims for infringement of the EU competition rules.

The reference was made in the context of proceedings before the German courts between Pfleiderer and the *Bundeskartellamt* (BKA) concerning an application for access to the BKA's file in the German decor paper cartel case. Pfleiderer is a customer of the companies concerned.

More specifically, in January 2008, the BKA, acting pursuant to art.81 EC (now art.101 TFEU) imposed fines totalling €62 million on the three largest European producers of decor paper (special paper for surface treatment of engineered wood) and on five individuals personally for price-fixing agreements and agreements on capacity closure. Those decisions were based, inter alia, on information and documents which the BKA had received in the context of its German leniency programme. The companies concerned did not appeal and the decisions imposing the fines became final.

Pfleiderer then submitted an application to the BKA seeking access to the file (which in German law meant the right of a lawyer to inspect the file). Pfleiderer stated that it had purchased goods worth more than €60 million from the companies concerned. The BKA replied by sending three decisions imposing fines on the companies concerned, from which identifying information had been removed and a list of the evidence recorded as having been obtained during the search.

Pfleiderer then sent a second letter to the BKA expressly requesting access to all the material in the file, including the documents relating to the leniency applications. The BKA partly rejected that application and restricted access to the file to a version from which confidential business information and internal documents had been removed.

Pfleiderer then brought an action before the *Amtsgericht* Bonn challenging that decision. In February 2009, the court made a decision whereby it ordered the BKA to grant Pfleiderer access to the file, in accordance with the relevant national provisions. The BKA objected and the court then stayed enforcement and made the reference to the ECJ.

The *Amtsgericht* asked whether the provisions of EU competition law in particular arts 11 and 12 of Regulation 1/2003 and the second paragraph of art.10 EC (now art.4(3) of the Treaty on the European Union, TEU), in conjunction with art.3(1)(g) EC (now replaced, in substance, by arts 3 to 6 TFEU) were to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil law claims, be given access to leniency applications or to information

[54] *VEBIC* [2011] 4 C.M.L.R. 12 at [57].
[55] *VEBIC* [2011] 4 C.M.L.R. 12 at [58].
[56] *VEBIC* [2011] 4 C.M.L.R. 12 at [60]–[61].
[57] *VEBIC* [2011] 4 C.M.L.R. 12 at [63].
[58] *VEBIC* [2011] 4 C.M.L.R. 12 at [64].
[59] *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011] 5 C.M.L.R. 7. With thanks to Katarzyna Bojaroję for her assistance with this section.

voluntarily submitted by leniency applicants which a NCA has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are intended to enforce art.81 EC (now art.101 TFEU).[60]

(It will be recalled that art.11 of Regulation 1/2003 provides for co-operation between the EC and the competition authorities of the Member States, including the transmission of the most important documents in its file. Further, art.12 of that Regulation provides that such authorities have the power to provide one another with any matter of fact or law, including confidential information. Competition authorities may include courts.)

In short, the ECJ said "no". The EU provisions concerned did not *preclude* such access, but it was for national courts to assess whether such disclosure was necessary and proportionate to protect a claimant's right to damages, given the public interest in enforcement based on such leniency statements.

More specifically: first, the ECJ recalled that the competition authorities of the Member States and their courts are required to ensure that the EU competition rules are applied effectively in the general interest (referring to *VEBIC*).[61]

Secondly, the court noted that neither the provisions of the EU Treaty, nor Regulation 1/2003 lay down common rules on leniency or common rules on the right of access to documents relating to a leniency procedure. Moreover, the court stated that EC Notices are not binding on the courts of Member States. Similarly, the ECN Model Leniency programme has no binding effect on the courts of the Member States. In the absence of binding EU Regulation, it was therefore for Member States to establish and apply national rules on the access to leniency documents.[62]

Thirdly, the ECJ emphasised, however, that Member States must exercise their competence in this area in accordance with EU law and ensure that the rules which they establish or apply do not render the implementation of EU law impossible or excessively difficult. Specifically, in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardise the effective application of EU competition law.[63]

Fourthly, the court acknowledged that leniency programmes are useful tools to uncover and bring to an end competition law infringements and that their effectiveness could be compromised if leniency documents were disclosed to private damages claimants.[64] Further, that the view could reasonably be taken that the possibility of such disclosure would deter a person involved in a competition infringement from seeking leniency, particularly if that information might then be exchanged with other competition authorities.

Fifthly, the court noted, however, that an individual has the right to claim damages for loss caused to him by anti-competitive conduct (referring to *Courage Ltd v Crehan* and *Manfredi*).[65] According to the court, the existence of such a right also strengthens the working of the EU competition rules and has a deterrent effect on potential infringers so such actions are also important to the maintenance of effective competition in the European Union.[66]

Sixthly, the court noted that, in considering access to leniency documents, the applicable national rules must not be less favourable than those governing similar domestic claims; and that they cannot operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation.

Finally, the court held that it is necessary to weigh the interests in favour of disclosure of the information against those in favour of protection of such information. This had to be done by national courts on a case-by-case basis, according to national law and taking into account all the circumstances.[67]

This was an immediately controversial ruling, mainly because:

- some hoped for a strong ruling generally protecting leniency document disclosure;
- others hoped for the opposite, given that the relevant German proceedings were over when Pfleiderer made its application;
- some argued that the court should have gone further and given more guidance to the national courts (as occurred in some earlier cases like *Delimitis*,[68] concerning the interplay of EC proceedings and national court cases);
- many are concerned about the potential adverse effects on existing immunity/leniency applicants, who will have gone to the competition authorities relying on legitimate expectations of non-disclosure of their leniency materials, based on competition authority notices or other statements; and
- many (especially competition authorities) are concerned about the potential adverse effects on potential applicants who may be deterred in future because what they say seeking leniency will be perceived as more

[60] *Pfleiderer* [2011] 5 C.M.L.R. 7 at [18].
[61] *Pfleiderer* [2011] 5 C.M.L.R. 7 at [19].
[62] *Pfleiderer* [2011] 5 C.M.L.R. 7 at [20]–[23].
[63] *Pfleiderer* [2011] 5 C.M.L.R. 7 at [24].
[64] *Pfleiderer* [2011] 5 C.M.L.R. 7 at [25]–[26].
[65] *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297; [2001] 5 C.M.L.R. 28; *Manfredi*, Joined cases (C-295/04-C298/04) [2006] E.C.R. I-6619, [2006) 5 C.M.L.R. 17.
[66] *Pfleiderer* [2011] 5 C.M.L.R. 7 at [28]–[29].
[67] *Pfleiderer* [2011] 5 C.M.L.R. 7 at [30]–[32].
[68] *Stergios Delimitis v Henninger Brau* (C-234/89) [1991] E.C.R. I-935; [1992] 5 C.M.L.R. 210.

> accessible and used against them in particular (as opposed to other infringing parties) in follow-on actions.

To add spice to matters the judgment was also immediately used in the *Switchgear* damages case before the English courts to ask a court to order disclosure of other leniency statements.[69]

The judgment also appears to have caught some by surprise, insofar as Advocate General (A.G.) Mazák had taken a different line, proposing a distinction between two types of documents: those prepared specifically for leniency and those which were pre-existing documents given to the competition authorities. The A.G. would have denied access to the former, but allowed release of the latter.[70] Moreover A.G. Mazák had emphasised, in a detailed and interesting Opinion, that while there is no de jure hierarchy between public and private enforcement, in his view public enforcement is of far greater importance than private actions in ensuring compliance.

Further, importantly, he stressed that it is the public cartel decisions which in fact allow private parties to bring damages claims in follow-on actions (there being few standalone actions and many more cartel cases since immunity/leniency incentives were introduced). In short, he suggested that making such statements accessible may be counter-productive to damages claims overall and, at least for the moment, the balance should be in favour of supporting the public procedure.

Various actions and issues arise now:

First, one would expect the EC to be active in national interventions, *amicus curiae* briefs on these issues. Already the EC has suggested that it would oppose similar applications for its EC file and that it considers that this ruling concerns German procedural law alone.

Secondly, it will be interesting to see if the EC and/or national governments now put forward legislation, focusing on the ECJ's reference to the absence of binding regulation on the issue.

Thirdly, a bigger and more complex issue is whether the ECJ's judgment may lead the EC to think that its leniency notices, which provide legitimate expectations as against the EC, but are not generally binding, should be turned into EC Regulations.

Fourthly, in practice one would expect further argument in follow-on cases on what is "practically impossible or excessively difficult" in the circumstances. This is really the core issue now. One may think that, even if a national system does not provide for general discovery, it may still provide for specific discovery of pre-existing documents and that a claimant could bring its case using that and the non-confidential version of a decision. That may well be enough, without actual leniency statement disclosure. It is also apparent from the phrasing of the test "practically impossible or excessively difficult" that a very high degree of difficulty is required before any such disclosure should be ordered. Simply put, that it would be easier for the claimant to bring its case, or that it might be more burdensome to have to go through a specific discovery process, should not be enough.

Fifthly, one would expect further references to the ECJ on the proportionality of disclosure issue, because these are important EU rights balancing questions, even if the decisions also turn on national procedural rules and case circumstances.

Sixthly, overall one would expect a lot of attention to A.G. Mazák's Opinion because, while the court may have felt the need to give a more restrained answer, he was able to be more direct and was clearly convinced of the need to protect leniency materials. He said:

> "In my view, the disclosure to civil litigants of the contents of voluntary self-incriminating statements made by leniency applicants, in the course of a leniency procedure and for the purpose of that procedure, in which the applicants effectively admit and describe to a competition authority their participation in an infringement of Article 101 TFEU, could substantially reduce the attractiveness and thus the effectiveness of a national competition authority's leniency programme. *This in turn could undermine the effective enforcement by the national competition authority of Article 101 TFEU and ultimately private litigants' possibility of obtaining an effective remedy. Thus, while the denial of such access may create obstacles to or hinder to some extent an allegedly injured party's fundamental right to an effective remedy, I consider that the interference with that right is justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities and indeed private interests in detecting and punishing cartels*."[71] (Emphasis added.)

This is important, insofar as it emphasises how protecting public enforcement is also in the private interest, since in practice it is often the basis of the subsequent private claim and that the "fundamental right" to a remedy is not an absolute one, but may be limited in appropriate circumstances.

Finally, there is a clear issue of legal certainty here. In other words, if different courts in different jurisdictions decide different ways, then there is no systematic protection for EU leniency materials, which may undermine EU leniency and anti-cartel enforcement as a whole.

[69] See MLex, June 15, 2011.
[70] *Pfleiderer* [2011] 5 C.M.L.R. 7, A.G. Mazák's Opinion, December 16, 2010 at [40]–[47].
[71] *Pfleiderer* [2011] 5 C.M.L.R. 7, A.G. Mazák's Opinion at [44].

Tele2 Polska[72]

In May 2011, the ECJ gave a preliminary ruling on the interpretation of art.5 of Regulation 1/2003. The reference was made in proceedings between the Polish Competition Authority (PCA) (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*) and Tele2 Polska, now Netia, concerning a decision taken by the PCA pursuant to art.82 EC (now art.102 TFEU).

The issue related to the manner in which a NCA can bring to an end an administrative procedure where, in applying EU competition law in parallel with national law, it finds that the practice does not infringe the prohibition of abuse of a dominant position under art.102 TFEU.

The problem arose in a procedure against Telekomunikacja Polska (TP) which was suspected of having abused a dominant position under both Polish and EU competition law. At the end of the procedure the PCA found that the conduct did not constitute an abuse and adopted a decision under national law finding that the undertaking had not acted in restraint of competition, whereas under art.102 TFEU the PCA held that there were no grounds for action on its part.

Tele2 Polska, a competitor of TP, challenged that decision, stating that Polish law required the NCA to adopt a decision of a declaratory nature to the effect that there was no restrictive practice under art.102 TFEU, since it had adopted a decision to that effect under national law (presumably so that it could then be challenged).

On appeal, the Supreme Court of Poland asked the ECJ whether EU law precludes an NCA, where it finds that there has been no abuse on the basis of its national law, from taking a decision stating that there has been no breach of the EU provisions. Further, whether art.5 of Regulation 1/2003 constitutes a direct legal basis for an NCA, precluding application of a national law.

It may be recalled that art.5 of Regulation 1/2003 specifies the powers of NCAs, stating that where a NCA applies EU competition law, it may require that an infringement be brought to an end, order interim measures, accept commitments, or impose fines, periodic penalty payments or any other penalty provided for in its national law. Further, where on the basis of the information in its possession the conditions for prohibitions are not met, an NCA may decide that there are no grounds for action on its part.

Regarding the first question, on review of the text of art.5, the ECJ indicates that the power of NCAs in the situation here is limited to the adoption of a decision stating that there are no grounds for action.[73] Moreover, the court noted that the limitation of the power of NCAs is corroborated by the way that the EC has power, under art.10 of the Regulation, to find that arts 101 or 102 TFEU are not applicable to a given practice or agreement.[74]

Recital 14 in the Preamble to the Regulation states that the EC may adopt such a decision of a declaratory nature only in "exceptional cases", with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case law and administrative practice.[75]

The court further observed that to allow NCAs to take decisions stating that there has been no breach of the EU rules on abuse of a dominant position would call into question the system of co-operation established by Regulation 1/2003 and would undermine the power of the EC.[76] Such a negative decision on the merits would risk undermining the uniform application of the competition rules, since it might prevent the EC from finding subsequently that the practice in question amounts to a breach of those rules.[77]

Regarding the second question, the ECJ stated that art.5 of Regulation 1/2003 is directly applicable in all Member States by virtue of art.288 TFEU. Moreover, the article precludes the application of a rule of national law which would require a procedure relating to the application of art.102 TFEU to be brought to an end by a decision stating that there has been no breach of that article.[78] (As Polish law states as regards Polish competition law.) The ECJ recalled that it is only where EU law does not lay down a specific rule that an NCA may apply its national rules.[79]

Box 4

General cases

- Swiss luxury watches—*CEAHR*
  - — GC detailed review of EC rejection of a complaint (proceedings now opened)
  - — Aftermarket not shown to be part of primary market
  - — EC has to take account of European case law (*Hilti*)
  - — Cannot assess disturbance on the market without defining it
- *E.ON*
  - — GC upheld proportionality of €38 million fine
  - — Breach of seal is the infringement
  - — Even if not deliberate, negligence if not protected
- *TeliaSonera*
  - — Comprehensive summary of margin squeezing in EU competition law
  - — Unfair pricing abuse "in itself"
- *Pierre Fabre Dermo-Cosmétique*
  - — A ban on internet sales is a restriction by object, unless "objectively justified"!
- *Solvay*

[72] *Prezes Urzdu Ochrony Konkurencji i Konsumentów v Tele2 Polska* (C-375/09) judgment of May 3, 2011. With thanks to Katarzyna Bojarojċ for her assistance with this section.
[73] *Tele2 Polska*, judgment of May 3, 2011 at [21]–[23].
[74] *Tele2 Polska*, judgment of May 3, 2011 at [24].
[75] *Tele2 Polska*, judgment of May 3, 2011 at [25].
[76] *Tele2 Polska*, judgment of May 3, 2011 at [27].
[77] *Tele2 Polska*, judgment of May 3, 2011 at [28].
[78] *Tele2 Polska*, judgment of May 3, 2011 at [34].
[79] *Tele2 Polska*, judgment of May 3, 2011 at [33].

— Defence rights upheld by ECJ
— A case going back to 1990 finally ends?!
— Loss of files and no new access to file/hearing when related case annulled for a similar lack of access = unlawful
— A.G. Kokott also proposed that the issue of excessiveness of duration of proceedings should be assessed as a whole, not just looking at it stage by stage (and a 50 per cent fine reduction).

Swiss luxury watches—CEAHR[80]

In December 2010, the General Court (GC) gave an interesting and important judgment in a case concerning an action by an association representing independent watch repairers against the EC's rejection of a complaint in 2008. The complaint alleged that Swiss luxury watch manufacturers had infringed arts 81 and 82 EC by their refusal to continue to supply spare parts to independent watch repairers.

The GC annulled the EC's decision.

The EC's position was that the complaint lacked sufficient Community interest, given that the market concerned was of limited size and that the practices might be covered by the Vertical Restraints Block Exemption (VRBE). Further, that there was no abuse of dominant position because the primary product market (for the watches concerned) was not distinct from spare parts supply and repair and maintenance, so the watch manufacturers were not dominant on an aftermarket for their products. The EC also found that the (watch) product market was competitive. In any event, the EC considered that NCAs and national courts were well placed to deal with the case.

The association's position was that: the issue concerned the elimination of a profession of craftsmen across 27 Member States; the case involved collusion, insofar as all Swiss manufacturers had ceased supply of independent watch repairers over a limited period of time; and that the relevant aftermarkets were brand-specific and separate to the primary product supply markets, meaning that the VRBE did not apply and that the suppliers were dominant. The EC had therefore failed to assess the Community interest correctly.

The GC essentially agreed with the association's appeal, save that it found no evidence of collusion. (It was quite possible that one supplier had changed its supply practices so as not to supply independent watch repairers and others had followed independently over what was quite a long period of time.)

First, the GC noted that the EC had discretion in complex economic assessments and that, in such cases, its review was limited to reviewing for manifest error. However, the court then stressed that on the case law the EC still has to consider all relevant matters of law and fact and proceeded to look at these closely.[81]

Secondly, the GC essentially rejected the EC's position. Above all, the EC's view of the relevant market as a combined one (of watches with aftermarket) and essential finding that, because the primary (watch) market was competitive, the secondary aftermarket had to be.

The court also considered that NCAs and national courts were not well placed to deal with case, since the issue covered at least five to six Member States; if not the whole EU of 27 Member States. The court also stressed that the EC could not assess the amount of disturbance on the market (to assess whether it should intervene or not), without defining the market correctly.

Interestingly, the GC considered the primary/secondary markets section in the EU Relevant Market Notice (and noted that there were Swiss and Dutch Competition Authority positions that aftermarkets in a case like this were brand-specific).[82]

The court found that the EC had not shown that a consumer could switch to spare parts of another manufacturer to avoid an increase in price of spare parts,[83] or that a consumer could avoid price increases for spare parts by switching to another primary product. The court also noted that spare parts costs were very small in comparison to the initial cost of the watch.

The court rejected the EC's suggested possibility of selling a watch second-hand and buying another as "wholly implausible", because before doing so a watch would need to be repaired first![84] Further, it had not been shown that a sufficient number of consumers would switch to another primary product to render a price increase unprofitable. The court held that the mere possibility of switching to another brand is not enough.[85]

Further, the court noted that on the case law (*Hilti*[86]), if some operators are only active in the aftermarket, that is a strong indication of a specific market.[87] The EC could not disregard this and the fact that the independent watch repairers are not on the watch market.[88]

The court noted therefore that if the relevant market was brand-specific, the EC was not entitled to consider that the practices concerned were covered by the VRBE. If markets were brand-specific, the EC had also not shown that the companies' market shares were less than 30 per cent, so coming within the VRBE. Equally, a possible abuse of dominant position could not be ruled out on such a revised market definition.

[80] *CEAHR v Commission* (T-427/08) [2011] 4 C.M.L.R. 14.
[81] *CEAHR* [2011] 4 C.M.L.R. 14 at [26]–[28] and [65]–[66].
[82] *CEAHR* [2011] 4 C.M.L.R. 14 at [68] et seq. esp. [88]; [1997] OJ C372/5.
[83] *CEAHR* [2011] 4 C.M.L.R. 14 at [89].
[84] *CEAHR* [2011] 4 C.M.L.R. 14 at [96] and [102].
[85] *CEAHR* [2011] 4 C.M.L.R. 14 at [105]–[107].
[86] *Hilti AG v Commission* (T-30/89) [1991] E.C.R. II-1439; [1992] 4 C.M.L.R. 16.
[87] *CEAHR* [2011] 4 C.M.L.R. 14 at [108].
[88] *CEAHR* [2011] 4 C.M.L.R. 14 at [113]–[114].

This is an interesting judgment, which likely will have ramifications beyond luxury watches. In August 2011 the EC announced that it had opened an investigation into the case.[89]

E.ON[90]

In December 2010, the GC upheld the EC's decision, fining E.ON Energie €38 million for breaking a seal during a "dawn raid" investigation. It will be recalled that this was very controversial, if only because of the amount of the fine for a procedural infringement.

On appeal, E.ON claimed that: the EC had not sufficiently proven the infringement because there were a number of alternative explanations which the EC did not rebut (e.g. vibrations caused by a nearby door, possible effects of cleaning products, the age of seal, high humidity level, etc); the method for the setting the fine was not sufficiently reasoned; and the amount of the fine was disproportionate.

The GC disagreed and upheld the EC's approach. Notably, the court held that the EC had to prove that the seal was broken, not that the door concerned had been opened in fact.[91] The court also referred to the fact that E.ON's representative had signed the record of sealing to reject the claim that the seal had not been properly affixed.[92]

The court held that, even if E.ON had successfully demonstrated that the breach of the seal was caused by vibrations or by a cleaner, E.ON would still have been liable as it was under an obligation to take all necessary measures to ensure that the personnel were informed of the seal.[93] So the court considered that the EC was right to consider that, at the very least, the seal had been negligently broken by E.ON.

The court also considered that the EC had sufficiently reasoned the method for setting the fine.[94] The court noted that the usual Fining Guidelines were not applicable. The EC was therefore not obliged to set a basic amount and subsequently increase or decrease the fine in case of aggravating/mitigating circumstances. Nor did the court consider that the fine was disproportionate, given the serious nature of the infringement, the size of the company and the need to ensure a sufficiently dissuasive effect.[95]

All practically very important. It is understood that some firms are now placing security guards outside sealed rooms overnight! It is also worth noting that the fine here appears to have been set by reference to, and imposed on, the company with responsibility for the premises, not the ultimate parent.

TeliaSonera[96]

In February 2011, the ECJ gave an important judgment on margin squeezing, on a preliminary reference from the Stockholm District Court (*Stockholms tingratt*) in Sweden. The reference arose in the context of proceedings by the Swedish Competition Authority (the SCA) against TeliaSonera for breach of art.82 EC (now art.102 TFEU) and national competition rules, concerning ADSL broadband supply between 2000 and 2003.

The SCA considered that there was unlawful margin squeezing insofar as there was an insufficient spread between TeliaSonera's wholesale ADSL supply price and its end-user supply price to cover TeliaSonera's own distribution costs.

The District Court referred some ten questions on various aspects of margin squeezing,[97] which resulted in a wide-ranging judgment. The main findings are as follows:

First, the court recalled that margin squeezing is a form of unfair pricing, which is "in itself" capable of constituting an abuse of art.102 TFEU. It occurs where the spread between the wholesale price charged by a dominant firm to its downstream rivals on an upstream wholesale market and the retail price charged by the dominant firm in competition with its rivals is either negative or insufficient to cover the dominant firm's costs of supply to retail end-users, so that such a spread does not allow a competitor which is as efficient as the dominant firm to compete for those retail end-users. In such circumstances, equally efficient competitors may be able to compete with the dominant firm only at a loss, or at artificially reduced levels of profitability.[98]

Secondly, the court recalled that "since the unfairness is linked to the very existence of the margin squeeze and not its precise spread", it is not necessary to show that the wholesale prices are excessive or that the retail prices are predatory in nature.[99] The court also indicated that for margin squeezing there is no requirement to show that the dominant firm would recoup any losses it would make (as already indicated as regards predatory pricing); the point being that margin squeezing is about a spread in price, not necessarily loss-making prices.[100]

Thirdly, the court states that, in order to assess the lawfulness of the pricing policies of a dominant firm, as a general rule, account should be taken of the costs of the

[89] IP/11/952, August 5, 2011.
[90] *E.ON Energie v Commission* (T-141/08), judgment of December 15, 2010.
[91] *E.ON*, judgment of December 15, 2010 at [85].
[92] *E.ON*, judgment of December 15, 2010 at [104] and [169].
[93] *E.ON*, judgment of December 15, 2010 at [208] and [216].
[94] *E.ON*, judgment of December 15, 2010 at [28].
[95] *E.ON*, judgment of December 15, 2010 at [294].
[96] *Konkurrensverket v TeliaSonera* (C-52/09) [2011] 4 C.M.L.R. 18
[97] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [12] and [19].
[98] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [25] and [31]–[33].
[99] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [31]–[34] and [98].
[100] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [98]–[103].

dominant firm and its strategy. If the dominant firm could only offer retail services at a loss, when looking at its own costs, that would be indicative of unlawful exclusionary conduct. Using the costs of the dominant firm conforms to the general principle of legal certainty, because it allows the dominant firm to determine whether a competitor as efficient as itself would suffer from squeeze and, while a dominant firm knows its own costs, it does not as a general rule know those of its competitors.[101]

However, the court notes that the costs and prices of competitors may be relevant in some circumstances.[102] Notably:

- where the cost structure of the dominant firm cannot be precisely identified for objective reasons;
- where the wholesale product supplied involves the mere use of an infrastructure which has been written off already, so that access to that infrastructure no longer represents a cost for the dominant undertaking, which is economically comparable to the cost which its competitors have to incur to have access to it; and
- where "the particular market conditions dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it".

Fourthly, the court indicated that the fact that TeliaSonera was not under a regulatory obligation to supply (as had occurred in other margin squeezing cases) did not mean that there was no abuse.[103] So margin squeezing is not just something for (partly) regulated markets.

Fifthly, the court stated that abusive margin squeezing was not limited to situations where the terms offered were so disadvantageous as to amount to a refusal to supply. The strict conditions of *Bronner*[104] in order to establish an abusive refusal to supply do not necessarily apply when assessing the abusive nature of conduct, which consists in the supply of goods or services on conditions which are disadvantageous, or for which there might be no purchaser.[105] Such conduct may, of itself, constitute an independent form of abuse distinct from that of refusal to supply.

The court indicated that it is also irrelevant to the finding of abuse that the affected competitor is an existing or new customer,[106] the point being that margin squeezing may be about driving out existing competitors, but also about making market entry more difficult.

Sixthly, in response to the District Court's question as to whether the abusive nature of the pricing practice depended on actual effect, the court essentially reiterated the position it had taken in *Deutsche Telekom*.[107] Thus the court noted that it had "ruled out the possibility that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors can constitute an abuse *without it being necessary to demonstrate an anti-competitive effect*" (emphasis added). Such an effect must relate to the possible barriers which such a pricing practice may create to growth on the retail market.

However, it followed that:

> "[I]n order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, *but the effect does not necessarily have to be concrete and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors* who are at least as efficient as the dominant undertaking." (Emphasis added.)

Further, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze with the purpose of driving competitors from the relevant market, the fact that the desired result, the exclusion of those competitors, is not ultimately achieved, does not alter its categorisation as an abuse. However, in the absence of any effect on the competitive situation of competitors, so that market penetration is not made any more difficult by the practice, a margin squeeze practice could not be classified as an exclusionary practice and abusive.

Seventhly, in response to the District Court's question whether the wholesale product supplied had to be indispensable for entry to the retail market, the court stated that this may be relevant when assessing the effects of the margin squeeze.[108] Where access to a wholesale product is indispensable for retail competition, the "at least potentially anti-competitive effect of a margin squeeze is probable"; but where access to a product is not indispensable, it must be verified whether the margin squeeze may not be capable of having an anti-competitive effect—even a potential one.[109]

[101] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [41]–[44], applying *Deutsche Telekom AG v European Commission* (C-280/08 P) [2010] 5 C.M.L.R. 27, summarised in John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2009-2010 (Part 1)", [2011] I.C.C.L.R. 67, 86–87.
[102] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [45].
[103] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [52] and [53].
[104] *Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag* (C-7/97) [1998] E.C.R. I-7791; [1999] 4 C.M.L.R. 112.
[105] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [55]–[56].
[106] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [92]–[95].
[107] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [61]–[66].
[108] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [69].
[109] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [70]–[72].

Eighthly, the court added that it was necessary to look at the level of margin squeeze on competitors. If the margin is negative (i.e. the retail supply price is lower than the wholesale price), a potentially exclusionary effect is probable because competitors would be compelled to sell at a loss. However, if the margin remained positive, then it had to be shown that the effect of the pricing practice (e.g. through reduced profitability) would be such as to make it more difficult for competitors to trade. A company engaged in a margin squeeze could also seek to show that there is an economic justification for it in terms of efficiency, which would also benefit consumers.[110]

Ninthly, the court held that margin squeezing does not require any particular degree of dominance. Article 102 TFEU does not envisage "any variation in form or degree in the concept of a dominant position". The court accepted that it had itself sometimes based its assessments on the fact that a company was super-dominant, but:

> "[T]he degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned, rather than in relation to the question of whether the abuse as such exists."[111]

Tenthly, the court also held that margin squeezing does not require "double dominance". The firm dominant in the upstream market does not also have to be dominant in the retail market. The court held that conduct may be abusive even if it has effects on a non-dominated downstream market where the dominated and non-dominated markets are closely linked (applying *Tetra Pak*[112]). The court added that:

> "[I]n the absence of any other economic and objective justification, such conduct can be explained only by the dominant undertaking's intention to prevent the development of competition in the downstream market and to strengthen its position, or even to acquire a dominant position in that market, by using means other than reliance on its own merits."[113]

Finally, the District Court asked if it made a difference that markets were growing fast and involved new technology requiring high levels of investment.

The court says essentially "no". Article 102 TFEU does not distinguish according to the degree of market maturity. In rapidly growing markets, there may be an inclination for an operator with a dominant position on a market to operate on a neighbouring market at a loss or at lower levels of profitability. Precisely in such circumstances margin squeezing may prevent the development of normal conditions of competition.

In such markets, art.102 TFEU also requires action to be taken as quickly as possible to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighbouring market. In other words, it requires action before the anti-competitive effects of that strategy are realised.[114]

However, the investments of a dominant firm were relevant to assessing a dominant firm's costs (as noted above). Otherwise, the court refers to competitors who are "currently or potentially, equally efficient", suggesting that in emerging markets the issue that competitors may only become as efficient as a dominant firm over time as they achieve critical mass, may be a relevant factor.

Pierre Fabre Dermo-Cosmétique[115]

In October 2011, the ECJ ruled on a reference for a preliminary ruling by the Paris Court of Appeal as to whether a ban on internet sales in a selective distribution system was unlawful.

The case arose from a decision of the French Competition Authority (FCA), which had ruled that a ban imposed by Pierre Fabre Dermo-Cosmétique (Pierre Fabre) on its distributors selling its cosmetics and personal care products via the internet was contrary to art.81 EC and the equivalent in the French Commercial Code.

Pierre Fabre has a selective distribution system for products under brands such as Klorane, Ducray, Galénic and Avène, which are sold mainly through pharmacists. Its distribution contracts provided that sales must be made exclusively in a physical space, in which a qualified pharmacist must be present, de facto excluding all forms of selling by internet. Pierre Fabre had a 20 per cent market share for the products concerned in 2007.

In its decision the FCA held that the old VRBE[116] did not apply because it considered that the ban on internet selling was a ban on active and passive sales. Further, the restriction requiring supply via pharmacists was not justified, since the products concerned were not medicines whose distribution was restricted. Pierre Fabre had not argued for individual exemption.

On appeal to the Paris Court of Appeal, that court asked questions to the ECJ interpreted by the court to be:

- Is such a ban on internet selling a restriction "by object"?

[110] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [73]–[77].
[111] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [80]–[82].
[112] *Tetra Pak International SA v Commission* (C-333/94 P) [1996] E.C.R. I-5951; [1997] 4 C.M.L.R. 662.
[113] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [84]–[88].
[114] *TeliaSonera* [2011] 4 C.M.L.R. 18 at [105]–[108].
[115] *Pierre Fabre Dermo-Cosmétique v Président de l'Autorité de la Concurrence, Ministre de l'Economie de l'Industrie et de l'Emploi* (C-439/09), judgment of October 13, 2011. Court Press Release 110/11 of the same date.
[116] Regulation No 2790/1999 [1999] OJ L336/21.

- Could a selective distribution system with such a clause benefit from Regulation 2790/1999 where it falls within (what is now) art.101(1) TFEU?
- If not, could the contract still benefit from individual exception under art.101(3) TFEU?

The court's answer to the first question was "yes", unless in the specific circumstances the clause could be shown to be objectively justified for the sale of the products concerned.[117] However, the court also noted that it had not accepted arguments relating to the need to provide individual advice to the customer and to ensure their protection, in the context of non-prescription medicines and contact lenses in order to justify a ban on internet sales.[118]

Further, the court held that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within art.101(1) TFEU.[119]

As regards whether the VRBE applied, the court held "no".[120] The court found that the contractual clause, de facto prohibiting internet marketing, at the least has as its objective the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.[121]

Pierre Fabre argued that the ban on internet sales was equivalent to a prohibition on operating out of an unauthorised establishment, which is allowed under the VRBE for selective distribution.[122] The court disagreed, finding that art.4(e) of the VRBE, by referring to "a place of establishment", concerns only outlets where direct sales take place.[123] The court noted moreover that since Pierre Fabre could argue the position for individual exception under art.101(3) TFEU, a broad interpretation to provisions which bring agreements or practices under the VRBE was not necessary.

The answer to the third question was that the ECJ did not have enough information to assess whether art.101(3) TFEU applied and that it was for the national courts to assess whether the conditions of that article applied.[124]

Solvay

In October 2011, the ECJ annulled the EC's decision in the now almost ancient *Solvay* cases and overturned the GC's judgment upholding those decisions.[125] The background to these cases was summarised last year.[126] It may be recalled that they are controversial on four main points:

- The cases started in 1990 and had still not been resolved in judicial review. (Solvay argued the right to have its case disposed of within a reasonable time.)
- The art.82 EC case is considered likely now to be out of line with the EC's more "modern approach".
- Although the EC admitted that it had mislaid certain "sub-files" "probably containing the replies to the requests for information made by other parties", controversially the GC had still upheld the EC's decision, finding no infringement of Solvay's fundamental right of access to file.
- When the European courts had annulled the first decisions in 1990 for lack of proper authentication, the EC had simply readopted the decision, without a new hearing and related access to file, even though in another related *Solvay* case, the relevant decision had been annulled for that lack of access to file. Solvay argued that this was contrary to its fundamental rights of defence.

It has been an interesting year. Faced with the claim of unreasonable time for proceedings (and a parallel application to the European Court of Human Rights), the ECJ appears to have pulled out all the stops to take a fast decision: Solvay's claims were filed in February 2010. There was a hearing in January 2011. A.G. Kokott gave her Opinion in April 2011[127] and judgment was in October 2011.

The A.G. considered that the EC's decision should be annulled. In the alternative, she considered that, when looking at the excessiveness of duration of proceedings, regard should be had not just to what was reasonable step-by-step at the different stages of the procedure, but also looking at the total, overall length. On that basis she suggested a 50 per cent fine reduction.[128]

In both cases the court found for Solvay on the fundamental defence rights points outlined above and annulled the EC's decisions.

In Case C-109/10, which concerned the art.82 EC case,[129] the ECJ first noted that the GC had found that:

[117] *Pierre Fabre*, judgment of October 13, 2011 at [41], [43] and [47].
[118] *Pierre Fabre*, judgment of October 13, 2011 at [44].
[119] *Pierre Fabre*, judgment of October 13, 2011 at [46].
[120] *Pierre Fabre*, judgment of October 13, 2011 at [59].
[121] *Pierre Fabre*, judgment of October 13, 2011 at [54].
[122] VRBE art.4(c).
[123] *Pierre Fabre*, judgment of October 13, 2011 at [56] and [58].
[124] *Pierre Fabre*, judgment of October 13, 2011 at [50]–[59].
[125] *Solvay v Commission* (C-109/10 P and C-110/10 P), judgments of October 25, 2011; Court Press Release 116/11 of the same date.
[126] John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2009-2010 (Part 1)", [2011] I.C.C.L.R. 67, 77–79.
[127] *Solvay*, Opinion of A.G. Kokott, April 14, 2011.
[128] See *Solvay*, judgments of October 25, 2011 at [243] and [335]–[357].
[129] *Solvay SA v Commission* (T-57/01) [2009] E.C.R. II-4621; [2009] 4 C.M.L.R. 1.

- despite the lack of access to the missing files, Solvay should have been aware of any exceptional circumstances which might be relevant to rebut a presumption of dominant position based on large market shares;
- any error on the EC's part as regards the definition of the geographic market "could not have had a decisive influence on the outcome";
- Solvay ought to have endeavoured to indicate to what extent other evidence might have cast doubt on the content of a certain alleged "secret protocol" in the case or, at the very least shed different light on it.[130]

The court noted:

> *"Such assertions ignore the inferences to be drawn from the loss of the files, in the circumstances, for Solvay's rights*. By reasoning in that way the [GC] takes as a basis assumptions not only as regards the content of the documents mislaid, but also as regards the knowledge which Solvay ought to have had of that content."[131] (Emphasis added.)

The court also emphasised the EC's account as to what was "probably" in the missing sub-files (noted above) and found that Solvay might have found evidence useful to its defence therein. Accordingly the GC had erred in law in requiring Solvay "to state the arguments which it would have raised had those documents been available to it—something which was materially impossible for it to know without access".[132]

The GC also emphasised that the issue here was not:

> "[A] few missing documents, the content of which could have been reconstructed from other sources, but of whole sub-files which were lost and which could have contained essential documents relevant to Solvay's defence."[133]

The GC had therefore erred in law in finding that Solvay's lack of access to all the documents in the investigation file had not prevented it from defending itself[134] and had "based its findings on a theory regarding the content of the missing documents which it was itself unable to test".[135]

Secondly, as regards the lack of a hearing before the readopted decision, the court also found for Solvay. Here the court noted that the EC's contested decision had been annulled for lack of proper authentication but was also affected by a defect before that procedural irregularity, lack of access to file, which had been the reason for annulment of another *Solvay* decision. The two decisions were linked, being the subject of the same SO.

As a result, the court found that the EC should have opened a new administrative proceeding, granting Solvay access to file before the readopted decision. By failing to take into account these specific circumstances, the GC wrongly found that it was unnecessary to hear Solvay.[136]

The court then chose to annul the EC's decision, rather than referring the case back to the GC.

In Case C-110/10 P, the issue was the EC's readopted decision finding an agreement on pricing between Solvay and CFK, contrary to art.81 EC, which the GC had also upheld.[137] Again the court focused on the issues of access to file and right to a hearing.

As regards the issue of access to file, the ECJ noted that the GC had found that, although Solvay did not have access to all the documents in the investigation file, that had not prevented it from defending itself against objections raised in the SO.[138]

This was, among other things, because the GC found that since Solvay had not challenged the existence of the agreement referred to by the EC, there was no reason to presume that it might have discovered documents casting doubt on the EC's findings in the missing files. However, the ECJ noted that Solvay *had* challenged that agreement in the EC proceedings, arguing that its actions were unilateral.[139]

This was significant because the loss of files and the fact that there was no list of their contents meant that Solvay *had* been unable to see whether the missing documents could have been useful for its defence.[140] Again the issue here was "whole sub-files" not just a few missing documents. The GC had therefore erred in law in finding that Solvay's rights of defence had not been infringed by the lack of access to all the documents in the investigation file.[141]

The court took the same position as in Case C-109/10 on the issue of no hearing before the readopted decision, linked to the issue of access to file. The GC had erred in accepting that readoption without Solvay having access to all the documents in particular, the exculpatory documents in the file, to see if they were useful to the defence.[142]

[130] *Solvay*, judgments of October 25, 2011 at [60].
[131] *Solvay*, judgments of October 25, 2011 at [61].
[132] *Solvay*, judgments of October 25, 2011 at [63].
[133] *Solvay*, judgments of October 25, 2011 at [64].
[134] *Solvay*, judgments of October 25, 2011 at [65].
[135] *Solvay*, judgments of October 25, 2011 at [65].
[136] *Solvay*, judgments of October 25, 2011 at [68]–[71].
[137] *Solvay* (T-58/01) [2009] E.C.R. II-4781; [2011] 4 C.M.L.R. 2.
[138] *Solvay*, judgments of October 25, 2011 at [53].
[139] *Solvay*, judgments of October 25, 2011 at [55]–[56].
[140] *Solvay*, judgments of October 25, 2011 at [59].
[141] *Solvay*, judgments of October 25, 2011 at [62].
[142] *Solvay*, judgments of October 25, 2011 at [65]–[68].

Others

In November 2010, the ECJ rejected an application by *Transportes Evaristo Molina*, against the CFI order rejecting its application to appeal the EC's decision in 2006 accepting commitments from Repsol concerning petrol station supply in Spain.[143]

In February 2011, the ECJ upheld the GC's judgment in the *Activision Blizzard Nintendo* case.[144] The GC had reduced the fine imposed by the EC to €500,000. Activision Blizzard had appealed that on the evidence there was no agreement contrary to the EU rules and inadequate statement of reasons.

In April 2011 the GC upheld the EC's 2007 decision in finding an infringement of art.101 TFEU by *Visa* by refusing to admit Morgan Stanley as a member without objective justification.[145]

In May 2011, the ECJ gave judgment in a case called *AG2R Prévoyance v Beaudout Père et Fils* on a preliminary ruling concerning whether the competition rules applied to a compulsory scheme for reimbursement of healthcare costs in the French traditional bakery sector.[146]

In May 2011, A.G. Mengozzi gave an interesting opinion in a preliminary ruling from a Danish court on the circumstances in which selective/individualised price reductions by a dominant company may be contrary to art.102 TFEU. The case is called *Post Danmark v Konkurrenceradet* and is in the context of bulk mail delivery.[147]

The Opinion is interesting because, apart from the possible issue of cross-subsidisation from a reserved monopoly, the A.G. emphasised that dominant companies should be able to compete on price[148] and a "selective" price should be assessed against the costs of the dominant company, as in the *Akzo* predatory pricing case.[149]

Cartel appeals

Box 5

Cartel appeals
• *Rubber chemicals*: *General Quimica* — A rebuttable presumption of parental subsidiary liability means that the relevant arguments raised must be examined • *Spanish raw tobacco* — A company is not required to contest the facts and law in a response to the SO or be prevented from raising such issues on appeal.

A great many cartel appeals came to judgment by the ECJ and the GC in 2011. These judgments are important. They show detailed judicial review on a number of core principles, such as burden of proof, evidence of duration, participation in a "single and continuous" infringement, the duty to state reasons, the parent/subsidiary presumption and recidivism. They also give clarification on the 2006 Fining Guidelines. Taken collectively, they add up to a very significant reduction in fines, some €947 million as of October 2011.

While it may be that some decisions will be retaken in the future, perhaps with similar fines and some annulments are within a group's fines, this is a significant outcome. It appears to reflect considerable attention to procedural defence rights and evidentiary issues. Notably, a number of presumptions have been clarified, in some ways arguably reducing their scope. For example, application of the presumption that if there is not much evidence of a cartel, gaps may be overlooked in the overall scheme, provided that there is enough circumstantial evidence (*Aalborg Portland*) and the need for a company to publicly distance itself from cartel activity, when withdrawing from it (again *Aalborg Portland* among others). The court is also consistently rejecting "evidence" outside the infringement period, unless its relevance to facts in the infringement period is established.

It may be that this is just the natural result of the judicial review process for these cases. Nevertheless the impression given is that stricter attitudes are prevailing, perhaps because of greater weight being given to the GC's role as the independent tribunal in the enforcement process.

Rubber chemicals[150]

In January 2011, the ECJ ruled on the Repsol Group's further appeal concerning the rubber chemicals cartel. It may be recalled that at the GC level this was already a leading case on the parent/subsidiary presumption. Factually the case is known for: (1) the way that two layers of parent were held liable; and (2) the fact that a parent had a seat on the board of its subsidiary was considered relevant to the parent's control of the latter.

On appeal to the ECJ the main points were as follows:

First, the ECJ upheld the GC's statements of the relevant law, but considered that, since the parent/subsidiary presumption was a *rebuttable* presumption (not an automatic presumption),[151] the GC had been wrong not to concretely examine the arguments raised by the Repsol Group to suggest that the parent

[143] *Transportes Evaristo Molina v Commission* (C-36/09 P), judgment of November 11, 2010.
[144] *Activision Blizzard Germany GmbH v Commission* (C-260/09P) [2011] 4 C.M.L.R. 17; Court Press Release 6/11, February 10, 2011.
[145] *Visa Europe Ltd v Commission* (T-461/07) [2011] 5 C.M.L.R. 3.
[146] *AG2R Prévoyance v Beaudout Père et Fils* (C-437/09) [2011] 4 C.M.L.R. 19.
[147] *Post Danmark v Konkurrenceradet* (C-209/10) Opinion of May 24, 2011.
[148] *Post Danmark*, Opinion of May 24, 2011 at [57] and [89].
[149] *Akzo Chemie BV v Commission* (C-62/86) [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215 at [95]–[98] and [108]–[110].
[150] *General Quimica SA v Commission* (C-90/09 P) [2011] 4 C.M.L.R. 13.
[151] *General Quimica* [2011] 4 C.M.L.R. 13 at [52].

companies exercised decisive influence over their subsidiary. Notably it was not enough to reject them by just referring to the case law on parent subsidiary liability.[152] The court annulled this part of the GC's judgment and then went on to rule on the issues itself. However, on considering the facts itself, the court still held that decisive influence had been shown.[153]

Secondly, the ECJ did not follow the GC's finding that an instruction by a parent to comply with EU competition law showed, in itself, that the parent exercised decisive influence over the subsidiary's activities. The instruction had been general, was not given exclusively to the infringing subsidiary and was given more than two and a half years after the alleged anti-competitive conduct had been brought to an end, so it did not show such influence by the parents.[154] Moreover, the GC had not set out its reasons for considering that instruction indicative of decisive influence, so that part of the GC's judgment was annulled.[155]

The conclusion was that the GC's judgment was partially set aside, but the ECJ itself dismissed the Repsol Group appeals and upheld the EC's decision.

Spanish raw tobacco

In February 2011, the GC ruled on an appeal by Cetarsa (*Compaňia española de tabaco en rama SA*) against the EC's decision in 2004, imposing a fine of €3.6 million on Cetarsa.[156] Overall the court rejected Cetarsa's arguments that its fine should have been lower but accepted one, resulting in a reduction of 10 per cent and an ultimate fine of €3.15 million.

It may be recalled that this case concerned buyers and sellers cartels for Spanish raw tobacco, which were held to have gone further than allowed in the specific regulatory context.

Given the size of the market and this regulatory context the EC reduced the fines on the producers greatly (taking only €8 million rather than €20 million as the starting amount for a "very serious" infringement; and reducing the basic amount of the fine by 40 per cent). However, on the suppliers' side the EC went even further and, in the circumstances, only imposed symbolic fines of €1,000. This, among other reasons, appears to have driven Cetarsa to appeal, with a full range of arguments as to why its fine should be reduced, as explained only being successful on one.

Two points are of particular interest:

First, on appeal Cetarsa argued that the facts concerned did not involve an appreciable restriction on trade between Member States. This led the EC to argue that Cetarsa's fine should be increased.[157] The court rejected Cetarsa's claims, but also made clear that Cetarsa was entitled to raise them on appeal and it saw no reason to increase Cetarsa's fine. Notably, no provision of EU law required the addressee of a Statement of Objections (SO) to contest the different elements of fact and law during the administrative procedure, at the risk of not being able to do so later on appeal to the courts.[158]

Secondly, the court disagreed with the EC's view that Cetarsa had contested the facts and should not have a 10 per cent reduction of fines on that basis (as allowed for under the 1998 Guidelines). Cetarsa was considered by the EC to have suggested that the two cartels, the buyers and suppliers, neutralised each other. The court disagreed on reviewing the passage of Cetarsa's reply to the SO to which the EC referred.[159]

In March 2011, the GC ruled on a parallel appeal by *World Wide Tobacco Espana* (WWTE).[160] Again the court rejected most of the arguments raised, which were directed at the level of fine imposed, but accepted one leading to a fine reduction of a further 10 per cent.

The main points of interest are as follows:

First, WWTE's appeal appears to have been driven in part by the fact that its fine was increased for deterrence, on the basis that it was a single undertaking with its parent Standard Commercial Tobacco, while some of the other producers which were also in large groups had not had similar increases. (The EC had stated it did not have evidence of the determining influence of the parents in those other cases.)

The court rejected this in part since a company is not entitled to invoke to its benefit an illegality as regards another company. This is noted here because it is a point which comes up often in practice.[161]

Secondly, as with the Cetarsa case, the court disagreed with the EC's assessment of WWTE's co-operation, in particular the EC's view that, while saying that it was not contesting the facts WWTE had suggested that the two cartels had neutralised each other. It appears that WWTE had suggested that the effects of the buyers' cartel had been, if not "neutralised", at least "minimised" by the producers' cartel. However, the court found that with such a discussion of the effects of the agreements in question, WWTE had not contested the actual existence of such agreements. As a result, the court reduced the fine on WWTE from €1.8 million to €1.58 million.[162]

[152] *General Quimica* [2011] 4 C.M.L.R. 13 at [75]–[80].
[153] *General Quimica* [2011] 4 C.M.L.R. 13 at [104]–[109].
[154] *General Quimica* [2011] 4 C.M.L.R. 13 at [19] and [101].
[155] *General Quimica* [2011] 4 C.M.L.R. 13 at [58]–[62].
[156] *Cetarsa v Commission* (T-33/05), judgment of February 3, 2011.
[157] *Cetarsa*, judgment of February 3, 2011 at [96].
[158] *Cetarsa*, judgment of February 3, 2011 at [127].
[159] *Cetarsa*, judgment of February 3, 2011 at [269]–[272].
[160] *World Wide Tobacco España v Commission* (T-37/05), judgment of March 8, 2011.
[161] *WWTE*, judgment of March 8, 2011 at [31]–[32], [98] and [112], [114].
[162] *WWTE*, judgment of March 8, 2011 at [193]–[198].

In October 2011, the court ruled on the appeals by *Agroexpansion* and *Alliance One*.[163] The GC reduced the fine on Agroexpansion, considering that it should have had a greater fine reduction for its co-operation.[164] As a result Agroexpansion's fine was reduced a further 5 per cent from €2.59 million to €2.43 million. Again this was because the court considered that the EC was wrong to find that Agroexpansion had contested the facts *if* it had commented on the "neutralising effect" of a suppliers' cartel with a buyers' cartel (which in fact was also not clear).

The court also held that Alliance One (formerly Dimon Inc) should not have been held jointly liable for Agroexpansion's fine for the period before November 1997, since it was only from then that it was a single "undertaking" with Agroexpansion.[165] Alliance's liability was therefore reduced to €2.18 million, reflecting the shorter duration and Agroexpansion's reduced fine.

Box 6

Switchgear

- Fine increases for being ringleaders varied according to duration/contribution
- Reductions of fines because full duration not shown (*Alstom*/*Areva*)
- Fines within a group have to be defined, as penalties are specific to the offender and the offence (*Siemens*/*VATech*/*Areva*)
- Finding of unwritten understanding not to enter European market upheld
- Fines on Mitsubishi Electric and Toshiba annulled, because set with a different reference year to European undertakings (not equal treatment)
- Liability of a Fuji company annulled for failure to state reasons finding that it managed the infringement (court raised this of own motion)
- Defence can raise new arguments and evidence on appeal; Commission cannot raise new grounds for liability in its pleadings, not already in its decision (*Fuji Electric*).

Gas insulated switchgear[166]

In March 2011, the GC issued a first set of judgments related to the EC's decision in 2007, imposing fines on Siemens, Alstom/Areva and various of their related companies for their participation in a cartel for gas insulated switchgear (GIS).

The main points are as follows:

First, the court reduced the fine on Alstom and companies in the Areva group since they had all been treated as ringleaders and had all been given a 30 per cent increase in the basic amount of their fines, whereas the court noted that they had been ringleaders for markedly different periods.[167] Notably, Siemens was European secretary for 11 years and five months; whereas one Areva subsidiary was found to have been involved in running the European secretariat for only four years and five months, the other subsidiary only for five months and Areva only four months.

Alstom's fine increase was therefore reduced to 35 per cent, that of an Areva subsidiary and other Areva companies to 20 per cent. However, the change by the GC, in its unlimited jurisdiction, was not just a pro rata one related to the time difference. The fine increase was still high because the period of leadership was considered to have played a decisive role in the continuation and functioning of the cartel.[168]

Secondly, the court also considered as regards certain Siemens and VA Tech group companies that the EC had made a mistake in finding an infringement on their part between April and June 2002,[169] insofar as the court considered that the EC had not sufficiently proved that those companies started to participate in the cartel again before July 2002.

Thirdly, the court considered various questions related to the liability of various subsidiaries in the Siemens, VA Tech and Areva groups, insofar as those companies had been sold and/or in terms of joint and several liability. Thus the court held that:

- Legal entities which participated in their own right in an infringement and which have been acquired subsequently by another company continue to bear responsibility for their unlawful conduct prior to their acquisition, where those companies have not purely and simply been absorbed by the acquiring undertaking, but have continued their activities as subsidiaries.
- In such a case, the acquiring undertaking may be held responsible only for the conduct of its subsidiary from its acquisition if the subsidiary continues the infringement and if the responsibility of the new parent company can be established.
- The same principle applies where prior to its acquisition, the company acquired participated in the infringement not independently, but as the subsidiary of another group.[170]
- Joint and several liability for payment of a fine covers only the period of the infringement during which the various companies formed an economic unit and therefore constituted an "undertaking".[171]

[163] *Agroexpansión v Commission* (T-38/05) and *Alliance One v Commission* (T-41/05), judgments of October 12, 2011.
[164] *Agroexpansión* (T-38/05), judgment of October 12, 2011 at [258]–[261] and [270].
[165] *Alliance One* (T-41/05) judgment of October 12, 2011 at [202].
[166] *Siemens* (T-110/07); *Areva and Others* (T-117/07 and T-121/07); *Siemens AG Osterreich and Others (T-122/07 to T-124/07)*; judgments of March 3, 2011; Court Press Release 15/11 of March 3, 2011.
[167] *Areva and Others*, judgment of March 3, 2011 at [302]–[307].
[168] *Areva and Others*, judgment of March 3, 2011 at [318] to [303].
[169] *Siemens AG Osterreich and Others*, judgment of March 3, 2011 at [65]–[72] and [82].
[170] *Siemens AG Osterreich and Others*, judgment of March 3, 2011 at [137]–[143].
[171] *Siemens AG Osterreich and Others*, judgment of March 3, 2011 at [149]–[152].

- It is for the EC to determine the amount which each company is to bear in relation to the other joint and several debtors for the unlawful conduct for a specific period following from the principle that penalties must be specific to the offender and to the offence concerned[172]; this should take into account the periods of joint responsibility of the companies concerned and, to the extent possible, the weighing of the individual shares of the joint liability of those companies.
- If the EC does not offer a specific indication in this regard, it must be considered that the EC attributes the infringement to them in equal measure.[173]

Applying that here, the court held that, by failing to establish the fines imposed in accordance with the duration of the participation of the various companies in the cartel within the same undertaking the EC infringed the principle that penalties must be specific to the offender and the offence.

The court therefore annulled and reset certain fines.[174] Otherwise, the court upheld the fine of €396.6 million on Siemens after a detailed review.

In July 2011, the GC ruled on the appeals by *Hitachi*, *Toshiba*, *Fuji Electric* and *Mitsubishi* which had been held to have participated in the GIS cartel.[175]

The main points are as follows:

The GC first confirmed that the alleged commitment of these Japanese undertakings not to enter the European market constituted an infringement of the EU competition rules.

Secondly, the court upheld the EC's decision after a detailed review, weighing the reliability and value of evidence that there was an unwritten understanding to this effect. The understanding was directly proved by the statements of several undertakings involved and the witness statements of the employees of one of those undertakings. The understanding was also indirectly proved through a notification and account "loading mechanism" for orders to be taken into the quota system.[176]

Thirdly, the court decided to annul the fines on Mitsubishi Electric and Toshiba of €118.6 million and €90.9 million respectively insofar as the EC did not use the same reference year as for the European undertakings.

The EC had reasoned that for most of the cartel these companies had participated individually. As a result, in setting the fines the EC took into account their sales for the year prior to their establishment of a joint venture (called TM T&D Corp). This was 2001. For the European undertakings the EC had taken 2003 as the reference year.

This was held to be contrary to the principle of equal treatment. The court considered that there were other methods which the EC could have used to achieve its objective without such unequal treatment.[177] Notably, the court considered that the EC could have taken as the starting amount the JV's fine, calculated by reference to its turnover in 2003 and divided it between Toshiba and Mitsubishi Electric in proportion to their GIS sales in the year prior to the creation of the JV, 2001.

Fourthly, Fuji Electric sought to rely on new evidence before the court, which the EC contested, because it had not been presented in the administrative proceedings. The court held that Fuji Electric could do so, since that was a necessary right for the defence.[178] The defence is *not* required to offer during the administrative proceedings all the material on which it may wish to rely on appeal.

Fifthly, when Fuji Electric argued that one of the Fuji entities held responsible for the infringement (Fuji Electric Systems—FES) should not have been held personally liable, the EC also argued that this was in admissible, since the argument had not been raised in response to the SO. The court again disagreed, noting that the right of appeal could not be so restricted and that, in the absence of a specific legal basis, to do so would be contrary to fundamental rights of the defence and the right of access to an impartial court under art.47 of the EU Charter of Fundamental Rights.[179]

Sixthly, the court then upheld Fuji Electric's claim, raising of its own motion that the EC's finding that FES managed Fuji's GIS business for a period was unsupported with a sufficient statement of reasons. The court therefore annulled that finding. The EC could also not raise new grounds of liability based on economic succession before the court, since the court's review is of the Commission's decision.[180] The court varied the fine liability on FES accordingly.[181]

Seventhly, the court considered that the fine for which Fuji Electric was responsible after the merger of Fuji Electric Holdings, which had been held jointly and severally liable for the infringement, should be reduced to €2.2 million from €2.4 million, since these companies had provided the EC with essential information about the cartel before October 2002, which the EC should have taken into account when setting the fines.[182]

[172] *Siemens AG Osterreich and Others*, judgment of March 3, 2011 at [153]–[157].
[173] *Siemens AG Osterreich and Others*, judgment of March 3, 2011 at [158]–[159]. See also *Areva and Others*, judgment of March 3, 2011 at [214]–[215].
[174] *Siemens AG Osterreich and Others*, judgment of March 3, 2011 at [166].
[175] *Hitachi and Others v Commission* (T-112/07) [2011] 5 C.M.L.R. 19; *Toshiba v Commission* (T-113/07) [2011] 5 C.M.L.R. 20; *Fuji Electric v Commission* (T-132/07) [2011] 5 C.M.L.R. 21; *Mitsubishi v Commission* (T-133/07) [2011] 5 C.M.L.R. 22; Court Press Release 70/11 of July 12, 2011.
[176] See, e.g. *Toshiba* [2011] 5 C.M.L.R. 20 esp. at [186] and [204]–[210].
[177] See *Toshiba* [2011] 5 C.M.L.R. 20 at [286]–[294] and *Mitsubishi Electric* [2011] 5 C.M.L.R. 22 at [271]–[280].
[178] *Fuji Electric* [2011] 5 C.M.L.R. 21 at [122]–[125].
[179] *Fuji Electric* [2011] 5 C.M.L.R. 21 at [157]–[159].
[180] *Fuji Electric* [2011] 5 C.M.L.R. 21 at [162]–[170].
[181] *Fuji Electric* [2011] 5 C.M.L.R. 21 at [218]–[221].
[182] *Fuji Electric* [2011] 5 C.M.L.R. 21 at [263]–[268].

The Japanese undertakings otherwise generally argued that their lack of participation in the European market was because the barriers to entry were too high. This was rejected by the court.

Fittings

Box 7

Fittings

- *Aalberts/Aquatis/Simplex*
  - — Fine annulled
  - — Simplex: Infringement after inspection not proven
  - — Aquatis: Not shown to have been aware or that should have been aware that joining wider, earlier infringement. (See also below *International Removals*, *Coppens*)
  - — But later infringement was "single and continuous one," linked to the earlier one
- *FRA.BO*
  - — Claim rejected that no benefit from co-operation because treated as partial immunity before 10 per cent ceiling
- *Pegler/Tomkins*
  - — Pegler: Dormant company for period of claimed infringement, so not liable
  - — Increase for deterrence wrong because not part of Tomkins group at moment of fine
  - — But similar claim for Tomkins not possible, because not raised before Court (which left the EC to rectify the situation!)
- *Kaimer companies*, *Pegler* and *Tomkins*
  - — Duration of infringement reduced
  - — Tomkins duration liability could not be greater than that of its subsidiary Pegler
- *IBP*
  - — Fine increase for misleading information annulled, because information not shown to be wrong, but no impact on fine.

In March 2011, the GC issued some ten judgments concerning the *Fittings* cartel case.[183] It will be recalled that the EC took its decision in this case in September 2006. The EC found a "single, complex and continuous" infringement from December 1998 to April 2004, concerning copper and copper alloy fittings in the EEA.

The decision was unusual and controversial because the EC's dawn raids occurred in March 2001, so this decision involved findings that the cartel had continued *after* the EC's investigation had started, with corresponding fines.

This issue was the core of certain appeals, with the essential issue being whether the later contacts amounted to unlawful activity and, if so, whether they could be linked to the earlier cartel in EU competition law.

In *Aalberts*,[184] the background was that Aalberts had bought the fittings business of IMI in August 2002, a company which became Aquatis and another which became Simplex. Aalberts was fined some €100 million for an infringement from 2003 until 2004. Aquatis and Simplex were fined €55.15 million for infringements in the same period jointly and severally with Aalberts. Aalberts' fine was increased by 60 per cent for involvement after the EC's inspections.

On appeal, as regards itself and Simplex, Aalberts argued that there was not adequate proof of infringement.

The GC agreed, noting that FRA.BO's leniency statement implicating Simplex had to be corroborated, if contested by others. The court found: no evidence of the infringement in 2003 and that the EC relied on reported telephone conversations in 2004, notably one in February 2004 with FRA.BO saying that Simplex called about a price increase in Greece, which was confirmed by Simplex's Greek distributor. However, the court found that it was not clear if Simplex or the distributor decided to increase the price.[185]

The EC also relied on a meeting between IBP/Simplex at the Essen Trade Fair in March 2004, but the GC compared conflicting statements and concluded there was not enough evidence to find an infringement.[186]

As regards Aquatis, Aalberts argued that if there were unlawful contacts, they were not part of the "single, complex and continuous" infringement and the EC had not shown that Aquatis was, or ought to have been aware of the (earlier) common scheme regarding the cartel.

The GC agreed and emphasised that for an infringement to have a "single object", it is not enough for the EC to show just distortion of competition, rather the EC needs to show complementarity of conduct, with interaction, linked to a global plan with a single objective (applying *BASF and UCB*).[187] Further, for a single infringement, it has to be shown that a company was aware of the unlawful conduct of others (applying *Anic Partecipazioni*).[188]

The GC found the first test was met, but not the second one. The court compared the unlawful conduct before March 2001 with that after March 2001 and noted that it was very different. Before 2001, there was a grand EEA-wide structure; after 2001 the conduct in question was specific and related to the French market. However, the GC found that, because the conduct in question still related to the objective of collusion on prices on fittings, there was a single, complex and continuous infringement: "The fact that certain characteristics of the intensity of those practices changed is not conclusive."[189]

The GC then found that it was not clear that Aquatis knew, or must have known, when it attended some French industry association meetings and had other contacts with competitors in the later period that it was "joining the circle of participants in the pan-European cartel". Previous participation in the cartel was not enough to show that Aquatis rejoined the cartel. Aquatis had ended its

[183] Court Press Release 24/11, March 24, 2011.
[184] *Aalberts Industries NV v Commission* (T-385/06) [2011] 4 C.M.L.R. 33.
[185] *Aalberts* [2011] 4 C.M.L.R. 33 at [48]–[61].
[186] *Aalberts* [2011] 4 C.M.L.R. 33 at [62]–[69].
[187] *BASF and UCB* (T-101/05 and T-111/05) [2007] E.C.R. II-4949; [2008] 4 C.M.L.R. 13.
[188] *Commission v Anic Partecipazioni* (C-49/92 P) [1999] E.C.R. I-4125; [2001] 4 C.M.L.R. 17.
[189] *Aalberts* [2011] 4 C.M.L.R. 33 at [105].

participation in March 2001. There was no evidence that Aquatis knew that others had continued the infringement. Moreover, the French association meetings were about new packaging, so not directly associated with cartel meetings. They also only concerned the French market.[190]

The result was that the EC's decision and related fines on Aalberts, Aquatis and Simplex were overturned insofar as they related to participation in the cartel from June 2003 to April 2004.

In *FRA.BO*,[191] the situation was somewhat different. Its appeal focused on the way that the EC had set its fine in the circumstances, and in particular, when the 10 per cent fine ceiling should apply.

FRA.BO is a small Italian firm, which made a leniency application in July 2004 (fourth in). It indicated that the cartel had continued *after* the EC inspections in March 2001. The EC found that FRA.BO had infringed from July 1996 to April 2004 and fined FRA.BO €1.58 million.

In setting that fine, the EC first set FRA.BO's fine at €9.6 million after differentiated treatment and duration. The EC then gave FRA.BO a leniency reduction outside the 1996 Leniency Notice (i.e. applying the 2002 Leniency Notice "partial immunity" rule), insofar as its information had lead to a finding that the cartel had continued from March 2001 to April 2004.

As a result, the basic amount of FRA.BO's fine was reduced by three years and no fine increase was made for aggravating circumstances (while 60 per cent was applied to others). That meant that FRA.BO's fine was set at €7.97 million. Then the EC applied the 10 per cent fine ceiling in Regulation 1/2003 and reduced the fine to €1.97 million. Finally, the EC gave FRA.BO a 20 per cent fine reduction for leniency co-operation, giving an overall fine of €1.58 million.[192]

On appeal FRA.BO argued that its co-operation in relation to the 2001–2004 period should have been considered under the 1996 Leniency Notice (giving a greater reduction after the 10 per cent fine ceiling); or, if the 2002 Leniency Notice partial immunity rule was applied, that had to be such as to give FRA.BO the benefit of a more favourable rule. FRA.BO argued that this was not so here, since the reward for co-operation was in practice theoretical, being given *before* the 10 per cent fine ceiling.[193] FRA.BO therefore argued that, if partial immunity applies, it should be *after* the 10 per cent fine ceiling (as with leniency co-operation).[194]

The GC rejected this, holding that the partial immunity reduction was still a "benefit" to FRA.BO.[195] Further, that partial immunity has to be treated as an attenuating circumstance under the 1998 Fining Guidelines,[196] i.e. coming before the 10 per cent fine ceiling rule. Moreover, the court noted that such co-operation was not covered by 1996 Leniency Notice.[197]

While one can see how the court takes this position on the 1998 Fining Guidelines, it appears nevertheless to be an odd result. On the one hand, one may note that in fact FRA.BO had no gain from its co-operation, because it still ended up with a fine amounting to 10 per cent of its turnover. On the other hand, as FRA.BO noted there is a "manifest and direct contradiction" in the way that the EC used the information and the low level of fine reduction granted to FRA.BO itself.[198] Perhaps this situation needs further review, because the issue comes up regularly in practice.

In *Pegler/Tomkins*[199] the GC had to consider a complex appeal related to which entity in the Tomkins Group had been involved in the fittings cartel. It should be recalled that Pegler was found to have directly participated in the infringement between December 1988 and March 2001, together with its then parent Tomkins Plc. The two companies were held jointly and severally liable. The starting amount of the fine was set at €2 million, with a deterrence increase of a 1.25 multiplier because of Tomkin's group size. Duration was set at 12 years and two months, with an increase of 5 per cent a year for two years and 10 per cent thereafter so that the ultimate fine was set at €5.25 million.

On appeal there were two main issues.

First, Pegler noted that it had no economic activity from December 1988 to January 1989, being a dormant company in English company law. Then Pegler noted that it had been the unremunerated agent of another Tomkins subsidiary, FHT, which had used its business name "Pegler" to trade until October 1993, and again argued that Pegler itself had no economic activity, but was a dormant company in English company law in that period.

The GC agreed with Pegler that it should not be liable for the infringement in these periods, emphasising that Pegler had been held to have directly participated in the infringement, which it had not, as it had no economic activity in either period.[200]

There appears to have been a fair amount of confusion here. There had been an internal reorganisation within Tomkins where two companies (one the original Pegler company, the other the applicant) swapped names. FHT, as noted, another Tomkins subsidiary, had also appeared to be Pegler, using note paper with that name, because it

[190] *Aalberts* [2011] 4 C.M.L.R. 33 at [111]–[120].
[191] *FRA.BO SpA v Commission* (T-381/06) [2011] 4 C.M.L.R. 30.
[192] *FRA.BO* [2011] 4 C.M.L.R. 30 at [18]–[20].
[193] *FRA.BO* [2011] 4 C.M.L.R. 30 at [40]–[41].
[194] *FRA.BO* [2011] 4 C.M.L.R. 30 at [54].
[195] *FRA.BO* [2011] 4 C.M.L.R. 30 at [51]–[52] and [57], [61].
[196] *FRA.BO* [2011] 4 C.M.L.R. 30 at [50] and [70].
[197] *FRA.BO* [2011] 4 C.M.L.R. 30 at [93].
[198] *FRA.BO* [2011] 4 C.M.L.R. 30 at [77].
[199] *Pegler Ltd v Commission* (T-386/06) [2011] 4 C.M.L.R. 34.
[200] *Pegler* [2011] 4 C.M.L.R. 34 at [49] and [86].

was in fact managing the "Pegler" business. However, the court accepted that the applicant was not the company involved in such practices.

The EC also argued that the applicant should be liable because it was the economic successor of the original Pegler. The court disagreed, however, because the EC had not put that case to Pegler in the SO, but had rather treated Pegler as a direct participant.[201] The EC could not therefore change tack now, as this would be contrary to Pegler's rights of defence.

Secondly, Pegler argued that it should not have had a fine increase as a member of the Tomkins Group. The position here was that the EC's decision in the fittings cartel case was taken in 2006. In February 2004 Pegler was sold to its management team and then the following year in August 2005 to Aalberts. The issue raised therefore was whether the EC was correct to increase Pegler's fine for deterrence on the basis that it was in the Tomkins group, which had a large turnover, when Pegler was no longer in that group at the time of the fine.

The GC held not. The court noted that, in setting the fines, the EC had taken into account Tomkin's turnover in 2005 (the year before the year of its decision) but that this was not the relevant figure, given that Pegler had left the Tomkins group then.

The court also rejected the EC's position that, in assessing deterrence for Tomkins, it had looked at Tomkins turnover as a group at the time of its decision, but for Pegler it had looked at the legal/economic knowledge and infrastructure available to it at the time of the infringement. The court considered that to divide up these factors in that way and apply them separately to two companies in the same undertaking was not correct.[202]

Taking all of this into account, the court applied no increase for deterrence to Pegler and set the duration of the infringement at seven years and five months, resulting in a fine of €3.4 million rather than €5.25 million.

As regards *Kaimer*, *Sanha Kaimer* and *Sanha Italia*, *Tomkins* and *Pegler*[203] the court found that the duration of their participation in the infringement was less than that found by the EC. As a result, the fine on Kaimer was reduced from €7.97 million to €7.15 million, for which it was jointly and severally liable with Sanha Kaimer and with Sanha Italia as to €6.33 million.[204]

The fine on Tomkins was also reduced because it was only held liable as the parent of Pegler and the court considered that the liability of a parent could not exceed that of a subsidiary.[205]

The matter was complicated because Tomkins had only alleged that the duration of Pegler's participation dated from February 1989, whereas in the *Pegler* case, the court held that the duration of its participation was only proved from the end of October 1993. The court noted that it was not allowed to rule "*ultra petita*" (i.e. on issues not raised by the parties)[206] so arguably could not give Tomkins the same reduction of duration.

However, the court was not deterred. It ruled that Tomkins should have the benefit of the partial annulment of Pegler's liability, since they were a single entity. Further, it was not ruling *ultra petita* since Tomkins had requested that if Pegler's liability were annulled, its own should also be, and Tomkins challenged the duration of Pegler's participation.[207]

This still left the issue that the GC had also found that the EC was wrong to apply a 1.25 deterrence multiplier to Pegler's fine, while Tomkins had withdrawn its claim on that issue before the GC. Here the court decided that it could not take a similar approach "without going beyond the bounds of the dispute as defined by the parties to the present case".[208] However, the court stated that it was for the EC "to draw the appropriate conclusions for that mistake".[209]

The result was that the court set Tomkins' fine at €4.25 million, while Pegler was jointly and severally liable for only €3.40 million, the court apparently expecting the EC to correct Tomkins' joint and several liability afterwards.

Otherwise the court rejected the appeals by *Viega*, *Legris*, *Comap*, *IMI* and *IBP*[210] and therefore upheld their fines. In the case of *IBP* the court held that the EC was wrong to find an aggravating circumstance in the provision of misleading information. However, that did not lead to a reduction in fine, since the reduction was before the 10 per cent of turnover ceiling on fines.[211]

In *IBP* the court also upheld the EC's view that there was a single and continuous infringement, linking the pre-2001 and post-2001 contacts. Further that, unlike Aalberts/Aquatis, IBP had been aware of a wider European infringement.[212]

Box 8

Cartel appeals

- *Steel Beams*: *Arcelor Mittal*
  — An appeal suspends the limitation period for those who appeal, not all in the cartel (*inter partes*, not *erga omnes*)
- *Dutch Beer*

[201] *Pegler* [2011] 4 C.M.L.R. 34 at [54]-[56] and [59].
[202] *Pegler* [2011] 4 C.M.L.R. 34 at [132]–[134].
[203] *Kaimer and Others* (T-379/06); *Tomkins* (T-382/06); *Pegler* (T-386/06), judgments of March 24, 2011.
[204] *Pegler* [2011] 4 C.M.L.R. 34 at [68]–[82] and [105].
[205] *Tomkins* [2011] 4 C.M.L.R. 31 at [35]–[46], [54].
[206] *Tomkins* [2011] 4 C.M.L.R. 31 at [40]–[41].
[207] *Tomkins* [2011] 4 C.M.L.R. 31 at [42]–[46].
[208] *Tomkins* [2011] 4 C.M.L.R. 31 at [58].
[209] *Tomkins* [2011] 4 C.M.L.R. 31 at [57].
[210] *Viega v Commission* (T-375/06); *Legris v Commission* (T-376/06); *Comap v Commission* (T-377/06); *IMI and Others v Commission* (T-378/06); and *IBP and IBP France v Commission* (T-384/06), Court Press Release 24/11, March 24, 2011.
[211] *IBP and IBP France*, judgment of March 24, 2011 at [106]–[117].
[212] *IBP and IBP France*, judgment of March 24, 2011 at [55]–[79].

- — A flat rate €100,000 fine reduction for excessive duration is not enough; should take into account amount of fine, so changed to 5 per cent (*Heineken*; *Bavaria*)
- — The EC must include sufficient reasoning for the liability of each addressee in a group (*Grolsch*)
- *Methacrylates (acrylic glass)*
  - — Deterrence assessed at moment of decision so, if a subsidiary is floated on the stock exchange just before, its fine cannot reflect its former group parent's size
  - — Parent subsidiary presumption not irrebuttable (*Arkema France*), but to succeed is exceptional.

Steel Beams[213]

In March 2011, the ECJ ruled on appeals by Arcelor Mittal Luxembourg (AM Lux) and the EC against the GC's judgment annulling the EC's 2006 decision in the *Steel Beams* case.[214]

The EC rejected both appeals.

The background is that the EC first took a decision against ARBED, now AM Lux, in 1994. The case was based on an infringement of the ECSC Treaty, which expired in July 2002. After two rounds of appeal, in 2003 the ECJ set aside the decision as regards AM Lux on the ground of infringement of the rights of the defence. (It had not been an addressee of the SO.)

In 2006, the EC started new proceedings, designed to overcome the rights of the defence issue and took a second decision in November 2006. The second decision related to conduct between July 1988 and January 1991, and was based, as regards the substantive rules, on the (by now) expired ECSC Treaty and, as regards the procedural rules, on Regulation 1/2003. The SO and decision were addressed to what is now AM Lux and two other AM companies.

The GC rejected arguments that this was unlawful, holding that the EC and the ECSC Treaties were part of a single legal order and the EC could take such steps to ensure continuity of the legal system.

The GC also found that there had been no breach of the rules of limitation as regards Am Lux, because the periods of appeal against the first decision had suspended the running of time. However, the court found that such suspension did not apply as regards the other two AM companies, which had not appealed the first decision, so for them the second decision was beyond the 10-year limitation period for the imposing of fines. Suspension took effect *inter partes* and not *erga omnes*. This prompted the EC to appeal further.

As regards Am Lux's argument that it was unlawful for the EC to combine the ECSC and EC Treaty rules in this way, the ECJ upheld the GC's position.[215] The key principle which "may be traced back to Roman Law", is that when legislation is amended, unless the legislator expresses a contrary intention, the continuity of the legal system must be ensured. That principle applied here.[216] Moreover, principles of legal certainty and legitimate expectations do not guarantee companies that subsequent amendments to legal bases and procedural rules will enable them to escape all penalties relating to their past infringements.[217]

As for the EC's appeal, the EC argued that the GC's approach to interpretation of the limitation rules was too restrictive and literal. It went too far for the GC to find that acts in an investigation interrupted the running of time for all companies concerned (*erga omnes*), but that appeals to the European courts only suspended limitation for the company appealing (*inter partes*). That meant in practice that the EC had to continue matters against some companies, even while others may be bringing a procedural challenge which could have wider implications for the EC's decision as a whole.[218] In short, the EC argued that the *erga omnes* interruption rule should also apply in the event of an appeal by some of the companies concerned.

The ECJ disagreed. It noted that the suspension of the limitation period if there is an appeal by a company is specific to those aspects of the decision which concern that addressee. Otherwise the decision becomes final and that finality starts time running against them for enforcement of the decision/fine. As a result, with respect to these other companies, an action brought by another company against the same final decision cannot have any suspensive effect.[219]

Since here the appeals had been brought by ARBED, now AM Lux and not the two other ARBED companies fined in the decision, the GC had held correctly that limitation applied to any fine imposed on those companies.

Another practical result of this is that the EC has dropped fines in the *Heat Stabilisers* case against CIBA/BASF and Elementis[220] on the basis that the fines are time-barred.

[213] *Arcelor Mittal v European Commission* (C-201/09 P and C-216/00 P) [2011] 4 C.M.L.R. 21.
[214] See also *Thyssen Krupp Nirosta v Commission* (C-352/09 P), judgment of March 29, 2011 concerning the EC's re-adopted *Alloy Surcharge* decision and similar ECSC/EC issues. The ECJ also rejected Thyssen Krupp's appeal. Court Press Release 26/11, March 29, 2011.
[215] *Arcelor Mittal* [2011] 4 C.M.L.R. 21 at [77].
[216] *Arcelor Mittal* [2011] 4 C.M.L.R. 21 at [59]–[63].
[217] *Arcelor Mittal* [2011] 4 C.M.L.R. 21 at [70].
[218] *Arcelor Mittal* [2011] 4 C.M.L.R. 21 at [127], [132]–[133].
[219] *Arcelor Mittal* [2011] 4 C.M.L.R. 21 at [142]–[148].
[220] IP/11/820, July 4, 2011.

Dutch Beer[221]

In June 2011, the GC issued two judgments related to appeals against the EC's decision in 2007 concerning the supply of beer in the Netherlands by Heineken and Bavaria. In both cases the court reduced the fines, while mainly upholding the decision.

It may be recalled that the EC found an infringement for some three years and eight months, relating to co-ordinated prices and price increases, and the occasional allocation of customers in the "horeca" (hotels, restaurants and café) sector and also as regards supermarket and off-licence supply. The EC also found that the participants had occasionally co-ordinated other commercial conditions to the horeca sector (loans and financing arrangements). Heineken was fined €219 million and Bavaria €22.85 million.

On appeal *Heineken* argued that the EC had not sufficiently proved the cartel, notably suggesting that the "declaration" of InBev (immunity application) as to what had occurred was too vague and insufficiently corroborated by other reliable evidence. As a result, the court reviewed this in detail and rejected Heineken's position as regards the main co-ordination on prices and customers in what had apparently been called "Operation Catherine" or "Agenda Commission".[222]

However, the court agreed with Heineken as regards the issue of "occasional co-ordination of other terms", on which the court found the evidence put forward fragmented, imprecise and insufficient.[223]

The EC also agreed with Heineken's claim that the procedure had been excessively long. The EC took some 65 months between the first inspections and the SO and 20 months between the SO and the final decision.[224] The EC had already recognised that the proceedings had lasted too long and therefore reduced the fine with a "flat rate" amount of €100,000. Interestingly the court held that was not enough, since it did not take into account the amount of the fine. In its unlimited jurisdiction the EC therefore reduced the fine by 5 per cent.[225]

However, the court rejected an argument by Heineken that its fine should be much lower because, if the EC had not taken so long in dealing with the case, it would have been fined under the 1998 Fining Guidelines rather than the 2006 Fining Guidelines, at a much lower level.[226] One may think Heineken had a reasonable point on this, even if the court considers that, on the case law, the EC is entitled to adjust its fining policy over time.

The overall result was therefore that Heineken's fine was generally upheld, but reduced to €198 million.[227]

The court's position in the *Bavaria* case was much the same. The court upheld the main findings of infringement, but rejected the finding in relation to occasional co-ordination of other commercial conditions.[228] The "flat rate" fine reduction of €100,000 was replaced by a reduction of 5 per cent of the fine, so that the overall fine was reduced to €20.7 million.[229]

In September 2001, the GC issued a further judgment in relation to the *Dutch Beer* cartel case, this time as regards *Koninklijke Grolsch NV* (KGNV).[230] The GC annulled the EC's decision imposing a fine of €31.6 million.

It appears that in its cartel decision in 2007, the EC found KGNV liable as having directly participated in the cartel, rather than liable as the 100 per cent parent of a subsidiary which participated. The EC stated that it regarded the "Grolsch group" as responsible, as a single economic undertaking and also noted that a member of the board of Grolsch had participated in the infringement himself. It should be noted that there were three aspects to the infringement and the EC found that KGNV had participated in a "single and continuous" infringement.

KGNV argued that its subsidiary might have participated, but the evidence as regards KGNV was not enough to show direct participation in the way alleged. Further, KGNV argued that it could not be held liable for the conduct of its subsidiary, because the EC had not established the legal and economic links for the presumption of liability of a parent in its decision.

Interestingly the GC agreed with both arguments.

First, the court reviewed the evidence of KGNV's participation in detail, notably the participation of the President of KGNV's board in one meeting in the infringement period and found that this did not show, by itself, participation in the aspect of the infringement concerned and that there was not evidence implicating KGNV in the other two aspects. So a finding of participation in a "single and continuous" infringement of the three aspects could not be sustained.[231]

Secondly, the court found that the EC had not specified the liability of each legal entity involved as it had to do. Where a decision concerns a number of addresses and raises an issue as to the liability for the infringement, it must include sufficient reasoning as regards each addressee, in particular those which must bear the financial penalty for the infringement.[232] Further, where a parent company is held responsible for the conduct of

[221] *Heineken v Commission* (T-240/07) and *Bavaria v Commission* (T-235/07), judgments of June 16, 2011. Court Press Release 62/11 of the same date.
[222] *Heineken*, judgment of June 16, 2011 at [56]–[164].
[223] *Heineken*, judgment of June 16, 2011 at [165]–[176].
[224] *Heineken*, judgment of June 16, 2011 at [290] and [293].
[225] *Heineken*, judgment of June 16, 2011 at [429]–[434].
[226] *Heineken*, judgment of June 16, 2011 at [416]–[422].
[227] *Heineken*, judgment of June 16, 2011 at [435]–[436].
[228] *Heineken*, judgment of June 16, 2011 at [155] and [167].
[229] *Heineken*, judgment of June 16, 2011 at [344]–[345].
[230] *Koninklijke Grolsch v Commission* (T-234/07), judgment of September 15, 2011; Court Press Release 93/11 of the same date.
[231] *Grolsch*, judgment of September 15, 2011 at [66]–[70].
[232] *Grolsch*, judgment of September 15, 2011 at [77].

its subsidiary, a decision must set out detailed reasons for imputing the liability to the parent. Here, the EC had just treated KGNV and the Grolsch group as one, without specifying the economic, organisational and legal links between parent and subsidiary.[233]

Thirdly, again the EC argued that Grolsch was prevented from denying liability like this on appeal, because it had not done so in the administrative procedure. The GC rejected this, pointing out that KGNV had in fact denied liability and recalled that in any event, the defence has a right to trial before an independent tribunal, so cannot be prevented from raising arguments in this way (see art.47 of the EU Charter of Fundamental Rights).[234]

Fourthly, one may also note that GC again excludes as irrelevant evidence of participation in a meeting outside the reference period.[235]

Methacrylates

In June 2011 the GC issued two judgments in relation to its decision in 2006 concerning methacrylates (otherwise known as acrylic glass). The court reduced the fine on Arkema from €219.1 million to €113.3 million. The court dismissed the appeals by Total and Elf Aquitaine.[236]

The main points of interest on the appeals are as follows:

First, interestingly in *Arkema*, in exercise of its unlimited jurisdiction the court decided to take note of the fact, which otherwise appeared to have been overlooked by both the EC and Arkema in its decision and/or pleadings, that Arkema was not a single undertaking with Total at the moment of the EC's decision imposing a fine for the infringement.

The EC had set its fine on the basis that Arkema was in the Total Group and considered that a deterrence multiplier of 3 (300 per cent) had to applied as a result. However, it appears that at the hearing of the appeal, Arkema pointed out that, in fact, it had been floated on the stock exchange two weeks before the EC's decision and was not therefore in the Total Group then.

The court decided, in its unlimited jurisdiction, to examine the issue and reduced the deterrence increase on Arkema to 1.25 per cent (25 per cent). An increase for deterrence is to take into account the greater economic power and ability to pay of larger undertakings, so it was wrong to increase the fine for Total's size,[237] if Arkema was no longer in the Total group.

Secondly, a great deal of both judgments reflect *Arkema* and *Total/Elf Aquitaine* arguments on the parent subsidiary presumption. Above all, arguing that a parent should only be liable if involved in the commercial policy of the subsidiary. These arguments were rejected insofar as the court applied the case law requiring rather that it be shown that Arkema was not subject to the decisive influence of its ultimate parent at the relevant time (i.e. Elf Aquitaine for most of the period of the infringement; Total for the last part, after it acquired Elf Aquitaine). A notable point was the finding that residual control over important strategic decisions may suffice to confirm decisive influence, even if the parent was not involved in day-to-day commercial policy.[238]

In line with other rulings last year, it is also noteworthy that the court rejects arguments made as to lack of control by the parent on the basis that they were just assertions, not supported by proof.[239]

The court also rejects the argument that in practice the parent subsidiary "presumption" is "irrebuttable",[240] although clearly that remains controversial, because many argue that to be able to rebut it will be very rare. The court also accepted short reasoning by the EC of elements put forward to rebut the presumption in the circumstances.[241]

Thirdly, the court rejected the argument that Arkema's fine should be reduced because it had also been fined for several other infringements. Arkema argued that it did not need further "dissuading". The court held, however, that it would be paradoxical to reward a company for multiple infringements by fining them less, so that the marginal cost of each infringement would progressively decrease.[242]

In September 2011, the GC dismissed *Lucite's* appeal.[243] It may be recalled that Lucite had been fined €25 million. Lucite argued (among other things) that the EC had failed to take into account its aggressive competitive approach after it acquired the business from ICI in assessing the gravity of its infringement. Lucite argued that this also showed an attenuating circumstance going beyond mere non-implementation of the cartel.

The GC rejected both arguments. As regards gravity, because that is assessed in relation to the infringement as a whole (not Lucite's infringement).[244] As regards non-implementation, because the court considered that Lucite had not established that its conduct justified such a reduction: Lucite had not shown conduct disrupting the cartel. It had competed aggressively on some but not all

233 *Grolsch*, judgment of September 15, 2011 at [88]–[90].
234 *Grolsch*, judgment of September 15, 2011 at [39]–[40].
235 *Grolsch*, judgment of September 15, 2011 at [53].
236 *Total and Elf Aquitaine v Commission* (T-206/06); *Arkema France v Commission* (T-217/06), judgments of June 7, 2011; Court Press Release 52/11 of the same date.
237 *Total/Elf Aquitaine* and *Arkema*, judgments of June 7, 2011 at [251]–[280] and [338]–[353].
238 *Total/Elf Aquitaine* and *Arkema*, judgments of June 7, 2011 at [107].
239 e.g. *Arkema*, judgment of June 7, 2011 at [102], [110] and [140].
240 *Arkema*, judgment of June 7, 2011 at [103].
241 *Arkema*, judgment of June 7, 2011 at [138]–[141].
242 *Arkema*, judgment of June 7, 2011 at [335].
243 *Lucite International v Commission* (T-216/06), judgment of September 15, 2011.
244 *Lucite*, judgment of September 15, 2011 at [47].

products and had continued to co-operate in confidential information exchanges and discussions on prices. Others had also competed aggressively.

An interesting point, however, is that the GC criticised the EC for not giving sufficient reasons to explain its rejection of Lucite's arguments, which had been made in response to the SO. The EC had made certain general findings, without specifically dealing with Lucite's central argument.[245] However, the court did not consider this omission a ground for annulling the decision. Instead, the court assessed in detail whether the EC was correct not to have considered Lucite's conduct as an attenuating circumstance and found that it was.[246] Further, the court did not consider it necessary to amend the fine in its unlimited jurisdiction.[247]

Box 9

Sodium chlorate
• 97 per cent shareholding enough to justify presumption of parent/subsidiary control (*Elf Aquitaine*) • Evidence of Aragonesas' participation between 1996 and 2000 unreliable, excessively sporadic and fragmented. Detailed review. Finding annulled (*Aragonesas*).

Sodium chlorate

In May 2011, the GC dismissed Elf Aquitaine and Arkema France's appeals against the EC's 2008 decision in this case.[248] The EC had found that four groups of companies had fixed prices and allocated volumes for sodium chlorate between late 1994 and 2004. It fined Arkema France and its parent, Elf Aquitaine, €22.7 million jointly and severally, Arkema 90 per cent of this basic amount (€20.43 million) for repeat infringements and Elf Aquitaine 70 per cent of the basic amount (€15.89 million) as an increase for deterrence in view of its size.

The main point of interest in the *Elf Aquitaine* judgment is the acceptance of the parent subsidiary presumption to a 97 per cent (as opposed to 100 per cent) owned subsidiary.[249] The court reasoned that the presumption was applicable to Elf Aquitaine as it owned the "quasi-totality" of Arkema France's shares at the relevant time.[250]

Among its other grounds of appeal, Elf Aquitaine had contested the EC's increase in its fine owing to its size. It argued that the EC had infringed the principle of equal treatment, since it was the only parent company to be fined. The court disagreed, holding that the EC was entitled to increase Elf Aquitaine's fine in order to ensure adequate deterrence.[251]

In the *Arkema France* case, the main point of interest is the court's confirmation that the EC was entitled to increase Arkema's fine by 90 per cent of the basic amount for repeat infringements. Arkema, basing itself on dicta in previous cases, argued that the EC could not take account of its conduct from 1961 to 1980 (fined in a 1984 EC decision) as more than 10 years had elapsed since then, which it argued rebutted arguments that it had a tendency to reoffend.

The court disagreed and stated that the EC had the discretion to take this earlier conduct into account.[252] The court noted that, under para.28 of its Fining Guidelines, the EC is entitled to increase a fine by 100 per cent for recidivism so the 90 per cent increase was acceptable.[253] The court also rejected the relevance of earlier EC decisions which had only increased the basic amount by 50 per cent.

In October 2011, the GC also annulled the EC's decision concerning *Aragonesas*.[254] In doing so this also ended the joint and several liability on its parent Uralita for the infringement.[255]

When appealing the EC's decision, Aragonesas essentially argued that the EC had not adequately proved that it had participated in the infringement. After a long and detailed review, the court agreed, finding that most of the evidence used by the decision was unreliable, excessively sporadic and fragmented.[256] The court found that it was not enough to show to the requisite standard that Aragonesas participated in the infringement, as found by the EC, from December 1996 to February 2000. The court found the evidence against Aragonesas sufficiently convincing only in 1998, when Aragonesas had itself acknowledged attending a cartel meeting. The court therefore held that the EC had erred in the duration of Aragonesas' infringement.

It may be interesting to note the court's approach, which was to consider the EC's conclusions as to the infringement and see if the evidence referred to as underpinning those conclusions was reliable. Then, having looked at it element by element, the court considered whether the whole of what had been accepted showed the infringement as found by the EC. It is a very fact intensive review. The court offers a quite extensive summary of the evidentiary rules in doing so.[257]

[245] *Lucite*, judgment of September 15, 2011 at [111]–[118].
[246] *Lucite*, judgment of September 15, 2011 at [119]–[170].
[247] *Lucite*, judgment of September 15, 2011 at [171]–[174].
[248] *Elf Aquitaine v Commission* (T-199/08) and *Arkema France v Commission* (T-343/08), judgments of May 17, 2011. Court Press Release 49/11, of the same date. With thanks to Cormac O'Daly for his assistance with this section.
[249] *Elf Aquitaine*, judgment of May 17, 2011 at [34] to [123].
[250] *Elf Aquitaine*, judgment of May 17, 2011 at [54].
[251] *Elf Aquitaine*, judgment of May 17, 2011 at [318].
[252] *Arkema France*, judgment of May 17, 2011 at [64]–[72].
[253] *Arkema France*, judgment of May 17, 2011 at [97].
[254] *Aragonesas Industrias y Energía v Commission* (T-348/08), judgment of October 25, 2011.
[255] Court Press Release 117/11, October 25, 2011.
[256] *Aragonesas*, judgment of October 25, 2011 at [245]–[248].
[257] *Aragonesas*, judgment of October 25, 2011 at [90]–[107].

Otherwise the court rejected Aragonesas' claim that it was not aware of the geographic scope of the infringement, but was only concerned with Spain, Portugal and France.[258]

The court also rejected argument by Uralita, in a separate action[259] that it should not be liable for Aragonesas' conduct as the economic successor to Aragonesas' parent EIA. The infringing "undertaking" was held to be that composed of Aragonesas and EIA, which wholly owned Aragonesas. After the infringement period, Uralita had absorbed all of the assets of EIA, as a result of which EIA ceased to exist. Uralita, as legal successor to EIA assumed liability for the unlawful conduct in the infringement in question.

International Removals Belgium

Box 10

International Removals

- If the value of sales figure for gravity is near the minimum, no need for differentiation based on additional elements or circumstances, but if higher, that would be required, with an obligation to state reasons (*Ziegler*, *Putters*, *Gosselin* and others)
- Application of the 10 per cent fine ceiling could also be at odds with the principle of individual penalties and sanctions and lead to judicial review of differentiation (*Putters*)
- If "effect on trade" presumptions are an issue, EC has to define the market (*Gosselin*, *Putters* and others)
- Dutch share holding foundation with no economic activity found not to be liable as part of an infringing undertaking, because not shown to be involved in undertaking's activity. (No presumption)
- Presumption of parent/subsidiary liability also rebutted because shown that no decisive influence on infringing undertaking (*Gosselin/Portielje*)
- Proof of duration particularly important because of greater weight attached to it in the 2006 Fining Guidelines
- Need to "publicly distance" from a cartel to leave it only applies where there are multi-lateral meetings (*Gosselin*).

In June 2011, the GC issued some five judgments related to the EC's decision in 2008 in relation to this cartel.[260] There is some important material on the 2006 Fining Guidelines and rulings on duration, the parent/subsidiary presumption in unusual circumstances, participation in a "single and continuous" infringement and "public distancing" from a cartel.

In *Putters*,[261] the GC rejected this company's appeal. However a number of points on fines should be mentioned:

First, faced with the argument that a 17 per cent figure for value of sales/gravity was disproportionate and, in particular, that there should have been differentiation between the companies concerned, the GC stated that, when the EC only applies a percentage rate which is equal or nearly equal to the minimum rate for the most serious restrictions, it is not necessary to take into account additional elements or circumstances. That would only be required if a higher percentage were taken.

Secondly, considering that the fine on Putters had been reduced considerably already through application of the 10 per cent fine ceiling rule, the GC further held that differential appreciation of the gravity of the infringement would not make a difference. Even if the GC varied the rate to 15.1 per cent in its unlimited jurisdiction, the basic amount would still be above the 10 per cent ceiling.[262]

Thirdly, the court made some interesting comments on the application of the 2006 Fining Guidelines to companies which mainly operate on one market and which participated in a cartel for more than one year. The court noted that, in such cases, application of the 10 per cent ceiling was now more the rule than the exception, meaning that any differentiation for gravity or attenuating circumstances could not normally have implications for the fine imposed.

The absence of differentiation as regards the 'final fine' which results is an issue with respect to the principle of the individual nature of penalties and sanctions which is inherent in this new methodology: "It may mean that the Court will have to fully exercise its power of full review in concrete cases where only applying the 2006 Fining Guidelines does not allow for an appropriate differentiation."[263] However, in the *Putters* case this was not required.

Fourthly, the court stated that where the nature of an infringement changes over time (and here certain written agreements were abandoned), the amount of sales to be taken into account could be varied over time. Such changes could also justify a fine reduction for attenuating circumstances.[264]

In *Ziegler*,[265] the court also rejected the appeal, but in doing so again made a number of interesting points:

First, as in other appeals in relation to this cartel, the court had to consider whether the presumptions of no "effect on trade" in the EC's Guidelines on Effect on Trade applied.[266] To do so it had to be shown that EU sales in the products concerned of the parties to the infringement were less than €40 million and that their total market share was less than 5 per cent of the market.

[258] *Aragonesas*, judgment of October 25, 2011 at [242].
[259] *Uralita v Commission* (T-349/08), judgment of October 25, 2011.
[260] Court Press Release 63/11, June 16, 2011.
[261] *Putters International v Commission* (T-211/08), judgment of June 16, 2011.
[262] *Putters*, judgment of June 16, 2011 at [68].
[263] *Putters*, judgment of June 16, 2011 at [75].
[264] *Putters*, judgment of June 16, 2011 at [83].
[265] *Ziegler SA v Commission* (T-199/08) [2011] 5 C.M.L.R. 9.
[266] [2004] OJ C101/81, paras 52 and 53.

The court agreed with Ziegler that the relevant sales to be taken into account had to exclude one remover sub-contracting for another, or there would be double counting.[267] The EC's estimates were therefore vitiated by a manifest error.[268] The EC had therefore failed to prove that the €40 million threshold had been reached.

The court also held that, contrary to the EC's general position as regards "obvious" restrictions of competition, the EC had to define the relevant market in this case, precisely so that the EC (and a reviewing court) could assess the appreciability of any restriction, whether the Guidelines presumptions applied[269] and whether the EC therefore had jurisdiction over a case.[270]

However, the court found that the EC *had* in fact done enough here, even though the EC admitted that it had not defined the market.[271] The result was that "exceptionally" the court accepted that the EC could rely on the market share presumption, without specifically defining the market (and, as a result, non-application of the Guidelines).

Secondly, faced with the claim that the EC had not sufficiently stated its reasons for fixing the share of sales at 17 per cent, since the EC had just set the figure without further explanation, the GC ruled that the EC had given enough reasons, by referring to the nature of the infringement and that a flagrant restriction was concerned.[272]

However, the court suggested that (in line with previous case law) the EC should increase its reasoning on the calculation of fines.[273]

Further, given the way that the basic amount under the 2006 Fining Guidelines involves finer distinctions than under the 1996 Fining Guidelines, the EC could not now just find that an infringement is "very serious". The court noted that the corollary of the EC's margin of discretion in the area of fines is an obligation to state reasons.[274]

The court criticised the fact that the EC had not explained why the percentage chosen was not more than 17 per cent, when the fine was to be "at the higher end of the scale". That was only sufficient if the EC applied a percentage very close to the lower end of the scale for the most serious restrictions. As in *Putters*, the court added that if a higher percentage were applied, more detailed reasons were required.[275] The same applies to the determination of the additional amount.[276]

Thirdly, echoing its position in *Putters*, the court stated that, where the EC applies a rate of sales equal or almost equal to the minimum rate for the most serious restrictions, it does not have to take into account additional factors or circumstances: "That would be required only if a higher rate had to be established."[277]

Fourthly, while rejecting Ziegler's claims that the EC had not taken into account Ziegler's inability to pay, the court noted that the EC could not reject such a claim by just noting that the fine was only 3.76 per cent of Ziegler's turnover. Such a simple calculation of turnover could not of itself lead to the conclusion that the fine would not irretrievably jeopardise Ziegler's economic viability.[278]

In *Gosselin* and *Portielje*, the court reduced the fine on Gosselin and annulled the fine on Portielje in an important judgment.[279]

It may be useful to recall that Gosselin was one of the companies found to have participated in this cartel from 1992 to 2002 as a result of which it had been fined €3.28 million. Further that Portielje (more precisely *Stichting Administratie Kantoor Portielje*) was a Dutch foundation, which directly owned 92 per cent of the shares of Gosselin and indirectly owned virtually all the rest. However, as a "foundation" Portielje had no commercial activity and was stated to be a structure of family shareholders to unify their management.[280] The EC also fined Portielje, insofar as it held Portielje jointly liable for €270,000 of Gosselin's fine (taking its involvement to be several months in 2002, since it was only established then).

The EC argued that Portielje was part of the undertaking with Gosselin and/or controlling it, focusing on the organic and functional links between the two entities. The EC did not consider Portielje to be an undertaking in itself, but a part of the undertaking which committed the infringement. It relied on the way that Portielje owned almost all of the capital of Gosselin.[281] Further, the EC noted that Portielje could have exercised a direct influence on Gosselin's activities, since three main members of Portielje's management were at the same time members of the board of Gosselin.[282]

The court disagreed with this approach.

First, the court emphasised that the notion of single economic entity allowing a parent to be held liable for the conduct of its subsidiary could not be used as the basis for determining the economic status of a parent company.

[267] *Ziegler* [2011] 5 C.M.L.R. 9 at [58].
[268] *Ziegler* [2011] 5 C.M.L.R. 9 at [59].
[269] *Ziegler* [2011] 5 C.M.L.R. 9 at [41]–[45].
[270] *Ziegler* [2011] 5 C.M.L.R. 9 at [50].
[271] *Ziegler* [2011] 5 C.M.L.R. 9 at [69]–[72].
[272] *Ziegler* [2011] 5 C.M.L.R. 9 at [89].
[273] *Ziegler* [2011] 5 C.M.L.R. 9 at [90].
[274] *Ziegler* [2011] 5 C.M.L.R. 9 at [92].
[275] *Ziegler* [2011] 5 C.M.L.R. 9 at [93].
[276] *Ziegler* [2011] 5 C.M.L.R. 9 at [94].
[277] *Ziegler* [2011] 5 C.M.L.R. 9 at [142].
[278] *Ziegler* [2011] 5 C.M.L.R. 9 at [167].
[279] *Gosselin Group and Stichting Administratiekantoor Portielje v Commission* (T-208/08 and T-209-08), judgment of June 16, 2011.
[280] *Gosselin/Portielje*, judgment of June 16, 2011 at [2].
[281] *Gosselin/Portielje*, judgment of June 16, 2011 at [34]–[35].
[282] *Gosselin/Portielje*, judgment of June 16, 2011 at [35].

The concept of single economic entity could not be used to remedy a lack of commercial activity of a parent company, meaning that it was not "an undertaking".[283]

Secondly, the court considered whether Portielje could be considered an undertaking and decided not. Here the EC argued that there was a presumption in the case law that if one company owned a controlling stake in another and was directly or indirectly involved in the management of that company, the first company should be considered part of that company's activity and be treated as an undertaking in competition law.[284]

The court considered that approach, but found there was no evidence of Portielje exercising a decisive influence on Gosselin. Further the court noted that in this situation there was no presumption of involvement because of the shareholding concerned and therefore the burden of proof was on the EC.[285] The EC had not offered concrete evidence of such involvement, just structural arguments which were not enough.[286]

Thirdly, the court considered whether, if Portielje were an undertaking, the conduct of Gosselin could be attributed to it. Again the court found not, because it considered that Portielje had rebutted the presumption that it exercised a decisive influence over Gosselin.[287] Here the court noted that:

- the first board meeting of Portielje had been after the infringement period;
- Portielje only had voting rights in the general assembly of shareholders and there had been none in the period of alleged infringement of Portielje;
- the court also considered that the fact that there was a partial overlap in membership between the boards of Portielje and Gosselin did not show that Portielje influenced Gosselin. Portielje had not influenced the composition of Gosselin's board in the relevant period. A partial overlap of the board members did not mean that all the companies in which the three Portielje board members were also board members should therefore be considered parent companies of Gosselin.[288]

Fourthly, as in *Ziegler*, the court considered whether Portielje and Gosselin could argue that there was no effect on trade because of the presumptions in the EC's Guidelines. The GC again rejected that claim. The EC had not shown that the €40 million threshold was exceeded again (since sub-contracting turnover had to be excluded). Nor was the EC correct to say that it did not have to define the market. However, here again "exceptionally" the court considered the EC had done enough to show that the 5 per cent threshold was exceeded and therefore the presumptions in the Guidelines did not apply.[289]

Fifthly, the court had to consider a claim by Gosselin that the EC had not shown that it had infringed between October 1993 and November 1996. Gosselin succeeded. It appeared that the EC had no documents proving Gosselin's infringement in this period. The EC argued, however, that in this period Gosselin had not definitively ended its participation. Notably Gosselin had not "publicly distanced itself" from the cartel.[290]

In an important passage in the judgment, the court recalled that the burden of proof was on the EC to produce precise evidence of an infringement. This was particularly so for proof of duration "a criterion whose weight has been considerably strengthened in the 2006 Fining Guidelines". In the absence of direct proof of infringement the EC was therefore bound to produce elements of proof sufficiently near in time to reasonably establish that the infringement had continued.[291] The EC had no such proof.

Further, the court held that the rule in the case law (*Aalborg Portland* and others),[292] about a company alleged to be in an infringement having to publicly distance itself from the infringement, did not apply here because it concerned the situation where there had been multi-lateral meetings in which anti-competitive objects had been raised and a company would otherwise have given the impression to others that it was agreeing to the result. Here Gosselin had not participated in such meetings.[293] So, the EC could not benefit from the presumption.

Looking at the evidence, the court then found that it was not enough to show Gosselin's infringement in the relevant period. The fact that Gosselin had participated before and after that period was not enough.[294] Moreover, the fact that Gosselin had been held responsible only until September 2002, when the cartel continued until September 2003 showed that it is possible to terminate participation in a cartel, even without an express declaration to that effect.[295] A piece of evidence from after the alleged infringement was irrelevant.

[283] *Gosselin/Portielje*, judgment of June 16, 2011 at [41]–[42].
[284] *Gosselin/Portielje*, judgment of June 16, 2011 at [47]. See *Cassa di Risparmio di Firenze* (C-222/04) [2006] E.C.R. I-289 ; [2008] 1 C.M.L.R. 28 at [111]–[113].
[285] *Gosselin/Portielje*, judgment of June 16, 2011 at [48].
[286] *Gosselin/Portielje*, judgment of June 16, 2011 at [49].
[287] *Gosselin/Portielje*, judgment of June 16, 2011 at [53]–[58].
[288] *Gosselin/Portielje*, judgment of June 16, 2011 at [57].
[289] *Gosselin/Portielje*, judgment of June 16, 2011 at [67], [74], [82] et seq., [114], [116].
[290] *Gosselin/Portielje*, judgment of June 16, 2011 at [151].
[291] *Gosselin/Portielje*, judgment of June 16, 2011 at [154], referring to *Adriatica di Navigazione SpA v Commission* (T-61/99) [2003] E.C.R. II-5349, [2005] 5 C.M.L.R. 30 at [125].
[292] *Aalborg Portland A/S v Commission* (C-204/00 P) [2004] E.C.R. I-123; [2005] 4 C.M.L.R. 4.
[293] *Gosselin/Portielje*, judgment of June 16, 2011 at [158].
[294] *Gosselin/Portielje*, judgment of June 16, 2011 at [161].
[295] *Gosselin/Portielje*, judgment of June 16, 2011 at [161].

Applying *IMI*,[296] the court also noted that the cycle of meetings in the cartel was usually three times a year, whereas there was no proof of Gosselin's participation for three years. Nor could this weakness in the evidence be remedied by the affirmation that the infringement was a "single and continuous" one.[297]

The result was that the infringement duration was reduced from ten years and seven months to seven years and six months. However, as in *IMI*, since Gosselin continued the infringement after the period concerned the court held that prescription did not apply.[298]

Gosselin's fine was reduced to €2.32 million and the liability of Portielje annulled.

In *Coppens*,[299] the GC annulled the fine imposed. Verhuizingen Coppens had been found by the EC to have participated in the international removals cartel, insofar as it had been involved in offering false (cover) quotes to customers. Coppens argued on appeal that it had not participated in other aspects of the infringement and that the EC had not shown that it was aware of them, so it could not be found to have participated in a "single and continuous" infringement.

The court agreed. It noted that the EC had not shown that, when participating in the agreement of cover quotes, Coppens was aware of the other companies' conduct on commissions or that it could reasonably have foreseen such conduct.[300] Nor was it for Coppens to deny such awareness or indicate the extent to which it knew of the wider infringement, since the burden of proof was on the EC.[301] The EC was not therefore entitled to find that Coppens had participated in a "single and continuous" infringement. While the Court held that participation in the system of "cover quotes" might in itself be an infringement, the EC's decision and related fine of €104,000 was therefore annulled.

In *Team Relocations*, the EC also dismissed the appeal.[302] The main points of interest were as follows:

First, Team Relocations argued that each company should have an individualised assessment of gravity, not a uniform "value of sales" percentage figure. Interestingly, the GC agreed that there should be individualised sanctions according to the infringement and infringer, but notes that the EC could do this either in its assessment of "gravity", or in its assessment of mitigating circumstances.[303] Here the EC did the latter, considering that if there is a "single and continuous" infringement there should be a single figure for gravity.

Secondly, the court otherwise echoes what it said in the other appeals as to the way the methodology under the 2006 Fining Guidelines has changed in comparison to the 1998 Fining Guidelines and states that, as a result, greater reasoning on the level of gravity is required.[304] A lack of detail could be accepted only where minimum levels of sale percentage were taken for the infringement which was the case here with 17 per cent.

Thirdly, Team Relocations pleaded that the EC should have considered inability to pay of its own initiative (even without an application to the EC). The court rejected.[305]

Box 11

Bleaching agents

- *Edison and L'Air Liquide*
  - — Fines annulled because EC did not take detailed position on specific arguments and evidence to rebut parent/subsidiary presumption
  - — Need for evidence of link to be in relevant period
- *Solvay*
  - — Fine reduced
  - — Part of duration not proved
  - — Co-operation undervalued
  - — But "preparing the ground for an infringement" is already an infringement
  - — Place in leniency order set by when evidence of significant value provided, not just offered.

Bleaching agents

In June 2001, the GC issued judgments in relation to the EC's 2006 cartel decision concerning hydrogen peroxide and sodium perborate.[306] It may be recalled that the EC imposed fines totalling some €388.13 million in the case.

The GC annulled the decision as regards Edison[307] and L'Air Liquide,[308] insofar as the court held that the EC had failed to adopt a detailed position on the evidence which the companies had put forward to rebut the presumption of a parent's liability for a subsidiary which it wholly owns. The court's point is that this is a rebuttable presumption, so the EC is obliged to provide a statement of reasons dealing with the arguments and evidence raised. The result was annulment of the decision as regards Edison, including the fine of €58.13 million and, as regards L'Air Liquide annulment of the decision, no fine having been imposed on grounds of prescription.

The court also reduced the fine on Solvay from €167 million to €139.5 million.[309] This was on the basis that the EC had not proved the infringement for part of the

[296] *IMI Plc v Commission* (T-18/05) [2010] 5 C.M.L.R. 21.
[297] *Gosselin/Portielje*, judgment of June 16, 2011 at [162]–[167].
[298] *Gosselin/Portielje*, judgment of June 16, 2011 at [169].
[299] *Verhuizingen Coppens NV v Commission* (T-210/08) [2011] 5 C.M.L.R. 11.
[300] *Coppens* [2011] 5 C.M.L.R. 11 at [31].
[301] *Coppens* [2011] 5 C.M.L.R. 11 at [31].
[302] *Team Relocations NV v Commission* (T-204/08 and T-212/08) [2011] 5 C.M.L.R. 10.
[303] *Team Relocations* [2011] 5 C.M.L.R. 10 at [83]–[93].
[304] *Team Relocations* [2011] 5 C.M.L.R. 10 at [97]–[100].
[305] *Team Relocations* [2011] 5 C.M.L.R. 10 at [163]–[177].
[306] Court Press Release 61/11, June 16, 2011.
[307] *Edison v Commission* (T-196/06), judgment of June 16, 2011.
[308] *L'Air Liquide v Commission* (T-185/06), judgment of June 16, 2011.
[309] *Solvay SA v Commission* (T-186/06) [2011] 5 C.M.L.R. 15.

alleged period; and that the EC had undervalued Solvay's co-operation in the case, which in the GC's view justified a reduction of its fine by 20 per cent, not 10 per cent as the EC had found. Other appeals by *Caffaro* and *FMC* were rejected.[310]

The court's position in *Edison* on reasoning merits further noting.

First, the GC recalled that the EC is not required to take a position on all arguments raised by the interested parties.[311] Notably the EC does not have to deal with elements which are manifestly not on point, of no significance or clearly secondary. However, if a decision concerns a number of addressees and raises an issue as to responsibility for an infringement, it must include sufficient reasoning as regards each addressee, notably those which have to bear the cost of the infringement.[312]

Secondly, the court noted that, in this case, the parent Edison had set out in its response to the SO specific arguments to show the independence of its subsidiary. These included, among others:

- that Edison was at the time of the infringement just a non-operational holding company; supported by a summary of its related VAT declarations on its activity and internal documents suggesting that Edison's control was financial; and
- that in the light of a financial crisis in the Edison Group in 1993 there had been a reorganisation giving total management independence to group companies, especially to "non-essential" companies such as the subsidiary concerned here; supported by certain pieces of proof, such as a letter to third parties talking of the independence of the subsidiary, a declaration by the former President of the company and a copy of the subsidiary's statutes.[313]

Thirdly, the EC had simply observed that Edison's arguments were contradicted by other points and that the "other elements" raised were not enough to reverse the presumption, without giving the reasons why the EC considered the elements raised insufficient.

The court disagreed, considering the elements significant for the appreciation of the independence of the subsidiary.[314] The court noted that Edison had not simply argued that the parent was a holding company, but had also argued in a detailed way how it had reorganised to give group companies an independence of behaviour and had not just made assertions, but offered detailed information on the functioning of the holding with other material in support.[315]

In such circumstances, the EC had to rule on the arguments raised to see if the presumption of parental control of a subsidiary had been rebutted looking at the economic, operational and legal links between the companies concerned. This duty followed clearly from the rebuttable nature of the presumption.[316]

Fourthly, the court rejected the EC's position that a meeting in which Edison's representatives had participated concerning an investment project of the subsidiary showed Edison's control. Notably, the EC had not ruled on Edison's points on that issue in response to an EC request for information just before the EC's decision, including the point that the meeting in question was more than a year before the beginning of the infringement.[317] Equally the EC could not reason from certain circumstances related to the sale of the subsidiary to Solvay after the end of the infringement without explaining how that showed the influence of Edison over the subsidiary at the moment of the infringement.[318]

Fifthly, nor could the EC rely on the fact that a director of Edison was also a director in a parent of the subsidiary since that had not been raised in the SO,[319] or other arguments which had not been raised in the decision[320].

Sixthly, to the EC's argument on appeal that the elements raised were, in any event, insufficient to show the subsidiary's independence, the court again reminded the EC that it has to put its reasoning in its decision, so that it can be reviewed by the court and the EC cannot regularise its position through the interested party learning the EC's reasoning in its pleadings.[321]

Finally, it might be that further complementary points of information could be taken into account on appeal where the court is reviewing the level of fines in its unlimited jurisdiction, but that did not apply where the court is reviewing whether the EC has reasoned its finding of an infringement.[322]

The General Court's judgment in *L'Air Liquide* was based on similar grounds. Again the court considered that the EC had not sufficiently explained why the elements raised by L'Air Liquide were not enough to reverse the presumption of control over its wholly-owned subsidiary. The court noted that L'Air Liquide had put forward a specific argument, supported by a number of concrete

[310] *Caffaro and FMC* (T-192/06, T-191/06 and T-197/06) judgments of June 16, 2011.
[311] *Edison*, judgment of June 16, 2011 at [57] and [72].
[312] *Edison*, judgment of June 16, 2011 at [58].
[313] *Edison*, judgment of June 16, 2011 at [62]–[66].
[314] *Edison*, judgment of June 16, 2011 at [72].
[315] *Edison*, judgment of June 16, 2011 at [74]–[75].
[316] *Edison*, judgment of June 16, 2011 at [76]–[77].
[317] *Edison*, judgment of June 16, 2011 at [81].
[318] *Edison*, judgment of June 16, 2011 at [84].
[319] *Edison*, judgment of June 16, 2011 at [83].
[320] *Edison*, judgment of June 16, 2011 at [86].
[321] *Edison*, judgment of June 16, 2011 at [88]–[90].
[322] *Edison*, judgment of June 16, 2011 at [92]–[93].

elements which was not without significance for the assessment of L'Air Liquide's effective control of its subsidiary.[323]

Instead of dealing with L'Air Liquide's arguments, the EC had just referred to other supplementary indications of L'Air Liquide's decisive influence over its subsidiary. Although such indications might be taken into account in considering the links between the companies concerned, that did not invalidate the relevant character of the arguments raised by L'Air Liquide.[324] The court therefore annulled the EC decision insofar as it concerned L'Air Liquide.

The *Solvay* case was a little different,[325] with Solvay raising a variety of arguments. The most interesting points are as follows:

First, Solvay argued that there had been no agreement or concerted practice in the early period when the EC found an infringement, because the companies concerned had just been discussing whether and how to collude, not actually doing so. The GC disagreed, noting that there was an agreement if there was a concurrence of wills on the very principle of a restriction of competition, even if specific features were still under negotiation. The disclosure of information to competitors in preparation for an anti-competitive agreement was also a concerted practice. "Preparing the ground" for an anti-competitive practice was already an infringement.[326]

Secondly, the court also noted that regular discussions over an extended period on the scheme of an anti-competitive agreement (to limit new capacity, allocate market shares and on prices) demonstrated a common intention to restrict competition. Even if specific features were still being negotiated and certain features were still being worked out.[327]

Thirdly, the court agreed with Solvay that the EC had not proved the infringement for a period from January 1994 to May 1995, but rejected claims concerning two other periods.[328]

The court carried out a detailed review of the evidence of the claimed infringement in this period and found it weak in itself and not precisely corroborated. Some evidence was also indirect and too general. For example:

> "[A] document from an undertaking that did not participate in the alleged discussions with the applicant and which was not confirmed by [another cartel participant]. Moreover the information in the document in question does not make it possible to identify the subject matter of the discussions in question."[329]

This was not a sufficient "body of evidence" to establish Solvay's participation in the period concerned.[330]

Fourthly, the case involved a dispute as to whether Solvay should have been treated as offering leniency earlier, therefore qualifying for a greater reduction in fine. It appears that Solvay had called the EC indicating that it was available to meet with the EC and offering to bring in witnesses. Another company, Arkema, sent its leniency application with other documents by fax to the EC, which it later supplemented.

On the facts, the GC did not accept that Solvay's leniency application should be dated and timed from its offer. The court held that the position in the leniency order is set by when the evidence of significant value is provided and found that Arkema's faxed material met that standard.[331] The court also noted that there is a risk of being later in the leniency ranking order when offering oral evidence which is provided later, as opposed to written evidence provided by fax earlier.[332]

Fifthly, on the other hand, as noted above, the court considered that the EC had made a manifest error in giving others a greater reduction in fine for their evidentiary contribution and the court increased Solvay's fine reduction for co-operation from 10 per cent to 20 per cent.[333]

In July 2011 the court followed up with rulings on the appeals by *Arkema* and *Total/Elf Aquitaine*.[334] The court rejected the arguments raised. The main point of interest is that Elf Aquitaine owned more than 96 per cent of Arkema and had been held jointly and severally liable on that basis. Similarly, Total had been held jointly and severally liable from when it controlled 99 per cent of Elf Aquitaine's capital. The court confirmed that this ownership structure was enough for the parent-subsidiary presumption to be applied and considered that the presumption had not been rebutted.

The court also noted that the applicants had themselves not objected to application of the presumption in the circumstances, nor had the applicants shown that Arkema was an autonomous entity.

Box 12

Lifts and escalators
• EC entitled to take case even if composed of several national cartels (and even if a company had provisional immunity before NCAs) (*Thyssen Krupp*) • Parent not recidivist, unless found to have had decisive influence over infringing subsidiaries each time, so "single undertaking" with respective subsidiaries each time

[323] *L'Air Liquide*, judgment of June 16, 2011 at [72]–[73].
[324] *L'Air Liquide*, judgment of June 16, 2011 at [69]–[77].
[325] *Solvay* [2011] 5 C.M.L.R. 15.
[326] *Solvay* [2011] 5 C.M.L.R. 15 at [85]–[89] and [143], [147].
[327] *Solvay* [2011] 5 C.M.L.R. 15 at [125]–[145] and [153].
[328] *Solvay* [2011] 5 C.M.L.R. 15 at [192].
[329] *Solvay* [2011] 5 C.M.L.R. 15 at [112]–[113].
[330] *Solvay* [2011] 5 C.M.L.R. 15 at [118].
[331] See *Solvay* [2011] 5 C.M.L.R. 15 at [365]–[366].
[332] *Solvay* [2011] 5 C.M.L.R. 15 at [374].
[333] *Solvay* [2011] 5 C.M.L.R. 15 at [428]–[437] and [439].
[334] *Arkema* (T-189/06) and, *Total/Elf Aquitaine* (T-190/06), judgments of July 14, 2001; Court Press Release 75/11, of the same date.

- Fact of 100 per cent shareholding in each case not enough; need finding of control because rebuttable presumption
- Not enough to say single undertaking because "we could have held the parent liable the first time if we had wanted to"
- So 50 per cent recidivist increase annulled (*Thyssen Krupp*).

Lifts and escalators

In July 2011, the GC ruled on various appeals related to its decision in 2007 imposing fines for participation in cartels on the market for lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands.[335]

The court generally rejected the appeals, save in the case of one aspect of Thyssen Krupp's (TK) case. Notably the court annulled a finding of recidivism, which meant that the overall fine on the TK group was reduced from €480 million to €320 million.

For present purposes it is proposed to focus on the judgment in the joined *TK* cases. The following are the most interesting points:

First, a major part of TK's claims relates to the fact that the EC had taken up and decided on the case, even though there were four national cartels found. TK argued that was wrong, for example, in so far as a legitimate expectation had been created that national competition authorities (NCAs) were "well-placed" to deal with national cartels (e.g. on the EC Notice on Co-operation with NCAs[336]). This the GC rejected, noting that the EC had not limited its ability to deal with such cases, in particular where there were several parallel cases and at least potential trans-border trade.[337]

Secondly, TK complained strongly that it was unfair for the EC to take the case and fine it, when it had obtained immunity positions in revealing the case to the NCAs concerned. TK argued that this was contrary to the *ne bis in idem* principle. The problem being that its appears that TK was not also the first to go into the EC and obtain immunity. The court rejected these claims, above all since it found that the immunity "grants" were provisional, rather than definitive decisions.[338]

Thirdly, TK successfully argued that it should not be considered a recidivist. Here it appears that the EC's position was based on the *Michelin* case,[339] where the Court of First Instance had found recidivism where a 100 per cent subsidiary of a parent company had infringed and the parent company controlled another entity held liable for an earlier infringement.

The EC decided that TK should be fined as a recidivist because previously, in the *Alloy Surcharge* cartel, as there had been an earlier, similar infringement by the same "undertaking".[340] However the EC had not made a finding of infringement as regards TK then, nor had the EC established decisive influence over the relevant subsidiaries in the *Alloy Surcharge* decision.

The court agreed with TK.[341] In the *Alloy Surcharge* decision, the EC had made a finding of infringement solely against the subsidiaries, but not their parent companies at the time, of which TK was the economic and legal successor.[342] Nor had the EC considered that the two infringing subsidiaries and their parent companies then formed a single economic entity. Nor was it clear from the *Lifts and Escalators* decision that the subsidiaries fined in the *Alloy Surcharge* case were among the undertakings fined in the later decision.[343] Although decisive influence had been established in the *Lifts and Escalators* case, the conduct of the two subsidiaries in the *Alloy Surcharge* case could not be imputed to TK and the six subsidiaries concerned.[344]

The GC stressed that a 100 per cent shareholding creates a rebuttable presumption of decisive influence. Thus the mere fact that the subsidiaries were wholly owned by the same parent company did not imply that they were part of the same legal "undertaking".[345]

A finding of decisive influence in the earlier case, ex post would also violate TK's rights of defence, since TK had not had an opportunity to respond to such claims in a SO at the time.[346] This is a particularly important factor because a claim of recidivism might be raised much later when it might be difficult for the parent to defend itself.[347] As a result, the 50 per cent fine increase applied to the basic amount of fine for each TK subsidiary was annulled.

Fourthly, it appears that, interestingly, in its SO the EC indicated that it would offer a reduction in fine for non-contestation of the facts or further help in clarifying or completing the facts found by the EC. The EC then gave a reduction of 1 per cent based on co-operation outside the scope of the 2002 Leniency Notice. TK then appealed, arguing that the reduction should have been 10 per cent since a legitimate expectation had been raised that it would be at that level, as under the 1996 Leniency Notice and in the EC's related decisions. The court

[335] *Schindler and Others* (T-138/07); *General Technic-Otis* (T-141/07); *General Technic* (T-142/07); *Otis* (T-145/07); *United Technologies* (T-144/07, T-147/07, T-146/07, T-148/07, T-149/07, T-180/07 and T-154/07) concerning Thyssen Krupp companies; and *Kone* (T-151/07), judgments of July 13, 2011. Court Press Release 72/11 of the same date.
[336] [2004] OJ C101/43.
[337] *TK*, judgments of July 13, 2011 at [66] and [76]–[81].
[338] *TK*, judgments of July 13, 2011 at [85] and [163]–[175].
[339] *Michelin* (T-203/01) [2003] E.C.R. II-4071; [2004] 4 C.M.L.R. 18 at [290].
[340] *TK*, judgments of July 13, 2011 at [302].
[341] *TK*, judgments of July 13, 2011 at [312]–[323].
[342] *TK*, judgments of July 13, 2011 at [314].
[343] *TK*, judgments of July 13, 2011 at [315].
[344] *TK*, judgments of July 13, 2011 at [316].
[345] *TK*, judgments of July 13, 2011 at [313].
[346] *TK*, judgments of July 13, 2011 at [319].
[347] *TK*, judgments of July 13, 2011 at [320].

rejected this on the facts, since the EC's offer had not gone so far. Equally, the court noted that the EC had indicated that information supplied after the SO necessarily was more limited in value.[348]

Box 13

Synthetic rubber
• Proof of participation found insufficient (*Unipetrol* and subsidiaries) • Recidivism as regards ENI companies not shown (changes in group structure not clear; ENI itself not found liable in previous decisions) (*ENI*).

Synthetic rubber

In July 2011, the GC ruled on a number of appeals[349] against the EC's decision in 2006, finding that 13 undertakings had participated in a cartel as regards butadiene rubber (BR) and emulsion styrene butadiene rubber (ESBR) (synthetic rubbers used essentially in tyre production).

On appeal *Unipetrol* and its subsidiaries *Kaučuk* and *Trade-Stomil*[350] raised various grounds which were rejected. The GC focused on whether the EC had shown that Tavorex (Kaučuk's representative) had participated in the price-fixing and market-sharing agreements.

Unipetrol claimed here that the EC had adduced little specific evidence and that its decision contained only vague statements. Further, Unipetrol disputed the involvement of one of Tavorex's employees in an unofficial meeting in November 1999, suggesting that the evidence in the file showed that no unofficial meeting had taken place.[351]

Among other things, the EC referred to another meeting in September 1999. Further, the EC emphasised that Unipetrol had not asserted that the employee could not have been present at the meeting in response to the SO. The EC argued therefore that the points which Unipetrol raised before the court were inadmissible.[352]

The court found for Unipetrol, rejecting the EC's arguments relating to the meeting held in September 1999, since that meeting did not fall within the period of the infringement as determined by the EC with regard to Unipetrol. The court pointed also to a number of contradictions as to the dates of alleged meetings (i.e. "the evening and night of 16 November 1999" and "the night between 15 and 16 November 1999"). Also, that handwritten notes relating to the involvement of one of Tavorex's employees in the cartel were without any probative value, since they only related to BR, for which Unipetrol was not held liable.[353]

As a result, the court ruled that the evidence was not sufficient to support the conclusion that Unipetrol or its subsidiaries participated in the unlawful agreements and, therefore, the EC's decision in this respect was annulled.[354] Similar findings were made in the *Kaučuk* and *Trade-Stomil* judgments.

As for *ENI* and its subsidiary *Polimeri Europa*,[355] ENI made various arguments concerning the principle and application of the 100 per cent parental liability presumption, which the GC rejected.[356]

However, ENI also argued that the EC should not have increased its fine by 50 per cent for recidivism. In the contested decision, the EC had increased ENI's and Polimeri's basic fine by 50 per cent for their participation in the *Polypopylene* and *PVC* cartels. ENI argued that the companies held liable in the *Polypopylene* and *PVC* cases were EniChem SpA, later Syndial and Anic SpA, whereas ENI was not involved in those decisions, either as an active participant or as a parent. EniChem, Syndial and Anic were not the addressees of the current decision.[357]

The EC argued that ENI did not contest recidivism after the SO was sent and that the EC, "if it had wanted to", could have held ENI liable in the previous decisions as well. The fact that the addressees of the previous decisions were entirely controlled by ENI was decisive. Otherwise, companies would be able to avoid recidivism by mere changes in their organisational structure.[358]

The court disagreed, stating that the fact that the EC could attribute liability to a group of companies meant that, when the EC intended to invoke the notion of an "undertaking" in the sense of the art.101 TFEU, it must present detailed and definite elements to support its position. However, the court noted that in its contested decision, the EC referred to "EniChem" as "any company owned by ENI SpA" and, therefore, the term used by the EC was not sufficiently clear to determine recidivism.

Moreover, after the adoption of the *Polypopylene* and *PVC* decisions, the organisational structure of the group had evolved. For example, the activity of ENI for the products concerned had initially been carried out by EniChem Elastomeri (before it merged with EniChem SpA in 1997, i.e. after the adoption of decision *PVC II*) and the activities of EniChem SpA were then transferred to Polimeri, which, according to the court, proved the complex structural evolution of the concerned companies.

[348] *TK*, judgments of July 13, 2011 at [417]–[426] and [430].
[349] *Shell Petroleum and Others* (T-38/07, 39/07, 42/07, 44/07, 45/07, 53/07 and 59/07), judgments of July 13, 2011. Court Press Release 71/11 of the same date. With thanks to Katarzyna Bojarojċ for her assistance.
[350] *Kaučuk* (T-44/07), *Unipetrol* (T-45/07) and *Trade Stomil* (T-53/07), judgments of July 13, 2011.
[351] *Unipetrol*, judgment of July 13, 2011 at [38]–[43].
[352] *Unipetrol*, judgment of July 13, 2011 at [48]–[51].
[353] *Unipetrol*, judgment of July 13, 2011 at [51]–[59].
[354] *Unipetrol*, judgment of July 13, 2011 at [66]–[68].
[355] *ENI SpA v Commission* (T-39/07) and *Polimeri Europa SpA* (T-59/07), judgments of July 13, 2011.
[356] *ENI*, judgment of July 13, 2011 at [88].
[357] *ENI*, judgment of July 13, 2011 at [150]–[155].
[358] *ENI*, judgment of July 13, 2011 at [156]–[160].

Finally, the name "ENI" did not appear in any of the previous decisions. As a result the court held that the EC had not provided a detailed and definite enough explanation as to how the companies evolved after the adoption of the *Polypropylene* and *PVC* decisions and recidivism had not been established.[359] The fine imposed jointly and severally on ENI and its subsidiary Polimeri Europa, originally €272.25 million, was therefore reduced to €181.50 million.

In its appeal *Dow Deutschland*[360] also challenged the presumption of parental liability as applied by the EC, but its arguments were rejected by the GC.

Dow also argued that the EC had incorrectly established when it had started to participate in the infringement. In the contested decision, the EC took as the starting point for Dow's participation in the infringement the date on which its employee first attended one of the trade association subcommittee meetings. However, Dow argued that, although BSL (Dow's supplier) made one of its employees available to Dow in July 1996, the employee did not attend their first meeting on behalf of Dow until September 1996. Moreover, in the contested decision there was no indication that the employee was in contact with representatives of the other parties to the cartel between July 1996 and the meeting held in September 1996.[361]

The court agreed with Dow. The GC noted that, apart from the fact that the employee was seconded from BSL, the EC did not refer to any evidence to suggest that Dow was involved in the infringement between July and September 1996. Moreover, the EC had not adduced any concrete evidence to support the conclusion that there was a concurrence of wills between Dow and the other members of the cartel in the contested period. As a result, the EC had not shown to the requisite legal standard the circumstances constituting an infringement in the period between July and September 1996. Dow did not deny that it participated in the infringement from September 1996 and consequently, the starting date was set by the court then.

However, the amount of the fine was upheld since the court noted that the EC's error could not have had any effect on the increase applied for the duration of the infringement (less than six months).[362]

Box 14

Cartel appeals (end!)

- *Italian raw tobacco*
  - — GC upheld EC decision not confirming Deltafina's immunity, because it had informed others before the EC's planned inspection
  - — Breach of duty of co-operation (*Deltafina*)
  - — Interesting reduction for *Romana Tabacchi*: small family firm unable to pay fine
  - — Reduced partly on finding of shorter duration and because another reference year should have applied and partly as "just" in the circumstances.
- *MCAA*
  - — Fine on Elf Aquitaine as parent annulled, because EC had not given sufficient reasons rejecting specific arguments against parent subsidiary presumption
  - — Particular circumstances also justified that (different approach in previous case).

Italian raw tobacco

In September 2011, the GC issued its judgment in *Deltafina's* appeal against its fine in the *Italian Raw Tobacco* cartel case.[363] It may be recalled that Deltafina had been the first company to give the EC information on this cartel and, as a result, obtained provisional immunity. However, the EC subsequently did not confirm that immunity because Deltafina revealed what it had done to other members of the cartel before the EC had been able to carry out inspections in the case. However, in view of Deltafina's extensive co-operation the EC still granted it a 50 per cent reduction in fine.

Deltafina raised various arguments against this approach which were rejected by the court.

Most interesting of these was the argument that Deltafina had been placed in an impossible position because it had to put an end to its infringement as it applied for immunity, yet was unable to do so other than by telling others at the next trade association meeting. It should be noted that this was before the EC amended its leniency practice so as to allow itself to authorise the immunity applicant to continue an infringement while the EC prepared its on the spot inspections.[364] This was changed in the 2006 Leniency Notice, whereas the 2002 Leniency Notice applied here.

However, the court focused on the point that immunity was an exception to the general rule that a company should receive a fine for participating in cartels and a conditional agreement with the EC which has to be respected. If a condition was not complied with, then immunity did not apply.[365] Here the court found that Deltafina had breached the obligation of an immunity applicant to co-operate fully with the EC. That obligation included not breaching the confidentiality of its application, with the related risk that this would undermine the EC's ability to carry out its investigation.

In practice, Deltafina was found to have done three things breaching that duty of co-operation:

- First, its President had told other cartel members of its immunity application some three weeks before the EC planned its "dawn raid".

[359] *ENI*, judgment of July 13, 2011 at [166]–[171].
[360] *Dow Chemical v Commission* (T-42/07), judgment of July 13, 2011.
[361] *Dow Chemical*, judgment of July 13, 2011 at [81]–[86].
[362] *Dow Chemical*, judgment of July 13, 2011 at [90]–[100].
[363] *Deltafina v Commission* (T-12/06), judgment of September 9, 2011; Court Press Release 87/11 of the same date.
[364] *Deltafina*, judgment of September 9, 2011 at [86]–[89] and [93].
[365] *Deltafina*, judgment of September 9, 2011 at [103] et seq.

- Secondly, Deltafina's external lawyers had also told the external counsel about two other cartel members of the application.
- Thirdly (and importantly in the court's view) Deltafina had not told the EC what it had done, so that it all came out only at the hearing some years later, when one of the other cartel companies raised the point.[366]

Deltafina argued otherwise that it had told the EC what it would have to do in meetings and in a call to an EC official. The court found on the facts that, although Deltafina had explained the difficulty it felt in not telling the other cartel members, Deltafina had not indicated clearly that it planned to reveal its application and, in that way "varied the immunity agreement" with the EC. Nor did the court accept that the EC had approved what Deltafina planned to do. On the contrary, it had been clear that confidentiality of the immunity application was required. Deltafina's fine of €30 million was therefore confirmed.[367]

The court also upheld the EC's fine of €24 million on *Alliance One International*.

In October 2011, the court followed up with rulings on the appeals by Romana Tabacchi, Mindo (the former Dimon Italia) and Transcatab.[368] The court partially annulled the decision on Romana Tabacchi and reduced the fine, while upholding the fines on the other two companies.[369] All three companies were in liquidation or bankruptcy proceedings.

Romana Tabacchi[370] (RT) had been fined €2.05 million. On appeal the court reduced that to €1 million.

First, the court found that the EC had erred in its assessment of the duration of RT's participation in the cartel. RT argued that it had left the cartel in February 1999, the date of the last meeting in which it participated. The EC had found that RT had left in November 1999, on the basis of indications contained in the handwritten notes of an employee of Deltafina concerning a meeting of the cartel on the same day. The court rejected this as proof since the document showed that relations between RT and the cartel members were among the matters to be discussed during the meeting—in other words, showing that RT was already outside the cartel.

The court then assessed the evidence and found that in line with the principle *in dubio pro reo* (in doubt, benefit to the defence) the date of February 1999 should be taken. An argument from the EC that RT had not "publicly distanced itself" from the cartel was also rejected. The court emphasised that the EC simply had not proved participation beyond February 1999.[371]

Concerning the subsequent re-entry of RT into the cartel between 2001 and 2002, the EC had based its reasoning on a fax of May 2001 which indicated the prices which Deltafina would insert into certain contracts with the producers' associations.

Again the court rejected this as evidence of cartel participation. The court observed that it had not been established either that these prices were determined in the cartel, or that Deltafina had been given the task by the cartel to communicate them. The fax was also an isolated contact concerning only the price of one sort of tobacco; a contractual price which the processors undertook to pay subject to the quality of tobacco, different from the one effectively paid when tobacco is delivered and usually determined during this period each year. This single piece of evidence was not sufficient to establish that RT had once more been involved in the cartel at that time.[372]

Moreover, the court did not consider that the participation of RT in meetings of the Tobacco Producers' Trade Association in 2001 and 2002 amounted to a re-entry into the cartel, insofar as it had been shown that it was there with another commercial purpose.[373] Overall the court therefore found that RT's proven participation in the cartel was 16 months, not two years and eight months.[374]

Secondly, the court found that the EC had infringed the principle of equal treatment in assessing the basic amount of the fine relating to the specific weight of RT's participation.

The EC determined the weight of the undertakings according to their market shares during the last full year of the infringement (2001), but on the EC's decision it was stated that RT had only come back to the cartel at the end of May 2001. Thus the EC was treating different situations in an identical way. RT was in the cartel for a shorter and fragmented period, plus it had only participated in it for a limited period during 2001.

Rather, the correct reference year should have been 1998 when RT had a smaller market share. The court considered that the EC had incorrectly relied on RT's market share in 2001, resulting in it being incorrectly classified in a category of undertakings to which it did not belong and therefore giving RT a starting amount of fine which was disproportionate to its actual weight in the infringement.[375]

Thirdly, in its unlimited jurisdiction, taking into account these findings and RT's limited financial resources, the court partially annulled the EC's decision,

[366] *Deltafina*, judgment of September 9, 2011 at [125]–[149].
[367] *Alliance One International v Commission* (T-25/06), judgment of September 9, 2011.
[368] Court Press Release 103/11, October 5, 2011.
[369] With thanks to Svetlana Chobanova for her assistance with this section.
[370] *Romana Tabacchi v Commission* (T-11/06), judgment of October 5, 2011.
[371] *Romana Tabacchi*, judgment of October 5, 2011 at [134]–[149].
[372] *Romana Tabacchi*, judgment of October 5, 2011 at [151]–[156].
[373] *Romana Tabacchi*, judgment of October 5, 2011 at [161].
[374] *Romana Tabacchi*, judgment of October 5, 2011 at [268]–[271].
[375] *Romana Tabacchi*, judgment of October 5, 2011 at [183]–[188] and [274].

insofar as it found that RT participated after February 1999 and held that the final amount of its fine should be set at €1 million.

It is interesting to see here that the court looked in detail at the proportionality of the fine for a small family business, noting that RT had already sold a factory in order to pay the fine and also that a fine of €2.05 million would have forced RT into liquidation and out of the market. Although the court held that the EC was not obliged to take such matters into account and noted that RT had not itself raised them before the EC,[376] the court itself found that it would be a "just appreciation of the circumstances" to lower the fine to €1 million, an amount which it appeared RT could pay.[377]

In *Mindo*,[378] the court confirmed the fine which the EC had imposed of €3.99 million, without ruling on the merits because the applicant had failed to show an interest in the outcome of the case.

It appears that Alliance One, which had no legal connection with Mindo, had already paid the fine imposed in full as its jointly and severally liable co-debtor and had not thus far claimed a contribution from Mindo, even though more than five years had elapsed since the payment. Since 2007 Mindo had also been a subject of a pre-bankruptcy agreement procedure with assignment of the assets, in which procedure Alliance One did not participate as a creditor. Given that Mindo essentially sought a reduction of the fine, the court considered that, in the circumstances, annulment and/or alteration of the decision would not procure any advantage to it.[379]

Finally, the court dismissed *Transcatab's* appeal, upholding the fine of €14 million imposed.[380] The main interest in the case was the argument that the EC should have given a 40 per cent fine reduction because of the legal context and influence of the Government (as it had in the *Spanish Raw Tobacco* case). This was rejected on the facts, the Spanish Government having had a significant role in the relevant negotiations, whereas there was no such finding as regards the Italian case.[381]

MCAA

In September 2011 the ECJ ruled on two appeals against the GC's judgments upholding the fines imposed on Elf Aquitaine and Arkema in the *MCAA (monochloroacetic acid)* cartel.[382] The ECJ upheld Elf Aquitaine's appeal, but rejected that of Arkema. The ECJ therefore set aside the EC's decision insofar as it attributed a liability of €45 million to Elf Aquitaine as parent of the company involved in the infringement (then Atofina).

The main interest in the judgments is the ECJ's ruling that the EC had failed to give sufficient reasons rejecting the arguments raised by *Elf Aquitaine* against liability based on the parent subsidiary presumption and that the GC should not therefore have upheld the EC's decision in this respect.[383]

There were two main points in the ECJ's decision:

First, the finding that if the parent subsidiary presumption is rebuttable, then it is essential that the EC explain its reasons rejecting arguments raised by a company to show that the presumption should not apply. While the EC is not required to answer arguments "off point", here the ECJ noted that there were some seven specific arguments which had been raised that had been dealt with by the EC with a "series of simple affirmations and negotiations, which were repetitive and not at all detailed".

The company concerned could not therefore know the justifications for the EC's position, nor could the courts review that position.[384] The issue is also important since it concerns the attribution of liability and especially where, as here, the EC relied exclusively on the presumption of parental control (based here on Elf Aquitaine owning 98 per cent of Atofina).

Secondly, the court noted that there were particular circumstances here which should have led the EC to set out more reasoning. Notably the fact that in its *Organic Peroxides* decision, the EC had not held Elf Aquitaine liable in similar circumstances.[385]

Otherwise, there is some useful discussion of the rebuttable nature of the parent subsidiary presumption.[386]

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

- the EC's cartel decisions (new this year and older, where the non-confidential text has now been published, e.g. *Aluminium Fluoride* and *LCD*) and related deductions for inability-to-pay (such as *Prym Fasteners*);
- the EC's other decisions on arts 101 and 102 TFEU, including as regards the French *Order National des Pharmaciens*, *VISA's MIF* and *Polish Telecom*;
- another EC decision on breach of a seal during an inspection (*Lyonnaise des Eaux/Suez Environnement*); and
- policy discussions on restructuring of capacity after the *Irish Beef Industry* case and on collective redress.

[376] *Romana Tabacchi*, judgment of October 5, 2011 at [258].
[377] *Romana Tabacchi*, judgment of October 5, 2011 at [281]–[285].
[378] *Mindo v Commission* (T-19/06), judgment of October 5, 2011.
[379] *Mindo*, judgment of October 5, 2011 at [87].
[380] *Transcatab v Commission* (T-39/06), judgment of October 5, 2011.
[381] *Transcatab*, judgment of October 5, 2011 at [315]–[318].
[382] *Arkema v Commission* (C-520/09 P), and *Elf Aquitaine v Commission* (C-521/09 P), judgments of September 29, 2011; Court Press Release 101/11 of the same date.
[383] *Elf Aquitaine*, judgment of September 29, 2011 at [144]–[170].
[384] *Elf Aquitaine*, judgment of September 29, 2011 at [167]–[168].
[385] *Elf Aquitaine*, judgment of September 29, 2011 at [167].
[386] *Elf Aquitaine*, judgment of September 29, 2011 at [59]–[61].

Major Events and Policy Issues in EU Competition Law, 2010–2011 (Part 2)

By

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Major Events and Policy Issues in EU Competition Law, 2010–2011 (Part 2)

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Cartels; Competition law; EU law; Fines

This is the second and final part of the overview of "Major Events and Policy Issues in EU Competition Law, 2010–2011", following on from Part 1 published in last month's journal.[1]

The main part of the article is devoted to the European Commission's (EC)[2] recent decisions. First, the article discusses those on cartels, both new for 2011 and older, where the non-confidential text has now been published by the EC, e.g. *Aluminium Fluoride* and *LCD* and related decisions on inability to pay, such as *Prym Fasteners*. Then the article discusses the EC's other decisions and settlements on arts 101 and 102 TFEU,[3] including as regards the French *Ordre National des Pharmaciens*, *Visa's MIF* and *Polish Telecom*, and another EC decision on breach of a seal during an inspection (*Lyonnaise des Eaux/Suez Environnement*).

This is followed by an outline of recent policy themes, such as the restructuring of capacity after the *Irish Beef Industry* case and collective redress for competition law infringements.

The author also notes the EC's current interest in financial services, the EC's continued focus on pharma, and the significant number of damages cases in various national courts now, with judgments on, for example, anchor defendants and passing on. Finally, he includes a note on the topical European Court judgment on copyright, competition and football broadcasting (*FAPL*/*Murphy*).

European Commission decisions

Cartels—new

Box 1

New cartel fines

(November 2010 – October 2011*)

Total fines		**Highest company fines(s)**	
Air Cargo Carriers	€799.5	*Air France*	€182.9
Liquid Crystal Displays	€648.9	*Chimei InnoLux*	€300.0
Pre-stressing Steel			
(Re-adoption)	€269.9	*GlobalSteelWire/Tycsa*	€54.4
Consumer Detergents	€315.2	*Procter & Gamble*	€211.2
Bananas	€8.9	*Pacific Fruit*	€8.9
CRT Glass	€128.7	*Asahi Glass*	€45.1
TOTAL	**€2171.1**		
(N.B. Reduction in *Pre-stressing Steel*)		*** in millions**	

Box 2

Main issues—cartels

- Not so many fines recently
- Fine reductions for
  - — correction based on review of parent subsidiary liability: *Pre-stressing Steel*
  - — application of 10-year limitation period: *Heat Stabilisers*
- *Prym/Fasteners*: Inability-to-pay relief for fine €15 million + €4.5 million in interest
- % of sales 16% to 20% (with some variations within cartel)
- What is taken as reference sales (e.g. *LCD*: direct, captive sales)
- Two settlements
- *LCD*: Hynix 5% off for "competitive conduct" > cheating on the cartel, proved by trade proceedings finding.

Air cargo carriers[4]

In November 2010, the EC announced that it had imposed fines of some €799.5 million on 11 air cargo carriers for operating a worldwide cartel.[5] The companies concerned are Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Quantas.

The cartel was found to have operated for six years from December 1999 to February 2006. The carriers were found to have co-ordinated first the setting of fuel surcharges and then to have introduced a security surcharge whose level had to be increased or decreased without exception by all cartel participants. The carriers also refused to pay a commission on surcharges to freight forwarders.

Lufthansa revealed the existence of the cartel and was therefore not fined, together with its subsidiary, Swiss. The EC decided not to fine 11 other air carriers and one consultancy, although addressed in the Statement of Objections (SO), for lack of evidence. The EC considered

[*] With many thanks to Sinéad Mooney for her help in the production of this article and Lisa Arsenidou, Katarzyna Bojarojc, Svetlana Chobanova, Philippe Claessens, Shane Dempsey, Roberto Grasso, Katrin Guéna, Alexander Israel, Cormac O'Daly and Stéphanie Strievi for their input and contributions.

[1] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the Commission's or EC's website are to DG Competition's specific competition page, *http://ec.europa.eu/comm/competition/index_en.html* [Accessed February 3, 2012].

[2] Please note that the abbreviation "EC" is now generally used for "European Commission", not "European Community". That will be the practice here, unless the context indicates otherwise (i.e. a reference to old treaty articles).

[3] Treaty on the Functioning of the European Union.

[4] With thanks to Katrin Guéna for her assistance with this cartel section.

[5] EC Press Release, IP/10/1487 (November 9, 2010).

that it could not sufficiently prove the previously alleged co-ordination of two other types of surcharge and of freight rate.

The EC granted a 50 per cent reduction on sales between the EEA and third countries to all carriers to take into account that part of the cartel that did not concern the EEA market. All carriers also received a 15 per cent fine reduction because regulatory authorities were seen to have encouraged surcharge co-ordination in certain ways. Four carriers received a 10 per cent additional reduction for their limited participation in the cartel and all carriers but Singapore Airlines had their fines reduced for their co-operation with the EC.

Fines ranged from €310.1 million for Air France-KLM, €104 million for British Airways and €79.9 million for Cargolux to €35.7 million for Japan Airlines and €8.2 million for LAN Chile.

LCD

In December 2010 the EC announced that it had imposed fines of some €648.9 million in the liquid crystal display cartel case. Then in October 2011, the EC published a summary of its decision and the non-confidential version was made available on its website.[6]

It appears that the infringement related to direct and indirect price-fixing in the LCD panel sector. The direct price-fixing was on price increases, ranges and/or minimum prices. The indirect price-fixing related to "regular and punctual exchange of information on prices, demand, production and capacity for the past, present and future".[7] The infringement is said to have involved bilateral and multi-lateral meetings and contacts in relation to LCD panels for IT and TV applications from October 2001 to February 2006.[8] The EC states it has evidence of 60 monthly meetings.

In setting the fines, the EC looked at the average yearly value of LCD panels sold by the participants into the EEA. The percentage of sales taken for the basic amount and additional amount was 16 per cent. The duration multiplier taken was generally 4.25 (for a cartel lasting some four years and three months). Samsung was given a deterrence uplift with a multiplier of 1.2.

Samsung was granted immunity for having revealed the cartel. LG Display had a 50 per cent leniency reduction, AU Optronics 20 per cent and, although it had not applied for it, Chunghwa was given a 5 per cent reduction. LG Display was also given partial immunity for revealing more duration of the cartel. As a result Chimei InnoLux was fined €300 million, LG Display was fined €215 million, AU Optronics €116.8 million, Chunghwa €9 million and Hannstar €8.1 million.

The most interesting additional points on the non-confidential version of the decision are as follows:

- First, since the meetings/contacts appear to have occurred mainly in Taiwan and involved Taiwanese and Korean companies, there is a fair amount of discussion about jurisdiction, with the EC arguing, on the basis of *Woodpulp* and *Gencor*,[9] that it has jurisdiction.[10]
- Secondly, the EC also considered intra-group sales since there were some discussions on such sales in the arrangements concerned.[11]
- Thirdly, for the purpose of assessing the value of sales the EC took the first "real" sale of an LCD panel (as such or integrated into a final IT or TV product) into the EEA during the period of infringement by one of the addressees of the decision.[12]
- Fourthly, in view of the exponential growth of sales over the years, the EC did not look at sales in the last business year before the decision, but took the average annual sales over the period of infringement.[13]
- Fifthly, two inability-to-pay relief applications were made, but these were rejected.[14]

Pre-stressing steel

In June 2010, the EC adopted a decision fining 17 producers of pre-stressing steel for a price-fixing and market-sharing cartel which lasted 18 years.

In October 2010, the EC corrected the fines it had imposed on ArcelorMittal, Emesa/Galycas/ArcelorMittal, WDI/Pampus and Rautaruukki/Ovako. The overall amount of fines was thus reduced from €518 million to €458.4 million.

In April 2011, the EC then stated that it had reviewed its position as regards ArcelorMittal's parental liability over its subsidiaries. Interestingly, Vice-President Almunia said:

> "[W]e decided to reduce the fines that have been imposed on the subsidiaries of two groups involved in the pre-stressing cartel. We took this decision because, in this specific case, the parent companies were liable for only a small proportion of the

[6] *LCD*, IP/10/1685, December 8, 2010; summary of decision [2011] OJ C295/8.
[7] *LCD*, summary of decision [2011] OJ C295/8 at [10].
[8] *LCD*, summary of decision [2011] OJ C295/8 at [70].
[9] *Woodpulp* (89/95) [1988] E.C.R. I-5193; *Gencor Ltd v Commission* (T-102/96) [1999] E.C.R. II-753, [1999] 4 C.M.L.R. 971.
[10] Non-confidential version of the EC decision at [230]-[243]. This is available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3580_3.pdf* [Accessed February 29, 2012].
[11] Non-confidential version of the EC decision at [300] and 394.
[12] Non-confidential version of the EC decision at [381].
[13] Non-confidential version of the EC decision at [384].
[14] Non-confidential version of the EC decision at [474]-[481].

> infringement and therefore the fine, while the subsidiaries were solely liable for a much greater portion of the fine. *In other words, the liability gap was very wide and the normal application of our rules resulted in excessive and non-recoverable fines for the subsidiaries — several times their turnover, in fact*. That is why we have greatly reduced the fines we had imposed earlier; a reduction that I consider necessary on grounds of proportionality and effectiveness."[15] (Emphasis added.)

This is welcome, insofar as it is often argued in practice (usually thus far without success) that, by raising fines to the group level, a disproportionate level of fine is set for the subsidiary. It will be interesting to see if this example remains the exception, or may lead to similar considerations by the EC in other cases.

The highest fine therefore is now the one imposed on GlobalSteelWire/Tycsa, €54.4 million. The overall fine was reduced to €269.9 million.

Consumer detergents

In April 2011, the EC announced that it had imposed fines of some €315.2 million for a cartel related to washing powders.[16] Then in July 2011 the EC published a summary of its decision.[17] A non-confidential version of the decision has also been made available on the EC's website.

The main interest in the case relates to the nature of the infringement and the fact that the case was settled.

The EC found that three groups, Henkel, Procter & Gamble (P&G) and Unilever, pursued a single and continuous infringement to stabilise market shares and fix prices in relation to heavy duty, low suds detergent powders in eight countries (Belgium, France, Germany, Greece, Italy, Portugal, Spain and the Netherlands) from January 2002 until March 2005.

It appears that the infringement occurred after the companies started co-operating on an environmental initiative, which involved dosage and weight reductions and corresponding packaging. The companies were found to have agreed certain practices to stop any of them gaining a competitive advantage as these measures were introduced. So, for example, they agreed not to reduce prices when products were "compacted" (reducing their weight), when the volume of the product was reduced, or when the number of scoops per package were reduced. The EC called these "indirect price increases". The EC also found that the companies had agreed to exclude certain types of promotion as the environment initiative was implemented and agreed on a price increase in 2004 on certain markets.[18]

As regards the settlement, it appears this took some six months of discussions between June 2010 and January 2011. The process included an estimate of the range of fines likely to be imposed by the EC and indications by the parties of the maximum fine they would accept in a settlement.[19]

Henkel was granted immunity because it approached the EC first. The percentage of sales taken for the basic and additional amounts was 16 per cent. Duration was found to be three years and two months, giving a multiplier of 3.16. P&G was given a small deterrence increase with a multiplier of 1.1 on the basis of its size as an undertaking. P&G was granted a leniency reduction of 50 per cent for its co-operation and Unilever 25 per cent for its co-operation, which apparently started later in the investigation. The result was a fine of €211 million on P&G and €104 million on Unilever.

The compliance message is clearly to watch environmental initiatives, which may be entirely legitimate in themselves, for such "spill-over" additional unlawful agreements.

Heat stabilisers

In November 2009, the EC announced that it had imposed fines of some €173.9 million on ten groups of companies for participating in a price-fixing and market-sharing cartel concerning heat stabilisers and for having exchanged sensitive commercial information.

In July 2011, the EC repealed its decision as regards *Ciba/BASF* and *Elementis*.[20] Following the *ArcelorMittal* judgment (summarised in last month's journal), the EC had to reconsider its rules on the 10-year limitation period. According to art.25 of Regulation 1/2003, the EC cannot impose fines on a company ten years after the infringement had ended. Ciba/BASF and Elementis participated in the cartel until 1998 only. The EC, however, fined the two companies because other cartel participants had brought an action against the EC's investigative measures and the EC considered that such court action would suspend the limitation period for *all* cartel members. Since the court clarified that such a suspension can only apply to the actual applicants, the EC decided that Ciba/BASF and Elementis did not have to pay their fine.

The EC announced that it also modified its 2009 decision regarding two other companies which were previously held jointly and severally liable with Elementis for its part of the fine. However, this change did not reduce the fine imposed on those two companies.

[15] See the speech by Vice-President Almunia at the St Gallen Competition Conference, April 8, 2011, available on the EC's website.
[16] *Consumer detergents*, IP/11/473 (April 13, 2011).
[17] *Consumer detergents* [2011] OJ C193/14.
[18] Non-confidential version of the EC decision at [25]-[26]. This is available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf* [Accessed February 29, 2012].
[19] Non-confidential version of the EC decision at [7]-[14].
[20] *Heat stabilisers*, IP/11/820 (July 4, 2011).

Bananas

In October 2011, the EC announced that it fined Pacific Fruit €8.9 million for operating a price-fixing cartel in relation to banana supply in Italy, Greece and Portugal together with Chiquita.[21] The EC found that the cartel lasted for nine months, from July 2004 to August 2005. Chiquita received full immunity because it informed the EC about the existence of the cartel.

Cathode ray tubes glass

In October 2011, the EC announced that it adopted a decision imposing fines on four producers of cathode ray tube (CRT) glass for price-fixing and the exchange of confidential and sensitive market information.[22] The companies concerned settled. CRT glass, also called bulb glass, is used in traditional television and computer screens.

The companies involved are: Samsung Corning Precision Material (SCP), Asahi Glass, Nippon Electric Glass and Schott. The cartel was found to have lasted from February 1999 to December 2004 and concerned all of the EEA. Asahi was fined €45.1 million, Nippon Electric Glass €43.2 million and Schott €40.4 million. SCP received full immunity because it revealed the infringement to the EC.

All the companies received a 10 per cent reduction in fines to take account of their decision to settle with the EC. Nippon Electric Glass and Schott obtained an additional reduction of respectively 50 per cent and 18 per cent for their co-operation. The EC also recognised that Schott and Asahi were not involved in all the aspects of the cartel.

Cartels—old

Heat stabilisers

In November 2010, the EC published a summary of its 2009 decision in this case.[23] It will be recalled that this was the case in which Akzo Nobel brought its appeals concerning legal professional privilege, which were ultimately rejected by the European Courts.[24] AC Treuhand was fined €174,000 for its administrative role.[25]

It may be of interest to note that the percentage of sales taken for the basic amount for each of the cartels (tin stabilisers and ESBO/esters) was set at 20 per cent, save for Chemtura and Arkema France in the tin stabilisers cartel where 19 per cent was taken, and for Chemtura and Faci in the ESBO/esters cartel, where 18 per cent was taken. The EC indicated that this was because the companies had not participated in the "rigorous implementation" of the cartels carried out until 1996.[26] A 1.7 deterrence multiplier was applied to Elf Aquitaine.

One company's fine was reduced on the basis of inability to pay.

Aluminium fluoride

In February 2011 the EC published a summary of its decision in June 2008 concerning this cartel.[27] The non-confidential version of the decision was also put on the EC's website in August 2011.

The case appears to have involved a short infringement in a small market. The EC found that the participants had

> "agreed on a target price increase for aluminium fluoride and examined various regions worldwide, including Europe to establish a general price level and, in some cases, market division".[28]

The infringement revolved around a meeting in Milan in July 2000 and related contacts until December 2000. The product is used in the production of aluminium to reduce the consumption of electricity in the smelting process and thereby contributes to reducing the production costs of aluminium. It appears that Boliden sought and obtained immunity.

The main interest in the decision itself is:

- The fact that the EC found a short infringement (approx. six months) so only used a 0.5 multiplier for duration.[29]
- The point that the EC found a worldwide infringement and therefore applied point 18 of the 2006 Fining Guidelines,[30] taking the participants' worldwide sales and applying each participant's share to aggregate sales in the EEA of the undertakings concerned.[31] There appears to have been a fair amount of discussion as to whether this was correct and/or whether market shares should be assessed excluding vertically integrated captive sales or not. The EC considered it could look at the relative sales of the participants on the merchant (non-captive) market for fining purposes.
- The fact that the EC found Fluorsid, a Sardinian company, responsible together with its majority shareholder, a Swiss company called Minmet Financing, which

21 *Bananas*, IP/11/1186 (October 12, 2011).
22 *CRT Glass*, IP/11/1214 (October 19, 2011).
23 *Heat Stabilisers* [2010] OJ C307/9.
24 *Heat Stabilisers* [2010] OJ C307/9 at [2].
25 *Heat Stabilisers* [2010] OJ C307/9 at [7].
26 *Heat Stabilisers* [2010] OJ C307/9 at [12].
27 *Aluminium Fluoride* [2011] OJ C40/22.
28 *Aluminium Fluoride* [2011] OJ C40/22 at [1].
29 *Aluminium Fluoride* [2011] OJ C40/22 at [241].
30 Fining Guidelines [2006] OJ C210/2.
31 *Aluminium Fluoride* [2011] OJ C40/22 at [50]–[51], [228]–[229].

owned 54.8 per cent of the shares but did not proceed against the other shareholders, notably the Autonomous Region of Sardinia, which owned 40.7 per cent of the shares.[32] Minmet was also Fluorsid's exclusive sales agent outside Italy.

- The fact that a Mexican firm, Industrial Quimica de Mexico was fined on the basis that it participated in the cartel, even though it did not sell in Europe.[33]
- The way that Industries Chimiques du Fluor, a Tunisian company, objected to the EC's approach, arguing that the EC should have acted via the Euro-Mediterranean Agreement. This was rejected by the EC.[34]
- Two companies applied for fine relief based on inability to pay, which were considered, but rejected.[35]

Reinforcing bars

In March 2011, the EC published a summary of its readopted decision in this case from September 2009, as amended in December 2009.[36] It will be recalled that the first decision was taken in 2002, but annulled as based on the expired ECSC Treaty, rather than Regulation 1/2003. The fines were maintained, save that a deterrent increase on one company, Lucchini/Siderpatenze was reduced, because it was no longer so much bigger than its rivals.[37]

Animal feed phosphates

In April 2011, the EC published summaries of its two decisions in the animal feed phosphates case in 2010.[38] It may be recalled that the EC took one decision for those who settled and another for Timab/Compagnie Financière et de Participation Roullier (CFPR), who did not. One company was granted a reduction of 70 per cent of its fine on the basis of inability to pay.[39] Timab and CFPR were fined some €59.8 million.

Carbonless paper

In May 2011, the EC published a summary of its decision in this case from June 2010.[40] The decision related to Bolloré, insofar as the ECJ had annulled an earlier decision which did not specify that Bolloré was being held liable for its direct involvement, as well as parent of its subsidiary, Copigraph. The EC issued a new SO and, after the appropriate proceedings, a new decision. Bolloré was granted a further 5 per cent reduction in fine on the basis that this time it no longer contested the starting date of the infringement.[41]

DRAMs

In June 2011 the EC published a summary of its decision from May 2010 in the DRAMs[42] cartel case.[43] The EC also published a provisional version of its non-confidential decision on its website in September 2011.

It may be recalled that in its decision the EC found that some ten undertakings had participated in a single and continuous infringement, whereby they shared information and co-ordinated their conduct on general pricing levels and quotations to major PC/server original equipment manufacturers (OEMs). This was done in relation to several types of DRAM from July 1998 to June 2002 by all ten undertakings. There was also co-ordination between Toshiba, Samsung and Elpida in respect of Rambus DRAMs from April 2001 to June 2002.

The figure for percentage of sales taken for gravity and the additional amount was 16 per cent. Duration periods were rounded down to the month.[44] Deterrence multipliers were added—for Hitachi 1.2 and for Samsung and Toshiba 1.1. Micron obtained immunity. The Commission emphasised that "every single submission" had added to its case, but varied leniency reductions based on timing. Given delay in co-operation after the Commission's request for information, the EC therefore set the fine reductions at 10 per cent off the maximum percentage within each band (e.g. 45 per cent for Infineon as the first leniency applicant; 27 per cent for Hynix as the second; and 18 per cent for the other leniency applicants.).[45] Samsung was also given immunity as regards the Rambus DRAM infringement which it had revealed to the Commission. A flat 10 per cent reduction was given for the settlement.

As a result Samsung was fined €145.7 million, Infineon €56.7 million, Hynix €51.4 million and the others' amounts ranged from €1.8 million to €20.4 million.

The main interest in the case relates to the fact that it was settled and certain variable treatment of participants in the fines imposed.

32 *Aluminium Fluoride* [2011] OJ C40/22 at [196]–[226].
33 *Aluminium Fluoride* [2011] OJ C40/22 at [178]–[185].
34 *Aluminium Fluoride* [2011] OJ C40/22 at [68]–[72].
35 *Aluminium Fluoride* [2011] OJ C40/22 at [264]–[275].
36 *Reinforcing Bars* [2011] OJ C98/16.
37 *Reinforcing Bars* [2011] OJ C98/16 at [28].
38 *Animal Feed Phosphates* [2011] OJ C111/15 and C111/19.
39 *Animal Feed Phosphates* [2011] OJ C111/15 at [27].
40 *Carbonless Paper* [2011] OJ C 138/21.
41 *Carbonless Paper* [2011] OJ C 138/21 at [8].
42 Dynamic random access memory.
43 *DRAMs* [2011] OJ C180/15.
44 Provisional non-confidential version of the EC decision at [104]. This is available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38511/38511_1763_4.pdf* [Accessed February 29, 2012].
45 Provisional non-confidential version of the EC decision at [115]-[117].

- First, as regards the settlement, it may be noted that the process and discussions appear to have taken some seven to eight months. The likely range of fines was indicated by the EC.[46]
- Secondly, as regards Hynix, the EC notes that in 2001 the EC found in trade proceedings that Hynix had contributed significantly to the fall in prices of Community producers.[47] The EC considered this to be competitive conduct in the market (i.e. not just cheating on a cartel): "Hynix went beyond a mere opportunistic behaviour and showed during 2001 a competitive conduct."[48] As a result Hynix's fine was reduced by 5 per cent.
- Thirdly, as regards Mitsubishi and Toshiba, the EC found that "the evidence shows more sporadic/indicia contacts in the collusive activities compared to other suppliers".[49] Given that the cartel was based on "regular and repeated contacts", these companies were found to have contributed to a lesser extent to the cartel and not to have been involved in all aspects of the infringement. As a result both companies' fines were reduced by 10 per cent.[50]

Candle wax

In April 2011, the EC also put on its website the final non-confidential version of its decision in the *Candle Wax* case.[51]

Cartels—inability to pay

In March 2011, the EC took a decision reducing the fine on three companies in the Prym group[52] in the *Fasteners* cartel case.[53] It may be recalled that in September 2007, the EC imposed a fine of €40.5 million on William Prym and two related companies. Since then it appears that, while appealing, Prym sought interim measures to suspend execution of part of the fine and a release of part of the bank guarantee, although the latter application was subsequently withdrawn. Prym also applied to the EC for fine relief under point 35 of the 2006 Fining Guidelines, which procedure led to this decision.

Importantly, Prym's fine was reduced by €25 million and the corresponding interest, amounting to €4.5 million was also waived: "In order to remove with reasonable likelihood the risk of the company's bankruptcy linked to the EC's fine." The Prym group's fine was therefore adjusted to some €15.5 million from some €45 million, including interest.

In April 2011 Vice-President Almunia, speaking at the Bundeskartellamt conference in Berlin, noted again that fines on SMEs and "mono-product" firms can be high. He talked of the need to ensure a fair distribution of the "global deterrence" of fines distributed to different participants in a cartel.[54] He suggested that this was an issue DG Comp was looking at in decisions this year.

This is interesting, especially taken with the General Court's remarks about possible need to address fining differentiation and the 10 per cent fine ceiling in the *International Removals* case, noted in last month's journal.

Article 101 decisions

Box 3

Article 101 cases

- *Ordre National des Pharmaciens*
  - — Action to maintain prices and prevent new structures in biomedical analysis laboratories
  - — Association €5 million fine, because members may have to pay
- *VISA MIF*
  - — Commitments based on "merchant indifference test"
- *Lyonnaise des Eaux/Suez Environnement*
  - — €8 million—Breach of seal (admitted)
  - — Fine on premises owner and parent.

Ordre National des Pharmaciens

In December 2010, the EC fined the *Ordre National des Pharmaciens* (ONP) and two of its governing bodies €5 million for having infringed art.101 TFEU.[55] The EC found that ONP took decisions in order to protect the small clinical laboratories, which represent the vast majority of laboratories in France, from competition from developing groups of laboratories. In France, clinical analysis is the monopoly of pharmacists[56] and medical doctors.[57]

[46] Provisional non-confidential version of the EC decision at [4]-[7].
[47] Provisional non-confidential version of the EC decision at [36].
[48] Provisional non-confidential version of the EC decision at [109].
[49] Provisional non-confidential version of the EC decision at [42] and [48].
[50] Provisional non-confidential version of the EC decision at [110].
[51] It may be recalled that the provisional text was available before. The final text is available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39181/39181_1908_8.pdf* [Accessed February 29, 2012].
[52] William Prym GmbH & Co KG, Prym Inovan GmbH & Co KG and Éclair Prym Group SA.
[53] *Fasteners*, summary of decision [2011] OJ C210/26.
[54] MLex, April 14, 2011. He made similar comments in January 2010, when appearing before the European Parliament, Economic and Monetary Affairs Committee.
[55] *ONP*, IP/10/1683 (December 8, 2010); summary of decision [2011] OJ C92/16. The non-confidential version of the decision is available on the EC's website in French at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39510/39510_1203_3.pdf* [Accessed February 29, 2012]. With thanks to Stéphanie Strievi for her assistance.
[56] More than 70% of the clinical laboratories are run by pharmacists: *ONP*, non-confidential version of the EC decision at [11].
[57] *ONP*, non-confidential version of the EC decision at [7].

ONP is the French governing body for pharmacists; elected by them. It has been entrusted by the French State with the public task of supervising the profession of pharmacists.[58] Pharmacists are compelled by law to be members of this professional order.

The EC investigated ONP's behaviour after it received a complaint from a laboratory group called LABCO in 2007. The investigation revealed two types of anti-competitive behaviour.

First, the EC found that between 2004 and 2008, ONP sent letters to a large number of laboratories which had given notice of contracts for co-operation with other laboratories or hospitals, where the contracts involved rebates deemed by the ONP to be too large (over 10 per cent on public prices). ONP required these laboratories to modify these rebates, stating that they constituted unfair competition, contrary to the pharmacists' Codes of Ethics.

The EC states that until January 2011, the legislation allowed rebates.[59] It also notes that during the period of investigation, the prices of clinical laboratory services were often two to three times higher in France than in other Member States. However, except for non-reimbursed analysis, prices are determined by the State, which takes into account the fact that, because of the geographical organisation of laboratories imposed by law, some laboratories have only a small volume of analysis.[60]

Secondly, the EC found that between 2003 and 2009, ONP also took various decisions to prevent laboratory groups from developing in the market for clinical laboratory tests, essentially related to shareholdings, statutes or directional appointments by non-pharmacists.

The main points of interest are as follows:

First, the EC found that each time ONP used[61] or threatened to use its disciplinary power delegated by the State[62] in order to achieve its anti-competitive objectives. However, the EC found that the decisions were not in line with the official interpretation of the law by the French State and, even sometimes, by ONP's own departments.[63] Rather, the interpretations taken were those favourable to ONP's anti-competitive objectives.[64] The EC concludes that ONP's behaviour was outside the scope of the State delegation[65] and hence that art.101 TFEU applies.[66]

Secondly, the EC rejects the argument that *Wouters*[67] should apply, i.e. that the measures in question should be considered outside art.101(1) TFEU, because necessary to support an objective of general interest, such as the protection of public health, or the deontological or ethical objectives of pharmacists. On the contrary, the EC held that the decisions were purely economic.

Thirdly, regarding the disciplinary proceedings started and sanctions imposed by ONP,[68] the EC left open the question of the application of art.101 TFEU, since it decided not to examine this behaviour. However, the EC noted that the French *Conseil d'Etat* (the highest French administrative court) has ruled that ONP's disciplinary proceedings do not ensure impartial treatment and hence infringe art.6 of the European Convention of Human Rights. Further, the EC considers that the sanctions imposed were disproportionate to the risks to public health and reinforced the effects of ONP's decisions. It appears that there also have been parallel proceedings against France recently before the European Court concerning rules on biomedical analysis laboratory ownership.[69]

Finally, as regards the fine, the EC applies para.37 of the 2006 Fining Guidelines, not following the general methodology for the setting of fines because of the particularities of the case. Notably, this is the first time that the EC might have to apply art.23(4) of Regulation 1/2003, which allows the EC to require members of an association to pay the fine where the association does not do so.[70]

This is an important decision, which may be relevant to other professional associations, insofar as it warns members of their potential liability for the acts of their executive bodies. The decision also underlines that it is not for associations of undertakings to regulate market structure and the related economic issues, unless specifically empowered by the State and consistent with EU law. Clearly all this is highly controversial and political.

Visa MIF

In December 2010, the EC announced that it had made legally binding commitments offered by Visa Europe to cut its multi-lateral interchange fees (MIFs) for debit card payments.[71] The EC's decision is available on the Commission's website.

Under the commitments, the maximum weighted average MIF applicable to immediate debit card cross-border transactions and to national debit transactions in countries where the MIF is set directly by Visa Europe will be cut to 0.2 per cent of the value of the transaction. It appears that this represents a reduction of some 30 per

[58] *ONP*, non-confidential version of the EC decision at [44].
[59] Non-confidential version of the EC decision at [24], [103] et seq.
[60] Non-confidential version of the EC decision at [24] and [30].
[61] It appears that no disciplinary proceedings were engaged concerning the rebates (see *ONP*, non-confidential version of the EC decision at [170]).
[62] *ONP*, non-confidential version of the EC decision at [128]–[129] and [548] et seq.
[63] *ONP*, non-confidential version of the EC decision at [564].
[64] *ONP*, non-confidential version of the EC decision at [548] et seq.
[65] *ONP*, non-confidential version of the EC decision at [614] et seq.
[66] *ONP*, non-confidential version of the EC decision at [618].
[67] *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) [2002] E.C.R. I-1577; [2002] 4 C.M.L.R. 27.
[68] *ONP*, non-confidential version of the EC decision at [508] et seq. and [579] et seq.
[69] *EC v France* (C-89/09) Judgment of December 16, 2010.
[70] *ONP*, non-confidential version of the EC decision at [744] et seq.
[71] *VISA MIF*, IP/10/1684 (December 8, 2010); summary of decision [2011] OJ C79/8.

cent for cross-border MIFs and some 60 per cent on average for domestic MIFs. As a result the EC has closed part of its investigation.

The EC's concern is that the MIFs are set by the Visa banks, essentially by the card issuing banks, and then passed on to merchants and consumers. It is argued, however, that the existence of such a multilateral fee, as opposed to numerous bilateral agreements between banks, is pro-competitive as it is more efficient (avoiding heavy and complex transaction costs) and facilitates the network effects of card transactions.

It appears that the EC is willing to accept the system where the charge is based on the so-called "merchant indifference test", which aims to establish the charge at the level where merchants do not mind whether the payment is in cash or by card. The idea is that at this level of charge, a fair share of the relevant benefits is passed on to consumers. The EC is accepting the Visa MIF, which is considered consistent with that approach, although saying that it may change its view in the future based on a study which it will carry out.[72]

Visa's commitments also provide, among other things, for the unblending of merchant fees, the publication of all MIF rates and the possibility for merchants to choose between different VISA cards. The idea is that these measures will increase transparency and competition between payment cards.

The commitments are binding on Visa Europe for four years and will be monitored by a trustee. The EC is continuing to investigate consumer credit and deferred debit card transactions.

The Hearing Officer's report has also been published, showing that: (1) MasterCard was denied a copy of the non-confidential version of the SO in the case, as a third party, rather than a complainant; and (2) Visa objected that it did not have proper access to the file to check for exculpatory evidence, but did not pursue the issue when asked to be more precise in its request for each document, given the confidentiality interests of third parties to those documents. It may be recalled also that there was a complainant in the case, Euro Commerce.[73]

Digitalisation of European cinemas

In March 2011, the EC announced that it had closed its preliminary investigation into certain contracts between major Hollywood film studios and so-called "integrators", third-party intermediaries which obtain financing for digital projection equipment and install it in cinemas.[74]

It appears that to encourage cinemas to install such equipment the major Hollywood studios use a so-called "virtual print fee" system (VPF). The integrator finances and installs the equipment. Film distributors pay the integrator every time a digital film is shown in a cinema towards recoupment of the equipment cost. The balance of the cost is paid for by the cinemas, through an upfront payment to the integrator. Most VPF payments are expected to be made by Hollywood film studios.

The EC's concern was a provision whereby many contracts gave the film studio the right to benefit from the most favourable terms, including lower VPF payments agreed between a given integrator and film studio or distributor. It was argued that this was to ensure that competitors (mainly the studios) would not contribute less to the digital switchover, while obtaining equal access to the new equipment. However, the EC's concern was that the effect would be to deter integrators from showing independent or art house films, for which different terms (presumably lower payments) would be agreed, as opposed to "Hollywood Blockbusters".

It appears that the major Hollywood film studios have adjusted the contracts.

Hungarian and Romanian collective rights management

In March 2011, the EC indicated that it had closed a preliminary investigation into practices by collective rights management organisations which restricted membership, in particular in these countries.[75] It appears these related to administrative requirements for registering foreign performers. The EC states the relevant recommendations and practices have been amended.

Articles 102/106 TFEU

Box 4

Articles 102/106 TFEU

- *Standard & Poor*
  - — Proposed commitments
  - — Question of excessive pricing for access to "international securities identification numbers" issued in the United States (used for various communications and operations)
- *Polish Telecom*
  - — Fine of €127.6 million for foreclosure of wholesale broadband market and the local loop
  - — Debate about double jeopardy (*ne bis in idem*), because of previous Polish telecoms regulator proceedings and fine
  - — While rejecting such claims, EC stated that it had reduced its fine to take account of the earlier one
- *Norway Post*
  - — EFTA Surveillance Authority proceedings
  - — Fine of €12.89 million
  - — Foreclosure issues re. exclusivity/preferred partner agreements with retail outlets
  - — Mail order competitor seeking access to distribution channel for parcel delivery.

[72] *VISA MIF*, non-confidential version of the EC decision at [58]–[68]. This is available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_6930_6.pdf* [Accessed February 29, 2012].
[73] *VISA MIF* Report of Hearing Officer [2011] OJ C79/6.
[74] *Digitalisation*, IP/11/257 (March 4, 2011).
[75] *Collective rights management*, IP/11/284 (March 11, 2011).

Standard & Poor

In May 2011, the EC published a notice of proposed commitments offered by Standard and Poor (S&P) in relation to its pricing policy in Europe for the distribution of international securities identification numbers (ISINs) issued in the United States.[76] The EC sought third-party comments. The EC also sought comments on (1) a clause prohibiting redistribution and resale of ISINs to other information service providers (ISPs) and (2) the effects of the commitments on global ISPs.[77]

The EC's concern is that S&P was overcharging for the use of these numbers in Europe. It appears that such identifying numbers are essential for various financial communications, operations and reporting obligations.

Under the commitments S&P, which acts as the number agency in the United States for securities, offers to distribute US ISINs to ISPs for redistribution in Europe and to financial institutions wishing to source US ISINs directly from S&P for a specific maximum total price of US $15,000 per year. S&P also commits to abolish all charges to users who source ISINs not directly from S&P, but from ISPs.

The EC's concern appears to be that, insofar as ISINs are based on the international standard ISO 6166 and S&P has a legal monopoly for the issue and first level distribution of US ISINs, its pricing should be in compliance with principles set by the ISO, regarded by the EC as a benchmark for fair prices. Other pricing would be abusive.

Under the ISO principles, there should be no charges to indirect users and charges to direct users and ISPs should not exceed the distribution costs incurred,[78] whereas S&P applied charges to indirect users and, in the EC's view, its charges to direct users and ISPs exceeded the distribution costs.

While denying the EC's claims, S&P has proposed to abolish all charges to indirect users for use of US ISINs within the EEA, as users already will have paid for the distribution cost via fees to ISPs. Current licensing agreements between indirect users and S&P (with related fees) are also to be discontinued. However, such users will have to agree not to extract, use or resell to third parties certain numerically similar, US national identifying numbers (called CUSIPs).

As regards direct users and ISPs, S&P undertakes to supply ISIN records separately from other added value information (for which S&P said it charged the higher prices). (S&P previously sold ISINs as part of a full database.) As noted above, the initial price is to be set at US$15,000 (some €10,000 per year), to be adjusted for inflation, again with the related agreement as regards the underlying US ISIN/CUSIP. Based on "a review of S&P's business processes and allocation of costs" the EC considers that this price is not excessive.[79] The commitments would be valid for five years.

Polish Telecom

In June 2011 the EC imposed a fine of €127.6 million on the Polish telecoms incumbent *Telekomunikacja Polska* (TP) for abusing its dominant position in Poland in breach of art.102 TFEU, between August 2005 and October 2009.[80] The EC started the proceedings on its own initiative in April 2009 and adopted a decision two years later.

TP was considered dominant because it is the only supplier of wholesale broadband and the local loop in Poland (it has 100 per cent shares in the wholesale markets) and, during the infringement period, it held high market shares in the retail market (at least 40 per cent). The EC found that there were significant barriers to entry and expansion which mainly arose from the fact that duplicating TP's network was not economically viable.[81]

Interestingly, in response to the SO and at the oral hearing, it appears that TP disputed the EC's jurisdiction, claiming that TP's obligations were regulated by national law which enabled alternative operators (AOs) to access the network and preserved competition in the relevant market.

Moreover, TP invoked the principle of *ne bis in idem*, arguing that it had been fined already by the Polish Telecoms Regulator, the UKE, and that in 2007 the Polish Competition Authority, the UOKIK, initiated proceedings and closed them without finding an abuse.

Further, TP invoked the agreement signed with the UKE in 2009 which addressed very similar concerns and obliged TP to comply with the regulatory framework. Finally, TP argued that there was no EU interest in the EC taking sanctions for already punished behaviour, which was further addressed by the 2009 agreement.[82]

The EC rejected TP's arguments by referring to *Deutsche Telekom*,[83] where the ECJ confirmed the GC's findings that national regulators, which act in accordance with national law, may have different objectives from EU competition law. Moreover, even if a regulatory body examines whether there was a breach of art.102 TFEU, an undertaking may still be subject to the EC's investigation.

In TP's case, the UKE's decisions were not based on art.102 TFEU, mainly because the latter is a telecoms regulator, rather than a competition authority. On the

[76] *Standard & Poor*, IP/11/571 (May 16, 2011); [2011] OJ C144/28. The proposed commitments are available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39592/39592_1727_3.pdf* [Accessed February 29, 2012].
[77] *Standard & Poor*, EC Notice [2011] OJ C144/28 at [18].
[78] *Standard & Poor*, EC Notice [2011] OJ C144/28 at [7].
[79] *Standard & Poor*, EC Notice [2011] OJ C144/28 at [12].
[80] *Polish Telecom*, IP/11/171 and MEMO/11/444 (June 22, 2011); summary of decision [2011] OJ C324/7. The non-confidential version of the decision is now available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39525/39525_1916_7.pdf*[Accessed February 29, 2012]. With thanks to Katarzyna Bojaroję for her assistance with this section.
[81] *Polish Telecom*, non-confidential version of the EC decision at [640]–[694].
[82] *Polish Telecom*, non-confidential version of the EC decision at [119]–[123].
[83] *Deutsche Telekom AG v European Commission* (C-280/08 P) [2010] 5 C.M.L.R. 27.

other hand, the proceedings closed by the UOKIK could not preclude the EC from investigating the same case, as was found by the ECJ in the *Tele2 Polska* case.[84]

As for the principle of *ne bis in idem*, the EC argued the strict view that, for this principle to be applicable, three cumulative conditions have to be fulfilled, i.e. identity of infringer, infringement and legally protected interest. As the ECJ found in the *Deutsche Telekom* case, national telecoms regulations pursue a different objective from EU competition law, so the EC considered the principle did not apply. Nevertheless, in practice the EC decided to take into account penalties previously imposed by the UKE and deduct their amount from the fine.

Finally, regarding the alleged lack of EU interest in the case, the EC emphasised that according to Article 82 EC/102 TFEU Guidance,[85] refusal to supply is one of its priorities and in TP's case, even after fines had been imposed by the UKE, the former did not change its abusive behaviour which hindered the development of wholesale broadband access in Poland.[86]

Turning to the substantive case, the EC identified the following relevant product markets: (1) wholesale broadband access (the BSA market); (2) the wholesale market for local loop unbundling (LLU); and (3) the retail market, which comprises all standard broadband products offered at a fixed location. The whole territory of Poland was identified as the relevant geographic market.[87]

The EC found five main types of abuse of dominant position: (1) proposing unreasonable conditions governing AOs' access to the wholesale broadband products; (2) delaying the negotiation process; (3) limiting access to the network; (4) limiting access to subscriber lines; and (5) refusing to provide reliable and accurate general information indispensable for AOs.

As regards unreasonable conditions, the EC found that TP deleted and modified certain clauses in standard contracts which served as a basis for BSA and LLU negotiations. The contracts did not meet the minimum standards set in relevant reference offers (ROs) imposed by the UKE and, despite a number of revised drafts, TP's subsequent proposals still did not meet the minimum requirements of the ROs.[88]

The fact that AOs had very limited bargaining power vis-à-vis TP aggravated their situation. AOs were either forced to accept TP's proposal or abandon the negotiations. As a result, it appears that the UKE had to intervene on a regular basis. Examples of such modified or deleted clauses include, inter alia:

- provisions requiring TP to make the IT interface available to AOs;[89]
- the presumption of a positive response if TP does not reply to the service change request within the time-limit;[90]
- clauses providing AOs with a longer period to withdraw from their access requests;[91]
- provisions requesting AOs to provide TP with a reasonable prognosis of their future requests (the scope of these prognoses had been significantly widened by TP, which often resulted in AOs exceeding such prognoses and a sanction up to 100 per cent of the regular TP charge);[92] and
- provisions requiring TP to provide AOs with an alternative solution in case of lack of possibilities to grant access to subscriber lines due to technical reasons.[93]

As regards delaying tactics at the different stages of the negotiation process, the EC found that TP used various delaying tactics throughout the access negotiation process, which in 70 per cent of the cases resulted in very lengthy negotiations.

Namely, even though the ROs and Polish telecoms law set a 90-day period to sign an access agreement, the EC noted that from 250 negotiations started, only 103 had been concluded with an agreement, out of which only 31 had been signed within 90 days (mainly in 2010, after the EC had started the investigation).[94]

Such delays were found to have taken place at every level of the negotiations. TP was delaying the start of negotiations by postponing delivery of the draft contracts to AOs, then negotiating particular contractual clauses, and finally delaying signing of the contract. Moreover, often TP's representatives lacked power to commit the incumbent, which resulted in further delays.[95]

As regards limited access to TP's network, the EC found that TP also created impediments to the AOs at the stage of accessing TP's network for BSA and LLU. In particular, TP rejected a high number of AOs' requests on formal and technical grounds (more than 30 per cent) and took an unreasonably long time to implement accepted requests.[96] Further, the EC found that in almost 50 per cent of positively verified requests in 2007–2008, no access was finally granted, owing to AOs' withdrawals caused by exaggerated cost estimates presented by TP.[97] The EC also found that TP could have granted more

[84] *Tele2Polska* (C-375/09), judgment of May 3, 2011, summarised in last month's journal.
[85] Article 82 EC/102 TFEU Guidance [2009] OJ C45/7.
[86] *Polish Telecom*, non-confidential version of the EC decision at [125]–[145].
[87] *Polish Telecom*, non-confidential version of the EC decision at [571]–[639].
[88] *Polish Telecom*, non-confidential version of the EC decision at [165]–[169].
[89] *Polish Telecom*, non-confidential version of the EC decision at [176]–[179] (BSA agreements).
[90] *Polish Telecom*, non-confidential version of the EC decision at [184]–[186] (BSA agreements).
[91] *Polish Telecom*, non-confidential version of the EC decision at [172]–[175] (BSA agreements).
[92] *Polish Telecom*, non-confidential version of the EC decision at [197]–[205] (BSA agreements).
[93] *Polish Telecom*, non-confidential version of the EC decision at [255]–[258] (LLU agreements).
[94] *Polish Telecom*, non-confidential version of the EC decision at [296]–[300].
[95] *Polish Telecom*, non-confidential version of the EC decision at [302]–[374].
[96] *Polish Telecom*, non-confidential version of the EC decision at [375]–[376].
[97] *Polish Telecom*, non-confidential version of the EC decision at [387]–[388].

favourable access conditions because TP's subsidiary, PTK, benefited from network access on terms not available to other AOs.[98]

As regards limited access to subscriber lines, the EC found that, as with its network, TP hindered AOs' access to subscriber lines, owing to the high number of rejections of AOs' orders on formal and technical grounds.[99] The rejections were mainly caused by the use of outdated TP data to verify AOs' orders[100] and unclear verification mechanisms.[101] In this case too, PTK enjoyed better conditions and a lower rejection rate.[102]

Further, the EC noted that AOs faced the problem of limited availability of subscriber lines, linked to the failure to provide BSA services on wholesale line rental lines[103] and delays in the repair of faulty lines.[104]

In practice, TP was therefore found to have prevented AOs from upgrading their narrowband clients to broadband, limiting the AOs' ability to expand and grow on the retail broadband market.

Finally, the EC held that TP significantly delayed the implementation of AOs' orders for subscriber lines. Such delays were mainly caused by a lack of resources dedicated to regulated services on TP's side, lack of experience, lack of a clear interpretation as to how the process should be implemented, an unclear division of competences between TP's internal units and insufficient IT support.[105]

As for the refusal to provide reliable and accurate general information (GI) indispensable for AOs, the EC found that TP did not provide reliable GI to AOs which was necessary for them to make a sound decision regarding access to TP's wholesale broadband products at specific locations, provided inaccurate and often outdated information and failed to provide IT interface. The data was also often provided in a difficult to process format such as scanned pdf or on paper.[106]

Having reviewed TP's behaviour, the EC found that TP's conduct had the abusive effect of hindering access to the network and was capable of restricting competition in the retail market. It appears that this finding was supported by a number of TP's internal documents setting out its strategy to preserve its retail revenues.[107]

According to the EC, TP's refusal to supply was likely to reduce the rate of entry and expansion of competitors on the retail market for DSL services. The low number of unbundled local loops was considered to be a revealing indicator of the likely effect of TP's refusal to supply access to its wholesale products, delaying the growth of competition and thereby the development of alternative infrastructures.

It was also noted that the LLU penetration in Poland was one of the lowest in the EU, being 0.07 per cent in 2008 and 2.89 per cent in 2010, whereas the EU average was 15.7 per cent.[108]

Similarly, the EC stated that TP's refusal to supply was likely to have a detrimental impact on end-users, which was reflected in low broadband penetration, high broadband prices and low average broadband connection speeds. In January 2010, broadband penetration in Poland was only 13.5 per cent, one of the lowest results in Europe and significantly below the EU average of 24.88 per cent.[109]

The fine was calculated on the basis of the average value of wholesale and retail sales of internet products made by TP between 2005 and 2009. The EC had regard to the fact that, inter alia, refusal to supply had already been condemned by the EC and the European Courts, the affected markets are of considerable economic importance, the alternative operators are dependent on TP's infrastructure and that TP was considered to be aware of the illegality of its behaviour. No mitigating or aggravating circumstances were identified in this case. The previous fines imposed by the UKE amounting to €8.4 million were deducted from the fine.[110]

IBM[111]

In September 2011, the EC invited comments on IBM's proposed commitments to address the EC's concern that IBM might be abusing its dominance on the market by allegedly imposing unreasonable supply conditions for certain inputs required for maintenance of IBM mainframe hardware and software.[112] IBM commits to ensure expeditious availability of spare parts and technical information to third-party maintainers under reasonable and non-discriminatory terms and conditions for five years. Interested parties were given one month to comment on the proposed commitments.

In September 2011, the EC also announced that it was closing its investigation into IBM's alleged illegal tying of mainframe hardware with its operating system. The companies who had lodged the relevant complaints with the EC withdrew them during the year.

98 *Polish Telecom*, non-confidential version of the EC decision at [397]–[399].
99 *Polish Telecom*, non-confidential version of the EC decision at [444]–[445].
100 *Polish Telecom*, non-confidential version of the EC decision at [456]–[463].
101 *Polish Telecom*, non-confidential version of the EC decision at [464]–[468].
102 *Polish Telecom*, non-confidential version of the EC decision at [446].
103 *Polish Telecom*, non-confidential version of the EC decision at [469]–[472].
104 *Polish Telecom*, non-confidential version of the EC decision at [473].
105 *Polish Telecom*, non-confidential version of the EC decision at [474].
106 *Polish Telecom*, non-confidential version of the EC decision at [511]–[534].
107 *Polish Telecom*, non-confidential version of the EC decision at [707]–[709].
108 *Polish Telecom*, non-confidential version of the EC decision at [826]; at the same time, the LLU penetration in, for example, the Czech Republic was 7.2%.
109 *Polish Telecom*, non-confidential version of the EC decision at [839].
110 *Polish Telecom*, non-confidential version of the EC decision at [888]–[921].
111 With thanks to Cormac O'Daly for his assistance with this hi-tech section.
112 *IBM*, IP/11/1044 (September 20, 2011) EC Notice; [2011] OJ C275/8. The proposed commitments are available on the EC's website at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39692/39692_1181_5.pdf* [Accessed February 29, 2012].

Microsoft

In December 2010, the EC published a summary of its March 2009 decision deleting art.7 of its 2004 decision concerning appointment of a monitoring trustee and repealing a 2005 decision based on that article.[113] The March 2009 decision followed from the Court of First Instance's annulment of art.7 in September 2007.[114]

Google

Last year we noted the EC's announcement that it had received three complaints against Google alleging that it abused its dominance in online search. In November 2010, the EC announced that it had opened an investigation into this conduct.[115] According to the press release, it is alleged that Google lowers the ranking of its competitors' unpaid search results, lowers the "Quality Score" for sponsored links to competing vertical search services and imposes anti-competitive exclusivity obligations on advertising partners.

In 2011, Microsoft and 1plusV also announced they had lodged complaints against Google.[116] 1plusV has also initiated a damages action against Google before the Paris Tribunal de Commerce.[117]

Norway Post

In June 2011, the EFTA Surveillance Authority (ESA) published a summary of its decision from July 2010, imposing a fine of €12.89 million on *Posten Norge* for abusing its dominant position in Norway between 2000 and 2006 in breach of art.54 of the EEA Agreement.[118]

Posten Norge operates the national postal service in Norway and is a leading provider of parcel delivery services. The case concerned the market for the provision of parcel services with over-the-counter delivery and home delivery sent by mail-order and e-commerce companies to Norwegian consumers.

Following a complaint from Schenker Privpak, a company delivering parcels from distance selling companies to consumers in Norway, Sweden and Finland, the Authority carried out an investigation of Posten Norge's exclusivity agreements with certain retail groups and outlets (supermarkets, grocery stores, kiosks and petrol stations) for the establishment of its Post-in-Shop network. The ESA found that Posten Norge's conduct made it more difficult for new entrants to obtain access to the most sought after distribution channels in Norway and thus created strategic barriers to entry.

Other

In December 2010, the EC published a summary of its decision in the *ENI* case, concerning alleged strategic underinvestment.[119]

In January 2011, the EC invited comments on new proposals by the Greek Government to comply with the 2008 *Greek Lignite* decision.[120] It may be recalled that in 2009 the EC accepted proposed commitments to tender four new lignite mines to competitors of the Greek electricity incumbent Public Power Corporation (PPC) to counter concerns about PPC's privileged access to existing deposits. These represented some 40 per cent of total exploitable Greek lignite reserves.

Greece has asked for a review of that decision owing to a new energy policy. Greece plans to continue with existing lignite mines and not to open up new mines. As an alternative measure, the Greek Government proposes to give competitors of PPC access to 40 per cent of lignite-fired generation through drawing rights in existing lignite-fired power plants of PPC. Further, participants would be offered participation in future power plants using currently available lignite.

In March 2011, the EC announced that it was not pursuing investigations into *Visa*'s exclusive sponsorship deal for the *London Olympics*, apparently on the basis that this will not force these wishing to purchase tickets or wishing to buy related merchandise to establish normal Visa card accounts. (Visa will offer a "virtual" free-of-charge pre-paid Visa card.)[121]

Procedure

Lyonnaise des Eaux/Suez Environnement

In May 2011, the EC imposed a fine of €8 million jointly and severally on Lyonnaise des Eaux (LDE) and Suez Environnement (Suez), its parent, for breach of a seal during an EC inspection.[122]

It appears that the breach of seal occurred in April 2010 in the context of an investigation into water and waste water purification markets. It appears that LDE and Suez admitted that an LDE employee broke the seal and "voluntarily and without delay" gave the EC a great deal of information shedding light on the infringement, information going "far beyond what the EC could have insisted on".

The EC's power to fine is based on art.23(1)(e) of Regulation 1/2003, under which fines can be set at up to 1 per cent of turnover. Unlike in *E.on*,[123] the addressee of

[113] EC Decision 2007/53 of March 24, 2004 and EC Decision C(2005) 2988 of October 5, 2005.
[114] *Microsoft v Commission* (T-201/04) [2007] E.C.R. II-3601; [2007] 5 C.M.L.R. 11.
[115] IP/10/1624 (November 30, 2010).
[116] 1plusV Company Statement of February 22, 2011 and Microsoft Company Statement of March 31, 2011.
[117] 1plusV Company Statement of June 28, 2011.
[118] *Norway Post* [2011] OJ C190/18; EFTA Surveillance Authority Decision, Case No.34250, *Norway Post v Privpak* of July 14, 2010. The non-confidential version is available on its website at *http://www.eftasurv.int* [Accessed February 29, 2012].
[119] *ENI* [2010] OJ C352/8.
[120] IP/11/34 (January 14, 2011).
[121] MLex, March 15, 2011.
[122] *Lyonnaise des Eaux/Suez Environnement*, IP/11/632 (May 23, 2011); summary of decision [2011] OJ EU C251/4.
[123] See the summary in last month's journal, in John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010-2011 (Part 1)" [2012] I.C.C.L.R 67, 78 and Ratliff [2009] I.C.C.L.R 113, 119-121.

the decision was not just the direct owner of the relevant premises, LDE but also the parent company, Suez. It appears this was partly because Suez was closely involved in the inspection at LDE, but also to underline that this was a group compliance issue.

Policy

Box 5

Other policy issues
• Irish Competition Authority on approach to industry restructuring • Another, broader based collective redress consultation • EC interest in financial services • EC monitoring and cases re originator/generic competition in the pharma sector • Significant number of damages cases in various national courts, with judgments on, e.g. anchor defendants and passing on • Copyright, competition and football broadcasting (*FAPL*/*Murphy*).

Irish Beef Industry case

It may be interesting to note that the *BIDS* case (concerning restructuring of the Irish slaughterhouse industry through an industry agreement) has ended.[124] After the ECJ judgment holding that the relevant agreement was restrictive by object,[125] the Irish Supreme Court held that the BIDS agreement had infringed art.101(1) TFEU. The case then went back to the High Court to allow BIDS to argue that the agreement should be allowed on efficiency grounds. BIDS however withdrew its claim.

In June 2011, the Irish Competition Authority (ICA) published a *Notice on Agreements to Reduce Capacity*, which makes interesting reading.[126] The main point is that the ICA indicates its view that the "traditional approach" to this type of agreement, whereby agreements to reduce structural as opposed to cyclical overcapacity could satisfy the conditions of art.101(3) TFEU, is inconsistent with what the EC now calls the General Guidelines on Article 81(3) EC/101(3) TFEU.[127] The ICA considers that the distinction between cyclical and structural overcapacity should no longer be considered relevant.[128]

The ICA also indicates that, in its view, a party seeking to show that art.101(3) TFEU applies would have to show that the conditions were met at the date of implementation of the agreement.[129] In practice, this meant in the *BIDS* case that evidence would have had to be provided to the High Court as of the date of its implementation; not when the agreement was signed.

The ICA also indicates that, in its view, the EC's decisions in *Synthetic Fibres*[130] and *Dutch Bricks*[131] should no longer be considered reliable, insofar as they may lead people to think that in situations of structural overcapacity art.101(3) TFEU clearance should be more easily available than in cyclical overcapacity cases.[132]

The Authority also emphasises that any restrictions concerned have to be indispensable to achieve the efficiencies claimed (referring to the General Guidelines) rather that just the objective of capacity reduction. The Authority appears sceptical as to whether industry agreements are necessary to do what market forces should be expected to do anyway.[133]

That view may be debated, but it is interesting to see the ICA's views, given the topicality of industrial restructuring at the moment.

Collective redress

In February 2011, the EC launched a public consultation on collective redress in Europe, with a related questionnaire.[134] The related document, an EC staff working document called "Towards a Coherent Approach to Collective at Redress", is available on the EC's website.

The EC sought comments and answers by April 2011. It appears that there were more than 300 submissions (the responses are on the EC's website). The EC states that it plans a "Communication" on the topic this year.

The main point of this consultation is that it is not just about competition law, but is rather a broader one, looking at whether a general EU based collective redress system with related legislation, makes sense and, if so, in what form. The EC notes that some collective redress is possible in consumer law and environmental law. The EC stresses that it is aware of the risk of abusive litigation and conscious of the need to avoid US-style class actions. The EC is also looking at the case for an EU-wide solution, or leaving the issue to national law.

In annex to the document there are one-page summaries of the situation on collective redress in the 27 Member States. We will again have to see what happens, given previous suggestions to do something specific in the competition law field.

[124] See Irish Competition Authority Press Release (January 25, 2001), *http://www.tca.ie/* [Accessed February 3, 2012].
[125] *Competition Authority v Beef Industry Development Society* (C-209/07) [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6.
[126] Irish Competition Authority ("ICA"), N/11/001 (June 16, 2011) *http://www.tca.ie/* [Accessed February 3, 2012].
[127] General Guidelines on Article 81(3) EC/101(3) TFEU [2008] OJ C101/8.
[128] ICA, *Notice on Agreements to Reduce Capacity* (June 2011), para.4.6.
[129] See ICA, *Notice on Agreements to Reduce Capacity* (June 2011), paras 6.7 to 6.9 (referring to paras 44 and 45 of the General Guidelines).
[130] *Synthetic Fibres* [1984] OJ L207/17.
[131] *Stichting Backsteen* [1994] OJ L131/15.
[132] ICA, *Notice on Agreements to Reduce Capacity* (June 2011), paras 6.11 to 6.16.
[133] ICA, *Notice on Agreements to Reduce Capacity* (June 2011), paras 6.30 to 6.36.
[134] IP/11/132 (February 4, 2011).

Financial services

The EC appears active in this area at the moment. In April 2011 the EC announced two investigations into "credit default swaps"[135] related to financial information and clearing house systems. Credit default swaps are financial instruments to protect investors in the event a company or State they have invested in defaults on its payments. The EC states that they are also used as speculative tools.

In September 2011 the EC opened an investigation into the standardisation process for payments over the internet (e-payments), undertaken by the European Payments Council.[136]

In October 2011, the EC announced that it had carried out inspections in relation to derivative products linked to the Euro Interbank offered rate (Euribor).[137]

Focus on pharma

There have been several developments of note in relation to the pharma sector this year.

First, in December 2010 the EC announced further "dawn raids" in relation to possible actions to delay generic entry for a particular medicine.[138]

Secondly, in January 2011 the EC sent information requests to some 129 pharmaceutical companies asking for copies of their patent settlement agreements between originator and generic companies concerning the EEA in 2010[139] (a further "monitoring exercise" of this type).

Thirdly, in July 2011 the EC published a report on the results.[140] The EC indicated that there had been 89 relevant patent settlement agreements between originator and generic companies in 2010, with only three per cent "falling into the category which might attract scrutiny", insofar as the settlement involved a value transfer to the generic company. Otherwise the EC notes that there are a high number of settlements in comparison to the period reviewed in the pharma sector inquiry and that there are fewer involving value transfers. It appears the EC will repeat the exercise again in 2012.

Fourthly, the EC indicated that it had closed its investigation against *Boehringer Ingelheim* after the latter settled with its competitor *Almirall*.[141] This is a case which has been going on since 2007. It appears that Almirall claimed that Boehringer had filed patent applications for combinations of three categories of active substance for treating chronic destructive pulmonary disease (COPD). Boehringer is the market leader in such treatments. The companies had then become embroiled in patent litigation at national and European level on whether Boehringer's applications were unmeritorious.

The EC's investigation concerned whether Boehringer had misused the patent system to block Almirall's market entry. The settlement removes the alleged "blocking positions" in Europe, provides for a licence for two countries outside Europe and an end to pending litigation. The EC states that Almirall will be able to launch its products therefore, after obtaining relevant market authorisations.

Fifthly, in April 2011, the EC indicated that it had opened an investigation into whether a settlement agreement between *Cephalon* and *Teva* had the object or effect of hindering entry of the generic Modafinil in the EEA. (Modafinil is used in the treatment of certain sleeping disorders.)

Sixthly, it appears that the UK Government and a number of local health authorities have brought damages claims against *Reckitt-Benckiser*, concerning alleged practices to delay generic supply of a heartburn treatment drug in competition with Gaviscon.[142]

Finally, in October 2011, the EC indicated that it had opened an investigation into agreements between *Johnson & Johnson* and the generic arm of *Novartis* related to generic versions of a painkiller for chronic pain called Fentanyl in the Netherlands.[143]

Damages litigation

It is beyond the scope of this article, which focuses on the EC and the European Courts, to outline recent developments in national damages cases.

However, apart from (1) the public/private enforcement issues raised by cases like *Pfleiderer* (summarised in last month's journal); (2) the EC's Draft Guidance Paper on Damages (summarised in last month's journal); and (3) continuing debate about collective redress (outlined above), it is important to appreciate that there are now many cases working their way through the different national systems.

A conservative estimate would put this at some 50 actions. Many are in the United Kingdom, but there are also many in Germany, the Netherlands and Scandinavia.

We are seeing a lot of so-called "satellite litigation", where the focus is on preliminary questions of jurisdiction, such as whether there is an "anchor defendant" in the United Kingdom allowing claims against a cartel to be pulled in there. We are also seeing some settlements and a number of rulings on the passing-on defence (e.g. in Germany and France), showing that there are developments on the mainstream issues also. Last but not least, we are seeing public claims

[135] IP/11/509 (April 29, 2011).
[136] IP/11/1076 (September 26, 2011).
[137] MEMO/11/711 (October 19, 2011).
[138] MEMO/10/647 (December 3, 2010).
[139] IP/11/40 (January 17, 2011).
[140] IP/11/840 (July 6, 2011).
[141] IP/11/842 (July 6, 2011).
[142] MLex (May 16, 2011).
[143] IP/11/1228 (October 21, 2011).

brought, for example, in relation to asphalt in Scandinavia and pharma issues in the United Kingdom (see the cases noted in the "Pharma" section above).

It is therefore now becoming common for defence counsel to take full account of the risks of private damages litigation in Europe in assessments, as well as the public enforcement aspects.

Football broadcasting

Finally, we should note that in October 2011, the ECJ issued its judgment in the *Football Association Premier League* (FAPL) and *Murphy* cases, concerning exclusive territorial broadcast licences.[144]

FAPL licenses the rights to broadcast Premier League football on a territorial basis with only one licensee per Member State. Licensees, who pay a premium for exclusivity, are obliged to prohibit the supply of decoding devices (satellite decoder cards) outside of their territories.

The case concerns the practice whereby UK publicans (pub operators) purchase less expensive satellite decoder cards to receive Greek television broadcasts of Premier League football instead of purchasing these cards from BSkyB, the licensed broadcaster in the United Kingdom. In addition to costing less, a holder of a Greek satellite decoder card can also view live Premier League games on Saturday at 3 p.m., which is not possible in the United Kingdom as there is a "closed period" during which Premier League football cannot be broadcast in the United Kingdom (this aims to encourage attendance at lower league football matches on Saturday afternoons).

The FAPL initiated a number of actions before English courts against Greek companies promoting the sale of satellite decoder cards to the United Kingdom, and pub operating companies, and a criminal action against a publican for infringement of FAPL's copyright. The English courts before which the actions were taken referred a series of questions to the ECJ under the preliminary reference procedure.

Much of the judgment turns on freedom to provide services. Notably, the court held that UK law upholding FAPL's licensing conditions constituted a prima facie infringement of art.56 TFEU, which was not objectively justified by the need to protect intellectual property rights or the aim of encouraging the public to attend football stadiums.

Much also concerns the limits to copyright protection, where the court ruled that FAPL could not claim copyright over football matches, since these are not "copyright works", but it *could* claim copyright over opening video sequences, the Premier League anthem, pre-recorded highlights and graphics including the Premier League logo.

However, the referring courts also questioned the legality of FAPL's licensing conditions under art.101 TFEU. In particular, they asked whether the prohibition on supplying a decoding device giving access to a broadcast outside the broadcaster's licensed territory was an infringement of art.101(1) TFEU "by object".

The ECJ held that the mere fact of granting an exclusive licence in each Member State was not of itself an infringement by object.[145] This is consistent with the *Coditel II* judgment.[146]

The court then turned to consider the so-called "additional obligation" of prohibiting supply of (Greek) decoding devices enabling access to the licensed broadcast (in the United Kingdom) outside the licensed territory (Greece). The court considered that this obligation tended to restore market divisions along Member State lines and frustrate the internal market's establishment.[147] The prohibition, which was "designed to prohibit or limit the cross-border provision of broadcasting services", resulted in absolute territorial exclusivity for the licensees and was an infringement of art.101(1) by object.[148] The court considered that the conditions of art.101(3) TFEU were not satisfied since the prohibition on supplying satellite decoder cards was not indispensable.[149]

Clearly this judgment is of huge importance to any holder of intellectual property rights considering how best to license content in the EU.

[144] *Football Association Premier League v QC Leisure* (C-403/08); *Murphy v Media Protection Services* (C-429/08), judgment of October 4, 2011 [2012] F.S.R. 1. With thanks to Cormac O'Daly for his assistance with this section.
[145] *FAPL v QC Leisure* [2012] F.S.R. 1 at [137] and [138].
[146] *Coditel SA v Cine Vog Films SA (Coditel II)* (262/81) [1982] E.C.R. 3381; [1983] 1 C.M.L.R. 49 at [15].
[147] *FAPL v QC Leisure* [2012] F.S.R. 1 at [139].
[148] *FAPL v QC Leisure* [2012] F.S.R. 1 at [142] and [144].
[149] *FAPL v QC Leisure* [2012] F.S.R. 1 at [145].