Major Events and Policy Issues in EU Competition Law, 2009–2010 (Parts 1 and 2)

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Major Events and Policy Issues in EU Competition Law, 2009–2010 (Part 1)

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Abuse of dominant position; Anti-competitive practices; Block exemptions; Cartels; Competition policy; EU law; Guidelines; Horizontal agreements; Vertical agreements

This article is designed to offer an overview of the major events and policy issues related to what are now arts 101, 102 and 106 of the Treaty on the Functioning of the European Union (TFEU) from November 2009 until the end of October 2010.[1] The article is divided into an overview of:

- Legislative developments.
- European Court judgments.
- European Commission decisions.
- Follow-up to the Commission's pharma review.
- 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.

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

- Legislative updating:
  - — Vertical restraints: buyer power and internet issues
  - — Horizontal restraints proposals: information exchanges and standards debate
- *Alrosa* at the ECJ: art.9 commitment proportionality revisited
- Classic art.82 EC judgments
  - — *Solvay*, *ICI* and *Tomra*
- Cartel case divisions
  - — Single, continuous and/or multi-form infringements, e.g. *Thread, Fasteners, Copper Plumbing Tubes* and *Calcium Carbide*
  - — Evidence (and gaps therein), e.g. *IMI*, *Fasteners*, *Bitumen Spain*
- Cartel fines and "inability-to-pay" in the current economic climate

Major themes/issues in 2010

- Growth of cartel damages claims
- Best practices debate and judicial review

Legislative developments

Box 2

Legislation/Notices (adopted)

- Lisbon Treaty
- (Revised) Insurance BE
- (Revised) Vertical Restraints BE (VRBE) and Guidelines
  - — 30% "ceiling" supplier and buyer market share
  - — New hard core restraints (e.g. website re-routing)
  - — Active/passive sales in internet context
  - — Suppliers may require brick and mortar shops, but not prevent internet sales by distributors
  - — New sections on upfront access payments and category management
- (Revised) Motor Vehicle BE
  - — Cars: MVBE until 2013, with new hardcore restraints (e.g. dealers must be able to sell spare parts to independent repairers), then VRBE
  - — Spare parts and repairs/maintenance: Supplementary Guidelines apply from June 1, 2010.
  - — Transition controversial
  - — No more notice and arbitration provisions
- Best practices (but to be "adjusted")
  - — Antitrust proceedings
  - — Economic evidence
  - — Hearing Officer procedures

Adopted

Lisbon Treaty

Box 3

Small changes?

- Article 3(g) EC
  - — "undistorted competition" reference to art.3 TFEU and Protocol 27
- Articles 6 (1) and (2) TEU
  - — EU Charter of Fundamental Rights binding
  - — Future accession to ECHR

The Lisbon Treaty entered into force on December 1, 2009, some two years after it was signed on December 13, 2007.[2] The main provisions on anti-competitive agreements are now in the TFEU, with core principles in the Treaty on the European Union (TEU) and related Protocols. Article 81 EC is now art.101 TFEU, art.82 EC is now art.102 TFEU, art.86 EC is now art.106 TFEU and State Aid (formerly dealt with in arts 87–88 EC) is now in arts 107–108 TFEU. The Court of First Instance is now the General Court. We also now refer to the

* With many thanks to Sinéad Mooney and Katrin Guéna for their general help in the production of this article and to my various colleagues whose names are indicated below, with the parts with which they have helped.

[1] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LPP. References to the Commission's website are to DG Competition's specific competition "page": *http://ec.europa.eu/comm/competition/index_en.html* [Accessed December 17, 2010].

[2] See [2008] OJ C115/1.

European Union, rather than the European Community. (For this article, I have kept the terminology applicable at the time of the relevant measure or judgment).

There are three main issues raised for EU competition law:

First, art.6(1) TEU makes the EU's Charter of Fundamental Rights legally binding. While not part of the Treaty, the Charter "shall have the same legal value" as the treaties.[3] (The Charter was not formally binding before.) Under art.6(2) TEU, the EU shall also accede to the European Convention of Human Rights. What is interesting therefore (and as yet unclear) is whether this will change things, whether in terms of procedural or substantive rights.

Secondly, art.3(g) EC has gone, with the reference to "a system ensuring that competition in the internal market is not distorted" as an EU policy objective. Instead, the amended art.3 TFEU refers to "competition rules necessary for the functioning of the internal market". The reference to "undistorted competition" has been moved to Protocol 27 to the Treaty, where it is stated that "the internal market as set out in art.3 of the Treaty on European Union includes a system ensuring that competition is not distorted".

This appears to reflect the French Government's desire during the Lisbon negotiations to convince EU leaders that competition is not an end in itself, but a means to serve an end, the EU internal market. It will be interesting to see whether this change will have real practical consequences, for example on *CIF* type cases,[4] under which the legality of an EU Member State measure has been successfully challenged as contrary to a combination of arts 3(g), 10 and 81 EC[5].

Thirdly, interpretational issues may also arise owing to the stronger references to full employment and social objectives, including the reference to a "highly competitive social market economy" in amended art.3(3) TEU. Some argue that this may lead to a broader industrial policy standard.

(Revised) Insurance Block Exemption[6]

In March 2010, the European Commission (the Commission) adopted a new Regulation to replace the Insurance Block Exemption (BE), Regulation 358/2003. The new BE, Commission Regulation 267/2010, entered into force in April 2010 and will expire in 2017.[7] The Commission also issued an explanatory Communication on the new BE.[8]

The new Commission Regulation only allows two categories of agreements to be exempted from the application of art.101 EU, namely information exchanges and insurance pools.

The Commission states that information exchange is crucial for the insurance industry to assess the costs to cover risks and that access to data is important to facilitate the entry of new or foreign market players. The new Regulation modifies the conditions linked to that exemption by providing a right of access to data, also to customer and consumer organisations[9]; and by clarifying the scope of the information exchange that is exempted.

As for insurance pools, the new BE exempts pools which cover new risks or those which are inferior to a defined market share threshold. The main changes in the new Regulation in that respect concern the calculation of market shares (also taking into account income earned outside a particular pool) and a wider definition of "new risks".

Agreements on standard policy conditions and on security devices are no longer covered by the new BE because they were found not to be specific to the insurance sector. The Commission announced it would deal with those agreements in its coming revised Guidelines on Horizontal Cooperation Agreements.

(Revised) Vertical Restraints Block Exemption and Guidelines[10]

In April 2010, the Commission adopted the revised Vertical Restraints Block Exemption, Commission Regulation 330/2010 (the new VRBE) and revised Guidelines on Vertical Restraints (the new Guidelines[11]). They replaced the previous rules as from June 1, 2010. Distribution agreements in force on May 31, 2010 which do not satisfy the new rules are still covered by the old rules until they expire on May 31, 2011. The new VRBE will be valid until May 31, 2022.

The revisions were issued after a large-scale consultation process (with more than 150 contributions) which involved intense lobbying efforts until the last minute, notably in respect of the rules which should apply to online distribution.[12] Pure online retailers generally were opposed to selective distribution and suppliers which use such distribution lobbied hard to protect their physical distributors from internet free-riding.

In revising the current VRBE and Guidelines, the Commission stated that it wanted to take into account what it saw as the two major developments since entry into force of the existing rules in 1999:

[3] There are specific exceptions for the UK, Poland and the Czech Republic (see Protocol 30 and Declarations 53, 61 and 62).
[4] *Consorzio Industrie Fiammiferi (CIF) v Autorita Garante della Concorrenza e del Mercato* (C-198/01) [2003] E.C.R. I-8055, [2003] 5 C.M.L.R. 16; see Peter Roth and Vivien Rose (eds), *Bellamy & Child: European Community Law of Competition*, 6th edn (Oxford: Oxford University Press, 2010), paras 11.029–11.035.
[5] The substance of art.10 EC is now set out in art.4(3) TEU.
[6] With thanks to Katrin Guéna for her assistance.
[7] Regulation 267/2010 [2010] OJ L83/1; IP/10/359, March 24, 2010.
[8] [Communication from the Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector [2010] OJ C82/20, 30 March 2010.
[9] Regulation 267/2010 art.3.2(d) and (e).
[10] With thanks to Christian Duvernoy and Gabriele Accardo for their assistance.
[11] IP/10/445 and MEMO/138, April 20, 2010. The new VRBE was published in [2010] OJ L102/1; the new Guidelines in [2010] OJ C130/1.
[12] The contributions to the consultation are on the Commission's website. See also, generally [2010] I.C.C.L.R. 101, 105–107.

- The recognition that buyer power in the context of vertical agreements can lead to consumer harm in certain circumstances.
- The now widespread use of the internet as a modern distribution channel.

Most of the other changes to the existing rules are evolutionary. These include the definition of a "vertical agreement" and what a "hardcore" restriction means in terms of enforcement of art.101 TFEU. They also include more specific issues involving the definition of an agency agreement (generally not caught by art.101(1) TFEU[13]) and the criteria for assessing restrictions having effects similar to resale price maintenance, which remains a "hardcore" restriction, save in exceptional circumstances.[14]

The main issues on the texts are as follows:

First, the new VRBE is available now only where both the supplier and the buyer have market shares of 30 per cent or less on their respective markets, where previously only the supplier's market share mattered for most restraints. Importantly, this means considering the buyer's position on its (upstream) purchasing market for the goods concerned.[15] Importantly, it also means that, for vertical restraints involving buyers with more than 30 per cent market share, the Commission and national competition authorities can open proceedings directly, without having to withdraw the VRBE first.

Secondly, the new VRBE includes expanded clarifications on internet sales. Thus, within very limited exceptions (e.g. expansion of a distribution system into a new territory for the first two years[16]), the new VRBE provides that a supplier cannot prohibit passive sales. Notably, the new Guidelines clarify that operation of an online store by an authorised distributor in different language versions, as well as general advertising to attract online customers which is not targeted at specific customer groups or specific territories allocated to others, is considered a form of passive sales.[17]

However, new hardcore resale restrictions include[18]:

- A block on website access for customers from another exclusive territory, or automatic re-routing of those customers to other websites.
- Termination of transactions with credit cards not issued in the distributor's territory.
- A limit on the proportion of overall sales made through the internet by a distributor (but suppliers can require a fixed minimum amount of product to be sold in the distributor's physical "brick and mortar" shop).
- Payment of a higher price by the distributor for products sold online (but a fixed fee can be agreed to support the services offered by brick and mortar shops).

The new Guidelines state that targeted online advertising such as banner ads directed at a specific territory, or paid search or other online ads displayed specifically to users in a particular territory constitute active selling into that territory.[19]

Suppliers may require their distributors to have a brick and mortar shop, but they cannot limit internet sales by a distributor which operates a physical shop.[20]

The new Guidelines also clarify that suppliers can impose quality standards on a distributor's online shop. This includes rules specifying the appearance of the distributor's website and preventing sales through a third-party platform.[21] The Commission notes that this is similar to the rules that can be imposed on the appearance of physical shops in a selective distribution system, for example by luxury product suppliers.

More generally, the new Guidelines state that the criteria which suppliers may impose for online sales by selected distributors must pursue the same objectives and achieve comparable results as the criteria imposed on brick and mortar sales, while taking into account the different nature of online and physical retailing.[22]

Thirdly, as regards upfront access payments (fixed fees which distributors require suppliers to pay for access to their distribution networks), the Commission states that they benefit from the BE when the market share thresholds are not exceeded.[23]

The new Guidelines discuss the criteria that will be applied to assess the competitive impact of these practices where the new VRBE does not apply. The new Guidelines state that the use of such up-front access payments may contribute to better allocation of shelf-space for new products, taking into account that suppliers have more information on such products. However, the Commission notes that such payments may result in anti-competitive foreclosure. This is considered to be the case, in particular where the buyer can require access payments that are so large that they induce the supplier to channel all or most of its products through it (or through only a limited number of large distributors) in order to amortise the cost of the fee.

[13] New Guidelines, paras 12–21.
[14] See the new VRBE art.4(a) and the new Guidelines, para.48. Exceptions may be the launching of a new product or as support for short-term, low price advertising (two to six weeks), see the new Guidelines, paras 223–229.
[15] New VRBE art.3(1).
[16] New Guidelines, para.61.
[17] New Guidelines, para.52.
[18] New Guidelines, para.52. (See also new Guidelines, para.64.)
[19] New Guidelines, para.53.
[20] New Guidelines, paras 52 and 54.
[21] New Guidelines, paras 54–56.
[22] New Guidelines, para.56.
[23] New Guidelines, paras 203–208.

Fourthly, the new Guidelines also address category management for the first time.[24] These are agreements through which the distributor entrusts a supplier (the so-called "category captain") with advising the distributor on the marketing of a category of products, including in general not only the supplier's products, but also the products of its competitors.

The Commission states that, in most cases, such agreements will not be problematic. However, the Commission sees the main risk associated with category management as anti-competitive foreclosure of products of other suppliers competing directly with the category captain. Another risk is that category management may facilitate collusion between suppliers by offering increased opportunities to exchange sensitive information through retailers. Risks of collusion are also present where the distributor sells private labels, i.e. its own branded products that compete with those of the category captain.

At the same time, the Guidelines acknowledge that category management can bring about efficiencies, notably by allowing distributors to better anticipate demand and tailor their promotions accordingly.

The Commission states that such agreements are covered by the new VRBE where the supplier's and buyer's shares in their respective markets are under 30 per cent. However, since category management is often provided by market leaders, it will often fall outside the BE and require individual assessment.

These sections on upfront access payments and category management were something of a surprise, since up to now such issues have been treated in the context of supermarket reviews concerned with market concentration and buyer power.[25] As noted above, it may be that, with the narrower VRBE, they may now be considered more directly. In any event, through these sections the Commission (and the EU national competition authorities) are clearly putting all on notice of their interest in such practices.

(Revised) Motor Vehicle Block Exemption

During the course of the year the Commission has been reviewing the Motor Vehicle Block Exemption (MVBE) in parallel to the VRBE. It will be recalled that the old MVBE, Regulation 1400/2002 was also to expire on May 31, 2010.

As a result, in December 2009, the Commission issued proposals as to what it wanted to do next.[26] This comprised two things:

- The Commission stated that it now considered that a specific BE was not justified for the sale of new cars and commercial vehicles. Rather the Commission favoured folding the MVBE into the new VRBE. However, it proposed to do so from May 31, 2013, after a three-year adaptation period, which it said was to take account of brand-specific long-term investments made by dealers.
- The Commission stated that it still had concerns about the lack of competition in repair and maintenance services where markets are brand-specific and market shares are therefore high. The Commission stated that it therefore planned to adopt a new block exemption for repair and maintenance services, together with guidelines dealing with specific issues for motor vehicle sales and repair.

Comments were invited for mid-February. These are now available on the Commission's website.

Then, in May 2010, the Commission adopted its new motor vehicle distribution rules, [27]Commission Regulation 461/2010[28] and Supplementary Guidelines on Vertical Restraints in agreements for the Sale and Repair of Motor Vehicles and for the Distribution of Spare Parts for Motor Vehicles.[29] The new MVBE entered into force on June 1, 2010 and applies until May 31, 2023.

All of this is very complex and sector specific. The main points for present purposes are as follows:

First, under Regulation 461/2010, from June 1, 2010 to May 31, 2013, block exemption still applies to agreements for the supply of new motor vehicles, which fulfil the requirements of the old MVBE, Regulation 1400/2002 and which relate "specifically to vertical agreements for the purchase, sale or resale of new motor vehicles".[30] However, from June 1, 2013, the new VRBE Regulation 330/2010 will apply to such agreements.[31]

Secondly, as regards agreements for the supply of spare parts or for the provision of repair and maintenance services, from June 1, 2010, block exemption is conditional on meeting the criteria of Regulation 330/2010 (notably the 30 per cent market share threshold) and three additional hard core restrictions set out in Regulation 461/2010.[32] These hardcore restrictions are:

[24] New Guidelines, paras 209–213.
[25] See further Ratliff, "Buyer-Related Vertical Restraints (Upfront Access Payments and Category Management) — New Sections in the EU Guidelines on Vertical Restraints" in Charles Gheur and Nicolas Petit (eds), *Vertical restraints and distribution agreements* (forthcoming book from Bruylant).
[26] IP/09/1984, December 21, 2009. See also [2010] I.C.C.L.R. 101, 107–108 as regards earlier background.
[27] IP/10/619 and MEMO/10/217, May 27, 2010.
[28] Regulation 461/2010 [2010] OJ L129/52.
[29] Supplementary Guidelines on Vertical Restraints in agreements for the Sale and Repair of Motor Vehicles and for the Distribution of Spare Parts for Motor Vehicles [2010] OJ C138/16
[30] Regulation 461/2010 art.2.
[31] Regulation 461/2010 art.3.
[32] Regulation 461/2010 art.4.

- Members of a selective distribution system cannot be restricted from selling spare parts to independent repairers which use these parts in the repair and maintenance of a motor vehicle.[33]
- Motor vehicle manufacturers cannot restrict suppliers of spare parts, repair tools, diagnostic or other equipment to sell these goods to authorised or independent distributors or authorised or independent repairers or end-users.[34]
- Motor vehicle manufacturers cannot restrict their component suppliers' ability to place their trade marks or logos visibly on the components supplied or on spare parts.[35]

These are clearly intended to increase scope for competition in these aftermarkets.

Turning to the Supplementary Guidelines on sale and repair agreements and spare parts, (the Supplementary Guidelines) these appear to have several functions:

- The Commission seeks to explain the Commission's transitional system here. Practically the Commission notes that its current Explanatory Brochure on Regulation 1400/2002 should still be referred to as regards car supply agreements until June 2013, but as regards agreements on spare parts and repairs and maintenance, the new Supplementary Guidelines apply.[36]
- The Commission explains its position on the new hardcore restraints.
- The Commission outlines its position on how single branding obligations and selective distribution should be assessed in this sector.

Of particular interest are the Commission's observations concerning the assessment of selective distribution for authorised repairers and other motor vehicle aftermarkets, where the Commission states that particular attention should be paid to: (1) access to technical information by independent operators; (2) the misuse of legal or extended warranties to exclude independent repairers; and (3) making access to authorised repairer networks conditional upon non-qualitative criteria.[37]

It is beyond the scope of a review of this type to discuss these changes in detail. Suffice it to say that a great deal of the change is controversial. On the one hand, some dealers are dissatisfied that, having been led to believe that multi-branding was the concept required by the Commission and having invested in showrooms and other facilities accordingly, they now find the Commission going the other way and only envisaging a three-year transitional period, which is generally considered far too short. On the other hand, car manufacturers say that they have argued for some time that there was no market foreclosure problem (despite the Commission's view that there was, because of cumulative effects) and consider this recognition of their position as long overdue.

It has been important also clearly that there have been major shifts in the car industry. On the one hand, the recession leading to considerable price competition for new cars. On the other hand, the way that car manufacturers have vertically integrated or reduced the number of dealers through higher quality standards, leading to greater numbers of independent dealers potentially available for new entrants and greater numbers of independent repairers.

Standing back from such debates, there are two points to note overall:

- First, it is clear that the Commission is still concerned about competition in aftermarkets and trying to encourage greater third-party spare part and independent repairer networks to compete with authorised repairers, in markets which are viewed as mainly brand-specific (at least beyond warranty periods) and therefore involving high market shares, so that the related agreements are not block exempt and need self-assessment.
- Secondly, it should be noted how the Commission is moving away from the broader notice and arbitration provisions in the old MVBE, which were designed to protect dealers, to a more strictly competitive assessment. In this respect it appears that car manufacturers have established a Code of Ethics covering such issues,[38] but the point is that, at least from June 2013, such issues will not be addressed in the relevant BE, then the new VRBE.

Commission "Best Practices" and Hearing Officers' Guidance Paper[39]

In January 2010, DG Competition and the Hearing Officers published various documents on European Commission competition law procedures:

- Best Practices for proceedings concerning arts 101 and 102 TFEU.

[33] Regulation 461/2010 art.5(a).
[34] Regulation 461/2010 art.5(b).
[35] Regulation 461/2010 art.5(c).
[36] Supplementary Guidelines, paras 3 and 13.
[37] Supplementary Guidelines, paras 57–71.
[38] Supplementary Guidelines, para.7.
[39] With thanks to Lisa Arsenidou for her assistance.

- Best Practices for the submission of economic evidence and data collection (in art.101 and 102 cases and merger proceedings).
- Guidance on the procedures of Hearing Officers in art.101 and 102 TFEU cases.[40]

These texts are available on the Commission's website.[41] While the Best Practices on Economic Evidence were expected, having been discussed for some time with other economists, the two other procedural documents generally were not.

Although the Commission stated that it would apply the Best Practices from their issue on January 6, 2010, interested parties were invited to submit comments with a view to "adjusting them" in the light of comments received. Some 50 interested parties have participated in the consultation, which lasted until March 3, 2010. We are currently waiting to see what changes the Commission will propose.

Best Practices for Article 101 and 102 TFEU Proceedings

In general, this describes existing, rather than new practice. The main new points are as follows:

- The Commission states that it will offer "state of play" meetings in such proceedings, although not normally for cartel proceedings. These could be after the opening of the case; at a "sufficiently advanced stage" in the investigation (i.e. before the statement of objections (S/O)); and after a party's reply to the S/O. At least two meetings are also envisaged if commitments are offered.[42]
- The Commission states that English is the standard language for requests for information, although the addressees will be informed of their right to a translation.[43]
- The Commission states that normally companies' executive officers will be offered the opportunity to discuss their cases with the Director-General or deputy Director-General, or where appropriate, the Competition Commissioner.[44]
- The Commission states that it will offer the parties the opportunity to comment on "all elements of importance for any subsequent calculation of fines," including the relevant sales figures to be taken into account in the S/O.[45]
- The Commission clarifies a possible "negotiated disclosure procedure", whereby parties would be encouraged to provide access to file to a restricted circle of persons of interested third parties, to be decided on a case-by-case basis, rather than through having to create non-confidential summaries.[46]
- The Commission indicates that it may give one or more parties to a case a copy of the non-confidential version of other parties replies to the S/O, giving them an opportunity to comment.[47]
- The Commission states that it is the Commission's practice to ensure the continuous presence of senior management (Director or deputy Director-General) in oral hearings.[48]
- The Commission explains its practice to issue "letter of facts" aimed to disclose to the defence evidence which is revealed after the S/O and/or the hearing.[49]
- The Commission outlines its procedure in commitments cases.[50]
- The Commission explains that if there are delays with issuing non-confidential versions of decisions because of disputes, it may issue a provisional text, excluding accepted extracted information and disputed information, while confidentiality is being resolved.[51]

Clearly, much is welcome but a number of aspects are controversial. WilmerHale's main comments[52] focus on:

- The need for more transparency on how economic and other legal assessments are brought together in the decision-making process, as the case moves from the fact-finding in the allocated case team to the final decision-making, going up through DG Competition to the College of Commissioners.
- The related need to explain the interaction between the case team and the economists involved in a case to provide useful guidance as to how the parties should be

[40] IP/10/2, January 6, 2010.
[41] *http://ec.europa.eu/competition/consultations/2010_best_practices/index.html* [Accessed December 17, 2010].
[42] Best Practices for Article 101 and 102 TFEU Proceedings, paras 54–60.
[43] Best Practices for Article 101 and 102 TFEU Proceedings, para.26.
[44] Best Practices for Article 101 and 102 TFEU Proceedings, para.64.
[45] Best Practices for Article 101 and 102 TFEU Proceedings, para.77.
[46] Best Practices for Article 101 and 102 TFEU Proceedings, para.84.
[47] Best Practices for Article 101 and 102 TFEU Proceedings, para.89.
[48] Best Practices for Article 101 and 102 TFEU Proceedings, para.94.
[49] Best Practices for Article 101 and 102 TFEU Proceedings, paras 95–98.
[50] Best Practices for Article 101 and 102 TFEU Proceedings, paras 101–118.
[51] Best Practices for Article 101 and 102 TFEU Proceedings, para. 135.
[52] The full text is on the Commission's website.

dealing with what may even appear at times to be two different teams working in parallel.

- The view that the Hearing Officers should be given a wider role to ensure that procedures are complied with, including before the S/O is issued.
- The need for the Commission to abandon its apparent scepticism as to the abuse of legal professional privilege and respect its use as a fundamental tenet of democracy.
- The need for more information as to how DG Competition procedures ensure the protection of personal data (especially in the context of electronic discovery) and what role the European Data Protection Supervisor plays in practice.

Best Practices on Economic Evidence and Data Collection

The main objective of this document is to establish a targeted quality standard for DG Competition, the defence and third parties.

Importantly, DG Competition states that it will apply these Best Practices as well as ask companies engaged in Commission proceedings to follow them.[53] This is very welcome.

The main points concern:

- The content and presentation of economic and econometric submissions (formulating the relevant question, data relevance and reliability, choice of empirical methodology, reporting and interpreting the results).
- Responses to requests for quantitative data (general motivation for data requests, common elements of a data request, main criteria to consider when responding to a data request, co-operation in good-faith, early consultation with DG Competition to inform about what type of data is available, consultation on a draft data request and data samples, transparency regarding data collection, formatting and submission, direct access).

WilmerHale's main comments focus on:

- The need for more general guidance as to what types of empirical analysis DG Competition considers appropriate and useful in testing anti-competitive and/or efficiencies theories in particular situations.
- The need for a prudent and timely use of econometric assessments involving third party data, especially in merger cases where such assessments limit the ability of the parties to do an effective pre-merger notification and therefore obtain Phase 1 clearance.
- The need to use less burdensome economic assessments (than, e.g., full econometrics) where appropriate, i.e. where that is more proportionate to the issue and context in question.
- The need to limit data requests to existing data sources and to accept that it is not the parties' task to recreate and rearrange the data to solve any issues with their existing databases.
- The related need for greater sensitivity to the often considerable burden and cost of complying with data requests.
- The need for a clear standard practice that the parties can request a meeting with the Chief Economist or his deputy together with the head of unit to clarify any concerns as to the line which an economist appears to be taking.

Guidance on Procedures of the Hearing Officers

The main points in this Guidance document describe the Hearing Officers' tasks: during the investigative phase; in procedures potentially leading to prohibition decisions; in connection with the admission of third parties in the procedure; in connection with the oral hearing; after the oral hearing; in connection with rejection of complaints and commitment decisions; and in connection with the final decision-making process.

The Guidance gives a useful account of the specific tasks which the Hearing Officers have, while emphasising that conduct of arts 101 and 102 TFEU proceedings is primarily an issue for DG Competition and that the Hearing Officers have a limited role in the Commission's investigative phase.

WilmerHale's main comments focus on: the idea that the hearing officers' role in the proceedings should be widened to an independent general "procedural officer", with a general monitoring competence over all procedural issues, to whom the parties will be able to turn throughout the procedure and who will be able to decide whether a certain practice is reasonable or not.

Issues such as the scope of an investigation, privilege, computer investigations, unduly short deadlines to reply to requests for information or the statement of objections and delay in bringing issues to the attention of the defence are, for example, all key issues on which the hearing officer could be actively involved. This would allow for a practical and independent intervention within days, which should be much more effective than specific appeals to the General Court, which may take months, if not years (if available), or procedural points raised on

[53] IP/10/2, January 6, 2010 and Best Practices on Economic Evidence and Data Collection, para.6.

appeal after a decision is already taken, which some view as rarely successful because the General Court is reluctant to push the matter back to the Commission on such issues to start again.

Recent Commission speeches

There have been two recent speeches on "due process". Vice-President Almunia has defended an administrative system of competition enforcement, in the face of recently renewed criticisms that it would be better for the Commission to be only the prosecutor, with the infringement decisions being taken by the Courts.[54] He argues that the administrative model is better suited than the judicial one, allowing more economic analysis to be introduced and enforcement to be more dynamic. He also notes that between 2007 and 2009, 17 out of 21 cartel cases were amended "after the parties exercised their rights of defence" and six out of seven abuse of dominance cases were amended and one other case was dropped in the same period. In short, he argues that defence rights are respected.

Echoing Commissioner Van Miert some years ago, he also argues that it is important for the Commission to keep its decision-making powers in order to keep the "clout and political capital" to "help European governments and business take competition seriously".

The other speech was by Dr Italianer, Director-General for Competition, addressing similar themes. He states that "major structural changes to our competition enforcement and institutional structures are not an option". He also emphasises the transparency and accountability of the EU system. He stated that the Commission is working on ways to improve the way that hearings take place.[55]

Otherwise, there has been much focus on judicial review this year, considering in particular the extent of the European Courts' review of matters of discretion in relation to so-called "complex economic assessments" and fines, and any possible changes after the Lisbon Treaty.[56]

Proposed

Box 4

Legislation/Notices (proposed)

- Draft Horizontal Guidelines
  - — Object/effect categorisation.
  - — Presumption that parent controls JV?
  - — No environmental agreements section.
  - — New (interesting) information exchange section.
  - — Substantially revised standardisation section.
  - — Draft R&D BE narrower (e.g. not one party doing R&D; other financing).

Draft Horizontal Guidelines and Draft R&D and Specialisation Regulations[57]

In May 2010, the Commission published Draft Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements.[58] The relevant Commission documents, including the Draft Guidelines and related draft Revised BEs on R&D and specialisation, are available on the Commission's website.[59]

The main changes compared to the current Guidelines on Horizontal Cooperation[60] are:

- The inclusion of a new section focusing on information exchange.
- A revision of the section on standardisation.
- A revised draft R&D BE.

The consultation has generated a significant amount of debate and over 120 entities submitted comments to DG Competition. The submissions are now available on DG Competition's website, along with a summary of the comments.[61] The European Commission was expected to adopt the new Guidelines and new BEs before the end of 2010 (since the BEs expired on December 31, 2010).

General The 81-page Draft Guidelines contain a lot of interesting material, some of which signals a change from existing law and practice. As in the current Guidelines, it is important not only to look at the text, but also to look at the examples offered, which explain much of the Commission's approach. I propose to make a few general points, before turning to particular areas of proposed changes.

First, there are changes proposed to the general approach to assessing horizontal agreements. For example, the Draft Guidelines attach greater importance to the distinction between restrictions of competition by object and restrictions by effect.[62] This emphasis replaces the reference in the current guidelines to agreements that "fall, almost always fall, or never fall" under art.82 EC. This appears better, although predictably debate has now switched to what constitutes a restriction by object!

[54] Vice-President Almunia, "Due process and competition enforcement", IBA 4th Annual Competition Conference, September 17, 2010, SPEECH/10/449, available on the Commission's website.

[55] "Safeguarding due process in antitrust proceedings", Fordham International Antitrust Conference, September 23, 2010, available on the Commission's website.

[56] See, e.g., Ratliff, "Judicial Review in EC Competition cases before the European Courts: Avoiding double renvoi": European University Institute Proceedings, 2009 (see Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009* (Hart Publishing, forthcoming)); and see the EUI website at *http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Research/CompetitionPolicyMarketRegulation/CompetitionWorkshop/2009Session.aspx* [Accessed December 17, 2010].

[57] With thanks to Cormac O'Daly for his assistance.

[58] IP/10/489, May 4, 2010.

[59] *http://ec.europa.eu/competition/consultations/2010_horizontals/index.html* [Accessed December 17, 2010].

[60] [2001] OJ C3/2.

[61] *http://ec.europa.eu/competition/consultations/2010_horizontals/index.html* [Accessed December 17, 2010]. WilmerHale's comments are at *http://www.wilmerhale.com/files/Publication/840d9fc9-fc89-47a6-943b-74c91f351d44/Presentation PublicationAttachment/6ecc7080-70b2-4022-9209-6c5ddb24d74e/DG_COMP.pdf* [Accessed December 17, 2010].

[62] Draft Guidelines, paras 23 and 24.

Secondly, the Commission proposes to replace the current focus on an agreement's "centre of gravity" to determine which section of the guidelines is most relevant by focussing instead on the agreement's "most upstream indispensable building block of [the] integrated cooperation".[63]

Thirdly, the Draft Guidelines raise issues on the assessment of joint ventures. Notably, it is suggested that parent companies with decisive influence over a JV will be treated, consistent with the treatment in cartel cases, as a single economic entity.[64] This appears to mean that a parent is not expected to compete with a joint venture which it jointly controls, which is welcome. However the Draft Guidelines appear to imply also that there will be a general presumption that the parent "controls" the JV. Predictably, this has concerned lawyers from a cartel liability perspective. As a result, many argue that it would be better to leave the situation as it is now, i.e. with control of a JV to be established based on thorough review of the relevant facts, as occurred in the leading *Avebe* case[65] (and was recently confirmed in *Alliance One*[66]).

Fourthly, the Draft Guidelines delete the current separate section on environmental agreements, preferring now to treat such issues as "environmental standards", with one example on washing machines (as before[67]). The Commission (and it is understood some national competition authorities) reason that the relevant parts of environmental agreements should be analysed under the guidelines' other sections and that, if environmental agreements are to be assessed separately, then why not agreements on health, employment, social protection, education etc? On the other hand, many argue that the Commission should be providing more, not less, guidance on environmental agreements. In particular, it may be difficult to assess environmental agreements under the guidelines' standardisation provisions (as now proposed) when environmental agreements by their nature are often mandatory (or at the least state engineered).

Information exchange The Draft Guidelines contain a new section dedicated to information exchange.[68] Existing Commission guidance in this area is to be found in the context of maritime transport services[69] and there are several well-known cases notably, the *UK Tractor Exchange*,[70] *T-Mobile*[71] and *Asnef-Equifax*.[72] For the most part the Draft Guidelines reflect this case law.

A number of statements have provoked discussion however. For example, while the Draft Guidelines note that art.101 TFEU only applies to information exchange that "establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings",[73] some ambiguity is created by the statement that "publishing" can be a means by which information is exchanged[74]. The key point is that ordinary unilateral publication to customers should not be subject to art.101 TFEU, whereas the interactive development of a common understanding through (e.g. web) publishing might be.

Again, the Draft Guidelines appear to reflect a broad view of what constitutes a restriction of art.101 TFEU by object,[75] notably focusing not only on exchanges to achieve co-ordination, but also on exchanges which may facilitate monitoring of deviations from collusive outcomes. The Draft Guidelines also state that some information exchanges on current conduct may reveal future intentions and be restrictions by object. Further, the Draft Guidelines indicate that "cases where the combination of different types of data enables the direct deduction of intended future prices or quantities"[76] are restrictions by object.

Given uncertainties about how to apply these rules many argue that such restrictions concerned should not be "by object", but should be "restrictions by effect". It will be interesting to see if the Commission narrows its approach on these issues after the consultation.

The Draft Guidelines propose a more economic approach to the effects of information exchange, emphasising that the legality of information exchanges depends on market coverage, the market's characteristics and how the exchange of information modifies these characteristics, and the type of information exchanged[77]. This is generally welcome, although some argue that it would be useful to have a "safe harbour" based on low market share to facilitate compliance.

As for the type of information exchanged, the Draft Guidelines give illustrations of what is commercially sensitive information. Relevance is attached to (1)

[63] Draft Guidelines, para.13.
[64] Draft Guidelines, para.11.
[65] *Cooperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities* (T-314/01) [2006] E.C.R. II-3085; [2007] 4 C.M.L.R. 1 at [136] and [137].
[66] *Alliance One International Inc v European Commission* (T-24/05) Unreported October 27, 2010 GC.
[67] Draft Guidelines, paras 252 and 319.
[68] Draft Guidelines, paras 54–104.
[69] Guidelines on the application of Article 81 of the EC Treaty to maritime transport services [2008] OJ C 245/2.
[70] *John Deere v Commission* (C-7/95 P and C-8/95 P) [1998] E.C.R. I-3111; [1998] 5 C.M.L.R. 311.
[71] *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] E.C.R. I-4529; [2009] 5 C.M.L.R. 11.
[72] *Asnef-Equifax v Ausbanc* (C-238/05) [2006] E.C.R. I-11125. .
[73] Draft Guidelines, para.55.
[74] Draft Guidelines, para.54 and fn.40.
[75] See DG Competition, "Overview of the Feedback received from Stakeholders in the Public Consultation on the Draft Texts Published in 2010", para.35.
[76] DG Competition, "Overview of the Feedback received from Stakeholders in the Public Consultation on the Draft Texts Published in 2010", para.35.
[77] Draft Guidelines, paras 70 onwards.

whether the exchanged information is "genuinely public"[78]; (2) whether the exchange is public or in secret[79]; (3) whether the information is individualised or aggregated[80]; (4) the data's age[81]; and (5) the frequency of the exchange.[82]

As drafted the concept of "genuinely public information" has raised concerns. It is defined as "information that is equally easy (i.e. costless) to access for everyone".[83] Thus not all information in the "public domain" is "genuinely public" information if "the costs involved in collecting the data discourage to a sufficient degree other companies and buyers from doing so".[84] This is controversial insofar as it is argued that the key point should not be the cost of access, but whether the data is reasonably available on equal terms to all market participants. For instance, in principle information published in a fee-bearing trade journal should be regarded as genuinely public. Likewise, publication on a publicly accessible website should mean that the exchange is public.

Standardisation The Draft Guidelines' revised section on standardisation builds on the Commission's practice in investigations such as *Rambus* and *Qualcomm*.[85] The draft substantially revises the existing guidelines' section on standardisation.[86]

First, as in other sections, restrictions on competition are divided into restrictions by object and restrictions by effect[87]. Restrictions by object include when standard-setting is used as a cover for a cartel and when, before adopting a standard, intellectual property rights (IPR) holders agree "on the licensing terms they will disclose".[88]

Secondly, the Draft Guidelines propose introducing a "safe harbour" for standard-setting that (1) follows "unrestricted and transparent" rules on participation and procedure; (2) leads to the introduction of standards that are not compulsory; and (3) has a clear and binding IPR policy.[89] If all of these conditions are not fulfilled, individual assessment is required, but it does not follow that the standard-setting infringes art.101(1) TFEU.[90] Moreover, it may be possible that the standard-setting will come within the exception in art.101(3) TFEU.[91]

Thirdly, the Draft Guidelines express a clear preference for standard-setting organisations which encourage ex ante disclosure of potentially essential IPR including patent applications.[92] They also stipulate that IPR policies must require companies to "make reasonable efforts" to identify such IPR.[93] This is useful although predictably what amounts to "reasonable efforts" is a point of discussion.

Fourthly, the Draft Guidelines strongly encourage making irrevocable written commitments to license essential IPR on FRAND terms.[94] Moreover, when companies transfer IPRs, the transferor should take all necessary measures to ensure that the transferee is bound by the FRAND commitment.[95]

Fifthly, the Draft Guidelines contain two paragraphs on the controversial question of what constitutes a FRAND royalty.[96] Effectively a non-FRAND royalty is said to be an excessive royalty in the sense of the case law and Commission practice on art.102 TFEU. Rather than using cost-based models, however, a preference is indicated for measuring a proposed royalty's reasonableness by comparing it to fees charged before the IPR became part of the adopted standard.[97] The use of expert assessment to value IPR and reference to ex ante disclosure of most restrictive licensing terms including maximum royalties is also favoured.[98] The Draft Guidelines state that such disclosure will not normally infringe art.101 TFEU provided that joint negotiation and discussion of royalty rates does not happen.[99]

Sixthly, the standardisation section of the Draft also contains guidance on the legality of industry standard terms. This would, replace the Standard Policy Conditions section in the former Insurance BE, which expired on March 31, 2010.[100]

R&D The main development here is that the draft BE would introduce a number of changes, most of which would narrow its scope. This is controversial.

[78] Draft Guidelines, paras 82 and 83.
[79] Draft Guidelines, para.84.
[80] Draft Guidelines, para.85.
[81] Draft Guidelines, para.86.
[82] Draft Guidelines, para.87.
[83] Draft Guidelines, para.82.
[84] Draft Guidelines, para.82.
[85] See Part 2 of this article.
[86] Draft Guidelines, paras 252–232.
[87] Draft Guidelines, paras 266 onwards.
[88] Draft Guidelines, para.267.
[89] Draft Guidelines, para.277.
[90] Draft Guidelines, para.276.
[91] Draft Guidelines, para.276.
[92] Draft Guidelines, para.281.
[93] Draft Guidelines, para.281.
[94] Draft Guidelines, para.282. (FRAND is the abbreviation for "fair, reasonable and non-discriminatory terms".)
[95] Draft Guidelines, para.286.
[96] Draft Guidelines, paras 284 and 285.
[97] Draft Guidelines, para.284.
[98] Draft Guidelines, paras 285 and 287.
[99] Draft Guidelines, para.287.
[100] Commission Regulation 358/2003 [2003] OJ L53/8, Ch.III.

For example, under draft art.1(12) (the definition of "specialisation in research and development"), each party should carry out "some of the research and development", but this excludes when one party does all the R&D and the other "merely finances these activities or exploits the results". This is controversial because in practice, this "research as a business" model arises frequently, where work is carried out by universities or by small pharma or biotech companies which may be pre-financed by larger ones with the resources to bring products to market. These companies then (quite logically) seek and need long exclusive licences in return. It is argued therefore that "research as a business" like this should not be excluded from the BE, even if a flexible approach in self-assessment is offered.

Again, under draft Recitals 12 and 13 and the proposed art.3(2), as a condition to the BE's application, before starting the R&D, the parties must agree to disclose all existing and pending intellectual property rights that may be "relevant" to other parties' exploitation of the R&D's results. This condition, driven by patent "hold-up"/ambush issues, is controversial, in particular since the BE is already conditional on the parties' combined market shares being below 25 per cent. It is argued therefore that the issue of disclosure should better be left to the parties to resolve as appropriate.

Other changes Otherwise there are various specific changes proposed to the guidance on specialisation/production agreements (including a revised Regulation), purchasing agreements and commercialisation (sales) agreements (where there is now a proposed separate section on communality of costs). All of these may involve important detail in practice, but the changes are incremental rather than radical. We now await with interest to see how the Commission will respond to the comments received.

European Court judgments

General

Box 5

Main European Court cases

- *Alrosa*
  - — Article 9 commitments can go further than would be required in an art.7 decision
  - — ECJ reversal of GC "equity based" ruling
  - — Commission not obliged to look for less onerous remedies
  - — Rights of co-contractor limited despite very specific facts
- *Solvay* and *Imperial Chemical*
  - — Classic confirmations of art.82 EC law: rebates have to be strictly justified by economic advantages
  - — Extremely long proceedings!!

Main European Court cases

  - — A desire to maintain or increase production capacity is not an adequate justification for foreclosing practices
- *AstraZeneca*
  - — A dominant pharmaceutical company cannot extend its exclusive rights through misleading applications, or bar generic competition through deregistration of its related market authorisations
  - — Such defensive steps are not "competition on the merits"
  - — A dominant company has a duty to rectify errors in its filings (in these circumstances)
  - — BUT burden on Commission to show that unlawful practice capable of affecting parallel imports.
  - — Dominance upheld despite a 42% fall in market share in four years!
- *Akzo*
  - — ECJ again says no legal professional privilege for in-house counsel, even if they have such a privilege in national law
  - — Rejected idea that material charges since AM&S ruling
- *Tomra*
  - — Exclusive agreements, de facto foreclosing agreements and retroactive rebates unlawful
  - — Even if only some two-fifths of market tied!
  - — No objective justification or efficiency gain argued.

Soda ash

In the course of the year the General Court (GC) has issued three rulings in relation to the old Soda ash cases, two judgments on art.82 EC and one on art.81 EC. These will be dealt with together here.

Solvay In December 2009, the GC upheld the Commission's decision in the art.82 EC case,[101] although the court reduced the fine imposed from €20 million to €19 million, on the basis that no fine increase should have been applied to Solvay for recidivism. Solvay had not been found to have abused a dominant position before, although it had been involved in a cartel infringement. As a result, the court reduced Solvay's fine by 5 per cent.[102]

This is a case which is controversial in a variety of ways: first, as regards access to file, insofar as the Commission appears to have lost five files and could not therefore produce a full list of all the documents available,[103] and, secondly, as regards the use of material from the art.81 EC investigation in the art.82 EC case. Here the issue was that the Commission had carried out a dawn raid with a mandate referring to an art.81 EC investigation and to market sharing through exclusive purchasing arrangements, but then used the material in an art.82 EC case.

On both issues, Solvay complained of breach of its defence and/or procedural rights. However, on both issues the court found for the Commission. As regards access

[101] *Solvay v Commission* (T-57/01) Unreported December 17, 2009 GC.
[102] *Solvay* Unreported December 17, 2009 at [506]–[511].
[103] *Solvay* Unreported December 17, 2009 at [454] and [464].

to file, the court held that the material lost would not have affected the defence case.[104] As regards the art.81/82 EC investigation issue, the court found that, since the mandate had referred to exclusive purchasing arrangements, which facts had been the basis of the art.82 EC case, the seizure of such documents was not illegal.[105] This appears a lenient approach to the Commission.

Thirdly, there was and still is great controversy about the very long proceedings involved here. It may be recalled that the Commission's original decision in this case was taken in December 1990 although, since the Commission failed to authenticate the decision before sending it, there then followed a sequence of procedural appeals and the re-adoption of the decision in December 2000.

What all this means in practice is that the total duration of the proceedings from the first investigation until the GC's judgment has been some 20 years, with the Commission's readopted decision in 2000 occurring some 11 years after the first investigation started. Unsurprisingly, Solvay is complaining that this is just too long in quasi-penal proceedings and contrary to the European Convention of Human Rights.

Here the GC found that there was no infringement because, looking at the specifics of the procedure, the time for each stage in the proceeding was not considered unreasonable. For example, the time taken by the Commission to readopt the decision in 2000, some eight months, was not considered unduly long. The GC also found that Solvay had not shown that the long passage of time had affected either its ability to defend itself effectively, or the ultimate result of the litigation.[106]

Solvay has appealed again to the ECJ and, in parallel, has now brought an action before the European Court of Human Rights in Strasbourg. One would think that the European Courts should now be looking for some way to concentrate the hearing of procedural and substantive issues to stop this sort of thing happening.

Fourth and also controversial, is the classic nature of the GC's ruling concerning the rebates concerned. The court held that "marginal tonnage" rebates are unlawful, where they are not shown to reflect economic advantages.[107] In the case in question Solvay had a rebate system with rebates up to 10 per cent and then a higher rebate of 20 per cent for the final "marginal tonnage". Solvay also appears to have had other financial incentives for the customer in question to buy exclusively or almost exclusively from Solvay.

The GC held that a group rebate not linked to the purchases of each national company which was supplying the product concerned was unlawful, for the same reason that it did not reflect economic advantages.[108] Further, the GC held that exclusive agreements and arrangements providing for exclusivity "in fact" were unlawful (i.e. agreements providing for the supply of a specific tonnage which was all, or close to all of the customers demands[109]).

This is controversial because this is not a "modern" art.82 EC economic assessment in the sense of the Commission's Guidance note.[110] It may be argued that this is simply because the judicial function here is to review the basis of the Commission's decision and see if it was legal or subject to manifest error. In other words, it was not for the court to launch into a different, more modern review of its own, but just to see if the approach taken by the Commission in 1990 and then readopted in 2000 was lawful. On this basis it would have been surprising to see new reasoning of a more modern type.

However, the point remains that we are seeing the court confirming the classic view, which it has stated in many cases, that a dominant company's sales practices, which are considered foreclosing in nature, have to be strictly justified in economic terms, or they will be considered abusive.

The court appears to have explored to some extent whether Solvay was suggesting that there were particular economic advantages which had not been taken into consideration. However, it appears that Solvay's argument was not that there were economies of scale in these circumstances, but rather that the marginal tonnage gained was economically justified as giving it assurance of use of its production capacities. This was not enough for the court.[111]

Fifthly, there is also a discussion of discrimination. The court explains that, to the extent an economy of scale curve is not a straight line, but rather may go up faster at the beginning and then slower at the top end of the curve, that is not discrimination, if that is supported by the economic facts. However, the court states that the structuring of a price scale in steps can be unlawful if they are not justified by economies of scale.[112]

The GC also rejected arguments that there was no discrimination since the soda ash was going to customers which were not competing (i.e. because they were making different types of glass). As far as the court was concerned "the market" on which Solvay was operating was just that of the supply of soda ash.[113] This is also controversial.

[104] *Solvay* Unreported December 17, 2009 at [470]–[479].
[105] *Solvay* Unreported December 17, 2009 at [226].
[106] *Solvay* Unreported December 17, 2009 at [130]–[142].
[107] *Solvay* Unreported December 17, 2009 at [316]–[340].
[108] *Solvay* Unreported December 17, 2009 at [348]–[359].
[109] *Solvay* Unreported December 17, 2009 at [365]–[383].
[110] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.
[111] *Solvay* Unreported December 17, 2009 at [334]–[335].
[112] *Solvay* Unreported December 17, 2009 at [396].
[113] *Solvay* Unreported December 17, 2009 at [393] and [400].

ICI In June 2010 the GC gave judgment in the similar case involving Imperial Chemical Industries Ltd (ICI).[114] Here the focus was on so-called "top slice" rebates. Again the court reduced ICI's fine by 5 per cent, here from €10 million to €8 million, because again there had been no previous infringement of the same type, in other words no previous abuse of dominant position.[115]

In addition, the GC reduced ICI's fine by a further 15 per cent because the court found that the Commission had not adequately proved the full duration of the infringement claimed. The Commission had argued that the infringement started "in about 1983", but without adequate evidence to show that.[116]

Again there was controversy over access to file and the overall duration of the proceedings, dealt with in a very similar way to the *Solvay* case.

Turning to the issue of abuse of dominant position the court was again very classic. The court indicated that a rebate system which is not related to efficiency gains and economies of scale (i.e. not linked purely to the volumes of purchase), which prevents customers from purchasing from competitors, infringes art.82 EC.[117]

Importantly, the court also stated that a desire to maintain or increase production capacity in order to avoid plant closure is no defence.[118] Further, that it is no defence to the dominant company that the rebates it was offering to its customers were designed to help those customers to better compete with cheap imported goods.[119] These are important statements because they are the sort of practical arguments which companies often raise. They often explain their desire to have a more flexible pricing position, even though they are dominant.

Solvay—CFK Although it is a cartel case, the author also notes here, to complete the soda ash cases together, that in December 2009, the GC ruled on Solvay's appeal against the Commission's decision that it had been involved in a cartel on the soda ash market with Chemische Fabrik Kalk for four years.[120] In general, the GC dismissed the appeal. However, the Court found that the Commission had not adequately proved the duration of the infringement. In particular, the Commission had not shown that the infringement had continued in 1990 and reduced the finding on duration by one year. The result was that the fine was reduced from €3 million to €2.25 million.

Alrosa[121] In June 2010,[122] the European Court of Justice (ECJ) ruled on an appeal by the Commission against the judgment of the Court of First Instance (CFI, as it then was[123]), annulling the Commission's 2006 commitment decision, in a case concerning the supply relationship between rough diamond producers Alrosa and De Beers.

This is an interesting case, notably because the ECJ disagreed with a number of the CFI's rulings. In particular, the ECJ held that:

- The extent and the content of the proportionality principle in the context of commitment decisions under art.9 of Regulation 1/2003 are different from in the context of decisions establishing an infringement under art.7 of Regulation 1/2003.[124]
- Commitments under art.9 may go beyond what the Commission could impose in an art.7 decision.[125]
- The Commission is not required to seek out less onerous or more moderate solutions than those offered by the company or companies in the proceedings.[126]
- The Commission only has to verify that the commitments offered address the concerns which the Commission explained to the companies; and that these companies have not offered less onerous commitments which address these concerns adequately.[127]

Given its importance, this is summarised in some detail here.

It may be recalled that Alrosa and De Beers are respectively the No.2 and the No.1 producers of rough diamonds in the world.[128] Alrosa is based in Russia, De Beers in Luxembourg and Southern Africa. For many years they had a supply relationship, in which, according to the Commission's findings, De Beers was effectively purchasing all of Alrosa's rough diamonds for export outside Russia.

In 2002, after Alrosa and De Beers had notified their agreement to the Commission, seeking confirmation that there was no infringement of arts 81 and 82 EC, the Commission opened two proceedings: an art.81 EC proceeding, in which both companies were concerned, and an art.82 EC proceeding, in which only De Beers was concerned. The Commission considered that the supply relationship kept Alrosa out of the world market

[114] *Imperial Chemical Industries Ltd v Commission* (T-66/01) Unreported June 25, 2010 GC.
[115] *Imperial Chemical* Unreported June 25, 2010 at [376]–[381].
[116] *Imperial Chemical* Unreported June 25, 2010 at [392]–[402].
[117] *Imperial Chemical* Unreported June 25, 2010 at [303].
[118] *Imperial Chemical* Unreported June 25, 2010 at [306].
[119] *Imperial Chemical* Unreported June 25, 2010 at [328].
[120] *Solvay* Unreported December 17, 2009.
[121] With thanks to Lisa Arsenidou for her assistance.
[122] *European Commission v Alrosa Co Ltd* (C-441/07 P) [2010] 5 C.M.L.R. 11.
[123] *Alrosa Co Ltd v Commission of the European Communities* (T-170/06) [2007] E.C.R. II-2601; [2007] 5 C.M.L.R. 7 .
[124] *Alrosa* [2010] 5 C.M.L.R. 11 at [38].
[125] *Alrosa* [2010] 5 C.M.L.R. 11 at [48].
[126] *Alrosa* [2010] 5 C.M.L.R. 11 at [61].
[127] *Alrosa* [2010] 5 C.M.L.R. 11 at [40]–[41].
[128] See [2007] I.C.C.L.R. 82 (Commission decision) and [2008] I.C.C.L.R. at 37–39 (CFI judgment).

(including the European Union) and contributed to reinforcing De Beers' dominant position on that market. In 2003, the Commission sent two separate statements of objections, one to both parties under art.81 EC and one only to De Beers under art.82 EC.

Essentially, three rounds of negotiations and commitments followed:

First, Alrosa offered a "phase out" progressive reduction of supply to a point where it would cease supplying De Beers in 2013. However, Alrosa later withdrew that commitment.

Then, Alrosa and De Beers offered joint commitments with another progressive reduction schedule to a capped supply of diamonds worth US$275 million in 2010 and thereafter. These were market tested by the Commission in June 2005. However, third-party comments appear to have suggested that the supply relationship was, in effect, a form of cartel and to have called for its outright end soon.

Before the ECJ the Commission later explained that third parties argued that any supplies to De Beers by Alrosa would still leave De Beers as the "market maker". Further, that the Commission considered it complex to assess what level of supply might be acceptable and that this could only be done through a full investigation. The Commission argued therefore that it was entitled to accept a remedy which had been offered under art.9, even though that remedy might be greater than required in the circumstances, in order to avoid that additional investigation burden.[129]

Then, De Beers alone offered a new commitment, a shorter "phase out" progressive reduction schedule, resulting in no purchases with effect from 2009. This, the Commission decided to accept and took a decision making the commitments binding. Under the accepted commitments, De Beers would not buy from Alrosa at all after 2008.

The De Beers commitments ended the art.82 EC case. Technically, Alrosa was not an addressee in that case, albeit clearly affected by the commitments, which in practice also ended the art.81 EC proceedings against Alrosa and De Beers. It appears that Alrosa was given the opportunity to comment on the proposed commitments and on a non-confidential summary of the third party comments to the joint comments.

In its appeal against the Commission's decision to the CFI, Alrosa argued successfully that the outright "prohibition" on supplies to De Beers was disproportionate and that, given the particular circumstances, it was an undertaking concerned also in the art.82 EC case.

Alrosa also argued successfully that an art.9 settlement could not go further than the Commission could itself have ruled in an art.7 decision and that the outright cessation of the supply relationship went beyond what the Commission could have ordered.[130]

The CFI found that its review was not limited to checking for manifest errors since the Commission had not carried out a complex economic assessment.[131] After reviewing the proportionality of the measure adopted, the Court found that the Commission's assessment was manifestly wrong.[132] Other, less onerous, solutions than the permanent prohibition of transactions between the two companies were possible to achieve the aim pursued by the contested decision. The Commission could not relieve itself of the duty to consider such solutions. The Commission's duty to apply the principle of proportionality required it to evaluate the viability of intermediate solutions. More specifically the Court held that the appropriate solution was to prohibit Alrosa from supplying all or a material part of its exports to De Beers.

In short, an apparent victory for specific equity in a complex situation.

However, the ECJ disagreed with the CFI on most things: the court's view of its review powers in the case; the principle of proportionality when applied in the context of art.9; and Alrosa's right to be heard!

As regards the CFI's review power, the ECJ held that, by expressing its own assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission and concluding that there existed alternative solutions which were less onerous, the CFI had put forward its own assessment of the complex economic circumstances and thus substituted its own assessment for that of the Commission, instead of reviewing the lawfulness of the Commission's assessment.[133] This went too far.[134]

As regards the principle of proportionality, the ECJ held that, while that principle is a criterion for the lawfulness of any institutional act, its extent and content differ, depending on whether it is considered in relation to art.7 or in relation to art.9.[135]

The court noted that the two articles pursue different objectives and different means of action: art.7 is about remedies proportionate and necessary to put an end to an infringement which has been found to exist, while art.9 is based on considerations of procedural economy and involves no finding of an infringement.[136]

According to the ECJ, the application of the principle of proportionality in the context of art.9 is confined to verifying that the commitments in question address the concerns which the Commission raised with the

[129] *Alrosa* [2010] 5 C.M.L.R. 11 at [52]–[55].
[130] *Alrosa* [2007] E.C.R. II-2601 at [58]–[60].
[131] *Alrosa* [2007] E.C.R. II-2601 at [123]–[125].
[132] *Alrosa* [2007] E.C.R. II-2601 at [126]–[137].
[133] *Alrosa* [2010] 5 C.M.L.R. 11 at [42] and [66]–[67].
[134] *Alrosa* [2010] 5 C.M.L.R. 11 at [63]–[64].
[135] *Alrosa* [2010] 5 C.M.L.R. 11 at [36]–[38].
[136] *Alrosa* [2010] 5 C.M.L.R. 11 at [38]–[40] and [46].

undertakings concerned; and that they have not offered less onerous commitments which also address those concerns adequately.[137]

Companies which offer commitments on the basis of art.9 consciously accept that the concessions they make may go beyond what the Commission itself could impose on them in a decision adopted under art.7, after a thorough examination.[138] (So, in practice, commitments here are similar to remedies in merger cases at the end of Phase I.)

In doing so, the ECJ states that the Commission must take into consideration third-party interests, but says little more as to what that means.[139] However, the ECJ notes that this does not necessarily mean that Alrosa is without remedy,[140] perhaps meaning that it might be open to Alrosa to bring proceedings against De Beers on its supply contract, to the extent that it argues that De Beers gave up more than legally required.

As regards Alrosa's right to be heard, the CFI had concluded that Alrosa should have been accorded the rights given to an "undertaking concerned", notably because of the parallel art.81 and 82 EC proceedings, the impact on Alrosa and its general involvement.[141] The CFI held that Alrosa had not had an opportunity to exercise its right to be heard on De Beers' individual commitments fully, since the third-party observations had been supplied to it at the same time as the copy of those individual commitments. Alrosa had been unable therefore to make an effective reply and to propose new joint commitments with De Beers.[142] Further, the CFI held that the Commission should have given reasons why Alrosa and De Beers' earlier joint commitment offer (of phased reduction of supply, but leaving some supply at the end) was not enough.

The ECJ again disagreed, finding that Alrosa was not an "undertaking concerned" in the art.82 EC proceedings. Only if the Commission had made a single factual situation the subject of two separate sets of proceedings without an objective reason would Alrosa have to be accorded the rights enjoyed by an undertaking concerned.[143] The court considered that this was not the case here and that it was objectively justified for the Commission to conduct two separate sets of proceedings in view of the different legal bases.[144]

Therefore, in the art.82 EC proceeding against De Beers, Alrosa enjoyed only the less extensive rights of an interested third party.[145] Alrosa could make observations but was not owed a reasoned explanation for the Commission's view on the appropriateness of commitments.

Finally, the ECJ gave judgment on the merits of Alrosa's action for annulment of the contested Article art.9 decision and rejected all of Alrosa's pleas.

AstraZeneca[146] In July 2010 the GC largely dismissed AstraZeneca's appeal against the Commission's 2005 decision finding that AstraZeneca had infringed art.82 EC.[147] The Commission had found that AstraZeneca committed two abuses designed to protect sales of its anti-ulcer product, Losec from generic competition[148]:

- First, AstraZeneca had pursued a pattern of misleading representations before national patent offices and the courts of several EU/EEA Member States, thereby extending the exclusive period of protection which it had for Losec.[149]
- Secondly, AstraZeneca had submitted requests for deregistration of marketing authorisations for Losec capsules in some EU/EEA Member States, combined with withdrawal of these products and substitution with Losec tablets,[150] thereby preventing generic producer entry and parallel imports.

The judgment is long (some 210 pages) and very fact-specific, as the court deals with extensive claims. However, it provides important guidance on when use of regulatory procedures may be considered not to be competition on the merits, so is summarised in some detail here.

On appeal AstraZeneca contested: the Commission's market definition; the finding that it occupied a dominant position on the relevant market; and the characterisation of AstraZeneca's conduct as abusive.

The GC dismissed almost all of the arguments raised. However, the court found that the Commission had not shown that AstraZeneca's deregistration of its Losec capsule market authorisation was capable of restricting parallel imports into Denmark and Norway. The court therefore reduced the fine imposed on AstraZeneca for that part of the abuse.[151] AstraZeneca's fine was reduced from €60 million to €52.5 million.

[137] *Alrosa* [2010] 5 C.M.L.R. 11 at [41].
[138] *Alrosa* [2010] 5 C.M.L.R. 11 at [48].
[139] *Alrosa* [2010] 5 C.M.L.R. 11 at [41].
[140] *Alrosa* [2010] 5 C.M.L.R. 11 at [49].
[141] *Alrosa* [2007] E.C.R. II-2601 at [187].
[142] *Alrosa* [2007] E.C.R. II-2601 at [201].
[143] *Alrosa* [2010] 5 C.M.L.R. 11 at [88]–[89].
[144] *Alrosa* [2010] 5 C.M.L.R. 11 at [89].
[145] *Alrosa* [2010] 5 C.M.L.R. 11 at [91].
[146] With thanks to Cormac O'Daly for his assistance.
[147] *AstraZeneca AB v European Commission* (T-321/05) Unreported July 1, 2010 GC.
[148] [2007] I.C.C.L.R. 86–87.
[149] *AstraZeneca* Unreported July 1, 2010 at [305]–[307].
[150] *AstraZeneca* Unreported July 1, 2010 at [619].
[151] *AstraZeneca* Unreported July 1, 2010 at [905].

On market definition the GC upheld the Commission's finding that proton pump inhibitors (PPIs) such as Losec were a separate relevant market. The other main treatment for ulcers, H2 blockers, was found not to exercise a competitive constraint on PPIs, as only PPIs were used to treat more severe medical conditions.[152] AstraZeneca argued, amongst other things, that sales of PPIs had gradually substituted for sales of H2 blockers, which indicated that the two belonged to the same relevant market. The court disagreed, finding that there was only one-way substitution between the products (PPIs exercising a constraint on H2 blockers, but not the other way around).

The court also rejected AstraZeneca's plea that the Commission had not established dominance, considering AstraZeneca's very high market shares, IP and other regulatory rights, first-mover advantages and greater financial resources.

One part of this in particular will be a disappointment to some: as regards Germany, the GC found AstraZeneca still dominant, even after a fall in market share of 42 per cent in four years from 96 per cent in 1993 to just under 54 per cent in 1997! The court noted that AstraZeneca's share was still above 50 per cent and AstraZeneca had much higher sales revenues than its competitors and found that enough for dominance.[153]

Turning to the abuses found, it should first be explained that under EU pharmaceutical regulations, to compensate for the time lost between when companies obtain patents and when they obtain their first product market authorisation in the EEA, companies may apply for so-called Supplementary Protection Certificates (SPCs) to extend their patent rights by up to five years.

The Commission found as a first abuse that AstraZeneca had deliberately misled patent offices and national courts, essentially by not indicating the correct date of Losec's first market authorisation, in order to obtain SPCs to which AstraZeneca was either not entitled, or to which it was only entitled for a shorter duration.[154]

Importantly, the GC held that:

> "[T]he submission to the public authorities of misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which an undertaking is not entitled, or to which it is entitled for a shorter period, constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition."[155]

Further, the court found that a dominant company has a duty to rectify errors of which it becomes aware, notably where such errors give exclusive rights to which the dominant company is not entitled.[156]

Turning to the facts, the GC disagreed with the Commission concerning when the abuse started. The Commission considered that the abuse began when AstraZeneca sent instructions to patent attorneys to file the applications concerned. The court found that the abuse began later, when the patent attorneys filed the SPC applications.[157] However, this only amounted to some two weeks difference and did not therefore affect AstraZeneca's fine.[158]

AstraZeneca also argued that an abuse of dominance could only be found where the relevant behaviour had a direct effect on competition. However, the Court disagreed and stated that indirect effects can also be relevant provided they are "*actually liable to restrict competition*" (emphasis added). In the circumstances, the Court considered that AstraZeneca's statements were "actually liable to lead the public authorities to grant the exclusive rights applied for" (and thereby restrict competition[159]).

The court also found that the fact that the conduct in question might only have effects *after* AstraZeneca ceased to be dominant made no difference, if the acts concerned were committed while AstraZeneca was dominant.[160]

After a detailed review of the conduct in issue, the court found that AstraZeneca had misled the authorities concerned because, instead of filling in its applications with the date of the first technical authorisation of its patent (as was the generally accepted view), it had chosen to do so on the basis of the later date when AstraZeneca considered it could first effectively market Losec (including with authorisation of its prices). Importantly, AstraZeneca had also not explained to the authorities that it was filing for SPCs on this basis.

The court considered that AstraZeneca should have realised that its interpretation was likely to mislead and referred to evidence that at one point AstraZeneca even appeared to recognise that the date of technical authorisation was the relevant date. The Court concluded that the "manifest lack of transparency" which AstraZeneca had exhibited was contrary to its special responsibility as a dominant firm.[161]

The court also appears to have been influenced by what it terms AstraZeneca's "consistent and linear course of conduct" in pursuing an approach which it knew was not accepted[162]. In other words, that AstraZeneca continued with its claimed "effective marketing" approach, despite

[152] *AstraZeneca* Unreported July 1, 2010 at [73].
[153] *AstraZeneca* Unreported July 1, 2010 at [287]–[294].
[154] *AstraZeneca* Unreported July 1, 2010 at [352]–[355], [375] and [608].
[155] *AstraZeneca* Unreported July 1, 2010 at [355].
[156] *AstraZeneca* Unreported July 1, 2010 at [358].
[157] *AstraZeneca* Unreported July 1, 2010 at [369]–[370].
[158] *AstraZeneca* Unreported July 1, 2010 at [912].
[159] *AstraZeneca* Unreported July 1, 2010 at [377].
[160] *AstraZeneca* Unreported July 1, 2010 at [379]–[380].
[161] *AstraZeneca* Unreported July 1, 2010 at [493], [594].
[162] *AstraZeneca* Unreported July 1, 2010 at [598].

clear indications that it was not being accepted in some Member States and/or involved errors in applications. In sum therefore, the GC upheld the Commission's first finding of abuse.

The second abuse which the Commission found was AstraZeneca's selective deregistration of Losec's capsule marketing authorisations in some EU/EEA Member States, combined with the replacement of sales of Losec capsules by Losec MUPS tablets in those Member States. The Commission found that this selective deregistration prevented generics manufacturers from using a simplified procedure to launch their products based on the Losec capsule authorisation. The Commission also found that the selective deregistration prevented parallel imports.

The GC held that, while a dominant company can defend its commercial interests when these are attacked, it "cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market", unless such action relates "to the defence of the legitimate interests of an undertaking engaged in competition on the merits", or is defensible because of another objective justification.[163]

AstraZeneca argued that its pharmacological and toxicological tests and its clinical trials were the results of significant investment, which they were entitled to protect. The court disagreed, stating that this investment was sufficiently protected by the exclusivity period during which only the original proprietary medicinal product could be marketed. After expiry of this period, it was *not* legitimate for AstraZeneca to protect its investment by preventing generic producers' market entry.[164]

The court also rejected the argument that, since requesting the withdrawal of market authorisation was in itself lawful, the conduct could not have infringed art.82 EC. The fact that conduct is legal under other rules does not enable it to escape art.82 EC.[165]

Turning to the facts, the court appears to have been influenced by AstraZeneca's documents, which appear to show that it knew that certain actions could be illegal and that it was pursuing a goal of delaying generics' market entry.[166] In particular, the documents suggested that one of AstraZeneca's aims in delaying generics' entry was to enable it to market a new drug, esomeprazole, before generic omeprazole (the generic equivalent of Losec) was on the market, as this would affect the reimbursement level for esomeprazole in certain countries, where the price of the cheapest comparable product on the market was used as a reference point.[167]

Importantly, the court stresses that even a company in a dominant position is entitled to prepare a strategy to defend against erosion of sales by generic products. However, preparing and carrying out such a plan is legitimate only if it constitutes competition on the merits.[168]

The court focuses on deregistration as being the crux of AstraZeneca's abusive behaviour. By themselves, other conduct, such as withdrawing Losec capsules and converting its sales to Losec MUPS tablets would not have led to the creation of barriers to entry and/or affected the legality of parallel imports.[169]

Interestingly the court then considered closely whether AstraZeneca's conduct in deregistering its market authorisation was capable of restricting competition. Regarding the ability of deregistration to delay the market entry of generics, the court found that this was the case.[170]

However, the court disagreed with the Commission as to whether such conduct was capable of or likely to affect parallel imports. The court reviewed the rules and practice regarding parallel import licences in each of Denmark, Finland and Sweden[171] and concluded that the Commission had not shown that the deregistration of AstraZeneca's market authorisation was likely to lead either the Danish or Norwegian authorities to prevent parallel imports. The Commission's presumption of a causal link between deregistration and a fall in parallel imports licences was not enough.[172] In contrast, the responsible Swedish authorities had actually withdrawn parallel import licences following the market authorisation's deregistration.[173] As a result the court reduced the fine for the second abuse.[174]

Akzo Nobel[175] In September 2010, the ECJ issued its judgment in the appeal by Akzo concerning the extent of legal professional privilege (LPP) in EU competition law investigations. The court confirmed the case law, under which communications between in-house lawyers and their clients are not covered by LPP in EU Competition law investigations.[176]

It will be recalled that the EU rule on LPP was first established in the *AM&S*[177] case, where the ECJ stated that LPP only applies to written communications between a lawyer and a client when two cumulative conditions are met:

- First, the communications must be made for the purpose and in the interest of the client's rights of defence.

[163] *AstraZeneca* Unreported July 1, 2010 at [672], [816] and [817].
[164] *AstraZeneca* Unreported July 1, 2010 at [674] and [675].
[165] *AstraZeneca* Unreported July 1, 2010 at [677] and [836].
[166] *AstraZeneca* Unreported July 1, 2010 at [759]–[788], [813] and [814].
[167] *AstraZeneca* Unreported July 1, 2010 at [787].
[168] *AstraZeneca* Unreported July 1, 2010 at [804].
[169] *AstraZeneca* Unreported July 1, 2010 at [807] to [812].
[170] *AstraZeneca* Unreported July 1, 2010 at [834].
[171] *AstraZeneca* Unreported July 1, 2010 at [838] to [862].
[172] *AstraZeneca* Unreported July 1, 2010 at [852] and [859].
[173] *AstraZeneca* Unreported July 1, 2010 at [862].
[174] *AstraZeneca* Unreported July 1, 2010 at [884] to [913].
[175] With thanks to Christian Duvernoy and Gabriele Accardo for their assistance.
[176] *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* (C-550/07 P) (2010) 160 N.L.J. 1300.
[177] *Australian Mining & Smelting Europe Ltd v Commission of the European Communities* (Case 155/79) [1982] E.C.R. 1575; [1982] 2 C.M.L.R. 264.

- Secondly, the communications must emanate from "an independent lawyer, that is to say, one who is not bound to the client by a relationship of employment".

According to this reasoning and controversially, in-house lawyers, since they are economically dependent on their employers, are not sufficiently independent to deal effectively with conflicts of interest between their professional obligations and the aims and wishes of their client (i.e. their employer).

In *Akzo Nobel*, the ECJ reaffirmed this reasoning. It rejected the argument that in-house lawyers who are enrolled in a Bar or Law Society are just as independent as external lawyers, since they are subject to the same obligations of professional conduct and discipline. The court confirmed its previous case law, finding that independence requires the absence of any employment relationship between a lawyer and his client. Thus LPP does not extend to communications with in-house lawyers within a company or group.

The main points in the Court's ruling are as follows:

First, the ECJ states that an in-house lawyer's position as an employee, by its very nature, does not allow him or her to ignore the commercial strategies pursued by his or her employer, thus affecting his or her ability to exercise professional independence.

Secondly, for the same reasons, the court rejected the claim that refusing to apply LPP to correspondence exchanged with an in-house lawyer violates the principle of equal treatment, i.e. that in-house counsel admitted to a Bar organisation should be treated equally with external counsel.

Thirdly, the court rejected Akzo Nobel's alternative claim that the *AM&S* ruling should be revised owing to significant developments in the legal landscape since it was given. Notably, the ECJ found that the legal situation in the EU Member States has not evolved enough to justify a change in case law. The Court rejected the argument that the "modernisation" of EU competition law through Regulation 1/2003, which requires companies to self-assess compliance with EU competition rules, has increased the need for in-house legal advice, thereby justifying the extension of the privilege to communications with in-house lawyers.

The ECJ emphasises that Regulation 1/2003 does not address the subject of in-house legal privilege, but instead "aims to reinforce the extent of the Commission's powers of inspection, in particular as regards documents which may be the subject of such measures".[178] In addition, the court stated that there was no predominant trend in the European Union's 27 Member States to extend LPP to in-house counsel, which could justify a change of approach to this issue at EU level (even though it appears that some national laws do recognise such a privilege).

Fourthly, the court found that the rights of defence, which include the right freely to choose a lawyer to provide legal advice, are not impaired by applying certain restrictions and conditions regarding the practice of law, such as the rules on LPP.

Fifthly, the court found no lack of legal certainty insofar as national competition authorities applying arts 101 and 102 TFEU might recognise LPP for in-house lawyers, but the Commission would not. On the contrary, the ECJ considered the *AM&S* rule clearer for the Commission's investigations throughout the European Union.[179]

Tomra[180] In September 2010, the GC ruled on the appeal by Tomra, a "reverse vending machines" (RVMs) producer, against a 2006 Commission decision imposing a fine of €24 million on Tomra for abusing its dominant position on the market for supply of RVMs in Germany, the Netherlands, Austria, Sweden and Norway.[181]

It may be recalled that in its decision the Commission concluded that Tomra had followed an exclusionary strategy in these countries between 1998 and 2002. This strategy was implemented through 49 agreements between Tomra and certain supermarket chains which took the form of:

- exclusive or preferred supplier agreements;
- agreements for individualised, high-volume quantity orders; and
- individualised retroactive discounts or bonuses for targets by the end of a given reference period.[182]

The Commission found that this strategy was aimed at preventing market entry, market access and growth opportunities for existing and potential competitors. Importantly in practice, the case arose from a complaint by Prokent, a German competitor.

Before the GC, Tomra argued generally that its market position was a result of its revolutionary technology which gave it a competitive advantage and that its sales practices did not involve material foreclosure (an average of at least 61 per cent of the total RVM market being open[183]). Further, that the Commission's assessment did not show that the agreements and practices were capable of foreclosing, or had foreclosed competition on the market.

The court disagreed with these claims and upheld the Commission's decision, with some important statements on the applicable law.

Tomra's main claims and the court's assessment of these claims were as follows:

[178] *Akzo Nobel* (2010) 160 N.L.J. 1300 at [86].
[179] *Akzo Nobel* (2010) 160 N.L.J. 1300 at [74]–[76].
[180] With thanks to Lisa Arsenidou for her assistance.
[181] *Tomra Systems ASA v European Commission* (T-155/06) Unreported September 9, 2010 GC.
[182] See [2007] I.C.C.L.R. 83.
[183] *Tomra* Unreported September 9, 2010 at [203].

First, Tomra challenged whether the specific agreements concerned had been correctly characterised as "exclusive", or as designating Tomra as the "preferred, main or primary supplier" of a customer. The GC rejected these claims after specific review of the arrangements by country[184].

Tomra argued that, by reference to national contract law, these agreements had not created enforceable exclusivity rights. However, the court considered that there was no need for formal undertakings for these practices to amount to an abuse. The decisive point was that customers were given an incentive not to turn to competing suppliers and to obtain all or most of their requirements exclusively from Tomra.[185] Moreover, clauses in the agreements allowing customers to purchase competing machines for testing purposes, or if the competing machines offered significant advantages, reinforced the conclusion that the agreements were meant to be exclusive.

Secondly, Tomra claimed that the Commission had focussed on proving only the existence and form of the agreements and had failed to show that they were capable of foreclosing competition.

Here, the GC gives a summary of the classic case law on art.82 EC foreclosure. In short, agreements and rebates offered by a dominant company are unlawful where they are not based on economic justifications, but are designed to remove or restrict the purchaser's freedom to choose his suppliers and deny other producers access to the market.[186]

The court also states that quantity rebates linked solely to the volume of purchases from a dominant company are generally not considered foreclosing under art.82 EC. This is provided that increasing the quantity supplied lowers the cost for the supplier and/or that there are other economically justified countervailing advantages.[187] In short, a strict statement of the existing case law.

The court also noted that whether the agreements and practices were intended to restrict or foreclose competition, or were capable of doing so had to be looked at in the circumstances and context. The court found that the Commission had done so.[188]

The court also noted that Tomra had not put forward an objective economic justification for its practices. Nor had it claimed efficiency gains which benefited consumers.[189]

Thirdly, Tomra argued that to show that the agreements were capable of having an exclusionary effect, the Commission had to show that the agreements covered such a broad part of the market that they were capable of foreclosing a sufficient number of competitors from the whole market, causing a significant reduction in competition. The relevant question was whether a competitor could profitably remain on the market by serving only the contestable part of the market. The Commission should have determined therefore what was the contestable part and the minimum profitability required to operate on the market concerned. If the contestable demand was sufficiently large and the scale of profitability sufficiently low to enable a potential competitor to enter or remain on the market alongside the applicants, the Commission ought to have concluded that the applicants' practices were not abusive.[190]

Further Tomra contended that the contestable portion of the market was, for each national market, at least 30 per cent and in most cases over 50 per cent and, for the five markets taken together, on average around 61 per cent.[191] According to Tomra, that figure was higher than the minimum level of sales necessary to ensure the viability of a competing producer of RVMs.

Importantly, the court rejected this approach. The GC agreed with the Commission which, it appears, took the position that it was sufficient to find that the part of demand foreclosed was substantial, or not insubstantial and noted that, particularly during the key years of growth on each of the relevant markets, Tomra's tied share of demand represented a very significant proportion. That was enough for the Court. Restricting entry to one or a few competitors and therefore limiting the intensity of competition was an adequate foreclosing effect.[192]

Further, the GC held that the foreclosure of a substantial part of the market could not be justified by showing that the contestable part of the market was still sufficient to accommodate a limited number of competitors:

- First, the customers on the foreclosed part of the market "should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it".
- Secondly, it was not for a dominant company "to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand".[193]

[184] *Tomra* Unreported September 9, 2010 at [49]–[67].
[185] *Tomra* Unreported September 9, 2010 at [56] and [59].
[186] *Tomra* Unreported September 9, 2010 at [206]–[209].
[187] *Tomra* Unreported September 9, 2010 at [212]–[213].
[188] *Tomra* Unreported September 9, 2010 at [217]–[219].
[189] *Tomra* Unreported September 9, 2010 at [224].
[190] *Tomra* Unreported September 9, 2010 at [231]–[233].
[191] *Tomra* Unreported September 9, 2010 at [236].
[192] *Tomra* Unreported September 9, 2010 at [239].
[193] *Tomra* Unreported September 9, 2010 at [241].

The court stated that it would be "artificial to establish, without prior analysis, the portion of the tied market beyond which the practices of a dominant undertaking may have an exclusionary effect on competitors".[194] Here, Tomra's "practices foreclosed on average, two-fifths of total demand during the period and in the countries under consideration" which the court considered a considerable proportion.[195] Tomra also had a very high proportion of tied demand in the key years of market growth. Moreover, Tomra "tied end customers, not distributor demand and competitors were thus unable to use alternative distribution methods which could have mitigated the effects of Tomra's practices".[196]

Clearly this is highly controversial. Since cases like *Distrigas*,[197] generally it has been thought that, provided there are significant market openings for third parties to contest, there is not abusive foreclosure.[198]

Fourthly, Tomra argued that if its retroactive rebates still resulted in positive prices (not below cost) no exclusionary effect should be presumed.[199] In other words, again a "modern" approach similar to that in the Commission's Guidance note.

The court rejected this approach as well. The GC found that whether or not retroactive rebate schemes obliged competitors to offer negative prices to Tomra's customers was not one of the fundamental bases of the Commission's decision that retroactive rebate schemes were capable of having anti-competitive effects.[200] Rather, the Commission had found that the retroactive rebates created incentives for customers to buy all or almost all of their needs from Tomra based on various other considerations[201]: the retroactive nature of the rebate, its individualised nature and the way the thresholds were based on customers' estimated requirements. These raised the costs of switching to a different supplier, even for a small number of units.[202]

Moreover, the court noted that Tomra had not shown that its rebates were objectively justified or that they generated significant efficiency gains which outweighed the anti-competitive effects on consumers.[203]

As regards individualised quantity commitments, the court also stated that they constitute an abuse when "*de facto* they tie and/or induce the purchaser to obtain all or most of its requirements from the dominant undertaking and *are not based on an economic transaction which justifies this burden or benefit*", even if it is accepted that they do not bind the purchaser by a formal obligation[204] (emphasis added).

Even if Tomra allowed customers a degree of flexibility in relation to due observance of deadlines and targets, that flexibility in no way diminished the foreclosure. On the contrary, that flexibility helped to maintain the incentive to buy Tomra's RVMs, even with regard to customers who otherwise would not have reached the requisite thresholds.[205]

So, overall, a classic yet controversial ruling leaving practitioners focussing on (1) objective justifications and efficiencies for possible foreclosing practices, and (2) the variations in approach between (some of) the Commission's practice and the GC's position here.

Finally, Tomra argued that the Commission breached the principles of proportionality and non-discrimination in setting its fine at 8 per cent of the Tomra Group's 2005 worldwide turnover. Tomra argued that the proportion of its worldwide turnover which its fine represented was much higher than the proportion that Microsoft and AstraZeneca's fines represented of their respective worldwide turnovers (1.5 per cent and 3 per cent). Tomra's case was also a "serious" infringement and not a "very serious" one.

The court rejected this, recalling that the Commission's practice in earlier decisions does not serve as a legal framework for fines and that the Commission has a considerable discretion to set fines. The Commission was not tied to setting fines which were identical percentages to turnover from case to case.[206]

Deutsche Telekom In October 2010 the ECJ confirmed the GC's ruling, in which it upheld the Commission's decision in 2003 that Deutsche Telekom (DT) had abused its dominant position in the markets for direct access to the fixed telephony network in Germany.[207]

It may be recalled that the Commission had found "margin squeezing" insofar as it held that DT charged competitors prices for wholesale network access, which were higher than the retail prices which DT's end-user customers were charged for access. DT was fined €12.6 million. The case was controversial, mainly because the Germany national regulator had approved DT's prices and had not found margin squeezing.[208]

On appeal in 2008, the CFI ruled that the Commission had been correct to find that DT had unlawfully applied an insufficient price differential (or "spread") between its wholesale local loop access charges and retail end-user access charges, raising barriers to entry for competitors.

194 *Tomra* Unreported September 9, 2010 at [242].
195 *Tomra* Unreported September 9, 2010 at [243].
196 *Tomra* Unreported September 9, 2010 at [245].
197 See [2008] I.C.C.L.R. 91–92.
198 See also the *EdF commitments* case, discussed in Part 2 of this article.
199 *Tomra* Unreported September 9, 2010 at [248].
200 *Tomra* Unreported September 9, 2010 at [258].
201 *Tomra* Unreported September 9, 2010 at [259].
202 *Tomra* Unreported September 9, 2010 at [262].
203 *Tomra* Unreported September 9, 2010 at [264].
204 *Tomra* Unreported September 9, 2010 at [298].
205 *Tomra* Unreported September 9, 2010 at [299].
206 *Tomra* Unreported September 9, 2010 at [312]–[314].
207 *Deutsche Telekom AG v European Commission* (C-280/08 P) Unreported October 14, 2010 ECJ.
208 See [2004] I.C.C.L.R. 68–69.

The court considered that, even if the national regulator had controlled the wholesale access price, DT was still in a position to raise its retail prices, so as to allow its competitors to make a profit. The national regulator's role was no bar to the Commission applying art.82 EC.

The court also upheld the Commission's approach to margin squeezing. In other words, comparing DT's wholesale prices and retail prices and considering, based on DT's own charges and costs, rather than the situation of its competitors, whether that would have left DT (and therefore a competitor as efficient as DT) the ability to cover its product-specific costs and compete with DT.[209]

On appeal to the ECJ, DT argued that the CFI had erred in law by attributing the infringement to DT, when the wholesale access prices in question were set by the national regulatory authorities.

The ECJ rejected this, in view of the fact that DT had scope to adjust its retail prices, even if these prices were subject to some regulation. The ECJ noted that it was not inconceivable that the national regulatory authorities might have infringed EU law and that the Commission could have brought an action against Germany on that basis. However, according to the court, that did not change the finding that DT could have adjusted its retail prices.[210]

Otherwise the ECJ upheld the CFI's approach to margin squeezing. The court stated that art.82 EC prohibits a dominant undertaking from,

> "adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view therefore, not all competition by means of price can be regarded as legitimate."[211]

The court also held that the Commission did not have to show that DT's wholesale or retail prices were abusive in themselves (i.e. excessively high or low). The court held that the issue here is the lack of spread between the two prices, squeezing the margins of competitors and driving them from the market. The court considered that this limited the choices available to consumers as well as the prospects of a longer-term reduction of retail prices through competition on the retail market.[212]

Further, the ECJ approved reference to the dominant company's own charges and costs, noting that it had already accepted such an approach in the *Akzo* case as regards predatory pricing.[213] Such an approach showed whether, if DT had been obliged to pay its own wholesale prices, it would have been able to offer its retail services at a profit. The court also considered the use of DT's own charges and costs as consistent with legal certainty, even if a competitor might be subject to less onerous legal and material conditions than its competitors, insofar as it allows dominant companies to assess the lawfulness of their own conduct, which they could not do if they had to consider whether competitors (with their own differing profiles, charges and costs) could compete with them.[214]

Finally, the ECJ upheld the CFI's view that, in order to be regarded as abusive, a margin squeeze must have made market penetration more difficult for DT's competitors. Proof of *some* anti-competitive effect was required.[215] Here the court held that the Commission had to show possible barriers which DT's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market.[216] In the circumstances, the GC considered that this had been shown.

Clearly of particular interest in the same year as *Tomra*, because the whole focus here is on exclusion through effect on an "as efficient competitor", which approach the GC did *not* pursue in the *Tomra* case.

Cartel appeals

Box 6

Main cartel appeals cases

- *IMI*
  - — If the Commission finds no evidence of cartel infringement for a period, it has to find no infringement
  - — Burden on the Commission to show "sufficiently proximate" facts
  - — Consider length of break against habitual cycle of cartel contacts
  - — *Aalborg Portland* revisited?
  - — The Commission should differentiate the fine in a multi-form cartel according to the number of "branches" of the cartel in which a company is involved
- *Amann and Cousin*
  - — GC description as to why the EU fining system is legal
  - — GC summary as to when cases should be treated as a single infringement or as multiple infringements
  - — NB In the Thread cartel cases, the Commission allowed the defence to see non-confidential replies to the S/O
- *Knauf*

[209] See further [2009] I.C.C.L.R. 67–69.
[210] *Deutsche Telekom* Unreported October 14, 2010 at [47], [84], [85], [88] and [91].
[211] *Deutsche Telekom* Unreported October 14, 2010 at [177].
[212] *Deutsche Telekom* Unreported October 14, 2010 at [182].
[213] *Deutsche Telekom* Unreported October 14, 2010 at [198]. *AKZO Chemie BV v Commission of the European Communities* (C-62/86) [1991] E.C.R. I -3359; [1993] 5 C.M.L.R. 215.
[214] *Deutsche Telekom* Unreported October 14, 2010 at [202]–[203].
[215] *Deutsche Telekom* Unreported October 14, 2010 at [250].
[216] *Deutsche Telekom* Unreported October 14, 2010 at [252]–[253].

Main cartel appeals cases

- — An applicant to the GC cannot be prevented from raising an argument just because it had not raised that argument in the administrative procedure
- — Contrary to art.47 of the Charter of Fundamental Rights
- *Lafarge*
  - — Commission cannot take recidivism into account without limitation in time
  - — Time since previous infringement relevant to "tendency to infringe" assessment
  - — But the Commission does *not* have to wait until a decision is definitively upheld before doing so
- *Deltafina*
  - — A company does not have to be active on a market to be jointly and severally liable for an infringement
- *Alliance One*
  - — Leading ruling on parental liability (applying *Akzo Nobel*). Intermediate financial holding company not so liable
- *Le-Carbone Lorraine/Belgian Sewing Thread*
  - — General "gravity" in the fine assessment is about the infringement as a whole

Electrical and mechanical carbon and graphite

In November 2009 the ECJ gave two rulings concerning appeals against the CFI's judgments upholding the Commission's decision in this case,[217] one involving SGL Carbon, the other Le Carbone-Lorraine.

It may be recalled that in 2003 the Commission imposed fines of some €101 million on the participants in this cartel, including fines of €23.64 million on SGL Carbon and €43.05 million on Le Carbone-Lorraine. The CFI dismissed the appeals in October 2008.

On further appeal to the ECJ, SGL Carbon challenged the CFI's ruling that it could not raise the argument that the Commission incorrectly had taken into account the captive (internal) sales of the companies concerned in setting the level of fine. The CFI found that this was a new plea raised in the hearing before the court, which should have been raised in SGL Carbon's application and which had not come up as a result of issues raised in pleadings before the court. In short, applying art.48(2) of the Court's Rules of Procedure.

The ECJ rejected SGL Carbon's claim, noting that the use of captive sales by the Commission had been clearly indicated in its decision, so the CFI's position was correct.[218] Moreover, the court noted that, on the case law, the Commission's position also appeared substantively correct since, if internal sales were *not* taken into account, that would necessarily give an advantage to vertically integrated companies as regards the evaluation of the profit they had from a cartel.[219]

On further appeal to the ECJ, Le Carbone-Lorraine argued that the CFI had incorrectly upheld the Commission's decision insofar as it had infringed the principle that penalties should be specific to the offender.[220] Since it had only been involved in part of the cartel, the starting amount for gravity set, should have been lower. The ECJ rejected this, stating that the CFI had held correctly that the general appreciation of the gravity of an infringement relates to the nature of the infringement as a whole, not the infringement of any individual company.[221] The individual circumstances of a company's involvement are then assessed in considering the relative gravity of the company's participation on the cartel. The ECJ also noted that the CFI had considered Le Carbone-Lorraine's argument that it was not involved in certain parts of the cartel.[222]

Thread[223]

In April 2010, the GC gave judgment in a number of cases related to the Commission's decisions concerning the *industrial thread and automotive thread* cartels.[224] Various interesting points were raised.

Belgian Sewing Thread[225] This concerned a relatively small cartel for the supply of thread to industrial customers other than automotive customers in the Benelux and Nordic countries from June 1991 to September 2001. Belgian Sewing Thread (BST) is a small Belgian company which was fined some €979,000.

BST raised various arguments on appeal, mainly focussed on the idea that "its infringement" was small and therefore that it should have been fined less.

The main points of interest are as follows:

First, although generally the Commission does not allow co-defendants to see the responses of others to the statement of objections, it appears that in this case the Commission did allow access to the non-confidential version, as well as to comments made by the parties at the hearing, with a deadline to submit further comments.[226]

Secondly, the GC emphasised that in its claims concerning "its infringement" BST was confusing the *general gravity* of the infringement, which is assessed solely by reference to the infringement itself, such as its nature and impact on the market itself and determines the general starting amount of the fine and the *relative gravity* of each company's participation.[227] BST's point was that

[217] *SGL Carbon AG v Commission of the European Communities* (C-564/08P and C-554/08P) [2009] E.C.R. I-191.
[218] *SGL Carbon* [2009] E.C.R. I-191 at [19]–[21].
[219] *SGL Carbon* [2009] E.C.R. I-191 at [29]–[30].
[220] With thanks to Stéphanie Strievi for her assistance.
[221] *SGL Carbon* [2009] E.C.R. I-191 at [14] and [21]–[24].
[222] *SGL Carbon* [2009] E.C.R. I-191 at [30].
[223] With thanks to Alexander Israel for his assistance.
[224] , *Amann & Söhne and Cousin Filterie* (T-446/05) [2010] 5 C.M.L.R. 14; *Oxley Threads* (T-448/05) [2010] 5 C.M.L.R. 15; *Belgian Sewing Thread* (T-452/05) [2010] 5 C.M.L.R. 16; *Gütermann AG v European Commission* (T-456/05 and T-457/05) [2010] 5 C.M.L.R. 17.
[225] *Belgian Sewing Thread (BST) NV* [2010] 5 C.M.L.R. 16.
[226] See, e.g. *BST* [2010] 5 C.M.L.R. 16 at [9].
[227] *BST* [2010] 5 C.M.L.R. 16 at [46]–[48].

the scale of starting amount under the 1998 Fining Guidelines, leading to a "very serious" infringement finding was too high for what it had done. This was rejected.

Thirdly, in summarising the law, the court emphasised that fines do not have to be assessed in direct relation to the size of the affected market.[228] Nor was the Commission obliged to ensure that the final amounts of fines imposed on undertakings in the same infringement reflected every difference between the undertakings concerned in terms of overall turnover or their relevant turnover.[229] This is noted here, because the arguments come up frequently in practice.

Fourthly, in a year when the Commission is being very sensitive to inability-to-pay claims, the GC confirmed the general rule that the Commission is *not* required in setting fines to take into account the poor financial situation of an undertaking.[230]

Fifthly, although emphasising that the Commission had a broad discretion to assess the quality and usefulness of the co-operation which it had from members of a cartel, the court noted that such appraisal was still subject to respect for the principle of equal treatment.[231] The court then found that the Commission had made a manifest error because, on the one hand it had found BST's contribution important, while on the other it had found the contributions of others "useless"; yet the Commission had only given BST a 20 per cent fine reduction, while giving the others a 15 per cent fine reduction. Such a limited differentiation was "unreasonably narrow". So, in its unlimited jurisdiction, the court increased BST's fine reduction by 10 per cent to 30 per cent overall (after application of the upper limit of 10 per cent of turnover). BST's fine was therefore reduced by 30 per cent of €1.224 million to €856,800.[232]

Amann and Cousin A second judgment concerned Amann & Söhne (Amann) and Cousin Filterie, (Cousin) German and French companies which had been treated as one economic unit in relation to the industrial thread and automotive thread cartels.[233] Amann and Cousin were found to have participated in these two, relatively small cartels and were fined €4.88 million for participation in the EEA-wide automotive thread cartel and €13.09 million for participation in the industrial thread cartel concerning the Benelux and the Nordic countries.

Again there are several interesting points in the judgment:

First, Amann and Cousin argued that the Commission should have treated the two infringements as one, partly insofar as they argued one market was involved and partly insofar as there were interrelations between the cartels. This led the court to carry out a detailed review of the Commission's findings that two markets were concerned[234] and also the extent to which the cartels could be said to be part of an "overall plan".[235] The court rejected the claims.

Secondly, Amann and Cousin challenged the legality of the fining system here, whereby finding multiple infringements, each subject to the 10 per cent of turnover fining ceiling, a company could be fined more than 10 per cent of its turnover in a Commission decision.

This led the court to set out in detail why it considered the system to be legal and consistent with art.7 of the European Convention of Human Rights, taking a combination of laws, case law and Commission decisional practice.[236] Its conclusion was that "for objective reasons, the Commission may initiate separate procedures, find separate infringements and impose a number of separate fines"[237] and it was lawful for there to be a 10 per cent of turnover ceiling in respect of each infringement.

A prudent trader, if need be, by taking legal advice, could also foresee in a sufficiently precise manner the method which the Commission would apply to decide whether a given conduct should be viewed as a single continuous infringement or a number of separate infringements,[238] and the order of magnitude of the fines which he may incur for a given line of conduct.[239]

Gütermann and Zwicky One aspect of this case is also of interest.[240] The particular situation here was that Zwicky sold its industrial thread *assets* to Gütermann one year before the Commission's inspections in 2001.[241] Zwicky objected that, in setting its fine, the Commission had wrongly taken Gütermann's turnover into consideration, instead of Zwicky's own. Further, Zwicky noted that its turnover was zero in the year preceding the Commission's decision in 2005.

The court agreed that the Commission should not have used Gütermann's turnover, since Gütermann had in no sense taken over Zwicky (as a company). However, the court noted, following *Britannia Alloys*[242] that, in assessing the upper limit for fines, the Commission had to look at

[228] *BST* [2010] 5 C.M.L.R. 16 at [62].
[229] *BST* [2010] 5 C.M.L.R. 16 at [77] and [89]–[90].
[230] *BST* [2010] 5 C.M.L.R. 16 at [95]–[96].
[231] *BST* [2010] 5 C.M.L.R. 16 at [142].
[232] *BST* [2010] 5 C.M.L.R. 16 at [143]–[153].
[233] *Amann & Söhne GmbH & Co KG v European Commission* (T-446/05) [2010] 5 C.M.L.R. 14.
[234] *Amann & Söhne* [2010] 5 C.M.L.R. 14 at [53]–[88].
[235] *Amann & Söhne* [2010] 5 C.M.L.R. 14 at [89]–[94].
[236] *Amann & Söhne* [2010] 5 C.M.L.R. 14 at [125]–[151].
[237] *Amann & Söhne* [2010] 5 C.M.L.R. 14 at [93].
[238] *Amann & Söhne* [2010] 5 C.M.L.R. 14 at [139].
[239] *Amann & Söhne* [2010] 5 C.M.L.R. 14 at [147]. Similar points were also made by the GC in *Wieland-Werke AG v European Commission* (T-11/05) Unreported May 19, 2010 GC at [58]–[73], where the applicant challenged the legality of art.23(2) of Regulation 1/2003.
[240] *Gütermann* (T-456/05) [2010] 5 C.M.L.R. 17.
[241] *Gütermann* (T-456/05) [2010] 5 C.M.L.R. 17 at [70]–[108].
[242] *Britannia Alloys & Chemicals Ltd v Commission of the European Communities* (C-76/06 P) [2007] E.C.R. I-4405; [2007] 5 C.M.L.R. 3.

turnover which reflected Zwicky's true economic situation in the period during which the infringement was committed. Since that was not the case for Zwicky in the year preceding the Commission's decision, the court held, in its unlimited jurisdiction, that the relevant turnover to consider was for the year from July 1999 to June 2000 (€4.5 million) before Zwicky sold the relevant assets to Gütermann. As a result the basic amount of the fine imposed on Zwicky did not exceed 10 per cent of its turnover.

Oxley Threads As regards this appeal two points may be noted[243]:

First, most of the appeal focuses on the difference in size of Oxley Threads in comparison to Coats. It appears Coats's total turnover was 71 times larger than that of Oxley Threads. Oxley Threads therefore argued that to put it in the same category as Coats for fining purposes was unlawful (e.g. an infringement of the principle of equal treatment). The GC rejected this, noting that the Commission had set categories based on turnover in the relevant market, which it was entitled to do and that Coats and Oxley Threads had similar turnovers in that market.[244]

Secondly, Oxley Threads argued that its co-operation in relation to the UK industrial threads case should have been taken into account as regards its fine in the automotive thread cartel case. Again the court disagreed, holding that the co-operation to be considered had to relate to the specific administrative procedure related to the suspected infringement which gave rise to that procedure.[245]

Copper plumbing tubes

In May 2010, the GC ruled on six appeals in relation to the Commission's 2004 decision in the *Copper plumbing tubes* case.[246] The GC dismissed all of the claims, save for two made by IMI and Chalkor. As a result, the fine on IMI was reduced from €44.98 million to €38.55 million and the fine on Chalkor was reduced from €9.16 million to €8.24 million. (KME has appealed further to the ECJ.)

It may be recalled that this was a case in which the Commission found a "single, continuous, complex and multi-form" cartel with three branches:

- SANCO (co-operation related to the supply of plain tubes sold under that mark);
- WICU/Cuprotherm (plastic coated tubes); and
- "broader European arrangements" (other plain tubes not sold under the SANCO mark).

Total fines of some €222.3 million were imposed on the seven companies. Interestingly, in combining the three branches of the cartel the Commission emphasised that the starting amounts for the fines on each company were based on a percentage of the total combined "market", so that, in this way, market shares were diluted overall.[247]

On appeal there were three main issues:

First, various applicants argued that the fines had been set at too high a level because the cartel was only as regards "conversion margin". In other words, the manufacturing cost of converting copper into the tubes sold, not the underlying metal price, the value of which was set by reference to the London Metal Exchange.[248]

This the court rejected (as it had in the earlier Industrial tubes cases[249]) on the basis that there was no reason to distinguish metal input into copper tubes from other manufacturing inputs into the production process which are also not cartelised.[250]

This is still controversial because conversion margin accounted for only about one third of the total plumbing tube supply turnover (some €1,151 million), and the Commission said that it took into account the "whole sector affected" in setting the fine. In short, the companies argue that their unlawful co-operation concerned much less than that.

Secondly, the court held that if the Commission has no evidence implicating a company in an infringement for a specific period, it should not fine that company for that period, even though that company was in the cartel before and after.[251] Interestingly, the court emphasised that the burden is on the Commission to offer "evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates".[252] This was necessary before the burden passed to the defence to show that it had manifested intent no longer to participate in the cartel.[253]

This is an important finding (even if based on other previous cases). What was going on here is that IMI argued that it had left the cartel for a period and there was no evidence brought by the Commission that it had participated in any way in that period. The Commission, on the other hand, emphasised that IMI had been involved up to a certain date and then came back after and continued straight on. The Commission also appears to

[243] *Oxley Threads* (T-448/05) [2010] 5 C.M.L.R. 15.
[244] *Oxley Threads* (T-448/05) [2010] 5 C.M.L.R. 15 at [40]–[89].
[245] *Oxley Threads* (T-448/05) [2010] 5 C.M.L.R. 15 at [122]–[130].
[246] *Wieland-Werke* Unreported May 19, 2010; *IMI Plc v European Commission* (T-18/05) Unreported May 19, 2010 GC; *Boliden AB v European Commission* (T-19/05) Unreported May 19, 2010 GC; *Outokumpu Oyj v European Commission* (T-20/05) Unreported May 19, 2010 GC; *Chalkor AE Epexergasias Metallon v European Commission* (T-21/05) Unreported May 19, 2010 GC; and *KME Germany AG v European Commission* (T-25/05) Unreported May 19, 2010 GC.
[247] *IMI* Unreported May 19, 2010 at [42], and see the Commission's decision, para.692.
[248] e.g. *Outokumpu* Unreported May 19, 2010 at [73] and *KME* Unreported May 19, 2010 at [93]–[94].
[249] e.g. *Outokumpu Oyj v European Commission* (T-122/04) [2009] 5 C.M.L.R. 7; and *KME Germany AG v Chalkor AE Epexergasias Metallon v European Commission* (T-127/04) [2009] E.C.R. II-1167.
[250] e.g. *Outokumpu* Unreported May 19, 2010 at [77].
[251] *IMI* Unreported May 19, 2010 at [79]–[97].
[252] *IMI* Unreported May 19, 2010 at [86].
[253] *IMI* Unreported May 19, 2010 at [86].

have been relying on the courts' tendency to accept that, provided there is some evidence of participation on a number of dates over the cartel period, that may be enough for the Commission to establish its case, relying on the presumption in *Aalborg Portland* case that limited evidence may be enough given the secretive nature of cartels.[254]

On critical review of the evidence, the court found that IMI's claim that it had been out of the cartel for 20 months was too long. Rather, on the facts, it appeared that IMI had not been in the cartel for 16 months.

The court then went on to state that whether a period separating two manifestations of infringing conduct is enough to constitute an interruption of an infringement is not to be assessed in the abstract. The court held that one should look at that period as compared to the habitual cycle of contacts in the cartel.[255] In IMI's case the break was for 16 months, which was more than a year longer than the habitual contacts in the third branch of the cartel in which it was involved (which appeared to have been every three to four months[256]).

The GC also held that limitation did not apply, because IMI "resumed and repeated" its conduct in the same cartel when it came back.[257]

Thirdly, the GC held that, if the Commission finds that a company is only involved in one branch of a multi-form cartel, it should differentiate in assessing the gravity of that company's infringement in comparison to a company involved in all three branches.[258]

That is also an interesting finding. Clearly the Commission was attempting to find some differentiation in the overall participation of some companies in the several cartels through focus on turnover in the combined figures for all three branches of the cartel together. However, the court did not find that adequate and preferred that there should be a differentiation based on participation in one or more branches of the cartel.

Practically, the GC then found that the duration increase element of the fine on IMI should be reduced to 100 per cent from 110 per cent and, in the court's unlimited jurisdiction, the starting amount of the fines on IMI and Chalkor were reduced by 10 per cent because they had been involved only in one branch of the cartel.[259]

Plasterboard[260]

Lafarge In June 2010 the ECJ ruled on Lafarge's appeal of the CFI's judgment in 2008, upholding the Commission's decision to fine Lafarge €249.6 million for its involvement in the *Plasterboard* cartel case.[261] The ECJ rejected Lafarge's appeal.

The main points of interest relate to the court's findings on recidivism:

First, the court held that there was a legal basis in Regulation 17/62 for recidivist increases. This is insofar as the Commission has to assess fines according to their "gravity" which, the ECJ notes, includes taking into account whether an infringement is repeated or not.[262]

Secondly, referring to its judgment in *Groupe Danone*,[263] the court notes that "European Union competition law does not authorise the Commission to take account of repeated infringement without any limitation in time".[264] Rather:

> "The principle of proportionality requires that the time elapsed between the infringement in question and a previous breach of competition rules be taken into account in assessing the undertaking's tendency to infringe those rules."[265]

However, that did not assist Lafarge here since, as the CFI had noted, Lafarge had been notified of the Commission's decision in the *Cement* cartel case, yet its subsidiary had continued in the *Plasterboard* cartel for a further four years.[266] In short, there was *not* a significant lapse of time between infringements on the facts, justifying no recidivist increase.

Thirdly, the fact that the infringement in the *Cement* case had not become definitive until 2000 (i.e. after the end of the Plasterboard cartel in 1998), did not prevent the Commission from using it as a basis for recidivism in its 2002 *Plasterboard* decision.

The ECJ considered that the CFI had been correct to find that Commission decisions are presumed lawful and further that actions before the CFI do not have suspensory effect.[267] Should the court annul a decision on the basis of which a fine for another infringement is increased in a later decision then, under art.233 EC, the Commission is required to take the necessary measures to amend the later decision. However, this did not undermine the Commission's ability to increase fines for recidivism in the meantime.[268] (Lafarge's argument was that it should

[254] *Aalborg Portland A/S v Commission of the European Communities* (C-204/00 P) [2004] E.C.R. I-123; [2005] 4 C.M.L.R. 4 at [55]–[57].
[255] *IMI* Unreported May 19, 2010 at [90].
[256] *IMI* Unreported May 19, 2010 at [96].
[257] *IMI* Unreported May 19, 2010 at [97].
[258] *IMI* Unreported May 19, 2010 at [159]–[174], and *Chalkor* Unreported May 19, 2010 at [91]–[113].
[259] *IMI* Unreported May 19, 2010 at [187] and [189]–[190]; *Chalkor* Unreported May 19, 2010 at [182] and [184]–[185].
[260] With thanks to Gabriele Accardo for his assistance.
[261] *Lafarge SA v European Commission* (C-413/08 P) [2010] 5 C.M.L.R. 10.
[262] *Lafarge* [2010] 5 C.M.L.R. 10 at [63]–[64].
[263] *Groupe Danone v Commission of the European Communities* (C-3/06 P) [2007] E.C.R. I-1331; [2007] 4 C.M.L.R. 18.
[264] *Lafarge* [2010] 5 C.M.L.R. 10 at [73].
[265] *Lafarge* [2010] 5 C.M.L.R. 10 at [70].
[266] *Lafarge* [2010] 5 C.M.L.R. 10 at [71].
[267] *Lafarge* [2010] 5 C.M.L.R. 10 at [81]–[86].
[268] *Lafarge* [2010] 5 C.M.L.R. 10 at [87]–[88].

not be held to be a recidivist unless it had committed a second infringement, after the first finding of infringement had become definitive.)

Knauf In July 2010, the ECJ confirmed the CFI's judgment upholding a €85.8 million fine imposed by the Commission on Knauf Gips KG (Knauf) as regards a cartel on plasterboard markets in Germany, the United Kingdom, France and the Benelux between 1992 and 1998.[269]

On appeal to the ECJ, Knauf raised three points of particular interest:

First, Knauf argued that it had been unlawfully denied access to inculpatory and exculpatory evidence in the Commission's file. The ECJ rejected this as regards inculpatory evidence, on the basis that Knauf had not shown that the Commission had relied on documents to which Knauf had been denied access and that the Commission's decision would have been different if use of those documents had been disallowed.[270] It appears that Knauf had referred mainly to the recitals of the Commission's decision indicating what documents it had not seen. Further, Knauf had not shown that it could have used for its defence other exculpatory documents to which it had not had access. Notably, the CFI had held that the Commission had already taken into account and rejected the arguments contained in those documents, so they appeared not to add anything new to the defence.[271]

Secondly, Knauf claimed that it could not be held liable for the actions of the Knauf Group and, in particular, that it did not constitute an economic unit in terms of EU Competition law with Gebrüder Knauf Verwaltungsgesellshaft (GKV) and its subsidiaries which were active in the plasterboard market. The particular situation here is that Knauf is a partnership of 21 members of the Knauf family and a company which holds the shares of four other members and that both Knauf and GKV are owned by these 22 legal persons. In short, Knauf was not simply at the apex of the group with GKV as a subsidiary.

The ECJ found that the CFI had been right to find on the "body of evidence" that Knauf formed an economic unit with GKV, insofar as, notably, the shareholders in the companies were the same; and the two managing shareholders in Knauf were also managing shareholders of all the companies in the Knauf Group, GKV also had no staff of its own, but was in fact a holding company, depending for managers and premises on Knauf. The CFI had not just found that there was an economic unit because all the companies in the Knauf group belonged to the same family.[272]

Thirdly, interestingly, the ECJ annulled the CFI's judgment insofar as it had held that Knauf should have raised the issue as to whether it was in the same economic unit as GKV during the administrative procedure, or be faced with the prospect of no longer being able to do so later in judicial proceedings. The Court held:

> "Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well-founded, it cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court."[273]

The court then added that such a restriction would be contrary to fundamental principles of the rule of law and respect for the rights of the defence. Further, it would be at odds with the rights to an effective remedy and access to an impartial tribunal guaranteed by art.47 of the Charter of Fundamental Rights which, under art.6 of the TEU has the same legal value as the EU Treaties. Any such limitation had to be provided for by law, under art.52(1) of that Charter. It is interesting to see this "strengthened Charter" argumentation.

The ECJ then itself ruled on the issue of the responsibility of Knauf and, after reviewing the facts again, held that the Commission had been right to consider Knauf responsible for all the activities of the Knauf Group.[274]

Spanish raw tobacco

Deltafina[275] In September 2010, the GC ruled on Deltafina's appeal against the Commission's 2004 *Spanish raw tobacco* decision.[276] It may be recalled that in this case the Commission found that Deltafina, an Italian company which bought processed tobacco from Spanish processors, had participated in a cartel among Spanish processors, fixing purchasing prices for Spanish raw tobacco and sharing out supplies of that product. There was also found to be a cartel on the tobacco producers' side.

Deltafina was fined €11.88 million: €12 million for its involvement over five years, with a 50 per cent increase for being the leader of the cartel, but then reduced by 40 per cent for the attenuating circumstances (the legislative framework and involvement of the Spanish Ministry for Agriculture) and a further 10 per cent for its co-operation.

On appeal Deltafina argued that it should not have been held liable when it was not present on the market in question; that it was, at most, an indirect facilitator of the

[269] *Knauf Gips KG v European Commission* (C-407/08 P) [2010] 5 C.M.L.R. 12.
[270] *Knauf* [2010] 5 C.M.L.R. 12 at [13]–[14].
[271] *Knauf* [2010] 5 C.M.L.R. 12 at [22]–[28].
[272] *Knauf* [2010] 5 C.M.L.R. 12 at [64]–[74].
[273] *Knauf* [2010] 5 C.M.L.R. 12 at [89]–[92].
[274] *Knauf* [2010] 5 C.M.L.R. 12 at [94]–[110].
[275] With thanks to Stéphanie Strievi for her assistance.
[276] *Deltafina SpA v European Commission* (T-29/05) Unreported September 8, 2010 GC.

cartel (with the real protagonists being the Spanish processors); and challenged the Commission's finding that it was leader of the cartel.

The GC rejected the first and second arguments finding that (as held in the *AC Treuhand* case[277]) a company could be held liable for an infringement, even if it was not active on the relevant market. Further, the court held that Deltafina had actively and directly participated in the cartel, including attendance at some meetings and with various related communications. The court also noted that, since Deltafina was active on the market immediately downstream of the cartel, Deltafina had a clear interest in it.[278]

As regards the third argument however, contesting leadership of the cartel, the court agreed with Deltafina.[279] The court found that the Commission had not shown that Deltafina was the "significant driving force" behind the cartel to justify a finding that Deltafina was its leader. On the contrary, Deltafina had only attended four out of almost 30 meetings. As a result the 50 per cent fine increase for being leader was overturned. Further, since the Commission had taken into account that finding in considering what level of reduction to give Deltafina for its co-operation, the court reassessed that and increased the fine reduction from 10 per cent to 15 per cent in its unlimited jurisdiction.

The net result was that Deltafina's fine was reduced from €11.88 million to €6.2 million.

Alliance One[280] In October 2010, the GC gave judgment in another appeal concerning the *Spanish raw tobacco* case, this time by parent companies in the Standard Group, which owned one of the Spanish processors, Worldwide Tobacco Espana (WWTE).[281] The ultimate parent of the group, Standard Commercial Corp (SCC), is now called Alliance One.

On appeal the Standard Group companies argued that the three parent companies which had been held responsible for WWTE and therefore jointly and severally liable with WWTE should not have been, essentially for two reasons:

- First, insofar as an intermediate parent of WWTE, a company called Trans-Continental Leaf Tobacco (TCLT), which held the largest Group stake of WWTE, only had a financial interest in WWTE and had not exercised decisive influence over WWTE.
- Secondly, insofar as making TCLT (and thereby the Standard Group) liable in this way infringed the principle of equal treatment because other parents of companies in the cartel had not been held liable in that way. Notably, the Commission had not found the Universal Group liable for Taes and Deltafina, or SEPI for Cetarsa, nor had the Commission found Intabex, an intermediate parent in the Dimon Group, liable for the activities of Agro-Expansion, another Spanish processor.

This led the GC into an interesting focus on the basis for parental liability, resulting in what appears to be the leading judgment on the subject now.

The precise facts are very specific, relating to two different periods of shareholding control structures. Interestingly, it appears that at the time the Commission considered it prudent on the case-law to found parental liability not only on the ability to exercise decisive influence over a subsidiary, but also on evidence of actual exercise of decisive control (as the Commission called it a "dual basis" of liability[282]).

In practice in the case, the Commission considered that it did not have evidence in its file, allowing it to meet that dual standard as regards the Universal Group, or SEPI, or Intabex. However, the Commission considered that it did have such proof as regards the parents of WWTE. Notably the Commission had found that an employee of a subsidiary of Standard Commercial Tobacco (SCTC), itself a subsidiary of SCC, had acted as co-ordinator of the Standard Group's activities; and that WWTE had acted subject to SCTC control.[283]

After detailed review, the GC agreed. However, the GC disagreed with the Commission's finding that TCLT was liable as a parent on this approach, when it was just a financial holding company with no employees. The finding of TCLT's parental liability was therefore overturned.[284]

Since TCLT had the Standard Group's main holding in WWTE, the Standard Group argued that its overall parental liability should also fall. However the GC disagreed, noting that SCTC and SCC had been shown to have decisive influence over WWTE and that the Standard Group's fine had been based on SCC's overall turnover.

The GC usefully summarises the parental liability law.[285] The key points made are that:

- For such liability, it is not a question of the Commission showing that a parent instigated or was involved in a subsidiary's infringement. Rather liability is based on a

[277] *AC Treuhand AG v Commission of the European Communities* (T-99/04) [2008] E.C.R. II-1501; [2008] 5 C.M.L.R. 13
[278] *Deltafina* Unreported September 8, 2010 at [50]–[51].
[279] *Deltafina* Unreported September 8, 2010 at [331]–[336].
[280] With thanks to Philippe Claessens for his assistance.
[281] *Alliance One International Inc v European Commission* (T-24/05) Unreported October 27, 2010 GC.
[282] *Alliance One* Unreported October 27, 2010 at [118] and [147].
[283] *Alliance One* Unreported October 27, 2010 at [194], [217] and [226].
[284] *Alliance One* Unreported October 27, 2010 at [195]–[197], [218]–[219] and [227].
[285] *Alliance One* Unreported October 27, 2010 at [126]–[132] and [165]–[171].

parent's ability to exercise decisive influence and evidence that a parent had actually done so.

- Nor does the Commission have to show that the parent's influence was over the subsidiary's activities which make up its commercial policy or are directly linked to the infringement.
- If a parent has a 100 per cent stake in a subsidiary, there is a presumption that the parent exercised decisive influence.
- Following *Avebe*,[286] if a company is subject to joint control, a parent is only liable if it is shown that it actually exercised control (so in fact only one parent may be liable, depending on the circumstances).

On the equal treatment argument, interestingly the GC and the Commission both took the view that if, as here, the Commission raised the standard of proof for finding parental liability (i.e. beyond just relying on a 100 per cent shareholding in a subsidiary), then it had to apply that approach to all the parents in the case which (apart from as regards TCLT) the Commission was found to have done correctly.[287]

Industrial bags[288]

In September 2010, the GC ruled on Trioplast Wittenheim and Trioplast Industrier's appeals against the €17.85 million fine imposed on Trioplast Wittenheim, for which its parent company, Trioplast Industrier, was jointly and severally liable for up to €7.73 million[289] in the *Industrial bags* case. Trioplast Industrier had bought Trioplast Wittenheim three years before the end of the infringement. Trioplast Wittenheim's former parent companies, FLSmidth and FLS Plast, were jointly and severally liable for up to €15.30 million of Trioplast Wittenheim's fine.

It may recalled that the Commission had imposed a total fine of €290.71 million on 16 firms for a cartel in which Trioplast Wittenheim had participated for 20 years. For the purpose of calculating Trioplast's fines, the Commission had set a basic amount of €8.5 million, increased according to the infringement's duration (200 per cent for Trioplast Wittenheim and 30 per cent for Trioplast Industrier) and subsequently reduced by 30 per cent in application of the Leniency Notice.

Trioplast Wittenheim and Trioplast Industrier lodged separate appeals. Except for one additional ground, however, Trioplast Industrier's grounds of appeal were virtually identical to those raised by Trioplast Wittenheim.

While the GC upheld the Commission's decision in its entirety with respect to Trioplast Wittenheim, the court accepted two of Trioplast Industrier's grounds of appeal.

The following are the main points of interest:

First, the appellants argued that the Commission's method for setting fines was erroneous given that the overall joint and several liability of the successive parent companies (€23.03 million) exceeded Trioplast Wittenheim's total fine (€17.85 million). However, the GC noted that the mere fact that the sum of the joint and several liabilities exceeds the total fine does not imply that the Commission's method for setting fines is erroneous.[290]

Secondly, regarding the claim that the Commission had not taken into account Trioplast Wittenheim's inability to pay the fine, which led to its bankruptcy, the GC, referring to *IAZ International Belgium*,[291] noted that an obligation for the Commission to do so would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market.[292]

Thirdly, although both appellants argued that the Commission had erred when using 1996 as the reference year for the purpose of calculating the fines, the GC only upheld this argument with respect to Trioplast Industrier. Since Trioplast Industrier only acquired Trioplast Wittenheim in 1999, the GC found that the 1996 market share could not reflect the economic reality at the time both companies formed one economic entity.[293] The GC therefore reduced Trioplast Industrier's fine from €7.73 million to €2.73 million, having adjusted the basic amount from €8.5 million to €3 million.[294]

Fourthly, Trioplast Industrier argued that the Commission had violated the principles of legal certainty and good administration by not indicating how the payment of the fine should be shared between itself and the former parent companies, FLSmidth and FLS Plast, since the total amount of the fine for which they are jointly and severally liable exceeds the amount of Trioplast Wittenheim's fine.

Interestingly, the GC accepted the claim. The court stated that the fact that Trioplast Industrier was held jointly and severally liable for an undetermined share of the fine, in combination with the fact that Trioplast Industrier and FLSmidth and FLS Plast were never part of the same economic entity, violates the principle of legal certainty and the principle that penalties must fit the offence.[295]

[286] *Cooperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission of the European Communities* (T-314/01) [2006] E.C.R. II-3085; [2007] 4 C.M.L.R. 1.
[287] *Alliance One* Unreported October 27, 2010 at [156]–[159].
[288] With thanks to Philippe Claessens for his assistance.
[289] *Trioplast Wittenheim SA v European Commission* (T-26/06) Unreported September 13, 2010 GC and *Trioplast Industrier AB v European Commission* (T-40/06) Unreported September 13, 2010 GC.
[290] *Trioplast Wittenheim* Unreported September 13, 2010 at [72].
[291] *IAZ International Belgium SA v Commission of the European Communities* (96/82) [1983] E.C.R. 3369; [1984] 3 C.M.L.R. 276 at [55].
[292] *Trioplast Wittenheim* Unreported September 13, 2010 at [150].
[293] *Trioplast Industrier* Unreported September 13, 2010 at [95].
[294] *Trioplast Industrier* September 13, 2010 at [173].
[295] *Trioplast Industrier* September 13, 2010 at [17].

The GC therefore concluded that the amount of the (reduced) fine should be used as the basis on which the Commission must determine Trioplast Industrier's share of the overall joint and several liability of the successive parent companies for the payment of the fine imposed on Trioplast Wittenheim.[296] Thus the amount paid by Trioplast Industrier must not exceed its share of the joint and several liability.

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

- the European Commission's cartel decisions (new this year and older where the non-confidential text has now been published, e.g. *Carglass, Fasteners* and *Calcium Carbide*);
- the Commission's other decisions and settlements (notably, five art.9 energy cases and the *Microsoft Browser*);
- follow-up to the Commission's pharma sectoral inquiry, including monitoring of patent dispute settlements (and some related national competition authority action); and
- recent policy themes, such as giving "inability-to-pay" (fine) relief to cartel offenders in exceptional circumstances; and developing damages actions.

[296] *Ibid*, para. 173.

Major Events and Policy Issues in EU Competition Law, 2009–2010 (Part 2)

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Cartels; Competition law; Damages; Energy; EU law; Fines; Private enforcement

This is the second and final part of the overview of "Major Events and Policy Issues in EU Competition Law 2009–2010", 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 recent decisions. First, those on cartels, both new and older decisions, where the non-confidential text has been published now by the Commission, e.g. *Car Glass*, *Fasteners* and *Calcium Carbide*. Then, the Commission's other decisions and settlements under art.9 of Regulation 1/2003, notably, five energy cases based on art.102 of the Treaty on the Functioning of the European Union (TFEU), including unbundling and significant capacity release commitments; and the *Microsoft Browser* case.

This is followed by a summary of Commission follow-up to the pharma sectoral inquiry including monitoring of patent dispute settlements (and some related national competition authority action). Finally, the article includes an outline of recent policy themes, such as giving "inability-to-pay (fine) relief" to cartel offenders in exceptional circumstances and developing damages actions in competition cases.

European Commission decisions

Cartels—new[2]

Box 1

New cartel fines (November 2009–October 2010)			
Total fines			**Highest company fines(s)**
Heat stabilisers	€173.9 million	*Ciba*	€68.4 million
DRAMs	€331.3 million	*Samsung*	€145.7 million
Carbonless paper	€21.2 million	*Bolloré (Re-adoption)*	€21.2 million
Bathroom equipment	€622.3 million	*Ideal Standard*	€326.1 million
Prestressing steel	€458.4 million	*Arcelor Mittal*	€230.4 million
Animal feed phosphates	€175.7 million	*Tessenderlo Chemie*	€83.8 million
TOTAL	**€1,782 million**		

Box 2

Main issues—new cases

- First settlement decision—*DRAMS*
- First hybrid cartel case—*Animal feed phosphates*
- Fine reductions for inability to pay:
  - — *Bathroom equipment* (5 companies—3 x 50%, 2 x 25%)
  - — *Prestressing steel* (3 companies—25%, 50%, 70%)
  - — *Animal feed phosphates* (1 company—70%)
- Fine on AC Treuhand for role in *Heat Stabilisers*—€346,000

Heat stabilisers

In November 2009, the Commission announced that it had imposed fines of some €173.9 million on 10 groups of companies for participating in a price-fixing and market-sharing cartel concerning heat stabilisers and for having exchanged sensitive commercial information in relation thereto.[3] The companies concerned are: Akzo, Baerlocher, Ciba, Elementis, Arkema France (part of Elf Aquitaine at the time of the infringements), GEA, Chemson, Faci, Reagens and AC Treuhand. The cartels were EEA-wide.

Heat stabilisers are added to PVC products to improve their thermal resistance, to increase the plasticity, rigidity and transparency of final PVC products, and to protect them from discolouration. Two kinds of heat stabilisers exist, both of which were subject to the investigation: tin stabilisers and epoxidised soybean oil (ESBO)/ester stabilisers. Heat stabilisers are used in packaging, credit cards, bottles, coatings, flooring, artificial leather, plastic wallpaper and other plastic products.

The cartel was found to have operated for 13 years as regards tin stabilisers (1987–2000) and for nine years as regards ESBO/ester stabilisers (1991–2000).

It appears that Chemtura Corp revealed the existence of the cartel and was therefore not fined. AC Treuhand was fined €346,000 because the principal decisions for the cartel for both products were taken at meetings

* With many thanks to Sinéad Mooney and Katrin Guéna for their general help in the production of this article and to my various colleagues whose names are indicated below, with the parts with which they have helped.

[1] The views expressed in this paper are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the Commission's website are to DG Competition's specific competition page at *http://ec.europa.eu/comm/competition/index_en.html* [Accessed January 24, 2011].

[2] With thanks to Katrin Guéna for her assistance.

[3] "Antitrust: Commission fines plastic additives producers €173 million for price fixing and market sharing cartels" EU Press Release, IP/09/1695, November 11, 2009.

organised at the premises of AC Treuhand (and this time more than a symbolic fine was imposed[4]). The fine on Arkema France was increased by 90 per cent for multiple recidivism. However, as regards the tin stabiliser cartel, Arkema France was granted a 30 per cent reduction of its fine for its co-operation with the Commission and as regards the ESBO/ester stabiliser cartel a 50 per cent reduction for its co-operation. Fines were also reduced for Baerlocher and Ciba. Akzo had requested leniency but did not receive a reduction in fines.

Overall, Ciba was fined €68.4 million, Akzo €40.6 million, Elementis €30.6 million, Arkema €28.7 million. Other fines ranged from €10.8 million to €1 million (apart from AC Treuhand, noted above). Fines were assessed separately for tin stabilisers and ESBO/ester stabilisers. The combined markets were stated to be worth some €121 million at the time of the infringement.

DRAMs

In May 2010, the Commission adopted its first settlement decision in a cartel case.[5] The investigation concerned 10 producers of memory chips (DRAMs) for computers and servers. The Commission announced that it had imposed a total of €331.3 million in fines on Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya. It appears that Micron was also involved in the cartel, but was not fined because it revealed the infringement to the Commission.

The Commission found that between July 1998 and June 2002, all the companies were involved in a network of mainly bilateral contacts and the sharing of information to co-ordinate prices and quotations.

In setting the fines, the Commission took into consideration that all the companies agreed to settle the case and that Infineon, Hynix, Samsung, Elpida and NEC co-operated with the Commission. The fines for all the companies were therefore reduced by 10 per cent. The fines on Infineon and Hynix were reduced a further 45 per cent and 27 per cent respectively. The fines imposed on Samsung, Elpida and NEC were reduced by 18 per cent. The fines on Hynix, Toshiba, and Mitsubishi were also reduced for mitigating circumstances.

It appears that the proceedings took around one year from the moment the Commission opened proceedings to adoption of the final settlement decision.

The fines are complex. Overall, Samsung was fined €145.7 million, Infineon €56.7 million, Hynix €51.5 million, Hitachi (for the period before entering into a joint venture with NEC and Elpida) €20.4 million, Toshiba €17.6 million, Mitsubishi €16.6 million, NEC (for the period before entering into a joint venture with Hitachi and Elpida) €10.3 million, Elpida, NEC and Hitachi (jointly and severally) €8.5 million, NEC and Hitachi (jointly and severally) €2.1 million and Nanya €1.8 million.

It appears there have been no appeals.

Bathroom equipment

In June 2010, the Commission announced that it had imposed fines of €622.3 million on 17 bathroom equipment manufacturers for price-fixing.[6]

It appears that the cartel operated for 12 years, from 1992 until 2004. The companies agreed on prices for baths, sinks, taps and other bathroom fittings, and exchanged sensitive information. The co-ordination took place during meetings of trade associations in Germany, Austria, Italy, Belgium, France, and the Netherlands.

The investigation was prompted by Masco, a US company whose subsidiaries include Hansgrohe and Hüppe, who obtained full immunity.

As regards the fines, the Commission granted a 30 per cent reduction to Grohe and Ideal Standard for their co-operation. Interestingly, the Commission also reduced fines of three companies by 50 per cent and of another two companies by 25 per cent, noting their likely "inability to pay" the fines due to their bad financial situation. 10 companies applied for inability-to-pay relief. Commissioner Almunia was quoted as saying "the objective of anti-cartel enforcement is not to precipitate the fall of companies in financial difficulties".[7]

Fines ranged from €326.1 million on Ideal Standard, €71.5 million on Villeroy & Boch, €54.8 million on Grohe and €29.5 million on Duravit to €1.7 million on Duscholux and €253,600 on RAF.

Prestressing steel

In June 2010, the Commission announced that it had imposed fines of some €518 million on 17 producers of "prestressing" steel for a cartel in all the EU countries, except for Greece, Ireland and the United Kingdom. The cartel was found to have lasted for 18 years (from 1984 to 2002) However, in October 2010 this was corrected to €458.4 million.[8]

Prestressing steel comprises long, curled steel wires used with concrete to make foundations, bridges, and balconies. It appears that the companies fixed prices and quotas, allocated clients and exchanged sensitive information. They also monitored arrangements via a system of national co-ordinators.

[4] See *Organic Peroxides Cartel, Re* (Comp/E2/37.857) [2005] 5 C.ML.R. 14 CEC; "Commission fines members of organic peroxides cartel" EU Press Release, IP/03/1700, December 10, 2003.
[5] "Antitrust: Commission fines DRAM producers € 331 million for price cartel; reaches first settlement in a cartel case" EU Press Release, IP/10/586, May 19, 2010; "Antitrust: Commission adopts first cartel settlement decision – questions & answers" EU Press Release, MEMO/10/201, May 19, 2010.
[6] "Antitrust: Commission fines 17 bathroom equipment manufacturers € 622 million in price fixing cartel" EU Press Release, IP/10/790, June 23, 2010.
[7] EU Press Release, IP/10/790, June 23, 2010.
[8] "Antitrust: Commission fines prestressing steel producers € 518 million for two-decades long price-fixing and market-sharing cartel" EU Press Release, IP/10/863 June 30, 2010; "CORRECTED Antitrust: Commission fines prestressing steel producers € 458 million for two-decades long price-fixing and market-sharing cartel" EU Press Release, IP/10/1297, October 6, 2010 with corrected amounts for fines.

DWK Saarstahl received full immunity because it was the first company which sought leniency under the 2002 Leniency Notice. The Commission increased fines by 60 per cent on Arcelor Mittal Fontaine and Arcelor Mittal Wire France for recidivism, but reduced the fines by 5 per cent on Proderac and Emme for their limited participation in the cartel. The fines on Italcable, Nedri, Emesa, Galycas, Arcelor Mittal and WDI Pampus were reduced for their co-operation.

The Commission also reduced fines by 25 per cent, 50 per cent and 70 per cent respectively in response to three inability to pay requests. Thirteen applications for such relief were made. In this case Commissioner Almunia was somewhat stricter, saying: "inability to pay claims will be accepted only when it is clear the fine would send a company into bankruptcy, which is rare even in the current difficult times".[9]

The Commission also noted that owing to the very long duration of the cartel, the fines on several companies would have exceeded 10 per cent of their 2009 turnover. The Commission therefore reduced the fines to that level.

Fines (as corrected) ranged from €230.4 million on Arcelor Mittal to €46.6 million on WDI/Pampus, and €2.6 million on CB Trafilati to €482,250 on Proderac.

Animal feed phosphates

In July 2010, the Commission announced that it had imposed fines of €175.7 million on five groups of companies for allocating market shares, sales quotas and customers, and for coordinating prices and sales conditions in the animal feed phosphates sector.[10]

Animal feed phosphates are chemicals used in feed for cattle, pigs, poultry, fish and pets.

The companies involved are: Kemira/Yara, Tessenderlo Chemie, Ercros, Quimitecnica.com, José de Mello SA, FMC, Timab Industrie and Compagnie Financière et de Participation Roullier (CFPR). It appears that the companies operated the cartel for three decades, between March 1969 and February 2004.

The cartel, known as the "Club", "CEPA" (Centre d'Etude des Phosphates Alimentaires) or "Super CEPA", adapted to different industry and market conditions over the years. In 2003, Kemira informed the Commission about the cartel and applied for leniency.

This is the Commission's first hybrid cartel decision, meaning that all the companies settled with the Commission and thus received a reduction in fines of 10 per cent, except for Timab/CFPR, to which the ordinary procedure was applied. It appears the Commission produced two decisions, a standard one and a "streamlined settlement" one.

Owing to the very long duration of the cartel, the fines on several companies would have exceeded 10 per cent of their 2009 turnover. The Commission therefore reduced the fines to that level. The Commission also reduced fines for co-operation on: Tessenderlo (50 per cent), Quimitecnica/José de Mello (25 per cent), and Timab/CFPR (5 per cent). The Commission granted a reduction of 70 per cent to one of the companies, which claimed inability-to-pay relief, while rejecting another claim. Overall, Tessenderlo was fined €83.8 million, Timab/CFPR €59.9 million, Ercros €14.9 million, FMC €14.4 million and Quimitecnica/José de Mello €2.8 million.

It appears that only Timab/CFPR have appealed.

Bolloré—carbonless paper (re-adoption)

In June 2010, the Commission announced that it had re-adopted its decision on Bolloré's participation in the carbonless paper cartel.[11] The previous decision had been annulled by the ECJ on procedural grounds in September 2009.[12] The new Statement of Objections addressed to Bolloré specified Bolloré's parental liability for its subsidiary Copigraph and Bolloré's direct involvement. It appears that Bolloré co-operated during the new procedure and did not contest Copigraph's participation in the cartel. The Commission therefore reduced the fine imposed on Bolloré by 25 per cent. Bolloré was fined €21.3 million, instead of the €22.7 million in the previous decision.

Other

In September 2010, it appears that the Commission closed its investigation into alleged cartel arrangements for flexible alternating current transmission systems (FACTS).[13] FACTS are used to increase power transfer capabilities of electricity transmission networks. The Commission opened investigations involving, inter alia, Siemens and ABB, at the same time as investigations were started in New Zealand, the United States, Korea and Mexico. The reasons for closing the investigation were not revealed.

Cartels—old

Box 3

Main issues—old decisions (1)

- Repeated debate about what is a "single and continuous" infringement
  - Found "even though each participant may play a role appropriate to its own specific circumstances" (*Anic Partecipazioni*), e.g. *Fasteners*
- *Calcium carbide* powder/granulates and magnesium granulates decision
  - Two product markets; three products

[9] EU Press Release, IP/10/863, June 30, 2010.
[10] "Antitrust: European Commission fines animal feed phosphates producers €175 647 000 for price-fixing and market-sharing in first 'hybrid' cartel settlement case" EU Press Release, IP/10/985, July 20, 2010.
[11] "Antitrust: Commission re-adopts fine on Bolloré for participation in carbonless paper cartel" EU Press Release, IP/10/788, June 23, 2010.
[12] J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2007–2008 (Part 2)" [2009] I.C.C.L.R. 113, 119.
[13] MLex, September 14, 2010.

Main issues—old decisions (1)

- — Single infringement, but product sales per product assessed separately for fines (i.e. different amounts, durations by product for each company)
- — Variations in sanction, while procedure is still one
- — Contrasts? *Copper plumbing tubes* (single, but multi-form infringement), *Fasteners* (several infringements dealt with separately in one decision).

Box 4

Main issues—old decisions (2)

- Elaborations on parental liability, applying *Akzo Nobel*
  - — Ability to exercise influence.
  - — Evidence that actually exercised influence or could have.
  - — 100% shareholding presumption; if not (i.e. JV) show influence.
  - — Not a question of control over the particular commercial policy/unlawful conduct in the infringement.
  - — Intermediate parents/financial investors may not be held liable.
  - — *BMW* based plea rejected (*Calcium Carbide*).
- Challenges to 2006 Fining Guidelines
  - — Article 7 ECHR.
  - — Principle of non-retroactivity, etc. (*Sodium Chlorate*, *Car Glass*)
- *Nitrile Butadiene Rubber*: Unusual case where cartel found even though (at least some) price increases appear not to have been executed. Information exchange enough.
- *Bitumen Spain*: Commission appears to have put leader allegation in S/O!
- *Fasteners*: Not only single and continuous infringement issue, but also several cartels issue.
- Treatment of continuity/gaps between events: e.g. *Bitumen Spain*, *Fasteners*.

Sodium Chlorate[14]

On October 30, 2009 the Commission put the non-confidential version of its 2008 decision concerning sodium chlorate on its website.[15] It may be recalled that the Commission imposed fines totalling some €79 million on four groups of companies for allocating sales volumes and fixing prices for sodium chlorate between late 1994 and 2000.[16] The Commission also found that the companies exchanged sensitive commercial information and followed up the implementation of their illegal agreements.

Sodium chlorate is a strong oxidising agent, mainly used to produce chlorine dioxide, which is used in the pulp and paper industry for the bleaching of chemical pulp.

The four groups concerned were: EKA Chemicals, owned by Akzo Nobel; Arkema France (formerly Elf Atochem), owned by Elf Aquitaine; Finnish Chemicals, originally a limited company which was acquired by Erikem Luxembourg in 1996 (and has been sold again and is now owned by Kemira); and Aragonesas Industrias y Energia (Aragonesas), which was originally wholly owned by Uralita, whose stake subsequently changed to an indirect holding of some 50 per cent in the parent of Aragonesas in the mid-1990s.

The Commission's investigation was prompted by an immunity application submitted by EKA Chemicals in 2003. Immunity was given. Finnish Chemicals was given a 50 per cent fine reduction because of its co-operation with the Commission. The Commission found that Atochem's leniency application could not be regarded as constituting significant added value and therefore rejected it.

Finnish Chemicals/Erikem were fined €10.15 million, Arkema France and Elf Aquitaine €59.02 million, Aragonesas/Uralita €9.9 million. The Commission applied the 2006 Fining Guidelines, in force at the time the Statement of Objections was notified to the parties.

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

- *First*, there is much discussion of the position of Aragonesas insofar as Aragonesas argued that it was only involved in the cartel in Spain, France and Portugal. The Commission rejected this on the facts, concluding that Aragonesas was part of the wider cartel scheme.[17]
- *Secondly*, Elf Aquitaine argued that Elf Atochem had full autonomy from Elf Aquitaine which was just a holding company. The turnover generated by sodium chlorate was also so small (0.15 per cent of Elf Aquitaine's turnover in 1999) that it would not have been significant enough to require the ultimate parent's intervention or authorisation. Holding Elf Aquitaine liable is also contrary to fundamental principles such as the person nature of sanctions.[18] The Commission rejects these arguments,[19] notably relying on the CFI's 2007 ruling in *Akzo Nobel* on similar issues[20] and emphasising that specific influence over the sodium chlorate business is not required, just control of the relevant business entity.

[14] With thanks to Roberto Grasso for his assistance.
[15] Decision C(2008) 2626 final relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38.695-*Sodium Chlorate*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38695/38695_796_1.pdf* [Accessed February 15, 2011]; the Commission's summary is in [2009] OJ C137/6.
[16] "Antitrust: Commission fines sodium chlorate paper bleach producers € 79 million for market sharing and price fixing cartel" EU Press Release, IP/08/917, June 11, 2008; see also Ratliff, "Major Events and Policy Issues in EC Competition Law, 2007–2008 (Part 2)" [2009] I.C.C.L.R. 113, 116.
[17] *Sodium Chlorate* Decision at [319], [342], [347]–[350].
[18] *Sodium Chlorate* Decision at [392]–[395].
[19] *Sodium Chlorate* Decision at [396]–[415].
[20] *Akzo Nobel NV v Commission of the European Communities* (T-112/05) [2007] E.C.R. II-5049; [2008] 4 C.M.L.R. 12.

- *Thirdly*, Aragonesas and Uralita also contest parental liability given Uralita's lesser indirect stake in a company which owned Aragonesas. The Commission found that Uralita maintained a decisive influence over its subsidiary.[21]
- *Fourthly*, Atochem and Elf Aquitaine also argue that the 2006 Guidelines should not have been applied as contrary to art.7 of the European Convention on Human Rights, given that their application means that greater sanctions will be applied than were applicable when the offence was committed.[22] They also argue that there was a violation of the principle of equal treatment because a parallel investigation into *Hydrogen Peroxide*[23] resulted in lower fines earlier, under the 1998 Fining Guidelines.[24] The Commission rejects this[25] based on the *Dansk Røhrindustri* case[26] and the *Archer Daniels Midland* case on a similar argument concerning the 1998 Guidelines.[27]
  This remains controversial, notably because it remains hard to accept that companies should be subject to harsher penalties set after the infringement was committed, because the Commission in its discretion then thinks fines should be set higher and/or accordingly to when the Commission finishes its proceedings.
- *Fifthly*, the fine imposed on Arkema France was increased by 90 per cent because it had been fined already for cartel activities in three Commission decisions prior to this cartel, all in the plastics sector (*Peroxygen products* in 1984, *Polypropylene* in 1986 and PVC in 1994[28]).

Bitumen Spain[29]

In December 2009, the Commission published its summary of this case and also made the non-confidential version available on the Commission's website.[30] It may be recalled that on October 2007 the Commission imposed fines totalling €183 million on BP, Repsol, Cepsa, Nynäs and Galp (five "undertakings", 13 legal entities) for operating a market-sharing cartel.[31] The Commission found that, from 1991 until 2002, these companies shared the market for so-called "penetration bitumen", which is used for road construction and co-ordinated bitumen prices in Spain.

More specifically, the Commission stated that the infringement, which covered the territory of Spain excluding the Canary Islands, consisted in establishing market quotas; allocating volumes and customers; exchanging sensitive market information; establishing a compensation mechanism to correct deviations; and agreeing on the variation of bitumen prices and the moment at which the new prices would apply.[32]

Bitumen is a by-product from the distillation of heavy crude oils. It is mainly used for road construction as an adhesive in the production of asphalt where it is used to bind stones together. The Commission noted that, during the infringement period, the parties controlled about 90 per cent of the Spanish market for penetration bitumen, a market worth an estimated €286 million in 2001 (the last full year of the infringement).

In October 2002, the Commission conducted inspections at the premises of the companies concerned in Spain, prompted by an immunity application filed by BP in July 2002.

During the investigative phase, Nynäs and Petrogal raised two procedural issues which appear of interest. Both were rejected by the Commission.

The first concerned the fact that the Commission did not make accessible certain documents relating to products other than those covered by the Statement of Objections. Nynäs and Petrogal claimed that these documents would have shed a different light on the infringement, showing that it had been wider in scope and had covered bitumen in general, not just penetration bitumen. Consequently, their participation in such a wider infringement would have been only peripheral.

The view of the Commission and the Hearing Officers was that access should be denied on the basis of objective factors (e.g. different products, participants, meetings and duration) which led to the conclusion that separate cartels would be involved. As a result, the Commission did not consider it was entitled to disclose evidence which might incriminate other companies in other possible infringements, if that evidence was not objectively linked to the objections raised in the particular case.[33]

The second issue which Nynäs and Petrogal raised was that the strict conditions under which parties were given access to statements and documents provided voluntarily

[21] *Sodium Chlorate* Decision at [416]–[426], [436]–[441], [455]–[469].
[22] *Sodium Chlorate* Decision at [499]–[500].
[23] Decision C(2006) 1766 final relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/F/38.620-*Hydrogen Peroxide and Perborate*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38620/38620_380_4.pdf* [Accessed February 15, 2011].
[24] *Sodium Chlorate* Decision at [501].
[25] *Sodium Chlorate* Decision at [502]–[508].
[26] *Dansk Røhrindustri A/S v Commission of the European Communities* (C-189/02 P) [2005] E.C.R. I-5425; [2005] 5 C.M.L.R. 17.
[27] *Archer Daniels Midland Co v Commission of the European Communities* (T-329/01) [2006] E.C.R. II-3255; [2007] 4 C.M.L.R. 2.
[28] *Sodium Chlorate* Decision at [526].
[29] With thanks to Lisa Arsenidou for her assistance.
[30] Decision C(2007) 4441 final relating to a proceeding under Article 81 of the EC Treaty (COMP/38710-*Bitumen Spain*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38710/38710_790_1.pdf* [Accessed February 15, 2011]; Commission summary in [2009] OJ C321/15.
[31] "Antitrust: Commission fines bitumen suppliers € 183 million for market sharing and price coordination in Spain" EU Press Release, IP/07/1438, October 3, 2007.
[32] *Bitumen Spain* Summary Decision [2009] OJ C321/15 at [7]; Decision at [373].
[33] *Bitumen Spain* Decision at [108]–[110].

by undertakings adversely affected their rights of defence. The Commission's position was that a balance had to be struck between monitored access (where mechanical copies of the documents or recordings may not be made) and the interests of the leniency applicants (who may risk civil and criminal proceedings in other jurisdictions if their statements or documents are used for purposes other than the application of art.81 EC). The Commission considered that the possibility to listen to tape recordings, read transcripts, take handwritten notes, type the information using the computer provided by the Commission, make use of the services of a stenographer or dictate transcripts using a recording device adequately safeguarded the rights of defence of undertakings having access to the file.[34]

It appears that Nynäs also complained that the case should have been brought by the Spanish competition authorities, not the Commission, which would have resulted in lower fines. The Commission noted that two importers and significant imports were involved in the case, showing effect on trade, in addition to the fact that the whole territory of Spain was involved.[35] Further, that neither Regulation 1/2003, nor the Commission Notice on Cooperation within the ECN creates rights or legitimate expectations for undertakings as to which competition authority will deal with a case.[36]

In general Nynäs and Petrogal, who were importers, argued that their roles in the cartel were far more limited than Repsol and Proas (owned by CEPSA). Although finding that the two companies had participated in the cartel,[37] the Commission accepted this in the sense of finding that Repsol and Proas/CEPSA were the cartel leaders (and imposing a 30 per cent fine increase accordingly); and recognising Nynäs and Petrogal's more limited involvement through a 10 per cent fine reduction.[38]

There was also argument about the continuity of the infringement, with the Commission relying on the *TU* case[39] (and others) to say that some gaps do not matter provided that the various actions which form part of the infringement pursue a single aim and come within the framework of a single and continuous infringement.[40]

Interestingly, in this case the Commission appears to have specifically indicated in the Statement of Objections that it was considering whether Repsol and Proas/CEPSA should be treated as leaders of the cartel, resulting in specific responses thereto.[41] A very welcome development, which one may hope will become regular practice, even if the Commission may not have to do so on the case law and even if, clearly, this can only be a question of ensuring the issue is put to the companies concerned for comment, rather than some sort of preliminary finding.

As often now, there is extensive treatment of the issue of parental liability for the participation of a subsidiary in the decision. Four out of the five of the groups concerned (with the exception of BP, the immunity applicant) contested the liability of a parent for the participation of its subsidiaries in the infringement.

Three particular points may be noted:

- *First*, the Commission stated that the contention that a subsidiary's activities are marginal within a group does not prove that the group allowed it complete autonomy in defining its conduct on the market.[42]
- *Secondly*, the Commission stated that the parental liability presumption cannot be rebutted simply by describing typical features of a business organisation, which in no way prove the full autonomy of the subsidiaries, such as the empowerment of local management in the case of a wholly-owned subsidiary for the day-to-day business.[43]
- *Thirdly*, the Commission stated that:

  > "[W]hen a supervising company is a *sister company* of a supervised subsidiary [which is] directly involved in the anti-competitive behaviour, the powers of the supervising company can only be based on *a decision of the parent company to leave it to that supervising company to oversee the supervised company's business* and to instruct the latter to obey the decisions of its supervising sister company. The ultimate parent company has [therefore] *decided* to exercise its influence over its subsidiary through another company of the group. The ultimate parent company has *not* given up its exercise of the decisive

[34] *Bitumen Spain* Decision at [112].
[35] *Bitumen Spain* Decision at [383]–[385].
[36] *Bitumen Spain* Decision at [320]–[322].
[37] See, e.g. *Bitumen Spain* Decision at [343], [353]–[354].
[38] *Bitumen Spain* Decision at [527]–[536] and [566]–[567].
[39] *Technische Unie BV v Commission of the European Communities* (C-113/04 P) [2006] E.C.R. I-8831.
[40] *Bitumen Spain* Decision at [491]–[492]; *TU* (C-113/04 P) [2006] E.C.R. I-8831 at [169].
[41] *Bitumen Spain* Decision at [530].
[42] *Bitumen Spain* Decision at [400], [406] and [423].
[43] *Bitumen Spain* Decision at [408], [452].

> influence but has just decided to exercise it differently, *through delegation"*.[44]

Nitrile Butadiene Rubber[45]

In December 2009 the Commission published the non-confidential version of its decision in this case on its website.[46] It may be recalled that in January 2008, the Commission imposed a total fine of €34.2 million on Bayer and Zeon for their participation in the so-called *Nitrile Butadiene Rubber* (NBR) cartel. NBR is a type of synthetic rubber, used mainly in the automotive industry for fuel and oil handling hoses, seals, o-rings and water handling applications. Bayer and Zeon were respectively fined €28.87 and €5.36 million. Neither company has appealed the decision.

The Commission found that from October 2000 to September 2002, Bayer and Zeon met and reassured "each other on their intentions to apply price increases, co-ordinating a simultaneous price increase and exchanging information".[47] However, interestingly, this is a case where it appears that the infringement found was simply to meet and exchange information, which information the Commission found was "acted upon", although in practice in some of the instances raised, in fact the price increase was *not* carried out.[48] Such contacts and acts are considered enough for an infringement.[49]

Bayer's fine was increased by 50 per cent for recidivism, based on the *Citric Acid* decision,[50] which was issued one year before the end of the NBR cartel.

Power Transformers

In February 2010, the Commission put the non-confidential version of this decision on its website. It may be recalled that in October 2009 the Commission had fined producers of power transformers some €67 million for having operated a market-sharing agreement under which Japanese members of the cartel agreed not to sell power transformers in Europe and the European members agreed not to sell power transformers in Japan.[51] The Commission found that the cartel lasted from 1999 to 2003 (some four years).

Power transformers are electrical components which are used to increase or reduce the voltage in an electrical circuit. Electricity suppliers use them to manage the tension level in their electricity grids for the transmission and distribution of electric power to the customer.

At the time of the infringement, it appears the cartel participants' combined annual sales in the EEA were estimated to be some €100 million. Sales of power transformers which are part of so-called "gas insulated switchgear" based sub-stations were not taken into account, because such sales were included in the Commission's previous decision on that.

Otherwise, interestingly the Commission used para.18 of the 2006 Fining Guidelines to assess the fines and take account of the fact that the Japanese suppliers had no relevant sales in the EEA. In other words, the Commission looked at the worldwide sales of the cartel participants and applied that to the EEA market to determine the "proportionate amount" for the fine calculation.[52]

The fines were assessed under the 2006 Fining Guidelines. The Commission decided to deviate from the general principle that the sales of the last full business year of the infringement prior to the Commission decision should be taken for determining the basic amount of the fine. The Commission took the sales figures of 2001 as reference year, since on October 1, 2002 the Japanese producers Hitachi, Fuji and Toshiba transferred their respective power transformer businesses into the then created joint ventures JAEPS and TM T&D.[53] Accordingly, only 2001 was for the three Japanese producers the last complete year of individual sales of power transformers.

It appears that a significant part of the Commission's case is based on corporate statements of immunity/leniency applicants.[54] As happens now, the amount of information on the actual events is severely "redacted" from the Commission's decision.

Siemens, as leniency applicant, received full immunity from fines (for its own activity and that of VA TECH which it had acquired). ABB's fine was increased by 50 per cent for recidivism (the *Pre-Insulated Pipes* cartel). Fuji was granted a reduction of 40 per cent under the Leniency Notice and the fine for Areva and Hitachi was reduced by 18 per cent for their co-operation outside the Leniency Notice.

[44] *Bitumen Spain* Decision at [450] (emphasis added).
[45] With thanks to Stéphanie Strievi for her assistance.
[46] Decision C(2008) 282 final relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38.628-*Nitrile Butadiene Rubber*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38628/38628_498_2.pdf* [Accessed February 15, 2011]. Commission's summary in [2009] OJ C86/7. See also "Antitrust: Commission fines synthetic rubber producers € 34.2 million for price fixing cartel" EU Press Release, IP/08/78, January 23, 2008; and Ratliff, "Major Events and Policy Issues in EC Competition Law, 2007–2008 (Part 2)" [2009] I.C.C.L.R. 113, 115.
[47] *Nitrile Butadiene Rubber* Decision at [2] and [41].
[48] *Nitrile Butadiene Rubber* Decision at [112]–[113] and [122]–[130].
[49] *Nitrile Butadiene Rubber* Decision at [115] and [119].
[50] Decision 2002/742/EC relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/36604-*Citric acid)* [2002] OJ L239/18.
[51] Decision C(2009) 7601 final relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (COMP/39.129-*Power Transformers*) at [2] and [76], available at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39129/39129_1161_1.pdf* [Accessed February 15, 2011]; Commission's summary in [2009] OJ C296/21. See also "Antitrust: Commission fines producers of power transformers € 67.6 million for market sharing cartel" EU Press Release, IP/09/1432, October 7, 2009; and J. Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 153.
[52] *Power Transformers* Decision at [229]–[236].
[53] *Power Transformers* Decision at [227].
[54] *Power Transformers* Decision at [133].

Interestingly, the Commission gave Areva this reduction even though Areva had not applied for it and had not been directly involved in the cartel, having purchased the power transformer business from Alstom in early 2004 after the infringement was committed.[55] The Commission stated that it wanted to reward Areva for having reported the behaviour shortly after purchasing Alstom, even though in the circumstances Areva did not qualify for leniency under the 2002 Leniency Notice.[56]

Car Glass

In February 2010 the Commission put on its website the provisional text of the non-confidential version of its 2008 decision concerning car glass.[57] It may be recalled that the Commission found that four undertakings, Saint-Gobain, Pilkington, Asahi/Glaverbel and Soliver, had concerted in the allocation of contracts concerning the supply of car glass pieces and so-called "car sets" (windscreen, sidelights and backlights) for all major car manufacturers in the EEA, through co-ordination of their pricing policies and supply strategies,[58] between 1998 and 2003.

More particularly, the Commission found that the car glass suppliers had concerted in their responses to "requests for quotations" from car manufacturers for glass for new and existing models. They had planned who should have the lowest price, "covered" each other by offering higher prices to ensure another supplier won the bid and pursued "corrective" action if the bid allocation did not work out as planned. The fines were colossal in a huge market, with a five-year duration period and a 60 per cent increase on Saint-Gobain for recidivism (Saint-Gobain's fine alone was €896 million).

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

- *First*, it appears that the companies argue that what was going on was a reaction to the demanding requests of the car manufacturers who suggested among other things "target prices" for bids from their suppliers, sought information on their suppliers' own costs and also expected rebates for productivity gains after the initial bids.[59] (The Commission's position is that, even if this is true, this is no reason to discuss bids and prices, etc. with competitors.)
- *Secondly*, a central point of dispute is whether what was going on was a "single and continuous infringement", i.e. with a common objective and plan, or just a series of specific acts responding to the power of the car manufacturers.[60] The Commission finds a single and continuous infringement based on the way notably that there was "cross-accounting" so that, if one supplier did not obtain so much of one order, it was to be compensated by other orders.[61]
- *Thirdly*, the car manufacturers also contest to what extent their actions had effects in the circumstances (although on some occasions the Commission finds that they did). However, the Commission's case is based on object, that in any event, this collusion was anti-competitive in nature[62], thus not going into effect for the fine, other than essentially to say that the anti-competitive conduct was "implemented" (i.e. put into effect by meetings and concerted responses to customers).
- *Fourthly*, there is interesting discussion about parental liability, insofar as Saint-Gobain and Asahi/Glaverbel contest this. Saint-Gobain argues, among other things, that to find the parent liable is contrary to the principle of the personal nature of criminal responsibility, something which cannot be just inferred from a presumption of decisive influence.[63] The Commission argues that the "undertaking", including the parent, is correctly held responsible.[64] However, the Commission does not find intermediate parent companies responsible here.[65]

  Asahi/Glaverbel echo Akzo Nobel's recent case,[66] arguing that to hold the parent liable is at odds with their whole "conglomerate model", in which actual day-to-day management is delegated to subsidiary level. The Commission rejects this, emphasising that control of the structure and the system of delegation is enough, because the parent has the option to the involved if it wishes.[67]

[55] *Power Transformers* Decision at [269]–[274].
[56] *Power Transformers* Decision at [272].
[57] Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.125-*Carglass*, at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39125/39125_1806_5.pdf* [Accessed February 15, 2011]; see the summary of this decision in last year's review—Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 150.
[58] *Car Glass* Decision at [99] and [492].
[59] *Car Glass* Decision at [104]–[106].
[60] *Car Glass* Decision at [431]–[438].
[61] *Car Glass* Decision at [500]–[508].
[62] *Car Glass* Decision at [673], [694] and [698].
[63] *Car Glass* Decision at [606].
[64] *Car Glass* Decision at [613].
[65] *Car Glass* Decision at [621] and [636].
[66] *Akzo Nobel* (T-112/05) [2007] E.C.R. II-5049; [2008] 4 C.M.L.R. 12.
[67] *Car Glass* Decision at [575] and [582].

- *Fifthly*, Asahi/Glaverbel challenge the way that the Commission applied the 2006 Fining Guidelines as contrary to the principles of non-retroactivity and legitimate expectation and art.7 of the European Convention of Human Rights. Notably, they argue that, as they applied for leniency, they expected fines on the basis of the 1998 Fining Guidelines, not the 2006 Fining Guidelines, which are tougher.[68] The Commission rejects this, referring to the *Dansk Røhrindustri* case[69] confirming its discretion to change fining levels. The Commission also considers that the legitimate expectation concerned was as regards the Leniency Notice, not the fine level.
- *Finally*, it appears that Saint Gobain's recidivist fine increase is based on the old *Italian Flat Glass*[70] and *Benelux Flat Glass*[71] Decisions in 1989 and 1984 respectively. It will be interesting to see if the GC upholds that, given how old they are (after the *Groupe Danone*[72] and *Lafarge*[73] cases in which the courts have held that recidivism findings may not be unlimited in time[74]).

Fasteners[75]

In March 2010, the Commission published the non-confidential version of its 2007 *Hard Haberdashery*/*Fasteners* decision on its website.[76] It may be recalled that the case followed 2001 Commission inspections leading to three proceedings, on *Needles*,[77] *Threads*[78] and *Fasteners*. The *Needles* case led to a decision in 2004, with a CFI judgment reducing Prym's fine in 2007.[79] In 2009, the ECJ dismissed Prym's further appeal.[80] The Commission's 2005 decision regarding *Threads* was reviewed by the CFI in April 2010, with BST receiving a fine reduction.[81]

The *Fasteners* decision was summarised last year.[82] It may be useful, however to recall the structure of the infringements and note a number of points on the Commission's approach.

To recap, the *Fasteners* case involved four cartels:

- The *first cartel*, called the Baseler/Wuppertaler and Amsterdam work circle, ran for more than 20 years, from 1991 until at least 2001. In addition to various producers, YKK, Prym, Scovill, A. Raymond, and Berning & Söhne, the Commission found that the German trade association VBT was involved in the infringement. The Commission held that the companies agreed, among other things, to co-ordinate annual price increases with respect to "other fasteners and their attaching machines". (These fasteners are things such as press buttons, snap fasteners, press fasteners and other metal and plastic accessories for the leather and garments' industries.) It appears the market was valued at some €160–192 million.

  Even though the Commission found that different companies were involved in different "work circles", with different regional scopes, the activities were seen as a single, continuous infringement. (This is discussed further below.)

  The trade association VBT was found to have been the secretariat to the work circles, preparing agendas for the meetings and having taken on a separate role to its members (including communications on cartel decisions) so that it had committed a separate infringement for which it was given a symbolic fine of €1,000 (even though it was an association without legal capacity).[83]
- The *second cartel* involved Prym and Coats. It was the longest infringement of the investigation and lasted for more than 21 years, from 1977 until at least 1998. The

[68] *Car Glass* Decision at [652].
[69] *Dansk RøhrIndustri* [2005] E.C.R. I-5425; [2005] 5 C.M.L.R. 17.
[70] *Italian Flat Glass, Re* (Case IV/31906) [1990] 4 C.M.L.R. 535; Decision 89/93/EEC relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.906-*Flat Glass*) [1989] OJ L33/44.
[71] *European Economic Community v BSN SA* (84/388/EEC) [1985] 2 C.M.L.R. 350 CEC; Decision 84/388/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/30.988-*Agreements and concerted practices in the flat-glass sector in the Benelux countries*) [1984] OJ L212/13.
[72] *Groupe Danone v Commission of the European Communities* (C-3/06 P) E.C.R. I-1331.
[73] *Lafarge SA v European Commission* (C-413/08 P) [2010] 5 C.M.L.R. 10 (particuarly at [70] and [73]).
[74] *Car Glass* Decision at [685]–[686].
[75] With thanks to Alexander Israel for his assistance.
[76] Decision C(2007) 4257 final relating to a proceeding under Article 81 of the EC Treaty (COMP/E-1/39.168-*PO/Hard Haberdashery: Fasteners*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39168/39168_757_5.pdf* [Accessed February 15, 2011]; the Commission's summary was published in [2009] OJ C47/8. See also "Antitrust: Commission fines members of fasteners cartels over €328 million" EU Press Release, IP/07/1362, September 19, 2007; and Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 157.
[77] Decision C(2004) 4221 relating to a proceeding under Article 81 of the EC Treaty (COMP/F-1/38.338-*PO/Needles*); summary of decision in [2009] OJ C147/15.
[78] Decision C(2005) 3452 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38337/E1-*PO/Thread*).
[79] *William Prym GmbH Co KG v Commission of the European Communities* (T-30/05) [2007] E.C.R. II-107.
[80] *William Prym GmbH Co KG v Commission of the European Communities* (C-534/07 P) [2009] E.C.R. I-7415; [2009] 5 C.M.L.R. 21.
[81] *Belgian Sewing Thread (BST) NV v European Commission* (T-452/05), Judgment of April 28, 2010.
[82] See Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 157.
[83] *Fasteners* Decision at [348]–[351], [450] and [494].

Commission found that the companies shared the haberdashery market by agreeing that Coats would not enter the market for other fasteners.[84] These were industrial zips for apparel, garments and footwear. The market was valued at some €413–441 million.

- The *third cartel* involved Prym and YKK and ran from 1999 until at least 2003. The companies were found to have fixed prices and allocated customers on a product-by-product and country-by-country basis for "other fasteners and attaching machines". This ran in parallel to the "three circles" co-operation outlined above and concerned various types of press buttons.
- The *fourth cartel*, running between April 1998 and at least November 1999, involved the tripartite co-operation between YKK, Coats and Prym. This related to zip fasteners. In this period the companies were found to have exchanged price information, discussed price increases and agreed on a methodology to set minimum prices for zip fasteners in Europe.

The main points of interest on the Commission's decision are as follows:

1. *First*, the Commission spends time showing why it considered the Baseler, Wuppertaler and Amsterdamer circles to be part of the same infringement. The core idea is that the Wuppertaler circle was the forum for German undertakings. Topics discussed there were then discussed further with non-German counterparts in the Baseler circle and the Amsterdamer circle was a continuation of the co-operation which previously took place within the Baseler and Wuppertaler circles.[85] All three were seen by the Commission as part of the same continuous scheme.[86]
2. *Secondly*, as so frequently now, the Commission explains in detail why it considers some of these cartels to be "single and continuous" infringements based notably on the *ANIC Partecipazioni* case,[87] where it was said that this may be found even though each participant in a cartel may play a role appropriate to its own specific circumstances.[88]
3. *Thirdly*, Coats argued that the Commission had not established the continuity of the market sharing between Prym and Coats and there were "very long gaps between sporadic and isolated events".[89] The Commission rejected this, stating that contacts between parties to a market-sharing agreement can be less frequent than with price-fixing because monitoring the agreement is less challenging.[90] Further, the Commission notes from the *TU* case[91] that the fact that evidence is not adduced for certain specific periods does not preclude the infringement from being regarded as established for a more extensive overall period, provided such a finding is based on objective and consistent indicia.[92]
4. *Fourthly*, it appears that both Prym and YKK said in their leniency submissions that they had met to discuss a request for information from the Commission (although they disagreed on what they talked about). This was considered under possible aggravating circumstances by the Commission but, without deciding that it would be such a circumstance, the Commission decided that it did not have sufficient evidence on the point.[93]
5. *Fifthly*, it appears that the Commission had two applications for inability-to-pay relief, but rejected them, one on the merits, the other for lack of evidence.[94]

Calcium carbide and magnesium based reagents

In August 2010 the Commission put on its website the non-confidential version of its 2009 decision[95] concerning calcium carbide powder and magnesium granulates supplied to the steel industry; and calcium carbide granulates supplied to the gas industry. This case was summarised last year.[96]

The main points of interest in the decision are as follows:

[84] *Fasteners* Decision at [215].
[85] *Fasteners* Decision at [71].
[86] *Fasteners* Decision at [147] and [298].
[87] *Commission of the European Communities v Anic Partecipazioni SpA* (C-49/92 P) [1999] E.C.R. I-4125; [2001] 4 C.M.L.R. 17.
[88] *Fasteners* Decision at [260]–[264].
[89] *Fasteners* Decision at [340].
[90] *Fasteners* Decision at [343].
[91] *TU* [2006] E.C.R. I-8831 at [169].
[92] *Fasteners* Decision at [345]–[346].
[93] *Fasteners* Decision at [550]–[553].
[94] *Fasteners* Decision at [681]–[691].
[95] Decision C(2009) 5791 relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (COMP/39.396-*Calcium carbide and magnesium based reagents for the steel and gas industries*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39396/39396_2009_5.pdf* [Accessed February 15, 2011]. Commission's summary in [2009] OJ C301/18.
[96] See Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 152.

- *First*, a central issue is how the infringement is treated as a "single, continuous" one. Notably, insofar as three products are involved, two of which are on one market; and there are different producers, albeit with some overlaps.
  The Commission's position on this is quite complex. On the one hand, the Commission finds the unlawful activities were all part of an overall plan and notes (put broadly) that not each company in a cartel has to be doing everything.[97]
  On the other hand, having found a single infringement, the Commission takes some care to differentiate the particular involvement of each company. So, for example, the Commission notes the sales of each company by product.[98] In setting fine reductions, where a company's contribution was useful on one product only, the Commission also adjusts the percentage given on the basis that it would also affect fines related to sales for which no contribution had been recognised.[99] The Commission's general position is that the individual nature of each company's infringement is reflected in the variations in sales figures and durations by product.[100]
- *Secondly*, in considering Degussa's liability when it sold a business the Commission held Degussa still liable for the unlawful activities of the business it was selling on the basis that the benefit of these activities "accrued economically to [Degussa] via the price negotiated for the sale of the business".[101] Degussa had sold the business with retroactive effect and argued that the liability therefore had moved to the purchaser. The Commission said that sort of contractual arrangement did not affect Degussa's liability in law.
- *Thirdly*, Arques, the purchaser of the business in question from Degussa, argued that as a company specialised in restructurings, it only had a strategic control of the business concerned, not an operative one (and should not therefore be liable as a parent). The Commission disagreed, considering that Arques had the interests of the group in mind when taking decisions concerning its subsidiary and that was enough to find parental liability.[102]
- *Fourthly*, Degussa tried to rely on the old *BMW* case[103] to say that, since its subsidiary was not acting according to instructions when infringing the competition rules, Degussa as parent should not be liable. The Commission rejected this, noting that in *BMW*, the parent company had known of the (parallel import) infringement and given specific instructions to its subsidiary to comply, whereas in this case Degussa said it did not know of the infringement and had just given general instructions on compliance.[104]
- *Fifthly*, faced with seven applications for reduced fines on the basis of inability to pay under para.35 of the 2006 Fining Guidelines[105] the Commission rejected six, but allowed one, for a trading company called Almamet. Initially, the Commission appeared to question whether Almamet was in danger of irretrievable jeopardy to its economic viability, such that all its assets would lose their value as a result of the fine contemplated. However ultimately the Commission gave Almamet a 20 per cent fine reduction because it was a small trader, not in a large group of companies, working in a low margin business with a relatively focused product portfolio, so the fine would have a high impact on its financial situation.[106]

Other horizontal decisions/settlements

Baltic Max Feeder scheme

In March 2010, the Commission closed its investigation into the Baltic Max Feeder scheme.[107] Feeder vessels are small container ships for short-sea transport. They transport or "feed" containers arriving at or departing from central container terminal ports served by large deep-sea container vessels to smaller ports in the region. Feeder vessel operators either own the vessels they operate or charter them from the vessel owners.

The Commission was concerned that the Baltic Max Feeder scheme, whereby European ship owners collectively agreed to cover the costs of removing feeder

[97] *Calcium Carbide* Decision at [148], [169], [171], [173] et seq.
[98] *Calcium Carbide* Decision at [280], [288] and [303].
[99] *Calcium Carbide* Decision at [355].
[100] *Calcium Carbide* Decision at [174], [296].
[101] *Calcium Carbide* Decision at [236], [237] and [290].
[102] *Calcium Carbide* Decision at [254], [262].
[103] *BMW Belgium NV and Belgian BMW dealers* [1978] OJ L46/33.
[104] *Calcium Carbide* Decision at [240–[241].
[105] *Calcium Carbide* Decision at [362]–[378].
[106] *Calcium Carbide* Decision at [369]–[372].
[107] "Antitrust: Commission closes investigation into 'Baltic Max Feeder' scheme" EU Press Release, IP/10/374, March 26, 2010.

vessels from service, might have been aimed at reducing capacity and therefore could lead to higher charter rates for such vessels.

Once it was informed that the planned scheme had been abandoned, the Commission considered that there was no reason to further investigate and closed the case.

Oneworld Alliance

It may be recalled that in April 2009, the Commission opened proceedings against a proposed agreement between British Airways, Iberia and American Airlines, which provided for the joint management of pricing, capacity and schedules on routes between Europe and North America. The agreement also involved revenue sharing. A Statement of Objections was sent in September 2009.

In February 2010, the Commission announced that the airlines had submitted commitments. In March 2010 the Commission market-tested those commitments.[108] In July 2010 the Commission then adopted a decision making the commitments offered legally binding.[109] The parties have agreed to the following:

- They will make slots available for new entrants at London Heathrow and London Gatwick airports for routes to Boston, New York, Dallas, and Miami, which would allow competitors to operate 49 additional return flights. (21 London-New York, 14 London-Boston, 7 London-Dallas, 7 London-Miami.)
- Passengers flying with new entrant airlines on the routes concerned may benefit from the airline's frequent flyer programmes.
- The parties will conclude fare combinability and special pro-rate agreements with new entrants, making it easier for competitors to provide connecting flights and allowing them to offer tickets on the airlines' flights.
- The parties will submit data to the Commission on their co-operation regularly.

The Commission's assessment was by route, looking at the premium and non-premium (restricted economy) markets.

The Commission has appointed a trustee to monitor the correct implementation of the commitments, which will be binding on the parties for 10 years.

Otherwise it may be noted that Virgin Atlantic formally complained about the co-operation, and a data room was organised for the economic data used in the S/O.

VISA

In April 2010, one year after the multilateral interchange fees (MIFs) settlement with MasterCard,[110] the Commission announced that Visa Europe had offered commitments in response to the Commission's preliminary view that Visa Europe had infringed art.101 TFEU in the way that it set MIFs for cross-border and certain domestic VISA debit card payments.[111] The high level of these MIFs allegedly restricted price competition between acquiring banks by artificially inflating the basis on which these banks set their charges to merchants.

Visa Europe offered to cap its yearly weighted average cross-border MIFs applicable to its debit cards at 0.20 per cent (of the final price of a product or service) within two months following the notification of the commitment decision. The cap would also apply to domestic MIFs in a number of specific EEA countries.

In May 2010, the Commission market-tested the related commitments.[112] The Commission states that the MIFs which Visa Europe has committed to apply to debit card transactions are in conformity with the "merchant indifference methodology" (or "tourist test") as developed in economic literature. A MIF which meets this test is set at such a level that merchants are indifferent as to whether they receive a card or a cash payment. The same methodology was applied in the MasterCard MIFs settlement. In addition, Visa Europe has offered to continue to implement and to further improve the transparency measures it introduced in 2009.

The commitments would be valid for a period of four years. They do not cover Visa Europe's current MIFs for credit and deferred debit card transactions, which are included in the Commission's ongoing antitrust investigation (and apparently are the subject of separate discussions).

Articles 102/106 TFEU

Box 5

Articles 102/106 TFEU
• Energy — A network as an essential facility (*E.on*, *ENI*) — Long-term capacity bookings as a refusal to supply? (*GdF Suez*, *E.on*)

[108] "Antitrust: Commission confirms assessment of proposed commitments from Oneworld airline alliance" EU Press Release, MEMO/10/25, February 1, 2010; "Antitrust: Commission market tests commitments proposed by BA, AA and Iberia concerning transatlantic co-operation" EU Press Release, IP/10/256, March 10, 2010 and [2010] OJ C58/20.

[109] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of The European Union and Article 53 of the EEA Agreement (COMP/39.596-*BA/AA/IB*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_4342_9.pdf* [Accessed February 15, 2011]; Commission summary in [2010] OJ C278/14. See also, "New Commission report presents first assessment of roll-out of European cohesion policy" EU Press Release, IP/10/396, March 31, 2010; and "Antitrust: British Airways, American Airlines and Iberia commitments to ensure competition on transatlantic passenger air transport markets made legally binding – frequently asked questions" EU Press Release, MEMO/10/330, July 14, 2010.

[110] Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 160–161.

[111] Decision C(2010) 8760 final relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/39.398-*Visa MIF*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39398/39398_6183_6.pdf* [Accessed February 15, 2011]. See also "Antitrust: Vice President Almunia welcomes Visa Europe's proposal to cut interbank fees for debit cards" EU Press Release, IP/10/462, April 26, 2010.

[112] "Antitrust: Commission market tests Visa Europe's commitments to cut Multilateral Interchange Fees (MIFs) for debit cards transactions – frequently asked questions" EU Press Release, MEMO/10/224, May 28, 2010 and Commission Article 27(4) Notice [2010] OJ C138/34.

Articles 102/106 TFEU

- — Abuse of strategic underinvestment in capacity (*GdF Suez*, *ENI*)
- — Extensive concessions including unbundling in art.9 decisions (*ENI*)
- — Interesting decision on managing internal congestion and connectors (*Svenska Kraftnat*)
- High-tech
  - — *Microsoft Browser* case—Choice Screen remedy

Energy[113]

In the last year the Commission has adopted five decisions in the energy sector all under art.9 of Regulation 1/2003. This brings to nine the number of final decisions that the Commission has adopted following the Energy Sector Inquiry.[114]

EdF commitments In March 2010, the Commission adopted a decision making binding commitments offered by EdF concerning its long-term supply contracts with large electricity customers.[115]

The Commission had sent EdF an S/O in December 2008 alleging that the volume, duration, and exclusive nature of its electricity supply contracts with large industrial customers hindered competitors' entry and expansion in this retail market. In addition, the Commission alleged in the S/O that the supply contracts contained an illegal prohibition on resale. The Commission considered that this restriction prevented customers from optimising their portfolios and exacerbated a lack of liquidity on the trading market. EdF submitted commitments in October 2009 and the final decision revised these slightly to take account of third party comments after market- testing.[116]

The commitments, which are similar to those offered in the *Distrigas* case,[117] are as follows:

- *First*, EdF has committed to ensure that each year an average of 65 per cent of the electricity that it has contracted to sell to large industrial customers will return to the market, throughout the duration of the commitments, with a minimum of 60 per cent per calendar year, either as a result of the contract coming to an end, or because the customer can opt out of the contract without any penalty.[118] This is considered to offer some leeway to EdF to manage its portfolio of contracts, while leaving potential competitors scope to enter or expand in the market.[119]
- *Secondly*, EdF's future contracts with large industrial customers will be limited to a maximum duration of five years, or provide that the customer can opt out of the contract without incurring a penalty every five years.[120]
- *Thirdly*, in all of EdF's new contract proposals for large industrial customers, it must also offer the possibility of a non-exclusive contract that would allow the customer to source part of its electricity needs from another supplier.[121]
  These commitments are for 10 years unless EdF's market share falls below 40 per cent for two consecutive years.[122]
- *Fourthly*, to address the allegedly illegal resale restriction, EdF has committed to remove the relevant provision from its new contracts.[123] For existing contracts, it is required to write to the customer and inform them that the prohibition on resale is to be considered null and void.[124] Moreover, to facilitate resale, EdF must allow large industrial customers to change the power withdrawal points stipulated in their contracts.[125] The idea is to allow customers to sell volumes of electricity to other large industrial customers. The commitment regarding the prohibition on resale is also for 10 years, but without possibility of earlier termination.

[113] With thanks to Cormac O'Daly for his assistance with this section.
[114] *Distrigas*: Decision relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/B-1/37.966-*Distrigaz*), at *http://ec.europa.eu/competition/antitrust/cases /dec_docs/37966/37966_639_1.pdf* [Accessed February 15, 2011]; summary decision in [2008] OJ C9/8. See also "Antitrust: Commission opens Belgian gas market to competition" EU Press Release, IP/07/1487, October 11, 2007 and "Antitrust: Commission increases competition in the Belgian gas market – frequently asked questions" EU Press Release, MEMO/07/407, October 11, 2011. *EdF*, see below; *ENI*, see below; *E.on* (wholesale and balancing), Decision (COMP/39.388-*German Electricity Wholesale Market*) and (COMP/39.389-*German Electricity Balancing Market*), summary decision in [2009] OJ C36/8. See also "Antitrust: Commission opens German electricity market to competition" EU Press Release, IP/08/1774, November 26, 2008; *E.on* (import infrastructure), see below; *E.on*/*GdF* (collusion), Decision relating to a proceeding under Article 81 of the EC Treaty (COMP/39.401-*E.ON/GDF*), summary decision in [2009] OJ C248/5. See also "Antitrust: Commission fines E.ON and GDF Suez €553 million each for market-sharing in French and German gas markets" EU Press Release, IP/09/1099, July 8, 2009; *GdF Suez*, see below; *RWE*, (COMP/39.402-*RWE Gas Foreclosure*), summary decision in [2009] OJ C133/10. See also "Antitrust: Commission opens German gas market to competition by accepting commitments from RWE to divest transmission network" EU Press Release, IP/09/410, March 18, 2009; and *Svenska Kraftnat*, see below. The Commission's decisions are all available on its website.
[115] "Antitrust: EDF commitments to open French electricity market to competition made legally binding" EU Press Release, IP/10/290, March 17, 2010. The Commission's summary is in [2010] OJ C133/5. The Commission's decision is available on its website.
[116] "Antitrust: Commission market tests proposed commitments by EDF to increase competition in the French electricity retail market" EU Press Release, IP/09/1669, November 4, 2009; Commission Article 27(4) Notice [2009] OJ C262/32.
[117] See J. Ratliff "Major Events and Policy Issue in EC Competition Law, 2006–2007 (Part 2) [2008] I.C.C.L.R. 71, 91–92.
[118] *EDF* Decision at [43], [44], [72], and [74]–[76].
[119] *EDF* Decision at [76].
[120] *EDF* Decision at [45].
[121] *EDF* Decision at [46].
[122] *EDF* Decision at [47] and [87]–[90].
[123] *EDF* Decision at [49].
[124] *EDF* Decision at [49].
[125] *EDF* Decision at [50] and [93].

EdF is to provide yearly reports to the Commission and the French energy regulator.

E.on commitments This is a different investigation from the one discussed in last year's review, which concerned the German wholesale electricity market and the German balancing market.[126] This case concerns access to entry capacity to E.on's gas transmission grid.[127]

The facts and the commitments are very similar to those in the *GdF Suez* Decision described below. The Commission's preliminary assessment had indicated that by booking large amounts of the available firm and freely allocable entry capacities into its transmission grid and by refusing to supply this capacity to third parties, E.on may have abused its dominant position on the markets for gas import capacity.[128] The Commission considered in its preliminary assessment that the refusal to supply may have led to foreclosure of competitors trying to transport and sell gas to customers connected to E.on's grid and a consequent reduction in competition on downstream gas supply markets.

The Commission states in its preliminary assessment that access to E.on's transmission network was an essential facility (an "indispensable input" for suppliers wanting to compete for customers currently served by E.on) and that its reproduction was unrealistic.[129]

The Commission also states its view that long-term capacity bookings "can be regarded as refusal to supply" under art.102 TFEU and, even if E.on had used its booked capacities for its own supply business, this could not in itself exclude an abuse under art.102 TFEU.[130] The Commission refers to its *RWE Gas foreclosure* Decision in this context[131] and states that:

> "A dominant essential facility holder is under the obligation to take all possible measures to remove the constraints imposed by the lack of capacity (e.g. by limiting the duration and volume of its own bookings or by expanding its capacities)."[132]

There is little discussion of this controversial obligation, but in a footnote the Commission observes that E.on built its network pre-liberalisation at a time when it would have been shielded from competition.[133] The same footnote also refers to the sentence in para.82 of the Commission's Article 82 EC Guidance on its Enforcement Priorities[134] which refers to "special or exclusive rights" conferred on certain undertakings and to investments that had been financed from state resources.[135]

Similar to the commitments in the *GdF Suez* case, E.on has committed to the following:

- *First*, is has committed to release significant amounts of firm, freely allocable entry capacities into its transmission grid. E.on was to do this by October 2010. The amount of capacity concerned is 15 per cent of the total firm, freely allocable entry capacity into E.on's grids.
- *Secondly*, E.on has committed, by October 2015, to reduce its overall share of bookings for firm, freely allocable entry capacity to 50 per cent in the H-gas (high calorific) area and 64 per cent in the L-gas (low calorific) network.[136] E.on can reach these thresholds either by returning capacity to the transmission system operator or by adopting measures to increase entry capacity into the grid.[137] These thresholds will apply until the gas year 2025/2026.

The Commission states that the commitments will result in a "permanent change in the structure of the German gas transport markets" and are "of a structural nature".[138]

The procedure is noteworthy for its short timeframe: the Commission initiated proceedings and adopted a Preliminary Assessment on December 22, 2009. E.on submitted commitments on January 7, 2010. These were the subject of an art.27(4) Notice published on January 22, 2010. The final decision was adopted on May 4, 2010. While one would think that there must have been a good deal of background work before initiation of proceedings, the official procedure therefore lasted under five months.

[126] See Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 164.
[127] Decision C(2010) 2863 final relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/39.317-*E.ON Gas*); summary decision in [2010] OJ C278/9. See also "Antitrust: E.ON's commitments open up German gas market to competitors" EU Press Release, IP/10/494, May 4, 2010 and "Antitrust: Commission's commitment decision opens German gas pipelines to competitors – frequently asked questions" EU Press Release, MEMO/10/164, May 4, 2010. The decision is available on the Commission's website.
[128] *E.on* Decision at [31].
[129] *E.on* Decision at [32]–[35].
[130] *E.on* Decision at [40].
[131] Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/39.402-*RWE Gas foreclosure*), at fn.25, available at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf* [Accessed February 25, 2011]. See Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 165.
[132] *E.on* Decision at [40] and fn.46.
[133] *E.on* Decision at [40] and fn.46.
[134] Commission's Article 82 EC Guidance on its Enforcement Priorities [2009] OJ C45/7.
[135] *E.on* Decision at [46].
[136] *E.on* Decision at [47].
[137] *E.on* Decision at [47].
[138] *E.on* Decision at [68]; EU Press Release, MEMO/10/164, May 4, 2010 where the Commission also rejected the need for unbundling as a remedy, reasoning that the competition concerns identified related to E.ON's behaviour as a shipper rather than as operator of the grid. Even if the Commission had forced unbundling, this would not address E.on having booked the capacity on the grid.

ENI remedies[139] In September 2010, the Commission made legally binding the commitments offered by ENI to divest its shares in the companies which own, operate and manage the transport capacity on the international pipelines TAG, TENP and Transitgas, bringing gas into Northern Italy respectively from Russia (TAG) and the North of Europe (the TENP/Transitgas system).[140]

The commitments end an investigation started in May 2006 following surprise inspections. Proceedings were opened in May 2007. In March 2009, the Commission sent an S/O to ENI, alleging an abuse of dominant position contrary to art.82 EC.

It appears that the Commission alleged that ENI is a dominant player on the market(s) for the transport of natural gas to and into Italy as well as on the downstream gas markets for the supply of gas.

The Commission said it had concerns that ENI may have abused its dominant position by refusing to supply transportation capacity on its natural gas pipelines. Notably, ENI's management and operation of its natural gas transmission pipelines allegedly may have entailed: (1) a refusal to grant access to capacity available on the transport network ("capacity hoarding"); (2) an offer of capacity in a less useful manner ("capacity degradation"); and (3) a strategic limitation of investment ("strategic underinvestment") in its international transmission pipeline system.[141]

These practices allegedly took place despite significant short and long-term demand from third party shippers. As a result the Commission alleged that the practices may have led to a foreclosure of competitors trying to transport and sell gas to Italian customers and therefore may have restricted competition on the downstream gas supply markets.

In the Commission's view, ENI's commitments effectively address the concerns set out in the S/O, namely the conflict of interest resulting from the vertical integration of the company in both the transport and supply of gas. In particular, the commitments will ensure that third-party requests to access the gas pipelines will be dealt with by an entity independent of ENI. According to the Commission, any incentive for ENI, as operator of the transport pipelines, to make additional profits from transporting more gas on its pipelines was more than outweighed by the incentive for ENI to maximise its profits from selling gas to customers on the Italian wholesale market by reducing access to that market for potential competitors.

Again it appears that the Commission's approach in the *ENI* case is based on the essential facilities doctrine. It appears that the Commission considered that the entire Italian gas network and the international gas import infrastructure into Italy constituted one essential facility, under ENI's control.

Clearly the strategic limitation of investment (or strategic underinvestment) aspect of the case is controversial (although also part of the *GdF Suez* case). Again, the Commission includes a footnote stressing a dominant essential facility holder's obligation to take "all possible measures to remove the constraints imposed by the lack of capacity".[142]

It may also be interesting to note that the Italian Competition Authority has taken a decision concerning ENI's investment in pipeline capacity in 2006.[143] Put shortly, it appears that ENI planned an expansion of capacity on the pipeline for gas from Algeria via Tunisia to Sicily, operated by its subsidiary (the TMPC pipeline) through greater compression capacity. Afterwards, having allocated capacity, it was alleged that ENI delayed that expansion because of an expected oversupply of gas to Italy. The Italian Competition Authority found this abusive, fined ENI €290 million and ordered ENI to allocate capacity to third parties. On appeal the fine was overturned on the basis that the issues were novel. ENI is appealing the supply obligation.

GdF Suez commitments In last year's review, we noted the publication of an Article 27(4) Notice market-testing commitments from GdF Suez to alleviate concerns regarding foreclosure of access to gas import capacity into France.[144] In December 2009, the Commission adopted a decision making amended commitments binding.[145]

The Commission's preliminary assessment was that the GdF Suez group had restricted competitors' access to gas import infrastructure and may have abused its dominance on the market for gas import capacity in each of the two balancing zones of the GRTgaz transport network. This would have affected competition on the downstream gas supply markets in these balancing zones.

The foreclosure of access was found in long-term reservation of import capacity into the GRTgaz transport network's two balancing zones. Much of this was also reserved for historical reasons rather than having been assigned under any transparent or non-discriminatory procedure. The Commission also questioned the way in which GdF Suez determined and allocated long-term capacity at a LNG terminal. Rather than conducting an

[139] With thanks to Roberto Grasso for his assistance.
[140] "Antitrust / ENI case: Commission opens up access to Italy's natural gas market" EU Press Release, IP/10/1197, September 29, 2010. The decision and commitments are available on the Commission's website. See also MEMO/10/29, February 4, 2010; the Commission's Article 27(4) Notice is in [2010] OJ C55/13.
[141] *ENI* Decision at [43]–[58].
[142] *ENI* Decision at [56], fn.43.
[143] AGCM Decision of February 15, 2006 No.15174, A358 ENI — Trans-Tunisian Pipeline.
[144] Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 165.
[145] Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/39.316-*Gaz de France*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39316/39316_2298_1.pdf*; EU Press Release IP/09/1872 and "Antitrust: Commission accepts commitments by GDF Suez to boost competition in French gas market – frequently asked questions" EU Press Release, MEMO/09/536, December 3, 2009. The committments are available on the Commission's website.

open, transparent, and non-discriminatory procedure, it appeared that third-party access was conditioned on receiving strategic assets in return.[146]

Finally, the Commission refers to strategic limiting of investment in additional capacity at another LNG terminal. Despite having received a request for firm capacity under an "open season" procedure (where possible users were invited to indicate demand), GdF Suez had decided not to develop additional capacity at the terminal.[147]

Invoking the essential facilities doctrine, the Commission considered that GdF Suez's infrastructure and import capacity was an "essential input" which competing gas shippers would find "impossible — or at least extremely difficult" to reproduce.[148] The Commission states that, while GdF Suez had explicitly refused to supply capacity to third parties, the lack of available capacity was known to the market and the bookings (by GdF Suez itself) in themselves may therefore also have constituted an implicit refusal to supply.[149] It appears that the Commission also considers that the strategic limitation in investments in additional capacity may have been another example of abusive refusal to supply an essential input.[150] Clearly, all this is controversial.

The commitments are designed to lower barriers to entry into the French gas market by increasing third-party shippers' access to import infrastructure. GdF Suez has committed, in particular, to release significant firm long-term import capacity in both balancing zones from October 1, 2010 and, from October 1, 2014, to limit its capacity reservations to under 50 per cent of total long-term import capacity.[151] Following third-party comments, the procedure for releasing this capacity has been detailed further in the final version of the commitments.[152] GdF Suez has also committed to release capacity at the two LNG terminals.[153]

The Commission considers that these commitments should have a "major structural impact" on other companies' ability to compete on the French gas market.[154] Despite third parties requesting sales of gas under a gas release programme, the Commission did not consider that this was necessary or proportionate.[155]

Svenska Kraftnät commitments In last year's review we noted the Commission's publication of an Article 27(4) Notice in which the Swedish national grid operator, Svenska Kraftnät (SVK), offered commitments to alleviate preliminary concerns which the Commission had identified after investigating the Swedish electricity transmission market.[156] In April 2010, the Commission adopted a decision making slightly revised commitments binding on SVK for 10 years.[157]

The Commission's preliminary assessment was that SVK was abusing its dominant position by reducing export interconnection capacity between Sweden and its neighbours at times of anticipated internal congestion in the Swedish transmission network.[158] The Commission considered that this reduction of export capacity discriminated on the basis of residence between Swedish electricity customers and customers in other countries without any objective justification. The possible abuse (curtailing interconnector capacity) was on the Swedish electricity transmission market, but had effects on the wholesale and retail electricity markets in neighbouring countries.[159]

SVK has committed to divide the Swedish transmission system into two or more bidding zones and manage congestion without limiting trading capacity on the interconnectors.[160] The configuration of the bidding zones should be sufficiently flexible to allow adaptation for future changes in flow patterns on the transmission system. Following third-party comments regarding the need to prepare regulations, market routines and IT systems, the division into zones will be effective from November 1, 2011 (rather than July 1, 2011).[161]

An exception will exist for the Swedish West Coast Corridor on which SVK argued bidding zones would be insufficient to manage congestion, as this area does not have suitable generation resources to be able to set a market price by itself.[162] To help address this, interestingly SVK has committed to build and operate a new transmission line by the end of November 2011.[163]

During the interim period to November 1, 2011, SVK has committed to manage anticipated congestion through counter-trade, taking into account "regulating resources" (sources of electricity that can vary production at short notice from which SVK will source the cheapest[164]).

[146] *GdF Suez* Decision at [32].
[147] *GdF Suez* Decision at [37]–[40].
[148] *GdF Suez* Decision at [26]–[27]. See also [36] and [40].
[149] *GdF Suez* Decision at [29].
[150] *GdF Suez* Decision at [40].
[151] *GdF Suez* Decision at [43], [44], [47] and [48]. Some of the commitments last to October 1, 2029.
[152] *GdF Suez* Decision at [53], [54], and [69]–[75].
[153] *GdF Suez* Decision at [45].
[154] "Antitrust: Commission accepts commitments by GDF Suez to boost competition in French gas market" EU Press Release, IP/09/1872, December 3, 2009.
[155] *GdF Suez* Decision at [78].
[156] Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 167.
[157] Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (39351-*Swedish Interconnectors*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39351/39351_1211_8.pdf* [Accessed February 25, 2011].
[158] *Svenska Kraftnat* Decision at [27].
[159] *Svenska Kraftnat* Decision at [27] and [42].
[160] *Svenska Kraftnat* Decision at [47].
[161] *Svenska Kraftnat* Decision at [92].
[162] *Svenska Kraftnat* Decision at [48].
[163] *Svenska Kraftnat* Decision at [48].
[164] *Svenska Kraftnat* Decision at [49], [73]–[74] and [95].

Following third-party comments the final commitment clarifies that non-Swedish counter-trade resources will be taken into account alongside Swedish resources where SVK assesses that the relevant neighbouring country will be an exporter to Sweden in the relevant period and that there will be sufficient interconnector capacity available.[165]

High-tech[166]

Rambus commitments In December 2009, the Commission adopted a decision making commitments offered by Rambus concerning its royalties for dynamic random access memory (DRAM) chips binding for five years.[167] The content of the Commission's Article 27(4) Notice seeking third-party comments on Rambus' proposed commitments was noted last year.[168]

The Commission had alleged that Rambus may have carried out a "patent ambush" contrary to art.102 TFEU by not disclosing the existence of patents and patent applications, which Rambus later claimed were relevant to standards adopted by the US based standard-setting organisation, JEDEC.[169]

The Commission considered in its preliminary assessment that this was intentionally deceptive conduct, which enabled Rambus to charge unreasonably high royalties to DRAM manufacturers for use of its patents. If not for the patent ambush and resulting lock-in to the adopted standard, charging such high royalties allegedly would not have been possible.[170] It appears that the Commission was heavily influenced by the standard-setting context in which Rambus's allegedly abusive conduct took place and was concerned that the positive economic effects of standardisation could be undermined by abusive conduct.[171]

Under the commitments Rambus agreed:

- *First*, in respect of DRAM chips, not to charge any royalties for use of standards adopted during the time that Rambus was a member of JEDEC and engaged in the allegedly deceptive conduct.
- *Secondly*, to cap its royalty rate for the later generation of JEDEC standards at 1.5 per cent of the price of the chip.
- *Thirdly*, to maximum royalties for use of the patents in memory controllers to the extent that they need to comply with JEDEC DRAM standards.

In practice Rambus has posted two default licence contracts, one for DRAM chips and one for memory controllers on its website. Licensees are able to download and sign these licences. The commitments have a worldwide scope.[172]

In response to comments received from third parties, the final commitments differ to some extent from the commitments in the Article 27(4) Notice.[173]

- *First*, Rambus has clarified that all existing JEDEC standards for DRAM chips and memory controllers are covered and that similar licensing conditions will apply to future JEDEC standards.
- *Secondly*, Rambus has removed a proposed "most-favoured-licensee" clause, which a number of third parties considered was counter-productive as it would discourage Rambus from ever agreeing to lower royalty rates.[174]
- *Thirdly*, Rambus has modified the text of its default licence agreements. In particular, the revised version more clearly states that royalties are to be determined on the basis of the price of the individual chip rather than the value of the end product into which the chip is incorporated.[175]

In January 2010, the Commission adopted a decision addressed to Hynix formally rejecting its complaint in light of the commitments.

Microsoft web browser commitments Last year we summarised the content of an Article 27(4) Notice detailing commitments offered by Microsoft to alleviate

[165] *Svenska Kraftnat* Decision at [74] and [95].
[166] With thanks to Cormac O'Daly for his assistance with this section.
[167] Decision relating to a proceeding under Article 102 of the Treaty on the European Union and Article 54 of the EEA Agreement (COMP/38.636-*Rambus*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1203_1.pdf* [Accessed February 25, 2011]; Commission's summary in [2010] OJ C30/17; "Antitrust: Commission accepts commitments from Rambus lowering memory chip royalty rates" EU Press Release, IP/09/1897, December 9, 2009 and "Antitrust: Commission accepts commitments from Rambus lowering memory chip royalty rates - frequently asked questions" EU Press Release, MEMO/09/544, December 9, 2009. The Commission's commitments are now available on its website.
[168] Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 168.
[169] *Rambus* Decision at [27].
[170] *Rambus* Decision at [27] and [28].
[171] *Rambus* Decision at [30]–[39].
[172] See EU Press Release, MEMO/09/544.
[173] *Rambus* Decision at [58].
[174] *Rambus* Decision at [53].
[175] *Rambus* Decision at [60] and [66].

the Commission's concerns over the tying of Internet Explorer, Microsoft's web browser, to Microsoft's client PC operating system, Windows.[176]

In December 2009, the Commission adopted a decision making amended commitments binding on Microsoft for five years.[177] The Commission indicated that its preliminary investigation showed that Microsoft enjoyed an artificial distribution advantage over rival browser developers, unrelated to the merits of its product: through tying Internet Explorer to the Windows PC operating system Microsoft was able to ensure that Internet Explorer was present on over 90 per cent of PCs.[178]

The Commission states in its decision that, while the Commission "can normally assume that the tying of a specific product has, *by its nature*, a foreclosure effect", here the Commission has examined the effects more closely.[179] The Commission considers that Internet Explorer's ubiquity distorts competition, hinders innovation and, because of network effects, artificially creates incentives for software developers and content providers to choose to design products and websites primarily for Internet Explorer rather than other platforms.[180] The Commission also considered that the development of web applications made browsers particularly important for competition between platforms.[181] Thus the tying also countered competitors' web browsers' perceived "platform threats" to the Windows client operating system.[182]

The commitments only relate to Windows users and PC manufacturers in the EEA.[183] They apply both to the installed base of existing Windows users and to sales of new operating systems.

The commitments are as follows:

1. *First*, starting in March 2010, Microsoft has committed to provide the EEA's 100 million or more existing users of the Windows XP, Windows Vista, and Windows 7 operating systems who have Internet Explorer installed as the default browser with a "Choice Screen", by means of a software update.

   This screen contains information on the 12 most widely used web browsers that run on Windows and enables users to download and install as many of these browsers as they wish. It also allows users to set another browser as the default and, in Windows 7, turn off Internet Explorer. The list of the 12 browsers will be updated every six months on the basis of independent market analysis.[184]

   Third parties submitted comments on the presentation of the Choice Screen.[185] In the end, the screen is a dedicated window[186] displaying the five most prominent browsers and the other seven when the user scrolls to the side (this less cluttered presentation was considered to be more effective).[187] The positioning of the 12 browsers within these two groups is random, so as to avoid potential positional bias.[188]

2. *Secondly*, the commitments provide that when selling new PCs carrying Windows operating systems, OEMs will be able to install competing web browsers, set them as the default browser, and, if they wish, turn off Internet Explorer. Previously Microsoft's licences provided that OEMs had to license Windows with Internet Explorer pre-installed.[189] Microsoft has undertaken not to circumvent this commitment and not to retaliate against OEMs which install competitors' web browsers.[190] If OEM vendors choose to ship Windows with Internet Explorer as the default browser, then the user will be presented with the Choice Screen when they start up their PC.

   The decision allows the Commission to review the commitments after a minimum of two years if either the market conditions have fundamentally changed or the Choice

[176] Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 167–168.

[177] Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/C-3/39.530-*Microsoft (tying)*), at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_3.pdf* [Accessed February 25, 2011]."Antitrust: Commission accepts Microsoft commitments to give users browser choice" EU Press Release, IP/09/1941, December 16, 2009, "Antitrust: Commission accepts Microsoft commitments to give users browser choice – frequently asked questions" EU Press Release, MEMO/09/558, December 16, 2009 and "Antitrust: Commission decision on Microsoft's new web browser Choice Screen - user's guide" EU Press Release, MEMO/09/559, December 16, 2009. The Commission's commitments are available on its website. See also "Antitrust: Commission welcomes Microsoft's roll-out of web browser choice" IP/10/216, March 2, 2010.

[178] *Microsoft* Decision at [39] and [40]. The Commission appears to have examined alternative modes of distribution such as downloading from the internet: see the Decision at [45] to [48]. However, the decision refers to the results of two surveys which indicated that downloading was not a viable alternative for many customers: see [50]–[53].

[179] *Microsoft* Decision at [34].

[180] *Microsoft* Decision at [37]–[58].

[181] *Microsoft* Decision at [57].

[182] *Microsoft* Decision at [58].

[183] *Microsoft* Decision at [88].

[184] *Microsoft* Decision at [80] and [82]–[84].

[185] *Microsoft* Decision at [62] et seq.

[186] *Microsoft* Decision at [63], [72(a)] and [74]. Third parties believed that presentation in an Internet Explorer window would create a bias in favour of Microsoft.

[187] *Microsoft* Decision at [81].

[188] *Microsoft* Decision at [65] and [72(c)].

[189] *Microsoft* Decision at [42].

[190] *Microsoft* Decision at [100].

Screen has "manifestly failed to provide consumers with an effective choice among browsers in a reasonable way".[191] Microsoft must provide regular reports on the commitments' implementation, including usage statistics.[192] In addition, Microsoft has agreed to modify the Choice Screen at the Commission's request if this proves necessary and proportionate.[193]

In sum, the decision appears to apply the Commission's reasoning in the 2004 *Microsoft* decision relating to Windows Media Player.[194] The Choice Screen remedy, however, is novel and noteworthy both because it affects the installed base of Windows users and because it allows Windows operating systems to be shipped with a pre-installed browser from Microsoft *or* from a competitor. The 2004 Media Player remedy, whereby Microsoft had to offer a version of its operating system *without* any installed media player, is generally thought not to have been effective, as many users want a PC which they buy to be shipped with a form of media player.

Microsoft—other In addition to these developments in the web browser case, on December 16, 2009, the Commission also noted Microsoft's revised informal public undertaking regarding disclosures of interoperability information between certain Microsoft products and third-party products.[195] The press release stated that the Commission would analyse the undertaking's impact as part of its investigation into the complaint by the European Committee for Interoperable Systems.

Other developments Four other developments should be noted:

- *First*, in November 2009, the Commission announced that it was closing its proceedings against *Qualcomm*.[196] It will be recalled that this investigation was opened in 2007 and concerned whether the royalties that Qualcomm has charged since its patented technology became part of the WCDMA 3G standard are unreasonably high. The press release states that the Commission has not reached any formal conclusions on this issue and notes that all the complainants have withdrawn their complaints or have indicated an intention to withdraw.
- *Secondly*, in February 2010, largely in response to reports in the press, the Commission announced that it had received three complaints against *Google*.[197] According to a Google statement issued on the same day, the complaints relate to Google's ranking of search results which, it is claimed, discriminates against Google's competitors.[198] In October 2010, Commissioner Almunia stated that DG Competition is reviewing Google's comments on the complaints.[199]
- *Thirdly*, in July 2010, the Commission announced that it was opening formal proceedings against *IBM* in two possible abuse of dominance cases.[200] Both proceedings relate to IBM's conduct on the market for mainframe computers (powerful computers used in large corporations and government bodies). One is investigating alleged tying of mainframe hardware to IBM's mainframe operating system. The other concerns alleged discrimination against competing suppliers of mainframe maintenance services.
- *Finally*, in September 2010, the Commission announced that it would not continue its preliminary investigation into *Apple*'s polices regarding its iPhone.[201] The preliminary investigation had focussed on Apple's policy whereby repair services were only available under warranty in the country where the iPhone was purchased. The Commission was concerned that this amounted to a territorial restriction resulting in market partitioning. In response, Apple has abolished its "country of purchase" rule. The preliminary investigation also looked at a restriction in Apple's licence agreement with independent developers of "apps" (applications) for its iPhone operating system. The licence agreement apparently required that only Apple programming tools and approved languages be used when writing iPhone apps, which allegedly could have excluded competition from devices

[191] *Microsoft* Decision at [78].
[192] *Microsoft* Decision at [72(d)].
[193] *Microsoft* Decision at [72(d)].
[194] Decision C(2004) 900 relating to a proceeding under art.82 of the EC Treaty (COMP/C-3/37.792-*Microsoft*), in particular at [843]–[899], available at *http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf* [Accessed February 25, 2011]; Commission's summary in [2007] OJ L32/23.
[195] "Antitrust: Commission accepts Microsoft commitments to give users browser choice" EU Press Release, IP/09/1941, December 16, 2009.
[196] "Antitrust: Commission closes formal proceedings against Qualcomm" EU Press Release, MEMO/09/516, November 24, 2009.
[197] "Statement on press reports on complaints against Google" EU Press Release, MEMO/10/47, February 24, 2010.
[198] See *http://googlepublicpolicy.blogspot.com/2010/02/committed-to-competing-fairly.html* [Accessed January 24, 2011].
[199] "Joaquín Almunia Vice President of the European Commission responsible for Competition policy Competition Policy: State of Play and Future Outlook European Competition Day, Belgium Brussels, 21 October 2010" EU Press Release, SPEECH/10/576, 21 October 2010.
[200] EU Press Release, MEMO/10/1006, July 26, 2010.
[201] "Antitrust: Statement on Apple's iPhone policy changes" EU Press Release, IP/10/1175, September 25, 2010.

running non-Apple platforms. In response Apple has removed the relevant restrictions on use of third-party development tools and languages.

Follow-up of Commission's Pharma Review[202]

It may be useful to summarise what appears to be the current state of play on follow-up to this inquiry.

It will be recalled that the Commission issued its Final Report on the inquiry in the pharmaceutical sector in July 2009. The Commission found that originator companies contribute to delayed entry of generics to the market; originator companies have overlapping patents with negative effects on innovation; and that a Community patent and a Community patent litigation system are urgently needed. In July 2009, the Commission also opened proceedings against *Les Laboratoires Servier, Matrix, Niche Generics* and other generics companies for alleged restrictions of competition.[203]

In December 2009, it appears that the Commission carried out further inspections.[204]

In January 2010, the Commission then opened proceedings against *Lundbeck*, in particular to investigate agreements signed by Lundbeck which the Commission stated may obstruct the market entry of a generic for one of Lundbeck's anti-depressant drugs (citalopram).[205]

In January 2010, the Commission also started to monitor patent settlement agreements and in July 2010 issued its first report on this.[206] The Commission stated that it asked 41 originator companies and 45 generic companies to submit copies of all settlement agreements relevant for the EU/EEA market. The report covers developments from July 1, 2008 to the end of 2009.

The Commission determined several categories of agreements: (1) agreements that do not limit generic entry; (2) agreements that limit entry but do not involve any value transfer from the originator company; and (3) agreements that limit entry and involve value transfers (which the Commission considers are most likely to attract competition law scrutiny).

The Commission concluded that since the year 2000, the total number of patent settlements increased. However, the number of agreements which restrict generic entry and contain a value transfer to the generics company decreased significantly from 22 per cent to 10 per cent in comparison with the period reviewed by the sector inquiry. Also, the Commission found that the amounts paid to the generics companies appear to have decreased. However, the two first categories of settlements increased from 52 per cent to 57 per cent and from 26 per cent to 33 per cent respectively. The Commission announced that the monitoring exercise would continue at least until the end of 2010.

In July 2010, the Commission sent a Statement of Objections to Les Laboratoires Servier, stating its provisional view that the company provided misleading and incorrect information to the Commission's questionnaire in the framework of the sector inquiry.[207]

It may also be interesting to note that, in October 2010 *Reckitt Benckiser* is reported to have agreed to pay a €10.2 million penalty to settle an abuse of dominance case in UK Office of Fair Trading proceedings.

According to the Press Release on the OFT website, the OFT alleged that Reckitt Benckiser withdrew NHS packs of Gaviscon Original Liquid from the NHS prescription channel after the product's patent had expired, but before the publication of the generic name for it, so that more prescriptions would be issued for its alternative product, Gaviscon Advance Liquid.

It appears the settlement involves an admission by Reckitt Benckiser that it has "infringed UK and European Competition Law by withdrawing and deleting Gaviscon Original Liquid from the NHS prescription channel in 2005".[208]

In October 2010 the Italian Competition Authority also opened an investigation into whether *Pfizer* has acted improperly to prolong its patent protection for latanoprost (an active ingredient for treating visual glaucoma) to delay generic competition to its product Xalatan,[209] after a complaint by Ratiopharm.

Policy

Box 6

Policy issues
• "An industrial policy for the globalisation era"
• Inability to pay
• Damages actions
• ECN/Co-operation with courts

New Commissioner, new Director-General

It has been "all change" at the top of the Commission's Competition Directorate this year. Commissioner Almunia took over from Mrs Kroes: he is a Spanish Basque, a socialist and former candidate to be Prime Minister in Spain. Mr Almunia is Vice-President of the Commission. Importantly also, he was former Commissioner for Economic and Monetary Affairs, so someone used to the current agenda of financial distress, when a great deal of

202 With thanks to Katrin Guéna for her assistance.
203 Ratliff "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 169–170.
204 "Antitrust: Commission confirms surprise inspections in the pharmaceutical sector" EU Press Release, MEMO/09/546, December 9, 2009.
205 "Antitrust: Commission opens formal proceedings against pharmaceutical company Lundbeck" EU Press Release, IP/10/8, January 7, 2010.
206 "Antitrust: Commission launches monitoring of patent settlements concluded between pharmaceutical companies" EU Press Release, IP/10/12, January 12, 2010 and "Antitrust: Commission welcomes decrease of potentially problematic patent settlements in EU pharma sector" EU Press Release, IP/10/887, July 5, 2010. The report is available on the Commission's website, at *http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent_settlements_report1.pdf* [Accessed February 25, 2011].
207 "Antitrust: Commission sends Statement of Objections to Servier for providing misleading and incorrect information" EU Press Release, IP/10/1009, July 26, 2010.
208 *http://www.oft.gov.uk/news-and-updates/press/2010/106-10* [Accessed January 24, 2011].
209 Press release, October 26, 2010, at *http://www.agcm.it/agcm-eng*.

what DG Competition is doing is state aid.[210] Dr Italianer also took over from Philip Lowe. Dr Italianer is a Dutchman, who was previously Deputy Secretary-General and has a graduate degree in econometrics and a PhD in economics. He worked for 10 years in the Commission's Directorate for Economic and Financial Affairs.[211]

Unsurprisingly we have seen a different style already, even though much of the agenda otherwise appears the same: due process, cartels, "high-tech", damages and state aid.

An interesting development is the so-called "Europe 2020" agenda of objectives, which appear to be something of a repackaging of older priorities with new ones.[212] Nevertheless the themes are important: essentially modernising Europe to compete and keep wealth and jobs in the face of globalisation.[213] Practically in competition terms there is a focus on energy, the so-called "Digital Agenda" (broadly meaning competition for and through the internet) and innovation.[214]

Inability to pay

During the year, the Commission changed quite radically its approach to companies asking for a reduction in fines in cartel cases due to their so-called "inability to pay". It may be recalled that such requests are provided for in Point 35 of the 2006 Fining Guidelines.[215]

The Commission's approach has changed insofar as the Commission appears more receptive to such claims. While Commissioner Kroes' stated approach was that companies that "cheat … get a heavy fine",[216] Commissioner Almunia now states that the Commission's "goal is to strike the right balance between maintaining a deterrent level of fines and avoiding … to push companies out of business".[217] However, the Commission has also noted that inability-to-pay reductions will continue to be exceptions to avoid rewarding inefficient and badly managed companies. As Commissioner Almunia puts it:

> "Our analyses have led us to grant reductions to some companies, mostly small-and-medium sized enterprises. These reductions have been granted on an exceptional basis to respond to an unprecedented economic and financial situation in the history of EU anti-trust enforcement."[218]

Practically, this year the Commission granted significant reductions in fines (ranging from 25 per cent to 70 per cent) to several companies in three different cartel cases: bathroom fittings, pre-stressing steel and animal feed phosphates.[219]

It appears that there are essentially five conditions for a successful inability-to-pay claim:

- *First*, the company has to make the request to the Commission. Such request can be made at any time of the procedure.
- *Secondly*, the Commission will assess in detail the company's financial situation to evaluate the risk of insolvency. The Commission will take into account detailed information and data for the last financial years, the current year and any projections for the near future, in particular the company's cash flow and provisions made for fines. The Commission will also assess the financial situation of the parent company and the shareholders to pay the fine, as well as the company's relation with outside financial partners, such as banks.
- *Thirdly*, there has to be a causal link between the amount of the fine and the company's future bankruptcy. The fine should "irretrievably jeopardise" the economic viability of the undertaking. Causality will be considered absent in cases where the company is in pre-existing, long-standing economic distress.
- *Fourthly*, the company's "loss of asset value" has to be significant. It is not enough that the company may go into liquidation, because liquidations can be organised and voluntary. The situation is different, if no viable restructuring plan exists, or no new owner may be found and the company would thus be likely to exit the market.
- *Fifthly*, the company will have to prove that a particular social and economic context such as the recent economic crisis, contributes to the risk of its insolvency.

[210] See generally the *Commission's 2009 Annual Report and MLex magazine*, April-June 2010 pp.8–11.
[211] CVs are available on the Commission's website.
[212] European Council Conclusions, June 17, 2010.
[213] Available on the Commission's website.
[214] See Commissioner Almunia, "Competition in Digital Media and the Internet", UCL Jevons Lecture, July 7, 2010, SPEECH/10/365; Dr Italianer, "Competition Policy in support of the EU 2020 Objectives", Vienna Competition Conference, June 9, 2010. Both are available on the Commission's website.
[215] 2006 Fining Guidelines point 35 [2006] OJ C210/2.
[216] "Neelie Kroes European Commissioner for Competition Policy Car Glass Cartel Opening remarks at press conference Brussels, 12th November 2008" EU Press Release, SPEECH/08/604, November 12, 2008.
[217] "Joaquín Almunia Vice President of the European Commission responsible for Competition policy Competition Policy: State of Play and Future Outlook European Competition Day, Belgium Brussels, 21 October 2010" EU Press Release, SPEECH/10/576, October 21, 2010.
[218] "Competition Policy: State of Play and Future Outlook", European Competition Day, Belgium, October 21, 2010. SPEECH/10/576 available on the Commission's website.
[219] See above pp.114–115 of this article.

Damages actions

As Commissioner Almunia took on his post this was *the* issue. Commissioner Kroes and the President of the Commission, Mr Barroso were in negotiations with the European Parliament about a proposed Directive to promote damages actions for competition infringements. Business was worried about American-style damages claims on top of colossal fines and how to limit the seemingly endless "clean-up" process for cartel infringements.

During this year essentially three things have happened:

- *First*, on the proposed Directive there was a regrouping with other Directorates-General of the Commission to build consensus on "collective redress" (i.e. class action) structures which may be of wider application that competition law.[220] It appears that afterwards, somewhere in late 2011, Commissioner Almunia will then make other, more specific proposals for competition damages. He states that his concern is that such actions should be available for all types of claimant across Europe, not just for the big claims by big companies brought in some countries.
- *Secondly*, the Commission has published an economic study on damages by Oxera and a multinational legal team led by Dr Assimakis Komninos.[221] In parallel, it is understood that the Commission has been talking to various parties about its proposed Notice on the calculation of damages. All still very new and very controversial for the moment, as one might expect.
- *Thirdly*, in the meantime, in practice actions are being brought. A great many of these are being filed in London, relying on the advantages of English discovery and English rulings about the ability to draw in Europe-wide claims if there is an "anchor defendant" giving sufficient nexus to the United Kingdom and the English courts.[222] Companies and their counsel are rediscovering more classic notions of corporate liability than the EU "single economic unit" and the full implications of joint and severable liability. However, it is all still very new.

It appears that the main jurisdictions for claims so far are England and Wales, The Netherlands and Germany, but there are clearly other actions across Europe, such as the asphalt litigations in Scandinavia.

ECN/Co-operation with courts

Finally I have not included much about the ECN this year, because there has been a lot to cover at European Court and Commission level already. The statistics are on the Commission's website and in the Commission's 2009 Annual Report.

What I would note are two points: first, the ECN is now producing a Newsletter, again available on the Commission's website. This indicates usefully, for example, that Slovenia has now introduced a leniency programme.[223] Secondly, it appears that there have been more amicus curiae cases recently. Notably, the Commission submitted observations in the French *Pierre Fabre* internet distribution case.[224]

[220] Commissioner Almunia: "Common Standards for Group Claims Across the EU", University of Valladolid, School of Law. October 15, 2010, SPEECH/10/554, available on the Commission's website.
[221] "Quantifying anti-trust damages: Towards non-binding guidance for Courts", December 2009, available on the Commission's website.
[222] *Roche v Provimi* [2003] EWHC 961 (Comm), [2003] E.C.C. 29; *Cooper Tire v Dow* [2010] EWCA Civ 864, [2010] Bus. L.R. 1697.
[223] ECN Brief 01/2010 p.19.
[224] ECN Brief 01/2010 p.17.