# Major Events and Policy Issues in EU Competition Law, 2011–2012 (Part 1)

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This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU[1] from November 2011 until the end of October 2012.[2] The article is divided into an overview of:

- legislative developments;
- European Court judgments;
- European Commission ("EC") decisions and settlements;
- other EC/ECN initiatives; and
- current policy issues.

Legislative developments and European Court judgments on general issues and cartel appeals are included in Part 1. The judgments dealing with other horizontal agreements, distribution and art.102 TFEU issues are included in Part 2, together with the other sections. This 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 2011/2012**

- Effective judicial review: what the courts will raise of their own motion (statement of reasons and other issues of public policy). (*KME*, *Chalkor*)
- Access to file under the EU Transparency Regulation. (*CDC Hydrogen Peroxide*, *EnBW*)
- Parent liability presumption: more standard rebuttals. (e.g. *Industrial Bags* and *Dutch Bitumen cartels*)
- Classic or modern art.102 approach? (*Tomra*, *Post Danmark*)
- Bitumen—*KWS*
  - — EC inspectors must have access to premises on "dawn raids" immediately.
  - — But how long they should wait for external counsel (to protect a company's defence rights) to be decided on a case-by-case basis.
  - — Denial of access for 47 minutes can be treated as aggravating circumstances and lead to a fine increase of €1.71 million. (some €18,000 per minute!)

## Legislative developments

**Box 2**

**Legislation/Notices (adopted/proposed)**

- Not much this year.
- TTBE/TTG review:
  - — Questions about cross-licensing, patent pools and grant-backs.
  - — Major changes not expected.
- Should the Maritime Transport Antitrust Guidelines lapse?
- Informal documents on: confidentiality, DG COMP's Manual of Antitrust Procedures, a DG COMP Compliance brochure, FAQs on the MVBE.

In the course of the year, the EC has engaged in two consultations in the antitrust area. The first was in December 2011 and related to the Transfer of Technology Block Exemption ("TTBE") and the related Transfer of Technology Guidelines ("TTG"); the second was in May 2012 in relation to the future of the Maritime Transport Antitrust Guidelines. The EC has also published a number of informal guidance documents on its website.

### *Review of the TTBE and TTG*

The current TTBE expires in April 2014. In December 2011 the EC therefore started a consultation on its review, with a questionnaire seeking responses by February 2012. Since then some 20 responses have been published on the EC's website.

In general, it is understood that many think that the TTBE and the TTG work well and do not need radical reform. However, the EC asked specific questions about cross-licensing, patent pools and grant-backs to see if the rules in these areas work well.

With its questionnaire the EC also published a study by economists on licensing and competition. This report deals with licensing, patent thickets (i.e. overlapping sets of patent rights requiring that those seeking to

* With many thanks to Sinéad Mooney and Katrin Guéna for their general help in the production of this paper; and to my Brussels colleagues for numerous insights. More specific assistance is indicated with the appropriate section.

[1] "TFEU" is the abbreviation for the Treaty on the Functioning of the European Union; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court and "CJEU" for the Court of Justice of the European Union. "SO" is the abbreviation for Statement of Objections; "Article 27(3) Notice" refers to the EC's Communications under that article of Regulation 1/2003 [2003] OJ L1/1. References to the "ECHR" are to the European Convention of Human Rights and references to the "CFR" are to the EU Charter of Fundamental Rights. This article does not cover merger control.

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page, *http://ec.europa.eu/competition/index_en.html* [Accessed December 31, 2012].

References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in (formerly EC) EU Competition Law", published in the *International Company and Commercial Law Review*.

commercialise new technology obtain licences from multiple partners), cross-licensing, patent pools and grant-backs.

There is also discussion of "pass through clauses" (clauses which guarantee that a licensee's customers are protected from infringement claims by the licensor) and discussion of IP issues in merger remedies and some related economic modelling.

It will be interesting to see what the EC does. Some argue that patent pools should be given a more favourable treatment than at present. There is also much discussion these days about how well FRAND[3] works. On grant-backs, it appears that some argue that they reduce innovation, although licensors tend to argue that, but for the grant-backs, they would not license in the first place. It will be interesting to see whether the EC also revises its rules in view of current cases on essential standards.

### *Review of the Maritime Transport Antitrust Guidelines*

In May 2012, the EC put on its website a staff working document discussing whether the EC's Guidelines on the application of competition rules to maritime transport should lapse in September 2013,[4] inviting comments. It appears that the EC would like these specific guidelines to lapse, arguing that the issues which they address are covered by other EU texts. Notably, the EC argues that there is no need for specific rules on information exchange in the maritime sector now, since there are general, "more thorough" rules set out in the general EU Horizontal Guidelines. The EC argues that other issues such as co-operation (e.g. pools) and market definition are also covered in other EU texts.

It may be recalled that the Guidelines were adopted for a defined period, five years after the end of the Liner Block Exemption in 2006, which itself had a transitional period to 2008.

### *Other informal guidance*

The EC has also published a number of other documents in the year which are of interest.

First, in March 2012 the EC put on its website an informal document offering *Guidance on Confidentiality Claims in relation to requests for information*. It is a useful, practical document emphasising what is likely to be accepted or not. It is clearly not designed to replace the actual rules and statements in the annexes, which are enclosed with RFI's, but is just designed to help. It is quite amusingly done, with a text about collusion in relation to a tender for biscuits for a royal wedding.

Secondly, as a result of controversial pressure to know more about how the EC's internal procedures work and action by the European Ombudsman, the EC made available its *Manual of Antitrust Procedures*. This contains 28 chapters, containing a lot of material which is not new, but offering a useful summary. At the time it was put on the EC's website, the chapters on sectorial inquiries (Ch.7) and remedies and fines (Ch.19) were not yet available.

There were no huge revelations as to procedure, as one might expect, but there are some useful comments. For example, that in relation to the follow-up on fine recovery, exceptionally the EC may give an addressee of the fine time to pay in instalments (see Ch.25).

Thirdly, in November 2011 the EC published its own short compliance brochure called "*Compliance Matters*". It is not entirely clear why the EC felt that was necessary, since many companies already have such brochures. It certainly provides an easy reference point, but without industry tailoring as more frequently happens if such brochures are drafted by in-house or external counsel for a particular company.

Fourthly, in August 2012 the EC put on its website a short document setting out answers to *Frequently Asked Questions on the Application of EU Antitrust Rules in the Motor Vehicles Sector*. Eighteen questions are answered on topics such as: the honouring of warranties, servicing in the context of leasing contracts, the supply of spare parts, the use/purchase of tools, access to technical information and access to authorised repairer networks. These FAQs are meant to be complementary to the Supplementary Guidelines to the Motor Vehicle Block Exemption.[5]

## European Court judgments

### *General*

**Box 3**

**Main European Court cases**

- *Judicial review*
  - — *KME* and *Chalkor*
  - — Advocate General Sharpston checked the maths!
  - — CJEU upheld current system as in line with art.47 of Charter of Fundamental Rights.
  - — Stressed thorough review required, even on economic issues.
  - — But also stressed need for parties to bring evidence and pleas and that only issues of public policy are raised by Court of its own motion, including duty to state reasons.
  - — Found GC had carried out full review, even if it referred to the EC's discretion.
  - — Query what else is in public policy? Respect for fundamental rights?
- *Access to file*
  - — *EnBW*, *CDC Hydrogen Peroxide* (and, in the United Kingdom, *National Grid*).
  - — *CDC Hydrogen Peroxide*: Plaintiffs could ask for the case-file contents list.

[3] Fair, reasonable and non-discriminatory licensing.
[4] IP/12/446, May 4, 2012.
[5] Regulation 461/2010 [2010] OJ L129/52.

**Box 3**

**Main European Court cases**

— *EnBW*: "Concrete and individual assessments" required after EC decision, no blanket exceptions nor, generally, claims to exclude by category of document; applies even to EC internal documents.

• *Slovak/Czech cases*

— EC could ask for information related to a period prior to Slovak accession.

— *Ne bis in idem*: no infringement where the Czech Competition Authority fined until Czech accession and the EC fined afterwards.

## Judicial review

In December 2011 the European Court ("CJEU") ruled on the further appeals by KME, related to the *Industrial Tubes* and *Plumbing Tubes* cartel cases[6] and Chalkor's further appeal in the *Plumbing Tubes* case.[7]

In all three cases the CJEU rejected the claims made against the General Court's ("GC's") rulings by which the GC upheld the EC's decisions. The judgments raise some interesting and important issues on what is effective judicial review. It should also be noted that, in *Norway Post*, summarised below, the EFTA Court has followed a similar position to that set out in the *KME* and *Chalkor* judgments.

### *KME*

In the *KME* case concerning *Industrial Tubes*, the main points of interest are as follows:

First, the CJEU rejected claims that the metal turnover of the companies concerned should have been excluded for fining purposes. This was an unusual situation, where buyers of such tubes would agree the price of the metal with tube producers, who would then transform the metal into the tubes requested. KME (and others in the cartel) argued that in such circumstances such metal turnover should be excluded from the fine assessment.

The court disagreed, upholding the GC's position that such turnover should still be included, apparently concerned that if the court admitted the argument here, it might lead to endless and insoluble disputes, with allegations of unequal treatment in other cases.[8]

Stressing the EC's discretion in setting fines, the court therefore held that the GC was not wrong to find that the EC was entitled to take into account *gross* turnover, rather than *net* turnover in the sector concerned in setting fines (even though that meant that the fines were based in part on a sectoral value that was some two-thirds higher than without the metal value).

Secondly, KME argued that the increase for duration of 125 per cent, which had been applied to its fine for involvement in the cartel of 12 years and 10 months, was manifestly disproportionate, since the cartel's intensity and effectiveness had varied over time.[9]

However, the court rejected this, noting that A.G. Sharpston, on checking the maths, had worked out that the rate of increase was only 62.51 per cent, not 125 per cent! Unsurprisingly, the court then went on to hold that the increase for duration was not unlawful.[10]

Thirdly, KME argued that the GC had been unduly deferential to the EC, accepting too readily the EC's discretion on various matters. KME argued that this meant that there was no effective judicial review, contrary to art.6 of the European Convention of Human Rights ("ECHR") and art.47 of the Charter of Fundamental Rights[11] ("CFR" or the Charter).

In an important ruling, the court disagreed and set out the principles of judicial protection under the Charter.[12]

The court noted that the Courts of the European Union have to review the legality of EC decisions, which includes the EC's interpretation of information of an economic nature. The court referred to the well-known statement in *Tetra Laval*.[13] It will be recalled that statement of the judicial review test emphasised that the GC had to review whether the evidence relied on was: (1) factually accurate, reliable and consistent; (2) contained *all* the information that must be taken into account; and (3) whether it was capable of substantiating the conclusions drawn from it.[14]

As for penalties, the court emphasised that the EC has to take into account a wide range of factors and has to carry out a thorough examination of the circumstances. Further, it is bound to follow its Fining Guidelines, unless it gives reasons for departing therefrom which are compatible with the principle of equal treatment.[15]

Importantly, the CJEU then noted that the courts must establish "of their own motion" that there is a statement of reasons.[16]

Further, the courts must review the legality of the decision, based on the evidence and pleas put forward on appeal. The courts also could not use the EC's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.[17]

[6] *KME Germany AG v European Commission (Industrial Tubes)* (C-272/09 P) [2012] 4 C.M.L.R. 8 and *KME Germany AG v European Commission (Plumbing Tubes)* (C-389/10 P) [2012] 4 C.M.L.R. 10 (judgments of December 8, 2011); see *CJEU Press Release 134/11* (December 8, 2011).
[7] *Chalkor AE Epexergasias Metallon v European Commission* (C-386/10 P) [2012] 4 C.M.L.R. 9 (judgment of December 8, 2011).
[8] See *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [53].
[9] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [59].
[10] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [70]–[71].
[11] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [83]–[88]. The Charter is at [2000] OJ C364/1.
[12] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [91]–[110].
[13] *Commission v Tetra Laval BV* (C-12/03 P) [2005] E.C.R. I-987; [2005] 4 C.M.L.R. 8.
[14] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [94].
[15] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [100].
[16] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [101].
[17] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [102].

Again, the court emphasised that the courts have an unlimited jurisdiction to review the lawfulness of a penalty and can substitute their own appraisal for that of the EC, including to cancel, reduce or increase the fine.[18]

However, the court went on to say that the proceedings before the European Courts are inter partes and the exercise of unlimited jurisdiction does not amount to a review of the court's own motion[19]:

> "With the exception of pleas involving matters of public policy which the Courts are required to raise with their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas."

The court then concluded that this overall review system, involving the assessment of evidence, the ability to annul a contested decision and the ability to alter the amount of a fine was not contrary to the principal of effective judicial protection in art.47 of the CFR.

Finally the court added that even if the GC had referred to the EC's "discretion" or "wide discretion", in fact the GC had carried out a "full and unrestricted review in law and in fact" as required of it.

The *KME (Plumbing Tubes)*[20] judgment is essentially similar, save that the duration increase was here only 58.75 per cent, not 125 per cent.[21]

As one might expect, this ruling has refocused attention on what has to be pleaded. One question raised is whether the respect for fundamental rights is something which the courts have to raise of their own motion or which has to be pleaded. For example, in *Sachsa Verpackung GmbH*[22] in the *Industrial Bags* cartel case, a late plea on that issue was rejected as something which should have been raised earlier, in part it appears on the basis that fundamental rights principles are already part of EU law as general principles of EU law and in part that a failure to respect such principles should have been pleaded before.

In any event many are raising CFR issues in their pleadings now and that is clearly the prudent course, if the issue appears relevant.

## *Chalkor*

The *Chalkor* case is a little different. The GC had reduced Chalkor's fine already by 10 per cent on the basis that the EC had not taken into account that Chalkor only participated in one branch of the "multi-form" infringement (i.e. not arrangements concerning SANCO products, nor WICU or Cuprotherm products).

Chalkor's further appeal challenged the GC's approach in similar terms to *KME*. However, Chalkor added: (1) an Opinion from former A.G. Sir Francis Jacobs, suggesting that the GC had simply checked whether the EC had applied the Fining Guidelines, rather than exercising its unlimited jurisdiction[23]; and (2) that it considered the EC's proceedings to be criminal in nature.[24]

Chalkor's key point was that the GC should have gone further in its review. The CJEU disagreed, summarising its system of judicial review in the same terms as in the *KME* cases,[25] but adding that, moreover, the GC did not have to "undertake of its own motion a new and comprehensive investigation of the file".[26]

As in the *KME* cases, the CJEU then reviewed and rejected the criticisms of the GC raised by Chalkor and found that, even if the GC had referred to the EC's "substantial margin of discretion", it had carried out the "full and unrestricted review, in law and fact, required of it".[27]

Chalkor also argued that the figure of 10 per cent for its fine reduction by the GC was arbitrary. The CJEU disagreed, noting the factors which had led the GC to that figure in the judgment.[28]

Finally, the CJEU noted that it could not review a decision of the GC based solely on fairness.[29]

## Access to file

The issue of access to file under the EC Transparency Regulation, Regulation 1049/2001[30] appears to be the hot topic in relation to cartel cases at the moment. There are two important judgments on this as regards cartel cases which should be noted this year, *CDC Hydrogen Peroxide* and *EnBW* (although there have also been others in relation to access to file and merger control).

## *CDC Hydrogen Peroxide*

This case concerned an application for full access to the statement of contents of a case file in the EC's *CDC Hydrogen Peroxide* cartel case.[31] The application was brought in 2008, after a cartel decision in 2006.

[18] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [103].
[19] *KME (Industrial Tubes)* [2012] 4 C.M.L.R. 8 at [104].
[20] *KME (Plumbing Tubes)* [2012] 4 C.M.L.R. 10.
[21] *KME (Plumbing Tubes)* [2012] 4 C.M.L.R. 10 at [73]. The section on effective judicial review is at [108]–[138].
[22] See *Sachsa Verpackung GmbH v European Commission* (T-79/06), judgment of November 16, 2011 at [91]-[95].
[23] *Chalkor AE Epexergasias Metallon v European Commission* (C-386/10 P) [2012] 4 C.M.L.R. 9 at [36].
[24] *Chalkor* [2012] 4 C.M.L.R. 9 at [37] and [40].
[25] *Chalkor* [2012] 4 C.M.L.R. 9 at [52]–[67].
[26] *Chalkor* [2012] 4 C.M.L.R. 9 at [66] and [49].
[27] *Chalkor* [2012] 4 C.M.L.R. 9 at [82].
[28] *Chalkor* [2012] 4 C.M.L.R. 9 at [94]–[98].
[29] *Chalkor* [2012] 4 C.M.L.R. 9 at [101].
[30] [2001] OJ L145/43.
[31] *CDC Hydrogen Peroxide Cartel Damage Claims v European Commission* (T-437/08) [2012] 4 C.M.L.R. 14.

The main point is that the EC argued on the basis of principle that disclosure would undermine its leniency programme, because those co-operating would be more likely to be sued for damages, with the result that their commercial interests would be undermined.

Significantly, the GC disagreed.[32] The main points of interest are as follows:

First, the GC held that the list of confidential documents in the EC's case file was not of itself confidential, or part of the "commercial interest" of the companies concerned.[33] The court emphasised that in assessing disclosure, the relevant issue was not what use would be made of the list, but rather whether the list itself was confidential.

Secondly, the court held that protecting cartelists from damages is not a commercial interest deserving of protection.[34]

Thirdly, the court also considered that denial of access to the list was not required in order to protect the purpose of the EC's investigation, one of the possible grounds for withholding disclosure, because that investigation was over, even if the EC's decision was being appealed and therefore the case might be reopened.[35]

As a result the GC annulled the EC's decision denying access to the list.

## *EnBW*

The second case concerning access to file in cartel decisions concerns EnBW, the energy company in Baden-Württemberg.[36] The case before the GC related to an application for access to the EC's file by EnBW after the *gas insulated switchgear* decision had been taken.

The plaintiffs asked for virtually everything except for Japanese documents! The EC said "no", arguing on the basis of principle and by reference to the categories of documents requested. EnBW then challenged that approach and decision before the GC and the matter came in front of the same Chamber of the Court (the Fourth Chamber) that had ruled on the *CDC Hydrogen Peroxide* case.

Unsurprisingly given the *CDC Hydrogen Peroxide* judgment, the GC annulled the EC's decision and elaborated on what it had said in the earlier judgment.

The court outlined that the general approach as regards Regulation 1049/2001 is that the exceptions to disclosure have to be construed strictly.[37]

In most respects the GC held that the EC should have made a "concrete and individual" examination of the contents of the documents, to see which ones should be disclosed or not.[38] The documents which were in the different categories claimed (i.e. "requests for information and parties' replies to those requests" and included leniency statements)[39] were not "manifestly covered in their entirety" by Regulation 1049/2001 exceptions.

The GC gave various indicators to the EC on the approach that should be taken. The court noted that documents should be grouped by content/type of information, not by the type of document (e.g. request for information).[40] The court emphasised that there was no presumption that disclosure would undermine public enforcement against cartels[41] and stated that there was no exception for competition law in Regulation 1049/2001. The court held that only documents that had been obtained through dawn raids could be looked at by category insofar as they had been obtained on a non-voluntary basis.[42]

As regards the issue as to whether disclosure would undermine the "commercial interests" of the company concerned (a term in Regulation 1049/2001), the court made four main points:

First, the EC's investigation was closed, so disclosure after that was not likely to undermine the purpose of the EC's investigation.[43]

Secondly, leniency was not the only way to enforce the competition rules; actions for damages could do so also (referring to *Courage Ltd v Crehan*[44]).

Thirdly, the passage of time had to be assessed again at the moment that an application was made for access to documents in order to decide if the documents were still confidential. In other words, the cartel in this case was held to be from 1998 to 2004, the EC's cartel decision was in 2007 and the EC's decision on access to documents was in 2008[45] so, with the later access to documents decision, some of the earlier material might not still be confidential.

Fourthly, the court noted that the presumption on the case law that documents may no longer be confidential after five years, which is reflected in the EC's *Notice on Access to File*[46] is an indicator as to whether access to documents should be given, but the assessment of harm to "commercial interests" under the EU Transparency Regulation, after the EC's decision, is not the same assessment as access to file during the proceedings.[47]

[32] *CDC Hydrogen Peroxide* [2012] 4 C.M.L.R. 14 at [69]–[72].
[33] *CDC Hydrogen Peroxide* [2012] 4 C.M.L.R. 14 at [45].
[34] *CDC Hydrogen Peroxide* [2012] 4 C.M.L.R. 14 at [47]–[50].
[35] *CDC Hydrogen Peroxide* [2012] 4 C.M.L.R. 14 at [60]–[62].
[36] *EnBW Energie Baden-Wurttemberg AG v European Commission* (T-344/08) [2012] 5 C.M.L.R. 4.
[37] *EnBW* [2012] 5 C.M.L.R. 4 at [40]–[41] and [54].
[38] *EnBW* [2012] 5 C.M.L.R. 4 at [109]–[111] and [170]–[176].
[39] *EnBW* [2012] 5 C.M.L.R. 4 at [8].
[40] *EnBW* [2012] 5 C.M.L.R. 4 at [46] and [66].
[41] *EnBW* [2012] 5 C.M.L.R. 4 at [61].
[42] For example, *EnBW* [2012] 5 C.M.L.R. 4 at [77].
[43] *EnBW* [2012] 5 C.M.L.R. 4 at [119] and [122].
[44] *EnBW* [2012] 5 C.M.L.R. 4 at [128]. See *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297; [2002] Q.B. 507.
[45] *EnBW* [2012] 5 C.M.L.R. 4 at [146].
[46] [2005] OJ C325/7.
[47] *EnBW* [2012] 5 C.M.L.R. 4 at [137]–[142].

The GC also took a very strict view of the EC's internal documents and said that even these had to be looked at specifically in terms of access. In this context, the EC claimed that their disclosure would undermine its decision-making process, because the documents would reflect the opinions of officials.

The court took the view that the EC could not take such a general and abstract position, but had to evaluate "concretely and individually" whether disclosure should occur. Again the court emphasised that the position would be different after the EC's decision had been taken. The court also emphasised that parts of documents might be discloseable.[48]

Much of this reasoning is also included in the *CDC Hydrogen Peroxide* case, but the fuller treatment is in *EnBW*.

Clearly all this is extremely controversial because, in practice, those considering co-operation in cartel proceedings are now on full notice that there may be wide applications for access to documents after the cartel's decision and that the EC will not be able to produce blanket, "pure principle" defences in most cases, but will have to look at disclosure in detail. Equally, it appears that the EC may be forced to devote considerable resources to working out what can be disclosed or not, on a concrete and individual assessment. It is understood that the EC is appealing the *EnBW* decision.

It may also be interesting to note that in *Odile Jacob SAS* and *Agrofert Holding*,[49] a rather different approach was taken. The court ruled that the EC could refuse access to documents in merger proceedings and annulled the GC judgment to the opposite effect. There, the court appears to have balanced the interests of the EU Merger Control Regulation with the EU Transparency Regulation and held that third parties should not have access, because that would inhibit the EC's review process.

## Slovak/Czech cases

**Slovak Telekom** In March 2012, the GC upheld an EC decision, confirming the EC's powers to request information on the activities of Slovak Telekom *prior* to the accession of Slovakia to the European Union in its investigation.[50]

The EC initiated proceedings alleging the possible existence of a refusal to enter into agreements, margin squeezing and other exclusionary and discriminatory practices, such as mixed bundling and tying, with respect to wholesale access services to the local loop and other wholesale and retail broadband access services.[51]

Slovak Telekom brought proceedings seeking annulment of two sets of EC decisions requesting information pursuant to art.18(3) of Regulation 1/2003 and ordering it to provide information on its activities also during the period prior to Slovakia's accession. However, the EC stated that the decisions aimed at obtaining concrete factual information with a view to investigating, in full knowledge of the facts and in their correct economic context, the existence of anti-competitive practices and *not* to find an infringement of competition rules for the period before accession.[52]

Slovak Telekom argued that, since the EC was not competent to apply art.102 TFEU to conduct on the territory of Slovakia before its accession to the European Union, it was also not empowered to request information for that period under art.18(3) of Regulation 1/2003.[53]

The GC disagreed, reasoning that art.18(1) of Regulation 1/2003 gave to the EC broad powers of investigation and assessment, which were only subject to the requirement that the requested information be necessary for the detection of a possible infringement of competition rules from the point at which they became applicable. Moreover, it was for the EC to evaluate the necessity of that information. Thus a prohibition, as a matter of principle, to request or rely on information from a period during which EU competition law did not apply would risk depriving the article of its effectiveness.[54]

Slovak Telekom also argued that conduct *prior* to Slovak accession in May 2004 could not be relevant to an infringement of art.102 TFEU *after* that date, since there could be no nexus between the breach and the information requested. However, the GC considered that such information might be necessary to enable the EC: (1) to define the markets or find a dominant position; (2) to determine certain anti-competitive practices (such as margin squeezing) in their economic context, e.g. in the light of investment costs which need to depreciate over a period not necessarily coinciding with that of the infringement; and (3) to assess the gravity of the infringement so as to determine a proportionate fine.[55]

Slovak Telecom's other related pleas were also rejected. Slovak Telekom argued that the EC had infringed the "procedural fairness" principle in art.41(1) of the CFR. The GC disagreed, stating that, because of the duty of the EC to examine carefully and impartially all the relevant aspects of a case, it was required to prepare a decision on the basis of all the information capable of influencing it.[56]

[48] *EnBW* [2012] 5 C.M.L.R. 4 at [90]–[91] and [151]–[168].
[49] *European Commission v Editions Odile Jacob SAS* (C-404/10 P) [2012] 5 C.M.L.R. 8 and *European Commission v Agrofert Holding* (C-477/10) [2012] 5 C.M.L.R. 9; *CJEU Press Release 92/12*, June 28, 2012.
[50] *Slovak Telekom AS v European Commission* (Joined cases (T-458/09) and (T-171/10)) [2012] 4 C.M.L.R. 28. *CJEU Press Release 31/12*, March 22, 2012. With thanks to Svetlana Chobanova for her assistance.
[51] *Slovak Telekom AS* [2012] 4 C.M.L.R. 28 at [3].
[52] *Slovak Telekom AS* [2012] 4 C.M.L.R. 28 at [35].
[53] *Slovak Telekom AS* [2012] 4 C.M.L.R. 28 at [32].
[54] *Slovak Telekom AS* [2012] 4 C.M.L.R. 28 at [45].
[55] *Slovak Telekom AS* [2012] 4 C.M.L.R. 28 at [53]–[60].
[56] *Slovak Telekom AS* [2012] 4 C.M.L.R. 28 at [65]–[71].

The GC also rejected the argument that the EC investigation would be biased by such pre-accession information.[57]

**Toshiba/Czech Competition Authority** In February 2012, the CJEU ruled on a reference for a preliminary ruling concerning the possibility for the Czech Competition Authority ("CCA") to penalise the effects of a worldwide cartel operating in the Czech Republic before its accession to the European Union.[58]

The questions arose in the context of the international cartel on the market for gas insulated switchgear. It may be recalled that the case concerned a single and continuous infringement for which fines were imposed on European and Japanese undertakings in proceedings before both the EC and the CCA.[59]

Taking into account that the anti-competitive behaviour had taken place largely before the accession of the Czech Republic to the European Union (May 1, 2004) and the difficulties related to imposing a fine only for the last days of the conduct (from May 1 to 11, 2004), the EC started a procedure only for the activities of the cartel on the territory of the EEA, as it existed before the 2004 Enlargement and not concerning the Czech Republic. The EC then adopted a decision,[60] finding a termination date for the cartel of May 11, 2004 (last communication showing links between competitors).

The CCA applied Czech competition law and found an infringement concerning only the territory of the Czech Republic for the period up to March 3, 2004 (last working level meeting), using, under national law, different assessment criteria than those of the EC.[61] Moreover, it only penalised the cartel up to May 1, 2004.

On appeal the Regional Court in Brno annulled the CCA decision stating that the infringement was a single and continuous one, which in fact continued until May 11, 2004, was thus committed under "new law" (art.81 of the European Community Treaty, now art.101 TFEU). Since the EC had already initiated proceedings under that article for the cartel's worldwide scope, the CCA, first, had infringed the *ne bis in idem* principle and, secondly, had no longer the power to deal with the issue in accordance with art.11(6) of Regulation 1/2003.

However, the Supreme Administrative Court set aside this judgment, declaring that two distinct infringements should be recognised and that the date of accession was pivotal in establishing jurisdiction. Before that date, the cartel on Czech territory could only be prosecuted under national law. It referred the case back to the Regional Court, which then referred two questions to the CJEU[62]:

- Do art.101 TFEU and art.3(1) of Regulation 1/2003 apply (in proceedings initiated after May 1, 2004) to the whole period of operation of a cartel, which commenced in the Czech Republic before the latter acceded to the European Union and ended after that date?
- If the EC brings proceedings after May 1, 2004 for infringement of art.101 TFEU and makes a decision: (i) are national competition authorities ("NCAs") permanently prevented from exercising their competence to deal with that conduct, even for effects produced on national territory prior to accession; and (ii) does the principle *ne bis in idem* preclude in such circumstances the application of national competition law by the NCA?

The CJEU answered "no" to all three questions.

With regard to the first question, the CJEU pointed out that both art.101 TFEU and the provisions in Regulation 1/2003 governing the assessment by the competition authorities of agreements between undertakings constitute substantive provisions, which by virtue of the principle of legal certainty cannot normally be applied retroactively.[63]

Thus these provisions would be applicable to cartel behaviour with effects on Czech territory only for the period after its accession to the European Union and there was no conflict insofar as the CCA had confined itself to applying Czech competition law to the effects of the anti-competitive practices in the Czech Republic and prior to that date.[64]

As regards the second question, Toshiba and others argued that, pursuant to art.11(6) of Regulation 1/2003, after accession, the NCAs definitively lose their power to apply national competition law to conduct already subject to an EC decision.[65]

Here the CJEU confirmed that, on initiation of proceedings by the EC, the NCA can no longer apply either EU or parallel domestic competition law. However, the court also stated that, since competition rules at European and at national level view restrictions on competition from different angles and their areas of application do not coincide, the power of the NCAs is restored once the EC proceedings are concluded.[66]

This was confirmed, first, by the rejection of the EC proposal prior to the adoption of Regulation 1/2003 that, in cases where a cartel is capable of affecting trade between Member States, EU competition law should be

[57] *Slovak Telekom AS* [2012] 4 C.M.L.R. 28 at [73].
[58] *Toshiba Corp v Urad pro ochranu hospodarske souteze* (C-17/10) [2012] 4 C.M.L.R. 22; *CJEU Press Release 6/12*, February 14, 2012. With thanks to Roberto Grasso and Svetlana Chobanova for their assistance.
[59] See J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007: Part 2" [2008] I.C.C.L.R. 79, 83.
[60] Case COMP/38.899, *Gas Insulated Switchgear*, decision of January 24, 2007.
[61] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [20]–[27].
[62] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [29]–[34].
[63] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [50]–[52].
[64] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [49]–[50], [60] and [67].
[65] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [72].
[66] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [75]–[81].

solely applicable. Secondly, art.16(2) of Regulation 1/2003 provides that NCAs cannot take decisions which contradict a previous decision of the EC, showing that NCAs retained powers to act even if the EC has itself taken a decision.[67]

It followed that a NCA does not permanently and definitively lose its power to apply national competition law and may intervene after the termination of the EC proceedings, provided it does not contradict the latter's decision.[68]

Secondly, as to the *ne bis in idem* principle, the court noted that its application in competition law cases is subject to a threefold condition of: (1) identity of the facts; (2) unity of offender; and (3) unity of the legal interest protected. The court found that the first criterion was not fulfilled here: there was not identity of facts.[69]

This was so, in view of the fact that the EC decision referred specifically to the consequences of the cartel within the EEA to the exclusion of effects produced on Czech territory prior its Accession and the fines were calculated on the basis of turnover figures in the EEA during 2003. Accordingly, the scopes of the two decisions in terms of period and territory were not identical and the principle was not infringed.[70]

**Compass-Datenbank v Austria** In July 2012, the CJEU delivered its judgment in *Compass-Datenbank*, a preliminary reference from Austria.[71] The court stated that a public authority storing data that companies are obliged to report and permitting access to that data in return for a fee was not exercising an economic activity and was therefore not an undertaking within the meaning of art.102 TFEU.[72]

The judgment summarises the existing case law on the definition of an undertaking[73] (e.g. *Hofner*, *Poucet and Pistre*, *Aéroports de Paris*[74]).

## Cartel appeals

### *Industrial Bags*

The first judgments in relation to the *Industrial Bags* cartel decision were noted in 2011.[75] During the course of this reference period we have had two further batches of judgments: eight in November 2011[76] and a further three in March 2012. In most cases the applications were rejected although there were a few fine reductions.

The following are the main points of interest:

**Box 4**

**Cartel appeals**

- *Industrial Bags*
  - Appeals mainly dismissed.
  - *Stempher* fine annulled. Duration not proved and limitation applied.
  - Some small fine reductions (*Low & Bonar*, *UPM-Kymmene*, *FL Smidth*, *FLS Plast*)
  - *Low & Bonar*: Not shown that relevant subsidiary had known or should have known that it was joining a wider European cartel.
  - *FLSmidth* and *FLS Plast*: Issue as to whether mitigating circumstances for parent should be considered for fine; individualisation of sanctions v. "undertaking" concept tension.
  - *Kendrion*: Not allowed to raise excessive delay at Hearing (compare *Methacrylates-ICI*).
  - *RKW JE*: Application of 10% fine ceiling as regards 8 out of 25 companies not contrary to equal treatment (compare *Putters* comment last year).
- *Fasteners*: Appeals dismissed.

### Low & Bonar

In November 2011, in *Low & Bonar Plc*[77] the GC found that the EC had not shown that a subsidiary of Low & Bonar had known, or should have known that by participating in certain meetings, it was joining a wider European cartel.[78] As a result the GC reduced the fine by 25 per cent from €12.24 million to €9.18 million.

### Stempher

In November 2011, the GC annulled the EC's decision as regards Stempher.[79] The court found that the EC had not shown that Stempher continued the infringement after 1997.[80] The five-year limitation period rule therefore precluded a fine being imposed, the EC's decision being in November 2005.[81] Nor had the EC shown a legitimate interest in a finding of an earlier infringement despite the application of the limitation period.[82]

[67] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [83]–[85].
[68] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [85]–[86] and [91].
[69] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [97]–[98].
[70] *Toshiba Corp* [2012] 4 C.M.L.R. 22 at [101]–[102].
[71] *Compass-Datenbank v Austria* (C-138/11) [2012] 5 C.M.L.R. 13. With thanks to Cormac O'Daly for his assistance.
[72] *Compass-Datenbank* [2012] 5 C.M.L.R. 13 at [40]–[42].
[73] *Hofner v Macrotron GmbH* (C-41/90) [1991] ECR I-1979; [1993] 4 C.M.L.R. 306; *Poucet and Pistre v AGF* (C-159/91 and C-160/91) [1993] E.C.R. I-637; and *Aéroports de Paris v Commission* (C-82/01 P) [2002] E.C.R. I-9297; [2003] 4 C.M.L.R. 12.
[74] *Compass-Datenbank* [2012] 5 C.M.L.R. 13 at [35]–[39].
[75] See J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009–2010 (Part 1) [2010] I.C.C.L.R. 67, 94.
[76] See *CJEU Press Release 121/11*, November 16, 2011.
[77] *Low & Bonar Plc v European Commission* (T-59/06) [2012] 4 C.M.L.R. 11.
[78] *Low & Bonar Plc* [2012] 4 C.M.L.R. 11 at [59]–[71].
[79] *Stempher v Commission* (T-68/06), judgment of November 16, 2011.
[80] *Stempher*, judgment of November 16, 2011 at [28]–[42].
[81] *Stempher*, judgment of November 16, 2011 at [42].
[82] *Stempher*, judgment of November 16, 2011 at [44].

## UPM-Kymmene

In March 2012, the GC reduced the fine on UPM-Kymmene from €56.55 million to €50.7 million. The GC found that the EC had been wrong to find that a subsidiary of UPM-Kymmene participated in the main cartel between 1994 and 1997 and that it had participated in the "block bags" sub-group.[83] The court treated the subsidiary's attendance at a 1994 meeting as an "isolated infringement".[84] As a result the duration of the infringement was reduced and the fine was reduced by €5.85 million.

## FLSmidth

In March 2012, the GC ruled on two cases in relation to the FLSmidth Group. One appeal related to the ultimate parent of this group, FLSmidth[85] ("FLS") and the other to an intermediate holding company in the group FLS Plast[86] ("FLSP").

The essential background was that FLSP acquired 60 per cent of the shares in a company called Silvallac from Cellulose de Pin in the Saint-Gobain Group. Then, the following year, FLSP acquired the remaining shares. Some seven years later FLSP sold Silvallac to a company in the Trioplast Group. Two years later British Polythene Industries went to the EC as an immunity applicant and then, in 2002 the former Silvallac, now called Trioplast Wittenheim ("TW"), applied for leniency.

In 2005 the EC took a decision imposing a fine on TW of €17.85 million, for which FLS and FLSP were held jointly and severally liable for the amount of €15.30 million and the parent in the Trioplast Group, Trioplast Industrier ("TI") was held jointly and severally liable for the amount of €7.73 million.

TW's liability was upheld[87] and TI's reduced in the first GC judgments in this case. Notably, TI's liability was reduced on the basis that 1996 could not be the reference year for a fine, since TI had only bought Silvallac in 1999. TI's liability was then defined as €2.73 million.[88]

## *FLS*

The main points of interest of the *FLSmidth* case are as follows:

First, the GC upheld FLS's argument as regards the first year of the infringement, when FLS Plast only had 60 per cent of the shares of Silvallac. The court found that it had not been established that FLS had the power to impose actual control on the board of Silvallac and noted, in particular, that the day-to-day management of the subsidiary was still held by a representative of the Saint-Gobain Group.[89] However, for the remaining seven-year period, the GC considered FLS liable, since it formed a single economic entity with Silvallac, even if it was not aware of the anti-competitive conduct of its subsidiary.[90]

Secondly, FLS argued that the fine imposed on it should be in proportion to the period when it owned Silvallac—in other words, at most for 8 out of the 20 years of the infringement found. The GC rejected this, taking the view that the amount for which FLS had been held liable was a "necessary result of the calculation method employed by the Commission in this case"; and that the penalty imposed "does not necessarily correspond to the subsidiary's fine adjusted *pro rata* to the period of control".[91]

Thirdly, FLS argued that, when considering its position, the EC should have acknowledged mitigating circumstances applying to FLS, e.g. that its lack of any knowledge of a pre-existing infringement should be a mitigating circumstance and, at the most, FLS could be criticised for not having brought the infringement to an end. Again the GC rejected this, on the basis that FLS's liability is based on the fact that, together with its subsidiary, it formed a single undertaking.[92]

Fourthly, FLS argued that the EC had wrongly denied it the benefit of TW's application for leniency, which had resulted in a 30 per cent reduction for co-operation. FLS argued that, in giving the benefit of that co-operation to TI (the parent of the Trioplast Group, which bought Silvallac from FLSP) the EC had been inconsistent and discriminatory, since FLS had also been a single undertaking with Silvallac/TW. In other words, FLS argued that it was unfair to make it liable on the basis of its subsidiary, but then to deny FLS the benefit of its subsidiary's activity in terms of fine reduction.[93]

The EC argued that a distinction was justified since, at the moment of the application to the EC for leniency, Silvallac/TW was a single undertaking with TI.

Interestingly the GC disagreed, taking the view that the EC had decided to take an individualised approach to the fines on TW, TI and FLS. Yet it was not apparent from the contested decision or the documents before the court that TI had provided any information justifying a reduction of 30 per cent. To that extent TI and FLS were in the same situation and there was discrimination against FLS. However, the GC then applied the principle that a person may not rely in support of his claim on an unlawful act committed in favour of a third party.[94]

[83] *Stempher*, judgment of November 16, 2011 at [49].
[84] *Stempher*, judgment of November 16, 2011 at [70]–[71].
[85] *FLSmidth & Co A/S v European Commission* (T-65/06) [2012] 4 C.M.L.R. 26.
[86] *FLS Plast A/S v European Commission* (T-64/06) [2012] 4 C.M.L.R. 25.
[87] *Trioplast Wittenheim v Commission* (T-26/06), judgment of September 13, 2010.
[88] *Trioplast Industrier v Commission* (T-40/06), judgment of September 13, 2010 at [95] and [173].
[89] *FLSmidth* [2012] 4 C.M.L.R. 26 at [39].
[90] *FLSmidth* [2012] 4 C.M.L.R. 26 at [30] and [36].
[91] *FLSmidth* [2012] 4 C.M.L.R. 26 at [44].
[92] *FLSmidth* [2012] 4 C.M.L.R. 26 at [55].
[93] *FLSmidth* [2012] 4 C.M.L.R. 26 at [82].
[94] *FLSmidth* [2012] 4 C.M.L.R. 26 at [91]–[96].

This is surprising because TI's leniency reduction had been upheld already by the GC in its own appeal and the adjustment of fines is clearly possible in the event of unequal treatment. FLS has appealed.

Overall therefore the GC reduced the fine on FLS (and FLSP) from €15.30 million to €14.45 million, jointly and severally with TW.

## *FLS Plast*

The main points of interest in the *FLS Plast* case[95] are as follows:

First, FLSP argued that the aggregate amounts of fine imposed on the successive parents of TW, namely, FLSP and TI, should not exceed TW's fine. This the court rejected on the basis that it was not unlawful for a parent company, or in this case successive parent companies, to be liable for more than the fine imposed on a subsidiary, insofar as penalties were specific to the offender and the offence and generally that was how the EC's Fining Guidelines work.[96]

Secondly, as in the *FLS Plast* case, the court found that FLSP was not liable for the first year of the infringement, since FLSP had only a 60 per cent stake in Silvallac and, in practice, an employee of Saint-Gobain, which owned 40 per cent of Silvallac, had been managing director for that period.[97] However, otherwise the GC found FLSP liable for the 1992 to 1998 period.

Thirdly, the court rejected the approach put forward by FLSP (and FLS in its case) that, in practice, they were liable for 87.5 per cent of TW's fine, whereas they had only controlled TW/Silvallac for seven years—in other words, only for 35 per cent of the overall duration. Both FLS and FLSP argued that this was a disproportionate and unlawful result.[98]

Fourthly, the court took the view that the EC had set individualised starting amounts on TW, TI and FLSP/FLS, although in practice it was the same amount applied to TW/Silvallac as well as to its parents. The court then sees some individualisation of the sanction on each parent through the different 10 per cent increases based on duration. However, the court then went on to hold that the EC had not applied the individualised approach "coherently and consistently" as regards mitigating circumstances. Notably, the EC had not looked at FLSP's situation specifically, as opposed to whether TW/Silvallac was entitled to mitigating circumstances. However, the court found that this was ineffective here, because FLSP had not specifically argued grounds for mitigation for itself.[99]

Fifthly, as in the case of *FLSmidth*, the court then denied FLSP the 30 per cent reduction which had been granted to TW, but found that there had been discrimination between FLSP and TI. In other words, again the court found that, while TW had co-operated with the EC earning a 30 per cent leniency reduction, neither TI nor FLSP had done so and therefore in the court's view neither should have received a 30 per cent reduction. Since TI had obtained such a reduction there was a discrimination between TI and FLSP, but the court relied on the principle that a person may not rely on an unlawful act in favour of a third party.[100]

All this is again indicative of the tensions between the undertaking concept and the individualisation of sanctions. FLSP has appealed.

Overall the court, as in the *FLSmidth* case, reduced the amount for which FLSP was jointly and severally liable from €15.30 million to €14.45 million.

## Kendrion

Kendrion[101] was the parent of Fardem Packaging ("FP"). It was fined €34 million and challenged that decision, mainly on the basis that FP was only fined €2.2 million. FP had been sold out of its group to its management before the decision imposing the fine, so the €60 million fine which it would have had was reduced by the 10 per cent of turnover ceiling rule. Despite the marked variation between Kendrion and FP, this was upheld as lawful.[102]

The main points of interest are as follows:

First, at the hearing Kendrion claimed that the duration of the procedure before the GC was excessive. (It had been five years between its application to the court and the hearing.) This was rejected on the basis that the jurisdiction of the GC was to consider the EC's decision and its legality could only be considered in light of the facts and circumstances before the EC, when the decision was adopted.[103]

This is noted because in the *Methacrylates ICI* case in 2012, the GC took the opposite approach and decided to rule on excessive delay. (See below.)

Secondly, the GC noted that if a company had been bought as an investment for resale that was not a ground for arguing that it was not under the investor's control. On the contrary, the parent investor would have an interest to involve itself in the affairs of its subsidiary, in order to increase its value.[104]

[95] *FLS Plast* [2012] 4 C.M.L.R. 25.
[96] *FLS Plast* [2012] 4 C.M.L.R. 25 at [99].
[97] *FLS Plast* [2012] 4 C.M.L.R. 25 at [36]–[46].
[98] *FLSmidth* [2012] 4 C.M.L.R. 26 at [181].
[99] *FLSmidth* [2012] 4 C.M.L.R. 26 at [103]–[105].
[100] *FLSmidth* [2012] 4 C.M.L.R. 26 at [159]–[176].
[101] *Kendrion v European Commission* (T-54/06), judgment of November 16, 2011.
[102] *Kendrion*, judgment of November 16, 2011 at [28], [87] and [93].
[103] *Kendrion*, judgment of November 16, 2011 at [18], relying on *CD-Contact Data GmbH v Commission* (T-18/03) [2009] E.C.R. II-1021, [2009] 5 C.M.L.R. 5 at [131]. FP also argued this in its appeal, where it was rejected in similar terms: see *Fardem Packaging* (T-51/06), judgment of November 16, 2011 at [19] and [33].
[104] *Kendrion*, judgment of November 16, 2011 at [66].

Thirdly, Kendrion also sought to rely on certain statements sworn before a notary. The EC argued they were inadmissible, because they had not been presented in the procedure before the EC. The GC disagreed, relying on *Knauf Gips*.[105]

Fourthly, it may also be of interest, because it is a point coming up several times in the cases recently, that on the court's Rules of Procedure, the GC rejected pleas by Kendrion in its application, which cross-referred to the pleading of another company in the same group (FP), with then here an attempted rectification by including the relevant pleas in its reply.[106] However, the court also accepted another cross-reference, where the substance of the arguments referred to had been set out in the application.[107]

Fifthly, there are various arguments suggesting that Kendrion, as parent, should not have been held liable for its subsidiary's activities, but these were rejected in standard and now classic fashion. It may also be of interest to note that, as in the *Dutch Bitumen* cases, the court sent a letter to the applicant before the hearing, asking it to explain its position as to the impact of the *Akzo Nobel* judgment[108] on its plea about the parental liability presumption.

## RKW and JE

A point of particular interest in the *RKW/JE Gesellschaft für industrielle Beteiligungen* ("JE") appeal[109] is that these companies argued that the systematic application of the 10 per cent of turnover ceiling rule was contrary to the principle of equal treatment and discriminatory. It may be recalled that a similar argument was raised by the GC itself in 2011 in *Putters International*.[110]

Here the GC rejected the claim, noting that: (1) the rule had only been applied to approximately one-third of those fined (8 out of 25 companies); and (2) in fact a company to which the rule was applied was more affected by the fine than a company to which the rule was not applied (such as RKW and JE), even if the amount of the fine on the former was lower than on the latter. Moreover, the rule was objectively justified by art.23(2) of Regulation 1/2003.[111]

## Other

The court also rejected appeals by: (1) *Fardem Packaging*[112]; (2) *Groupe Gascogne*[113]; (3) *Sachsa Verpackung*[114]; (4) *Armando Alvarez*[115] and *Plasticos Españoles* (*ASPLA*).[116]

**Box 5**

**Cartel appeals (cont'd)**

- *Chloroprene Rubber*

— *EI du Pont de Nemours* and *Dow*: Full function JV held to be part of two undertakings, so each could be fined on that basis.

- *Methacrylates*

— *Quinn Barlo*: Small fine reduction, because full duration of infringement not shown. Also found not to have been aware that it was participating in a wider infringement involving other products.

— *ICI*: Appeal dismissed, but interesting points.

— Should EC have authorised the successor to the business concerned, Lucite, to tell the former owner, ICI, of EC investigation? "Unfair interference with race for leniency"? GC said no. EC had not instructed Lucite to do anything; just pointed out that combined leniency applications are not possible.

— ICI allowed to raise excessive delay at hearing. GC applied *Baustahlgewerbe* by analogy, but no reduction. Claim considered not "significant", because only for a reduction in fine; 4 years and 5 months was considerable delay, but justified by "connexity" of several cases which had to be examined in parallel.

- *Copper Fittings*

— *Legris Industries SA*, *Comap* and *Kaimer* further appeals dismissed, mainly on admissibility (new claims not raised before GC or claims going to the evaluation of facts).

- *Spanish Raw Tobacco*

— Alliance One: Including EC appeal.

— CJEU upheld GC ruling that intermediate parent not liable if EC applied "dual basis test" of 100% shareholding *and* evidence of control to some defendants, but not TCLT, an intermediate holding in the Alliance One group.

## Chloroprene Rubber: DuPont and Dow

The GC upheld the EC's decision that DuPont and Dow Chemical, parents of a full function JV called DDE, were liable for the cartel activities of DDE.[117] The court found

[105] *Kendrion*, judgment of November 16, 2011 at [71]; *Knauf Gips KG v Commission* (C-407/08 P) [2010] 5 C.M.L.R. 12.
[106] *Kendrion*, judgment of November 16, 2011 at [124].
[107] *Kendrion*, judgment of November 16, 2011 at [115]–[116], [125]–[128] and [181].
[108] *Akzo Nobel NV v Commission* (C-97/08 P) [2009] E.C.R. I-8237; [2009] 5 C.M.L.R. 23 at [15].
[109] *RKW/JE Gesellschaft für industrielle Beteiligungen* (T-55/06 and T-66/06), judgment of November 16, 2011.
[110] *Putters International v Commission* (T-211/08), judgment of June 16, 2011 at [75]; see J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011: Part 1" [2012] I.C.C.L.R. 67, 94.
[111] *Putters International v Commission* at [16]–[17] and [22]–[24].
[112] *Fardem Packaging v Commission* (T-51/06), judgment of November 16, 2011.
[113] *Groupe Gascogne v Commission* (T-72/06), judgment of November 16, 2011.
[114] *Sachsa Verpackung GmbH v European Commission* (T-79/06), judgment of November 16, 2011.
[115] *Armando Alvarez v European Commission* (T-78/06), judgment of November 16, 2011.
[116] *ASPLA v European Commission* (T-76/06), judgment of November 16, 2011.
[117] *Dow Chemical Co v European Commission* (T-77/08) [2012] 4 C.M.L.R. 19; and *EI du Pont de Nemours v European Commission* (T-76/08) [2012] 4 C.M.L.R. 18.

that DDE was an undertaking with its parents, because subject to their decisive influence, which had been exercised.[118] This was applying *Avebe*.[119]

The court's position is controversial mainly because it is argued that if the joint venture company is a full function joint venture it is, by definition, an autonomous economic entity. On that basis how can it be part of two other "undertakings"?

The GC also rejected an appeal by the Japanese company *Denki Kagaku Kogyo* and its German subsidiary.[120]

## *Methacrylates*

In the reference period there have also been two judgments concerning this cartel: a judgment concerning *Quinn Barlo* in November 2011 and a judgment concerning *ICI* in June 2012.

### Quinn Barlo

In this judgment the GC reduced the fine imposed on Quinn Barlo from €9 million to €8.25 million. The EC found that the evidence which the EC put forward against the Quinn companies was insufficient to establish that they had infringed for the entire period claimed. The court annulled the decision as regards the period from November 1998 to February 2000 and held that the duration increase should be reduced from 20 to 10 per cent as a result.

Otherwise the court found that the EC had not established that the Quinn companies had participated in respect of the infringement as regards PMMA solid sheet. It may be recalled that this was a cartel with three different elements: (1) PMMA moulding compounds; (2) PMMA sanitary ware; and (3) PMMA solid sheet.

The GC found that the Quinn company had not been shown to be aware of the full extent of the infringement when participating in a cartel on PMMA sheet, i.e. that the cartel also concerned the other two PMMA products. So a finding of its participation in a single infringement comprising the three products was annulled.[121] However, this had no consequence on the fine, since the EC had already reduced the starting amount of the fine for Quinn by 25 per cent to take into account the issue.

### ICI

In June 2012, the GC ruled on ICI's appeal against the EC's decision, whereby the EC imposed a fine of €91.4 million on ICI.[122] The court dismissed ICI's appeal, but the case and the judgment raise a number of interesting points:

First, ICI was held liable on the basis that its acrylic glass business unit had been involved in the cartel until November 1999, when it transferred the business to Lucite.

It appears that during the administrative procedure Lucite asked the EC if it was acceptable for it to contact ICI and give it access to its staff and files for its defence. The EC did not say "no", but noted that a combined leniency application of two companies was not possible under the Leniency Notice. As a result Lucite did not contact ICI, submitted its own leniency application and, when ICI later applied for leniency, the EC rejected it as offering no significant added value.

ICI complained that the EC had "interfered with the race for leniency unfairly".[123] The GC rejected this, on review of the EC's correspondence with Lucite, concluding that, even if the EC had given the impression that it did not want Lucite to contact ICI, it had not instructed Lucite not to do so. Nor had the EC infringed the principles of sound administration and equal treatment.[124]

Secondly, in the circumstances of this change of ownership of the acrylic glass business concerned, ICI argued that the basic amount attributed to both ICI and Lucite should be apportioned, because it related to a "single gravity" assessment and, if not, there would be double counting of the anti-competitive effect.[125]

The GC rejected this, holding that the EC's assessment of gravity was not just linked to impact on competition, but related more to the nature of the infringement and that *both* ICI and Lucite had committed the infringement.

Thirdly, at the hearing in the case, ICI argued that the whole proceeding had been excessive in duration, notably insofar as the period before the GC between the end of the written procedure and the decision to open the oral procedure had been too long.[126]

Interestingly, the GC accepted the plea as admissible and then assessed its own performance, concluding that, in the circumstances, the duration of the proceedings was not excessive.

The GC accepted the *Baustahlgewerbe* approach[127] that, for reasons of procedural economy and in order to ensure an immediate and effective remedy regarding a procedural

[118] See, e.g. *Dow* [2012] 4 C.M.L.R. 19 at [70]–[89].
[119] *Avebe v Commission* (T-314/01) [2006] E.C.R. II-3085; [2007] 4 C.M.L.R. 1.
[120] *Denki Kagaku Kogyo Kabushiki Kaisha v European Commission* (T-83/08) [2012] 4 C.M.L.R. 20.
[121] *Quinn Barlo Ltd v European Commission* (T-208/06) [2012] 4 C.M.L.R. 13 at [124]–[152]; *CJEU Press Release 130/11*, November 30, 2011.
[122] *ICI Ltd v European Commission* (T-214/06) [2012] 5 C.M.L.R. 10.
[123] *ICI* [2012] 5 C.M.L.R. 10 at [219]–[220].
[124] *ICI* [2012] 5 C.M.L.R. 10 at [221]–[250].
[125] *ICI* [2012] 5 C.M.L.R. 10 at [103]–[137].
[126] *ICI* [2012] 5 C.M.L.R. 10 at [278]–[280].
[127] *Baustahlgewerbe GmbH v Commission* (C-185/95 P) [1998] E.C.R. I-8417; [1999] 4 C.M.L.R. 1203.

irregularity, requisite reasonable satisfaction could be granted by setting aside and varying the judgment of the GC. The GC applied that approach by analogy.[128]

In its specific assessment, the court then found that the matter was not shown to be of significant importance to ICI because it was not seeking annulment, just a reduction in fine. The court then accepted that the time between the close of the written procedure and the opening of the oral procedure had been "considerable". It was four years and five months!

However, the GC then found that period of apparent delay to be explained by the circumstances and complexity of the case. Here the fact that there were five actions in the case and there was "connexity" of the subject-matter of those actions, requiring their examination in parallel.[129]

This is clearly controversial. On the one hand, it is laudable that, in recognition of the fundamental issues, the GC is seeking to address them by making such an assessment, rather than just leaving the applicant to appeal to the CJEU. On the other hand, it is inescapable that it is ruling on its own acts, allowing at least the perception that its views are biased. On that basis, even if the claim is not raised before the GC, it must be heard on appeal to the CJEU, if raised there. However, the advantage of this approach is that the applicant can see what the court's position is (and whether to appeal further).

Many will also disagree with the actual assessment that judicial proceedings lasting overall five years and nine months can be considered reasonable (even if there are five actions on the same cartel). Also no company can be expected to agree that having a claim for reduction of a big fine hanging over it is not a matter of significance!

## *Spanish Raw Tobacco*

### Cetarsa

In July 2012, the CJEU ruled on Cetarsa's further appeal against the GC's judgment, upholding most of the fine which the EC had imposed on it in the *Spanish Raw Tobacco* cartel case.[130] The CJEU dismissed the appeal. These are the main points of interest:

First, the CJEU rejected Cetarsa's claim that it was unfair for it not to benefit from the 40 per cent reduction in fine granted to it by the EC, because the 10 per cent of turnover ceiling, which came later in the fine assessment rendered that reduction without value. The court stated that, in fact, the 10 per cent unit rule had led to a greater reduction in fine for Cetarsa than for others and that Cetarsa's complaint was just the consequence of the way the 10 per cent limit rule applied to the *final* amount of the fine. The argument which Cetarsa raised had also been rejected already on the case law.

Secondly, Cetarsa claimed that the GC had given insufficient reasons for rejecting its claims, by not *expressly* dealing with certain points which it had raised. The CJEU recalled that the GC did not have to deal with every point raised by the parties to litigation. Its reasoning could be therefore "implicit", on condition that it allowed those concerned to know the reasons on which the court relied and for the CJEU to have sufficient elements to exercise its review power.[131]

### Alliance One

In July 2012, the CJEU ruled on an appeal by Alliance One and Standard Commercial Tobacco ("SCTC") against the GC's ruling in the *Spanish Raw Tobacco* case, upholding their liability and fine in that case (Alliance One was formerly Standard Commercial Corp).

At the same time, the court ruled on the cross-appeal by the Commission against the GC's ruling, where the GC annulled the EC's decision that Trans-Continental Leaf Tobacco ("TCLT"), an intermediate holding in the Alliance One Group was *not* liable for the actions of the subsidiary involved in the infringement.[132]

These are the main points of interest:

First, the main issue in the case before the GC was that the EC had generally applied a "dual basis" test to establish parental liability for the subsidiary's infringement. In other words, in this case the EC had relied on a 100 per cent shareholding by the parent in the subsidiary *and* factual evidence showing that decisive influence was actually exercised, *not* just the shareholding, treating other facts as merely supplementary information.

On that basis TCLT had successfully argued an infringement of the principle of equal treatment and discrimination: TCLT had been found liable only on the basis of its 100 per cent shareholding, whereas other parent companies had not been held liable in such circumstances, because the EC stated it did not have the additional factual evidence of the exercise of decisive influence.

The CJEU upheld the GC's ruling, denying the EC's appeal. The EC had imposed a higher standard of proof requirement on itself in the case and had to apply it equally to all the parent companies in the case.[133]

Secondly, the EC also argued that the GC had not taken into account the principle that no one can rely on an unlawful act committed in favour of a third party and there was a breach by the GC of the duty to state reasons

[128] *Baustahlgewerbe* [1998] E.C.R. I-8417; [1999] 4 C.M.L.R. 1203 at [288]–[296].
[129] *Baustahlgewerbe* [1998] E.C.R. I-8417; [1999] 4 C.M.L.R. 1203 at [314].
[130] *Cetarsa v Commission* (C-181/11 P), judgment of July 12, 2012.
[131] *Cetarsa*, judgment of July 12, 2012 at [71]–[72] (and also [101] where similar reasoning is set out as regards a similar claim by the EC).
[132] *Alliance One International Inc v European Commission* (C-628/10 P and C-14/11 P) [2012] 5 C.M.L.R. 14. With thanks to Stéphanie Strievi for her assistance.
[133] *Alliance One* [2012] 5 C.M.L.R. 14 at [49]–[50] and [53]–[63].

on this point. The CJEU disagreed, noting that the GC had taken note of the EC's arguments, but "implicitly rejected" them (as it could).[134]

Thirdly, the EC also argued that it should have been entitled to raise any element necessary for its defence, if an argument was raised for the first time before the GC. In other words, that the GC should have allowed the EC to raise other factual circumstances, showing TCLT's influence over its subsidiary.

The CJEU disagreed and upheld the GC's ruling against that, referring to the principles set out in *Elf Aquitaine SA*,[135] that a failure to state reasons in an EC decision cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the EU Courts.[136]

Fourthly, in the *Alliance One* and *SCTC* appeals, the CJEU confirmed that the exercise of joint control by two parent companies of their subsidiary does not, in principle, preclude a finding that there was a single economic unit comprising *one* of these companies and the subsidiary concerned.[137]

**Box 6**

**Cartel appeals (cont'd)**

- *Natural Gas - Eon and GdF*
  - — EC decision partly upheld (scope for competition in Germany not shown for part of the alleged infringement and finding of infringement in France 2004/2005 not shown). Fine reduced from €553 m each to €320m each.
  - — GC decided in its unlimited jurisdiction NOT to reduce as much as applying the EC's approach would have required (i.e. to €267 million each).
  - — So fine reduction was €53 million less than if done the EC's way.
- — *Flat Glass - Guardian*
  - — GC rejected argument that fine discriminatory because decision only focused on independent customers and did not take into account captive sales.
  - — GC upheld EC view that a previous infringement 15 years earlier did not have to be taken into account for recidivism.
- — *Dutch Bitumen*
  - — A bilateral (vertical/horizontal — suppliers/big builders) cartel.
  - — Most appeals dismissed; many with standard rebuttals of challenges to parental liability.
  - — *Shell*: Fine reduction because not shown to be instigator or leader.
  - — Questions of use of documents not put before EC; GC looked at them insofar as relevant to exercise of its unlimited jurisdiction, but warned against abuse.
  - — *Ballast*: Part of liability of intermediate parent annulled as based on participation as parent of infringing subsidiary and this was not highlighted in the SO.

**Box 6**

**Cartel appeals (cont'd)**

- — *KWS*: Important as regards dawn raids and access.
- — Question as to whether a company can ask EC to wait 47 minutes for its lawyers to arrive before giving access? (No).
- — Also can a company deny access to an office thought not relevant to investigation? (No).
- — EC treated this as an aggravating circumstance to the main infringement, not standalone procedural infringement. Was that lawful? (Yes; and the fine increase, €1.71 million, was considered proportionate.)
- — Note: The GC raised the ECHR and CFR and right to fair process.
- — *Nynas* and *Total*: Delegation no answer to parental liability issue.

## Natural Gas: Eon and GdF

In June 2012 the GC ruled on the EC's decision imposing fines of €553 million on E.on and GdF for sharing the French and German markets for natural gas.[138] It is an interesting judgment for several reasons, starting with the simple point that the fines were reduced to €320 million each.

It may be recalled that this case relates to the construction of a pipeline to bring Russian gas across Germany to France and also to supply gas to Germany. This was a joint venture which was pre-liberalisation, with GdF looking for transit across Germany and E.on looking to increase the efficiency of its pipeline and spread the risk and construction costs.

However, as liberalisation occurred, it became possible, at least in principle, for E.on to sell in France and GdF to sell in Germany. The EC found that there had been an agreement between the two companies not to sell into each other's respective markets and there was much discussion both about whether this was correct and, if so, from when.

The GC confirmed the main points of the EC's decision, but found that the EC was wrong as regards the duration of the infringement:

First, the GC found that the EC had not established that there was scope for potential competition on the German market between 1980 and 1998, which could have been affected by the alleged anti-competitive agreement between the two companies. The court found that the EC had viewed potential competition in an abstract way and that potential competition was not realistic. This essentially related to the fact that there were a number of local monopolies, which had been accepted under German competition law and which made potential competition unlikely.

[134] *Alliance One* [2012] 5 C.M.L.R. 14 at [36]–[37] and [64]–[65].
[135] *Elf Aquitaine SA v European Commission* (C-521/09 P), judgment of September 29, 2011.
[136] *Alliance One* [2012] 5 C.M.L.R. 14 at [74]–[79].
[137] *Alliance One* [2012] 5 C.M.L.R. 14 at [101]–[104].
[138] See *E.ON Ruhrgas AG v European Commission* (T-360/09) [2012] 5 C.M.L.R. 16; *CJEU Press Release 93/12*, June 29, 2012. With thanks to Roberto Grasso for his assistance.

However, this did not affect the fine, since the EC had not taken the period into account for fining purposes.

Secondly, the GC found that the EC had not introduced any evidence to support the conclusion that the infringement on the French market continued after the agreement of August 2004, where the parties had said that they regarded the previous market-sharing arrangement as null and void retroactively.[139] So the GC annulled the EC's decision as regards the existence of the infringement in France from August 2004 to September 2005.

Thirdly, in an interesting ruling, the court decided not to reduce the fine to €267 million each but to only €320 million each. In considering the reduction that it should make to the gravity of the infringement given its findings, the court noted that, if it followed the logic which the EC had applied to fining, it would arrive at fines of €267 million each.

However, the court noted that it is not bound by the EC's calculations or its Fining Guidelines when it adjudicates in the exercise of its unlimited jurisdiction, but must make its own appraisal, taking account of all the circumstances of the case.

Applying the *BASF/UCB* case,[140] the court then found that application of the method followed by the EC in setting the fine did *not* take into account all the relevant circumstances.

Further that a reduction in the companies' fines on that basis would be "greatly disproportionate" to the relative importance of the error which had been found to exist. Although the EC's error related only to the French market and only to twelve and a half months of the five years and one month initially established by the EC for the infringement committed on that market, the application of the EC's method would result in a reduction in the fine of more than 50 per cent.[141]

The court also thought that applying the EC's method would underestimate the importance of the German infringement in comparison to that on the French market.

The net result was that the GC reduced the EC's fine by €53 million less than would have occurred through the EC's method.

## *Flat Glass: Guardian*

In September 2012 the GC also ruled on an appeal by Guardian against the fine of €148 million which was imposed on Guardian Industries and Guardian Europe, jointly and severally, in November 2007.[142]

It may be recalled that this case related to flat glass. In its decision, the EC had found a single and continuous infringement which covered the EEA and concerned the fixing of price increases and other commercial conditions in sales to independent customers of four types of flat glass products. Of the four companies concerned only Guardian appealed.

The main points of interest are as follows:

First, Guardian argued that the infringement, which had been found to last from April 2004 until February 2005, was not proven for that entire duration. It contested the evidence put forward concerning three elements on which the EC relied, while accepting that there had been a cartel meeting in February 2005, just before the EC's dawn raids in the case. There was intensive debate about the evidence and the GC ultimately decided that the EC had proved its case and there were anti-competitive meetings and contacts during this period.[143]

Secondly, Guardian argued that the EC had discriminated against it, insofar as the EC had focused only on the sales to independent customers, while ignoring the value of captive sales, internal to their competitors' groups. Guardian noted also the case law under which disregarding captive sales in the calculation of fines has been held to be discriminatory.[144] The point was that, if the captive sales were included, the total size of the market would be some 37 per cent larger and its own share of that market would have been less, resulting in a lower fine. Guardian therefore argued that there should be a reduction in the fine imposed on it, proportionate to the amount of the market which had been excluded in this way.[145]

The GC disagreed, holding that the EC could not be criticised on the ground that it had excluded the internal sales of vertically integrated members of the cartel from the calculation of the fine. Nor could the EC be criticised on the ground that it did not state the reasons for excluding those sales from the calculation of the fine.

Further, without dealing with case law on captive sales, the court noted that it had not been established that the vertically integrated members of the cartel obtained an indirect advantage from the price increase agreed on, or that the price increase in the upstream market resulted in an anti-competitive advantage in the downstream market for processed flat glass.[146]

Thirdly, the GC found that there was no discrimination insofar as different situations were being treated differently: since the EC had taken the view that the anti-competitive arrangements related only to the price of flat glass invoiced to independent customers, the exclusion of internal sales from the calculation of the fine in the case of vertically integrated members of the cartel meant that it treated objectively different situations differently.[147]

[139] *E.ON* [2012] 5 C.M.L.R. 16 at [241]–[250].
[140] *BASF AG and UCB v Commission* (T-101/05 and T-111/05) [2007] E.C.R. II-4949; [2008] 4 C.M.L.R. 13.
[141] *BASF* [2007] E.C.R. II-4949; [2008] 4 C.M.L.R. 13 at [303].
[142] *Guardian Industries Corp v European Commission* (T-82/08), judgment of September 27, 2012.
[143] *Guardian*, judgment of September 27, 2012 at [30]–[80].
[144] e.g. *Logstor Ror (Deutschland) GmbH v Commission of the European Communities* (T-16/99) [2002] E.C.R. II-1633.
[145] *Guardian*, judgment of September 27, 2012 at [98]–[100].
[146] *Guardian*, judgment of September 27, 2012 at [104]–[105].
[147] *Guardian*, judgment of September 27, 2012 at [106].

Fourthly, Guardian claimed discrimination insofar as its competitors' fines had not been increased for deterrence, even though they were larger than Guardian; and/or for recidivism even though Saint-Gobain and Glaverbel had been involved in previous infringements.

The court noted that the EC had increased the fine on Saint-Gobain for deterrence, but not increased the fine on either Glaverbel or Pilkington. However, the court noted the EC's discretion in setting fines and that the final amounts of fines do not have to reflect a distinction between defendants in terms of their overall turnover or relevant turnover.[148]

As regards the recidivism claim, interestingly the court noted that the principle of proportionality required that the time which has elapsed between the infringement and a previous breach of the competition rules should be taken into account in assessing an undertaking's tendency to infringe.

Here the previous infringements of the companies concerned were more than 15 years before the EC finding as to when this infringement started in April 2004 (although it appears there was some question as to whether it might have started earlier). The GC therefore found that the EC was entitled to take the view that the period between the two infringements was sufficiently long to preclude an increase on the grounds of recidivism.[149]

## *Dutch Bitumen*

In September 2012, the GC ruled on a number of appeals against the EC's 2006 decision in the *Dutch Bitumen* cartel case. The cartel consisted of agreements on prices and on rebates for bitumen, a by-product of fuel production mainly used to make asphalt, between eight suppliers and five purchasers between 1994 and 2002.

Most of the appeals were rejected, but there were reductions in the cases of Shell and Ballast Nedam. There are also some important points on inspections in the KWS case.

## Shell

In the Shell case,[150] the GC reduced the fine imposed on Shell from €108 million to €80 million, because it found that the EC had not shown that Shell was an instigator or leader of the cartel and that therefore a 50 per cent fine increase on that account had been justified.

It may be useful to recall that a particular feature of the *Bitumen* case is the way that the cartel was found to be bilateral, in the sense that both suppliers and purchasers were involved: The allegation and finding was that the companies had agreed to fix gross prices, with then a rebate for large builders at a certain level and that they had also agreed to fix prices for small builders at another higher price.[151]

The main points of interest are as follows:

First, Shell raised various points as regards parental liability in its case. Notably, that with its rather special structure, with overall ownership being held as to 60 per cent[152] by one company and 40 per cent by another, the EC had not shown that the company which had 40 per cent controlled the subsidiaries concerned. The GC disagreed and accepted the EC's position that a jointly controlled "Shell undertaking" existed on the facts.

Secondly, Shell argued that, after a restructuring, the ultimate parent, Royal Dutch Shell was not the successor of previous Shell companies and therefore should not be liable. The GC disagreed, noting that restructuring cannot be allowed to extinguish liability, or it could be used as an evasion tactic.

Thirdly, Shell also argued that a speciality bitumen product called Mexphalte C should be excluded from the relevant turnover in the cartel.

The issue was complicated, because it appears that Shell had not raised this issue in the proceedings before the EC and had submitted documents which could be interpreted as suggesting that the turnover *should* be included. However, then, later before the court, Shell produced evidence to the contrary.

Interestingly, here the court chose to review the relevant facts in two ways: first, the court considered the legality of the EC's assessment: whether the EC's review of the evidence available could be criticised. The GC held that it could not, since Shell had not produced the relevant documents at the time.[153]

The court then examined the relevant evidence in its unlimited jurisdiction.[154] In doing so, the court noted that late reliance on a document could affect the assessment before the court, if it was found that the company in question had held back information when sent a request for information and had therefore breached its duty of sincere co-operation with the EC. The court might consider the evidence, on the basis that a defendant is still entitled to produce such evidence before the court, even if it did not before the EC proceedings,[155] but the late production might be relevant to the court's determination of the appropriateness of any fine.[156]

In this case, the court found that the evidence was *not* enough to exclude Mexphalte C from the relevant fine turnover. The court also found that Shell had not been in breach of any duty to produce the document since, as Shell gave the turnover figures to the EC during the

[148] *Guardian*, judgment of September 27, 2012 at [117]–[120].
[149] *Guardian*, judgment of September 27, 2012 at [121]–[123].
[150] *Shell Petroleum v Commission* (T-343/06), judgment of September 27, 2012.
[151] *Shell* (T-343/06), judgment of September 27, 2012 at [12], [164], [193] and [209].
[152] *Shell* (T-343/06), judgment of September 27, 2012 at [32], [35] and [43]–[51].
[153] *Shell* (T-343/06), judgment of September 27, 2012 at [102]–[115].
[154] *Shell* (T-343/06), judgment of September 27, 2012 at [116]–[128].
[155] *Shell* (T-343/06), judgment of September 27, 2012 at [116].
[156] *Shell* (T-343/06), judgment of September 27, 2012 at [118]–[119].

proceedings, it had said that the product was not in the cartel and the EC had not followed up to find out why it had said so.[157]

On that basis, the overall conclusion was that the EC was entitled, on the evidence available, to include the speciality bitumen products in the relevant turnover for fining purposes.

Fourthly, in a long section reviewing the evidence, the court considered whether Shell had been an instigator of the cartel, in the sense that it had established or enlarged it, or a leader of the cartel, in the sense that it had been involved in its operation. The court concluded not.[158]

In general, the main discussion was whether the relevant Shell subsidiary, SNV had been a sort of co-manager of the cartel with the main purchaser in the market, KWS, deciding together what to do and then contacting others and/or feeding information to the other cartel members. Ultimately the court held that SNV had held a particular role in the cartel, but was not an instigator or a leader.

Fifthly, in the assessment of whether SNV was a leader of the cartel, there was debate about whether the EC could rely on a document attached to the SO, but not highlighted therein. The GC held that the court itself could assess the document, in its unlimited jurisdiction, insofar as the document was relevant to the amount of a fine.[159]

Finally, Shell attempted to rebut claims of recidivism by arguing that it was not the same undertaking with the same parents now as previously in other findings of infringement. The GC disagreed, emphasising again that, if there is a group restructuring, that cannot be allowed to impact on liability, or it could be used as an evasion tactic.

The court also found that the EC had been entitled to fine the entities which it did in the past, including *not* fining the parents as appropriate. The EC had explained why it had taken this approach before.[160] As a result the court upheld the 50 per cent fine increase for recidivism.

## Ballast Nedam

In September 2012, the GC ruled on the appeals lodged by Ballast Nedam and its wholly-owned subsidiary, Ballast Nedam Infra ("BNI"), against their €4.65 million fine in the Dutch bitumen cartel decision[161]. In its 2006 decision, the EC had held Ballast Nedam liable for its indirect participation and BNI liable for its direct and indirect participation in the cartel from 1996 until 2002.[162]

The EC had found that Ballast Nedam Grond en Wegen ("BNGW"), BNI's wholly-owned subsidiary, had participated in the Dutch bitumen cartel from June 1996 until September 2000 and that BNI had itself directly participated in the cartel from October 2000 until April 2002.

Before the GC, BNI argued that the EC had not clearly indicated in its SO that it intended to hold BNI liable in its capacity as parent company of BNGW for the period until September 2000 and that this constituted an infringement of BNI's rights of defence and right to be heard under art.27(1) of Regulation 1/2003.[163]

At the time of the SO, the EC wrongly considered BNGW to be BNI's predecessor, rather than its wholly-owned subsidiary. For that reason, the SO indicated that the EC intended to hold BNI liable for its direct participation in the cartel for the entire period from 1996 until 2002. Although the SO did not include a specific statement on BNI's liability for its subsidiary's participation in the cartel until September 2000, it did contain a general statement in the introductory part, indicating that all parent companies would be held jointly and severally liable for the behaviour of their infringing subsidiaries.

The GC confirmed the established case law according to which the EC is required to specify unequivocally in its SO the legal persons on which fines may be imposed and according to which it is necessary for the SO to indicate in which capacity an undertaking is called upon to answer the EC's allegations.[164]

The GC ruled that, given that the EC first indicated in its SO that it intended to hold BNI liable for its direct participation in the cartel for the entire period from 1996 until 2002, but subsequently held BNI liable in its capacity as BNGW's parent company for the period ending in September 2000, BNI had not been able to take notice of the EC's allegations based on its parental position vis-à-vis BNGW.

The GC added that the fact that the EC had included a general statement indicating that all parent companies would be held liable for the behaviour of their subsidiaries did not exempt the EC from its obligation to specify the capacity in which an undertaking is addressed in the SO.[165]

The GC concluded that BNI had not been able to exercise its rights of defence, which require that the accused is enabled to respond to the allegations made[166] and annulled the EC's decision insofar as it held BNI liable for its indirect participation in the cartel up until September 2000. BNI's fine was reduced from €4.65 million to €3.45 million.[167]

[157] *Shell* (T-343/06), judgment of September 27, 2012 at [126].
[158] *Shell* (T-343/06), judgment of September 27, 2012 at [182]–[183], and [234]–[237].
[159] *Shell* (T-343/06), judgment of September 27, 2012 at [220] and [232].
[160] *Shell* (T-343/06), judgment of September 27, 2012 at [252]–[255] and [264].
[161] With thanks to Philippe Claessens for his assistance with this section.
[162] *Ballast Nedam NV v European Commission* (T-361/06) and *Ballast Nedam Infra BV v European Commission* (T-362/06), judgments of September 27, 2012.
[163] *Ballast Nedam NV* and *Ballast Nedam Infra BV*, judgments of September 27, 2012 at [19].
[164] *Ballast Nedam NV* and *Ballast Nedam Infra BV*, judgments of September 27, 2012 at [22].
[165] *Ballast Nedam NV* and *Ballast Nedam Infra BV*, judgments of September 27, 2012 at [31].
[166] *Ballast Nedam NV* and *Ballast Nedam Infra BV*, judgments of September 27, 2012 at [28]–[30].
[167] *Ballast Nedam NV* and *Ballast Nedam Infra BV*, judgments of September 27, 2012 at [145].

In its appeal, Ballast Nedam argued that its liability could not exceed the liability of its subsidiary, BNI and that, if the GC were to reduce BNI's fine, it would also have to reduce Ballast Nedam's fine.[168]

However, the GC, dismissing Ballast Nedam's appeal, ruled that, whereas BNI's rights of defence were violated, because the SO indicated that the EC intended to hold BNI liable in its capacity as successor of BNGW (instead of in its capacity as BNGW's parent company), Ballast Nedam's rights of defence were not violated, since the SO indicated sufficiently clearly that the EC intended to hold Ballast Nedam liable in its capacity as overall parent company of BNGW.[169]

## KWS

There is also an important judgment involving Koniklijke Wegenbouw Stevin,[170] which concerns the subsidiary which was responsible for the purchasing of bitumen for the Koniklijke Wegenbouw Stevin/Volker Wessels Stevin Group for the production of asphalt in the Netherlands.

The fine on KWS and its parent Koninklijke Volker Wessels Stevin NV ("KVWS"), jointly and severally, was €27.36 million. The starting amount was €9.5 million, with an 80 per cent increase for duration taking the basic amount up to €17.1 million. Then the EC imposed a 10 per cent increase, i.e. €1.71 million for KWS's refusal to co-operate/attempted obstruction of the inspection and also applied a 50 per cent increase on the basis that KWS was an instigator and leader of the infringement.[171]

Overall the GC rejected the appeal, but it upheld the claim that the EC had not shown that KWS was an instigator of the infringement. However, that did not have an impact on the fine.

The main points of interest are as follows:

First, KWS argued that essentially this case was about a suppliers' cartel on prices, with a simple negotiating structure of joint purchasing on the part of large builders in the Netherlands, designed to respond to the suppliers' cartel and obtain better purchasing conditions.[172]

The GC did not accept this and found that the cartel was bilateral in nature. It was not a case of an earlier cartel by the suppliers imposing restrictions on the builders. Rather, the court found that the agreement between the suppliers and builders had to be considered globally. The court found that the agreement included three linked elements: the price increase on the gross supply price; the minimum rebate to the five largest builders in the Netherlands; and the maximum rebate on small builders.[173]

Secondly, there was discussion about the incentives for KWS and the other large builders to keep prices up and reference to one occasion where they appear to have resisted a price decrease by the suppliers. It appears that there was an allocation of risk price indexing system, which provided that, if the price of bitumen went up by a certain amount then the public authorities organising tenders had to pay money back to the builders who had submitted tenders; and vice versa, if the price of bitumen fell, then the builders who had won tenders with public authorities had to pay money back to those public authorities.

Considering this and the other evidence, the GC found that the suppliers and builders had a common interest in agreements on gross prices, based partly on these risk allocation clauses and public tenders and partly on the specific rebate that the suppliers gave the builders, which gave them an advantage over small builders in public markets.[174]

Thirdly, in general, the court upheld the EC's approach on fines. In particular, noting that the EC had defined a single listing, covering both the suppliers and the builders, based on their sales and purchases respectively in 2001. The court considered that lawful.[175]

Fourthly, as regards aggravating circumstances, it may be useful to recall that there were two incidents: first, the secretary of a director in KWS refused entry to the EC's inspectors, asking them to wait in a room until the outside lawyers arrived. KWS argued that only meant a delay of some 20 minutes but, according to the EC's protocol of the incident, it had meant a delay of 47 minutes. KWS argued that it was reasonable to ask the EC to wait this long in order to allow its lawyers to arrive and protect its defence rights.[176]

The second incident happened after that, when the lawyers who had arrived did not allow access to the office of a director of KWS, on the basis that he was not there, he was not concerned with bitumen and the mandate of the EC did not allow the EC to have access to the documents in that office. The EC then asked the Dutch Competition Authority to call the police and obtained entry.

The EC then chose not to have a separate proceeding about this (and impose a fine based on Regulation 17 art.15, which would have given a maximum of €5,000 for non-cooperation with the investigation), but chose instead to treat the incidents as an aggravating circumstance in its overall decision, meaning that the fine increase resulted in a sanction of €1.71 million.

The court's treatment of the first incident is extensive and important.

The court inferred that, by invoking its rights of defence, KWS was in fact appealing to a right to a fair procedure and then, even if it was not specifically raised in the defence, held that meant that the court had to

[168] *Ballast Nedam NV* and *Ballast Nedam Infra BV*, judgments of September 27, 2012 at [61].
[169] *Ballast Nedam NV*, judgment of September 27, 2012 at [69] and [74].
[170] *KWS v European Commission* (T-357/06), judgment of September 27, 2012.
[171] *KWS* (T-357/06), judgment of September 27, 2012 at [15].
[172] *KWS* (T-357/06), judgment of September 27, 2012 at [28] and [34].
[173] *KWS* (T-357/06), judgment of September 27, 2012 at [49].
[174] *KWS* (T-357/06), judgment of September 27, 2012 at [71].
[175] *KWS* (T-357/06), judgment of September 27, 2012 at [191]–[200].
[176] *KWS* (T-357/06), judgment of September 27, 2012 at [211] and [219].

consider the position under the ECHR and the CFR, notably, art.6(3)(c) of the ECHR, stating that all accused are entitled to a lawyer and art.47(2) of the CFR, which has an equivalent provision stating that all persons are entitled to be represented.[177]

However, then the court noted that there was a difference between proceedings leading to a finding of infringement, where there was specific provision for rights of the defence, and inspection decisions, where there is no provision for the rights of the defence. The GC also recognised that the courts have accepted that it is necessary to ensure that the rights of the defence are not irretrievably compromised during investigations, so some rights of the defence apply even before the SO, such as the rights to legal assistance and to preserve confidentiality of correspondance between a lawyer and his client.[178]

The court emphasised that in criminal law proceedings under art.6 of the ECHR it was recognised that the right to a lawyer in the first stages of a police interrogation can be restricted for valid reasons. The court then went on to note that there is a need for a "balance" between giving the EC the means to prevent the destruction or possible hiding of relevant documents, with these defence rights.[179]

The court then summarised the "balance" in the following terms:[180] (See Box 7)

**Box 7**

- *KWS Principles*
  - — The presence of an outside lawyer or in-house counsel is not a condition of legality of an inspection.
  - — A company can ask for a lawyer by telephone and ask him to come as soon as possible.
  - — Inspectors must be able to go into all the premises of the company inspected immediately and occupy the offices of their choice, without waiting for the undertaking to consult its lawyer.
  - — Inspectors must also be able to control the telephone and computer communications with the company to avoid contact to other companies which are subject to an inspection decision.
  - — The time which the EC has to give the company to contact its lawyer before it starts to consult books and other documents etc. depends on the specific circumstances in each case and, in any event, should only be extremely limited and reduced to the strict minimum.

Applying that here, the court found that the EC had *not* infringed the rights of the defence in refusing to wait for the lawyers and that the refusal of entry to the building before lawyers arrived causing a 47-minute delay was a refusal to submit to inspections.[181]

Turning to the second incident, the court simply emphasised that the EC has the right to go into all premises and that this is specifically laid down in Regulation 17.[182] The refusal of such access is therefore enough for a finding that the company has not submitted fully to an inspection.

Fifthly, the court examined whether the EC's treatment of these incidents as aggravating circumstances was a misuse of power. The court found not, because the court found that the EC had that ability, even before the Fining Guidelines, which specifically allowed it to take into account a refusal to co-operate as an aggravating circumstance. In short, the EC has discretion to go either way: to use the specific procedure and sanction or to bundle the issue in with the main decision.[183]

Sixthly, the court was asked to consider whether the fine increase of €1.71 million was manifestly disproportionate. Interestingly, the court said that, even if the EC was not bound by previous decisions, the court felt it useful to look at previous cases of an increase of fine for a refusal to co-operate and reviewed them. Then the court noted that:

> "[I]t is not excluded that the Court in its unlimited jurisdiction could consider that it is obliged to increase such a fine increase for refusal to cooperate." (Our translation.)[184]

However, then the court held that, given the small period of time during which the EC was denied access, there was no ground for a fine increase by the GC and that the 10 per cent fine increase by the EC did not appear disproportionate given the conduct in question, its repeated nature in the day and the importance of EC inspections. Given that this fine amounts to some €18,000 per minute, that remains very controversial.[185]

Nevertheless, it is important to emphasise the distinction the court is making: occupation of the premises and communication systems is a very strict issue. Time before looking at possibly privileged material is another to be looked at on a case-by-case basis.

Finally, the court reviewed whether KWS should be considered an instigator of the infringement and/or a leader of the infringement. As regards the question of instigation, the GC considered whether KWS had encouraged others to join the cartel and found, on a review of the evidence, that there was not enough to show this. The EC's position was that KWS had proposed to SNV, the largest supplier of bitumen in the Netherlands, to make proposals of co-operation and then sent those proposals to the other builders.

[177] *KWS* (T-357/06), judgment of September 27, 2012 at [221]–[225].
[178] *KWS* (T-357/06), judgment of September 27, 2012 at [223]–[228].
[179] *KWS* (T-357/06), judgment of September 27, 2012 at [230]–[231].
[180] *KWS* (T-357/06), judgment of September 27, 2012 at [232].
[181] *KWS* (T-357/06), judgment of September 27, 2012 at [233].
[182] *KWS* (T-357/06), judgment of September 27, 2012 at [237].
[183] *KWS* (T-357/06), judgment of September 27, 2012 at [244]–[251].
[184] *KWS* (T-357/06), judgment of September 27, 2012 at [254].
[185] *KWS* (T-357/06), judgment of September 27, 2012 at [252-]–[255]. (One may reasonably take the €1.71 million and divide by 2 to split the fine between the two incidents and again divide by 47 minutes.)

The GC's position as regards leadership was different. Here the test is whether KWS could be shown to be a "significant driving force" in the infringement.[186] Again the court reviewed the evidence but upheld the EC position, noting KWS involvement with SNV, which allowed the cartel to be established; that KWS had invited other builders to meet after contacts with SNV after 1996; that KWS had organised numerous meetings of the cartel in its premises; and that KWS had behaved as a spokesman for the large builders group in meetings with the suppliers. In doing so, the court was particularly influenced by the fact that other builders appear to have turned to KWS in the event of a complaint about the way the cartel was functioning.[187]

## KVWS

The GC also ruled on the appeal by KWS's parent, Koninklijke Volker Wessels Stevin ("KVWS"), claiming among other things that liability for its 100 per cent subsidiary was unlawful, because it was at odds with the concept of a legal person.[188]

As in various other cases in 2012, the GC gives its standard and now classic rejection, that liability is based on the fact that KVWS is part of a single undertaking with its subsidiary.[189]

Similarly, the GC rejects the argument that the effect of the parental liability presumption system is to reverse the burden of proof, again stating in a standard and now classic way that the presumption is rebuttable and that it is up to the parent to show that it did not control the subsidiary.[190]

However, it may be useful to note another passage in the court's judgment, making points which are not stated so often and sometimes overlooked in the focus on whether the presumption can be rebutted. In other words, the court then went on to say that the parental liability presumption aims to reconcile the importance of the objective of suppressing behaviour contrary to the competition rules and preventing their recurrence, with the demands of certain general principles of EU law, such as the principles of the presumption of innocence, the personal nature of sanctions and legal security, as well as the rights of the defence including the equality of arms.

Even if difficult to rebut, the court also noted that such a presumption is considered acceptable if proportionate to the legitimate aim pursued, there is a possibility to bring proof to the contrary and the rights of the defence are respected.[191]

Clearly all this continues to be contested, as time and time again, applicants show that, in fact, they cannot bring such proof, with only the rare exceptions of cases like *Gosselin Group*.[192] It will be recalled that in that case a Dutch foundation, which was not a commercial undertaking, was found not to have the ability to control a company in which it held shares and was therefore considered not to be liable as the ultimate parent.

The main point in most cases is that, faced with the 100 per cent shareholding presumption, companies generally seek to show how, in practice, a parent may not have been aware of the activities of its subsidiary and was not involved in any unlawful conduct, focussing on the various indices which the EC generally puts forward as supplementary evidence, without relying on it for liability. However, they are still unable to show that, structurally, there were not the control links in the sense of *Akzo Nobel* and *General Quimica*[193] and it appears very difficult to do so.

## Dura Vermeer

There are several judgments concerning a builders group called Dura Vermeer. In *Dura Vermeer Groep*[194] the court had to consider the position of the ultimate parent of this group.

The EC had fined a subsidiary in the group, Vermeer Infrastructuur ("Vermeer") some €5.4 million for which this group company had been held jointly and severally responsible for €3.9 million. Another company, Dura Vermeer Infra ("DVI") had become the parent of Vermeer from 2000 and was held jointly and severally responsible for a fine of €3.45 million.

Dura Vermeer Groep ("DV Groep"), tried to argue that despite its 100 per cent holding in Vermeer it should not be liable. In terms used in various cases this year, DV Groep argued that to infer liability on the basis of the economic, legal and material links tests of *Akzo Nobel*/*Quimica* was merely to rely on a "capitalistic presumption" and was a reversal of the burden of proof contrary to art.6 ECHR and art.48 CFR and contrary to the presumption of innocence.

The GC disagreed, reiterating its position that liability for DV Groep here was not related to its own involvement in any infringement, but because DV Groep, together with its subsidiary Vermeer, constituted a single undertaking. The court also rejected the "irrebuttable presumption" claim stating that it was not a question of the reversal of the burden of proof, but a question of

[186] *KWS* (T-357/06), judgment of September 27, 2012 at [283]–[284].
[187] *KWS* (T-357/06), judgment of September 27, 2012 at [291]–[299].
[188] *Koninklijke Volker Wessels Stevin v Commission* (T-356/06), judgment of September 27, 2012.
[189] *KVWS* (T-356/06), judgment of September 27, 2012 at [38].
[190] *KVWS* (T-356/06), judgment of September 27, 2012 at [41].
[191] *KVWS* (T-356/06), judgment of September 27, 2012 at [42].
[192] *Gosselin Group v European Commission* (T-208/08 and T-209/08), judgments of June 16, 2011; see Ratliff, "Major Events and Policy Issues in EU Competition Law" [2012] I.C.C.L.R. 67, 96.
[193] *General Quimica v European Commission* (C-90/09 P) [2011] All E.R. (EC) 544.
[194] *Dura Vermeer Groep v Commission* (T-351/06), judgment of September 27, 2012.

fixing the standard of proof which is required to rebut the presumption of influence where there is a 100 per cent holding of shares.

The second case in this group concerns *Dura Vermeer Infra*.[195] DVI was held jointly and severally responsible for a fine of €3.45 million with DV Groep.

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

First, of interest to legal practitioners is the point (which has come up in other cases recently) that DVI cross-referred to the pleadings of Vermeer as regards the facts and certain behaviour in the decision. The court ruled that this was *not* possible, relying on art.44(1) of the Court's Procedure. While noting that in certain cases the court had accepted that a company could refer to its own pleadings in another case, that was not possible, where there was a cross-reference to pleadings of another applicant, here a different company, even if it is in the same group![196]

Secondly, there was an issue as regards the way that the EC used the fact that a director of Vermeer had moved to become a director of DVI.

DVI argued that the EC had infringed the rights of the defence by not indicating in the SO that DVI was to be held to have directly participated in the infringement as a result, rather than that this would be used as evidence of its control of Vermeer. In other words, Infra relied on *Bolloré*.[197]

The GC rejected the claim. It appears that the EC stated in the SO that it was sending the SO to DVI insofar as it had decisive influence over Vermeer. It did not explicitly indicate that it was also holding DVI liable as having directly participated in the infringement. However, the EC had mentioned in the SO DVI's direct participation in the cartel, from when the relevant director had moved from Vermeer to DVI.

Noting that the EC's drafting could have been more explicit and explained these two bases for liability, the GC nevertheless found that DVI could not have been unaware that, in its decision, the EC might hold them liable on the basis of direct participation in the infringement.[198]

The court considered the position of *Bolloré* was different because, in that case, the SO gave no indication that the parent was to be considered to have directly participated in the infringement.[199] An interesting comparison with *Ballast Nedam Infra*, above.

In the third case concerning the Dura Vermeer Groep, *Vermeer Infrastructuur*[200] (*Vermeer Infrastructuur*), the case focused on the position of the actual subsidiary involved in the infringement. This company had been fined €5.4 million.

The main point of interest is that that Vermeer asked for access to other EC files related to parallel investigations into bitumen in Belgium and Germany. Vermeer argued that there was, in fact, a wider international cartel, as confirmed by the way that it had sought supplies in other countries but those requests had been rejected and that it had not had full access to the files concerned.

The EC appears to have given access to those files, including the list of what documents were available, but then Vermeer did not follow up and actually asked for further documents.[201] In those circumstances the court considered that there could be no complaint and did not therefore call for the files from the EC to review whether, if Vermeer had had access to the other remaining documents, it might have had a different result.

## Nynas

On the suppliers' side, there was an appeal by the Nynas Group brought by the ultimate parent Nynäs Petroleum and the subsidiary responsible for supply of bitumen in the Netherlands, Nynas Belgium among other countries in Europe.[202] The parent and subsidiary were fined €13.5 million jointly and severally.

The main points of interest are as follows:

First, Nynas noted, in particular, that under Swedish corporate law a parent has to show supervision of its subsidiaries. Predictably, the GC held that this was no ground to find that Nynas should *not* be held responsible for the activities of its subsidiary. The existence of such rules reinforced the view that the parent should be held liable for the subsidiary.[203]

Secondly, Nynas emphasised that, in fact, the management of its European bitumen business was centred at a subsidiary level in the subsidiary concerned here. There were even management service agreements between this subsidiary and other group subsidiaries.

However, the court found on the facts that the parent company was still controlling its subsidiary. The court noted: that the Nynas Group structure was very integrated and hierarchical; that the parent was closely and regularly involved in the business of its subsidiaries; and considered that the existence of the management service agreements

[195] *Dura Vermeer Infra v Commission* (T-352/06), judgment of September 27, 2012.
[196] *Dura Vermeer Infra* (T-352/06), judgment of September 27, 2012 at [25].
[197] *PapierFabrik August Koehler* (C-322/07 P) [2009] E.C.R. I-7191; [2009] 5 C.M.L.R. 20.
[198] *Dura Vermeer Infra* (T-352/06), judgment of September 27, 2012 at [69]–[70].
[199] *Dura Vermeer Infra* (T-352/06), judgment of September 27, 2012 at [73].
[200] *Vermeer Infrastructuur v European Commission* (T-353/06), judgment of September 27, 2012.
[201] *Vermeer Infrastructuur* (T-353/06), judgment of September 27, 2012 at [209].
[202] *Nynas Petroleum AB v European Commission* (T-347/06), judgment of September 27, 2012.
[203] *Nynas Petroleum AB*, judgment of September 27, 2012 at [38].

between the subsidiaries of the group was further evidence of the group control, since that would only happen if the parent had agreed to such a delegation of reporting lines.[204]

## Total

Total SA ("Total") also brought a parental appeal on the supply side, in which Total brought classic claims that it should not be liable for the activities of its subsidiary, Total Nederland.[205]

The main point again relates to the delegation issue.

Total argued that bitumen in the Total Group is essentially run from a department of Total France. Total SA is just a shareholder in the relevant business, Total Nederland,[206] so Total should not be liable for such activities. The EC and GC rejected this, considering that, in fact, the business was still run by the Total Group, with Total SA as the overall link. More specifically, the court found that in such cases, where control of a business is delegated within a group to a particular entity, it was correct to apply the criterion of control to attribute liability to the parent for the behaviour of its' subsidiary. This was to avoid that parents, which have the possibility of control, systematically and artificially delegate the effective exercise of that control to a smaller entity.

In any event, the delegation in itself was found to indicate that the parent had decisive influence over the relevant business. The simple fact of decentralisation of management within a group was not sufficient to reverse the presumption of parental liability.[207]

### *Other*

The Court also rejected appeals by: (1) *Total Nederland*[208]; (2) *BAM NBM Wegenbouw BV*[209]; and *Koninklijke BAM Groep*[210]; (3) *Heijmans Infrastructuur*[211] and *Heijmans*[212]; and (4) *Kuwait Petroleum*.[213]

## *Other cartel appeals*

## Copper Fittings

In May 2012, the CJEU ruled on further appeals by *Legris* and *Comap*, against GC judgments dismissing their applications against final decisions in the *Copper Fittings* cartel case.[214] The CJEU dismissed both appeals. Then in July 2012, the CJEU dismissed a further appeal by three companies in the *Kaimer Group* ("Kaimer").[215]

## Fasteners

In June 2012, the GC ruled on the appeals by *Coats Holdings Ltd*,[216] the *YKK Group*[217] and *Berning & Söhne GmbH & Co KG*[218] in the *Fasteners* cartel case, rejecting them all.[219]

## Carbonless paper: Bolloré

In June 2012, the GC ruled on an appeal by Bolloré against the EC's decision in 2010, re-adopting its 2001 decision in the *Carbonless paper* cartel and fining Bolloré €21 million.[220]

It will be recalled that the EC's first decision fining Bolloré had been annulled by the CJEU because Bolloré's direct participation had not been indicated in the SO, whereas in its decision the EC held Bolloré liable both for such direct participation and its ownership of Copigraph, which was also found to have participated in the cartel.

The EC issued a new SO in 2009 and retook its decision the following year, reducing Bolloré's fine by 5 per cent from €22.68 million to €21.26 million, because Bolloré did not contest certain facts in the procedure for the second decision.

Bolloré appealed again challenging its parental liability and, above all arguing that, since the whole proceedings had been so long, it had been denied its ability to defend itself.

The GC rejected this, finding that there had been no "excessive delay", even if the process of appeals and two rounds of decisions had taken some 14 years.[221]

In particular, the court held that it was no defence for Bolloré to say that it had no longer access to the archives of Copigraph, because it had sold the company, or that in 2009 it no longer had access to certain former employees. The GC reasoned that on selling Copigraph, Bolloré should have taken measures to protect its access to its former subsidiary's archives and still should have had access to its own archives.[222] Equally, Bolloré had

[204] *Nynas Petroleum AB*, judgment of September 27, 2012 at [49]–[52].
[205] *Total SA v European Commission* (T-344/06), judgment of September 27, 2012.
[206] *Total*, judgment of September 27, 2012 at [43] and [58].
[207] *Total*, judgment of September 27, 2012 at [61]–[66].
[208] *Total Nederland NV v European Commission* (T-348/06), judgment of September 27, 2012.
[209] *BAM NBM Wegenbouw BV v European Commission* (T-354/06), judgment of September 27, 2012.
[210] *Koninklijke BAM Groep NV v European Commission* (T-355/06), judgment of September 27, 2012.
[211] *Heijmans Infrastructuur v European Commission* (T-359/06), judgment of September 27, 2012.
[212] *Heijmans v European Commission* (T-360/06), judgment of September 27, 2012.
[213] *Kuwait Petroleum v European Commission* (T-370/06), judgment of September 27, 2012.
[214] *Legris Industries SA v European Commission* (C-289/11 P), and *Comap v European Commission* (C-290/11 P), judgments of May 3, 2012; *CJEU Press Release 56/12*. With thanks to Roberto Grasso for his assistance.
[215] *Kaimer GmbH & Co v European Commission* (C-264/11 P), judgment of July 19, 2012.
[216] *Coats Holdings Ltd v European Commission* (T-439/07), judgment of June 27, 2012.
[217] *YKK Corp YKK Holding Europe BV YKK Stocko Fasteners GmbH v European Commission* (T-448/07), judgment of June 27, 2012.
[218] *Berning & Sohne GmbH & Co KG v European Commission* (T-445/07), judgment of June 27, 2012.
[219] With thanks to Asta Rimkute for her assistance.
[220] *Bolloré v European Commission* (T-372/10), judgment of June 27, 2012.
[221] *Bolloré*, judgment of June 27, 2012 at [113], [184]–[185].
[222] *Bolloré*, judgment of June 27, 2012 at [152]–[155] and [183].

known the relevant allegations since 2001 (the first procedure/decision) and should have taken steps to obtain statements from its former employees then.[223]

## Hydrogen Peroxide: Total

In September 2012, there was an order by the CJEU, rejecting an application by Total SA[224] against the GC's judgment in the *Hydrogen Peroxide* case, as manifestly inadmissible and unfounded.

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

- The European Courts' judgments as regards horizontal agreements, distribution and art.102 TFEU cases (including *Tomra* in the CJEU, *Post Danmark*, *Norway Post* and *Greek Lignite*)
- The EC's cartel decisions (new this year and older, where the non-confidential text has now been published, including *Exotic Fruit (Bananas)*, *CRT Glass* and *Pre-stressing Steel*.
- The EC's other decisions and settlements (including proposed commitments regarding eBooks and as regards Czech electricity transmission capacity).
- EC decisions on failure to block email accounts during inspections (*EPH* and others) and a further "breach of seal" case (*Suez Environnement*).
- Various other EC/ECN actions on "pay for delay" in the pharma sector, the food supply chain and amicus curiae briefs to national courts.

[223] *Bolloré*, judgment of June 27, 2012 at [180]–[182].
[224] *Elf Aquitaine v European Commission* (C-495/11 P), judgment of September 13, 2012.

# Major Events and Policy Issues in EU Competition Law, 2011–2012 (Part 2)

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Abuse of dominant position; Anti-competitive practices; Cartels; EU law; European Commission; Procedure

This is the second and final part of the overview of "Major Events and Policy issues in EU Competition Law, 2011–2012", following on from Part 1 published in last month's journal.[1]

It may be recalled that the reference period is from November 2011 until the end of October 2012.

The first part of the article summarises the remaining European Courts' rulings on: (1) horizontal issues other than cartels (which were summarised in Part 1), such as the *MasterCard "MIF"* case; (2) art.102 TFEU and art.54 EEA,[2] including important cases such as *Tomra* and *Norway Post* on foreclosure, *Post Danmark* on rebates, *Telefonica* on margin squeezing and the GC's ruling annulling the European Commission ("EC")'s *Greek Lignite* decision; and (3) vertical issues in car distribution. *Norway Post* is also interesting on fine reduction for excessive delay.

The second part is devoted to the EC's recent decisions. First, those on cartels, both those new for 2011–2012 and those which are older, where the non-confidential texts have now been published by the EC, for example, the EC's *Exotic Fruit (Bananas)*, *Pre-Stressing Steel*, *Heat Stabilisers* and *Animal Feed Phosphates* decisions. Then we summarise the EC's other decisions and settlements on arts 101 and 102 TFEU (such as those involving *Standard & Poor's* and *Thomson Reuters*) and some new cases on e-books pricing, standards essential patent licensing, the *Microsoft Browser* and Czech electricity supply.

We also summarise two interesting cases on inspections: the new Czech case involving *EPH* and the older *Suez Environnement* case, where the EC's decision has now been published.

This is followed by an outline of recent EC/ECN policy initiatives, including: (1) continued follow-up on the pharma sector inquiry and "pay for delay" cases; (2) the topical EC Task Force on Food and the ECN Subgroup on Food Report; (3) the ECN Report on banking and financial payments; and (4) the EC's amicus curiae observations, which now published on the EC's website.

Finally we outline policy issues such as continued discussion about possible legislation on damages in competition cases and the EC's approach to dealing with the financial crisis.

## European Court judgments (continued)

### *Other horizontal agreements*

### MasterCard

In May 2012, the GC ruled on an appeal by MasterCard against the EC's decision that some of its Euro cross-border and EEA multilateral interchange fees ("MIFs") were contrary to EU competition rules.[3]

It will be recalled that an MIF is essentially a default interchange fee, which may apply if there is no bilateral agreement between financial institutions. The EC had found that the MIF system set a floor on costs charged to merchants, so amounted to a price restriction. The EC also found that countervailing efficiencies justifying the restrictions had not been proved.

On appeal, the GC rejected MasterCard's claims as to the objective necessity of the system. The GC considered it unlikely that, without the MIF, an appreciable number of banks would not issue MasterCard, or would significantly reduce their use of such cards.

The GC also found that the EC was entitled to: (1) consider the MIF effects without assessing the effects on the MasterCard system as a whole[4]; (2) find that MIFs were not ancillary to the MasterCard system[5]; and (3) find that, without the MIF, merchants could exert greater pressure on the cost they were charged for use of the payment cards.

The GC also found that the EC was entitled to continue to characterise the MIF as a decision of undertakings, despite MasterCard's claim that it was no longer controlled by the financial institutions in the MasterCard system, after an initial public offering (of the joint venture

* With many thanks to Sinéad Mooney and Katrin Guéna for their general help in the production of this article; and to my Brussels colleagues for numerous insights. More specific assistance is indicated with the appropriate section.

[1] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition "page": *http://ec.europa.eu/competition/index_en.html* [Accessed January 25, 2013]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in EU Competition Law", published in the *International Company and Commercial Law Review*.

[2] "TFEU" is the abbreviation for the Treaty on the Functioning of the European Union; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court and "CJEU" for the Court of Justice of the European Union. "EEA" stands for the Agreement on the European Economic Area. "SO" is the abbreviation for Statement of Objections; "Article 27(3) Notice" refers to the EC's Communications under that article of Regulation 1/2003 [2003] OJ EU L1/1. References to the "ECHR" are to the European Convention of Human Rights and references to the "CFR" are to the EU Charter of Fundamental Rights.

[3] *MasterCard Inc v European Commission* (T-111/08) [2012] 5 C.M.L.R. 5. CJEU Press Release 69/12, May 24, 2012. With thanks to Asta Rimkute for her assistance.

[4] *MasterCard* [2012] 5 C.M.L.R. 5 at [90]–[92].

[5] *MasterCard* [2012] 5 C.M.L.R. 5 at [207].

company concerned). The court found that the EC was entitled to find that the MasterCard payment organisation had remained an institutionalised form of co-ordination of the conduct of the participating financial institutions. The court noted the "commonality of interests" between MasterCard and the financial institutions[6].

The court also rejected the claim that the EC should have exempted the MIF. Even if the MIF increased the output of the MasterCard system, MasterCard had to show that a fair share of the result was passed on.[7]

## *Abuse of dominance*

**Box 1**

**Article 102 TFEU/art.54 EEA cases**

- *Tomra* (CJEU)
  - — GC ruling upheld: foreclosure cannot be rebutted by showing that a sufficient part of the market is still open.
- *Post Danmark*
  - — Interesting reference from Danish court.
  - — A dominant company can compete with an offer above ATC or above AIC, but below ATC, if would not drive out an as efficient competitor in the long run.
  - — Note: Competitor had won back two customers, after losing them to *Post Danmark*.
- *Telefonica*
  - — Spanish margin squeezing case upheld, again despite NRA ex ante findings of no abuse.
- *Greek Lignite*
  - — GC overturned EC decision on State measures denying competitors the opportunity to compete because of preferential access to cheap lignite.
  - — Specific abuse not shown.
- *Norway Post*
  - — EFTA Court upheld ESA decision that group and outlet exclusivity for Norway Post's "Post-in-Shop" concept in retail chains had abusively foreclosed the market (*Tomra* applied).
  - — But: Reduced fine by 20% for excessive delay of proceedings (68 months).
- *Microsoft*
  - — Periodic payment decision generally upheld, but reduced by small amount.

This has been quite an important year in terms of abuse of dominance cases. The most important rulings concern the further appeal in the *Tomra*[8] case to the CJEU and the reference to the CJEU in the *Post Danmark* case.

## Tomra

Taking *Tomra* first: this was a further appeal from the GC's judgment, upholding the EC's decision imposing a fine of €24 million on Tomra. It may be recalled that the context was a network of agreements for the supply of reverse vending machines to supermarket chains, with related rebates and a complaint to the EC concerning the alleged market foreclosure effect of these agreements and other practices.

The EC had found a strategy to foreclose the market and there had been much debate in the case as to whether the traditional case law approach should apply, suggesting that if there is any exclusivity that is an abuse of dominant position. Or whether the more modern EC approach put forward recently should apply, whereby one would look at whether there was market foreclosure in terms of whether an as efficient competitor could compete, whether there was scope for a competitor to come into the market and whether sales prices of the dominant company were below cost (more precisely long-range average incremental cost).

The EC's decision was controversial because it was heralded as an "economic" case, although some saw it as still really a reflection of the old approach. Similarly, before the GC, there were some traditional rulings, rather than adoption of the more modern approach.

The EC rejected Tomra's appeal against the GC's ruling, essentially staying with the traditional case law.

Tomra argued that the GC's ruling, that exclusivity is automatically market-foreclosing, was an error of law. The EC should have looked at whether the minimum viable scale was denied to a market entrant, in order to see if Tomra's behaviour was market-foreclosing.

The EC disagreed. It upheld the GC's approach that a claim of foreclosure cannot be rebutted by showing that a sufficient contestable part of the market remained. The court also agreed with the GC that a substantial proportion is foreclosed where two-thirds of the market is foreclosed. The court stated that it was not for the dominant company to set the contestable proportion of demand, nor was it necessary to establish a precise threshold of foreclosure of the market.[9]

Clearly this is controversial. However, in practice this means that the EC's modern "Guidance"[10] approach should be treated with considerable caution. Although such issues may be looked at in a more economic way in DG COMP, there can be no certainty that they will survive a broader assessment in the EC, especially if there is a complainant, invoking established case law, or if the matter is in the courts.

Tomra also argued that the GC had made an error of law, because it should have found that the EC should have looked at whether Tomra's prices were below cost.

[6] *MasterCard* [2012] 5 C.M.L.R. 5 at [250]–[254].
[7] *MasterCard* [2012] 5 C.M.L.R. 5 at [218]–[237].
[8] *Tomra Systems ASA v European Commission* (C-549/10 P) [2012] 4 C.M.L.R. 27. With thanks to Lisa Arsenidou for her assistance.
[9] *Tomra* [2012] 4 C.M.L.R. 27 at [37]–[49].
[10] EC 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, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF* [Accessed January 25, 2013].

The EC disagreed, holding that the GC was correct, that it was enough if the EC showed that abusive conduct tended to restrict competition. Below cost prices were not a prerequisite for a finding that rebates are abusive.[11]

## Post Danmark

Turning to *Post Danmark*,[12] there is a very different story which is rather interesting. It may be recalled that this was a reference from a Danish court. Post Danmark had made offers to three customers of its main rival in the market for certain mail services. Post Danmark had won those customers. One offer was above average incremental cost ("AIC") but below average total cost ("ATC"). The other two offers were above ATC.

Interestingly the competing company, Forbringer-Kontakt ("FK") had won back two customers later and had been able to continue its distribution service, despite losing the contracts in the meantime. In other words, it had not been driven out of business by Post Danmark's action. There was also evidence of what one may call a normal business logic to Post Danmark's activity, with efficiencies related to Post Danmark's offers, cost savings which were apparently shown.

On the other hand the offers were specific, i.e. not part of a general tariff.

The issue that was put to the CJEU was as follows. Is art.82 of the European Community Treaty infringed if a dominant company simply lowers a price selectively, but the price is AIC, but below ATC and it is not shown that the price is set with the aim of eliminating a competitor?

Interestingly, the EC said no. Applying a cost-based approach, rather than a form-based one, the court held that a pricing offer by a dominant company was not an exclusionary abuse, just because the relevant offer includes price discrimination in the sense of different prices to customers or a single price to all. Further, prices above ATC were not anti-competitive.[13]

The court held that, if a price was between AIC and ATC, the national court had to decide whether an as efficient competitor could compete without losses which it could not support in the long term.[14] Further, if there were anti-competitive effects, the court had to consider any justifications and any efficiencies which might counter-balance any exclusionary effects.[15]

This is clearly an interesting judgment which could signal an important change in attitude on these issues.

One may note the contrast between the *Tomra* and *Post Danmark* cases. *Tomra* is the review of an EC decision with, apparently, documents suggesting a strategy to foreclose and, it may be recalled, a whole network of exclusive or quasi-exclusive agreements. *Post Danmark* is a reference, apparently with "cleaner facts" in the sense that it looks that *Post Danmark* was working hard not to have an anti-competitive strategy, but at least to compete as far as it could in the circumstances.

It is also interesting to note that the Advocate General's Opinion, which we outlined last year, had been sympathetic to Post Danmark in pointing out that even dominant companies must be able to compete, provided here, that there was no cross-subsidisation from a reserved postal monopoly.

## Telefonica

In March 2012, the GC also ruled on the appeal by Telefonica against the EC decision imposing a fine of €151.8 million for margin squeezing. Spain also appealed against the EC's decision.[16]

It will be recalled that this case concerned a decision by the EC that Telefonica had engaged in unfair pricing through margin squeezing in the price spread between wholesale and retail broadband access. Various arguments were rejected as regards market definition and dominance. In its appeal Telefonica focused on the abuse finding, whereas Spain focused on the interplay between the decisions of the national regulatory authority ("NRA") and the EC.

As regards the abuse, the GC confirmed the *TeliaSonera* and *Deutsche Telekom* cases.[17] In other words, the GC confirmed that a margin squeeze is an abuse of itself, the result of the spread between the wholesale and retail prices charged.[18] Further, the EC was not required to show that Telefonica had charged excessive prices for wholesale services or predatory prices for retail services.[19] The EC had not made a manifest error in finding that the conduct concerned was likely to reinforce barriers to entry and that competition likely would have been stronger in the retail market, without the distortions from the margin squeeze.[20]

The GC also found that Telefonica could reduce the national wholesale price and the regional wholesale prices because the NRA was found only to have set maximum prices. Telefonica could also raise its retail prices.

On the question of the interplay between the NRA's decision and that of the EC, the GC found that Telefonica must have known that compliance with Spanish legislation on telecommunications (i.e. that NRA decision) did not protect it from EU intervention based on competition law, in particular because of the *Deutsche Telekom* case. The

[11] *Tomra* [2012] 4 C.M.L.R. 27 at [59]–[82].
[12] *Post Danmark A/S v v Konkurrenceradet* (C-209/10) [2012] 4 C.M.L.R. 23.
[13] *Post Danmark* [2012] 4 C.M.L.R. 23 at [30]–[36].
[14] *Post Danmark* [2012] 4 C.M.L.R. 23 at [37]–[44].
[15] *Post Danmark* [2012] 4 C.M.L.R. 23 at [42]–[43].
[16] *Telefonica SA v European Commission* (T-336/07) [2012] 5 C.M.L.R. 20; and *Spain v European Commission* (T-398/07) [2012] 5 C.M.L.R. 1. With thanks to Lisa Arsenidou for her assistance.
[17] See *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) [2011] 4 C.M.L.R. 18; and *Deutsche Telekom AG v Commission* (T-271/03) [2008] E.C.R. II-477, [2008] 5 C.M.L.R. 9.
[18] *Telefonica* [2012] 5 C.M.L.R. 20 at [180]–[182].
[19] *Telefonica* [2012] 5 C.M.L.R. 20 at [185]–[187] and [188]–[194].
[20] *Telefonica* [2012] 5 C.M.L.R. 20 at [268], [270] and [273].

fact that the NRA laid down a pricing system for regional wholesale pricing and had examined whether there was a margin squeeze was no defence. The court went on to hold that Telefonica must have known that the NRA assessment was not based on actual costs, but rather on historic costs, which were not in fact confirmed by market developments.[21]

Clearly all of this is controversial, because companies are faced with ex post review under competition law leading to abuse findings, even if compliant with ex ante NRA telecoms assessment. One may argue that the telecommunications and competition law reviews should be fully aligned. Further, that there should be a specific obligation to co-operate between the EC and NRAs to avoid double jeopardy issues (even though it appears that in its case, the EC did seek to involve the Spanish authority).[22]

## *Greek Lignite*

In September 2012, the GC ruled on two appeals by the Greek Public Power Corp (in Greek, Dimosia Epicheirisi Ilektrismau ("DEI")), against the EC's decision[23] finding: (1) that the Hellenic Republic had unlawfully awarded exploration and exploitation rights over lignite deposits to DEI, a state-controlled company, contrary to art.86(1) of the European Community Treaty ("ECT"), in combination with art.82 ECT; and (2) in requiring the Hellenic Republic to award certain deposits to others than DEI, unless no other serious offer for them was submitted, pursuant to art.86(3) ECT.[24]

The EC had found that by awarding this lignite to DEI, Greece had given DEI the ability to extend or strengthen its dominant position over lignite to the wholesale electricity market for that part of Greece which formed an interconnected network. The EC's point was that lignite was cheap fuel, used for the electricity base load and that, without access to it, competitors could not rival DEI and were therefore excluded from the market or hindered in new entry.[25]

Creating that inequality of opportunity was unlawful.[26] The EC considered that, through this preferential award to DEI, Greece was denying competitors an equal opportunity to compete and thereby reinforcing DEI's dominant position.[27]

DEI argued, supported by Greece, that the case law went further than this and required the EC to show precisely how DEI would abuse its dominant position, the mere creation or strengthening of a dominant position not being enough.[28]

Interestingly, the GC agreed with DEI and went through the main case law, showing in each case the abuse which the public or entrusted undertaking concerned could do as a result of the State measure.

The court also noted that the abuse could arise from the possibility of exercising the exclusive or special right given in an abusive way, or be a direct consequence of the right.[29]

Applying that case law, the court found that the EC had not made such specifications[30] and therefore annulled the EC decision based on art.86(1) ECT and the subsequent EC remedy decision based on art.86(3) ECT. The court also stressed that the impossibility to obtain lignite could not be imputed as conduct to DEI, since that was the State's measure.[31]

We shall have to see if the EC comes back with a revised decision, with more specific allegations of abuse, or appeals.

## Microsoft

In June 2012 the GC ruled on Microsoft's appeal against the EC's periodic penalty payment decision related to the interoperability case.[32] This case concerned the second EC periodic penalty decision in 2008, on the basis that the remuneration rates proposed by Microsoft for interoperability were unreasonable. Generally the GC upheld the EC's decision, but it reduced the fine on Microsoft from €899 million to €860 million.

It may be recalled that the underlying case is particularly interesting because there had been a dispute about what is the proper economic basis for any licensing remuneration. The EC had ruled that it should be based on innovative value rather than the strategic value of the relevant information. In other words, there should not be a premium paid for the value of interoperability with Microsoft's systems in order to assess reasonableness.

The court also found that Microsoft had been led to believe by an EC letter in 2005 that it could restrict distribution of "open source products", until after the GC's judgment in September 2007 on the legality of the EC's main decision. This affected the assessment of gravity of the infringement to a small degree and that led to the small reduction in fine of some €29 million.

[21] *Telefonica* [2012] 5 C.M.L.R. 20 at [293], [299] and [303].
[22] *Telefonica* [2012] 5 C.M.L.R. 20 at [310]–[312].
[23] See J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 165–167.
[24] *Dimosia Epicheirisi Ilektrismau v European Commission* (T-169/08 and T-421/09) judgments of September 20, 2012.
[25] *DEI*, September 20, 2012 at [20] and [90].
[26] *DEI*, September 20, 2012 at [75].
[27] *DEI*, September 20, 2012 at [29]–[32].
[28] *DEI*, September 20, 2012 at [63] and [66].
[29] *DEI*, September 20, 2012 at [103].
[30] *DEI*, September 20, 2012 at [92]–[118].
[31] *DEI*, September 20, 2012 at [89].
[32] *Microsoft Corp v European Commission* (T-167/08) [2012] 5 C.M.L.R. 15. With thanks to Cormac O'Daly for his assistance.

## Norway Post

In April 2012,[33] the EFTA Court dismissed Norway Post's application to annul the decision by the EFTA Surveillance Authority ("ESA") imposing a fine of €12.89 million for abuse of a dominant position in the market for business-to-consumer ("B-to-C") over-the-counter parcel delivery in Norway between 2000 and 2006.[34] The court dismissed the application, but reduced the basic amount of the fine by 20 per cent on account of the excessive length of the administrative procedure.

ESA initiated the investigation following a complaint from Norway Post's competitor Privpak in 2002. The complaint concerned agreements between Norway Post and major retail and petrol station chains in Norway (NorgesGruppen/Shell, ICA and COOP). Based on these agreements, NorgesGruppen/Shell became Norway Post's "preferred partner" and, in return, gave Norway Post exclusive access to all outlets in their retail network (group exclusivity). As regards COOP and ICA, exclusivity was agreed in all outlets in which a post-in-shop ("PiS") concept[35] was established (outlet exclusivity). The agreements also included non-compete obligations.

The ESA found an overall tying of some 3,672 outlets in 2004.[36] In addition, ESA was concerned that, in renegotiating its agreements with chains, Norway Post had created disincentives for them to go with competitors, insofar as, for example, the chains would be concerned that taking a competitor might mean they could not obtain "preferred partner" status.[37]

The relevant market was found by ESA to be the market for B-to-C over-the-counter parcel delivery in Norway.[38] At that time it was characterised by high barriers to entry and, until 2005, Privpak was Norway Post's only competitor. Norway Post was found to hold high market share (close to or above 98 per cent) and was the only supplier of B-to-C parcel services with a nationwide network.

It appears that Norway Post was also restructuring, i.e. reducing the number of post offices it had, in favour of smaller PiS outlets.[39]

The main interest in the case concerns: (1) the EFTA Court's review of ESA's assessment of Norway Post's conduct; (2) the 20 per cent fine reduction for excessive delay; and (3) as noted in Part 1, that the EFTA Court also explains its judicial review in terms similar to the CJEU's *KME* and *Chalkor* judgments.[40]

As regards ESA's assessment of Norway Post's conduct, Norway Post argued for an effects-based approach and submitted that ESA committed an error in law by failing to quantify the degree of possible foreclosure. ESA should have considered if the available alternatives would have allowed an "as efficient competitor" to compete effectively with Norway Post. Norway Post argued that no abuse of dominant position was committed, as it foreclosed only 40 per cent of the market.

The EFTA Court endorsed the ESA's view that Norway Post's conduct was abusive.

First, the court upheld ESA's conclusion that it was immaterial whether an "as efficient competitor" could have competed effectively with Norway Post and that it was for the competitive process to decide, without being distorted, which undertakings stay in the market.[41]

Further, the court disagreed with Norway Post's 40 per cent foreclosure argument, noting that it appeared that foreclosure amounted to 50 per cent, if not more and that such levels of foreclosure had to be considered as substantial.[42]

The court added that foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. Finally, referring to *Tomra* case,[43] the court pointed out that competitors should be able to compete on the merits for the entire market and not just for a part of it.[44] So overall the court appears to have followed the GC's *Tomra* approach.

Secondly, Norway Post claimed that a failure of Privpak to establish a successful delivery network was due to its special business requirements, inability to submit sufficiently attractive offers to petrol station and outlet chains and that many outlets were not willing to co-operate with more than one parcel delivery operator anyway. The court rejected these arguments.[45]

Thirdly, both ESA and the court criticised Norway Post for pursuing a "preferred partner" status in connection with the roll-out of the PiS concept. In doing so, Norway Post created disincentives for its business partners to deal with Norway Post's competitors. Further, ESA found additional disincentives during the renegotiation of the agreements concerned. On this point, the court concluded that Norway Post had failed to announce its intention not to maintain exclusivity clauses in future co-operation

[33] With thanks to Ivana Kreiselová for her assistance with this section.
[34] *Norway Post v EFTA Surveillance Authority* (E-15/10), judgment of the Court, April 18, 2012, *http://www.eftacourt.int/images/uploads/15_10_JUDGMENT.pdf* [Accessed January 25, 2013].
[35] A concept developed by Norway Post for the provision of a range of postal and financial services in retail outlets.
[36] *Norway Post*, April 18, 2012 at [56].
[37] *Norway Post*, April 18, 2012 at [57].
[38] "B-to-C parcel services" cover collection of parcels from distance selling companies, sorting, transportation and delivery to private consumers.
[39] *Norway Post*, April 18, 2012 at [26].
[40] *Norway Post*, April 18, 2012 at [81]–[101].
[41] *Norway Post*, April 18, 2012 at [132].
[42] *Norway Post*, April 18, 2012 at [160].
[43] *Tomra* [2012] 4 C.M.L.R. 27 at [241].
[44] *Norway Post*, April 18, 2012 at [161].
[45] *Norway Post*, April 18, 2012 at [171].

agreements and that such conduct created disincentives for its business partners to co-operate with Norway Post's competitors during these renegotiations.[46]

Fourthly, as to objective justification, the court did not accept arguments raised by Norway Post, such as a need to protect substantial financial risks related to the roll-out and maintenance of the PiS project, to secure its investments and to prevent free-riding. The court considered that Norway Post did not submit enough evidence that the conduct was objectively necessary to ensure the fast and secure establishment of Norway Post's PiS network and that Norway Post had not explained sufficiently why the presence of competing parcel delivery services, if properly separated, would be likely to negatively affect the quality of Norway Post's services.[47]

Fifthly, Norway Post disputed ESA's conclusion on the single and continuous nature of the infringement, arguing that the conduct should be divided into three distinct periods by reason of different foreclosure effects in each of these periods. According to Norway Post, it was entitled to request group exclusivity in the initial period to secure roll-out of the PiS concept. Norway Post also argued that there was no overall plan with the objective of distorting competition in the conduct concerned. However, ESA considered the overall plan to be the implementation of Norway Post's exclusive strategy.

The court did not elaborate on the different foreclosure effects argumentation, but simply stated that in the case at hand, where there was no break in the conduct and the infringement was committed by one undertaking and linked to a strategy of incorporating exclusivity provisions in the agreements, no overall plan within the meaning of the case law had to be proved.[48]

The court also agreed with ESA that by reason of the substantial share of outlets being continuously foreclosed, Norway Post's conduct was, by its very nature, a single and continuous infringement.[49]

As regards the fine reduction, the court found that Norway Post, owing to its economic strength, was clearly not endangered by the proceedings. However, the court pointed out that, as a matter of principle action must be taken within a reasonable time.[50]

The court considered insufficient a reduction of the basic level of the fine by €1 million by ESA (a discount of some 7.2 per cent) and reduced the basic amount of the fine by 20 per cent in total. The court agreed with Norway Post that the delays of the proceedings could not be justified by any particular circumstances of the case and the fine had to be further reduced.

The court stressed that, in a situation where Norway Post did not dispute the definition of the relevant market and its dominant position, a 68-month period until notification of the SO had to be considered prima facie as too long and that it went beyond what is normal for competition law cases. The court drew the same conclusion on the overall length of the proceedings and stressed that it appeared that between the end of 2005 and October 2007 ESA pursued no serious activity. The ESA had also taken a year to draft its decision after Norway Post's last submissions.[51]

## Protégé International

In September 2012,[52] the GC ruled on an action for annulment against a 2009 EC decision rejecting an art.102 TFEU complaint that Protégé International, a company active in the marketing of Irish whiskey, had lodged in 2006 against Pernod Ricard, a French company active in the production and distribution of wine and other spirits.[53]

The GC upheld the EC's decision to reject Protégé's complaint on the basis of lack of sufficient Community interest. The EC considered that it would have to engage in an investigation the scope of which would have been disproportionate and that the national competition authorities were better placed to examine Protégé's complaint.

In its 2006 complaint Protégé claimed that Pernod Ricard had abused its dominance on the market for Irish whiskey. In particular, Protégé made two allegations:

- Pernod Ricard's alleged abuse consisted in multiple opposition filings in the period from 1997 until 2006 in various EU countries against trade mark registration applications for trade marks such as WILD GEESE, and WILD GEESE RARE IRISH WHISKEY, which Protégé was in charge of marketing. In these filings, Austin Nichols, Pernod Ricard's American subsidiary, claimed that there was a risk of confusion between these trade marks and its own trade mark for American whiskey, WILD TURKEY.
- Pernod Ricard's alleged abuse consisted in its attempt to impose a territoriality clause during supply negotiations with Protégé, a clause which aimed to control the territories in which Protégé's products could be sold. The refusal of Protégé to accept this clause eventually led to the failure of the negotiations and to the conclusion by

[46] *Norway Post*, April 18, 2012 at [176]–[178].
[47] *Norway Post*, April 18, 2012 at [231].
[48] *Norway Post*, April 18, 2012 at [250]–[251].
[49] *Norway Post*, April 18, 2012 at [252].
[50] *Norway Post*, April 18, 2012 at [280].
[51] *Norway Post*, April 18, 2012 at [281]–[283].
[52] With thanks to Lisa Arsenidou for her assistance with this section.
[53] *Protégé International v European Commission* (T-119/09), judgment of September 13, 2012.

> Protégé of a more onerous supply agreement with another supplier, instead of Pernod Ricard's subsidiary.

The GC rejected all of Protégé's arguments.

First, it agreed with the EC's conclusion that pursuing an investigation in this case would have been disproportionate. In this context, the GC found that the EC was right to conclude that it was unlikely to be able to establish an abuse.

The court repeated the two cumulative criteria laid down in *ITT Promedia*[54] to determine cases in which legal proceedings can constitute an abuse, i.e. that the action: (1) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party; and (2) the action is conceived in the framework of a plan whose goal is to eliminate competition. The court also observed that, since these two cumulative criteria constitute an exception to the general principle of access to the courts, they must be construed and applied strictly.[55]

The court rejected Protégé's argument that the two cumulative criteria were met in this case. The fact that both sides' trade marks included the word "Wild" and the fact that they both covered the same product, i.e. whiskey, were objective elements which, according to the court, were likely to have created doubts on the side of Austin Nichols as to a risk of confusion. Further, some consumers could not differentiate that easily between an American and an Irish whiskey.[56] The fact that trade mark registration offices in several countries had concluded that there was no risk of confusion did not confirm the existence of an abuse.[57]

Secondly, the GC agreed with the EC's conclusion that national competition authorities would be better placed to deal with its case and that there was no sufficient Community interest in this case. The number of national trade mark registration offices involved was not relevant, even if the alleged abuse concerned the territory of several Member States. Otherwise, the EC would have to pursue every complaint where the conduct covered several Member States, irrespective of whether it was well founded or not.[58]

Further, considering the territoriality principle that is applicable in trade mark law and the direct application of art.102 TFEU, the EC was right to consider that the national jurisdictions were better placed to deal with this case.[59] It would also be up to national courts and not the EC to order damages in the case of an art.102 TFEU violation.[60]

Thirdly, as to Protégé's alleged abuse of attempting to impose a territoriality abuse, the court agreed and noted among other things that Protégé did not bring forward any evidence to show that Pernod Ricard had forced it to accept a territoriality clause and that the fact that the parties did not reach an agreement was related to this and not also other circumstances.[61]

### EFIM

In November 2011, the GC also dismissed an appeal by the European Federation of Ink and Ink Cartridge Manufacturers ("EFIM") against the EC's decision rejecting its complaint alleging, among other things, an abuse of collective dominant position in inkjet cartridge after-markets.[62]

The GC upheld the EC's view that the complainant had not shown an infringement of art.81 EC and that the pursuit of an art.82 EC investigation was not in the Community interest, because of the low probability of showing an infringement and the resources that would be required for such an investigation.

It appears that the EC considered: (1) that there was intense competition on the primary printers market; (2) that based on previous cases on similar markets, it was unlikely that the primary and secondary markets were not closely linked; and (3) that therefore competition on the primary market would regulate the secondary markets and exclude dominance on those markets.

## *Distribution*

### Auto 24

In June 2012,[63] the CJEU ruled on a reference for a preliminary ruling by the French *Cour de Cassation* as to whether quantitative selective distribution systems in the motor vehicle sector have to be based on objectively justified and uniformly applied criteria in order to enjoy an exemption under the Motor Vehicle Block Exemption ("MVBE").[64]

The case arose from a commercial dispute between Jaguar Land Rover ("JLR") and Auto 24, one of JLR's former authorised exclusive distributors.

In September 2002, JLR terminated a dealership agreement with Auto 24, which had been its exclusive distributor in Périgueux (France) since 1994 and concluded instead an authorised repairer contract with Auto 24 in 2004, on the day the termination became effective.

[54] *ITT Promedia v Commission of the European Communities* (T-111/96) [1998] E.C.R. II-2937; [1998] 5 C.M.L.R. 491.
[55] See *ITT Promedia* [1998] E.C.R. II-2937; [1998] 5 C.M.L.R. 491 at [61].
[56] *Protégé*, September 13, 2012 at [54].
[57] *Protégé*, September 13, 2012 at [55].
[58] *Protégé*, September 13, 2012 at [77].
[59] *Protégé*, September 13, 2012 at [78].
[60] *Protégé*, September 13, 2012 at [79].
[61] *Protégé*, September 13, 2012 at [87].
[62] *EFIM v European Commission* (T-296/09), judgment of November 24, 2011.
[63] With thanks to Lisa Arsenidou for her assistance with this section.
[64] *Auto 24 Sàrl v Jaguar Land Rover France SAS* (C-158/11) [2012] 5 C.M.L.R. 3. CJEU Press Release 80/12.

JLR rejected Auto 24's application to become an authorised distributor.

In 2005, the Versailles *Tribunal de Commerce* held that JLR acted in a discriminatory way and ordered it to pay damages to Auto 24 for loss of profit. Nevertheless, in 2006, JLR rejected Auto 24's application for authorised distributor status again on the ground that JLR's "*numerus clausus*" did not provide for a distributor of new cars in Périgueux. When one of JLR's authorised distributors opened a secondary outlet in a town very close to Périgueux, Auto 24 brought proceedings against JLR again, this time before the Bordeaux *Tribunal de Commerce*.

The Bordeaux *Tribunal de Commerce* dismissed all of Auto 24's grounds and the Paris *Cour d'Appel* upheld that judgment. Auto 24 lodged an appeal before the French *Cour de Cassation* claiming that the *Cour d'Appel* had infringed French and European law by holding (1) that it was not required for the grantor to justify the reasons behind a *numerus clausus* system, and (2) by not examining the objectivity of the selection criteria, their economic use, the improvement in customer services and the conditions of their implementation. Auto 24 maintained that, in a quantitative selective distribution system, the supplier must use quantitative selection criteria that are specific, objective and proportionate to the aim pursued and implemented in a non-discriminatory manner when selecting its distributors.

In its reference, the *Cour de Cassation* sought to determine what is to be understood by the words "specified criteria" in art.1(1)f of the 2002 MVBE[65] as regards quantitative selective distribution. In essence, the French court asked whether the term "specified criteria" must be interpreted as meaning that a quantitative selective distribution system must be based on objectively justified criteria that would be applied in a uniform and non-differentiated manner in respect to all applicants for a distribution authorisation in order for that system to benefit from the exemption.[66]

At the outset, the CJEU observed that, based on its case law, non-compliance with a condition necessary for the block exemption cannot in itself give rise to damages pursuant to art.101 TFEU, or oblige a supplier to accept an applicant distributor into its distribution system.[67]

The CJEU also pointed out that, while there was a 40 per cent market share threshold under which quantitative selective distribution systems were deemed to have advantages that outweigh their restrictive effects, there was no such threshold in the case of qualitative selective distribution systems, where such advantages may be expected whatever the market share of the supplier.[68]

The CJEU noted that both as regards quantitative selective distribution and as regards qualitative selective distribution, distributors must be selected on the basis of "specified criteria", i.e. criteria whose precise content may be verified.[69] The court noted further that such criteria do not need to be published (at the risk of compromising business secrets or even facilitating collusion) with a view to verification of their content.[70]

The court observed that it was only in the context of qualitative distribution that the MVBE foresees that the criteria must be not only "specified", but also objectively justified and uniformly applied to all applicants. This does not follow from the definition of quantitative distribution.[71] It was also not apparent from the scheme of the Regulation that the legislature wished to impose the same conditions of exemption for the two systems of selective distribution.[72]

Thus the answer to the preliminary question was that it was not necessary for a quantitative selective distribution system to be based on objectively justified and uniformly applied criteria for it to benefit from the exemption provided for by the MVBE.

## European Commission decisions

### *Cartels – new*

**Box 2**

**New cartel fines**

**(November 2011 – October 2012)**

| **Total fines (in millions)** | | **Highest company fines(s) (in millions)** | |
|---|---|---|---|
| *Gas Insulated Switchgear (Re-adoption)* | €682.1 | *Mitsubishi* | €74.8 |
| | | *Kuehne + Nagel* | €36.7 |
| *Freight Forwarding* | €169.0 | | |
| *Refrigeration Compressors* | €161.2 | *Danfoss* | €90.0 |
| *Window Mountings* | €85.9 | *Gretsch-Unitas* | €20.6 |
| *Sodium Chlorate (Re-adoption)* | €73.4 | *Arkema, Elf Aquitaine* | €59.0 |
| *Water Management Systems* | €13.7 | *Reflex* | €9.8 |
| **TOTAL** | **€1,185.3 billion** | | |

[65] Regulation 1400/2002 of July 31, 2002 on the application of art.81(3) of the European Community Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L203/30.
[66] *Auto 24* [2012] 5 C.M.L.R. 3 at [21].
[67] *Auto 24* [2012] 5 C.M.L.R. 3 at [22].
[68] *Auto 24* [2012] 5 C.M.L.R. 3 at [26].
[69] *Auto 24* [2012] 5 C.M.L.R. 3 at [29]–[30].
[70] *Auto 24* [2012] 5 C.M.L.R. 3 at [31].
[71] *Auto 24* [2012] 5 C.M.L.R. 3 at [32]–[33].
[72] *Auto 24* [2012] 5 C.M.L.R. 3 at [35]–[36].

**Box 3**

**Main issues**

- Not many decisions in the reference period this year, but some interesting points.
- *Refrigeration Compressors*
  - — EC reduced fine on ACC after 10% of turnover ceiling, because of inability to pay, from €40.7 million to €9.9 million to avoid jeopardising financial restructuring/insolvency.
  - — And allowed ACC to pay over three years.
- *Window Mountings* ("turn and tilt")
  - — EC appears to have reduced fines to take into account 10% of turnover ceiling impact, mono-producer nature of companies and their differences in participation.
- *Bathroom Fittings and Fixtures*
  - — Only 8 liable for full, single and continuous infringement; others for specified countries, because not established that aware or should have been aware of wider infringement
- *CRT Glass*
  - — EC excluded 1.5 years from calculation of fine as "limited cartel activity"
- *Exotic Fruit* (Bananas—Southern Europe)
  - — EC received information on cartel from Italian tax police.
  - — Access to file allowed through non-disclosure agreement between Chiquita and Pacific.
- *Pre-Stressing Steel* decision now published
  - — More detail on the second amendment, whereby, exercising its margin of appreciation and in discretion, four entities fines were capped by 10% of turnover rule (although later in larger group).
  - — Information to EC via BKA on a statement in a German labour court case.

## Refrigeration Compressors

In December 2011, the EC announced that it had settled a cartel with producers of household and commercial refrigeration compressors used in fridges, freezers, vending machines and ice-cream coolers.[73] The companies concerned were: Appliances Components Companies ("ACC")/Elettromeccanica, Danfoss, Embraco/Whirlpool ("Embraco"), Panasonic and Tecumseh Products.

The overall fine was some €161.2 million. Tecumseh was granted immunity. The percentage taken for the basic amount of fine was 17 per cent. Panasonic, ACC, Embraco and Danfoss were given leniency reductions of 40 per cent to 15 per cent. Embraco also had a reduction for co-operation outside the Leniency Notice. Panasonic's fine was reduced, because it was not involved in all aspects of the cartel.

ACC's fine was capped by the 10 per cent of turnover ceiling rule. Interestingly, ACC was also granted a fine reduction based on inability to pay. In practice, that meant that ACC's fine was reduced from €40.7 million to €9 million. It appears ACC was under an insolvency scheme under Italian law and it was noted that payment of the fine in full would frustrate the group's financial restructuring and hence lead to its insolvency.

ACC was also allowed to pay over three years by instalments, the first payment within three months, with interest due on the later payments, subject to a bank guarantee for the outstanding amounts.[74]

All received a 10 per cent fine reduction for settling the case. The highest fine was €90 million on Danfoss. Others ranged from €54.5 million to €7.67 million.

It appears the cartel involved bilateral, trilateral and multilateral meetings on prices (including some specific European customers) and a related exchange of confidential information. The EC found that it covered the EEA and lasted from April 2004 to October 2007 (November 2006 for Panasonic). It is stated that the aim was to increase prices in order to recover increased material costs.

It appears the settlement discussions took some 10 months.

## Window Mountings

In March 2012,[75] the EC announced that it had imposed fines of some €85.9 million on nine producers of window mountings for operating an EEA-wide cartel.[76] In September 2012, the EC published a summary of its decision.[77]

Window mountings are mechanical metal parts used to open and close windows and window-doors. The companies concerned have market shares above 80 per cent in the EEA for so-called "turn-and-tilt" mountings, used to either fully open a window or to tilt the window inwards.

The companies concerned are Roto, Gretsch-Unitas, Siegenia, Winkhaus, Hautau, Fuhr and Strenger from Germany, Maco from Austria, and Alban Giacomo ("AGB") from Italy.

The EC found that the cartel had operated for more than seven years, from November 1999 to July 2007. Fuhr and AGB only participated for some three years. The companies were found to have agreed on common price increases during yearly regular meetings called "Permanent Conferences", which were held in November at the occasion of a trade association meeting in Germany, supplemented by regular contacts of local sales representatives.

[73] *Refrigeration Compressors* IP/11/511, December 7, 2011. Case COMP/39.600. The EC's summary decision is in [2012] OJ C122/6.
[74] See the non-confidential version of the *Refrigeration Compressors* decision, available on the EC's website, at [88], [96]–[98] and art.3(1).
[75] With thanks to Katrin Guéna for her general assistance with this cartel section.
[76] *Window Mountings*, IP/12/313, March 28, 2012.
[77] *Window Mountings* [2012] OJ C292/6. The summary is also available on the EC website. Case COMP/39.452.

Interestingly, the EC indicates that exceptionally it exercised its discretion under para.37 of the 2006 EC Fining Guidelines[78] to reduce fines, because nearly all the defendants were mono-product companies and their fines otherwise would have been capped at 10 per cent of their total turnover. The idea apparently is to reflect differences in participation in the infringement, as noted in *Putters*.[79] It will be interesting to see what the EC did more precisely. Vice-President Almunia has been talking about the hard position of fines for mono-product companies for some time.

The percentage of the variable and additional amount of the fine was set at 16 per cent of the turnover concerned in the EEA, save for one company where its sales in Italy were taken.

Roto revealed the existence of the cartel and was therefore not fined. Fines ranged from €104,000 for Strenger to €20.6 million for Gretsch-Unitas. The EC granted a 45 per cent reduction of the fine to Gretsch-Unitas and a 25 per cent reduction to Maco for their co-operation during the investigation. The EC also granted a 5 per cent reduction of the fine to Winkhaus for co-operation outside the scope of the Leniency Notice.

One company invoked its inability to pay and the EC agreed, reducing its fine by 45 per cent.

## Freight Forwarding

In March 2012, the EC also announced that it had imposed fines of some €169 million on 14 international groups of companies for having participated in four cartels related to the co-ordination of surcharge and charging mechanisms.[80]

Participants and duration varied in each of the four cartels. The EC found that the overall period of the infringements was from 2002 to 2007. The companies involved organised their contacts in so-called "Gardening Club" meetings, using code names, or met during "Breakfast Meetings". They created a specific email account to exchange price information.

The EC indicates that the four cartels concerned: (1) the creation and fixing of a surcharge for the electronic declaration of exports ("new exports system" or "NES" cartel); (2) the introduction of a surcharge for the provision of advance information on goods to be shipped to the United States (advanced manifest system or "AMS" cartel); (3) the shift of contracts from USD to the Chinese currency RMB or the establishment of a surcharge (currency adjustment factor or "CAF" cartel); and (4) the introduction and timing of a peak season surcharge ("PSS"). The NES and AMS cartels were mainly related to Europe-United States trade lanes; the CAF and PSS cartels to China/Hong Kong-Europe trade lanes.

The EC indicates that Deutsche Post, including its subsidiaries DHL and Excel, was granted full immunity from fines for all four cartels, since it revealed their existence. Deutsche Bahn and its subsidiaries Schenker and BAX also participated in all four cartels and were given reductions of fines from 20 per cent to 50 per cent for their co-operation during the investigations.

CEVA, which participated in the NES cartel, received a 35 per cent reduction of its fine. zAgility received a 30 per cent reduction for its co-operation regarding the AMS cartel investigation and a 25 per cent reduction concerning the PSS cartel. Yusen's fine was reduced by 5 per cent for having provided evidence in the CAF cartel investigation.

Fines ranged from €2 million to €5.3 million (NES cartel); €379,000 to €36.7 million (AMS cartel); €319,000 to €3.9 million (CAF cartel); €2.7 million to €19.6 million (PSS cartel).

## Water Management Systems

In June 2012, the EC announced that it fined companies involved in the sector of water management products some €13.7 million following a settlement procedure.[81]

Water management products are used in heating, cooling and sanitation systems and include products such as expansion vessels, degassers, air vents and safety valves. The cartel was found to have operated on the German market from June 2006 to May 2008 and for three months in 13 other Member States. Cartel participants co-ordinated prices and exchanged sensitive market information in bilateral meetings.

Pneumatex was granted immunity since it revealed the existence of the cartel. Flamco and Reflex obtained 10 per cent reductions for having acknowledged their participation in the cartel. They were fined respectively €3.9 million and €9.8 million. All fines were reduced by 10 per cent for the settlement.

# *Cartels – old*

## Bathroom Fittings and Fixtures

In November 2011, the EC published a summary of its June 2010 decision addressed to 17 groups of bathroom equipment manufacturers.[82] It may be recalled that Masco revealed the cartel in July 2004 and that six other companies applied for leniency following the EC's investigations in November 2004.

The main points are as follows:

First, it appears from the EC's summary that, of the 17 undertakings/groups concerned, eight were found liable for the single and continuous infringement in six EU countries, as the EC states that it was established that they could not have been unaware of the general scope and

[78] [2006] OJ C210/2.
[79] See J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2010–2011 (Part 1)" [2012] I.C.C.L.R. 67, 94.
[80] *Freight Forwarding*, IP/12/314, March 28, 2012. Case COMP/39.422.
[81] *Water Management Systems*, IP/12/704, June 27, 2012. Case COMP/39.611.
[82] *Bathroom Fittings and Fixtures* [2012] OJ C348/12. Case COMP/39.092.

characteristics of the cartel. The remaining companies were held liable for the countries in which they were active, because their awareness of the overall scheme of the wider infringement was not established.[83]

Secondly, the infringement periods varied for the 62 addresses of the decision.[84]

Thirdly, otherwise, as regards the fine setting: the percentage for the basic amount of fine was set at 15 per cent. The 10 per cent of turnover limit was attained by all undertakings save two. The EC states that the fines were "adjusted accordingly".[85] (It is not clear if that means they were just capped, or there was a further adjustment, although the impression is the former.) Fines for three companies were reduced by 50 per cent as "inability to pay" relief. Those of two other companies were also reduced by 25 per cent, given their difficult financial situation.[86]

## Pre-Stressing Steel

In November 2011, the EC also published a summary of its decision in the *Pre-Stressing Steel* cartel decision, as subsequently amended.[87] The non-confidential version of the decision, as amended, was put on the EC's website in March 2012. It is long and detailed, some 269 pages. It will be recalled that we discussed the case last year, because of apparently interesting amendments to fines.

The main points of interest are as follows:

First, in general this is a decision addressed to 17 undertakings/groups with some 36 legal entities. Overall the fine was some €270 million. The EC found a cartel involving price-fixing, quota-fixing, client allocation and the exchange of commercially sensitive information. The cartel was found to have lasted some 18 years from 1984 to 2002 (with variations by undertaking/company). It concerned most of the "EU-15", plus Norway.[88] Apparently there were many meetings (over 550).

Secondly, the case arose partly because of information supplied to the EC by the *Bundeskartellamt*. Notably, a German labour case, where a dismissed employee of a German company had asserted that during his employment, he had been involved in an art.101 TFEU infringement.[89] There was also an immunity application by DWK/Saarstahl, which was accepted on the basis that it put the EC in a position to prove the infringement.[90]

Thirdly, as noted last year, this is case which has involved two rounds of amendment. The first, in September 2010, was correcting some errors in the fine calculation. The second, in April 2011, involved the EC adjusting the fine on four of the legal entities involved, which were solely liable, in that they related only to those periods in which the legal entities participated without their current parent companies. This was in order to ensure that the level of their fines was not disproportionate to their own size and turnover. The EC reduced the fines to 10 per cent of the companies' own turnovers.[91]

In its decision the EC states this[92]:

> "The 10% cap laid down in Article 23(2) is calculated on the basis of the total turnover of all the entities constituting an 'undertaking'. The 10% cap is not based on the individual turnovers of the legal entities within an undertaking that are held jointly and severally liable for an infringement … *However, in this particular case, the Commission will use its margin of appreciation and discretion to set the parts of the fines for which the ArcelorMittal subsidiairies (sic) are not jointly and severally liable with ArcelorMittal SA, and the fine for which SLM is solely liable at a level not exceeding 10% of their owhn (sic) turnover in the business year preceding the adoption of the Decision*."(Emphasis added.)

Fourthly, in its decision, the EC devotes a section to the question as to whether undertakings were individually aware of participating in a wider infringement, concluding in this case that they were.[93]

Fifthly, fines are indicated by undertaking and company with specification of the variable duration of liability (and specification of amounts in the case of joint and severable liability).

Sixthly, as regards other fine setting aspects: the percentage for the basic amount of fine was varied (16 per cent and 18 per cent for certain undertakings and 19 per cent for the others).[94] Two companies, Proderac and Trame, had their fines reduced by 5 per cent for their limited participation in the infringement.[95]

Two ArcelorMittal companies, ArcelorMittal Fontaine and Wire France, had 60 per cent recidivism increases. There was also a 50 per cent recidivism increase for

[83] *Bathroom Fittings and Fixtures* [2012] OJ C348/12, Summary at [7].
[84] *Bathroom Fittings and Fixtures* [2012] OJ C348/12, Summary at [10].
[85] *Bathroom Fittings and Fixtures* [2012] OJ C348/12, Summary at [15].
[86] *Bathroom Fittings and Fixtures* [2012] OJ C348/12, Summary at [20].
[87] *Pre-Stressing Steel* [2011] OJ C339/7. With thanks to Asta Rimkute for her assistance.
[88] *Pre-Stressing Steel* [2012] OJ C348/12, Summary at [10].
[89] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [105].
[90] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [1073].
[91] *Pre-Stressing Steel* [2012] OJ C348/12, Summary at [8].
[92] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [1072a].
[93] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [644]–[672].
[94] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [953].
[95] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [1023]–[1026].

Saarstahl, which did not apply, because of its immunity.[96] Arcelor Mittal's fine was increased by 20 per cent for deterrence.[97]

Various companies' fines were limited by the 10 per cent of turnover ceiling.

Apart from DWK/Saarstahl's immunity, there were leniency reductions from 50 per cent to 5 per cent.[98] The fine for ArcelorMittal Espana was also reduced by 15 per cent for co-operation outside the scope of the Leniency Notice.[99]

Finally, there was inability to pay relief for three companies of 25 per cent, 50 per cent and 75 per cent. The EC emphasised in its assessment that it attempts to take into account the economic crisis, notably in terms of its impact on access to finance for the groups concerned.[100]

## CRT Glass

In February 2012 the EC published its summary decision in the CRT (cathode ray tube) glass case.[101] The decision was taken in October 2011 and was noted briefly last year.[102] The case was settled. The non-confidential version of the EC decision is also available on the EC's website.

It may be recalled that the case related to direct and indirect price co-ordination between Samsung Corning Precision Materials ("SCP"), Nippon Electric Glass ("NEG"), Schott and Asahi Glass Co ("AGC") as regards CRT glass. The duration of infringement found was between February 1999 and December 2004, with variations for some companies. The EC also found that there was a period of limited cartel activity from July 2001 to December 2002.

The overall fine was some €128.7 million. SCP was granted immunity. The other companies were fined between €45 million and €40 million. NEG was granted a 50 per cent fine reduction for leniency.

AGC and Schott's fines were also reduced by 15 per cent for limited involvement in the cartel in the early and later periods. Schott also had a reduction for co-operation outside the scope of the Leniency Notice. All those fined were given a 10 per cent reduction for settling the case.

The settlement negotiations appear to have taken a year (July 2010 to July 2011). The percentage taken for the basic amount of fine was 16 per cent of the relevant turnover.

Interestingly, it appears that the EC's approach to the period of "limited cartel activity" was not to take it into account for the calculation of duration, so 1.5 years in the middle of the cartel were not fined.[103]

## Exotic Fruit (Bananas)

In March 2012, the EC published the summary of its decision of October 2011 in the *Exotic Fruit (Bananas)* case.[104] The non-confidential version of the decision is also now available on the EC's website.[105]

It may be recalled that this is the second bananas case after the EC's decision as regards Northern Europe in 2008.

It appears that the case started as a result of two factors: (1) Chiquita applied for immunity as regards cartel activities concerning bananas and pineapples in the whole EEA; and (2) because, controversially, in July 2007 the EC was sent copies of documents found by the Italian tax police while investigating an employee of a company in the Pacific group. The EC then carried out dawn raids.

The EC found an infringement involving companies in the Chiquita and Pacific groups for some eight months (July 2004 to April 2005). The two groups were found to have co-ordinated their prices and exchanged confidential information. The conduct concerned fresh bananas in Greece, Portugal and Italy and mainly concerned green bananas sold to independent ripeners who then sell to supermarkets. The cartel was found to have covered between 60 per cent and 30 per cent of the national markets concerned, with variations over time.

The EC fixed the percentage for the variable and additional amounts of the fine at 15 per cent. As in the *Northern Europe — Bananas* case, the EC also reduced the basic amount of the fine by 20 per cent because of the regulatory context. The EC emphasised that Chiquita had co-operated both in the Northern and Southern Europe cases. The Pacific group of companies was fined €8.9 million jointly and severally.

The main points of interest are as follows:

First, access to file in the case was allowed using a non-disclosure agreement between Chiquita and Pacific with the agreement of the Hearing Officer.[106]

Secondly, predictably, the way that the Italian tax police obtained and sent documents to the EC was very controversial. It appears the documents came from the employee's home and office. The investigation concerned

[96] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [970].
[97] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [1056].
[98] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [1136]–[1189].
[99] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [1011].
[100] *Pre-Stressing Steel* [2012] OJ C348/12, Decision at [1137]–[1140].
[101] *CRT Glass* [2012] OJ C48/18. Case COMP/39.605.
[102] J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2010–11 (Part 2)" [2012] I.C.C.L.R. 127, 130. With thanks to Alexander Israel for his assistance with this section.
[103] *CRT Glass* [2012] OJ C48/18 at [27], [32] and [81].
[104] *Exotic Fruit (Bananas)* [2012] OJ C64/10. Case COMP/39.482.
[105] With thanks to Alexander Israel for assistance with this section.
[106] *Exotic Fruit (Bananas)* [2012] OJ C64/10 at [252].

was not related to competition law. However, the Italian public prosecutor had granted permission to send the documents to the EC.

Both Chiquita and Pacific questioned the legality of such a transfer of documents.[107] It was argued that: (1) only a national competition authority ("NCA") is entitled to send information concerning a possible infringement to the EC (under art.12(1) of Regulation 1/2003); (2) information collected outside a procedure to establish an infringement of EU law should not be used as evidence; and (3) administrative approval by the Italian public prosecutor does not guarantee the procedural safeguards established at EU level.

The EC rejected such arguments.[108] In its view: (1) art.12 of Regulation 1/2003 did not prevent the EC from receiving information from different sources; and (2) the admissibility of the documents in question as evidence and the lawfulness of their transmission to the EC was a question for national law and the national courts.

Thirdly, Pacific argued that the EC had not respected its rights to legal professional privilege by not giving Pacific the option to claim privilege when the documents were transferred to the EC.[109] Notably, one document relied on by the EC had been produced by an independent lawyer.

Again the EC rejected such arguments. The EC took the view[110] that: (1) it was for national courts to rule on legal privilege in a national procedure; (2) allowing an undertaking access to documents from national authorities before the SO would seriously undermine its investigation; and (3) the EC also questioned whether the document would be privileged. (The document was about transfer pricing.)

Fourthly, Pacific argued that the EC did not have evidence for seven months of the infringement, when prices were negotiated weekly.[111]

The EC rejected this on the basis that there was evidence of the plan for the collusion, confirmed by later evidence of implementation.[112]

## Sodium Chlorate (Re-adoption)

In March 2012, the EC also indicated that it had re-adopted its decision in the *Sodium Chlorate* case,[113] reducing the fine on Uralita to €4.2 million and amending the original decision after the GC's judgment in the *Aragonesas* case.[114]

It may be recalled that the GC found that Aragonesas' infringement was for a shorter period than found by the EC (some 11 months in 1998), but annulled the fine in its entirety. However, Aragonesas' parent Uralita remained liable with Aragonesas for the full €9.9 million fine imposed,[115] because its appeal was dismissed.

Aragonesas has since ceased to exist as it has merged into another company, leaving Uralita solely liable for the fine.

In such circumstances, it appears that (very correctly) the EC has reduced Uralita's fine for the infringement to reflect the shorter period and also taken the correction decision to clarify the shorter period of infringement.[116] Since Uralita had paid the full fine, it appears the EC is paying back the difference, save the interest on the revised fine amount of €4.2 million.

## Gas Insulated Switchgear (Re-adoption)

In June 2012, the EC re-adopted its *gas insulated switchgear* cartel ("GIS") decision as regards Mitsubishi Electric and Toshiba after their fines had been annulled by the GC for breach of equal treatment.[117] The EC's non-confidential version of its decision is available on the EC's website.

The GC objected to the way that the EC had used a different reference year for the two companies as opposed to the others involved, because they had participated in the cartel via a joint venture in the cartel's last two years.

The EC set the new fines at: Mitsubishi Electric €74.8 million and Toshiba €56.79 million; with both jointly and severally €4.65 million.[118] Mitsubishi Electric was previously fined €113.9 million and Toshiba €86.2 million, with both fined jointly and severally €4.65 million.

To set the fines the EC took the GIS turnover of the companies' joint venture in 2003 to establish starting amounts for the two companies for the period before the JV. The EC divided that starting amount in accordance with the proportion of GIS sales made by each of them in the year prior to the creation of JV, i.e. 2001.[119]

Otherwise, the EC (with the agreement of the Hearing Officer) did not issue a new SO, only a "letter of facts", considering that new objections were not put to the companies.

[107] *Exotic Fruit (Bananas)* [2012] OJ C64/10 at [81], [86] and [244].
[108] *Exotic Fruit (Bananas)* [2012] OJ C64/10 at [245]–[246].
[109] *Exotic Fruit (Bananas)* [2012] OJ C64/10 at [86] and [254].
[110] *Exotic Fruit (Bananas)* [2012] OJ C64/10 at [255]–[257].
[111] *Exotic Fruit (Bananas)* [2012] OJ C64/10 at [214].
[112] *Exotic Fruit (Bananas)* [2012] OJ C64/10 at [215]–[221].
[113] *Sodium Chlorate (Re-adoption)*, IP/12/323, March 28, 2012. Case COMP/38.695. The EC's summary decision is in [2012] OJ C162/6.
[114] *Aragonesas Industrie y Energia SAU v European Commission* (T-348/08) [2012] 4 C.M.L.R. 3.
[115] *Uralita SA v European Commision* (T-349/08) [2012] 4 C.M.L.R. 4.
[116] *Sodium Chlorate (Re-adoption)* [2012] OJ C162/6 at [8].
[117] *Toshiba Corp v European Commission* (T-113/07) [2011] 5 C.M.L.R. 20; and *Mitsubishi Electric Corp v European Commission* (T-133/07) [2011] 5 C.M.L.R. 2.
[118] *Gas Insulated Switchgear (Re-adoption)*, IP/12/705, June 27, 2012. Case COMP/39.966.
[119] See the non-confidential version of the *Gas Insulated Switchgear (Re-adoption)* decision at [62].

## Animal Feed Phosphates

In July 2012, the EC published a non-confidential version of its 2010 decision concerning the companies which settled in the animal feed phosphates cartel.[120] This case has been described before.[121] It may be recalled that the case involved what was considered to be a single, continuous infringement as regards the sale of phosphates used in animal feed over some 34 years.[122]

The main points of interest are as follows:

First, predictably for an infringement of such a long duration, a number of the companies had merged with or acquired others or had been sold, leading to detailed treatment of the resulting allocation of liability.[123]

Secondly, it appears that the settlement negotiations lasted some nine months, with CFPR/Timab discontinuing the settlement procedure, so there were two decisions, one for those settling and another for CFPR/Timab.[124]

Thirdly, in its description of the cartel arrangements, the EC notes that the structure of the cartel changed several times, sometimes being more centralised and sometimes being more regional, but with links between regions and some companies involved in several regions. The key point is that the EC found that this showed awareness of the "global cartel developments" throughout.[125]

Fourthly, the EC notes also that its jurisdiction changed over time as the European Union expanded and the EEA was established.[126]

Fifthly, in calculating the value of sales for fining purposes the EC took the approach that it would add up the actual (real) value of the sales made by the undertakings during the period of the infringement, where those data were available. If not, the relevant value of sales was calculated by multiplying the sales in the last full business year of the infringement by the duration of the company's participation in the infringement.[127]

Sixthly, the EC gave a fine reduction of 70 per cent for "inability-to-pay" relief to one of the undertakings concerned.[128]

Finally, the EC also allowed Tessenderlo Chemie, which had a fine of €83.7 million, to pay in three instalments over three years.[129]

## Heat Stabilisers

In September 2012, the EC put on its website the non-confidential version of its original decision in November 2009 concerning the heat stabilisers cartel, after three modifying decisions to the original one.

It may be recalled that in November 2009 the EC announced that it had fined 10 groups of companies some €173.9 million for two cartels, one concerning tin stabilisers, the other concerning ESBO/ester stabilisers.[130] These are used in PVC products. In the original decision Ciba/BASF was fined €68.4 million and Elementis €30.6 million (among or others). Then, in November 2010, the EC published a summary of its decision.[131]

The case was particularly topical, because it was in the context of onsite inspections of Akzo/Akcros Chemicals that there was controversy over legal professional privilege, which led to appeals to the European Courts.[132] It was also important because AC Treuhand, the Swiss data management services company, successor to Fides, was fined €348,000 for its roles in the cartels (€174,000 for each cartel), not just a nominal amount as before.[133]

However, in July 2011 the EC repealed its decision as regards *Ciba/BASF* and *Elementis*,[134] in the light of the *ArcelorMittal* judgment.[135] In that case the CJEU ruled that when a company appeals an EC decision that suspends the running of time for the company alone and not all the other companies in the decision. As a result the prescription rule in art.25 of Regulation 1/2003 applied for the other companies and they could not be fined more than 10 years after infringement has ended. Since Ciba/BASF and Elementis participated in the infringements concerned only until 1998, they could not be fined in November 2009.

The main points of interest in the non-confidential version of the original 2009 decision, as modified, are as follows:

First, it appears that all references to Ciba/BASF and Elementis have been removed (although this may be at least partly as a result of confidential treatment).

[120] *Animal Feed Phosphates*, available on the EC's website, Case COMP/38.866.
[121] See J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009–2010 (Part 2)" [2011] I.C.C.L.R. 113, 115; and J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2010–11 (Part 2)" [2012] I.C.C.L.R. 127, 131.
[122] *Animal Feed Phosphates* Case COMP/38.866 at [4] and [127]–[149].
[123] *Animal Feed Phosphates* Case COMP/38.866 at [167]–[192].
[124] *Animal Feed Phosphates* Case COMP/38.866 at [34]–[37].
[125] *Animal Feed Phosphates* Case COMP/38.866 at [53]–[115] and [133]–[137].
[126] *Animal Feed Phosphates* Case COMP/38.866 at [118]–[119].
[127] *Animal Feed Phosphates* Case COMP/38.866 at [200] and [209].
[128] *Animal Feed Phosphates* Case COMP/38.866 at [231]–[240]; and IP/10/985, July 20, 2010.
[129] *Animal Feed Phosphates* Case COMP/38.866 at art.3(1) of the Decision.
[130] IP/09/1695, November 11, 2009; J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2009–2010 (Part 2)" [2011] I.C.C.L.R. 113, 113–114; Case COMP/38.589.
[131] OJ EU C307/9, November 12, 2010.
[132] See J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 1)" [2008] I.C.C.L.R. 29, 45–46. See *Akzo Nobel Chemicals* and *Akcros Chemicals*, Joined cases (T-125/03) and (C7/04 P (R)) [2007] E.C.R. II-3523; subsequently confirmed see J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2009-2010 (Part 1)" [2011] I.C.C.L.R. 67, 83–84; *Akzo Nobel Chemicals* and *Akcros Chemicals* (C-550/07P) [2010] E.C.R. I-8301.
[133] Please note that there is a mistake at J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2009–2010 (Part 2)" [2011] I.C.C.L.R. 113, where a total fine of €346,000 was indicated.
[134] IP/11/820, July 4, 2011; J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011 (Part 2)" [2012] I.C.C.L.R. 129.
[135] See J. Ratliff, "Major Events and Policy Issues in EU Competition Law, 2010–2011 (Part 1)" [2012] I.C.C.L.R. 67, 90; *ArcelorMittal Luxembourg SA* (C-201/09) and (C-216/09), judgment of March 29, 2011.

Secondly, the EC treated the case as involving a single infringement until the SO, but changed its position in light of the arguments of the companies concerned that there were two separate infringements.[136]

Thirdly, there is specific discussion about the role of AC Treuhand.[137] It may be recalled that this was the case where material was produced by AC Treuhand on red and pink paper for discussions in meetings and then retained. The EC therefore did not treat AC Treuhand as just providing secretarial and administrative support. Rather it was found to have taken an active role in the cartels and specifically in preventing their detection. The EC also set the fine for AC Treuhand specifically, recognising that the Fining Guidelines offered only limited guidance. However, apart from the circumstances taken into account, the decision in its non-confidential version does not explain exactly how the EC arrived at €174,000 for AC Treuhand's role in each cartel.[138]

Fourthly, interestingly it appears that Akcros Chemicals and CECA sought to distance themselves from the unlawful arrangements and appear to have done so effectively.[139]

Fifthly, the EC devotes a considerable amount of text to rebutting the arguments that the case involved procedural irregularities and unreasonable delay attributable to its handling of the procedure.[140] The key point here is that the EC waited until after the European Court rulings on the documents contested as regards legal professional privilege,[141] having stated that it would do that to the court and also because it considered that these documents could be relevant to fixing the end of the cartel and to the defence rights of the companies involved. The EC considers that this is different to the *ArcelorMittal* case and that the appeal by Akzo/Akcros Chemicals had an effect on all (*erga omnes*), not just those companies appealing.

Sixthly, nevertheless, without prejudice to that position, the EC gave an ad hoc 1 per cent fine reduction to all the companies fined, save Akzo/Akcros Chemicals, recognising that the duration of the proceedings had been considerable.[142]

Finally, again there is detailed discussion of the allocation of liability, as some companies changed ownership over the period of the cartels.

## *Other horizontal settlements*

**Box 4**

**Article 101 TFEU—other horizontal issues**

- *E-books proposed settlement*: Four publishers and Apple have proposed commitments re switch from wholesale sales model to agency model for e-books.
- *Siemens/Areva*: Non-compete obligation reduced in scope and duration.

## E-books

In December 2011, the EC opened a formal investigation into the sale of e-books in the EEA,[143] apparently after co-operating with the UK Office of Fair Trading on the issue.

In September 2012, the EC then published proposed commitments from Apple and four of the five publishers under investigation (Hachette, Harper Collins, Simon & Schuster and Verlaggruppe Georg von Holtzbrinck (including Macmillan, Germany). The fifth publisher, Pearson group (Penguin) has not submitted commitments and the investigation into its conduct is ongoing although, as noted below, it would be affected by the proposed commitments.[144]

According to the EC's art.27(4) Notice accompanying the proposed commitments, the EC has formed the preliminary view that the four publishers and Apple have engaged in a concerted practice, contrary to art.101 TFEU, to raise the retail price of e-books.[145] In particular, it is alleged that the four companies and Apple all switched from a wholesale sales model to an agency model and their contracts all contain the same key terms.

Specifically, a most-favoured-nation ("MFN") clause was in all four agreements with the same key terms, extending to price, maximum retail price grids and Apple's level of commission. The EC concluded that, to avoid having lower revenues and margins on their e-books sold by Apple, the publishers would have to pressurise other major e-book retailers to adopt a similar agency model.[146]

The key features of the proposed commitments, on which comments were due within a month, are as follows:

- First, the four publishers and Apple would terminate their respective agency agreements.[147]

[136] EC decision July 2011 at [395]–[404].
[137] EC decision July 2011 at [108]–[129], [356]–[359] and [376]–[387].
[138] EC decision July 2011 at [744]–[753].
[139] EC decision July 2011 at [320]–[321], [423]–[425] and [437].
[140] EC decision July 2011 at [453]–[461], [473]–[487] and [675]–[682].
[141] EC decision July 2011 at [87]–[88].
[142] EC decision July 2011 at [771]–[772].
[143] *E-books*, IP/11/1509, December 6, 2011. Case COMP/39.847. With thanks to Cormac O'Daly for his assistance.
[144] *E-books*, IP/12/986, September 19, 2012. The proposed commitments and the EC's art.27(4) Notice are available at *http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39847* [Accessed January 2013]. The Notice is also published at [2012] OJ C283/7.
[145] Article 27(4) Notice [2012] OJ C283/7 at para.3.
[146] Article 27(4) Notice [2012] OJ C283/7 at para.4.
[147] Article 27(4) Notice [2012] OJ C283/7 at para.8.

- Secondly, Apple would give Pearson (Penguin) the option immediately to terminate its agency agreement with Apple. If Pearson does not do this, Apple would terminate in accordance with the provisions in the agency agreement.[148]
- Thirdly, the four publishers would give all other e-book retailers the option immediately to terminate any agency agreements that restrict the ability to set prices or offer discounts or that contain similar MFN clauses to the Apple agreements. Again, if the retailers do not do this, the publishers would be bound to terminate the agreements in accordance with the agreements' termination provisions.[149]
- Fourthly, for a period of two years, the publishers would not restrict retailers' ability to set or reduce their prices or offer discounts.[150] The discounts are subject to an overall cap equal to the total of the agent's 12-month commission in any ongoing agency agreement.
- Fifthly, for five years, neither the publishers, nor Apple would enter into agreements containing similar MFN clauses to the ones in the Apple agreements.[151]
- Sixthly, Apple would inform any publisher with whom it has an agency agreement that it will not enforce the MFN for a period of five years.[152]

## Siemens/Areva

In March 2012, the EC market tested commitments proposed by Siemens and Areva concerning a non-compete obligation related to nuclear technology markets.[153]

In 2001 Areva and Siemens created a joint venture ("JV"), Areva NP, with non-compete obligations. In 2009 Areva acquired sole control of the JV. Under the non-compete clause Siemens was prevented from competing with Areva NP for 8–11 years thereafter. Siemens was also prevented from competing on markets for "non-core" products and services of Areva NP. During the lifetime of JV, Areva NP was not active with its own products in "non-core" products and services, or accepted sales by Siemens.

An arbitral tribunal reduced the duration of the obligation to four years in April 2011, while maintaining its product scope.

However, after an earlier complaint by Siemens in 2009, which was later withdrawn, the EC took the view that these non-compete obligations were still excessive in duration and scope. In response, the companies proposed to reduce the duration of the non-compete obligation to three years from Areva's acquisition of sole control of the JV and to drop the obligation for non-core products and services, which the EC proposed to accept. There are also some related confidentiality provisions which were aligned to the non-compete obligation, insofar as they related to the relevant "core" products and services.

The commitments were made binding in June 2012.[154]

## *Articles 102/106 TFEU*

**Box 5**

**Articles 102/106 TFEU**

- *IBM*: Maintenance services for mainframes. Commitments adopted.
- *Standard & Poor's*: Pricing for International Securities Identification Numbers. Commitments adopted.
- *Thomson Reuters*: Proposed commitments on Reuters Instrument Codes re market data feeds.
- *Standards essential patents/FRAND issues*: Alleged abusive injunctions and licensing policies. *Samsung* and *Motorola* investigations.
- *Microsoft Browser*: Alleged breach of "browser choice screen" commitment in Windows 7 Service Pack.
- *CEZ*: Alleged pre-emptive booking of electricity transmission capacity. Proposed commitments involving the divestment of a lignite or coal-fired plant in the Czech Republic.
- *Rio Tinto Alcan*: Proposed commitments to address alleged contractual tie of aluminium smelting technology to related equipment/cranes.

This has been a busy year in the technology area as regards art.102 TFEU issues, with the EC notably being called to play a role in the so-called "smartphone wars" concerning standards essential patents. In addition, a number of investigations have been closed by commitments, while others have been opened (with perhaps the Microsoft Browser case being of greatest interest). Other investigations, notably Reuters and Google, continue.[155]

There have also been proposed commitments concerning electricity in the Czech Republic and tying as regards aluminium smelting technology.

[148] Article 27(4) Notice [2012] OJ C283/7 at para.8.
[149] Article 27(4) Notice [2012] OJ C283/7 at para.9.
[150] Article 27(4) Notice [2012] OJ C283/7 at para.10.
[151] Article 27(4) Notice [2012] OJ C283/7 at para.11.
[152] Article 27(4) Notice [2012] OJ C283/7 at para.12.
[153] *Siemens/Areva*, IP/12/243, March 14, 2012. The Article 27(4) Notice has been published in [2012] OJ C75/10. The non-confidential version of the commitments is available on the EC's website.
[154] *Siemens/Areva*, IP/12/618, June 18, 2012.
[155] With thanks to Cormac O'Daly for his assistance with this section.

## IBM

In December 2011, the EC adopted a decision under art.9 of Regulation 1/2003 making legally binding IBM's commitments regarding its future conduct on the market for inputs required to provide maintenance services for IBM mainframes.[156] In its Preliminary Assessment the EC alleged that IBM was abusing its dominant position by restricting third-party maintainers' access to spare parts and updates required to compete in the downstream service markets.

IBM has committed that spare parts and updates will be made available to third-party maintainers expeditiously under reasonable and non-discriminatory terms and conditions for a five-year period.

Following a number of comments, the final commitments differ slightly from the version which the EC had market tested. In particular, IBM has clarified[157] that: (1) future replacement parts are covered; (2) records can be purchased separately from parts; (3) it will continue to inform third parties of Machine Code Updates via a particular website; and (4) all necessary updates (and not just the most recent) for the machine type will be on DVDs containing an update.

In addition, the EC has removed clauses relating to IBM's right to audit and check that the third party's client has authorised an order. These provisions were found to have no impact on the time-frame in which IBM provides its spare parts and updates. Finally, fixed prices for two specific spare parts have been removed.

## Standard and Poor's

In November 2011, the EC adopted a decision under art.9 of Regulation 1/2003 making commitments legally binding on Standard and Poor's (S&P).[158] The commitments are designed to address the EC's concern that S&P was infringing art.102 TFEU by engaging in excessive pricing for US-issued international securities identification numbers ("ISINs").[159] In brief, S&P has committed not to charge indirect users of the ISINs and to limit the price charged to direct users and internet service providers ("ISPs") to US$15,000.

The final commitments do not differ materially from those proposed in May 2011. Many of the 70 responses to the EC's market test appear to have raised issues that were unrelated to the scope of the EC's investigation.[160]

Two changes which have been made are: (1) to clarify that end-users can use the ISINs for any purpose, internally or externally, which falls within their ordinary course of business[161]; and (2) the contracts attached to the draft commitments have been removed and replaced by a model agreement, which is not binding (third parties had objected that the annexed contract was less favourable than the terms commonly negotiated with S&P).[162]

A noteworthy point is the statement in the decision on the commitments' geographic scope, which was limited to the EEA.[163] Third parties had objected and claimed that the commitments should apply globally. The EC disagreed, noting that, at present, even companies with global operations use US ISINs licensed under different contracts having limited territorial scope.[164] The decision states that the commitments' scope "reflects the territorial scope of application of the Union competition rules", namely the EC has jurisdiction over "restrictive practices that are implemented in the EEA and have an effect on inter-state trade within the EEA".[165] The decision continues: "in some circumstances remedies may have to be worldwide in scope in order to ensure fair competition in the EEA."[166]

## Thomson Reuters

In November 2009, the EC opened an investigation into Thomson Reuters.[167] Then in December 2011 and July 2012, the EC sought comments from third parties on proposed commitments.[168]

The investigation concerns Thomson Reuters' licensing of Reuters Instruments Codes ("RICs"), which are used to identify securities for "real-time market data feeds" and to retrieve information from those feeds. It appears that customers are not allowed to use RICs to retrieve data from consolidated real-time data-feeds from other providers, nor are they allowed to translate the RICs to other suppliers' identification codes (a practice known as "mapping"), which in the EC's Preliminary Assessment

[156] *IBM*, IP/11/1539, December 13, 2012. Case COMP/39.692. The EC Decision of December 13, 2011, *IBM Maintenance Services*, is available on the EC's website. The EC's summary is published in [2012] OJ C18/6.
[157] *IBM Maintenance Services*, December 13, 2011 at [55]–[71].
[158] *Standard & Poor's*, IP/11/1354, November 15, 2011. Case COMP/39.592. The EC Decision of November 15, 2011, *Standard & Poor's*, is available on the EC's website. The EC's summary is published in [2012] OJ C31/8.
[159] See also J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2010–11 (Part 2)" [2012] I.C.C.L.R. 127, 135.
[160] *Standard & Poor's*, IP/11/1354, November 15, 2011 at [55]–[67].
[161] *Standard & Poor's*, IP/11/1354, November 15, 2011 at [68]–[70].
[162] *Standard & Poor's*, IP/11/1354, November 15, 2011 at [71]–[75].
[163] *Standard & Poor's*, IP/11/1354, November 15, 2011 at [62]–[65].
[164] *Standard & Poor's*, IP/11/1354, November 15, 2011 at [65].
[165] *Standard & Poor's*, IP/11/1354, November 15, 2011 at [64].
[166] *Standard & Poor's*, IP/11/1354, November 15, 2011 at [65].
[167] *Thomson Reuters*, IP/09/1692, November 10, 2009.
[168] *Thomson Reuters* IP/11/1540, December 14, 2011; and IP/12/777, July 12, 2012. Case COMP/39.654. The second art.27(4) Notice was published in [2012] OJ C204/44. The proposed commitments are available on the EC's website.

is treated as creating a barrier to switching on the market for consolidated real-time data feeds, on which Thomson Reuters is dominant.[169]

The first set of commitments proposed that customers would be able to license extra rights for RICs and be able to access the information needed to map RICs to alternative providers' solutions.[170] The licence would have been available for five years to customers in the EEA.

Following reaction to the first market test, Thomson Reuters' revised commitments widen the scope of the RICs covered by the commitment, propose lower royalty rates and simplified fee structures and offer the possibility of worldwide licences when necessary.[171] In addition, the revised commitments would allow third-party developers to conclude a separate licence, which it is hoped will ease switching.[172] Third parties had four weeks to comment.

## "Standards essential" patent licensing/FRAND

The EC has opened three formal investigations against two companies (Samsung and Motorola) which allegedly have infringed art.102 TFEU by failing to abide by their commitments made to standard-setting organisations to license standards-essential patents on fair reasonable and non-discriminatory (FRAND) terms.

### *Samsung*

In January 2012, the EC announced that it had opened a formal investigation against Samsung.[173] The EC acted on its own initiative. In 2011 Samsung had sought injunctive relief notably against Apple, in a number of Member States, claiming infringement of patents which Samsung had earlier declared essential to certain European Telecommunications Standards Institute ("ETSI") mobile telephony standards and which Samsung had undertaken to license on FRAND terms.

The EC's Press Release notes that Samsung's pursuit of injunctions may potentially be abusive, but it appears from the later Press Releases concerning the investigations into Motorola that the EC may also be investigating other aspects of Samsung's licensing policies.

### *Motorola*

In April 2012, the EC announced that, following separate complaints from Apple and Microsoft, it had opened investigations against Motorola, which has been acquired by Google.[174] Again, the EC's Press Release highlights Motorola's seeking of injunctions as potentially abusive, but it also states that the EC is investigating "the allegation by both Apple and Microsoft that Motorola offered unfair licensing conditions for its standard-essential patents in breach of Article 102 TFEU". The investigation concerns 2G and 3G ETSI standards, the International Organization for Standardization's ("ISO") H.264 video compression standard and WLAN standards.

## Microsoft Browser

In July 2012, the EC opened proceedings to investigate Microsoft's possible non-compliance with its December 2009 commitments to provide a browser choice for consumers.[175] In October 2012, the EC announced that it had sent a SO to Microsoft.[176] It will be recalled that the EC was concerned that Microsoft was abusing its dominance on the client PC operating system market by tying its internet browser, Internet Explorer, to Windows, its client PC operating system.[177]

The Press Release announcing the SO notes the EC's preliminary view that Microsoft failed to offer users the "browser choice screen" required under its commitment when it released the Windows 7 Service Pack 1 in February 2011 and that this failure continued to July 2012. Microsoft has apparently acknowledged that, owing to a technical error, the choice screen was not offered during that period.

## MathWorks

In March 2012, the EC opened proceedings against The MathWorks Inc.[178] A complainant has alleged that MathWorks is dominant on the market for the design of commercial control systems (used, for example, in cruise control or anti-lock braking systems in cars). Apparently it is alleged that MathWorks is abusing this dominance, by refusing to license a competitor for its Simulink and MATLAB products and refusing to provide information which would enable the competitor to lawfully reverse engineer in order to achieve interoperability with these products.

## Slovak Telekom/Deutsche Telekom

In May 2012, the EC sent a SO to Slovak Telekom and its 51 per cent parent, Deutsche Telekom, alleging that Slovak Telekom had abused its dominance on a number of wholesale broadband markets in Slovakia.[179] The EC

[169] See art.27(4) Notice, July 12, 2012 at [3].
[170] *Thomson Reuters*, IP/11/1540, December 14, 2011.
[171] See art.27(4) Notice, July 12, 2012 at [5].
[172] See art.27(4) Notice, July 12, 2012 at [17].
[173] *Samsung*, IP/12/89, January 31, 2012.
[174] *Motorola*, IP/12/345, April 3, 2012. In February 2012, the EC cleared Google's acquisition of Motorola Mobility Inc: see Case No.COMP/M.6381, *Google/Motorola Mobility*, a non-confidential version of which is available on the EC's website.
[175] *Microsoft Browser*, IP/12/800, July 17, 2012.
[176] *Microsoft Browser*, IP/12/1149, October 24, 2012.
[177] See discussion in J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)" [2010] I.C.C.L.R. 149, 167; and J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009–2010 (Part 2)" [2011] I.C.C.L.R. 113, 129.
[178] *MathWorks*, IP/12/208, March 1, 2012.
[179] *Slovak Telekom/Deutsche Telekom*, IP/12/462, May 8, 2012.

considers that Slovak Telekom may have refused to supply competitors with unbundled access to the local loop and wholesale services and may have engaged in margin squeezing.

## Google

Finally, the EC's investigations into Google's alleged abuses on the market for internet search and advertising services continue.[180] During the year, it has been reported that a number of meetings were held with Google regarding technical issues. Most recently, in September 2012, Vice-President Almunia stated that, while settlement discussions are ongoing, the parties are "not there yet".[181]

## CEZ and Others

In June 2012, the EC expressed concerns that by pre-emptively booking capacity in the electricity transmission network, ČEZ a.s. ("CEZ"), the electricity producer incumbent, might have abused its dominant position on the market for generation and wholesale supply of electricity in the Czech Republic. According to the EC, such conduct might have resulted in competitors being prevented from making new investments in electricity generation and thus preventing their entry into the market.[182]

In November 2009, the EC carried out inspections at the premises of CEZ and other undertakings in the Czech Republic. Afterwards, in July 2011, the EC opened formal proceedings against CEZ for alleged abuse of its dominant position on the wholesale electricity market in the Czech Republic. In June 2012, the EC informed CEZ of its competition concerns.

In order to address those concerns, CEZ submitted commitments pursuant to art.9 of Regulation 1/2003. CEZ offered to divest one of its generation assets[183] in the Czech Republic to a suitable purchaser who would be approved by the EC,[184] while denying any abuse of its dominant position.

In July 2012, the EC invited interested third parties to comment on the proposed commitments. According to CEZ, comments received from various third parties as part of the market test would not materially affect the proposed commitments.

## Rio Tinto Alcan

In August 2012, the EC published an art.27(4) Notice as regards the commitments offered by Rio Tinto Alcan ("RTA").[185] In its Preliminary Assessment, the EC had expressed concerns that RTA may have been infringing arts 101 and 102 TFEU by contractually tying the licences of its leading AP aluminium smelting technology to the purchase of certain speciality cranes for aluminium reduction plants, so-called "pot tending assemblies" ("PTAs"), supplied by RTA's subsidiary, ECLSASU.

The EC indicated that RTA had a dominant position on the market for the licensing of aluminium smelting technology and that the contractual tie between RTA's licences of the technology, with the handling equipment for aluminium smelters could produce negative effects on innovation and prices and result in anti-competitive foreclosure on the relevant PTA market.[186]

While denying the EC's claims, RTA has offered to modify the terms of its technology transfer agreements, after the entry into force of the commitments, so that any licensee of the AP aluminium smelting technology will be entitled to purchase PTAs from ECLSASU, or from any recommended PTA supplier. In order to become a recommended PTA supplier, a third-party PTA supplier would have to meet certain technical specifications for the relevant AP technology family and go through an objective and non-discriminatory pre-qualification process set up by RTA.[187]

If accepted, the commitments will apply to all requests for tender which are related to the licensing of AP aluminium smelting technology addressed to RTA for five years from when the commitments become effective.[188]

## *Procedure*

**Box 6**

**Procedure**

- *EPH and Others*: Czech investigation €2.5 million fine for failing to block an email account and diverting incoming emails.
- *Suez Environnement*: Decision published.
  - — Controversially, it turns out that the €8 million fine was because an employee had missed the in-house lawyers' instructions not to open the relevant door and pulled on it, breaking the seal, but apparently without going further.

[180] See J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009–2010 (Part 2)" [2011] I.C.C.L.R. 113, 131 and J. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2010–11 (Part 2)" [2012] I.C.C.L.R. 127, 138.
[181] SPEECH/12/629, "Competition enforcement in the knowledge economy" (September 20, 2012), available on the EC's website.
[182] Article 27(4) Notice, Case 39.727, *CEZ* at [3]. The proposed commitments are available on the EC's website.
[183] Lignite-fired and coal-fired power plants: Pocerady (1,000 MW), Chvaletice (800 MW), Detmarovice (800 MW) or Melnik III (500 MW)/Tisova (Tisova I: 184 MW, Tisova II: 112 MW).
[184] The proposed commitments are available in English on the EC website.
[185] *Rio Tinto Alcan*, IP/12/896, August 10, 2012; Case COMP/39.230; [2012] OJ C240/23. The proposed commitments are available on the EC's website. With thanks to Philippe Claessens for his assistance.
[186] *Rio Tinto Alcan* [2012] OJ C240/23 at [3].
[187] *Rio Tinto Alcan* [2012] OJ C240/23 at [5]–[6].
[188] *Rio Tinto Alcan* [2012] OJ C240/23 at [11].

## EPH and Others

In March 2012, the EC issued a decision imposing fines of €2.5 million on Czech energy companies Energetický a půmyslový holding, a.s. ("EPH") and EP Investment Advisors, s.r.o. ("EPIA") for refusal to submit to an inspection.[189] According to the EC, the companies failed to block an email account and diverted incoming emails.

During the inspection, which was carried out in November 2009 in Prague, EC officials requested to block the email accounts of key personnel until further notice, a standard measure taken at the beginning of inspections. To that end, email accounts' passwords had been changed and new passwords were known only to EC inspectors.

On the second day of the inspection, it turned out that one of the key persons had been allowed to access his email account through modification of the password. Additionally, on the third day of the inspection, the EC found out that one of the key persons instructed the IT Department to store emails addressed to the blocked email accounts on the server located in the building. As a result, no new emails had arrived in the respective blocked email accounts.

As regards unblocking of the email accounts, the companies argued that:

- The relevant person was neither aware of the blockage of his account upon request by the EC officials, nor informed about the inspection.
- The EC could have verified the details of the communications executed through the given email account and its influence on the investigation.
- The IT department was not properly briefed by the inspectors about the nature of their obligations.
- This could not be cured by invoking minutes signed by the head of the IT Department after the incident, in which he acknowledged that he had been properly informed by EC inspectors about the importance of blockage of email accounts.[190]

In its decision, the EC stated that:

- A reconstruction of the content of the email account at each point in time during the inspection is not possible.
- Inspectors were not able to verify whether emails received or sent had been concealed, tampered with or deleted.
- The unblocking of the email account constituted an infringement, irrespective of whether specific emails had been actually manipulated or deleted.
- The fact that minutes were taken after the incidents did not diminish their evidentiary value.[191]
- The head of the IT department had a duty promptly to inform his subordinates about the inspectors' instructions and to ensure that the instructions were followed.
- It was not possible for the EC to brief separately every single employee of undertakings subject to the inspection.[192]

As regards diversion of incoming emails, the companies claimed that the EC had direct access to those emails as they were stored on the server of the third company that was subject to the inspection. The EC rejected this argument, stating that the duty of active co-operation does not merely mean passively allowing access to all files, but also indicating where the relevant information can be found and actually producing specific documents as requested. Thus the EC concluded that, during a significant part of the inspection, the incoming emails of one of the key persons were not made accessible to the EC.[193]

When setting the amount of the fine, the EC stressed the importance of documents stored in electronic format and their special nature making the risk of manipulation and deletion particularly high.[194] The EC considered both incidents as a single serious infringement and concluded that the fact that the companies did not refuse to submit to the overall inspection could not affect it. The EC concluded that, although the unblocking of one of the email accounts was committed negligently, that fact could alter the serious nature of the infringement.[195] The diversion of incoming emails was considered an intentional infringement.

The fine is stated to be 0.25 per cent of EPH's turnover in 2010.

## Suez Environnement

The EC has now published a non-confidential version of its decision in this case on its website. There is also a summarising article in the *EU Competition Policy Newsletter*, outlining the EC's position in this case.[196]

It appears that what happened is that an employee was asked to get a document. The room was sealed where he thought it was. He says that inadvertently he pulled on

[189] EC Decision of March 28, 2012. Case COMP/39.793, *EPH and Others*. The EC decision is available on the EC's website. A summary is also published in [2012] OJ C316/8. With thanks to Ivana Kreiselová for her assistance with this section.
[190] *EPH*, March 28, 2012 at [29]–[31].
[191] *EPH*, March 28, 2012 at [54]–[56].
[192] *EPH*, March 28, 2012 at [72].
[193] *EPH*, March 28, 2012 at [61].
[194] *EPH*, March 28, 2012 at [83].
[195] *EPH*, March 28, 2012 at [87].
[196] (2011) 3 *EU Competition Policy Newsletter* 8.

the door, so that it was half-open ("entrouvert"), saw the seal, stopped and shut the door.[197] For this, on a very strict basis,[198] Suez Environnement ("Suez") and its subsidiary Lyonnaise des Eaux ("LDE") were fined €8 million.

It is a hard decision, given that Suez/LDE immediately investigated, found the mistake fast and more importantly, had put up its own sign as well on the door, saying "Attention! Do not open or touch for any reason"[199] (our translation). The EC states that Suez should have locked the door, or put some physical obstacle to prevent such entry.[200] The EC also held Suez responsible, not just LDE, partly it appears because of the active involvement of the Suez in-house lawyers.

The EC notes that the fine was 0.065 per cent of Suez's turnover.[201] However, it appears that is still €8 million for a moment's inadvertence. Certainly the EC's investigatory powers are important and must not be undermined, but one may well argue that this whole fine goes too far.

**Box 7**

- *Other EC/ECN initiatives*
  - — Possible "pay for delay" pharma cases (*Servier and Others*, *Lundbeck and Others*).
  - — Task Force on Food and *ECN Subgroup on Food Report*.
  - — *ECN Banking and Payments Subgroup Report*.
  - — EC amicus curiae briefs on EC website.
- *Other policy issues*
  - — Damages cases, possible Directive and possible legislation to protect leniency documents?
  - — Dealing with the financial crisis: "Inability to pay" pragmatism again; accent on innovation and food supply, with some financial cases; but real issues elsewhere than in antitrust?

## Other EC/ECN initiatives

### *Follow-up on Pharma*

It will be recalled that the EC opened investigations in July 2009 into Les Laboratoires Servier (Servier) and others for alleged restrictions of competition.[202]

Then in 2010, the EC addressed a SO to Servier, alleging that it had provided misleading and incorrect information in reply to a request for information. In January 2012, the EC stated that it had decided to close that investigation since Servier had submitted arguments as to why the information it supplied was neither misleading nor incorrect.[203] The EC stated that it had decided to concentrate on the substance of the 2009 investigation.

Then in July 2012, the EC issued SOs to Servier and its subsidiaries, and to some of its generic competitors, Niche/Unichem, Matrix (now Mylan), Teva, Krka, and Lupin.[204] The EC stated its provisional view that Servier may have established a strategy to foreclose new entry for a generic to perindopril, a cardio-vascular drug. Servier's strategy was allegedly based on the conclusion of patent settlements with its generic competitors and on its acquisition of scarce competing technologies for the production of perindopril.

Also, in July 2012, the EC sent SOs to Lundbeck and its generic competitors Merck, Generics UK, Arrow, Resolution Chemicals, Xellia Pharmaceuticals, Alpharma, A.L. Industrier and Ranbaxy for entering into patent settlement agreements concerning citalopram, an anti-depressant.[205] The EC notes that the agreements provided for substantial value transfers from Lundbeck to the generic companies which then abstained from entering the market. Value transfers also included direct payments, the purchase of generics for destruction and guaranteed profits as part of a distribution agreement.

It will also be recalled that the EC started monitoring patent settlement agreements in 2010. In July 2012, the EC issued its third monitoring report.[206] The EC concluded that the number of problematic settlements from a competition point of view stabilised at a level of about 11 per cent (compared with 21 per cent found in the 2009 sector inquiry). The total number of patent settlements on the contrary increased by 500 per cent. The EC announced that it would continue to monitor such agreements.

Otherwise, the EC closed its investigation into possible action by Astra Zeneca and Nycomed to delay the market entry of generic medicines.[207]

### *Food supply chain initiatives*

It has been topical for several years now that the European Union is concerned with rising food prices and retail competition. It may be useful to mention two events this year: the creation of the EC Task Force on Food in January 2012 and the issuing of the *ECN Subgroup on Food Report* in May 2012.[208]

[197] *Suez Environnement* at [43].
[198] *Suez Environnement* at [70].
[199] *Suez Environnement* at [24] and [74].
[200] *Suez Environnement* at [73].
[201] *Suez Environnement* at [105].
[202] With thanks to Katrin Guéna for her assistance.
[203] *Servier*, IP/12/43, January 27, 2012.
[204] *Servier*, IP/12/835, July 30, 2012.
[205] *Lundbeck*, IP/12/834, July 25, 2012.
[206] MEMO/12/593, July 30, 2012. The Report is available on the EC's website.
[207] *Astra Zeneca*, IP/12/210, March 1, 2012.
[208] With thanks to Svetlana Chobanova for her assistance with this section.

## The EC Task Force on Food

In January 2012 the EC announced that it had established a Task Force within DG COMP with the purpose of co-ordinating antitrust enforcement in the food sector. It consists of some six officials and is intended to operate for an initial two-year period.

The creation of the Task Force was partly in response to demands from the European Parliament (EP) for intervention by the EC in the retail sector, concerned, it appears, by discrepancies between agricultural commodity and consumer food price developments, insofar as the fall of the former since mid-2008 did not result in a fall in final consumer prices.

There have been various reports to the EP on these issues,[209] among over things, suggesting action at EU level to address unfair contractual practices in the internal market.[210] The EC itself has so far limited its action to classic cartel investigations, such as the *Exotic Fruit (Bananas)*[211] case; while as noted below, there have also been many cases at NCA level.

In 2010, a "Forum for a Better Functioning Food Supply Chain" was set up within DG Enterprise and Industry with the task of focusing on business-to-business contractual practices, competitiveness in the agro-food industry and the monitoring of food prices.[212] Its mid-term report addressed, inter alia, the issue of unfair business-to-business contractual practices in the food supply chain.[213]

After the creation of the Task Force, Vice-President Almunia announced in March 2012 that the EC is looking into the need for an industry-wide inquiry at EU level, as requested by the EP. However, while recognising that problems exist in the entire value chain of the food industries, he stressed that, at present, the NCAs were dealing adequately with the task.

Following the European Competition Network ("ECN") Food Report (see below), in October 2012, Vice-President Almunia said that the conclusions of the Task Force in the upcoming months may lead to the opening of an EU level investigation. It is understood, however, that most of the complaints received by the Task Force on Food have related to unfair trading practices in the contractual relationships between suppliers and retailers due to the unbalanced bargaining positions of some operators.

## The ECN Subgroup on Food Report

This report, which was published by the ECN in 2012, shows that the activities of the NCAs have been considerable. The report is some 155 pages long and very useful.[214]

In the food sector, in the period since 2004 more than 180 antitrust cases were or are still under investigation, around 1,300 mergers were reviewed and more than 100 sector inquiries or monitoring actions were carried out. All levels of the supply chain were investigated, with the majority of cases involving manufacturers (16 per cent), processors (28 per cent) and retailers (25 per cent). The affected sectors include notably cereal-based products, retail sales of groceries and milk and dairy, as well as fruits and vegetables and meat, poultry and eggs.

Looking at the NCAs' enforcement actions, in about half of the cases anti-competitive conduct was in the form of horizontal cartels, fixing prices or allocating markets (50 such cartels were sanctioned and another 30 are under investigation). 19 per cent of cases were about vertical restraint and 20 per cent of cases were about abusive conduct. With regard to mergers, 82 were reported to have raised concerns, 31 per cent of which in the retail sector. Eight were ultimately prohibited in the sectors of pastry, cheese, meat, beverages and confectionary products.

Since 2004 there have been 103 market monitoring actions on food-related issues, 10 of which are ongoing, carried out by the NCAs, looking at the full supply chain, or focusing on specific products.

One interesting aspect is that it is stated that there has been concern about the diminishing share of value for farmers in the supply chain, given their fragmentary structure as against the strong bargaining power of other sectors of the food chain.[215]

It appears that the EC is recommending recognition by Member States of producers' organisations in all sectors of agricultural production. Specific rules have also been introduced for milk, allowing milk farmers to engage in collective bargaining negotiations and to agree common prices pursuant to "limited and temporary exceptions".[216]

### *Banking/financial payments*

In March 2012 the ECN Banking and Payments Subgroup published an Information Paper[217] which is a 69-page overview of the work of the EC and the NCAs in the payment sector, giving short details on resolved and pending cases, sector inquiries and market studies on this subject across Europe. It also provides links to the

[209] See, e.g., Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A better functioning food supply chain in Europe* (October 28, 2009), COM(2009) 591.
[210] *A better functioning food supply chain in Europe* (October 28, 2009), COM(2009) 591, paras 5–7.
[211] Case COMP/39.482, *Exotic Fruit (Bananas)*, noted above.
[212] IP/11/1469, November 29, 2011.
[213] See *http://ec.europa.eu/enterprise/sectors/food/competitiveness/forum_food/index_en.htm#h2-2* [Accessed January 28, 2013].
[214] See *http://ec.europa.eu/competition/ecn/food_report_en.pdf* [Accessed January 28, 2013].
[215] *ECN Subgroup on Food Report* (May 2012), p.26, para.38.
[216] *ECN Subgroup on Food Report* (May 2012), pp.26–27, paras 39–41. See EU Regulation 261/2012 of March 14, 2012 [2012] OJ L94/38.
[217] *Information Paper on Competition Enforcement in the Payments Sector* (March 2012), *http://ec.europa.eu/competition/sectors/financial_services/information_paper_payments_en.pdf* [Accessed January 28, 2013].

relevant Press Releases and the full text of the decisions or market surveys. In addition to the 27 EU Member States, there is a section on Norway and Switzerland.

The paper appears in the context of (1) the EU Regulation on Euro credit transfers and direct debits adopted in February 2012, containing a prohibition of per transaction multilateral interchange fees (MIFs) to enter into force for cross-border direct debits on November 1, 2012[218]; and (2) the Green Paper[219] from January 2012, starting a consultation to address the barriers to fully integrated, competitive markets in the areas of card, internet and mobile payments.

The main issues identified include market access and entry for existing and new service providers, payment security and data protection, transparent and efficient pricing of payment services, technical standardisation and inter-operability between service providers.

It may be noted that the NCAs are using different means and are at different stages in resolving competition concerns or analysing the payments market. In some Member States one or multiple cases involved the imposition of fines (Austria, France, Poland, Slovenia); in others they were terminated with commitments (Belgium, France, Greece, Italy). In others investigations are ongoing (Cyprus, Germany, Hungary, United Kingdom) or appeals are pending (Hungary, Italy, Latvia, Spain). Certain NCAs have chosen to analyse the market by way of sector inquiries (Bulgaria, Romania) or surveys/studies (Czech Republic, Denmark, Finland, Hungary, the Netherlands).

Many of the activities at national level are related to issues raised in the context of the Green Paper: a large number of the decisions concern MIFs on domestic or international credit and debit card transactions or internet payments and withdrawals from ATMs.

### *Amicus curiae observations*

The EC has now published on its website several of its observations to national courts as amicus curiae,[220] often with the related national judgment. Topics include: the *Pfleiderer* case on disclosure of documents,[221] the *Irish Beef Industry Development Society* case on industrial restructuring, whether fines should be tax deductible, online sales and selective distribution; and selective distribution in motor vehicle supply.

## Current policy issues

Many of the leading policy issues of the day have been covered already. Notably, the nature of judicial review (in the *KME* and *Chalkor* cases, discussed in Part 1), access to EC documents (in the *EnBW* and *CDC Hydrogen Peroxide* cases, discussed in Part 1) and the food initiatives (noted in the last section).

Two other leading topics remain: damages and reactions to the continuing financial crisis.

### *Damages*

The focus of this article is on EU activity: the European Courts and the EC. While all we have described here has been going on, many damages cases have been progressing in the national courts, with notably, the second *Pfleiderer* case in the Amtsgericht Bonn[222] and the *National Grid* case in the United Kingdom[223] on access to documents.

The broader policy issues at EU level remain: (1) a possible Directive on antitrust damages claims; and (2) whether there could be more specific legislation adopted in order to ensure that leniency documents are not disclosed,[224] which DG COMP had scheduled for 2012. We will have to wait and see what happens.

### *Dealing with the financial crisis*

In this context, one may note from the antitrust perspective that, while there is much talk as to whether the enforcement of competition law should be different in hard times, in practice the EC appears still to be pursuing a pragmatic line (e.g. in "inability-to-pay" cases, like ACC in the *Refrigeration Compressors* cartel, noted above). At the same time, the EC is still involved in numerous cartel investigations, many of which appear to date from before the crisis and some financial industry cases, such as on credit default swaps.

Predictably, the EC and other competition authorities are also talking about innovation, food and fuel competition and energy supply, seeking to reduce costs and make Europe more competitive in global marketplaces.

Otherwise, there is a great deal of macro and micro "state aid" work, which falls outside the scope of this review!

[218] *ECN Subgroup on Food Report* (May 2012), p.20.
[219] Green Paper, *Towards an integrated European market for card, internet and mobile payments* (January 11, 2012), COM(2011) 941 final.
[220] See *http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html* [Accessed January 28, 2013].
[221] *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011] 5 C.M.L.R. 7.
[222] Case No.51 Gs53/09, decision of January 18, 2012. The court rejected access to leniency documents in the files of the *Bundeskartellamt*; see Mlex, January 30, 2012. See WilmerHale Alert, *http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=92356* [Accessed February 18, 2013].
[223] *National Grid Electricity Provision Plc v ABB Ltd* [2012] EWHC 869 (Ch); [2012] U.K.C.L.R. 220; and Mlex, April 4, 2012. The judgment of Mr Justice Roth is available on the EC website at *http://ec.europa.eu/competition/antitrust/national_courts/1368894.pdf* [Accessed February 19, 2013]. Mr Justice Roth allowed parts of the EC's confidential decision and certain passages from requests for information to be disclosed to the plaintiffs.
[224] See also the UK Consultation on "Private Actions in Competition Law" (April 2012), *http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law* [Accessed January 28, 2013].