

Major Events and Policy Issues in EU Competition Law 2015–2016: Part 1

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☞ Abuse of dominant position; Anti-competitive practices; Cartels; EU law; State aid

This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU¹ from November 2015 until the end of October 2016.²

This article is divided into an overview of:

- legislative/EC practice developments;
- European Court judgments;
- European Commission decisions;
- sectoral inquiries;
- current policy issues; and
- co-operation with courts.

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

Box 1

• Major themes/issues in 2015/16

- ECN+
- Geo-blocking and e-commerce
- Restriction by object cases
 - * Review of context
- Pay for delay

* *Lundbeck (Citalopram), Servier (Perindopril)*

* IP rights/art.102 TFEU

— *Air Cargo*

— Freight forwarding services cartel

* Immunity process EC/NCAs

* GC appeals/EC decision

— Potential competition

* Agreement as evidence

Legislative/EC practice developments

Box 2

• Legislative/EC practice developments

— Guidelines on joint selling of agricultural products:

* 41 pages; to assist self-assessment;

* multiple working examples and flowcharts;

* significant efficiencies to assess;

* threshold ceilings for derogations apply; and

* NB: NCA/EC ability to withdraw derogations from competition rules.

— Ongoing review of Insurance Block Exemption.

EC Notice on joint selling of agricultural products³

In January 2014, a new Common Agricultural Policy (CAP) entered into force with new rules for the sale of olive oil, beef and veal livestock and arable crops. The rules aim to increase the competitiveness and sustainability of farmers and to strengthen their negotiating power vis-à-vis buyers. To achieve that aim, the new rules allow producers to jointly sell and set prices, volumes and other terms.

To that end, the EU adopted the so-called Common Market Organisation (CMO) Regulation⁴ to provide for derogations to competition rules applicable to the agricultural sector. According to art.206 of the CMO Regulation, arts 101–106 TFEU apply to agreements on agricultural products.

In November 2015, the EC adopted guidelines on the application of competition rules to the products concerned to clarify the conditions which farmers’ organisations

* With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this article.

¹ “TFEU” is the abbreviation for “Treaty on the Functioning of the European Union”; “TEU” is “Treaty on European Union”; “EC” for “European Commission” (not “European Community”, as before the Lisbon Treaty); “GC” is the abbreviation for “General Court”; “ECJ” for the “European Court of Justice” and “CJEU” for the overall “Court of Justice of the European Union”; “A.G.” for Advocate General; “NCA” is the abbreviation for “National Competition Authority”; “SO” is the abbreviation for “Statement of Objections”; “BE” is the abbreviation for “Block Exemption”; “Article 27(4) Notice” refers to the EC’s Communications under that article of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [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”.

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 available at: http://ec.europa.eu/competition/index_en.html [Accessed 9 January 2017]. 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*.

³ Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors [2015] OJ C431/1.

⁴ Regulation 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Regulations 922/72, 234/79, 1037/2001 and 1234/2007 [2013] OJ L347/671.

need to respect to benefit from the derogations.⁵ The Guidelines are some 41 pages in the *Official Journal*, with multiple working examples and flowcharts.

Rules

The CMO Regulation provides for two types of derogation: (1) derogations that apply to all agricultural sectors (“the general derogation”; arts 206 and 209 of the CMO Regulation); and (2) derogations that only apply to the sectors of olive oil, beef and veal and arable crops (arts 169–171 of the CMO Regulation).

The general derogation

The general derogation applies in two situations:

- first, where the agreement, decision or practice, which relates to the production of, or trade in, agricultural products, is necessary for the attainment of the CAP objectives set out in art.39 TFEU⁶; and
- secondly, where the agreement, decision or practice concerns the production or sale of agricultural products, or the use of joint facilities for the storage, treatment or processing of agricultural products, “unless the CAP objectives are jeopardised”. The General Derogation is not applicable to agreements, decisions and concerted practices which involve an obligation to charge an identical price, or by which competition is excluded.

Derogations that only apply to the sectors of olive oil, beef and veal and arable crops

Articles 169, 170 and 171 of the CMO Regulation concern any agreements, decisions or practices taken by the producer organisation (PO)⁷ when negotiating contracts for supply on behalf of its members.

A PO must fulfil a number of conditions when negotiating supply contracts on behalf of its members in order to benefit from the derogation:

- the PO must be formally recognised by the competent national authorities;
- the PO must pursue one or more of the objectives of concentrating supply, the placing on the market of the products produced by its members, or optimising production costs;

- pursuit of these objectives must lead to the integration of activities and be likely to lead to “significant efficiencies” so that the activities of the PO overall contribute to the fulfilment of the CAP objectives;
- the volume of a given product subject to negotiations by a particular PO must not exceed 20% of the relevant market for olive oil⁸ and 15% of the total national production for arable crops and for beef and veal;
- producers cannot be members of more than one PO, negotiating supply contracts on their behalf; and
- the PO must notify the volume of product concerned which is covered by the negotiations to the competent national authorities.

The Guidelines also provide detailed explanations of the type of activities and examples of services that can create efficiencies; explain how to calculate the volumes that may be sold by farmers’ organisations; how to verify that thresholds are not exceeded; and how to take account of exceptional circumstances, e.g. natural disasters.

The safeguard mechanism

Finally, para.5 of arts 169, 170 and 171 of the CMO Regulation sets out a “safeguard mechanism”, which provides competition authorities of Member States and the EC (depending on whether the negotiations cover one or several Member States) with powers to decide in an individual case whether a particular negotiation by the PO should be either reopened or should not take place.

The safeguard mechanism can be applied by the competent competition authority in the following three situations:

- if the authority considers that it is necessary in order to prevent competition being excluded;
- if the authority finds that the product covered by the negotiations forms part of a separate market by virtue of the specific characteristics of the product or its intended use and that such collective negotiation would cover more than 15% of the total national production of such market (in case of the beef and veal and arable crops sectors); and
- if it finds that the CAP objectives are jeopardised.

⁵ With thanks to Itsiq Benizri. IP/15/6187 and Memo, 27 November 2015. Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors [2015] OJ C431/1.

⁶ It may be recalled that, according to art.39 TFEU, the objectives of the CAP are: (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; (b) to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; and (e) to ensure that supplies reach consumers at reasonable prices.

⁷ This may also be an Association of Producer Organisations (APO).

⁸ A distinction is made between olive oil for human consumption and olive oil for other uses.

In all three situations, the action of the competent competition authority under arts 169, 170 and 171 of the CMO Regulation does not have the character of a sanction for infringement of competition rules, but is rather considered as a preventive measure.

Until a decision is adopted by the competent competition authority that negotiations should be reopened or that they should not take place, negotiations carried out by POs in compliance with arts 169, 170 and 171 of the CMO Regulation are legal.

Possible renewal of Insurance Block Exemption

In March 2016, the EC published a report on the functioning of the Insurance Block Exemption (IBE): Regulation 267/2010,⁹ in order to decide if the IBE should be completely or partially renewed.¹⁰ The current IBE entered into force on 1 April 2010 and will expire on 31 March 2017. The Regulation exempts agreements from competition rules which relate to: (1) joint compilations, tables and studies; and (2) co-insurance or co-reinsurance pools.

The EC started the review of the IBE in 2014 with a public consultation, questionnaires sent to pools, customers, brokers, intermediaries' federations, the launch of a study on different forms of pools and co-(re)insurance arrangements, and the consultation of NCAs.

The EC's preliminary findings in the report are the following:

As regards joint compilations, tables and studies, the existence of the IBE does not appear to be necessary any longer, since the EC Horizontal Guidelines¹¹ offer guidance permitting insurance companies to self-assess their co-operation agreements (notably as regards questions of information exchange). In addition, the EC noted that, if necessary, it could issue revised specific guidance for agreements in the insurance sector.

As regards pools, the EC found that only a small number of companies benefited from the BE, estimating that there were only some 46 active pools. Moreover, many of the potential beneficiaries argue that their pools are outside the scope of the BE (e.g. insofar as the risk concerned is often huge catastrophic risk, such as regards terrorism, nuclear power or environmental protection, and may therefore fall outside art.101(1) TFEU).

The EC also noted that, in the event the BE would not be renewed or no longer cover pools, this would not mean that pools would be prohibited. Rather they would fall to

be assessed according to the same rules applicable to other sectors, but just on an individual, case-by-case basis, which the EC considered might be better.

The EC thus concluded, at this preliminary stage, that the IBE does not need to be renewed. However, the EC indicated that it would continue to gather information before taking a final decision in early 2017.

The EC organised a meeting in April 2016 to discuss the findings of the report with interested parties. The EC has also commissioned two more studies, one on supply-side substitutability in insurance and one on different forms of co-(re)insurance available. The studies were made available in August 2016.¹²

Overall, although the EC states that it is still reviewing the issues and recognises the “enhanced need for co-operation” as regards insurance, one senses another example of the EC's effort to reduce the number of sectoral BEs. In part, it appears, driven by a concern that the permitted co-operation may lead to some standardisation of insurance offers.

European Court judgments

Box 3

• Court cases—general (1)

— *Maxima Latvija*¹³:

- * non-compete in favour of anchor tenant to shopping centre not restriction by object; and
- * appreciability assessment to see if caught by art.101(1) TFEU.

— *DHL Express*¹⁴ (Italy):

- * EC and NCA leniency programmes are independent;
- * “summary applications” not linked to a “main application” to EC; and
- * need to cover both EC and NCA action in case EC does not pursue all the case.

— *VM Remonts*¹⁵:

- * an undertaking is not liable for unlawful acts of its independent service provider, unless aware of the anti-competitive objective and intending to contribute to it; or
- * the undertaking should have reasonably foreseen that the ISP would adopt such conduct.

Maxima Latvija

In November 2015, the ECJ ruled on a reference from the Supreme Court of Latvia concerning whether non-compete restrictions on establishment in shopping centres, in favour of the anchor tenant, amounted to a “restriction by object”.¹⁶

⁹ With thanks to Katrin Guéna. Regulation 267/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector [2010] OJ L83/1.

¹⁰ IP/16/861, 17 March 2016; Report on the functioning of Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector COM(2016) 153 final. There is also an EC Staff Working Document available on the EC's website.

¹¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.

¹² Available at: http://ec.europa.eu/competition/sectors/financial_services/insurance.html [Accessed 31 January 2017].

¹³ *SIA ‘Maxima Latvija’ v Konkurences padome* (C-345/14) EU:C:2015:784; [2016] 4 C.M.L.R. 1.

¹⁴ *DHL Express (Italy) Srl v Autorità Garante della Concorrenza e del Mercato* (C-428/14) EU:C:2016:27; [2016] 4 C.M.L.R. 17.

¹⁵ *SIA VM Remonts (formerly SIA DIV un KO) v Konkurences padome* (C-542/14) EU:C:2016:578; [2016] 5 C.M.L.R. 13.

¹⁶ *Maxima Latvija* EU:C:2015:784; [2016] 4 C.M.L.R. 1.

The Court said “no”. The background was that the Competition Council of Latvia imposed a fine equivalent to some €35,770 on Maxima Latvija, a large supermarket chain, for having concluded some 12 commercial lease agreements with shopping centres, which each contained a non-compete provision. The Council had reviewed 119 such leases, based on an investigation under the Latvian equivalent to art.101 TFEU. Maxima Latvija appealed to the Supreme Court of Latvia against the judgment of the Regional Administrative Court, which had upheld the decision of the Competition Council, in view of Maxima Latvija’s market power.

The Supreme Court then made a preliminary ruling asking whether:

- an agreement between a commercial lessor and a retailer (the anchor tenant), which gives that tenant the right to oppose lettings of commercial premises to any potential competitors could be deemed to have the object of restricting competition;
- in assessing compatibility with art.101(1) TFEU, an analysis should be made of the structure of the market;
- the market power of the parties and its possible growth is relevant; and
- an assessment of the potential effects of the agreement could be sufficient to find that the agreement is prohibited.

The ECJ found that it had jurisdiction since Latvian competition law is based on the same principles as EU competition law.

Then, on the substance, the ECJ (applying *Cartes Bancaires*¹⁷ and similar case law) stated first that the notion of restriction of competition “by object” should be interpreted restrictively and can be applied only to certain types of co-ordination between undertakings, which show a sufficient degree of harm to competition, so that it can be justified not to look at the effects.¹⁸

Secondly, the ECJ noted that the fact that Maxima Latvija did not compete with the shopping centres with which it had concluded the agreements was not sufficient to exclude a restriction by object.

Thirdly, the ECJ concluded that such contracts are *not* among the agreements which are deemed, by their very nature, to be injurious to the proper functioning of competition. Even if such non-competes might restrict access to some shopping centres in which Maxima Latvija operates a large shop or hypermarket, that did not imply “clearly” that competition in the local market for retail food trade was restricted by such agreements.¹⁹ Taking into account the economic context, the content of such agreements did not disclose a restriction by object.²⁰

Fourthly, as regards the other questions, the ECJ considered them to be a request to explain when such a restriction might be an integral part of an “agreement” whose effect is caught by art.101 TFEU. The ECJ stated (essentially applying *Delimitis*²¹) that the national court needed to assess all the factors going to access to the relevant market. In other words:

- the real concrete possibilities for other undertakings to establish in other shopping centres in the catchment areas where the Maxima Latvija agreements applied, as well as outside such shopping centres;
- in particular, the availability and accessibility of other commercial land in the catchment area had to be taken into consideration; and the existence of any economic, administrative or regulatory barriers to the entry of new competitors in those sectors; and
- in addition, the competitive conditions on the market, including market concentration and customer fidelity to existing brands.

If access to the market was made difficult by all the similar agreements on the market, then the national court had to assess whether an individual agreement made an appreciable contribution to the closing-off of the market. In doing so, the national court should look at the position of the contracting parties on the market and the duration of the agreements.²² If such an appreciable contribution was found, there was a restriction *by effect* caught by art.101(1) TFEU (or, as here, its equivalent in national law).

DHL Express

Background

In November 2011, the Italian Council of State (*Consiglio di Stato*) made a request for a preliminary ruling to the ECJ related to proceedings between the Italian Competition Authority (AGCM) and DHL Express (DHL).²³ The proceedings concerned DHL’s immunity application to the EC with a summary application to the AGCM and whether, if the EC did not pursue all of the case, another company could obtain immunity for related Italian cartel proceedings, rather than DHL.

The key facts were as follows: in September 2007, following DHL’s immunity application, the EC granted DHL conditional immunity for the entire international forwarding sector, i.e. as regards maritime, air and road transit. However, in June 2008, the EC decided to pursue only the part of the cartel concerning international air

¹⁷ *Groupement des cartes bancaires (CB) v European Commission* (C-67/13 P) EU:C:2014:2204; [2014] 5 C.M.L.R. 22.

¹⁸ *Maxima Latvija* EU:C:2015:784; [2016] 4 C.M.L.R. 1 at [18]–[20].

¹⁹ *Maxima Latvija* EU:C:2015:784; [2016] 4 C.M.L.R. 1 at [22].

²⁰ *Maxima Latvija* EU:C:2015:784; [2016] 4 C.M.L.R. 1 at [23]–[24].

²¹ *Delimitis v Henninger Brau AG* (C-234/89) EU:C:1991:91; [1992] 5 C.M.L.R. 210.

²² *Maxima Latvija* EU:C:2015:784; [2016] 4 C.M.L.R. 1 at [27]–[29].

²³ With thanks to Philippe Claessens.

freight forwarding services, leaving the NCAs the possibility of pursuing the infringements in relation to sea and road freight forwarding services.

The AGCM subsequently decided to pursue infringements in relation to the road freight forwarding services and, in its decision of 15 June 2011,²⁴ found that DHL, Schenker Italiana (Schenker) and Agility Logistic (Agility) had participated in a cartel in that sector, granted Schenker immunity from fines and ordered DHL and Agility to pay fines.

The AGCM noted in its decision that DHL had submitted a *summary application* prior to Schenker and Agility's applications (in line with what was then para.22 of the ECN Model Programme on Leniency²⁵), but found that the application only related to maritime and air transit and excluded road transit. The AGCM found that DHL only applied for immunity in relation to road transit in June 2008, when DHL submitted an *additional summary application*, expressly extending its initial application to road transit, but *after* Schenker and Agility had already submitted summary applications covering all three types of transit.

DHL appealed the AGCM's decision, arguing that its summary application for immunity preceded those of Schenker and Agility and that AGCM was required to assess DHL's summary application *taking into account DHL's main application to the EC*, which, contrary to DHL's summary application to the AGCM, covered maritime, air and road transit. The administrative court rejected DHL's arguments and ruled that applications under different leniency programmes are autonomous and independent.

DHL then lodged an appeal with the Council of State, which referred questions to the ECJ on the relationship between the ECN Model Leniency Programme and the national leniency programmes.

GC judgment

In its judgment in January 2016,²⁶ the ECJ noted first that the ECN is intended to encourage discussion and co-operation. It does not have the power to adopt legally binding rules.²⁷ The ECJ noted that neither the TFEU nor Regulation 1/2003²⁸ lay down common rules on leniency and that leniency applications to NCAs are governed by national law. As a result, the ECN Model Leniency Programme was not binding on NCAs.²⁹

Secondly, the ECJ found that there is *no legal link* between the application for immunity to the EC and the summary application to an NCA. NCAs are not obliged to assess the summary application in the light of the main

application and to contact the EC or the undertaking where the scope of the summary application is narrower than that of the EC application. Such a link would call into question the autonomy of the various applications and therefore the rationale behind the system of summary applications.³⁰

There is no "main application" to the EC, with "secondary applications to the NCAs".³¹ A duty for the NCAs to contact the EC, where the material scope of the summary application is more limited than that of the application to the EC, would also weaken the duty of co-operation of leniency applicants, which is one of the pillars of any leniency programme.³² Applicants need to ensure that their applications contain no ambiguities.³³

When applying for broad immunity at EC level, applicants should therefore still make summary applications, *with the same scope* as at EC level (as far as possible), to Member States well placed to deal with the case, just in case the EC does as here, giving conditional immunity for several markets, but then later only pursuing one of them, so that NCAs may then intervene.

Box 4

• Court cases—general (2)

— *Eturas*

- * Concerted practice involving an administrator of an online booking system (and reactions of some users).
- * Vote on reduced discount range, communicated result, then technical change.
- * Were users to be *deemed* aware of the change?
- * ECJ: "no":
 - *T-Mobile* presumption re concerted practice did not apply; question of national law here;
 - presumption of innocence prevented such an inference and applied in national proceedings;
 - need to *prove awareness* by users of relevant message from circumstances (with defence ability to rebut that); and
 - defence rights also to rebut concerted practice through public distancing, objections or systematically higher discounts.

Eturas

In January 2016, the ECJ issued a preliminary ruling on the questions raised by the Supreme Administrative Court of Lithuania, concerning an allegedly concerted practice

²⁴ *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17 at [23].

²⁵ Available on the EC's website. It was amended in 2012, apparently as a result of this case.

²⁶ *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17.

²⁷ *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17 at [32].

²⁸ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

²⁹ *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17 at [44].

³⁰ *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17 at [61].

³¹ *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17 at [61].

³² *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17 at [63].

³³ *DHL Express* EU:C:2016:27; [2016] 4 C.M.L.R. 17 at [64].

by Eturas, the administrator of an online travel booking system in Lithuania called E-TURAS and its travel agency customers.³⁴

The ECJ ruling stems from an appeal to the Supreme Administrative Court of Lithuania against a decision by which the Lithuanian Competition Council (LCC) fined Eturas and the travel agencies using its booking system.

Eturas had done three things. First, Eturas sent an email message to various travel agencies asking whether it could modify the discount range in the system from 4% to between 0 and 3% (to which some replied). The agencies were asked to “vote”. Secondly, Eturas sent out an email message to the system users, indicating that it was implementing the change, “in light of responses received” and “to normalise competition”. This went to the message inbox of each user. Thirdly, Eturas made the technical change³⁵ so that discounts for online bookings were capped at 3%, unless a travel agency took certain additional steps to offer a higher discount.

The LCC also found that most travel agencies which had previously applied a discount above 3% had decreased their rate to 3%.

In June 2012, the LCC concluded that the travel agencies which had used the E-TURAS system without objecting to the discount cap engaged in a concerted practice. The regulator treated Eturas as the facilitator of that practice.³⁶

Owing to the uniform implementation of the booking system, the LCC found that the travel agencies could reasonably assume that all the other users of that system would also limit their discounts to 3%. It considered that the E-TURAS system was a tool for co-ordinating users’ actions and eliminated the need for direct contacts. Hence, it inferred that those agencies had informed each other of the discount rates which they intended to apply in the future and had thus indirectly, by way of implied or tacit assent, expressed their common intention with regard to conduct on the relevant market.³⁷

On appeal, various travel agencies contended that they did not engage in a concerted practice. They argued that they could not be held responsible for a decision taken unilaterally by Eturas and/or that they had not received or read Eturas’ email.

The referring court asked the ECJ whether the travel agencies could be presumed to have been aware of Eturas’ message about the cap to the discounts and, after the

implementation of the cap, whether they could be considered to have participated in a concerted practice absent any opposition.

The related issue was the *T-Mobile*³⁸ case, where the ECJ found a concerted practice from a single unlawful meeting, where the attendees remained on the market and were therefore presumed to have participated in a concerted practice. Further where, controversially, the presumption was treated as an integral part of the EU law on what is a concerted practice and therefore binding in national proceedings.

The main findings of the ECJ were as follows:

First, the ECJ held that the ruling in *T-Mobile* was not applicable here.³⁹ The ECJ considered that Regulation 1/2003 did not deal with procedural aspects and principles governing the assessment of the evidence and the standard of proof in national proceedings applying art.101 TFEU.⁴⁰ Thus, the question whether the mere despatch of a message may constitute sufficient evidence to establish that its addressees were aware, or ought to have been aware, of its content had to be assessed under national law.⁴¹

Secondly, however, the ECJ observed that the principle of effectiveness required that national rules of evidence must not render the application of EU competition law impossible or excessively difficult and, in particular, must not jeopardise the effective application of arts 101 and 102 TFEU.⁴²

Thirdly, the ECJ recalled that in most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and (objective and consistent) indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.⁴³

Fourthly, the ECJ noted that the presumption of innocence, now enshrined in art.48(1) of the Charter of Fundamental Rights of the European Union, was applicable in national proceedings.⁴⁴

Fifthly, as a result, the referring court could not infer simply from the mere despatch of the message from Eturas to the travel agencies that they necessarily were aware of the content of that message.⁴⁵

The despatch of the message might justify the finding that the travel agencies were aware of the content of that message as from the date of its despatch, depending on the other evidence concerned and provided that those agencies still had the opportunity to rebut that inference, for example, by proving that they did not receive the

³⁴ With thanks to Roberto Grasso. *Eturas UAB v Lietuvos Respublikos Konkutencijos Taryba* (C-74/14) EU:C:2016:42; [2016] 4 C.M.L.R. 19.

³⁵ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [9]–[11].

³⁶ The travel agency which had informed the LCC about that infringement was granted immunity.

³⁷ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [15].

³⁸ *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) EU:C:2009:343; [2009] 5 C.M.L.R. 11.

³⁹ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [33]–[34].

⁴⁰ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [29]–[31].

⁴¹ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [29]–[30] and [34].

⁴² *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [32] and [35].

⁴³ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [36].

⁴⁴ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [38].

⁴⁵ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [39].

message, or that they did not look at the section of their emails in question until sometime later (i.e. after Eturas had made the technical switch to the 3% cap).⁴⁶

Sixthly, the ECJ recalled that the concept of concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect.⁴⁷

Seventhly, the ECJ concluded that the circumstances were *capable* of justifying a finding of concertation, but only if the travel agencies were aware of the content of the message.⁴⁸ However, if it could not be established that a travel agency was aware of the message, participation could not be inferred from the mere existence of a technical restriction implemented in the system, unless it was established on the basis of other objective and consistent indicia that a travel agency tacitly assented to an anti-competitive action.⁴⁹

Finally, the ECJ noted that a travel agency could rebut the inference that it participated in a concerted practice, by proving that it distanced itself from that practice publicly or through a clear and express objection sent to the administrator, or through reporting the relevant conduct to the administrative authorities. The ECJ added that a travel agency could also counter an inference of participation by showing that it systematically applied discounts exceeding the cap.⁵⁰

Italsempione

In June 2016, the ECJ declined to give judgment on a preliminary reference from the Italian Council of State (*Consiglio di Stato*) in Italy, in which that court asked whether Italian rules governing fines imposed on cartel participants were lawful.⁵¹

The background was that in 2011 *Italsempione* was ordered to pay some €23 million for its role in an Italian road freight cartel. The fine was then reduced to €12.48 million, following the application of Italian guidelines stating that a fine should not exceed a 10% cap of a company's total sales.

After an initial appeal, the courts found that the company had played a lesser role in the cartel and ordered the fine to be recalculated. The AGCM reassessed the fine, but kept it at €12.48 million, because any reductions would have been applied to the €23 million, *before* the cap was applied.

On further appeal, the Council of State referred the case to the ECJ asking whether the reduction should be applied *before or after* the cap.⁵² It was noted that, in applying national law, the AGCM had followed the same calculation method as adopted by the EC.⁵³ However, *Italsempione* argued that this method infringed the fundamental principles of EU law, especially those of proportionality and the appropriateness of the sanction.⁵⁴

The ECJ noted that pursuant to art.5 of Regulation 1/2003, competent authorities of the Member States impose fines according to national law and that the interpretation of national law does not fall within the jurisdiction of the ECJ.⁵⁵

The ECJ noted that in some cases, when national law referred to EU law, the ECJ was competent to answer a preliminary reference in order to ensure the same treatment of situations under national law and under EU law.⁵⁶ However, in this case, the Italian rules did not refer to EU law.⁵⁷ So, the ECJ concluded that it was “manifestly incompetent” to rule on the case.⁵⁸

Salumificio Murru

In June 2016, the ECJ ruled on a preliminary reference from the Court of Cagliari in Italy (*Tribunale di Cagliari*). That court asked whether Italian law infringed EU law by providing that the price of haulage services could be no lower than minimum operating costs.⁵⁹

The background was that, in 2005, the Italian Government adopted legislative reforms as regards the law on the carriage of passengers and goods by road in order to introduce a system based on free bargaining for prices for road transport services. At the same time, the Monitoring Centre for Road Transport (the Monitoring Centre) was established in Italy to monitor compliance with provisions on road safety and social security and to update practices and customs applicable to haulage services.⁶⁰

However, in June 2008, by Decree,⁶¹ the Italian Government reduced the scope of the Italian tariff liberalisation introduced in 2005, providing that the charges payable by customers could not be lower than the minimum operating costs which the Monitoring Centre was asked to fix. Those costs included: (1) the average fuel cost per kilometre for various types of vehicle, which were set every month; and (2) the proportion, expressed

⁴⁶ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [40]–[41].

⁴⁷ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [42].

⁴⁸ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [44].

⁴⁹ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [45].

⁵⁰ *Eturas* EU:C:2016:42; [2016] 4 C.M.L.R. 19 at [46]–[49].

⁵¹ With thanks to Inés Pérez Fernández. *Autorità Garante della Concorrenza e del Mercato v Italsempione—Spedizioni Internazionali SpA* (C-450/15) EU:C:2016:508.

⁵² *Italsempione* EU:C:2016:508 at [10].

⁵³ *Italsempione* EU:C:2016:508 at [11].

⁵⁴ *Italsempione* EU:C:2016:508 at [12].

⁵⁵ *Italsempione* EU:C:2016:508 at [18].

⁵⁶ *Italsempione* EU:C:2016:508 at [20].

⁵⁷ *Italsempione* EU:C:2016:508 at [22].

⁵⁸ *Italsempione* EU:C:2016:508 at [25].

⁵⁹ With thanks to Inés Pérez Fernández. *Salumificio Murru SpA v Autotrasporti di Marongiu Remigio* (C-121/16) EU:C:2016:543.

⁶⁰ *Salumificio Murru* EU:C:2016:543 at [4].

⁶¹ Decree Law 112 of 25 June 2008, see *Salumificio Murru* EU:C:2016:543 at [5]–[7].

as a percentage of the operating costs of haulage undertakings represented by fuel costs, fixed every six months.⁶²

The 2008 Decree provided that

“until such time as [the determinations governing the activities of the Monitoring Centre] are available, the Ministry of Infrastructure and Transport (the ‘Ministry’) shall draw up the indexes on the cost of fuel per kilometre and the relative proportions, after having heard the trade associations most representative of hauliers and customers”.⁶³

As a result, from June 2009, that Ministry published, on a monthly basis, the data on the average costs of fuel until the publication in November 2011 of the tables drawn up by the Monitoring Centre.⁶⁴

In the dispute concerned, Salumificio Murru was ordered to pay €37,136, plus default interest, costs and fees, to the company Autotrasporti di Marongiu Remigio (Remigio) in settlement of the price of the haulage carried out by Remigio pursuant to an oral agreement concluded with Salumificio Murru. This corresponded, in particular, to the payment of the difference between the amounts paid by Salumificio and the amounts due under the 2008 Decree.⁶⁵

Salumificio Murru applied to have the order for payment set aside, submitting that the Italian provision was constitutionally unlawful and contrary to EU law.⁶⁶

The Court of Cagliari (the Court) noted that, in a previous case, *API*,⁶⁷ the ECJ held that art.101 TFEU, read in conjunction with art.4(3) TEU, must be interpreted as precluding national legislation, pursuant to which the price of road haulage services may not be lower than minimum operating costs which are fixed by a body composed mainly of representatives of the economic operators concerned.⁶⁸

However, the Court considered that the ECJ’s finding in that judgment concerned a situation different from the situation before it. According to the referring court, that case concerned the minimum operating costs fixed by *the Monitoring Centre*, a body composed mainly of representatives of the economic operators concerned, whereas the dispute before it concerned the minimum costs fixed by *the Ministry*.⁶⁹

The Court therefore asked the ECJ whether art.101 TFEU, read in conjunction with art.4(3) TEU, must be interpreted as precluding the 2008 Decree, insofar as it

provided that the price of road haulage services could not be lower than minimum operating costs determined by the Ministry and was not left to be freely determined by the contracting parties.⁷⁰

The ECJ’s answer was “no”.⁷¹ The Court noted that art.101 TFEU was concerned solely with the conduct of undertakings and not with the laws and regulations of Member States. However, read in conjunction with art.4(2) TEU, art.101 TFEU required Member States not to introduce or maintain measures which may render ineffective the competition rules, which implied that Member States should not require or encourage the adoption of agreements, decisions or concerted practices contrary to art.101, or delegate to private economic operators responsibility for taking decisions affecting the economic sphere.⁷²

However, in this case, the minimum costs referred to in the 2008 Decree were fixed by *the Ministry itself*, after the trade associations most representative of hauliers and customers had been heard.⁷³ Therefore, Italy had not divested its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.⁷⁴

There was nothing in the Italian legislation to suggest the existence of an agreement, decision or concerted practice between undertakings, within the meaning of art.101 TFEU, which had been required or encouraged by public authorities.⁷⁵

Box 5

• Court cases—general (3)

— *Portugal Telecom/Telefónica*:

- * detailed assessments of potential competition not required in a restriction by object case;
- * but exceptionally such an assessment was required here as part of setting the fine (because the scope of the non-compete was linked to potential competition); and
- * on appeal, the GC preferred not to make such an assessment (even though in its unlimited jurisdiction) because of concern that it would make the “only and first” such assessment and that would be wrong.

Portugal Telecom/Telefónica

In June 2016, the GC ruled on appeals by these companies against the EC’s decision, fining them respectively €12.9 million and €66.8 million for agreeing a non-competition clause as regards the Iberian market.⁷⁶ The GC rejected

⁶² *Salumificio Murru* EU:C:2016:543 at [5].

⁶³ *Salumificio Murru* EU:C:2016:543 at [6].

⁶⁴ *Salumificio Murru* EU:C:2016:543 at [8].

⁶⁵ *Salumificio Murru* EU:C:2016:543 at [10].

⁶⁶ *Salumificio Murru* EU:C:2016:543 at [11].

⁶⁷ *API—Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti* (C-184/13) EU:C:2014:2147; [2014] 5 C.M.L.R. 21.

⁶⁸ *Salumificio Murru* EU:C:2016:543 at [12].

⁶⁹ *Salumificio Murru* EU:C:2016:543 at [14].

⁷⁰ *Salumificio Murru* EU:C:2016:543 at [16].

⁷¹ *Salumificio Murru* EU:C:2016:543 at [28] and [29].

⁷² *Salumificio Murru* EU:C:2016:543 at [20] and [21].

⁷³ *Salumificio Murru* EU:C:2016:543 at [22].

⁷⁴ *Salumificio Murru* EU:C:2016:543 at [23].

⁷⁵ *Salumificio Murru* EU:C:2016:543 at [25].

⁷⁶ *Portugal Telecom v European Commission* (T-208/13) and *Telefónica v European Commission* (T-216/13) EU:T:2016:368 and 369. GC Press Release 68/16, 28 June 2016. With thanks to Inés Pérez Fernández.

both appeals as to the substance, but annulled the fines, insofar as the EC had not considered to what extent the two undertakings were potential competitors and that the non-competition clause in question had been specifically linked in scope to that issue.

It may be recalled that the context was rather unusual. Telefónica and Portugal Telecom (PT) were in a joint venture in Brazil, called VIVO. Telefónica launched a hostile bid for PT's 50% share. After controversial and confrontational exchanges, including the Portuguese Government invoking special voting rights to block the acquisition, the undertakings agreed on it. However, in the relevant agreement they included a non-competition clause "to the extent permitted by law", which was applicable "with the exception of any investment or activity in progress" on the day on which the agreement was signed and as regards projects for which each party was "capable of being in competition with the other party on the Iberian market".⁷⁷

Both parties argued that use of the words "to the extent permitted by law" had been intended to make the clause only effective if the parties considered it was lawful, which they did not, so it had never been applied.

Otherwise, PT stated that the clause had been introduced in view of the fact that Telefónica had a purchase option and Telefónica had two board members in PT with access to information on the undertaking. Whereas Telefónica stated that it had entered into the clause because it was necessary for Portugal to allow the VIVO transaction to proceed. Otherwise, the Portuguese Government would have blocked it.

On appeal, the main points were as follows:

First, the GC rejected the idea that the non-competition clause was ancillary to such objectives. Such an obligation, if motivated by the purchase option or board membership, was not ancillary to the acquisition agreement⁷⁸ which was the transaction in issue here.⁷⁹

Secondly, the Court rejected the undertakings' claims as regards the insertion of the wording "to the extent permitted by law" considering, among other things, that they had not shown that the clause was only meant to be effective *after* a self-assessment that the clause was unlawful.⁸⁰

Thirdly, the Court rejected Telefónica's claim that the clause had been *required* by the Portuguese Government, even if the whole context had been controversial.⁸¹

Fourthly, the GC rejected the argument that the EC should have defined the market and shown that there were real and concrete possibilities for each party to compete with each other. Notably, the Court recalled that such assessments were not required in a case of restriction by object, which was the case here, since this was a market sharing agreement.⁸²

The EC had also shown that the agreement had a wide scope and that the relevant markets were liberalised, i.e. capable of competition in that sense. In such circumstances, the EC was not obliged to undertake a detailed assessment of the structure of the markets concerned and potential competition to conclude that the clause was restrictive by object.⁸³ (See on this also *Toshiba*, below.)

Fifthly, *in the particular circumstances*, the EC was required to assess to what extent the two undertakings could compete for purposes of assessment of the fine. The Court emphasised that such an assessment was not generally required.⁸⁴ However, here it was, because in the clause itself the companies had agreed not to compete for projects for which they were capable of being in competition.⁸⁵

The EC also had an obligation under the EC Fining Guidelines to determine the value of the products or services directly or indirectly concerned by the infringement⁸⁶ in order to determine the economic significance of the infringement and the size of the undertaking's contribution to it. So the EC was required to examine the arguments of PT and Telefónica, seeking to establish that there was no possibility of competition between them with regard to certain services and to take new decisions on the amount of the fines.⁸⁷

Finally, the GC considered whether it could set the fine itself in its unlimited jurisdiction, but ruled that to undertake the sort of factual assessments required here would go too far. Moreover, it meant that the Court would make the "only and first" assessment on such issues, which it considered wrong.⁸⁸

An interesting ruling in itself and when taken with the ECJ's judgment in *Galp* in 2016 (see below) on the limits to the GC's "unlimited jurisdiction".⁸⁹

VM Remonts

In July 2016, the ECJ considered the question of the extent to which an undertaking can be held liable for the anti-competitive behaviour of one of its independent service providers.⁹⁰

⁷⁷ *Portugal Telecom* EU:T:2016:368 at [23].

⁷⁸ *Portugal Telecom* and *Telefónica* EU:T:2016:368 and 369 at [93], [110]–[111] and [113].

⁷⁹ *Portugal Telecom* and *Telefónica* EU:T:2016:368 and 369 at [120].

⁸⁰ See, e.g. *Portugal Telecom* EU:T:2016:368 at [123] and [131].

⁸¹ *Telefónica* EU:T:2016:369 at [138]–[147] and [160].

⁸² *Portugal Telecom* EU:T:2016:368 at [176] and [177].

⁸³ *Portugal Telecom* EU:T:2016:368 at [188]; and *Telefónica* EU:T:2016:369 at [227].

⁸⁴ *Portugal Telecom* EU:T:2016:368 at [240]; and *Telefónica* EU:T:2016:369 at [306].

⁸⁵ *Portugal Telecom* EU:T:2016:368 at [229]–[230]; and *Telefónica* EU:T:2016:369 at [295]–[296].

⁸⁶ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C210/2, para. 13.

⁸⁷ *Portugal Telecom* EU:T:2016:368 at [243]; and *Telefónica* EU:T:2016:369 at [309].

⁸⁸ *Portugal Telecom* EU:T:2016:368 at [248]–[249].

⁸⁹ *Galp Energía España SA v European Commission* (C-603/13 P) EU:C:2016:38; [2016] 4 C.M.L.R. 18.

⁹⁰ *SLA VM Remonts (formerly SLA DIV un KO) v Konkurences padome* (C-542/14) EU:C:2016:578; [2016] 5 C.M.L.R. 13. With thanks to Adélaïde Nys.

The case arose on a request for a preliminary ruling from the Supreme Court of Latvia. The city of Jurmala in Latvia issued a call for tenders to supply food to kindergartens. In total, three companies submitted bids. One of them, Pārtikas kompānija (PK), sought legal assistance from a law firm and sent its initial draft, including its prices, to the firm. The law firm then subcontracted the work to MMD Lietas, another company.

PK was not aware that MMD Lietas was also preparing the tenders for the two other companies that intended to bid for the same project. In the course of preparing these tenders, an MMD Lietas employee then used PK's draft tender including its prices. As a result, the prices offered by the two companies were set significantly lower than the price proposed by PK.

Subsequently, the Latvian Competition Council fined the *three* companies for bid-rigging and found that PK should be held liable for MMD Lietas' actions. The case was appealed to the Latvian Supreme Court, which asked the ECJ if an undertaking could be held liable for participating in a concerted practice due to the actions of an independent service provider, despite the fact that the undertaking had neither authorised nor had knowledge of the conduct.

In December 2015, A.G. Wathelet delivered his Opinion.⁹¹ Interestingly, he proposed that there should be a *rebuttable presumption of liability*, even where the infringing acts are distinct from the functions assigned to the third party and where it is not proved that the company was aware of the third party's acts.⁹² The presumption could be rebutted by the undertaking if it presented material substantiating that it was unaware of the unlawful conduct and if it proved that it took all necessary precautions to prevent such an infringement of competition law.⁹³ A.G. Wathelet also stated that the presumption should apply even if the undertaking demonstrated that it could not benefit from the unlawful acts carried out by the third party, as was the case for PK.⁹⁴ (PK had lost the tender.) However, that could be a factor helping to rebut the presumption.⁹⁵

Unsurprisingly, this caught practitioners' attention, concerned that an undertaking's liability would be widened to cover the acts of its service providers.

In July 2016, the ECJ gave its judgment and took a rather different line based around conditions for liability rather than a presumption.

First, the ECJ noted that independent service providers are undertakings separate from the customers they serve.⁹⁶ Therefore, an independent service provider's anti-competitive behaviour could not be attributed automatically to its customer.

Secondly, the Court recognised that a grey zone may exist as to the actual independence of the independent service provider. An independent service provider could act under the direction or control of the undertaking using its services. When an independent service provider had only little or no autonomy, or flexibility with regard to the way an activity is to be carried out, the customer could be held liable for the unlawful conduct of the independent service provider.⁹⁷

In order to evaluate the actual control of the customer, the Court stated that regard should be had to the organisational, economic and legal links between the independent service provider and the customer (i.e. a test similar to the *Akzo*⁹⁸ parental liability assessment).

Thirdly, the ECJ defined two conditions for a customer to be liable for the unlawful actions of a genuinely independent service provider:

- (1) the customer had to be aware of the anti-competitive objective and to have intended to contribute to it⁹⁹; or
- (2) the customer should have reasonably foreseen that the independent service provider would adopt anti-competitive conduct and was prepared to take that risk.¹⁰⁰

Whether those conditions were met was a question for the national court, but on the facts the implication was that PK likely should not be liable for the actions of MMD Lietas, since it appeared that PK had not been informed that its independent service provider would use its commercially sensitive information to complete competitors' tenders.

Genentech

In July 2016, the ECJ gave a ruling on a question from the Paris Court of Appeal as regards competition law and patent licences.¹⁰¹

The case arose from an arbitration which had been appealed to the French courts. Genentech had entered into a patent licensing agreement with Behringwerke, a company subsequently taken over by Sanofi-Aventis, for a worldwide non-exclusive licence to use a patented "cytomegalovirus enhancer" to make a product used for

⁹¹ Opinion of A.G. Wathelet in *VM Remonts* EU:C:2015:797.

⁹² Opinion of A.G. Wathelet in *VM Remonts* EU:C:2015:797 at [63].

⁹³ Opinion of A.G. Wathelet in *VM Remonts* EU:C:2015:797 at [65].

⁹⁴ Opinion of A.G. Wathelet in *VM Remonts* EU:C:2015:797 at [69].

⁹⁵ Opinion of A.G. Wathelet in *VM Remonts* EU:C:2015:797 at [70].

⁹⁶ Opinion of A.G. Wathelet in *VM Remonts* EU:C:2015:797 at [25].

⁹⁷ Opinion of A.G. Wathelet in *VM Remonts* EU:C:2015:797 at [27].

⁹⁸ *Akzo Nobel BV v European Commission* (T-47/10) EU:T:2015:506; [2015] 5 C.M.L.R. 9.

⁹⁹ *VM Remonts* EU:C:2016:578; [2016] 5 C.M.L.R. 13 at [30].

¹⁰⁰ *VM Remonts* EU:C:2016:578; [2016] 5 C.M.L.R. 13 at [31].

¹⁰¹ *Genentech Inc v Hoechst GmbH* (C-567/14) EU:C:2016:526; [2016] 5 C.M.L.R. 9.

treating herpes (Rituxan/MabThera). Genentech agreed to pay a one-off fee, an annual research fee and a running royalty on sales of finished products.

Subsequently, Genentech did not pay the running royalty and Sanofi-Aventis sued for it through arbitration. It appears that some time after the licence was entered into, the patent was revoked in Europe (with retroactive effect) and, in the US, the courts found that Genentech had not infringed Sanofi-Aventis' patent in its production.

The arbitrator found that the royalty was still due since the agreement had been entered into in order to avoid (often prolonged and costly) potential patent litigation. He found that some €108.3 million was payable. On appeal to the French courts, the Court of Appeal queried whether it was contrary to art.101(1) TFEU to have to pay licence fees, even if a patent has been revoked or if the technology has not been used.

The Court noted, following A.G. Wathelet,¹⁰² that on a preliminary reference, it was not for the ECJ to rule on the commercial aspects of the dispute. The Court's focus was only on whether such an obligation to pay was anti-competitive.

The Court's answer, applying *Ottung*,¹⁰³ was "no"; the key point being that the licensee had been able to terminate the licence on short notice throughout the agreement and therefore was not restricted in its behaviour.¹⁰⁴ The competition rules did not cover the fact that Genentech would have to pay this sum and therefore might be disadvantaged in comparison to others which did not have to do so.

A.G. Wathelet also rejected in his Opinion claims that a case like this could not be appealed to the French courts because it was not a "flagrant" restriction of competition law. He considered such a rule to be contrary to the principle of effectiveness in EU law.¹⁰⁵ He also rejected arguments based on transfer of technology block exemptions since these concerned rules applicable if a restriction of competition fell *within* the scope of art.101(1) TFEU, which was not the case here.¹⁰⁶

Box 6

• Court cases—general (4)

— *Lundbeck*¹⁰⁷—pay for delay (1)

- * GC upheld EC decision fining Lundbeck and several generic producers for agreements delaying market entry of generic Citalopram:

- EC had found infringements, taking into account the circumstances, notably payments aligned on anticipated profit of would-be market entrant, agreements involving obligation not to enter the market and the fact that agreements did not resolve/settle the patent dispute.

- * Focus on whether generics had "real and concrete possibilities" to enter the market, given Lundbeck's process patent:

- EC and GC found "yes", treating related litigation as part of the "dynamic competitive process" and noting that it was not clear Lundbeck would succeed.

- * Agreements substituted a certainty of no market entry for the uncertainties of such litigation and entry.

- * GC also noted that the very existence of the agreements was strong evidence of potential competition.

Lundbeck (*Citalopram*)

In September 2016, the GC ruled on appeals by Lundbeck against the EC's decision in June 2013 to impose a fine of some €93.7 million on Lundbeck for entering into six agreements with four generic suppliers, thereby delaying market entry of their products.¹⁰⁸ The GC dismissed the action.

Background

It may be recalled that in its decision,¹⁰⁹ the EC found that the agreements were essentially market exclusion agreements, not lawful patent dispute settlement agreements because:

- the parties were found to be at least potential competitors;
- Lundbeck transferred significant value to the generics, linked to not entering the market;
- the transferred value corresponded to the amount the generic expected to make if it successfully entered the market;
- the obligations on the generics went beyond the rights of Lundbeck in its patents; and
- there was no commitment by Lundbeck not to sue the generic if it entered the market, so the EC found that it was not a real "settlement".¹¹⁰

The EC found that this conduct was a restriction by object, based on cases like *BIDS*.¹¹¹

There were four separate fines on Lundbeck. The gravity of the infringement was set at 11% if the whole EEA was affected and 10% otherwise, so this was not

¹⁰² Opinion of A.G. Wathelet in *Genentech* EU:C:2016:177.

¹⁰³ *Ottung v Klee & Weibach A/S* (320/87) EU:C:1989:195; [1990] 4 C.M.L.R. 915 ECJ.

¹⁰⁴ *Genentech* EU:C:2016:526; [2016] 5 C.M.L.R. 9 at [40]–[43].

¹⁰⁵ Opinion of A.G. Wathelet in *Genentech* EU:C:2016:177 at [58]–[72].

¹⁰⁶ Opinion of A.G. Wathelet in *Genentech* EU:C:2016:177 at [101]. Genentech argued that the obligation was a hard-core restriction under art.4(1)(a) and (d) of Regulation 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L93/17, preventing it selling on its own prices to third parties, or restricting its ability to exploit its own rights.

¹⁰⁷ *Lundbeck v European Commission* (T-472/13) EU:T:2016:449.

¹⁰⁸ *Lundbeck* EU:T:2016:449. GC Press Release 90/16. We focus here on the *Lundbeck* ruling. There were also fines on the generics ranging from €19.8–31.9 million and related appeals which were dismissed: *Sun Pharmaceutical Industries Ltd v European Commission* (T-460/13) EU:T:2016:543; [2016] 5 C.M.L.R. 20; *Arrow Group ApS v European Commission* (T-467/13) EU:T:2016:450; [2016] 5 C.M.L.R. 21; *Generics (UK) Ltd v European Commission* (T-469/13) EU:T:2016:454; *Merck KGaA v European Commission* (T470/13) EU:T:2016:452; and *Xellia Pharmaceuticals ApS v European Commission* (T-471/13) EU:T:2016:460.

¹⁰⁹ See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015 (Part 2)" [2016] I.C.C.L.R. 99, 115.

¹¹⁰ See, for example, *Lundbeck* EU:T:2016:449 at [63] re the Lundbeck–Merck UK Agreement.

¹¹¹ *Competition Authority v Beef Industry Development Society Ltd* (C-209/07) EU:C:2008:643; [2009] 4 C.M.L.R. 6.

fined as if a normal cartel (at least in this test case). A 15% reduction was applied for multiple fines where infringements overlapped and there was a 10% reduction for duration of proceedings.

The fines imposed on the generics were based on the remuneration that they received under the agreements, relying on para.37 of the 2006 Fining Guidelines.

Appeal

In its appeal, Lundbeck claimed that the EC's decision was wrong for two main reasons: (1) because the generics were not "at least potential competitors"; and (2) because the agreements should not be considered restrictive "by object". Lundbeck also made arguments based on an early statement by the Danish Competition Authority as regards the case (before the EC opened proceedings) and argued that no fine should be imposed for a novel situation.

As regards the *assessment of potential competition*, Lundbeck argued that there were no "real concrete possibilities" for the undertakings to compete to enter the relevant market, relying on *E.ON Ruhrgas* in 2012¹¹² and older case law. Notably, Lundbeck argued that the generics' market entry would be blocked by reliance on its process patents regarding the production of Citalopram and that its patents were *presumed valid*, so the EC was here seeking to protect unlawful competition.

On the other hand, the EC considered that the generics had at least eight possible routes to market, including litigation against Lundbeck's claims and changing sources of supply for the product to suppliers using non-infringing processes to avoid infringements of Lundbeck's patents: a whole "dynamic competitive process".¹¹³

The GC's main findings were as follows:

First, the GC agreed that the "real concrete possibilities" test was the correct one and noted that the EC had to show that there were such possibilities.¹¹⁴

The GC found that the EC had applied the "real concrete possibilities" approach required on the case law.¹¹⁵ Some of the generics had even entered the market.¹¹⁶ The GC also noted several times that the generics were perceived as a potential threat by Lundbeck at the time that it entered into the agreements. Moreover, this was strongly evidenced by the fact that Lundbeck concluded the agreements with the generics in order to delay market entry.¹¹⁷

Secondly, the Court recalled that: (1) the existence of IP rights did not preclude the application of art.101(1) TFEU to settlement agreements; and (2) patent rights did not give protection against challenges to a patent's validity.¹¹⁸

Thirdly, the GC found that Lundbeck had wrongly made a *subjective assessment* that the generics' actions infringed their patents and that the patents would have withstood claims of invalidity. So competition law *could* apply here, despite the possibility that Lundbeck would bring legal claims challenging the generics' market entry.¹¹⁹

Fourthly, Lundbeck argued that any relevant competition here would take too long and that the generics would not be able to enter the market quickly enough to be considered potential competitors. The GC disagreed, noting that the EC had reviewed multiple factors in assessing generic market entry¹²⁰ and had shown that market entry was not just a theoretical possibility, which was the key point.¹²¹

The GC also recalled that, in *AstraZeneca*,¹²² the ECJ had held that: (1) entry had to take place within a reasonable period, but without fixing a specific time-limit; and (2) potential competition could also be exerted *before* the expiry of a patent.¹²³ So the fact that such litigation might take some time and that this happened before a patent expired (as occurred here) was no bar to the EC's findings.

Fifthly, Lundbeck argued that the generics could not have entered the market in the term of the relevant agreement, so there was no potential competition. However, the GC repeatedly noted that this was not required. The generic just had to have real concrete possibilities to enter the market in a sufficiently short period *to exert effective competitive pressure* on Lundbeck at the time the agreements were concluded.¹²⁴ The Court found that such possibilities existed for each agreement.¹²⁵

Sixthly, the GC found that the EC had not disregarded the presumption of validity of patents. That could not be equated with a presumption that the products put on the market by the generics infringed Lundbeck's patents.¹²⁶ That was not clear.¹²⁷

Seventhly, the Court also recalled that, even if the generics were found to be infringing Lundbeck's patents, they could still challenge the *validity* of those patents.¹²⁸

¹¹² *E.ON Ruhrgas AG v European Commission* (T-360/09) EU:T:2012:332; [2012] 5 C.M.L.R. 16.

¹¹³ *Lundbeck* EU:T:2016:449 at [94]–[97].

¹¹⁴ *Lundbeck* EU:T:2016:449 at [98]–[112].

¹¹⁵ *Lundbeck* EU:T:2016:449 at [142].

¹¹⁶ *Lundbeck* EU:T:2016:449 at [131].

¹¹⁷ See, e.g. *Lundbeck* EU:T:2016:449 at [144] and [157].

¹¹⁸ *Lundbeck* EU:T:2016:449 at [118]–[119].

¹¹⁹ *Lundbeck* EU:T:2016:449 at [120]–[131].

¹²⁰ *Lundbeck* EU:T:2016:449 at [157].

¹²¹ *Lundbeck* EU:T:2016:449 at [161].

¹²² *AstraZeneca AB v European Commission* (C-457/10 P) EU:C:2012:770; [2013] 4 C.M.L.R. 7.

¹²³ *Lundbeck* EU:T:2016:449 at [163]–[164].

¹²⁴ *Lundbeck* EU:T:2016:449 at [203].

¹²⁵ See, e.g. *Lundbeck* EU:T:2016:449 at [215]–[218] and [222]–[223] as regards Merck in the UK.

¹²⁶ *Lundbeck* EU:T:2016:449 at [121].

¹²⁷ *Lundbeck* EU:T:2016:449 at [121]–[132] and [166].

¹²⁸ *Lundbeck* EU:T:2016:449 at [122] and [202].

Box 7

• Court cases—general (5)

— Lundbeck—pay for delay (2)

- * Focus also on whether agreements were simple market exclusion agreements, “buying off competition” for a time and restrictions by object:
 - EC and GC found “yes”. Amount of payment a relevant factor.
- * Detailed defence arguments based on idea that action to defend rights within the scope of Lundbeck’s patent was lawful:
 - EC and GC position that actions were within the scope of the patent *and* beyond scope of patent; and
 - even if *within* the scope of the patent, GC noted that EU Competition law could apply to *exercise* of patent rights.
- * Lundbeck also argued that it was not clear that the conduct was unlawful, so the case should not be a restriction by object, nor should there be a fine:
 - GC disagreed on evidence and considered the fine justified because agreements were not “normal competition”.

As regards Lundbeck’s argument that the agreements were *not restrictive “by object”*, it may be recalled that the EC’s position was that a patent did not grant the holder the right to limit commercial autonomy *going beyond* the patent rights granted. The EC considered patent settlements problematic in competition law if they involved several elements: (1) exclusion of one of the parties from the market; (2) one of which was at least a potential competitor of the other; and (3) accompanied by a transfer of value from the patent holder to the generic (a “reverse payment”).

The EC also considered that, even if the restrictions fell *within* the scope of Lundbeck’s patents (i.e. only prevented entry of Citalopram deemed to potentially infringe Lundbeck’s patents), they could be considered restrictions by object since they prevented or rendered pointless any challenge to Lundbeck’s patents (which the EC considered to be normal competition regarding patents).¹²⁹

Further, the EC considered that the agreements transformed the uncertainty as to the litigation outcome into the certainty that the generics would not enter the market.¹³⁰

The GC agreed with the EC’s approach. The Court found that the EC had been correct to find a restriction of competition by object in the case because: (1) the

reverse payments encouraged or induced the generics not to enter the market; (2) the amount paid corresponded to the expected profits of the market entrant¹³¹; and (3) the certainty of the reverse payment replaced the uncertainties of market entry and removed any incentive the entrant might have to do so.¹³²

The Court also stressed that the EC had not said *all* reverse payments were illegal, just those, such as in this case, linked to delay in entry to the market.¹³³ More specifically, the GC found the following:

First, such agreements could be restrictive by object when such limits on a generic’s conduct did not result from an assessment of the merits of the rights in issue, but rather the size of the reverse payment, which induced the generic not to enter the market (a “buying off of competition”).¹³⁴

The GC rejected Lundbeck’s claim that the EC was wrong to find that the reverse payments did not reflect the parties’ assessment of the strength of the patents. The GC upheld the EC’s view that, where a reverse payment was linked to exclusion of a competitor, or limiting incentives for market entry, it was not linked to the parties’ assessment of the strength of the patents.¹³⁵

Secondly, the GC found that the size of the reverse payments was relevant and, if a payment was disproportionate, that might suggest that it was restrictive by object.¹³⁶ Further, if the agreements did not resolve the underlying patent dispute, they fell within art.101 TFEU.¹³⁷

Thirdly, the Court noted that the EC had reviewed, on the basis of various pieces of evidence, whether the reverse payments had induced the generics not to enter the market and found that they did. In particular, the Court noted that in various cases the amounts corresponded to the anticipated profits of the generic entrant.¹³⁸

Fourthly, the GC considered that the EC had been correct to compare the agreements to the market exclusion agreements in the *BIDS* case. The GC found that the EC had applied the case law on restriction of object correctly in determining whether an agreement may be regarded, by its very nature, as restricting competition in a sufficiently serious manner as to be classified as a restriction by object “in the case at hand”.¹³⁹ The EC was not required to look at the effects on competition, in particular whether the generic would have entered the market in the absence of these agreements, if it had already established that the generics had real concrete possibilities to do so.¹⁴⁰

¹²⁹ *Lundbeck* EU:T:2016:449 at [333]–[335].

¹³⁰ *Lundbeck* EU:T:2016:449 at [353] and [360].

¹³¹ *Lundbeck* EU:T:2016:449 at [414].

¹³² For example, *Lundbeck* EU:T:2016:449 at [399], [401] and [429].

¹³³ *Lundbeck* EU:T:2016:449 at [354] and [412].

¹³⁴ *Lundbeck* EU:T:2016:449 at [336].

¹³⁵ *Lundbeck* EU:T:2016:449 at [352].

¹³⁶ *Lundbeck* EU:T:2016:449 at [355].

¹³⁷ *Lundbeck* EU:T:2016:449 at [360].

¹³⁸ *Lundbeck* EU:T:2016:449 at [366].

¹³⁹ *Lundbeck* EU:T:2016:449 at [436].

¹⁴⁰ *Lundbeck* EU:T:2016:449 at [473]–[474].

Fifthly, the Court noted that it was not required that the same type of agreement had been censured by the EC already for it to constitute a restriction by object.¹⁴¹ The EC could find such restrictions in the future “following an individual and detailed examination of the measures in question having regard to their content, purpose and context”.¹⁴²

Box 8

• Court cases—general (6)

— Lundbeck—pay for delay (3):

- * (new) restrictions by object can be found in the future after “an individual and detailed examination of the measures in question having regard to their content, purpose and context”.

Sixthly, the GC rejected Lundbeck’s argument that the agreements were *ancillary* to its legitimate objective of protecting and enforcing its patents.¹⁴³ The Court found that such agreements were not objectively necessary (because Lundbeck could have brought infringement actions instead),¹⁴⁴ nor were they proportionate to achieving that objective (because they did not resolve any patent dispute and the restrictions often went beyond the scope of Lundbeck’s patents).¹⁴⁵

Seventhly, Lundbeck argued that the restrictions did not infringe competition law because they merely protected Lundbeck’s rights in the “scope of the patent” concerned¹⁴⁶ to take action against infringing medicinal products.¹⁴⁷ The GC rejected this,¹⁴⁸ noting again that, on the case law, competition law could apply to the exercise of patent rights, for example, to settlement agreements¹⁴⁹ and clauses designed to prevent the challenge of a patent’s validity.¹⁵⁰ So competition law could apply to restrictions within the scope of Lundbeck’s patents.

The GC also agreed with the EC that the “scope of the patent” test was problematic for competition law. It assumed that the patent was lawful when that issue was unresolved and it was based on the subjective assessment of Lundbeck that its patents were valid. The EC was therefore entitled not to apply it. The correct test was the concept of restriction by object, and the EC was entitled to rely on a number of contextual elements to show that.¹⁵¹

Eighthly, Lundbeck argued that the EC had been wrong to find that the restrictions went beyond the scope of Lundbeck’s patents. The GC generally rejected this, save as regards certain restrictions in an agreement with Merck,¹⁵² but found that finding ineffective since the EC had established that the restrictions on Merck were anti-competitive whether or not within the scope of Lundbeck’s patents.¹⁵³

As regards *other claims*, Lundbeck argued that it should have been able to see the correspondence on the case between the Danish Competition Authority and the EC. Lundbeck claimed that this might have contained evidence going to the issue as to whether there was uncertainty as to whether reverse payments infringed competition law when the relevant agreements were entered into.¹⁵⁴ In other words, going to whether there was a restriction by object and whether a fine should be imposed or not.

The EC voluntarily produced the documents in its pleadings and the GC considered them, finding that they were not useful to Lundbeck’s defence, since they only permitted an argument that there was doubt as to whether the agreements could be “classified immediately” without detailed examination “as restrictions of competition by object”.

However, the Court recalled that the case law did not require that an agreement be “prima facie or undoubtedly sufficiently harmful to competition without a detailed examination of its content, purpose, legal and economic context in which it occurs”.¹⁵⁵ So, had Lundbeck seen the documents concerned in the administrative procedure, it was not shown that a different result would have occurred.

The Court also noted that the Danish Authority’s statements still showed that it considered the agreements to be restrictive of competition.¹⁵⁶

Finally, the GC rejected Lundbeck’s argument that there should have been *no fine* because it was not foreseeable that the agreements infringed art.101(1) TFEU and novel issues were concerned.¹⁵⁷ The GC noted that a form of market exclusion was involved; a particularly serious restriction of competition and the possible application of competition law to settlement agreements/IP rights was also established.¹⁵⁸ Further, “the applicants’ conduct in the present case was clearly not part of normal competition”.¹⁵⁹

¹⁴¹ Lundbeck EU:T:2016:449 at [438].

¹⁴² Lundbeck EU:T:2016:449 at [438].

¹⁴³ Lundbeck EU:T:2016:449 at [447]–[449], and [456].

¹⁴⁴ Lundbeck EU:T:2016:449 at [457]–[458].

¹⁴⁵ Lundbeck EU:T:2016:449 at [460].

¹⁴⁶ Lundbeck EU:T:2016:449 at [478].

¹⁴⁷ Lundbeck EU:T:2016:449 at [484]. This appears to echo arguments raised in US pay for delay litigation. See A. Athanasidou, “FTC v Actavis: Are Reverse Payment Settlements Antitrust Immune?” in L. Heckendorn Urscheler and K. Topaz Druckmann (eds), *Les difficultés économiques en droit* (Zurich: Schulthess Editions Romandes, 2015).

¹⁴⁸ Lundbeck EU:T:2016:449 at [486]–[490] and [539].

¹⁴⁹ *Bayer AG v Sullhofer* (C-65/86) EU:C:1988:448; [1990] 4 C.M.L.R. 182.

¹⁵⁰ See *Windsurfing Chiemsee Produktions- und Vertriebs GmbH v Boots- und Segelzubehor Walter Huber* (C-108/97) EU:C:1999:230; [2000] Ch. 523.

¹⁵¹ Lundbeck EU:T:2016:449 at [490]–[491] and [499]–[500].

¹⁵² Lundbeck EU:T:2016:449 at [558]–[569].

¹⁵³ Lundbeck EU:T:2016:449 at [571]–[577].

¹⁵⁴ Lundbeck EU:T:2016:449 at [743].

¹⁵⁵ Lundbeck EU:T:2016:449 at [752].

¹⁵⁶ Lundbeck EU:T:2016:449 at [749].

¹⁵⁷ Lundbeck EU:T:2016:449 at [764].

¹⁵⁸ Lundbeck EU:T:2016:449 at [769]–[770].

¹⁵⁹ Lundbeck EU:T:2016:449 at [783].

Otherwise, in other appeals, the GC upheld the EC’s approach to the fines of the generics (setting the fine on the basis of the reverse payment received).

Cartel appeals

Box 9

• Cartel appeals—(1)

— *Air Cargo*:

- * EC decision annulled for contradictions between grounds and operative part (and within grounds);
- * operative part divided infringement by routes and periods based on developing EU jurisdiction, arguably suggesting four infringements;
- * grounds suggested one single infringement;
- * not clear; and
- * *had* to be clear, not only for rights of defence, but also because national courts had to apply the decision (could not take decisions “running counter” to it).

Air Cargo

In December 2015, the GC issued 13 judgments annulling the EC’s *Air Cargo* Decision.¹⁶⁰ The Court ruled that the decision was vitiated by an inadequate statement of reasons owing to inconsistencies in its grounds and between the decision’s grounds and its operative part. As a result, the decision’s addressees could not determine the nature and scope of the alleged infringements against them, which led to their rights of defence being infringed.

It will be recalled that, in November 2010, the EC adopted a decision finding that 21 air freight carriers within 12 corporate groups had infringed art.101 TFEU, art.53 EEA Agreement and art.8 Agreement between the European Community and the Swiss Confederation on Air Transport.¹⁶¹ In particular, the decision found that the freight carriers had co-ordinated the pricing of fuel and security surcharges. The EC imposed fines totalling some €790 million.

The EC’s investigation followed a leniency application from Lufthansa, which, with its subsidiary Swiss International Air Lines AG, was granted a 100% reduction of its fine. All the freight carriers except Qantas appealed the decision.

A number, but not all, of the applicants argued that there was an inconsistency between the decision’s grounds and its operative part, and that this constituted a failure to state reasons: the grounds described a single and continuous infringement, whereas the operative part appeared to find four separate infringements regarding separate time periods and separate groups of routes.

Noting that its jurisdiction had changed over time, the EC therefore appeared to find infringements: (1) among EEA airports; (2) among EU airports and third countries; (3) among EEA airports not including EU airports and third countries (outside the EEA); and (4) among EU airports and Switzerland.

The GC asked all of the applicants to comment on this alleged inconsistency¹⁶² and then addressed it before considering any other pleas.¹⁶³

First, the Court emphasised the EC’s obligation to state reasons in a clear and unequivocal fashion so that those concerned could defend their rights and the EU Courts could exercise their power of review.

Secondly, the Court noted that the operative part of a decision is key:

“[I]t is the operative part, and not the statement of reasons, which is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision.”¹⁶⁴

Thirdly, the Court stressed the importance of the decision’s operative part for national courts, since under art.16(1) of Regulation 1/2003, they could not take decisions that run counter to EC decisions.¹⁶⁵ As a result, “the meaning of the operative part of [a] decision must be unambiguous” and its wording

“must allow the national courts to understand the scope of [the] infringement and to identify the persons liable, in order to be able to draw the necessary inferences as regards claims for damages brought by persons harmed by that infringement”.¹⁶⁶

All the more so given that defendants in national court actions are often jointly and severally liable, which may give rise to indemnity or contribution rights between them.¹⁶⁷

¹⁶⁰ With thanks to Cormac O’Daly. Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258-Airfreight) [2014] OJ 371/11. GC Press Release 147/15, 16 December 2015. References here are to the judgment in *Singapore Airlines and Singapore Airlines Cargo PTE v European Commission* (T-43/11) EU:T:2016:989, unless indicated otherwise. See also judgments in *Air Canada v European Commission* (T-9/11) EU:T:2015:994; [2016] 4 C.M.L.R. 4; *Koninklijke Luchtvaart Maatschappij NV v European Commission* (T-28/11) EU:T:2015:995; [2016] 4 C.M.L.R. 5; *Japan Airlines Co Ltd v European Commission* (T-36/11) EU:T:2015:992; [2016] 4 C.M.L.R. 6; *Cathay Pacific Airways Ltd v European Commission* (T-38/11) EU:T:2015:985; [2016] 4 C.M.L.R. 7; *Cargolux Airlines International SA v European Commission* (T-39/11) EU:T:2015:991; [2016] 4 C.M.L.R. 8; *Latam Airlines Group SA v European Commission* (T-40/11) EU:T:2015:986; [2016] 4 C.M.L.R. 9; *Deutsche Lufthansa AG v European Commission* (T-46/11) EU:T:2015:987; [2016] 4 C.M.L.R. 11; *British Airways Plc v European Commission* (T-48/11) EU:T:2015:988; [2016] 4 C.M.L.R. 12; *SAS Cargo Group A/S v European Commission* (T-56/11) EU:T:2015:990; [2016] 4 C.M.L.R. 13; *Air France-KLM v European Commission* (T-62/11) EU:T:2015:996; *Société Air France SA v European Commission* (T-63/11) EU:T:2015:993; and *Martinair Holland NV v European Commission* (T-67/11) EU:T:2015:984; [2016] 4 C.M.L.R. 14.

¹⁶¹ *Air Cargo* Decision. See John Ratliff, “Major Events and Policy Issues in EU Competition Law, 2010–11: Part 2” [2012] I.C.C.L.R. 127.

¹⁶² *Singapore Airlines* EU:T:2016:989 at [19].

¹⁶³ *Singapore Airlines* EU:T:2016:989 at [31]–[89].

¹⁶⁴ *Singapore Airlines* EU:T:2016:989 at [41].

¹⁶⁵ *Singapore Airlines* EU:T:2016:989 at [43].

¹⁶⁶ *Singapore Airlines* EU:T:2016:989 at [45]–[46].

¹⁶⁷ *Singapore Airlines* EU:T:2016:989 at [47]–[48].

Fourthly, the GC noted that the operative part contained four articles finding liability but only 11 of the 21 addressees were mentioned in all four.¹⁶⁸ The Court noted that the time periods mentioned in the four articles overlapped to some extent and reasoned that, if the four articles were intended to find liability for a single infringement, as the EC maintained, all of the addressees mentioned in certain articles should have been mentioned in some of the other articles.¹⁶⁹ Therefore, the Court concluded that the four articles must be read either to concern four separate infringements on different routes, or one single infringement involving only those freight carriers that were mentioned in each of the four articles.

The Court considered that the decision's grounds suggested that there was a single worldwide infringement concerning all of the routes and all of the carriers.¹⁷⁰ The Court also noted that the decision itself stated that it would be "artificial to split up" the carriers' conduct into separate infringements.¹⁷¹ There was, as a result, a contradiction between the grounds of the decision and the potential interpretation of its operative part.¹⁷²

Fifthly, the Court found that certain parts of the decision's grounds were not internally consistent. In particular, certain statements were incompatible with a finding of a single continuous infringement covering all relevant routes.¹⁷³

The Court therefore concluded that the EC's decision was vitiated by a contradiction between its grounds and its operative part and contradictions within its grounds.¹⁷⁴

The Court then ruled on whether these contradictions infringed the applicants' rights of defence. Here, the Court found that this was so since they could not have established what evidence in the decision's grounds was related to the four infringements in the operative part and they also could not have contested the sufficiency of that evidence.¹⁷⁵

The Court therefore annulled the decision for those applicants that had pleaded for this outcome.¹⁷⁶ British Airways had not pleaded that the entire decision should be annulled.¹⁷⁷ It raised the issue at the hearing, but this was considered too late, so its decision was only annulled to the extent sought by British Airways. (Quantas did not appeal.)

The EC has not appealed the GC's judgment to the ECJ and is understood to be working on a new decision. British Airways has appealed.

It is an open question where this will leave the private damages actions ongoing against freight carriers in England, Germany and the Netherlands, not least in light of Brexit.

Box 10

• Cartel appeals—(2)

— Freight forwarding services cartel

- * Several pleas related to the fact that some services affected were only from the UK and/or for export from the EEA:
 - EC based jurisdiction on implementation.
- * Pleas rejected by GC.
- * Should a para.8(b) immunity application be accepted over a para.8(a) immunity application?
 - GC: "no". Intrinsic value in the para.8(a) application, allowing detection of the cartel.
- * Was it wrong to fine on basis that whole package of services were "related", when in some cases the surcharge was just a fixed amount and the surcharge only related to some services?
 - GC: "no". EC not required to show effect on services or to split out just those services where the surcharge was applied.

Freight forwarding services

Background

In March 2012, the EC fined 14 international groups €169 million for participating in one or more of four separate cartels aimed at fixing prices and other trading conditions in international air freight forwarding services (FFS).¹⁷⁸

It appears that the first was called the "new export system" (NES) cartel. When the UK introduced an electronic declaration for exports in 2003, the freight forwarders (FFs) agreed to establish a surcharge on this reporting service and to fix its amount according to the size of the customer.¹⁷⁹ The system applied to exports from the UK to countries outside the EEA.

The second was the "advanced manifest system" (AMS) cartel. This related to information on goods to be shipped to the US, which must be provided in advance. The system was introduced after the terrorist attacks of 11 September 2001. In 2003–04, the FFs agreed to introduce a surcharge for processing the electronic transmission of such information.¹⁸⁰

¹⁶⁸ *Singapore Airlines* EU:T:2016:989 at [58].

¹⁶⁹ *Singapore Airlines* EU:T:2016:989 at [59]–[61].

¹⁷⁰ *Singapore Airlines* EU:T:2016:989 at [63].

¹⁷¹ *Singapore Airlines* EU:T:2016:989 at [64].

¹⁷² *Singapore Airlines* EU:T:2016:989 at [65].

¹⁷³ *Singapore Airlines* EU:T:2016:989 at [75]–[78].

¹⁷⁴ *Singapore Airlines* EU:T:2016:989 at [79].

¹⁷⁵ *Singapore Airlines* EU:T:2016:989 at [83].

¹⁷⁶ *Singapore Airlines* EU:T:2016:989 at [90]–[92].

¹⁷⁷ See *British Airways Plc v European Commission* (T-48/11) EU:T:2016:988; [2016] 4 C.M.L.R. 12 at [87]–[93].

¹⁷⁸ With thanks to Itsiq Benizri, Adélaïde Nys and Mercedes Segoviano Guilarte. EC decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39462-*Freight Forwarding*). The EC's non-confidential decision was made available on the EC's website in 2016 (see below, cartels section).

¹⁷⁹ *Freight Forwarding* Decision at [94]–[95].

¹⁸⁰ *Freight Forwarding* Decision at [133]–[137].

The third was the “currency adjustment factor” (CAF) cartel. This related to a risk in fall of profits due to the decision of the Bank of China that it would no longer peg the Chinese currency, the renminbi, to the US dollar. This affected the cost of local services in China and therefore the margins of the FFs which invoiced their services in dollars. In 2005, the FFs agreed to convert all their contracts into renminbi and to introduce a CAF surcharge where that was not possible.¹⁸¹

Finally, the fourth was the “peak season surcharge” (PSS) cartel. The FFs agreed on the introduction of a PSS to be charged during the peak season transport period for air freight forwarding in the run-up to Christmas.¹⁸²

Deutsche Post had obtained immunity under the EC Leniency Notice.¹⁸³ EGL, UTi, Schenker, Deutsche Bahn and Panalpina Weltransport brought appeals.

The GC ruled on the appeals in February 2016, dismissing all pleas save for a small reduction in the fine of UTi Worldwide.¹⁸⁴

EGL

The most interesting arguments made by EGL were as follows:

First, EGL argued that trade between Member States was not appreciably affected by the NES cartel.¹⁸⁵ In particular, EGL pointed out that the NES arrangement was *only implemented in the UK*. However, the GC rejected this, noting, among other things, that the FFS affected by the NES cartel were sought not only by customers situated in the UK, but also by customers located in other EEA countries.¹⁸⁶

Secondly, EGL claimed that the services affected by the NES cartel were solely those sought by customers which wanted to *export* goods from the UK to a non-EEA destination. However, the GC rejected this also, finding that FFS were characterised by substantial trade between EU and EFTA Member States. The FFs compete with one another in all or almost all EEA States and their customers are established in the EEA, so the conduct of global undertakings in the UK could have repercussions on the competitive structure within the internal market, as the altered margins in the UK could have affected their business conduct in other Member States. It was sufficient if the EC established that the agreements were capable of having such effect.¹⁸⁷

Thirdly, EGL also argued that the NES surcharge was of negligible importance. However, the GC found that, taking into account the fact that the FFS market was characterised by low profit margins, the commercial importance of the NES surcharge could not be regarded as insignificant.¹⁸⁸ The Court also emphasised that it was not just a question of the surcharge, but also of the effect on the package of FFS offered.

Fourthly, EGL argued that the Exemption for Air Transport¹⁸⁹ (art.1 of Regulation 141/62) should have applied.¹⁹⁰ According to this provision, Regulation 17/62 (the predecessor of Regulation 1/2003) did not apply to the air transport sector.¹⁹¹ EGL claimed that Regulation 141/62 applied not only to air transport, but also to all the activities that were directly related to it.

The GC rejected this interpretation. Even if the NES services and transport services were directly related, this did not affect the fact that the services affected by the NES cartel were not transport services, but FFS, separate to transport services and therefore not exempted by Regulation 141/62.¹⁹² Only conduct *directly relating* to the provision of *transport services* is exempted by art.1 of that Regulation.¹⁹³

Fifthly, EGL argued that it should have been granted leniency because it had provided its immunity application before any other undertaking including Deutsche Post, with evidence concerning the CAF arrangement, that was not in the possession of the EC and on which the EC’s decision was to a great extent founded. In other words, EGL argued that its application based on para.8(b) of the 2006 Leniency Notice should have been accepted, rather than that of Deutsche Post, based on para.8(a) of that Notice on the basis that the latter had not given the EC enough to undertake an inspection.

The GC disagreed, stating that the EC Leniency Notice did not preclude the EC granting conditional immunity to an undertaking even where the information provided by that undertaking did not yet enable the EC to form a conception of the nature and scope of the alleged cartel, which is detailed and specific. The EC had to carry out an *ex ante* assessment of the application for immunity based exclusively on the type and quality of information submitted by the undertaking.¹⁹⁴ The GC also recalled that the undertaking seeking immunity must only submit specific information to the EC insofar as the undertaking has such knowledge *at the time of its application*.¹⁹⁵

¹⁸¹ *Freight Forwarding* Decision at [215]–[217].

¹⁸² *Freight Forwarding* Decision at [302]–[305].

¹⁸³ *Freight Forwarding* Decision at [72].

¹⁸⁴ *EGL Inc v European Commission* (T-251/12) EU:T:2016:114; [2016] 4 C.M.L.R. 23; *Kühne + Nagel International v European Commission* (T-254/12) EU:T:2016:113; *UTi Worldwide Inc v European Commission* (T-264/12) EU:T:2016:112; [2016] 4 C.M.L.R. 24; *Schenker Ltd v European Commission* (T-265/12) EU:T:2016:111; [2016] 4 C.M.L.R. 25; *Deutsche Bahn AG v European Commission* (T-267/12) EU:T:2016:110; [2016] 4 C.M.L.R. 26; *Panalpina World Transport (Holding) Ltd v European Commission* (T-270/12) EU:T:2016:109; [2016] 4 C.M.L.R. 27. GC Press Release 20/16, 29 February 2016.

¹⁸⁵ Kühne and Schenker made the same argument and the GC rejected it for the same reasons.

¹⁸⁶ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [70].

¹⁸⁷ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [70] and [74].

¹⁸⁸ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [71] and [74].

¹⁸⁹ Schenker and Deutsche Bahn made the same argument and the GC rejected it for the same reasons.

¹⁹⁰ Regulation 141/62 exempting transport from the application of Regulation 17 [1962] OJ 124/2751. Deutsche Bahn also made this argument.

¹⁹¹ Regulation 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

¹⁹² *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [111].

¹⁹³ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [109]; Recital 3 of Regulation 141/62.

¹⁹⁴ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [165].

¹⁹⁵ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [167].

Moreover, the collaboration of an undertaking in the detection of a cartel of which the EC has no prior knowledge has an intrinsic value which can justify immunity from fines.¹⁹⁶

Therefore, the fact that the material submitted by Deutsche Post in its statement did not refer specifically to the CAF cartel did not preclude the EC from granting conditional immunity to it for an alleged cartel the scope of which included, inter alia, the CAF cartel.¹⁹⁷

Deutsche Bahn

The most interesting arguments made by Deutsche Bahn (DB) were as follows:¹⁹⁸

First, DB argued that the information and evidence contained in Deutsche Post's application for immunity were inadmissible. Mainly, DB argued that the law firm which Deutsche Post had used infringed the obligation of professional secrecy, hence making the information and evidence contained in Deutsche Post's immunity application inadmissible. The law firm in question, before assisting Deutsche Post in compiling the evidence for its immunity application, was representing the Freight Forward International Association (FFI Association) and its individual members, including Deutsche Post.¹⁹⁹

According to DB, the reason why Deutsche Post chose to be assisted by that law firm for its immunity application was that it wished to benefit from the particular relationship between that firm and the FFI Association and the privileged information that the firm therefore possessed.²⁰⁰

The GC rejected this, noting that all the information and evidence which Deutsche Post submitted in its application for immunity was available to *all* the members of the FFI Association. Consequently, according to the EC's findings, that information and evidence was available to Deutsche Post, irrespective of whether there was a breach by the law firm in question of the obligation of professional secrecy.²⁰¹ The information was therefore admissible.

Secondly, DB argued that the value of sales used by the EC went beyond the gravity of the infringement. Notably, DB claimed that²⁰² the EC should have used value of sales that reflected the economic harm caused by the cartels, i.e. *only the value of sales made with a*

surcharge (for the AMS, CAF and PSS cartels).²⁰³ DB stated that apart from those sales, FFs also organise the transportation of goods for carriers, where the carriers invoice them for their services, which means that the FFs had no control over the charges and surcharges levied by the carriers. Instead, the EC had held that the aim of the cartel was to restrict competition with respect to FFS as *a package of services*, not as individual services and had taken the value of the sales to customers on the trade lanes affected by the AMS, CAF and PSS cartels.²⁰⁴

The GC rejected this, finding that the EC had been right to consider that the AMS, CAF and PSS cartels affected FFS as a package of services.²⁰⁵ The Court found that, from an economic perspective, the role of a FF was not confined to being a mere intermediary, as DB argued.²⁰⁶ Moreover, the GC recalled that the EC was not obliged to establish in every case the individual sales which were affected by the cartel.²⁰⁷

Thirdly, DB complained that the EC should have sought a settlement before making a decision. Notably, DB claimed that this breached the principle of equal treatment.²⁰⁸

The GC rejected this. The Court noted that art.10a(1) of Regulation 773/2004²⁰⁹ gave the EC discretion to decide whether a case was suitable for settlement without first having made contact with the parties concerned²¹⁰ and that the EC had simply used its discretion in the case at hand.²¹¹ The GC also noted that the number of cartel members was 47 and that the EC was right to say that the probability that all the parties would settle was low.²¹² Moreover, the fact that several parties refused to co-operate with the EC during the investigation had only reinforced the probability that the EC's decision would be disputed.²¹³

UTi Worldwide

The most interesting argument made by UTi Worldwide, and the only one upheld by the GC, related to an error found in the way that the EC had imposed a higher fine on UTi Worldwide in its capacity as parent company than on its subsidiaries.²¹⁴

It may be recalled that UTi Worldwide was held liable for a fine of €1.8 million for the behaviour of its subsidiaries UTi Nederland and UTi Worldwide (UK)

¹⁹⁶ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [167].

¹⁹⁷ *EGL* EU:T:2016:114; [2016] 4 C.M.L.R. 23 at [169].

¹⁹⁸ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26.

¹⁹⁹ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [41].

²⁰⁰ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [41].

²⁰¹ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [51].

²⁰² *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [170].

²⁰³ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [185].

²⁰⁴ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [173] and [192].

²⁰⁵ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [190].

²⁰⁶ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [205].

²⁰⁷ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [218].

²⁰⁸ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [412].

²⁰⁹ Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.

²¹⁰ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [418].

²¹¹ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [422].

²¹² *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [428].

²¹³ *Deutsche Bahn* EU:T:2016:110; [2016] 4 C.M.L.R. 26 at [429].

²¹⁴ *UTi Worldwide Inc v European Commission* (T-264/12) EU:T:2016:112.

(as well as €1.27 million on other grounds). In its decision, the EC *rounded down* the infringement periods imputed to the subsidiaries, but not that of the parent company, as a result of which a lesser fine was imposed on the subsidiaries than that imposed on UTi Worldwide.

UTi Worldwide claimed that the fine imposed by the EC on it, as a parent company, was artificially and erroneously inflated by the EC's mathematical formula. A parent company could be held jointly and severally liable only for the total amount of the fines imposed on those of its subsidiaries which participated directly in the infringement.²¹⁵ Consequently, UTi Worldwide claimed that the amount of the fine should be reduced at least by the difference between the fine imposed on UTi Worldwide and the fines imposed on its subsidiaries.

The GC agreed, stating that the rounding down of the duration of the subsidiaries' participation resulted in a combined reduction of about one month in their favour, which was not applied to the parent company.²¹⁶ The GC emphasised that the parent company, whose liability is entirely derived from that of its subsidiaries, must benefit from the same reduction in liability as enjoyed by its subsidiaries.²¹⁷

The fine imposed initially on UTi Worldwide was therefore reduced by €103,000 and the overall amount was set at €2.97 million instead of €3.07 million, which was the sum of fines on the subsidiaries.²¹⁸

Animal feed phosphates

Quimitécnica

In January 2016, the ECJ ruled on an appeal against the judgment of the GC, whereby that Court held that the EC could require Quimitécnica and its parent José de Mello SA (De Mello) to provide a bank guarantee from a bank with a long-term "AA" rating.²¹⁹ This arose in relation to the animal feed phosphates cartel. De Mello had been fined €1 million and De Mello and Quimitécnica were jointly and severally liable for a fine of €1.75 million.

The EC agreed to payment by instalments provided that a guarantee was provided from such a bank. The companies paid the instalments as required and sought to provide a guarantee from a bank which did not have the AA rating, but then had to pay some €36,000 in interest for having failed to provide the required AA rating guarantee.

The companies appealed, arguing that the EC had failed to give reasons for the AA rating requirement and that such a requirement was disproportionate. The GC dismissed this, stating that even if no explicit justification

for the requirement was given, it was clear that it was to protect the EU's financial interests and such a requirement was not manifestly unfounded.

On further appeal to the ECJ, that Court ruled that the GC's approach was wrong. Since the EC's decision did not contain any explicit explanation for the AA rating requirement, its reasons could only be assessed after examining the facts underlying the adoption of that decision.²²⁰ The GC had not looked at the exchanges between the EC and the companies to establish whether these allowed them to understand the reasons for the AA rating requirement. The GC therefore had not effectively checked and assessed the facts relating to such exchanges to decide on the companies' arguments and those of the EC.²²¹

As a result, the ECJ found that the GC's judgment did not contain adequate reasoning. The Court set aside the GC's ruling and sent the case back to the GC.

Insulated switchgear

Box 11

• Cartel appeals—(3)

— *Toshiba* (Power Transformers)²²²:

- * GC entitled to infer from a gentlemen's agreement that there was potential competition between Europe and Japan;
- * NB: similar approach in *Lundbeck*;
- * when considering a market-sharing agreement, the analysis of the related economic and legal context may be limited to what is strictly necessary to establish a restriction by object; and
- * NB: in practice here there were examples suggesting competition was possible.

— *Galp*²²³:

- * GC cannot make new findings of infringement based on evidence used by the EC in its decision and referred to in the GC pleadings; but
- * GC can assess facts going to fines/penalties and inability to pay in unlimited jurisdiction.

— Compare *Portugal Telecom* above and *Westfälische Drahtindustrie*²²⁴ below.

²¹⁵ *UTi Worldwide* EU:T:2016:112 at [316].

²¹⁶ *UTi Worldwide* EU:T:2016:112 at [327].

²¹⁷ *UTi Worldwide* EU:T:2016:112 at [334].

²¹⁸ *UTi Worldwide* EU:T:2016:112 at [337].

²¹⁹ With thanks to Philippe Claessens. *Quimitécnica.com—Comércio e Indústria Química SA and José de Mello—Sociedade Gestora de Participações Sociais SA v European Commission* (C-415/14 P) EU:C:2016:58.

²²⁰ *Quimitécnica* EU:C:2016:58 at [47].

²²¹ *Quimitécnica* EU:C:2016:58 at [53].

²²² *Toshiba Corp v European Commission* (T-404/12) EU:T:2016:18; [2016] 4 C.M.L.R. 21.

²²³ *Galp Energía España SA v European Commission* (C-603/13 P) EU:C:2016:38; [2016] 4 C.M.L.R. 18.

²²⁴ *Westfälische Drahtindustrie v European Commission* (C-523/15 P) EU:C:2016:541.

Toshiba and Mitsubishi Electric

In January 2016, the GC ruled on appeals by Toshiba and Mitsubishi Electric²²⁵ against the EC's decision²²⁶ as regards the gas insulated switchgear cartel.

It may be recalled that Toshiba and Mitsubishi Electric were originally fined €86.25 million and €113.92 million respectively.²²⁷ In addition, the EC also fined the two companies jointly and severally €4.65 million for their share of the liability of their joint venture, TM T&D. In July 2011, the GC annulled the fines on the basis that the EC had breached the principle of equal treatment while calculating the fines,²²⁸ in judgments that the ECJ upheld in December 2013.²²⁹

The EC then amended its decision and reset the fines imposed on Toshiba and Mitsubishi at €56.79 million and €74.82 million respectively. The further amount to be paid jointly and severally by the two companies remained fixed at €4.65 million. Both companies then appealed the decision again.

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

First, Toshiba claimed that the EC infringed its rights of defence owing to the fact it did not send a new Statement of Objections (SO) before adopting its amending decision.²³⁰ Toshiba and Mitsubishi also both claimed that the EC failed to address important elements of the calculation of the fine in the letter of facts which they had been sent instead of a new SO. They therefore lacked the knowledge necessary to defend themselves properly.²³¹

The GC rejected these claims on the basis that the EC had indicated enough in the original SO (that preceding its first decision), i.e. that it might impose fines and a further SO was not necessary²³² because new objections had not been raised. Moreover, the GC found that the EC had made clear that it would use the same parameters to calculate the new fine. Toshiba and Mitsubishi therefore had sufficient knowledge to defend themselves.²³³

The GC explained that the companies' understanding of what fines might be imposed continued to be based on the original SO and the "veracity, relevance or validity"

of the information in that SO had not been affected by the GC's first ruling in the case.²³⁴ Nor did the EC have to refer to all that information in the letter of facts.²³⁵

Secondly, Toshiba and Mitsubishi argued that the EC infringed the principle of equal treatment because of the EC's decision to take the value of sales of TM T&D in 2003, instead of the value of their respective, individual gas insulated switchgear sales.²³⁶

The point here was that by taking TM T&D's position into account, the EC put the joint venture in the second group of cartel members for purposes of assessing gravity and then divided the fine between Toshiba and Mitsubishi. The companies argued that the turnover of TM T&D should have been split between them first, which would have given them a lower weighting in terms of gravity and treated them like the European producers.

The GC again rejected the claim and noted that, after the first annulment of the fines, the EC was required to use 2003 as the reference year for the value of sales since the two companies had not recorded any sales themselves that year²³⁷ (having consolidated their business into the joint venture²³⁸).

Thirdly, Toshiba and Mitsubishi claimed that the EC failed to take into account the companies' lower level of culpability compared with the European cartellists.²³⁹ The point here was that they did not take part in all aspects of the cartel. They only participated in the common understanding, by which the Japanese members of the cartel agreed not to enter the EEA market. They did not participate in the allocation of the gas insulated switchgear projects within the EEA.²⁴⁰ Therefore, they argued that their infringement should be seen as a less serious one.²⁴¹

The GC rejected this based on the finding that there had been a single and continuous infringement comprising all the parts of the cartel (a worldwide agreement on allocation of GIS projects; another allocation agreement for Europe; and the common understanding that the EU and Japanese producers would not compete in Europe and Japan).²⁴²

The GC accepted that Toshiba and Mitsubishi had *failed to act* (i.e. agreed not to enter the EEA market), which was different than *actively colluding* to allocate

²²⁵ With thanks to Adélaïde Nys. *Mitsubishi Electric Corp v European Commission* (T-409/12) EU:T:2016:17; [2016] 4 C.M.L.R. 22 and *Toshiba Corp v European Commission* (T-404/12) EU:T:2016:18; [2016] 4 C.M.L.R. 21; GC Press Release 2/16, 19 January 2016.

²²⁶ Decision amending Decision C(2006)6762 final of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation (COMP/39.966-Gas Insulated Switchgear-Fines).

²²⁷ *Gas Insulated Switchgear* Decision.

²²⁸ *Toshiba Corp v European Commission* (T-113/07) EU:T:2011:343; [2011] 5 C.M.L.R. 20; and *Mitsubishi Electric Corp v European Commission* (T-133/07) EU:T:2011:345; [2011] 5 C.M.L.R. 22.

²²⁹ *Siemens AG v European Commission* (C-239/11 P) EU:C:2013:866; [2014] 4 C.M.L.R. 18.

²³⁰ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [32].

²³¹ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [31]–[35].

²³² *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [39]–[44].

²³³ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [87]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [41]–[44].

²³⁴ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [64].

²³⁵ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [75].

²³⁶ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [92]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [100].

²³⁷ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [120]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [109].

²³⁸ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [113]–[132]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [112].

²³⁹ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [133]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [145].

²⁴⁰ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [133]–[134]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [145]–[147].

²⁴¹ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [134]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [147].

²⁴² *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [138]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [151].

gas insulated switchgear projects.²⁴³ However, the Court found that, by honouring their commitment under the common understanding, the Japanese undertakings had made a necessary contribution to the functioning of the infringement as a whole.²⁴⁴ Therefore, the GC concluded that Toshiba's and Mitsubishi's contribution to the infringement was comparable to that of the European cartel members.²⁴⁵

Power transformers

Toshiba

In January 2016, the ECJ also ruled on an appeal by Toshiba as regards the power transformers cartel case.²⁴⁶ It may be recalled that in this case the EC fined seven European and Japanese manufacturers as regards a gentlemen's agreement not to compete in each other's markets, i.e. the EEA and Japan.

The EC treated this as a restriction by object. However, some undertakings argued that there was no impact on competition as the Japanese and European producers could not compete²⁴⁷ anyway, owing to "insurmountable barriers to entry".²⁴⁸

Both the EC and the GC rejected the Japanese manufacturers' arguments. Toshiba then brought an appeal to the ECJ. Toshiba claimed in its appeal that the assessment of what constituted a restriction by object required a more detailed assessment of the legal and economic context around the gentlemen's agreement. Such a detailed assessment would have focused on whether there were *real and specific possibilities* to enter the market.²⁴⁹

Toshiba also claimed that the GC was wrong to characterise the gentlemen's agreement as a restriction by object, without ascertaining beforehand whether entry to the EEA market was an *economically viable* strategy for Japanese producers.²⁵⁰ Toshiba claimed that the GC had been wrong to infer that there was potential competition from the gentlemen's agreement itself.²⁵¹

The ECJ rejected these claims:

First, the Court recalled that it had already held that market-sharing agreements were particularly serious breaches of the rules which have, in themselves, as object,

the restriction of competition. Such an object could not be justified by an analysis of the economic context of the anti-competitive conduct concerned.²⁵²

As a result, the ECJ considered that, in respect of such agreements, the analysis of the economic and legal context of which the practice forms a part may be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.²⁵³

Secondly, the ECJ reviewed the GC's assessment of potential competition. The GC had found that, since art.101 TFEU also concerns potential competition, the gentlemen's agreement was capable of restricting competition, unless insurmountable barriers to entry to the European market existed, which ruled out any potential competition from Japanese producers.²⁵⁴

The GC had held that those barriers could not be classified as insurmountable as Hitachi had accepted projects coming from customers situated in Europe.²⁵⁵ Further, the GC had held that the gentlemen's agreement represented a "strong indication that a competitive relationship existed" between the two categories of producers, which the ECJ noted constituted an element of the relevant economic and legal context.²⁵⁶

The ECJ concluded that the GC's analysis was sufficient and that no further analysis was required to conclude on the existence of a restriction by object.²⁵⁷

The Court also noted that there was other evidence that the barriers to entry to the European market were not insurmountable. Namely, that the Korean undertaking Hyundai had recently entered the market and that Japanese producers had been able to achieve considerable sales in the US.²⁵⁸

The Court also agreed with the GC that the very existence of the gentlemen's agreement called into question the plausibility of Toshiba's argument that the barriers to entry to the European market were insurmountable.²⁵⁹

²⁴³ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [140]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [153].

²⁴⁴ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [140]–[141]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [154].

²⁴⁵ *Toshiba* EU:T:2016:18; [2016] 4 C.M.L.R. 21 at [142]; *Mitsubishi* EU:T:2016:17; [2016] 4 C.M.L.R. 22 at [156].

²⁴⁶ With thanks to Itsiq Benizri. *Toshiba Corp v European Commission* (C-373/14 P) EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [10].

²⁴⁷ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [11].

²⁴⁸ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [11].

²⁴⁹ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [20].

²⁵⁰ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [20] and [30].

²⁵¹ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [19] and [21].

²⁵² *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [28].

²⁵³ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [29].

²⁵⁴ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [31].

²⁵⁵ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [32].

²⁵⁶ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [33].

²⁵⁷ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [34].

²⁵⁸ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [46].

²⁵⁹ *Toshiba* EU:C:2016:26; [2016] 4 C.M.L.R. 15 at [47].

Spanish bitumen

Galp

In January 2016, the ECJ clarified the scope of the GC's unlimited jurisdiction, confirming that the powers of the GC are limited when it comes to substituting its own assessment for that of the EC.²⁶⁰

In October 2007, the EC adopted a decision fining various oil companies for operating a market-sharing and price-fixing cartel in the market for bitumen in Spain between 1991 and 2002.²⁶¹ Galp was a small player in the Spanish market with only 4.5% market share and Galp was fined some €8.6 million. Galp then sought annulment of the EC decision, arguing among other things that the Commission had failed to show that Galp was involved in two aspects of the cartel: a compensation system and a monitoring system.²⁶²

The GC agreed that the EC had failed to establish Galp's participation in the monitoring system and the compensation mechanism in its decision. However, the GC still concluded that Galp was liable for both aspects of the infringement, taking into account a statement of the bitumen sales director of Galp that was used by the EC in its decision and relied on by the EC before the GC to show Galp's awareness of the system. The GC concluded that this document showed that Galp was aware of the participation of other members of the cartel in the compensation mechanism and that Galp could have foreseen the participation of the other members of the cartel in the monitoring system.²⁶³

As a result, the Court accepted the EC's evaluation of the basic amount of the fine, but decided to reduce the fine by an additional 4%. (Galp's fine had already been reduced by 10% by the EC for its limited involvement.)

Galp then appealed the GC's judgment to the ECJ, claiming that the GC exceeded the bounds of its unlimited jurisdiction by substituting an entirely new statement of reasons, thus finding an infringement that had not been established by the EC.²⁶⁴

The ECJ agreed. Importantly, the ECJ noted that the GC's review of the EC decision was limited to the legality of the decision in the first place, with unlimited jurisdiction only as to the amount of the penalty.²⁶⁵

"It follows from this that the unlimited jurisdiction enjoyed by the General Court on the basis of Article 31 of Regulation No 1/2003 concerns solely the assessment by that Court of the fine imposed by the Commission, to the exclusion of any alteration of the constituent elements of the infringement lawfully determined by the Commission in the decision under examination by the General Court."²⁶⁶

The ECJ then decided to give final judgment in the case (having noted that there had been considerable delay at the GC). The Court granted a further 10% reduction, taking into account that the contested aspects were ancillary components of the infringement, the bulk of the EC's findings remaining intact.²⁶⁷ In its unlimited jurisdiction, the ECJ therefore decided to reduce Galp's fine to €7.7 million.²⁶⁸

CEPSA, PROAS, Repsol

In June 2016, the ECJ rejected appeals by CEPSA,²⁶⁹ PROAS²⁷⁰ and Repsol²⁷¹ against the GC's judgments dismissing their appeals against the Spanish bitumen cartel.

The ECJ generally upheld the GC's approach. However, it may be useful to note that, in the *Repsol* case, the ECJ emphasised that, for the purposes of leniency, the key point is whether the EC has the information/facts already or not. If the EC has the evidence, that amounts to knowledge of it, so an undertaking cannot claim it added "significant added value" by bringing those facts to the EC's attention.²⁷²

Prestressing steel

In 2016, there were several sets of judgments on the prestressing steel cartel²⁷³: first in June, then in July and September. The first batch of judgments, which were delivered in July 2015, were described last year.²⁷⁴

The Celsa group

In June 2016, the GC gave judgment on appeals by Moreda-Riviere Trefilerías (MRT), Trefilerías Queijano (TQ), Trenzas y Cables de Acero PSC (Tycsa PSC) and Global Steel Wire (GSW).²⁷⁵

²⁶⁰ With thanks to Mercedes Segoviano Guilarte. *Galp Energía España SA v European Commission* (C-603/13 P) EU:C:2016:38; [2016] 4 C.M.L.R. 18.

²⁶¹ Decision relating to a proceeding under Article 81 of the EC Treaty (Case COMP/38710-*Bitumen Spain*). See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007: Part 2" [2008] I.C.C.L.R. 79, 86.

²⁶² *Galp Energía España v European Commission* (T-462/07) EU:T:2013:459; [2014] 4 C.M.L.R. 9 at [95].

²⁶³ See *Galp* EU:T:2013:459; [2014] 4 C.M.L.R. 9 at [605]–[626].

²⁶⁴ *Galp* EU:C:2016:38; [2016] 4 C.M.L.R. 18 at [60]–[67].

²⁶⁵ *Galp* EU:C:2016:38; [2016] 4 C.M.L.R. 18 at [77]–[79].

²⁶⁶ *Galp* EU:C:2016:38; [2016] 4 C.M.L.R. 18 at [77].

²⁶⁷ *Galp* EU:C:2016:38; [2016] 4 C.M.L.R. 18 at [86].

²⁶⁸ *Galp* EU:C:2016:38; [2016] 4 C.M.L.R. 18 at [92]–[94].

²⁶⁹ *Compania Espanola de Petroleos (CEPSA) SA v European Commission* (C-608/13 P) EU:C:2016:414; [2016] 5 C.M.L.R. 4.

²⁷⁰ *Productos Asfálticos (PROAS) SA v European Commission* (C-616/13 P) EU:C:2016:415; [2016] 5 C.M.L.R. 5.

²⁷¹ *Repsol Lubricantes y Especialidades SA v European Commission* (C-617/13 P) EU:C:2016:416.

²⁷² *Repsol* EU:C:2016:416 at [70]–[73].

²⁷³ Decision (as amended by Decision of 30 September 2010 notified under document number C(2010) 6676 (final) and Decision of 4 April 2011 notified under document number C(2011) 2269 (final)) relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/38.344-*Prestressing Steel*). See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2009–2010: Part 2" [2011] I.C.C.L.R. 113, 114.

²⁷⁴ See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015 (Part 2) [2016] I.C.C.L.R. 99, 102.

²⁷⁵ With thanks to Inés Pérez Fernández. *Moreda-Riviere Trefilerías (MRT) v European Commission* (T-426/10) EC:T:2016:235; GC Press Release 57/16, 2 June 2016.

The GC dismissed the appeals, rejecting arguments about alleged issues such as errors by the EC in its assessment of attribution of liability, the existence of a single economic unit and a single and continuous infringement, the calculation of the fine, and the applicants' ability to pay the fines.

It may be recalled that in June 2010 the EC had found that the prestressing steel suppliers had participated in a cartel between the 1980s/90s and 2002. The cartel was found to have consisted of activities involving quota-fixing, customer-sharing, price-fixing and the exchange of sensitive commercial information relating to price, volume and customers at European level and at regional and national levels.

The EC found that there had been a pan-European cartel called the "Club Zurich", which was later revised and called the "Club Europe". There were also cartels in Italy ("Club Italia"), and Spain and Portugal ("Club España") which the EC considered were linked.

The EC concluded that 17 undertakings involved in the cartel had participated in a single and continuous infringement of art.101 TFEU and imposed some €518 million in fines. However, in September 2010 and then again in April 2011, the EC reduced the fine imposed on some undertakings, so the total was reduced first to €458 million and then by another €188.1 to 269.9 million.²⁷⁶

MRT, TQ, Tycsa PSC and GSW are four companies belonging to the Spanish Celsa group. The EC considered that the Celsa group participated in the cartel.

Following the 2010 decision, the companies claimed that they were not able to pay the fines, which totalled some €54 million for the four companies of the group, without compromising their viability. As a result, they submitted to the EC an application seeking reassessment of their ability to pay, which was rejected by a letter from the Director-General of DG Competition in July 2012. (Such an application had already been made during the procedure.)

MRT, TQ, Tycsa PSC and GSW then brought actions against the 2010 EC decision and the letter of July 2012.

The main points in the GC's judgment are as follows:

First, overall, the GC dismissed all the actions brought.

Secondly, the undertakings challenged the EC's findings that they formed part of a single economic entity. Three of the undertakings were jointly managed by another (GSW) which indirectly held almost all of their shares.

The GC examined a number of indications of the applicant's economic integration and concluded that these were sufficient to render plausible the EC's view that the companies constituted a single economic entity.²⁷⁷ In particular, the Court noted that the four companies were:

united by stable and close structural links during the entire period of the infringement²⁷⁸; had not been shown to act independently; were perceived by the other members of the cartel as a single competitor²⁷⁹; and had staff in common. The allocation of tasks between them and the manner in which that allocation developed were also found to demonstrate a coherent strategy for optimising resources for the production and sale of prestressing steel.²⁸⁰

Thirdly, the undertakings alleged that the EC had wrongly found that the activities of the cartel participants amounted to a single and continuous infringement. Notably, they argued that there had been a crisis period in 1996 when the cartel was interrupted.

However, the GC agreed with the EC that this was not the case, because in that period the companies continued to meet on a regular basis to work out a revised system and continued the same anti-competitive discussions, which were intended to continue collusion on quota, prices and clients.²⁸¹ In any event, such a period would not have led to a time bar on the cartel activity before it.

There were also overlaps in membership and the objectives and means of the cartel as between the pan-European clubs and the regional ones.

Fourthly, the Court upheld the EC's approach to fines. The undertakings argued that the EC had infringed the principle of non-retroactivity of criminal law by applying the 2006 Fining Guidelines for the purpose of calculating the amount of the fine for an infringement committed prior to their adoption. However, the Court found that the new calculation method which those Guidelines laid down was reasonably foreseeable at the time when the infringement was committed, for undertakings such as the four companies concerned.²⁸²

Fifthly, the undertakings argued that the EC's proceedings had been excessively long. However, the Court disagreed, noting that there were many parties and the events were long-running and in many countries. So the investigation had taken a long time, but that was not excessive in the circumstances.

Sixthly, turning to the question of ability to pay, the GC took the view, like the EC in the initial decision, that the companies had the means, if not to pay off the fines imposed immediately, at least to obtain the necessary funding or guarantees. The Court also considered that the EC was justified in taking the view that the financial situation of the group's shareholders made it possible for the companies to cope with the payment of a fine of €54.4 million.²⁸³

Finally, as regards the Director-General's letter of July 2012 which rejected the requests of the undertakings to have their ability to pay reassessed, the GC noted that, in

²⁷⁶ *Prestressing Steel Decisions*. The decisions are available on the EC's website.

²⁷⁷ *MRT* EC:T:2016:235 at [170].

²⁷⁸ *MRT* EC:T:2016:235 at [167].

²⁷⁹ *MRT* EC:T:2016:235 at [168].

²⁸⁰ *MRT* EC:T:2016:235 at [169].

²⁸¹ *MRT* EC:T:2016:235 at [409].

²⁸² *MRT* EC:T:2016:235 at [434].

²⁸³ *MRT* EC:T:2016:235 at [473].

the absence of a substantial change of fact or law, the EC cannot be required to initiate a review of one of its decisions. The GC considered that the facts alleged by the companies in their requests were not capable of substantially amending the assessment of their ability to pay in the initial EC decision.²⁸⁴ Consequently, the EC's letter of July 2012 was not in the nature of a decision and the actions brought were inadmissible.

Westfälische Drahtindustrie and Fapricela

In July 2016, the ECJ dismissed an appeal by Westfälische Drahtindustrie (WDI) and its parent companies: Westfälische Drahtindustrie Verwahrungsgesellschaft (WDV) and Pampus Industriebeteiligungen (Pampus), against the GC's judgment, by which that Court upheld the EC's 2010 cartel decision concerning prestressing steel.²⁸⁵

The GC annulled the decision as regards the fine imposed, as well as a letter from the Director-General for DG Competition as regards inability to pay. The GC had then reassessed the fine and inability to pay in its unlimited jurisdiction and set the fine again in the same amount as the EC.²⁸⁶

It may be recalled that the EC ordered WDI to pay a fine of €46.5 million and held WDV and Pampus jointly and severally liable in the amounts of €38.8 million and €15.4 million respectively.²⁸⁷ It appears that the EC had then required provision of a bank guarantee.

The companies then appealed and sought interim relief from the GC, whose President had suspended the requirement of a bank guarantee, but required them to pay €2 million June 2011 and monthly instalments of €300,000 from mid-July 2011 until delivery of judgment in the main proceedings.²⁸⁸ Afterwards, it appears that the companies had then negotiated an extended payment plan by instalments with the EC.

The main points of interest are as follows:

First, the ECJ rejected the appeal as manifestly inadmissible or manifestly unfounded under art.181 of the Rules of Procedure of the ECJ.²⁸⁹

Secondly, the companies argued that the GC had exceeded its jurisdiction, by taking a decision on their ability to pay, based on new facts subsequent to the EC's decision. It appears that they argued that no new decision should have been taken.²⁹⁰

The ECJ disagreed, noting that the EU courts are empowered, in addition to the review of the legality of the penalty, to substitute their own assessment in relation to the determination of the amount of that penalty for that of the EC.²⁹¹ In doing so, the courts have to take into account all the factual circumstances, which includes evidence submitted by the companies as to their financial position as it had evolved since the EC's decision.²⁹²

The ECJ emphasised that, in the context of exercising unlimited jurisdiction, the EU courts are entitled to take into account, "in order to *complete* the exercise of their review as to legality", all the factual circumstances which they consider to be relevant, whether they be prior to or subsequent to the contested decision.²⁹³

In other words, *for exercise of its unlimited jurisdiction to reassess a fine and ability to pay*, the GC is entitled to take new evidence (but after *Galp*, not to find a new infringement).

Thirdly, the companies argued that the GC either should have reduced the fine for inability to pay, or organised payment of the fine over three–five years, taking into account the EC's Information Notice on Inability to Pay.²⁹⁴ It appears that the companies' core complaint here was that the instalments went on too long, rather than being limited to five years and that the overall fine should have been reduced to €20 million, payable partly through the €2 million already submitted to the EC and otherwise through instalments.²⁹⁵

The ECJ again disagreed. The Court noted that the GC had neither envisaged nor imposed payment of the fine in instalments.²⁹⁶ It was correct that payment by instalments had been required in the interim relief order, but that had ended with judgment in the main proceedings. Rather it appeared that the allegedly excessive duration of the period for payment of the fine stemmed from a payment plan *negotiated by the companies themselves* with the EC *after* that judgment.²⁹⁷ It was also not for the ECJ to review the GC's ruling not to reduce the fine below the EC's decision.

Fourthly, the companies argued that the GC had discriminated against them by assessing their ability to pay at the time of the judgment under appeal, whereas it assessed the other cartel participants' ability to pay at the time when the contested decision was adopted.²⁹⁸

²⁸⁴ *MRT* EC:T:2016:235 at [569].

²⁸⁵ With thanks to Lukas Šimas. *Westfälische Drahtindustrie v European Commission* (C-523/15 P) EU:C:2016:541.

²⁸⁶ *Westfälische Drahtindustrie* EU:C:2016:541 at [17].

²⁸⁷ *Westfälische Drahtindustrie* EU:C:2016:541 at [10].

²⁸⁸ *Westfälische Drahtindustrie* EU:C:2016:541 at [15].

²⁸⁹ *Westfälische Drahtindustrie* EU:C:2016:541 at [21].

²⁹⁰ *Westfälische Drahtindustrie* EU:C:2016:541 at [25] and [29].

²⁹¹ *Westfälische Drahtindustrie* EU:C:2016:541 at [31].

²⁹² *Westfälische Drahtindustrie* EU:C:2016:541 at [36]–[37] and [39].

²⁹³ *Westfälische Drahtindustrie* EU:C:2016:541 at [43].

²⁹⁴ *Westfälische Drahtindustrie* EU:C:2016:541 at [49]–[51].

²⁹⁵ *Westfälische Drahtindustrie* EU:C:2016:541 at [51].

²⁹⁶ *Westfälische Drahtindustrie* EU:C:2016:541 at [53].

²⁹⁷ *Westfälische Drahtindustrie* EU:C:2016:541 at [54].

²⁹⁸ *Westfälische Drahtindustrie* EU:C:2016:541 at [59].

The ECJ rejected this, noting that the companies were not in a comparable situation to those undertakings which did not bring proceedings to challenge the EC's assessment of their ability to pay.²⁹⁹

In July 2016, the ECJ also dismissed an appeal by *Fapricela* against the GC's ruling in July 2015, partially annulling the EC's decision, but in unlimited jurisdiction resetting the fine at the same amount.³⁰⁰

Ori Martin and Trafilerie Meridionali

In September 2016, the ECJ dismissed appeals by Ori Martin and Siderurgica Latina Martin³⁰¹ and Trafilerie Meridionali³⁰² against the GC judgments in July 2015.

Marine Hoses

Background

In July 2016, the GC ruled again on the marine hoses cartel, as regards the fines imposed by the EC on Parker ITR and Parker-Hannifin Corp (PH).³⁰³ It may be recalled that the EC had imposed fines of €131.5 million on several companies for illegal market-sharing and price-fixing agreements in the marine hoses sector.³⁰⁴

PH was the owner of Parker ITR Srl (Parker ITR), a business previously named ITR Rubber which it had acquired from a company called ITR, itself a subsidiary of Saiag. The EC fined Parker ITR €25.6 million for its part in the infringement, for which PH was held jointly and severally liable for €8.3 million.

A key issue in the case was the way that the ITR Rubber business had been transferred to PH. Notably, ITR had transferred its marine hoses business into a newly created subsidiary, ITR Rubber, which was then sold to PH and renamed Parker ITR after its acquisition by PH in January 2002. The EC considered that, in such circumstances, the business which had been involved in the cartel was “continued economically” and that PH became responsible, not only for its own continuation in the cartel after the transfer, but also for the cartel activity before it acquired the business. The EC also increased the fine on Parker ITR and PH because the ITR Rubber business had been found to be the leader of the cartel before its transfer to PH.

However, on appeal to the GC, that Court considered that the EC had failed to show that there was such economic continuity. The business transferred had been run by ITR, the parent of ITR Rubber for a period before

the transfer outside the Saiag group, and the Court therefore found that the ITR Rubber business went *without* its past infringement.³⁰⁵

The GC also considered that the now time-barred liability for the earlier cartel activity remained with Saiag and ITR. This also meant that the fine increase on PH for ITR Rubber's leadership of the cartel fell away.

Clearly, this caught the eye of many competition and M&A lawyers looking for ways to achieve that sort of insulation from possible past liabilities of an acquired business.

The EC appealed the GC's ruling and the ECJ overturned it.³⁰⁶ The Court stated that the GC had failed to examine whether structural links existed between ITR and ITR Rubber, the subsidiary it established before the transfer to PH, and whether ITR had decisive influence over ITR Rubber before its acquisition by PH. If so, the Court held that the business which had been involved in the cartel had been transferred within the Saiag group to ITR Rubber and then acquired by PH, giving the economic continuity which made PH responsible for the previous acts of ITR Rubber.

As a result, the ECJ referred the case back to the GC to re-examine whether there were structural links between ITR and ITR Rubber, whether they could be rebutted and to rule on the case again.

GC Judgment

The main points of interest in the GC's second judgment are as follows:

First, the GC applied the ECJ's ruling, took into account the intragroup transfer of the marine hoses activities from ITR to ITR Rubber³⁰⁷ and whether there were structural links between the two.³⁰⁸ The GC did not find any element showing that ITR Rubber acted independently on the market and ruled that the presumption of decisive influence was not rebutted. The principle of economic continuity was therefore applicable and PH acquired the business, including its cartel liability.³⁰⁹

As the GC put it, what all this meant is that the transfer of the ITR Rubber business to PH through the specially created subsidiary was not treated as *one transaction between different groups*, breaking economic continuity, but rather as a *two-stage transaction* where the ITR Rubber business in the cartel was moved intragroup into the specially created subsidiary and then transferred with its cartel liability to PH.³¹⁰

²⁹⁹ *Westfälische Drahtindustrie* EU:C:2016:541 at [66].

³⁰⁰ *Fapricela—Industria de Trefilaria SA v European Commission* (C-510/15 P) EU:C:2016:547.

³⁰¹ *Ori Martin SA and Siderurgica Latina Martin SpA (SLM) v European Commission* (C-490/15 P) EU:C:2016:678.

³⁰² *Trafilerie Meridionali SpA v European Commission* (C-519/15 P) EU:C:2016:682.

³⁰³ With thanks to Maude Vonderau. See *Parker Hannifin Manufacturing Srl v European Commission* (T-146/09 RENV) EU:T:2016:411; [2016] 5 C.M.L.R. 10.

³⁰⁴ See Summary of decision relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (Case COMP/39.406-*Marine Hoses*). See John Ratliff, “Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 2” [2010] I.C.C.L.R. 149, 151.

³⁰⁵ See *Parker ITR Srl v European Commission* (T-146/09) EU:T:2013:258, [2013] 5 C.M.L.R. 21; and John Ratliff, “Major Events and Policy Issues in EC Competition Law, 2012–2013: Part 1” [2014] I.C.C.L.R. 75, 88.

³⁰⁶ See *European Commission v Parker Hannifin Manufacturing Srl* (C-434/13 P) EU:C:2014:2456; [2015] 4 C.M.L.R. 6.

³⁰⁷ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [45].

³⁰⁸ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [49].

³⁰⁹ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [71]–[73].

³¹⁰ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [9] and [43]–[49].

Secondly, the GC considered again the issue of the fine increase for ITR Rubber's leadership of the cartel before the business was transferred to PH. The Court reviewed whether ITR Rubber had played such a role and found that it had.³¹¹

Thirdly, the GC considered whether PH should be affected by that leadership role given that, at the time, PH was not the parent of ITR Rubber. In other words, should the fine increase for leadership before PH bought ITR Rubber be applied to the part of the fine to be paid jointly and severally by PH?

Interestingly, the Court said "no".³¹² Since, at the time of the aggravating circumstance, PH had no links with ITR Rubber, the GC found that the EC was not allowed to increase the basic amount of PH's fine based on ITR Rubber's cartel leadership.³¹³

Finally, the GC upheld PH's claim that the EC had wrongly applied the 10% of turnover cap to the fines. The EC had applied the 10% ceiling based on PH's overall turnover, both to PH's fine and to the fine for which Parker ITR was solely liable.³¹⁴ The GC noted that the EC should have determined the ceiling on Parker ITR based on its own turnover with regard to the part of the fine for which it was solely liable.³¹⁵

All of this led the GC to reassess the fines in its unlimited jurisdiction. The Court reduced Parker ITR's fine to €19.9 million, for which PH was held jointly and severally liable for €6.4 million.

A complex story showing the tensions in balancing respect for the principles of economic continuity and the principles that liability is personal and specific to the offender.

North Sea Shrimps—Goldfish/Heiploeg

Box 12

• Cartel appeals—(4)

— *North Sea Shrimps/Goldfish/Heiploeg*³¹⁶

- * Conversations taped without consent (but not by the EC) could be used by the EC as evidence, provided defence rights were protected:
 - e.g. defence opportunity to comment on the evidence; and not only evidence relied on by the EC.
- * Fact that a Member State court (the French *Cour de Cassation*) has ruled that use of such evidence is illegal is not enough.
- * Where that approach was not the preponderant line in the Member States, the GC gave weight to the need for a uniform approach in the EU and respect for equal treatment.

In September 2016, the GC ruled on an appeal by Goldfish and Heiploeg against the EC's *North Sea Shrimps* Decision.³¹⁷

It may be recalled that Goldfish and Heiploeg (G/H) were fined some €27 million as part of the North Sea shrimps cartel.³¹⁸ In the proceedings, there was controversy over the EC's use of taped conversations (and related transcripts) as evidence. The EC had *found* the evidence in inspections, not taped them itself.

On appeal, G/H had three main arguments: first, the taping was illegal because without the consent of the party concerned (G/H) and the tapes and related transcripts should therefore be excluded as evidence. In particular, insofar as use of such tapes is unlawful in Member State (French) law. Secondly, the transcripts of the tapes were not reliable. Thirdly, the EC should have reduced G/H's fine for inability to pay, notably since G/H went bankrupt shortly after filing the appeal, at least in part because of the EC fine.

The EC's position as regards the taping was that it was not contrary to the principle of respect for private life, as protected in the European Convention of Human Rights (ECHR) (art.8), or the European CFR (art.7) to use illegally obtained tapes. The EC had not unlawfully taped conversations and it was not criminally unlawful to tape conversations in the Netherlands (where the tapes were found). Further, the EC argued that G/H had had an opportunity to review the tapes (and the related transcripts) in the proceedings, which they had exercised, so the use of the tapes as evidence was lawful. Moreover, the EC's case was based on a review of the whole evidence. The tapes were just one source.

As regards the *lawfulness of using the tapes and transcripts*, the Court agreed with the EC.

First, the GC noted that EC law on evidence is based on the "free appraisal of evidence" and does not *automatically* exclude evidence obtained illegally.³¹⁹ The European Court of Human Rights had ruled that the use of evidence which had been obtained illegally did not deprive a defendant of a fair trial (contrary to art.6 of the ECHR) "*as such*".³²⁰ The Court considered that this included when evidence was obtained contrary to art.8 of the ECHR.

Secondly, the Court held that it was therefore necessary to see if G/H had had the opportunity to contest the authenticity and use of the taped recording and whether such a recording was the only proof relied on to prove an infringement or one of several.³²¹ The Court noted that

³¹¹ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [105]–[122].

³¹² *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [143]–[146], [152]–[154].

³¹³ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [152]–[153].

³¹⁴ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [165].

³¹⁵ *Parker Hannifin* EU:T:2016:411; [2016] 5 C.M.L.R. 10 at [166].

³¹⁶ *Goldfish BV v European Commission* (T-54/14) EU:T:2016:455.

³¹⁷ Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (AT.39633-*Shrimps*); *Goldfish BV v European Commission* (T-54/14) EU:T:2016:455.

³¹⁸ See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015 (Part 2)" [2016] I.C.C.L.R. 99, 108.

³¹⁹ *Goldfish* EU:T:2016:455 at [42]–[44].

³²⁰ *Dumitru Popescu v Romania* (Nos 49234/99 and 71525/01), 26 April 2007 ECtHR.

³²¹ *Goldfish* EU:T:2016:455 at [54]–[55] and [62]; see *Schenk v Switzerland* (No.140), 12 July 1988 ECtHR.

the EC had allowed G/H to comment on the tapes (and related transcripts) and this was not the only evidence relied on to prove the infringement.³²²

Thirdly, the GC noted that the evidence was also particularly relevant, given its immediate and direct link with the EC investigation.³²³

Fourthly, the GC noted that the French *Cour de Cassation* had ruled that secret recordings could not be used to prove a competition law infringement.³²⁴ However, the GC stated that, while the Court could be inspired by Member State law, it was not obliged to follow the law of the Member State with the strictest rules on evidence.³²⁵

In the absence of a preponderant tendency in the legal orders of the EU Member States, the Court gave weight to the need for a uniform interpretation and application of the evidentiary rules to ensure that inspections could occur with equal treatment for undertakings.³²⁶

Fifthly, G/H had not shown that the EC had infringed Dutch law by using the tapes.

Sixthly, the GC rejected G/H's claims that the transcripts could not be relied on, since G/H had had the opportunity to review them. The EC had also made various qualifications re the transcripts as evidence and emphasised that they were just one of several sources relied on.

As a result, G/H's claims were dismissed.

As regards *inability to pay*, G/H's main argument was that the EC fine had led to, or at least contributed to, its bankruptcy.

The GC recalled that the key issues on inability to pay were: (1) would the EC fine mean that the assets of G/H would "lose all of their value" (not just had the fine led to G/H's bankruptcy)? and (2) did that have unacceptable social economic consequences?³²⁷

As regards the first question, the GC considered that this was not the case since a significant part of the assets of G/H had been bought by purchasers in the North Sea Shrimp sector.³²⁸ The GC stated that it did not therefore need to rule on the second question, but in any event the Court noted that opportunities for some 200 shrimp fisherman had been preserved in that way.³²⁹

Calcium and magnesium reagents

In June 2016, the ECJ ruled on two appeals concerning the calcium and magnesium reagents cartel, one by Evonik Degussa³³⁰ (ED), the other by SKW Stahl-Metallurgie³³¹ (SKW). It may be recalled that the

EC fined nine companies some €61 million for a price-fixing and market-sharing cartel for these products which are used in the steel and gas industries.

The two companies appealed to the GC, which reduced the fine on ED, but confirmed the fine on SKW. Both then appealed further to the ECJ which dismissed their claims overall.

The main points of interest are as follows:

Evonik Degussa

In *Evonik Degussa*, ED argued that SKW, at the time its subsidiary, participated in the cartel in blatant disregard of explicit instructions.³³² ED argued that the GC had failed to accept this as showing rebuttal of the presumption of parental control of a subsidiary (together with other factors suggesting that SKW acted autonomously).

The ECJ rejected this, noting that, while it was for the GC to review the evidence, the ECJ could review whether the correct methodology had been applied.

The Court then noted, first, that the manager of SKW had to send regular reports to AlzChem (with ED, a parent of SKW), which was a factor in support of the argument that AlzChem had decisive influence over SKW.

Secondly, the Court confirmed that the giving of an express instruction by a parent to a subsidiary not to participate in anti-competitive practices could also be a strong indication of decisive influence by the parent over the subsidiary.

Thirdly, the fact that a subsidiary did not comply with an instruction by its parent was not sufficient, by itself, to establish the absence of actual decisive influence over the subsidiary, as long as the failure to carry out such instructions is not the norm.³³³

SKW

In *SKW*,³³⁴ SKW had argued that at the relevant time, although ED no longer owned SKW, it continued to have decisive influence over it, as SKW's supplier of almost all the calcium carbide which it marketed. SKW had sought a hearing in camera before the EC in order to explain this, requesting such confidentiality because of its claimed dependency on ED and the fact that they were in negotiations for a new supply contract.

The Hearing Officer had denied this request, considering that the probative value of the claim had to be verified by comparison with what ED might say. In

³²² *Goldfish* EU:T:2016:455 at [63]–[66].

³²³ *Goldfish* EU:T:2016:455 at [71].

³²⁴ *Goldfish* EU:T:2016:455 at [75].

³²⁵ *Goldfish* EU:T:2016:455 at [78].

³²⁶ *Goldfish* EU:T:2016:455 at [79].

³²⁷ *Goldfish* EU:T:2016:455 at [139]–[142].

³²⁸ *Goldfish* EU:T:2016:455 at [162].

³²⁹ *Goldfish* EU:T:2016:455 at [167].

³³⁰ *Evonik Degussa GmbH v European Commission* (C-155/14 P) EU:C:2016:446; [2016] 5 C.M.L.R. 7.

³³¹ *SKW Stahl-Metallurgie GmbH v European Commission* (C-154/14 P) EU:C:2016:445; [2016] 5 C.M.L.R. 6.

³³² *Evonik Degussa GmbH v European Commission* (C-155/14 P) EU:C:2016:446; [2016] 5 C.M.L.R. 7 at [15].

³³³ *Evonik Degussa* EU:C:2016:446; [2016] 5 C.M.L.R. 7 at [40]–[42], applying *Fresh Del Monte Produce Inc v European Commission* (C-293/13 P) EU:C:2015:416;

[2015] 5 C.M.L.R. 7.

³³⁴ *SKW Stahl-Metallurgie GmbH v European Commission* (C-154/14 P) EU:C:2016:445; [2016] 5 C.M.L.R. 6.

other words, giving priority to SKW's request for this type of hearing, in exercise of its rights of defence, had to be balanced against ED's rights of defence. Subsequently, however the Hearing Officer allowed SKW to make its points in writing but not through a hearing.³³⁵

SKW argued before the ECJ that the GC had incorrectly reviewed this issue, insofar as it found that SKW's rights could not take priority over those of ED.

The ECJ ruled that SKW was right. The Court found an error in the GC's approach but not one that would have led to a different outcome in the appeal before the GC.³³⁶

The Court noted that SKW wanted to explain in camera its position as regards the role of ED following its sale of SKW. However, ED was not the subject of EC proceedings for that period, either at the time of the hearing or subsequently.³³⁷

Accordingly, the Court noted that, in denying the request for a hearing in camera, the Hearing Officer had taken account of ED's rights of defence, even though the latter could not rely on them, because it was a third party to the proceedings for that period.³³⁸

The Court added that, if SKW had raised issues which might have led to the EC holding ED liable for a longer period, the EC would also have been obliged to issue a supplementary SO to enable ED to give its observations, so ED's rights could have been protected that way.³³⁹

Carglass

Pilkington

In September 2016, the ECJ dismissed Pilkington's appeal against the GC's judgment³⁴⁰ upholding the fine that the EC imposed on Pilkington for its participation in the car glass cartel.³⁴¹

The main points of interest were as follows:

First, Pilkington argued that the EC should not have taken into account sales made pursuant to contracts concluded before the start of the infringement period when it set the value of sales³⁴² for the calculation of Pilkington's fine.³⁴³

The ECJ disagreed and noted that the cartel aimed to stabilise market shares. Sales under contracts concluded before the infringement period were therefore within the cartel's scope.³⁴⁴ The Court noted that the basic amount

(of which value of sales is part) should reflect the economic significance of the infringement and the size of the relevant undertaking's contribution to it.³⁴⁵

The value of sales is not limited to turnover achieved from sales which can actually be shown to have been affected by the cartel. The GC was therefore correct to include sales made under contracts preceding the infringement period, on the same basis as it included sales made under later contracts that were not specifically established to have been subject to collusion.³⁴⁶

Secondly, Pilkington claimed that the GC should not have accepted the EC's use of an average Euro/British pound exchange rate for the business year preceding the adoption of the decision rather than using the exchange rate applicable on the day the decision was adopted.³⁴⁷ According to Pilkington, this meant that its fine was almost €40 million higher than it should have been.

The ECJ rejected this, noting that using an average annual exchange rate was consistent with the EC's use, as a rule, of an undertaking's turnover in its last full business year preceding the adoption of the decision as the reference turnover.³⁴⁸ The Court also reasoned that an average annual rate was more likely to reflect economic reality and more likely to protect against currency fluctuations and unpredictability.³⁴⁹

Thirdly, the ECJ rejected Pilkington's plea based on its fine being a proportionally higher amount of its turnover than that imposed on other participants in the cartel owing to Pilkington being a less diversified company.

The ECJ considered that it was not contrary to the principles of equal treatment and proportionality that a company with activities that were more focused than others on the sales of goods connected to the infringement might receive a fine that was a higher proportion of its turnover.³⁵⁰ If the GC had accepted Pilkington's plea, this would favour less diversified companies on the basis of criteria that were irrelevant to the infringement's gravity and duration.³⁵¹

³³⁵ *SKW* EU:C:2016:445; [2016] 5 C.M.L.R. 6 at [9]–[15].

³³⁶ *SKW* EU:C:2016:445; [2016] 5 C.M.L.R. 6 at [65]–[72].

³³⁷ *SKW* EU:C:2016:445; [2016] 5 C.M.L.R. 6 at [65].

³³⁸ *SKW* EU:C:2016:445; [2016] 5 C.M.L.R. 6 at [66].

³³⁹ *SKW* EU:C:2016:445; [2016] 5 C.M.L.R. 6 at [67].

³⁴⁰ *Pilkington Group Ltd v European Commission* (T-72/09) EU:T:2014:1094; [2015] 4 C.M.L.R. 7. See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014–2015: Part 1" [2016] I.C.C.L.R. 65, 81.

³⁴¹ With thanks to Cormac O'Daly. *Pilkington Group Ltd v European Commission* (C-101/15 P), EU:C:2016:631; [2016] 5 C.M.L.R. 17.

³⁴² EC Fining Guidelines, para.13.

³⁴³ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [11]–[13].

³⁴⁴ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [22] and [23].

³⁴⁵ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [19].

³⁴⁶ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [20].

³⁴⁷ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [25]–[31].

³⁴⁸ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [39].

³⁴⁹ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [46].

³⁵⁰ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [64].

³⁵¹ *Pilkington Group* EU:C:2016:631; [2016] 5 C.M.L.R. 17 at [66].

Cathode ray tubes

In July 2016, the ECJ also rejected under art.181 of its Rules of Procedure, as manifestly inadmissible and/or manifestly unfounded, an appeal by Panasonic against the GC’s ruling upholding the EC’s decision in the cathode ray tubes cartel.³⁵²

Panasonic argued that the SO in this case had not established that it was aware of the cartel prior to a certain date. The GC had rejected this, noting that, in the SO, the EC had “implicitly but necessarily” considered that Panasonic was aware of the cartel. Panasonic argued before the ECJ that this was not enough.

The ECJ rejected this, stating that it was enough if the SO sets out clearly all the essential elements on which the EC is relying, even if that information is given “in summary form”.³⁵³ The ECJ considered the GC had correctly found that the essential elements on which the EC relied were contained in the SO.³⁵⁴

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

- **Other European Court rulings/opinions, including:**
 - *Cartes Bancaires* (the GC review of “effects” aspects);
 - A.G. Wahl’s Opinion in *Intel*; and
 - the ECJ’s ruling in the *Cement Requests for Information* case.
- **European Commission decisions and settlements:**
 - cartels, including the settlement in *Truck Producers* after the SO;
 - other arts 101 and 102 TFEU cases, such as *Liner Shipping*; and
 - the EC’s *Servier (Perindopril)* (pay for delay) decision.
- **European Commission policy issues and initiatives:**
 - the EC’s preliminary reports on geo-blocking and e-commerce; and
 - the EC’s Consultation on NCA powers and independence (“ECN+”).

³⁵² *Panasonic Corp v European Commission* (C-608/15 P) EU:C:2016:538.

³⁵³ *Panasonic* EU:C:2016:538 at [21].

³⁵⁴ *Panasonic* EU:C:2016:538 at [22]–[24].