Major EU Competition Law Developments and Policy Issues

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This paper offers an overview of the major EU competition law developments over the past year. It was prepared for the IBC Advanced Competition Law Conference in London on 4 May 2011. The views expressed in this paper are personal and do not necessarily reflect the views or opinions of Clifford Chance LLP or any of its clients.

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1. INTRODUCTION

This paper outlines the key developments in EU Competition Law from 2010 to present.[1] This introductory section provides a brief overview of some of the main developments in EU competition law in the past year before the subsequent sections analyse in detail each of the main developments in Article 101 of the Treaty on the functioning of the European Union ("TFEU"), 102 TFEU, merger control, and practice and procedure.[2]

Article 101

Cartels

The Commission issued six cartel decisions in 2010: *DRAM*, *Bathroom fittings and fixtures, Prestressing steel, Animal feed phosphates, Air Freight, and LCD panels*. The Commission also re-adopted a fine on Bolloré S.A. for its involvement with the earlier *Carbonless Paper* cartel. Total fines in 2010 amounted to approximately €2.87 billion,[3] a substantially higher number than the 2009 total fines of €1.62 billion, but in line with previous total fines of €2.27 billion in 2008 and €3.34 billion in 2007. High fines have therefore continued in the Commissioner Almunia era.

With the December decision in *LCD Panels* fining exclusively Asian manufacturers for price fixing the Commission also signalled its willingness to apply the EU competition rules extraterritorially where there is a direct impact on customers in the EEA. This approach is already before the General Court in Toshiba's appeal[4] of the *Gas insulated switchgear* cartel decision where the Commission also fined non EU manufactures not active in the EU market, and AU Optronics has filed an appeal of the *LCD Panels* decision challenging, inter alia, the Commission's jurisdiction to apply the EU competition rules.[5]

Settlements

The Commission achieved its first two settlements in the *DRAM* and *Animal Phosphates* cartel investigations in 2010. A third settlement was recently achieved in April 2011 in the *Consumer detergents* cartel. In June 2008, the Commission introduced the new procedure through which companies could admit liability in relation to a cartel, accept the Commission's proposed fine and agree not to challenge the findings of the Commission's statement of objections. In return, the undertaking would receive a 10% reduction of their fine. This reduction could be provided in addition to

1 This paper went to press as of 15 April 2011.

2 Despite the many interesting developments in State aid law in 2010, they are beyond the scope of this paper.

3 This figure includes the Commission's re-adopted fine of Bolloré S.A. for its involvement in the *Carbonless Paper* cartel.

4 See T-113/07, *Toshiba v Commission* (appeal pending).

5 See T-94/11 *AU Optronics v Commission* (appeal pending).

any reduction provided under the leniency notice.

In the *DRAM* cartel, the parties all agreed to settle.[6] The settlement negotiations took fifteen months. The Commission explained the length of the case by stating this was the first settlement procedure and that delays were inevitable following the introduction of such a novel procedure. Commissioner Almunia stated that the Commission's objective was to reduce the settlement period to less than six months.

The second settlement case arose in relation to the A*nimal Phosphates* cartel in which the Commission fined thirteen undertakings for price fixing. The case is the first "hybrid" settlement as one undertaking, Timab Industries S.A., withdrew from the settlement procedure once it received the Commission's initial settlement offer. It does not appear that the failure of all parties to agree to the settlement procedure substantially impacted on the efficiency of that particular settlement procedure. However, Timab Industries S.A., has appealed[7] and a significant reduction of its fine by the General Court could undermine general confidence in the settlement procedure.

In the third settlement case in the *Consumer detergents* cartel, the Commission fined two companies for their part in a cartel aimed at fixing market positions and coordinating prices. A third received full immunity as a leniency applicant. In total the settlement negotiations lasted under a year, but still longer than the stated six month objective, although the timeframe from the parties' acknowledgement of participation to the cartel decision was approximately four months.

Further fining guidance

The fining process in the *Prestressing steel* cartel has seen the Commission take the unusual move of reducing the initial fine attributed to the joint and several liability of a parent undertaking. ArcelorMittal saw its initial fine of €276,480,000 drop more than 80% to € 45,5705,600.

In reducing the fine, the Commission considered that the 18 year cartel was largely operated by smaller companies ultimately acquired by ArcelorMittal (which owned the subsidiaries for the last three years of the cartel). The Commission acknowledged that taking into account the maximum fine of up to ten per cent of the parent turnover in such circumstances "*may lead to disproportionate results*". The Commission reduced the fine "*because the subsidiaries could not pay it, and ArcelorMittal was under no legal obligation to pay it for them*." Indeed, the fine was several times the turnover of the subsidiaries.

In April, it was announced that going forward the Commission would include a section on fines in the statement of objections in order to avoid such rare post-decision corrections or revisions. We should expect this section to set forth the value of the cartelised sales, as well as indications of the gravity of the infringements and the Commission's view on whether any participant would be viewed as a recidivist.

6 The Commission announced the settlement on 19 May 2010.
7 See T-456/10, *Timab Industries and CFPR v Commission* (appeal pending).

Inability To Pay

As a result of the financial crisis, we have seen an increased use of the "*inability to pay*" provision in the Commission's fining guidelines.[8] According to the Commission, "as many as 32 out of the 69 companies" fined last year submitted such claims.

Whilst Commissioner Almunia in public has stated that the Commission "*cannot ignore the fact that some companies are in financial difficulties and may be driven into bankruptcy as a consequence of our fines – with the corresponding social costs*." In practice, while the Commission has been willing to reduce the fines of companies unable to pay them such as in the *Bathroom fittings* and *Animal Phosphates* cases, it has emphasised that such reductions will only be granted in "*exceptional circumstances*" by refusing the five applications for inability to pay in the recent *Air Freight* decision in spite of the ongoing difficulties in the airline industry.

In the *Bathroom fittings and fixtures* cartel, to assess inability to pay claims, the Commission looked at recent financial statements, provisional current year statements and future projections. The Commission also looked at "*the social and economic context of each company*." Finally, the Commission assessed whether the companies' assets would be likely to lose significant value if the companies were forced into liquidation as a result of the fine. The Commission claimed that the analysis was "*company-specific*" and aimed "*to be as objective and quantifiable as possible to ensure equal treatment and preserve the deterrence aspect of EU competition rules*." Out of ten applicants, the fines of three companies were reduced by 50% and those of another two by 25% given their difficult financial situation.

Similarly, in the *Animal phosphates* cartel, two parties claimed inability to pay and the Commission accepted one of the applications, granting a fine reduction of 70%.

Two unsuccessful interim measures applications before the General Court (*Reagens* and *Almamet*) and an unsuccessful appeal to the CJEU (*Ziegler*) underscore the exceptional nature of the inability to pay provisions. In the context of appeals, companies must still provide a bank guarantee for the fine even if they do not have to pay the fine pending the outcome of the appeal.

Division of Labour

In both the *Cathode ray tubes* and *Gas insulated switchgear* cartels, the European Commission's investigation is complemented by investigations by National Competition Authorities within the EU. This has raised questions regarding the correct division of responsibilities within the EU and has raised concerns in some instances that a clear division of jurisdiction between the Commission and National Competition Authorities is not being defined. The question is currently being considered by the Court of Justice in the *Switchgear* cartel.

[8] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 35.

Rio Tinto/BHP Billiton

On 5 June 2009, Rio Tinto and BHP Billiton announced plans to establish a production joint venture covering the entirety of both companies' western Australian iron ore assets. Following subsequent negotiations, the Parties agreed that all production from the proposed joint venture would be marketed separately by Rio Tinto and BHP Billiton. Rio Tinto indicated that the European Commission, the German Federal Cartel Office, Korea's FTC and Japan's FTC had each raised concerns about the potential for price coordination and the implications of the tie up. Following these objections, the Parties announced on 18 October 2010 that they had abandoned the deal.

Oneworld Alliance

In July, the Commission approved the Oneworld alliance, a joint venture between British Airways, American Airlines and Iberia on transatlantic flights on condition that the airlines gave access to London Heathrow airport slots.

Visa MIF – Visa Europe Limited

On 8 December 2010, the Commission made legally binding commitments offered by Visa Europe to cut its multilateral interchange fees (MIFs) for cross-border and domestic debit card transactions in nine countries to 0.20 per cent for a four year term. However, the Commission continues to investigate Visa's credit card transactions.

Order national pharmaciens (ONP)

In December 2010, for the first time, the Commission has imposed a fine of €5 million on an association of undertakings, France's ONP and its governing bodies. ONP is the professional body for pharmacists in France. French law grants the ONP control powers over pharmacists, in particular the power to keep a list of all pharmacists licensed to practice and the obligation to supervise clinical laboratories. The Commission found that the ONP had taken decisions aimed at imposing minimum prices on the French market for clinical laboratory tests and hindering the development of certain groups of laboratories.

General Court case law

The General Court has started its review of the Kroes era cartel fines, and while it broadly upheld the Commission's decisions in (a) the *Industrial thread* cartel, (b) the *Water, heating and gas tubes* cartel, (c) the *Spanish raw tobacco* cartel, and (d) the *Industrial sacks* cartel, (e) *Gas insulated switchgear* cartel, and (f) the *Copper fittings* cartel, it has granted a number of companies in these cartels fine reductions.

Industrial thread

On appeal of the *Industrial thread* cartel decision, BST was successful in having its fine reduced by an additional 10% due to its cooperation during the cartel investigation.

The Court felt that as the Commission relied primarily on BST evidence, it should have received a greater fine reduction than other participants who added evidence that was characterised as "useless".

Water, heating and gas tube

On appeal of the *Water, heating and gas tube* cartel decision, IMI and Chalkor were successful in reducing their fines following their arguments relating to equal treatment. IMI also was successful in arguing that it had not participated in the cartel for as long as the Commission had found, and benefited from further fine reductions.

Spanish raw tobacco

On appeal of the *Spanish raw tobacco* cartel decision, the General Court confirmed that Deltafina was liable even although it was not present on the Spanish market other than as a downstream customer of the other cartel participants. However, Deltafina's fine was reduced from € 11.88 million to € 6.12 million because the General Court agreed that it was not the leader of the cartel so did not deserve the 50% uplift that the Commission had imposed and because it was not the leader it could benefit from a 15% reduction for cooperation rather than the 10% granted by the Commission.

An appeal of the *Spanish raw tobacco* cartel decision in *Alliance One International and Others v. Commission* provided the Commission with another occasion to deal with parental liability as World Wide Tobacco España (WWTE)'s parents contested the attribution of joint and several liability to them. The Court reaffirmed its current position that there is a rebuttable presumption that parent undertakings exercise decisive influence over their subsidiaries. However, due to the unclear state of the case law at the time of the Commission's decision, the Commission decision sought to establish that the parents did in fact exercise decisive influence. On appeal, the Court upheld the Commission's legal standard in relation to two of the parents, but in the case of a third, the Court held that the company had no activities of its own and its interest in WWTE was purely financial and therefore annulled the decision in respect of WWTE.

Finally, in separate appeals of the *Spanish raw tobacco* cartel decision by Cetarsa and WWTE, the Court found that the Commission had committed manifest errors of judgment in fine calculations under the 1996 Leniency Notice by not adequately considering the level of their respective cooperation and reduced their fines by 10%.

Industrial sacks

On appeal of the *Industrial sacks* cartel decision, Trioplast Industrier ("TI") was successful in reducing its liability for its subsidiary found to be a participant in a 20 year cartel in the industrial sacks market running from 1982-2002. TI acquired the subsidiary in 1999 from FLS Plast and FLSmidth, but by 1997 the subsidiary had reduced its activity in the relevant product market and exited the market completely in 1999. While the Court affirmed that the Commission is free to attribute joint and several liability to the various successive parent companies of the subsidiary, the Court held that that the actual amount recovered from TI was effectively contingent on the amount recovered from (the previous owners of the infringing subsidiary). As separate economic entities, the actual amount paid by TI may not, in principle, exceed the share of its joint and several liability. However, the Commission failed to specify such share, and TI was therefore unable to know the exact amount of the fine that it would be expected to pay following the Commission's decision. The Court found that this breached fundamental legal principles of legal certainty and transparency, and annulled the decision on this point. Finally, the Court reduced the fine for TI from €7.73 million to €2.73 million as TI was not active in the market during the reference year used by the Commission to assess its liability nor was it active in the product market from 1999 until the end of the cartel. The Commission must now determine TI's share of joint and several liability on this fine level.

Gas insulated switchgear

On appeal of the *Gas insulated switchgear* cartel, Siemens AG was unsuccessful in its appeal of its fine (at one time the single largest cartel fine imposed on an undertaking at € 396,562,500), but Alstom and Areva had their fines reduced, on the grounds that, in applying a 50% increase in the basic amount of the fine to be imposed on them for their role of leader in the infringement, the Commission infringed the principles of equal treatment and proportionality. In a separate appeal, the Commission amended the fines of certain undertakings finding that the Commission had infringed the principle that penalties must be specific to the offender and to the offence in holding Reyrolle, SEHV and Magrini jointly and severally liable for payment of a fine which clearly exceeded their joint liability while not holding Siemens Österreich and KEG jointly and severally liable for payment of part of the fine imposed on SEHV and Magrini and not holding Reyrolle solely liable for a part of the fine imposed on it.

Copper fittings

In March, the Commission was less successful in relation to the *Copper fittings* cartel appeals, where a number of fines were reduced and the decision annulled as to certain participants. The General Court found that the duration of the participation of certain undertakings (Kaimer, Sanha Kaimer, Sanha Italia, Tomkins and Pegler) in the infringement was less than that determined by the Commission, resulting in fine reductions.

In the case of Pegler, its fine was further reduced as the General Court held that the Commission was not entitled to apply a multiplier for deterrence when calculating the fine.

The appeal by Tomkins dealt with parental liability and its fine was further reduced as it was held liable only in its capacity as parent company for the participation of Pegler, its subsidiary -- the General Court held that the liability of a parent company cannot exceed that of its subsidiary.

Finally, the Commission annulled the Commission's decision in relation to Aalberts, Aquatis and Simplex, as the Commission had erred finding that Aalberts had participated in the cartel during the period between 25 June 2003 and 1 April 2004.

According to the Court, although the Commission had established a bilateral contact in the time period, they had not established that Aquatis was aware of the fact that it had, through its conduct, joined a cartel made up of different parts that had a common purpose or the cartel in which it had already participated before March 2001 and which was ongoing. This is an interesting development which may impact the Commission's broad interpretation of a single and continuous infringement.

In the case of IBP, the Court considered that the Commission erred in finding the existence of an aggravating circumstance through the provision of misleading information. However, this did not result in a fine reduction.

Visa – Morgan Stanley

The General Court rejected Visa's appeal of a 2007 Commission decision fining it €10.2 million for excluding Morgan Stanley from the Visa system in the EU.

CJEU case law

At the CJEU, both the appeals of Lafarge and Knauf against the Commission's decision in the 2002 *Plasterboard* cartel decision were unsuccessful.

In *Lafarge*, the CJEU upheld the Commission's uplift in fine for recidivism confirming that even if the Commission decision for which the Commission considers the participant to be a 'repeat offender' is still subject to judicial review, such decision continues to have full effect, unless the General Court or the CJEU hold otherwise (only then would the Commission be obliged to re-assess any uplifts in fine for recidivism based on that decision in subsequent antitrust decisions).

Knauf Gips had argued that it should not have been held liable for the Knauf Group. The Court held that the fact that there was no single legal person at the apex of the Knauf group was not an obstacle to Knauf Gips being held liable for the actions of the group. The Court did overturn the General Court in so far as the General Court had found that because Knauf Gips had been the sole interlocutor with the Commission, Knauf Gips was effectively prevented from arguing that it was not liable for the Knauf group. In doing so the Court for the first time acknowledged that *"the rights of an effective remedy and of access to an impartial tribunal are guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union which, under the first subparagrapgh of Article 6(1) TEU, has the same legal value as the Treaties"*. Nonetheless, the reference to the Charter did not change the outcome of the case as Knauf Gips remained liable.

In *General Química*, the CJEU further refined its stance on parental liability. The Court clarified that, even though a parent company may be presumed to be liable for the conduct of its wholly-owned subsidiary (both directly or indirectly held), the parent company may adduce evidence to rebut this presumption. Once adduced, the Court has confirmed that such evidence must be analysed by the Commission. However, the judgment would seem to confirm that challenging the presumption is a nearly insurmountable task.

With the *Activision Blizzard* appeal, the CJEU reviewed the Commission's fine on Nintendo and its distributors for restrictions on parallel trade and affirmed the fine on "passive" participant Activision Blizzard (formerly CD-Contact Data).

Finally, the CJEU affirmed the Commission’s decisions fining ArcelorMittal Luxembourg €10 million and ThyssenKrupp Nirosta €3.17 million for anticompetitive conduct in a cartel in the steam beams market holding that the Commission may, after the expiry of the ECSC Treaty, apply procedural rules adopted on the basis of the EC Treaty to infringements of the ECSC Treaty.

<u>Article 102</u>

Although there has not been a single Article 102 decision finding an infringement in the last year, there have been a number of noteworthy commitments (including both structural and behavioural remedies) which have brought Article 102 investigations to a close.

Commitments in the Energy Sector

The Commission issued four Article 9 commitments decisions in the energy sector in the review period. In the *Svenska Kraftnet*, *EDF*, *EONgas*, and *ENI* cases, the Commission accepted significant remedies that have ended the practices that were alleged by the Commission to have been abusive. The remedies were a combination of access and structural remedies and tackled long standing problems of dominance and foreclosure in European energy markets.

In January, the Commission market tested measures offered by the Greek Government regarding its electricity market to grant access to 40% of lignite-fired generation to competitors of PPC in the Greek electricity market. The measures have been proposed to comply with the Commission's 2008 decision that Greece had infringed Articles 102 and 106 TFEU by maintaining rights giving the state-owned electricity incumbent Public Power Corporation (PPC) privileged access to lignite.

IT Sector

In November, the Commission formally opened antitrust proceedings into allegations that Google has abused its dominant position in online search officially launching what many see to be the next high profile battleground in antitrust enforcement.

The saga started back in February 2010, when the Commission unusually publicly confirmed that it had received three complaints against Google. Google then confirmed that the complaints came from a U.K. price comparison site, Foundem, a French legal search engine called ejustice.fr, and Microsoft's Ciao!. The complaints to the Commission complement other complaints that have been submitted to Member State competition authorities. The complaints relate *inter alia* to an allegation that Google is using its alleged dominance in the online search market to demote its rivals' listings in the search engine results pages on Google.com and related Google search sites.

On 31 March 2011, Microsoft, no stranger to EU antitrust investigations, announced that it had lodged a complaint against Google. This was unsurprising given that Microsoft subsidiary Ciao! was one of the original first three complainants. It would seem that Microsoft's direct complaint adds weight to the case, as Microsoft Bing search engine directly competes with Google's search (estimated to have approximately 90% share of online search in the EU). Microsoft is also in a partnership deal with Yahoo! Inc. in relation to search.

Microsoft has alleged that:

- Google has "put in place a growing number of technical measures to restrict competing search engines from properly accessing" its YouTube video-streaming site.

- Google has blocked Microsoft's Windows Phones "from operating properly with YouTube," but offers better services to its own Android phones and iPhones, whose producer Apple Inc. does not own a search engine.

- Google is keeping some advertisers from accessing their own data and transferring it to rival advertising platforms, such as its own adCenter. That allegation echoes complaints by other companies and is part of the Commission's probe.

The Commission itself has indicated publicly that it expects further complainants. Watch this space.

Court case law

The Courts have continued to endorse Commission Article 102 decisions, noting that even in a regulated context, dominant companies must still proceed cautiously.

ICI

On 25 June 2010, the General Court issued its judgment in Imperial Chemical Industries ("ICI")'s appeal against a 2000 Commission decision finding that it had abused its dominant position in the soda ash market; with this decision the Commission re-adopted a 1990 decision annulled by the European Courts for procedural errors. The Court upheld the Commission's findings in relation to market definition, dominance and abuse by applying loyalty inducing rebates. The Court, however, reduced the fine imposed on ICI from €10 million to €8 million to reflect a 5% reduction for error in assessing the gravity of the infringement as it was not deemed to be a recidivist and a further 15% reduction to take into account the Commission's error in assessing the duration of the infringement.

AstraZeneca

On 1 July 2010, the General Court issued its judgment in the *AstraZeneca* case, largely dismissing AstraZeneca's appeal against the Commission's decision of June 2005. The case raises interesting questions relating to market definition, dominance and abusive conduct. The key points of the case can be summarised as follows:

- The normal principles of market definition apply in the pharmaceutical sector. The Court rebuffed the suggestion that the specific reimbursement schemes that exist in Member States preclude an economic analysis of price competition and substitutability.

- The Commission downplayed the purchasing power of national health authorities and, indeed, argued that such reimbursement schemes may actually reinforce the dominance of a pharmaceutical company. The court reasons that, as the prices for medications are set by national authorities, this therefore allows a company to price its products "at a high level without having to worry about patients and doctors switching to other less costly products."

- In addition to the specific abuses cited in Article 102, the Commission's Guidance Paper, and existing case-law, the court outlined a duty of honesty or "good faith" for dominant companies. The court found that AstraZeneca had abused its dominant position by providing misleading information to patent authorities in various Member States. In its application for a special protection certificate for its Losec product, Astra provided the date of Losec's first price approval, rather than the date of Losec's first technical marketing authorisation, which would have represented normal industry practice. The departure from normal practice, without a clear explanation, was considered misleading and harmful to competition as it extended the duration of the patent protection for Losec.

- In addition, the court found that AstraZeneca abused its dominance by withdrawing its marketing registration for an older version of Losec in certain Member States. The court found that AstraZeneca’s withdrawal was liable to impede entry by generic manufacturers and that AstraZeneca had not provided an objective justification for its conduct.

The implications of the Court's judgment extend beyond the pharmaceutical sector, to all dominant companies that are subject to some form of regulation. The exploitation of seemingly legitimate loopholes, or otherwise "gaming" the system, can result in substantial antitrust liabilities.

Tomra

In September, the General Court dismissed Tomra's appeal against a Commission decision fining it €24 million fine for abuse of its dominant position in Germany, Austria, Sweden, the Netherlands and Norway on the market for reverse vending machines (RVM) used to collect used beverage containers. The judgment confirmed the existing case law in relation to exclusivity and loyalty discounts – there is no need to analyse any actual foreclosure effects, provided the conduct in question is capable of foreclosing competition. In relation to the fine imposed on Tomra at approximately 8 per cent of Tomra's turnover for a "serious" infringement (as compared to Microsoft's fine set at 1.5 per cent of its turnover for a "very serious" infringement or Astra Zeneca's fine set at 3 per cent of its turnover), the Court affirmed that the Commission enjoys considerable discretion in calculating the level of the fine and "*cannot be* *compelled to set fines which display perfect coherence with those imposed in other cases*."

Margin Squeeze

In last October's *Deutsche Telekom* judgment, the CJEU confirmed that 'margin squeeze' could be viewed as a standalone Article 102 abuse of a dominant position. The Court also affirmed the use of the "*as-efficient competitor*" test in the Commission's economic analysis. Also of note is that although prices in the sector were regulated by the German telecoms authority, the Court confirmed the special care that dominant companies must take in setting prices. The February *TeliaSonera* preliminary ruling judgment, gave the Court another occasion to confirm its view that 'margin squeeze' may constitute a standalone abuse even where the dominant operator was not being regulated.

Mergers

The Commission's 2010 statistics reveal that M&A activity is still down significantly with 274 mergers notified compared to the high in 2007 of 402.[9] The Commission initiated four phase II proceedings, and issued three phase II decisions. In the first quarter of 2011 it appears that the Commission is on a pace to match the 2010 figures but still down from 2007. The Commission has thus far initiated two Phase II proceedings in 2011.[10]

In 2011, *Syngenta/Monsanto* and *Unilever/Sara Lee* have since been cleared with remedies, but a third Phase II investigation has resulted in a prohibition: *Olympic/Agean Airways*.[11]

Olympic/Aegean Airlines – when remedies aren't enough?

On 26 January 2011, the European Commission prohibited the proposed merger between Greek airlines Aegean Airlines and Olympic Air, following an in-depth phase II investigation. This is the first prohibition of a concentration by the European Commission since the *Ryanair/Aer Lingus* decision of 2007. The decision is not yet published, but the Commission's press release gives some indication on the main substantive issues.

Olympic Air and Aegean are the two main airlines in Greece. In examining the proposed merger, the Commission found that the two carriers together control more than 90% of the Greek domestic air transport market, and that the merger would have led to a quasi-monopoly on nine routes between Athens and Thessaloniki and Athens and eight Greek island airports.

9 In 2009, 259 mergers were notified.

10 The Commission launched Phase II proceedings in Case COMP/M.5907, *Votorantim/Fischer/JV* (aka the so-called orange juice case) and Case COMP/M.6101, *UPM/Myllokoski/Rhein Papier*.

11 While the Commission has issued clearance decisions in the *Syngenta/Monsanto* and *Unilever/Sara Lee* cases, public versions of the decisions are not yet available.

The Commission itself highlighted the similarity to the prohibited *RyanAir/Aer Lingus* where similar substantive issues arose, *e.g.*, same home airport (Olympic and Aegean 77% of flights in/out Athens airport) with the unlikely prospect of new entry.

And unlike the other recent string of airline merger cases involving Lufthansa, the remedies proposed by the merging parties were not sufficient to address the Commission's concerns. The parties had offered to release slots at Athens and other Greek airports, along with other remedies such as granting third party access to their frequent flyer programmes and interlining agreements. However, the Commission found these remedies to be insufficient, primarily because, in its view, the main problem in this case was not the availability of slots, which are already available at most Greek airports, including Athens.

The prohibition decision does beg the question of the fate of these two airline companies. In the past, Olympic Air/Olympic Airways has been heavily reliant on aid from the Greek government to stay alight (Olympic Airways was previously forced to return € 850 million in state aid). Both airlines have public service obligations to run routes that are not economically viable. And the parties have indicated publicly that they do not have sufficient scale to compete.

The Commission has so far not indicated whether a failing firm defence was considered in its review.

Remedies

In 2010, 14 cases cleared phase I with commitments compared to 13 in 2009, and 19 in 2008 during the height of recent M&A activity. Nonetheless, the Commission has been touting developments in remedies, including interoperability remedies in the ICT sector such as in *Cisco/Tandberg* and *Intel/McAfee* to counter any foreclosure theories of harm.

Ryanair/Aer Lingus

The General Court this year gave its verdict in the *Ryanair/Aer Lingus* prohibition decision, rejecting Ryanair's appeal and endorsed the Commission's market definition, competitive assessment and economic analysis. Given the the presence of only two entities on most routes to and from Ireland, it was difficult for Ryanair to prove that competition would not be significantly affected. Indeed, once Ryanair lost the battle to define two separate markets for "*frills*" and "*non-frills*" air transport providers, it was difficult to see how the only two undertakings on the market could be considered as anything other than close competitors. Coincidentally, the judgment arrived shortly after Ryanair withdrew its second notification to the Commission in its long running efforts to acquire Aer Lingus.

Éditions Jacob v Commission

The General Court issued three judgments in relation to the 2004 acquisition of Vivendi

Universal Publishing ("VUP") by Lagardère on appeal by third party complainant *Éditions Jacob.* Natexis Banques Populaire ("NBP") held the VUP assets on a temporary basis pending competition approval of the sale of the VUP assets to Lagardère. Ultimately, the Commission cleared the sale of the VUP assets to Lagardère subject to commitments that Lagardère could retain only 40% of the VUP assets. The remainder of the VUP assets were sold in a trustee led auction won by Wendel.

Éditions Jacob was an unsuccessful bidder for the assets and lodged an appeal of (i) the Commission's clearance decision of the sale of VUP to Lagardère, (ii) the Commission's clearance decision of the sale of the VUP assets to Wendel, and (iii) the Commission's refusal of access to its file in relation to certain documents.

In relation to the Commission's clearance of the sale of VUP to Lagardère, the Court confirmed that Lagardère did not exercise decisive influence over VUP while it was held by NBP nor was the acquisition by NBP deemed a notifiable concentration due to specific exemptions for holding by a financial institution of a temporary nature. Query whether we will now see a re-emergence of so-called 'warehousing' arrangements.

However, in relation of the Commission's clearance of the sale of some VUP assets to Wendel, the Court annulled this decision as the trustee report assessing Wendel as a prospective purchaser was drawn up by a trustee that lacked the required independence vis-a-vis the VUP assets to be divested.

In relation to access to file, the Court confirmed its strict interpretation of the EU access to documents rule as it held that the Commission must individually examine each document in its file pursuant to the Transparency Regulation. Moreover, in this case, the Court held that the Commission could only legitimately withhold access to a legal opinion prepared by its legal services.

Other

In terms of other noteworthy mergers, the Commission was able to retain review of competition concerns in *NewsCorp/BSkyB* while referring review on public interest grounds to the UK OFT where the merger involved media broadcasting services in the UK through article 21 of the Merger Regulation which allows Member States to take into account certain legitimate public interests, such as public security, media plurality or prudential rules.

Policy Developments

Best Practices Papers

In January 2010, the Commission published consultation documents setting out its: (i) Best Practices for the Submission of Economic Evidence, (ii) Best Practices in Antitrust Proceedings, and (iii) Guidance on Procedures of the Hearing Officer (together, the "Best Practices Papers"). These papers are designed to provide detailed guidance on how the Commission's antitrust procedures work in practice. The Commission published the guidance to enhance the transparency and the predictability of Commission antitrust proceedings by making it easier for companies under investigation to understand how the investigation will proceed, what they can expect from the Commission and what the Commission will expect from them. While the Best Practices Papers are certainly a welcome step towards greater transparency of the Commission's decision making practices, more work is required and it is likely that we will see more demands for greater openness in this area.

Indeed, the publication of the Best Practices Papers has not reduced demands from practitioners for more openness. The EU Ombudsman has received a complaint that the Commission has not published its Antitrust Manual of Procedure ("ManProc") and that its failure to do so has undermined the transparency of its decision making process. The ManProc is an internal and confidential Commission document that describes in detail the Commission's review process. The Commission refuses to publish the document and claims that its public circulation would prejudice its decision making ability. It also claims that the publication of the Best Practices Papers satisfies the need for greater clarity in its decision making process. It remains to be seen whether it will yield to demands for further transparency and openness.

New Vertical Restraints Block Exemption Regulation and Guidelines on Vertical Restraints

The new Vertical Restraints Block Exemption Regulation and Guidelines on Vertical Restraints were published on 20 April 2010 and the Block Exemption came into force on 1 June 2010. The Commission has introduced a new 30% market share threshold for purchasers. Accordingly, to benefit from the block exemption, the supplier and buyer must each have less than a 30% share of their respective markets. The old regime focused only on the supplier's market share (other than in cases of exclusive supply where it focused only on the purchaser's market share). The new Guidelines provide revised guidance, in particular on passive sales and resale price maintenance.

Horizontal Cooperation Guidelines

In January, the Commission adopted revised guidance and block exemptions governing the application of EU competition law to "horizontal" cooperation agreements between actual and potential competitors.

The new Guidelines include a new section on information exchanges between competitors, which covers a wide range of scenarios, including disclosure of information via published materials and coordinated public announcements, through a common third party such as a trade association or via direct communication between competitors. Compared to the consultation draft, the final version also contains a more explicit warning that unilateral disclosure of strategic information to a competitor can give rise to a breach, *i.e.*, there need be no "exchange" of information for liability to arise.

They favour open and non-discriminatory standardisation initiatives and provide for a safe harbour for standardisation agreements meeting certain criteria, conformity with which will normally mean that these agreements are not restrictive of competition. If these criteria are not met, the standardisation process will not necessarily breach competition law, but must be assessed more carefully on the basis of the additional guidance provided in the Guidelines.

The new Guidelines also contain an expanded explanation of the way in which the Commission assesses agreements on industry standards and standard contractual terms.

The Specialisation and R&D Block Exemptions

The specialisation block exemption no longer covers specialisation or joint production agreements relating to products that the parties use captively for the production of products in a downstream market, where the parties have a combined share of more than 20% of that downstream market. Interim protection for agreements that cease to be block exempted because of these changes has been extended to 31 December 2012 (a year more than was envisaged in the consultation draft).

While the basic structure of the R&D block exemption remains virtually the same, the Commission has significantly widened its scope. In particular (and in contrast to the consultation draft), it now covers paid-for R&D, provided the parties' combined market share does not exceed 25%.

Collective redress

In 2011, in pursuit of an EU policy on collective redress, the Commission has taken a step back toward fact-finding and launched a consultation on collective redress involving both DG COMP and DG Consumer Affairs. Thus, it would appear that last year's proposed directive may have been permanently shelved.

In the meantime, the Commission's own pursuit of damages actions following the *Elevators and Escalators* cartel decision filed with the *Tribunal de Commerce de Bruxelles* has now been referred in April to the CJEU on the question of whether the Commission can perform the multiple roles of police, prosecutor, judge and jury as well as the additional hat of civil damages claimant, inter alia.

<u>Procedure and Practice</u>

Legal Professional Privilege

On 14 September 2010, the CJEU issued a ruling upholding the judgment of the EU's General Court which, in September 2007, denied the extension of legal professional privilege to certain communications between Akzo's managers and Akzo's in-house counsel. In confirming the existing case law stemming from the 28 year old *AM&S* judgment, the ruling effectively ends judicial debate on this point for the foreseeable future.

Filing annulment actions

In *Transportes Evaristo Molina v. Commission*, the CJEU affirmed the strict application of Article 263(6) TFEU on the time limits for applications for annulment of acts of the European institutions. Such annulment actions must be filed within two months of the publication or notification of the measure, or, in the absence thereof, of the day on which it came to the knowledge of the applicant. Accordingly, the Court held whether the applicant was already ‘directly concerned’ by the contested act at the time of notification/publication, or only became so at a later stage, was not material to establishing the starting date.

Dawn raid conduct

In December, the Commission was successful in defending E.ON's appeal against its fine for breach of seal during dawn raid investigations. Perhaps, emboldened by this judgment the Commission has sent a statement of objections to Energetický a průmyslový holding and J&T Investment Advisors, active in the electricity sector in the Czech Republic for obstruction during a 2009 dawn raid. The Commission also initiated proceedings against Suez Environnement for breach of seal in 2010 dawn raids in the French water and sanitation sector.

Commission discretion in rejecting antitrust complaints

In *EMC Development*, the General Court affirmed a Commission decision not to act on a complaint alleging the anti-competitive effects of standardisation in the European cement industry. It upheld the Commission’s two-pronged test to scrutinize standard setting under Art. 101 TFEU*:"(i) whether the procedure for adoption of the Standard had not been non-discriminatory, open and transparent, and (ii) whether the Standard was binding*".

In December, the General Court also annulled a Commission decision rejecting a complaint lodged by Swiss Confédération Européenne des Associations d'Horlogers-Réparateurs (CEAHR) alleging violation of the antitrust rules in connection with refusal by watch manufacturers to supply spare parts to independent watch repairers. The Court appeared to take a strict application of the case law obligation for the Commission to consider "*attentively all the matters of fact and of law which the applicant brought to its attention*" in its discretion to examine incoming complaints. The judgment provided useful insight into the Court's approach to market definition in aftermarkets as the Court considered that for there to be a distinct secondary market, it must be shown that a price increase in secondary products/services would not be able to affect the volume of sales in the primary market in such way as to render such increase unprofitable. In the context of examining incoming complaints this has to be considered in connection with the proposed relevant market. Further, the Court proffered that the Commission must affirmatively consider whether action at the European Union level could be more effective than various actions at national level.

The subsequent chapters set out in more detail the main Article 101, Article 102, merger control, and procedural developments in 2010 to present.

ARTICLE 101

1.1. Commission Decisions - Cartels

1.1.1. DRAM[12] – 19 May 2010

On 19 May 2010, the Commission announced that it had reached a settlement decision in the DRAM cartel.[13] This was the first cartel settlement under new rules introduced in June 2008, to facilitate the settlement of cartels.

The DRAM cartel involved 10 producers of memory chips used in computers and servers. The Commission found that the cartel operated between 1 July 1998, and 15 June 2002, and involved the sharing of secret information, mostly on a bilateral basis, through which the 10 undertakings coordinated their price levels and quotations for DRAMs (Dynamic Random Access Memory), sold to major PC or server original equipment manufacturers in the EEA.

Settlement discussions took place between the Commission and the Parties during 2009, after which the Parties indicated that they were prepared to engage in discussions with a view to a reaching a settlement. Subsequently, each Party introduced formal settlement submissions in which they clearly and unequivocally acknowledged their respective liability for an infringement. A statement of objections reflecting the Parties' respective submissions was sent to the Parties in February 2010, and they all confirmed that its content reflected their submissions and that they remained interested in the settlement procedure.

Following the lengthy investigation and a 15 month settlement process, the Commission announced on 19 May 2010, that it had imposed a total fine of €331,273,800 on the undertakings involved. The undertakings involved, and their respective fines, were as follows:

Company	Fine	Reduction under the Leniency Notice	Reduction under the Settlement Notice
Micron	€0	100%	N/A
Infineon	€56,700,000	45%	10%
Hynix	€51,471,000	27%	10%
Samsung	€145,728,000	18%	10%
Jointly and severally Elpida, NEC Corporation, Hitachi Ltd.	€8,496,000	18%	10%
Jointly and	€2,124,000		10%

12 Case COMP/38.511.
13 Commission Press Release IP/10/586.

severally NEC Corporation, Hitachi Ltd. (for the JV period)			
NEC (pre-joint venture)	€10,296,000	18%	10%
Hitachi (pre-joint venture)	€20,412,000		10%
Toshiba	€17,641,800		10%
Mitsubishi	€16,605,000		10%
Nanya	€1,800,000		10%
TOTAL	€331,273,800		

The 15 month length of the settlement discussions is clearly not consistent with the stated objective of the settlement process to speed up cartel proceedings and free up Commission resources. However, no doubt the length of the proceedings can be explained by the fact that it was the Commission's first settlement case and there were a significant number of parties. No company involved in the cartel and the later settlement procedure has appealed the Commission's decision. However, the possibility for follow-on damages claims in national courts remains. Oracle has already sued Micron (the immunity applicant in the EU proceedings) in a U.S. court.[14] It is possible that further follow-on litigation will also follow. Additionally, with the announcement in June 2010 that the Brazilian authorities are investigating the cartel, the companies involved will face further regulatory investigations.

1.1.2. Carbonless Paper (Bolloré SA)[15] – 23 June 2010

In 1996, the Commission opened an investigation into alleged price collusion in the carbonless paper sector. On 20 December 2001, the Commission imposed large fines on ten undertakings involved in a Europe-wide price fixing and market sharing cartel in the carbonless paper sector between 1992 and 1995. The undertakings involved, and their respective fines, were as follows:

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14 See http://uk.reuters.com/article/idUKN278750920100927 .

15 Case COMP/36.212.

Company	Fine
Arjo Wiggins Appleton Plc.	€184,270,000
Papierfabrik August Koehler AG	€33,070,000
Zanders Feinpapiere AG	€29,760,000
Bolloré SA	€22,680,000 (later reduced to €21,260,000)
Mitsubishi HiTech Paper Bielefeld GmbH	€21,240,000
Torraspapel SA	€14,170,000
Papeteries Mougeot SA	€3,640,000
Distribuidora Vizcaina de Papeles S.L.	€1,750,000
Carrs Paper Ltd	€1,570,000
Papelera Guipuzcoana de Zicuñaga SA	€1,540,000
TOTAL	€313,700,000

All undertakings involved appealed to the General Court and three companies subsequently appealed to the CJEU. The appeals against the Commission's decision were rejected by the EU Courts, except for a reduction of the fine on two companies (Arjo Wiggins Appleton and Papelera Guipuzcoana de Zicuñaga) and an annulment of the decision against Bolloré.

Bolloré alleged that there was a substantial discrepancy between the facts contained in the Commission's statement of objections and the facts contained in the Commission's decision. The statement of objections found that Copigraph, a subsidiary of Bolloré, was active in the cartel. However, the Commission's decision found that Bolloré itself was active in the cartel. The CJEU found that such a finding of liability meant that Bolloré’s rights of defence had not been respected. Specifically, the CJEU considered that Bolloré’s rights of defence were infringed because it could not have foreseen from the wording of the original statement of objections that the Commission intended to hold it liable not only as a parent company of the cartel participant Copigraph, but also on account of its own involvement in the cartel. The CJEU therefore upheld Bollorés's appeal and annulled the Commission's decision concerning Bolloré.[16]

After sending a new statement of objections on 15 December 2009, which addressed both the parental liability and the direct involvement of Bolloré, the Commission re-adopted its previous cartel decision on 23 June 2010, correcting the procedural error which led to the annulment of the 2001 decision.[17] As during the re-adoption procedure Bolloré no longer contested the participation of its former subsidiary Copigraph in the early stage of the cartel, the reduction for cooperation under the 1996 Leniency Notice was increased from 20% to 25%. The Commission therefore reduced Bolloré’s fine from €22.68 million to €21.26 million.

16 *See* Joined Cases C322/07P, C-327/07P and C-338/07P, *Papierfabrik August Koehler AG, Bolloré SA and Distributor Vizcaina de Papeles S.L. v Commission*.

17 Commission Press Release IP/10/788.

1.1.3. Bathroom fittings & fixtures[18] – 23 June 2010

On 9 and 10 November 2004, the Commission conducted unannounced inspections at the premises of some of the major European manufacturers and importers of bathroom fittings in Austria, Belgium, Germany, Italy and the Netherlands.[19] The products affected by the alleged cartel included ceramic sanitary ware, taps & fittings and shower enclosures. On 30 March 2007, the Commission announced that it had issued a statement of objections to members of the alleged cartel and oral hearings were held at the end of 2007.[20]

On 23 June 2010, the Commission announced that it had fined 17 bathroom equipment manufacturers a total of €622,250,783.[21] The Commission found that the coordination took place during meetings of 13 national trade associations in Germany (over 100 meetings), Austria (over 80), Italy (65), as well as in Belgium, France and The Netherlands. There were also bilateral contacts between manufacturers. The cartel consisted of fixing price increases, minimum prices, and rebates, and exchanging sensitive business information.

The 17 companies involved, and their respective fines, were as follows:

Company	Fine	Reduction Under The Leniency Notice
Artweger (AT)	€2,787,015	
Cisal (IT)	€1,196,269	
Dornbracht (DE)	€12,517,671	
Duravit (DE)	€29,266,325	
Duscholux (AT)	€1,659,681	
Grohe (DE)	€54,825,260	30%
Hansa (DE)	€14,758,220	
Ideal Standard (U.S.)	€326,091,196	30%
Kludi (DE)	€5,515,445	
Mamoli (IT)	€1,041,531	
Masco (U.S.)	€0	100%
RAF (IT)	€253,600	
Roca (ES)	€38,700,000	
Sanitec (FI)	€57,690,000	
Teorema (IT)	€421,569	
V&B (DE)	€71,531,000	

18 Case No. COMP/39.092.

19 Commission MEMO/04/256.

20 Commission MEMO/07/125.

21 Commission Press Release IP/10/790.

Zucchetti (IT)	€3,996,000	
TOTAL	€622,250,783	

Masco received full immunity from fines under the Commission's Leniency Programme, as it was the first to provide information about the cartel. Grohe and Ideal Standard received reductions of 30% for their cooperation with the Commission.

The case is unusual in that the Commission reduced the fines of five (unnamed) companies due to their inability to pay. A total of ten companies claimed they would be unable to pay a fine. To assess their claims, the Commission looked at recent financial statements, provisional current year statements and future projections. The Commission also looked at "*the social and economic context of each company*." Finally, the Commission assessed whether the companies' assets would be likely to lose significant value if the companies were to be forced into liquidation as a result of the fine. The Commission claimed that the analysis was "*company-specific*" and aimed "*to be as objective and quantifiable as possible to ensure equal treatment and preserve the deterrence aspect of EU competition rules*."[22] Following this investigation, the fines of three companies were reduced by 50% and those of another two by 25% given their difficult financial situation.

Speaking after the announcement of the fines, Commissioner Almunia stated that "*these 17 companies fixed prices for baths, sinks, taps and other bathroom fittings for 12 years in six countries covering 240 million people. The cartel will have harmed businesses such as builders and plumbers and, ultimately, a large number of families. However, as the objective of anti-cartel enforcement is not to precipitate the fall of companies in financial difficulties, the Commission reduced the fines on five companies to a level they could afford. Companies should be in no doubt that the Commission will continue its fight on cartels and the level of fines will continue to be such that it should dissuade them from engaging in illegal behaviour in the first place*."[23]

Despite the announcement that the Commission had reduced the fines of five companies due to their weakened financial condition, several of the fines were just short of the maximum 10% of turnover threshold. [24]

1.1.4. Prestressing steel[25] – 30 June 2010

In September 2002 and June 2006, the Commission launched unannounced inspections at the premises of several producers of prestressing steel. A statement of objections was sent to the companies involved in October 2008.[26] Following the parties' replies to the statement of objections, the Commission dropped its investigation against one

22 Commission Press Release IP/10/790.
23 Commission Press Release IP/10/790.
24 Several companies have appealed the Commission's decision. *See* T-364/10 *Duravit and Others v. Commission* (appeal pending); T-376/10 *Mamoli Robinetteria v. Commission* (appeal pending); T-380/10 *Wabco Europe and Others v. Commission* (appeal pending); T370/10 *Rubinetterie Teorema v. Commission* (appeal pending).
25 Case COMP/38.344.
26 Commission MEMO/09/53.

group of companies.

On 30 June 2010, the Commission announced that it had fined 17 prestressing steel producers a total of €518,470,750 for operating a price fixing and market-sharing cartel between January 1984 and September 2002.[27] The cartel stopped in 2002, when DWK/Saarstahl submitted an immunity application to the Commission revealing the existence of the cartel.

The Commission found that over a period of 18 years, the companies fixed individual quotas and prices, allocated clients and exchanged sensitive commercial information. In addition, they monitored price, client and quota arrangements through a system of national co-ordinators and bilateral contacts. The first pan-European cartel meetings were held in Zurich, Switzerland, hence the "Club Zurich" name to which it was initially referred. Later it became "Club Europe." But there were also two regional branches, in Italy ("Club Italia") and in Spain/Portugal ("Club España"). The different branches were interconnected by overlapping territory, membership and common goals. The companies involved usually met on the margins of official trade meetings in hotels all over Europe. The Commission had evidence of over 550 cartel meetings.

However, on 6 August 2010, the Commission announced that, due to a calculation error, it would reduce the fine imposed on four undertakings. The Commission stated that three of the undertakings fined will see their sanctions revised downwards due to an error concerning the 'additional amount,' otherwise known as the entry fee, while an error in the calculation of the value of sales will result in a reduction for a fourth undertaking. On 30 September 2010, the Commission announced the re-calculated fines for the four undertakings concerned.

On 4 April 2011, the Commission again announced it had revised the cartel fine downwards. This time the Commission reduced by 80% the fine imposed on ArcelorMittal for its two subsidiaries, as the Commission decided that it ultimately could not attribute joint and several liability to the parent.[28]

ArcelorMittal had already seen its €276 million fine reduced to € 230 million in September last year.

The total fine for the cartel is now € 269,870,750.

The companies involved, and their respective fines, were as follows:

Company	Fine (30 June 2010)	Amended Fine (where applicable) (30 September 2010)	Amended Fine (where applicable) (4 April 2010)	Reduction Under The Leniency Notice

27 Commission Press Release IP/10/790.
28 Commission Press Release IP/11/403.

ArcelorMittal (L, F, B, I)	€276,480,000	€230,400,000	€45,705,600	20%
Emesa/Galycas/ArcelorMittal (España) (ES, L)	€40,800,000	€36,720,000		5% (Em/Gal); 20% (AM); 35% (AM es).
GlobalSteelWire/ Tycsa (ES)	€54,389,000			
Proderac (ES)	€482,250			
Companhia Previdente/Socitrel (P)	€12,590,000			
Fapricela (P)	€8,874,000			
Nedri/HIT Groep (NL)	€6,934,000			25% (Nedri)
WDI/Pampus (DE)	€56,050,000	€46,550,000		5%
DWK/Saarstahl (DE)	€0			100%
voestalpine Austria Draht (AT)	€22,000,000			
Rautaruukki/Ovako (FI/SE)	€4,700,000	€4,300,000		
Italcables/Antonini (I)	€2,386,000			50%
Redaelli (I)	€6,341,000			
CB Trafilati Acciai (I)	€2,552,500			
I.T.A.S. (I)	€843,000			
Ori Martin/Siderurgica Latina Martin (I)	€19,800,000		€15,956,000	
Emme Holding (I)	€3,249,000			
Total	€518,470,750	€458,410,750	€269,870,750	

On 14 September 2010, the ArcelorMittal subsidiaries lodged appeals of the Commission's decision.[29] On 15 September 2010, voestalpine Austria Draht lodged an appeal of the Commission's decision.

[29] See T/399-10, *ArcelorMittal España v Commission* (appeal pending) and T-385/10, *ArcelorMittal Wire France and Others v Commission* (appeal pending).

The September amendment decision has seen its own set of appeals by cartel participants (which did not see their fines reduced) on procedural and non-discrimination grounds.[30]

1.1.5. Animal Feed Phosphates[31] – 20 July 2010

On 20 July 2010, the Commission announced that it had fined 13 companies a total of €175,647,000 for their role in a cartel in the animal feed phosphate sector that lasted 35 years.[32] The case is the first example of a "hybrid" settlement as 12 companies opted to settle with the Commission under the new settlement procedure while 1 company, Timab Industries S.A., opted to discontinue its involvement with the settlement procedure and was therefore fined under the normal procedure.

The case originated from 2003 when, Kemira, one of the participants in the cartel, applied for leniency. Following this immunity application, the Commission conducted dawn raids on various undertakings in February 2004. The Commission's subsequent investigation found that the 13 companies had operated a market-sharing and price fixing cartel that covered most of the EU. The cartel existed from as early as March 1969 until February 2004 (although not all companies were involved with the cartel for the entirety of this period). The cartel arrangements, known alternatively as the "Club," CEPA (Centre d'Etude des Phosphates Alimentaires), and Super CEPA, adapted to different market conditions throughout the 35 year period and facilitated regular meetings by members.

During the Commission's investigation, settlement proceedings were opened with all undertakings. After the Commission had informed the parties of the fines ranges, Timab Industries S.A. decided to discontinue the settlement proceedings, becoming the only party in the ordinary procedure. The companies involved, and their respective fines, were as follows:

Company	Fine	Reduction under the Leniency Notice	Reduction under the Settlement Notice
Yara Phosphates Oy (FI) Yara Suomi Oy (FI) Kemira Oyj (FI)	€0	100%	
Tessenderlo Chemie N.V. (B)	€83,752,000	50%	10%
Ercros S.A. and Ercros Industrial S.A. (ES)	€14,850,000		10%

30 See T-575/10, *Moreda-Riviere Trefilerías v Commission* (appeal pending), T-576/10, *Trefilerías Quijano v Commission* (appeal pending), T-577/10, *Trenzas y Cables de Acero v Commission* (appeal pending), and T-578/10, *Global Steel Wire v Commission* (appeal pending).

31 Case COMP/38.866.

32 Commission Press Release IP/10/985.

Quimitécnica.com – Comércio e Indústria Química S.A (PT) José de Mello SGPS S.A. (PT)	€2,795,000	25%	10%
FMC Foret S.A. (ES) FMC Chemicals Netherlands B.V. (NL) FMC Corporation (U.S.)	€14,400,000		10%
Timab Industries S.A. (FR) Compagnie Financière et de Participation Roullier ('CFPR') (FR)	€59,850,000	5%	
TOTAL	€175,647,000		

The Commission stated that "*due to the very long duration of the cartel, the fines for some of the companies would have exceeded the legal maximum of 10% of the 2009 turnover. They were, therefore, reduced within that legal ceiling*."[33] The Commission granted immunity to Kemira/Yara and also granted a reduction of fines for cooperation under the 2002 Leniency Notice to Tessenderlo (50%), Quimitécnica/José de Mello (25%) and Timab Industries S.A./CFPR (5%).

Two of the undertakings involved invoked the 'inability to pay' mechanism under the 2006 Fining Guidelines. In considering whether the applicants were eligible for reductions, the Commission examined the applicants' "*financial statements for recent years, projections for the current and coming years, ratios measuring the financial strength, profitability, solvency, liquidity, and relations with outside financial partners and with shareholders.*"[34] The Commission also examined the "*social and economic context of each applicant and assessed whether its assets would be likely to lose significant value if it were to be liquidated as a result of the fine*."[35] As a result of this assessment, the Commission accepted one of the applications and granted a reduction of 70% of the fine.

1.1.6. Air freight – 9 November 2010[36]

On 9 November 2010, the Commission announced that it had fined 11 air cargo carriers a total of €799,445,000 for operating a worldwide cartel which affected cargo services within the EEA. The case originated from 14 and 15 February 2006, when competition authorities in the EU, U.S., and South Korea launched coordinated dawn raids on several air cargo operators. British Airways, Air France-KLM, Japan Airlines, Cathay Pacific Airways, Lufthansa, United Airlines, Cargolux, Polar Air Cargo and Lan Chile all received either a request for information or a subpoena or were subjected to a dawn raid.

33 Commission Press Release IP/10/985.
34 Commission Press Release IP/10/985.
35 Commission Press Release IP/10/985.
36 Case COMP/39.258.

The anti-competitive agreements or practices being investigated were initiated in 1999 and involved agreements regarding certain surcharges to offset external cost increases, such as fuel surcharges, costs for additional security measures (after the attacks in the U.S. on 11 September 2001) and surcharges for war risk insurance premiums applied in conjunction with the outbreak of the war in Iraq in 2003. In this respect, the air cargo cartel resembles the facts of the freight forwarding cartel, discussed below, which allegedly occurred in the downstream market for freight forwarding services.

The Commission issued a statement of objections in December 2007 to a number of companies concerning their alleged participation in the cartel.[37] An oral hearing with the European Commission was held over several days from 30 June 2008 to July 4 2008. On 9 November 2010, the Commission issued its decision and imposed the following fines.

Company	Fine	Reduction under the Leniency Notice
Air Canada	€21,037,500	15%
Air France	€182,920,000	20%
KLM	€127,160,000	20%
Martinair	€29,500,000	50%
British Airways	€104,040,000	10%
Cargolux	€79,900,000	15%
Cathay Pacific Airways	€57,120,000	20%
Japan Airlines	€35,700,000	25%
LAN Chile	€8,220,000	20%
Qantas	€8,880,000	20%
SAS	€70,167,500	15%
Singapore Airlines	€74,800,000	
Lufthansa	€0	100%
Swiss International Airlines	€0	100%
TOTAL	€799,445,000	

The case is striking for its length and complexity. The Commission faced a number of difficult jurisdictional and evidentiary hurdles and a number of companies that were investigated by the Commission were not included in the eventual decision. Separately, the Commission refused 5 applications for inability to pay but did provide substantial reductions to several companies.

In addition to the Commission's investigation, U.S. DoJ has collected fines from airlines totaling more than U.S.$1.5 billion – the most ever collected during a criminal

[37] Commission MEMO/07/622

antitrust investigation. Moreover, the case has given rise to civil claims for damages in the U.K. and other jurisdictions. Following a class action settlement in the U.S. on 12 July 2010, several claimants suggested that they would launch several class action suits in other European countries in an attempt to recover damages allegedly incurred as a result of the cartel. An attempted class action suit in the English High Court against British Airways failed on 17 November 2010.

1.1.7. LCD Panels – 8 December 2010[38]

On 8 December 2010, the Commission announced that it had fined six LCD panel producers a total of €648,925,000 for operating a cartel between October 2001 and February 2006. LCD panels are the main component of thin, flat screens used in televisions, computer monitors and electronic notebooks.

According to the Commission, the companies agreed prices, including price ranges and minimum prices, exchanged information on future production planning, capacity utilisation, pricing and other commercial conditions. The cartel members allegedly held monthly multilateral meetings and further bilateral meetings. In total they met around 60 times mainly in hotels in Taiwan for what they called "the Crystal meetings".

Although the alleged cartel participants were all foreign firms (Samsung Electronics and LG Display of Korea and Taiwanese firms AU Optronics, Chimei InnoLux Corporation, Chunghwa Picture Tubes and HannStar Display Corporation), the Commission noted the direct impact on customers in the EEA because the vast majority of televisions, computer monitors and notebooks incorporating LCD panels and sold in the EEA come from Asia.

The Commission issued a statement of objections in May 2009 to a number of companies concerning their alleged participation in the cartel.[39]

The Commission decision of 8 December 2010 imposed the following fines:

Company	Fine	Reduction under the Leniency Notice
Samsung	0	100%
LG Display	€215,000,000	50% + partial immunity
AU Optronics	€116,800,000	20%
Chimei Innolux Corporation	€300,000,000	0%
Chunghwa Picture Tubes	€9,025,000	5%
Hannstar Display Corporation	€8,100,000	0%

38 Case COMP/39.309.
39 Commission MEMO/09/934.

TOTAL	€648,925,000	

The fines seemed designed, in part, to send a message about EU antitrust regulation of foreign companies. "*Foreign companies, like European ones, need to understand that if they want to do business in Europe, they must play fair*," EU Competition Commissioner Joaquin Almunia said at the time.

AU Optronics has appealed to the General Court challenging the Commission's jurisdiction to apply the EU competition rules against it inter alia.[40] Chimei InnoLux is seeking annulment of the decision insofar as it finds that the infringement extended to LCD panels for television applications.[41]

1.1.8. Consumer Detergents – 13 April 2011[42]

On 13 April 2011, the Commission announced it had reached a settlement decision fining consumer detergent (*i.e.*, washing machine and dishwasher detergents, and laundry softeners) producers Procter & Gamble and Unilever €315.2 million for operating a cartel between January 2002 and March 2005 in eight EU Member States (Belgium, France, Germany, Greece, Italy, Portugal, Spain, and The Netherlands). Leniency applicant Henkel, an addressee of the decision, received full immunity from the cartel fine.

The Commission launched its investigation following a leniency application from Henkel in 2008. On 17, 18 and 19 June 2008, the Commission carried out dawn raids at the premises of several producers of consumer detergents.[43]

As a settlement decision, the alleged cartel participants admitted their participation in the cartel which involved coordination on prices and other "anti-competitive practices" stemming through an initiative through their trade association to improve the environmental performance of detergent products.

Company	Fine	Reduction under the Leniency Notice	Reduction under the Settlement Notice
Henkel AG & Co. KGaA	0	100%	

40 See T-94/11 *AU Optronics v Commission* (appeal pending).

41 See T-91/11 *ChiMei Innolux v Commission* (appeal pending).

42 Case COMP/39.579; Commission Press Release IP/11/473.

43 Commission MEMO/08/424.

Procter & Gamble[44]	€211,200,000	50%	10%
Unilver[45]	€104,000,000	25%	10%
TOTAL	€315,200,000		

The Commission's press release indicates that settlement discussions took less than a year from the initiation of discussions during the second half of 2010 to the issuance of the Commission decision in April 2011.

1.2. Commission Decisions – Other

1.2.1. The "Baltic Max Feeder" scheme[46] – 26 March 2010

On 15 January 2010, the Commission opened a formal antitrust investigation into the "Baltic Max Feeder" scheme.[47] Under this scheme, European owners of feeder vessels planned collectively to cover the costs of taking vessels out of service. The Commission raised concerns that the proposed scheme was aimed at reducing capacity and therefore at pushing up charter rates for such vessels. On 26 March 2010, the Commission closed its investigation after Anchor Steuerberatungsgesellschaft GmbH, the company that originally proposed the scheme to other industry participants, informed the Commission in February that the planned scheme had been abandoned.

1.2.2. BA/AA/IB[48] – 14 July 2010

On 14 July 2010, the Commission announced that it had made legally binding the commitments offered by British Airways ("BA"), American Airways ("AA") and Iberia Líneas Aéreas de España ("Iberia") in response to the Commission's concerns about the planned joint venture between the three airlines. BA, AA, and Iberia had previously agreed to establish a revenue-sharing joint venture covering all their passenger air transport services on the routes between Europe and North America. The agreement provides for extensive cooperation between the parties on the transatlantic routes, which includes pricing, capacity and scheduling coordination, as well as revenue sharing.

In its statement of objections, the Commission took the preliminary view that the parties' agreements would restrict competition on specific transatlantic routes.

After taking into account the parties' reply to the statement of objections and other new elements, the Commission maintained its preliminary competition concerns in relation to six transatlantic routes: London-Dallas (premium and non-premium markets),

44 The Commission press release note that the decision was addressed to Procter & Gamble International S.à.r.l. and The Procter & Gamble Company which as parents of the P&G Group are held jointly and severally liable for the conduct of their relevant European subsidiaries.
45 Unilever NV and Unilever PLC were the addressees of the decision.
46 Case No. 39.699.
47 Commission MEMO/10/149.
48 Commission MEMO/09/168, Case No. COMP/39.596.

London-Boston (premium and non-premium markets), London-Miami (premium and non-premium markets), London-Chicago (premium market), London-New York (premium market), and Madrid-Miami (premium market).

The Commission provisionally considered that actual or potential anti-competitive effects would arise due to restriction of competition between the parties on the above-mentioned routes. On these routes, the parties' position was particularly strong and there were high barriers to entry or expansion, in particular lack of peak-time slots at London Heathrow/Gatwick and New York Newark/JFK airports, frequency advantage of the parties, limited access to connecting traffic and the parties' strength in terms of frequent flyer programmes ("FFPs"), corporate contracts and marketing. The agreements would eliminate competition between BA, AA and IB, which the competitors would not be able to replicate on the routes of concern.

In addition, the Commission provisionally concluded that anti-competitive effects were also likely to arise due to restriction of competition between the parties and third parties. Hence, on London-Chicago and London-Miami, the agreements would result in further actual or potential anti-competitive effects by means of the parties restricting their competitors' access to connecting traffic, which is of key importance for operations on these transatlantic routes.

The Parties offered the following commitments to remedy the competition concerns identified by the Commission:

- The parties proposed to make slots available at either London Heathrow or Gatwick airports — at the competitor's choice — to allow competitors to operate up to 21 additional non-stop frequencies per week on London-New York, 14 on London-Boston, 7 on London-Dallas and 7 on London-Miami. On the London-New York route, the parties also offered to provide the competitor with matching operating authorisations at New York JFK airport.

- The parties offered to enter into fare combination agreements with competitors on the routes of concern. These agreements provide for the possibility for interested carriers, and travel agents, to offer a return trip comprising a non-stop transatlantic service provided by that interested carrier, and a non-stop service the other way by the parties.

- The parties offered to conclude special prorate agreements with competitors on the routes of concern. These agreements allow interested carriers to obtain favourable terms from the parties to carry connecting passengers on flights of the parties on short-haul routes in Europe and North America (and selected other countries) in order to "feed" their own transatlantic services on the routes of concern.

- The parties proposed to open their FFPs on the routes of concern to a competitor that launches or expands a service on the route and does not have a comparable FFP of its own.

- The parties offered to provide data regularly to the Commission concerning the parties' cooperation.

On 14 July 2010, the Commission announced that it had made legally binding the commitments.[49] The decision is binding for a total period of ten years from the date of adoption.

1.2.3. Visa MIF - Visa Europe Limited – 8 December 2010[50]

On 8 December 2010, the Commission made legally binding commitments offered by Visa Europe to cut its default multilateral interchange fees (MIFs) for debit card payments for a four year term. Under the commitments, the maximum weighted average MIF applicable to debit card cross border transactions and to national debit transactions in those countries where MIFs are set directly by Visa Europe will be cut to 0.2% of the value of the transaction. This represents a reduction of about 60% on average for domestic MIFs and 30% for cross-border MIFs. Furthermore, Visa Europe committed to maintain and further develop measures which will increase transparency and competition in the payment cards markets.

In March 2008, the Commission announced that it had opened formal antitrust proceedings against Visa Europe Limited in relation to its default multilateral interchange fees (MIF) for cross-border point of sale transactions within the EEA using Visa branded consumer payment cards, and the "Honour-All-Cards-Rule" as it applies to these transactions.[51] It then confirmed, at the beginning of April 2009, that it had sent a statement of objections to Visa.[52]

The MIF is a per transaction inter-bank payment typically charged by the cardholder's bank (the "Issuing Bank") to the Merchant's Bank (the "Acquiring Bank") by way of a contribution to the costs of the payment services. The Acquiring Bank then takes this cost element on board in setting its prices to merchants. The Commission considers that the default MIFs, set directly by Visa, restrict competition between banks and do not meet the conditions for exemption. The MIFs are an important part of the total amount that retailers must pay for accepting Visa branded payment cards, and in the Commission's view establish a floor for the merchant service charge. The "Honour-All-Cards-Rule" is a central element of the Visa system and obliges merchants to accept all valid Visa-branded cards, irrespective of the identity of the issuer, the nature of the transaction and the type of card.

The case has a long history. In 2002, the Commission granted Visa an exemption[53] after Visa offered to reduce progressively the level of its fees from an average of 1.1% to 0.7% until the end of 2007 and to cap fees at the level of costs for specific services. Visa also improved the transparency of its fees. The exemption, however, expired on 31 December 2007 and the Commission issued Visa with an statement of objections in

49 On the same day, the Commission also authorised Iberia's merger with British Airways.
50 Case COMP/39.398.
51 Commission MEMO/08/170.
52 Commission MEMO/09/151.
53 Commission Memo IP/02/1138.

April 2009.

In the Sector Inquiry into retail banking in 2005 and 2006, the Commission indicated its unease in relation to interchange fee agreements, suggesting that they might stand in the way of a more cost efficient payment cards industry and of the creation of SEPA.

1.2.4. Orde national des pharmaciens– 8 December 2010 [54]

In December 2010, for the first time the Commission has imposed a fine of €5 million on an association of undertakings, France's ONP and its governing bodies. ONP is the professional body for pharmacists in France. French law grants the ONP control powers over pharmacists, in particular the power to keep a list of all pharmacists licensed to practice and the obligation to supervise clinical laboratories.

In its investigation, the Commission considered that the ONP's behaviour led to restrictions of competition in the French clinical testing market.

Since October 2003, ONP decisions have been systematically targeted at undertakings associated with groups of laboratories with the aim of impeding their development on the French market and slowing down or preventing acquisitions and statutory changes or changes in the capital of these undertakings.

Furthermore, between September 2004 and September 2007, the ONP took decisions aimed at imposing minimum prices, to the detriment in particular of state hospitals and state health insurance bodies, by seeking to prohibit discounts of over 10% on the public prices granted by private undertakings under contracts. It was found that during the period of the investigation the prices of clinical laboratory testing services were often up to two or three times higher in France than in other Member States.

In calculating the fines, the Commission's press release raised the issue of the "possible financial liability" of the undertakings of members of the governing bodies as provided for by Regulation No 1/2003.

Regulation No 1/2003 provides specific guidance on the maximum liability for an association of undertakings:

- Where the infringement of an association of undertakings relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.
- When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

However, any undertaking which can show that they did not implement the infringing

[54] Commission MEMO IP/10/1683.

decision of the association and either were not aware of its existence or actively distanced themselves from the association before the Commission began its investigation may not be liable for the infringement of the association.

1.3. Ongoing Commission Investigations – Cartels[55]

1.3.1. Mountings for Windows[56]

In July 2007 the Commission carried out unannounced inspections at the premises of a number of European producers of mountings.[57] The mountings concerned are the mechanical parts that allow the opening and closing of a window or window door and attach a window to its frame. On 22 June 2010, the Commission announced that it had sent statements of objections to nine producers of mountings for windows.[58] It is understood that an oral hearing was held on 19 October.

1.3.2. Freight forwarding[59]

On 10 October 2007, the Commission carried out surprise inspections at the premises of various providers of international freight forwarding services. Freight forwarding consists of organizing the transport of goods along with related activities such as customs clearance, warehousing and ground services. The freight forwarding business has been segmented into domestic and international freight forwarding and freight forwarding by air, land and sea. The case concerns only the provision of freight forwarding services by air.

DHL Global Forwarding has claimed that it first notified the Commission of the alleged abuse and has therefore received conditional immunity before the European Commission.[60] In February 2010, the Commission sent a statement of objections[61] to a number of companies including Panalpina, Kuehne + Nagal, Expeditors, DSV, UTi Worldwide, UPS, and DHL Global Forwarding. An oral hearing was held from 6 to 8 July 2010.

1.3.3. Cathode ray tubes[62]

The Commission carried out dawn raids on 8 November 2007, at the premises of manufacturers of cathode ray tubes.[63] The companies alleged to have been involved in

55 This list is not intended to be exhaustive and is based on publicly available information; the Commission has additional ongoing cartel investigations not known in the public domain.
56 Case COMP/39.452.
57 Commission MEMO/07/276.
58 Commission MEMO IP/10/776.
59 Case COMP/39.462.
60 *See* http://www.dp-dhl.com/en/media_relations/press_releases/2010/dhl_global_fowarding_cooperates_investigations.html.
61 Commission Press Release IP/10/149.
62 Case COMP/39.437.
63 Commission MEMO/07/453. Cathode ray tubes are used in television sets and computer monitors.

the suspected cartel are understood to include Samsung, Panasonic, Thomson, Technicolor, Toshiba, Philips, LGE and the immunity applicant Chunghwa.

On 26 November 2009, the Commission sent a statement of objections to a number of companies active in the cathode ray tubes industry.[64] The hearing was scheduled to take place on 19 and 20 April 2010 but was postponed due to the volcanic ash cloud.

Reflecting jurisdictional questions that are currently being considered by the CJEU in the *Switchgear* cartel, the Slovak and Czech Competition Authorities have opened parallel investigations into the suspected cartel. This has raised questions regarding the correct division of labour that may eventually be litigated before the European Courts. In addition, the suspected cartel has prompted civil litigation in the U.K. and other jurisdictions. In particular, Nokia has started damages litigation in the U.K. and the U.S. against Samsung, AU Optronics, LG, Philips, Toshiba and others for their suspected roles in the cathode ray tubes cartel. This litigation also claims damages for the respondents alleged involvement with the LCD cartel.

1.3.4. Exotic fruit[65]

In November 2007, the Commission carried out dawn raids at the premises of various producers and importers of fresh exotic fruits.[66] On 17 December 2009, the Commission sent a statement of objections to a number of companies active in the import and marketing of bananas.[67] Upon receipt of the statement of objections, Chiquita announced to the U.S. SEC that it was the immunity applicant. At the same time, Dole announced that while it had been the subject of a dawn raid and subsequent questions by the European Commission, Dole had not received a statement of objections. On 18 June 2010, the Commission held an oral hearing for the parties.

1.3.5. International airline passenger services[68]

On 11 March 2008, the Commission carried out dawn raids at the premises of a number of international airline passenger carriers.[69] These airline carriers provide scheduled passenger air transport services on long-haul routes between Europe and a third country. The JFTC is also investigating the suspected cartel in Japan. Lufthansa and Air France confirmed that the Commission conducted inspections of their respective premises.

1.3.6. Smart card chips[70]

On 21 October 2008, the Commission carried out dawn raids at the premises of several smart card chips producers in several Member States.[71] These chips are used for the

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64 Commission Press Release MEMO/09/525.
65 Case COMP/39.482.
66 Commission MEMO/07/534.
67 Commission MEMO/09/566.
68 Case COMP/39.419.
69 Commission MEMO/08/158.
70 Case COMP/39.574.
71 Commission MEMO/09/1.

production of smart cards, such as telephone SIM cards, bank cards, and identity cards. It issued the Parties under investigation with information requests in September and October 2009.

1.3.7. Cement and related products[72]

On 4 and 5 November 2008, the Commission carried out dawn raids at the premises of companies active in the cement and related products industry in several Member States.[73] The Commission has followed up with further dawn raids on 22 and 23 September 2009 on undertakings in Spain.[74]

On 10 December 2010, the Commission announced that it had opened formal antitrust proceedings.[75]

1.3.8. Power cables[76]

On 28-30 January 2009, the Commission carried out dawn raids at the premises of companies involved in the manufacture of high voltage undersea cables.[77] In April 2009, both Nexans[78] and Prysmian[79] brought actions against the Commission's decision ordering the inspection. They claim *inter alia* that certain documents were obtained unlawfully.

1.3.9. Refrigeration compressors[80]

On 17 February 2009, the Commission carried out dawn raids at the premises of producers of compressors, used mainly for domestic refrigeration and freezers and commercial refrigeration, in several Member States.[81] Dawn raids also took place in the U.S. and Brazil. Tecumseh initiated this global antitrust investigation and is reported to have received "*conditional immunity*" from the Commission and the Brazilian regulator and to have reached a "*conditional amnesty agreement*" with the U.S. DoJ.

1.3.10. Special glass sector[82]

On 4 March 2009, the Commission inspected industrial premises in the special glass sector and issued the Parties concerned with information requests in March 2009 and October 2009.[83] Special glass products are used for optical and electronics applications,

72 Case COMP/39.520.
73 Commission MEMO/08/676
74 Commission MEMO/09/409.
75 Commission MEMO/IP/10/1696.
76 Case COMP/39.610.
77 Commission MEMO/09/46.
78 T- 135/09, *Nexans v Commission* (appeal pending).
79 T-140/09, *Prysmian, Prysmian Cavi and Sistemi Energia v Commission* (appeal pending).
80 Case COMP/39.600.
81 Commission MEMO/09/73.
82 Case COMP/39.605.
83 Commission MEMO/09/316.

both commercial and industrial.

1.3.11. North Sea shrimps[84]

On 24 and 25 March 2009, the Commission carried out dawn raids at the premises of companies active in the North Sea shrimps and related products industry in several Member States.[85]

1.3.12. Servier[86]

On 2 July 2009, the Commission initiated proceedings against Les Laboratoires Servier and Servier SAS, its subsidiaries and companies under their control ("Servier") examining alleged anti-competitive conduct by Servier. The Commission is also examining agreements between Servier and its actual or potential competitors including Krka, tovarna zdravil, d.d., Lupin Limited, Matrix Laboratories Limited (subsidiary of Mylan Inc as of 28 August 2006), Niche Generics Limited (subsidiary of Unichem Laboratories Limited), and Teva U.K. Limited / Teva Pharmaceutical Industries Limited.

1.3.13. CRT Glass Bulbs[87]

On 4 March 2009, Commission officials inspected industrial premises in the special glass sector.[88] Special glass products are used for optical and electronics applications, both commercial and industrial.

1.3.14. Czech electricity and lignite sector[89]

From 24 to 26 November 2009, the Commission carried out inspections at the premises of Czech companies active in the electricity and lignite sectors, investigating a potential violation of EU antitrust rules.

1.3.15. French generics

In October 2009, Commissioner Kroes warned that her staff was "*capitalising on our pharmaceuticals sector enquiry with new cases*"; a week later dawn raids were confirmed in France by Sanofi-Aventis, Teva, Novartis, Sandoz, Ratiopharm, and Ranbaxy for potential infringements of Article 101 and 102. The Commission has not published any information on this case.

1.3.16. Lundbeck

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84 Case COMP/39.633.
85 Commission MEMO/09/142.
86 Case COMP/39.612.
87 Case COMP/39.605.
88 Commission MEMO/09/316.
89 Commission Press Release IP/10/1748.

On 7 January 2010, the Commission opened a formal antitrust investigation into Lundbeck on the basis of Articles 101 and 102.[90] The Commission has stated that it is particularly interested in unilateral behaviour and agreements that would have delayed the entry of generic citalopram, a selective serotonin reuptake inhibitor.

1.3.17. Electrical equipment[91]

On 20 January 2010, the Commission carried out dawn raids at the premises of producers of Flexible Alternating Current Transmission Systems (FACTS).[92] FACTS are used to increase the power transfer capability of electricity transmission networks.

1.3.18. Automotive electrical and electronic components[93]

On 24 February 2010, the Commission carried out unannounced inspections at the premises of companies active in the manufacture of automotive electrical distribution systems (also known as "wiring harnesses") and of other components for automotive electronic and electrical distribution systems.[94] Wiring harnesses link a car's computer to the various other mechanisms in the vehicle. Inspections were also conducted in the U.S. and Japan.

1.3.19. French water and sanitation[95]

On 13 April 2010, the Commission, in co-operation with the French competition authority, carried out unannounced inspections at the premises of a number of French companies that are active in the water and sanitation sector.

On 4 June 2010, the Commission announced that it has opened formal proceedings against Suez Environnement in relation to suspicions that a seal placed by the Commission during the inspection was breached.

1.3.20. Agricultural Film[96]

On 29 and 29 April 2010, the Commission carried out unannounced inspections at the premises of companies active in the bale wrap industry and on related markets in several Member States.[97] Bale wrap is plastic stretch film used for the packaging and preservation of silage, hay or straw.

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90 Commission Press Release IP/10/8.
91 Case COMP/39.459.
92 Commission MEMO/10/28.
93 Case COMP/39.748.
94 Commission MEMO/10/49.
95 Commission MEMO/10/134.
96 Case COMP/39.776.
97 Commission MEMO/10/190.

1.3.21. Polyurethane Foam[98]

On 27 June 2010, the Commission conducted dawn raids at premises of companies active in the polyurethane foam sector in several Member States.[99] Recticel, a Brussels-based firm, confirmed that its premises in Belgium, the U.K. and Austria had been visited by Commission officials. Likewise, Carpenter, a firm active in Germany and the U.K., confirmed that Commission officials had requested documents and information but did not specify whether Commission officials had visited any of its premises. Kabelwerk, a Eupen-based firm, also confirmed that it had received a questionnaire about the enquiry but it had not been visited. The sector association for rigid foam, PU Europe, has stated that it was not targeted by the raids. Following the Commission's announcement of the raids, the flexible foam association Europur said it was not aware of any inspections. BASF has stated that it has not been raided. The Commission has not announced any further developments in the case.

1.3.22. Paper Envelopes[100]

On 14 September 2010, Commission officials carried out unannounced inspections at the premises of several European manufacturers of paper envelopes in France, Denmark, Spain and Sweden. The Commission states that it has reason to believe that the companies may have co-ordinated price increases and allocated customers on several European markets.

1.3.23. Nexium (esomeprazole)[101]

On 30 November 2010, Commission officials carried out unannounced inspections at the premises of a limited number of companies active in the pharmaceutical sector in several Member States. According to public sources, the dawn raids were in relation to Nexium (esomeprazole). AstraZeneca confirmed it had been inspected.

1.3.24. Truck Sector[102]

On 18 January 2011, the Commission carried out unannounced inspections at the premises of companies active in the truck sector in several Member States.[103] Daimler and Volvo confirmed they were both being investigated.

Sweden's Scania and Germany's MAN, both allied to German auto giant Volkswagen,

98 Case COMP/39.801.
99 Commission MEMO/10/359. Polyurethane foam refers to a number of different types of foam consisting of polymers made of molecular chains bound together by urethane links. It can be flexible or rigid, but has a low density. Flexible polyurethane foam is most often used in bedding and upholstery, while the more rigid variety is used for thermal insulation and in automobile dashboards.
100 Commission MEMO/10/439.
101 Case COMP/39.801.
102 Case COMP/39.824.
103 Commission MEMO/10/359. Polyurethane foam refers to a number of different types of foam consisting of polymers made of molecular chains bound together by urethane links. It can be flexible or rigid, but has a low density. Flexible polyurethane foam is most often used in bedding and upholstery, while the more rigid variety is used for thermal insulation and in automobile dashboards.

and Fiat Industrial, maker of Iveco trucks also confirmed that they were being investigated. The Commission has not announced any further developments in the case.

The dawn raids follow an UK OFT probe into the sector opened last September.

1.3.25. Rail freight[104]

On 8 March 2011, the Commission conducted unannounced inspections at the premises of companies active in the rail freight sector and related products industry in Baltic countries.

1.4. Ongoing Commission Investigations – Other

1.4.1. Continental/United/Lufthansa/Air Canada[105]

In April 2009, the Commission opened two separate formal antitrust proceedings in relation to the compatibility with Article 101 of cooperation between certain airlines on transatlantic routes. The first investigation concerns both existing and planned cooperation between four current or prospective members of the "Star Alliance" – Air Canada, Continental, Lufthansa and United Airlines. The second investigation relates to proposed cooperation between three members of the "oneworld alliance" – American Airlines, British Airways and Iberia. The Commission has adopted a decision in the oneworld alliance case (*see* Section 2.2.2) while its investigation into the Star Alliance case is ongoing.

When opening the investigation, the Commission stated that the "*agreements provide for the coordination of the airlines' commercial, marketing and operational activities on transatlantic routes (principally routes between the EU and North America). The level of cooperation in question appears far more extensive than the general cooperation between these airlines and other airlines which are part of [the] alliances. In particular, the parties to each agreement intend to jointly manage schedules, capacity, pricing and revenue management on transatlantic routes, as well as share revenues and sell tickets on these routes without preference between these carriers*." The Commission has not published any further documents since the initiation of the investigation into the Star Alliance and the case is ongoing.

1.4.2. Brussels Airlines/TAP Air Portugal[106]
1.4.3. Lufthansa/Turkish Airlines[107]

On 11 February 2011, the Commission opened two separate own initiative formal antitrust proceedings in relation to two separate code share deals between Lufthansa and Turkish Airlines and Brussels Airlines and TAP Air Portugal respectively. The

[104] Commission MEMO/11/152.

[105] Commission MEMO/09/168, Case No. COMP/39.595.
[106] Commission MEMO/11/147, Case No. COMP/39.860.
[107] Commission MEMO/11/147, Case No. COMP/39.794.

agreements allow the carriers concerned to sell as many seats on their partner's flights as they want (free-flow), as long as there are seats available, on routes connecting their hubs (parallel hub to hub). This contrasts with another common form of code-sharing whereby a company sells seats on a partner's flights on routes it does not operate itself in order to extend the reach of services and broaden the choice for customers.

The Commission considers that such form of free-flow, parallel, hub-to-hub code share agreements may distort competition leading to higher prices and less service quality for customers on routes between Germany and Turkey and between Belgium and Portugal, respectively. The routes being the subject of the investigation are Munich-Istanbul and Frankfurt-Istanbul, on which Lufthansa and Turkish Airlines are the major operators and, in the other case, Brussels-Lisbon on which Brussels Airlines and TAP Air Portugal are the only operators.

1.4.4. Telefónica/ Portugal Telecom[108]

On 24 January 2011, the Commission opened an investigation into an agreement between Telefónica and Portugal Telecom not to compete on the Iberian telecommunications markets concluded in the context of Telefónica's 2010 acquisition of sole control over the Brazilian mobile operator Vivo, previously jointly owned by the two Iberian telecoms incumbents. The Commission has a copy of the agreement and of the non-compete clause, which runs from September 2010 to the end of 2011. The Brazilian deal itself is not affected by the investigation.

The Commission is investigating the scope and effects of the cooperation between the parties in Spain and Portugal prior to the 2010 Vivo transaction. Telefónica and Portugal Telecom concluded a cooperation agreement in 1997 concerning markets outside the EU, which was notified to the Commission at the time. In particular, the Commission is investigating whether that cooperation may have included a non-compete strategy affecting EU markets, in particular Spain and Portugal, prior to the non-compete clause concluded as part of the Vivo deal.

1.5. <u>Judgments of the General Court</u>

1.5.1. Thread Producers
1.5.1.1. T-456/05 Gütermann v Commission – 28 April 2010
1.5.1.2. T-457/05 Zwicky & Co. v Commission – 28 April 2010
1.5.1.3. T-446/05 Amann & Söhne, Cousin Filterie v Commission – 28 April 2010
1.5.1.4. T-448/05 Oxley Threads v Commission – 28 April 2010
1.5.1.5. T-452/05 Belgian Sewing Thread (BST) v Commission – 28 April 2010

On 14 September 2005, the Commission fined thread producers from Germany, Belgium, the Netherlands, France, Switzerland and the United Kingdom a total of €43.497 million for operating cartels in the market for industrial thread. Following dawn raids in November 2001 and a subsequent investigation, the Commission found evidence of 3 separate cartels. The first concerned the industrial thread market in the

108 Commission MEMO IP/11/58.

United Kingdom and was not penalised because the imposition of a fine was time-barred. The second cartel – in which Oxley Threads (United Kingdom), Cousin Filterie (France) and Amann & Söhne (Germany) participated from May 1998 to 15 May 2000 – concerned the automotive thread market in the EEA. The third cartel – in which Belgian Sewing Thread ("BST")(Belgium), Amann, Gütermann (Germany) and Zwicky (Switzerland) participated (from January 1990 to September 2001 in the case of BST, Amann and Zwicky, and from January 1990 to November 2000 in the case of Zwicky) – concerned the industrial thread market in Benelux and the Nordic countries.

For the cartel of industrial thread in the Benelux and Nordic countries, the Commission imposed the following fines:

Company	Fine
Coats Ltd	€15.05 million
Amann und Söhne GmbH	€13.09 million
Gütermann AG	€4.021 million
Barbour Thread Ltd	€2.145 million
Belgian sewing thread N.V.	€0.979 million
Bieze Stork B.V.	€0.514 million
Zwicky	€0.174 million

For the cartel of automotive thread in the EEA, the Commission imposed the following fines:

Company	Fine
Cousin/Amann	€4.888 million
Coats	€0.65 million
Oxley	€1.271 million
Barbour	€0.715 million

On 16 December 2005, Oxley filed an appeal with the General Court. On 22 December 2005, Amann & Söhne and Cousin Filterie filed appeals. On 27 December 2005, Belgian Sewing Thread filed an appeal. Finally, on December 30, 2005 Zwicky and Gutermann filed appeals.

On 28 April 2010, the General Court issued its decision. With the exception of BST, the Court rejected all requests for a reduction of the Commission's fines. Regarding BST's application for a reduction in its fine, the Court noted that the amount of a fine may be reduced where an undertaking has cooperated during the investigation. The Court found that BST was initially granted a 20% reduction for providing the Commission with evidence which substantially assisted the Commission in establishing the infringements. Moreover, BST had not substantially contested the facts on which the Commission based its allegations. The Court concluded that the 20% reduction provided to BST was insufficient as the Commission referred frequently to the documents (including the only price list provided by any of the Parties) provided by BST in its decision, which indicated the importance of that evidence. The Court noted that Amann, Gütermann and Zwicky were granted a 15% reduction in their fines even though the Commission described their cooperation as 'useless' in comparison with the evidence provided by DST. The Court concluded that the difference between the reduction in BST's fine and the reduction granted to Amann, Gütermann and Zwicky was unreasonably narrow as the latter three undertakings did not make any particular effort during the administrative procedure.

While the Commission argued that the logic of BST's argument pointed to a reduction in Amann's, Gütermann's and Zwicky's leniency reduction rather than an increase in BST's leniency reduction, the Court granted BST an additional reduction of 10%, in addition to the 20% reduction already granted by the Commission, and reduced its fine to €856 800.

1.5.2. Water, Heating, & Gas Tubes
1.5.2.1. T-21/05 Chalkor v Commission – 19 May 2010
1.5.2.2. T-11/05 Wieland-Werke and Others v Commission – 19 May 2010
1.5.2.3. T-20/05 Outokumpu and Luvata v Commission – 19 May 2010
1.5.2.4. T-19/05 Boliden and Others v Commission – 19 May 2010
1.5.2.5. T-18/05 IMI and Others v Commission – 19 May 2010
1.5.2.6. T-25/05 KME v Commission – 19 May 2010

On 3 September 2004, the European Commission fined a group of companies a total of €222.3 million for operating a cartel in the European market for water, heating and gas tubes for a period of up to 12 years. The companies were Boliden group, Halcor S.A., HME Nederland BV, the IMI group, the KME group, Mueller Industries, Inc., Outokumpu and Wieland-Werke AG. The Commission found that these companies operated a cartel between June 1988 and March 2001 in most of the EEA.

The Commission found that the cartel essentially involved the restriction of competition by means of (i) a system of allocation of production volumes and market shares, and (ii) the setting of targets and price increases. According to the Commission, there were three sets of arrangements between those companies, relating to different products: the "SANCO arrangements," the "WICU and Cuprotherm arrangements" and the "broader European arrangements."

Six of the seven companies concerned, Wieland-Werke AG (fined €27.84 million), the IMI group (€44.98 million), the Boliden group (€32.6 million), Outokumpu (€36.14 million), Chalkor (€9.16 million) and the KME group (€67.08 million) appealed to the General Court for annulment or reduction of their respective fines.

In separate decisions on 19 May 2010, the General Court upheld the fines imposed on four undertakings (Wieland-Werke, Boliden, Outokumpu and KME) and dismissed the Commission's counterclaims for fines to be increased. However, the Court found that the Commission had not proved to the requisite legal standard that the IMI group participated in the cartel between 1 December 1994 and 11 April 1996 and found that IMI's infringement had lasted 10 years and 1 month instead of 11 years and 5 months.

The Court therefore held that the increase in the starting fine imposed on the IMI group should be reduced from 110% to 100%.

In addition, the Court found that the Commission had infringed the principle of equal treatment when calculating the fines imposed on Chalkor and IMI. In particular, the Commission made a mistake by failing to take into account the fact that Chalkor and IMI did not take part in the SANCO arrangements but rather calculated their fines in the same way as those imposed on the companies which had participated in those arrangements. To remedy that mistake, the Court held that the starting amount of the fines imposed on those two companies must be reduced by 10%.

As a result of these two revisions, the Court reduced the fine imposed on Chalkor to €8.2467 million and reduced the fine imposed on IMI to €38.556 million.

1.5.3. Spanish raw tobacco
1.5.3.1. T-29/05 Deltafina v. Commission - 8 September 2010
1.5.3.2. T-24/05 Alliance One International and Others v. Commission - 27 October 2010
1.5.3.3. Case T-33/05 - Cetarsa v Commission - 3 February 2011
1.5.3.4. Case T‑37/05 World Wide Tobacco España, S.A. v Commission – 3 March 2011

On 20 October 2004, the Commission imposed fines totalling €20 million on five companies – Compañia española de tobaco en rama, Agroexpansión, World Wide Tobacco España, Tobacos Españoles and Deltafina. The Commission found that the five companies had participated in a cartel on the Spanish raw tobacco market between 1996 and 2001. The cartel fixed prices paid to tobacco producers and shared quantities of tobacco purchased from the producers.

The largest fine (€11.88 million) was imposed on Deltafina, an Italian company wholly owned by the American company Universal Corp. whose main activities are the processing of raw tobacco in Italy and the marketing of processed tobacco. The Commission found that Deltafina was the leader of the cartel and therefore increased the basic amount of its fine by 50%.

T-29/05 Deltafina v. Commission

On appeal, the General Court rejected Deltafina's argument that it was not present on the relevant market and therefore should not have been held liable. The Court held that the fact that Deltafina was not present on the relevant market, namely the Spanish market for the purchase and processing of raw tobacco, did not preclude it from being penalised for infringing Article 101. The Court found that the object of its conduct, as coordinated with that of other undertakings, was to restrict competition on the market. The Court noted that Deltafina, as the main customer of the tobacco processors, was active on the Spanish market immediately downstream from that on which the contested practices were implemented.

The Court went on to point out that Deltafina actively and directly contributed to the implementation of the cartel and did so in full knowledge of the facts and intentionally. Deltafina therefore could not have been unaware of the anticompetitive and unlawful objective of the cartel. Moreover, in the light of the important position which it held on the market for the purchase of Spanish processed tobacco and the responsibility it had for the coordination and supervision of the commercial activities of the Universal Group in Europe, Deltafina had an interest in ensuring that the restrictive practices at issue were implemented.

Separately, however, the General Court found that the Commission had erred in finding that Deltafina acted as leader of the cartel. The Court recalled that, in order to be characterised as leader, the undertaking in question must have represented a significant driving force in the cartel and borne individual and specific liability for the operation of the cartel.

The Court found that the evidence relied on by the Commission was not sufficient to establish that Deltafina represented a significant driving force in the cartel or even that its role was more important than that of any of the Spanish processors. The Court found that, during a period lasting over five years, Deltafina was present at only a very limited number of meetings at which the unlawful agreements were concluded and that its participation in exchanges of correspondence and information between the members of the cartel was relatively limited. Moreover, the Court found that there was nothing in the file to show that Deltafina took any initiatives to create the cartel, that it was instrumental in securing the participation of any of the Spanish processors or indeed that it assumed responsibility for activities usually associated with acting the part of leader of a cartel, such as chairing meetings or centralising and distributing certain data.

As a result of this finding, the Court concluded that the Commission was not justified in increasing the basic amount of Deltafina's fine by 50% or in taking account of that alleged role in reducing the amount of the fine by only 10% for cooperation. The General Court held that the reduction to be applied to take account of Deltafina's cooperation should be 15%.

T-24/05 Alliance One International and Others v. Commission

Alliance One International Inc, Standard Commercial Tobacco Co (“SCTC”), Inc and Trans-Continental Leaf Tobacco Corp Ltd (“TCLT”) appealed the 2004 Commission Decision in the *Spanish raw Tobacco* cartel investigation in relation to their joint and several liability for the fine imposed on World Wide Tobacco España, SA (“WWTE”) for its participation in the cartel between 1996 and 2001.

WWTE is active in Spain in the first-stage processing of raw tobacco alleged to have participated in the cartel. Between 1998 and May 1999 TCLT held more than two-thirds of the capital of WWTE. TCLT is a wholly-owned subsidiary of SCTC, which is itself a wholly-owned subsidiary of the American multinational Standard Commercial Corp. (“SCC”) (now Alliance One International Inc). In the 2004 Commission Decision, WWTE was fined €1,822,500 jointly and severally liable with TCLT, SCTC and SCC, on the basis that they exercised effective control over WWTE.

On 27 October 2010, the General Court handed out its judgment finding that the Commission was entitled to attribute liability for the infringement to the ultimate parent company and one of the intermediary subsidiaries, but not to another intermediary subsidiary.

Consistent with its previous case law, the General Court confirmed the basic principle that a parent company can be held jointly and severally liable for its subsidiary's infringement of competition law, provided the parent (i) is able to exercise decisive influence over its subsidiary and (ii) has actually exercised such decisive influence. This requirement can be fulfilled by one parent company or several parent companies jointly.

The General Court further noted that when a parent company holds 100 per cent of the capital of the subsidiary, there is a rebuttable presumption that such actual exercise has taken place. The presumption applies both to direct and indirect ownership, however remote.

However, in the Commission decision under review, possibly reflecting the unclear state of the law at the relevant time, the Commission had identified positive evidence of the actual exercise of influence. The Commission examined three main factors with regard to the first period in order to establish whether decisive influence was taking place, namely: (i) role of the WWTE board director appointed by SCTC, and documentary evidence including (ii) board meeting minutes, and (iii) faxes. In its review, the General Court affirmed the Commission's finding that SCC and SCTC exercised decisive influence of SCC and SCTC over WWTE's market conduct (in spite of the 80% and 90% stakes respectively). However, the Court overturned the finding that TCLT exercised decisive influence over WWTE's conduct on the market, as TCLT was a company with no activities of its own and its interest in WWTE was purely financial.

When examining the second period for the existence of a single economic unit from 1998 to the date of the decision, the General Court looked at the factors taken into account by the Commission in order to demonstrate that decisive influence was exercised over WWTE's conduct during that period. It concluded that the Commission established to the requisite legal standard that during this second period SCC and SCTC exercised decisive influence over WWTE's conduct. However, the Court again rejected the Commission's finding that TCLT had exercised such influence during that period, as the evidence relied on did not support this conclusion.

As, the Commission had not established that TCLT had actually exercised decisive influence over WWTE's conduct on the market, the decision was annulled in respect of TCLT's liability only.

On appeal:
Case C-628/10 - Alliance One International, Inc. and Standard Commercial Tobacco Company, Inc. v Commission
Case C-14/11 - European Commission v Alliance One International, Inc. and Standard Commercial Tobacco Company, Inc.

Case T-33/05 - Cetarsa v Commission

On 3 February 2011, the General Court handed down its judgment in Cetarsa's appeal of the *Spanish raw tobacco* cartel decision. The General Court found that the Commission had not sufficiently taken into account Cetarsa's co-operation in fine mitigation pursuant to the 1998 Fining Guidelines, making a manifest error of judgment when concluding that Cetarsa had contested certain facts in the statement of objections. Thus, the fine imposed on Cetarsa was reduced by 10%.

The 2004 Commission Decision in *Spanish raw tobacco* considered that Cetarsa is a public undertaking that held until 1990 a legal monopoly in the processing of raw tobacco in Spain. At the time of the Commission's decision it was still the largest Spanish processor, having bought in 2001 some 67.6% of the raw tobacco bought in Spain that year. As Cetarsa was by far the leading Spanish first processor, the Commission considered that it should be placed in a category of its own and receive the highest starting amount of the fine (€ 8 million).

On appeal of the 2004 Commission Decision in *Spanish raw tobacco*, Cetarsa appealed on the grounds that the Commission had failed to apply the principle of equal treatment, the gravity of the infringement, the duration of the infringement, factors distinguishing Cetarsa, proportionality and equal treatment of small undertakings in fining, and application of the 1996 Leniency Notice.

The General Court dismissed Cetarsa's arguments upholding the Commission decision save for application of the 1996 Leniency Notice. Whilst the Commission had reduced Cetarsa's fine by 25% pursuant to the 1996 Leniency Notice for cooperation prior to the statement of objections that provided the Commission with evidence that materially contributed to establishing the existence of the infringement, or for not contesting the facts contained in the statement of objections. The 1996 Leniency Notice specifies a range in reduction from 10 – 50% at the Commission's discretion for such cooperation.

Cetarsa argued that, in applying the Leniency Notice, the Commission breached the principles of equal treatment and its rights of defence by virtue of its treatment in comparison to that of the other Spanish processors. Cetarsa asserted that it should have been given a reduction of 50% or at least 40%, similar to Tobacos Espanoles Sl (Taes).

The Commission found that the information provided by Cetarsa was less useful than that provided by Taes, which the Court considered to be in its discretion. However, whilst the Commission considered that Cetarsa, unlike Taes, had contested certain facts in the statement of objection, on review of the evidence contained in Cetarsa's response to the statement of objections, the General Court found that the Commission had made a manifest error of judgment when reaching this conclusion. Therefore, the Court considered that the Commission should have granted Cetarsa a further reduction in its fine on the grounds of its cooperation. The General Court considered that a further reduction of 10% was appropriate.

T‑37/05 World Wide Tobacco España, S.A. v Commission

In its 3 March 2011 ruling, the General Court similar to the Cetarsa appeal described above found that the Commission had not sufficiently considered World Wide Tobacco España (WWTE)'s cooperation pursuant to the 1996 Leninency Notice, making a manifest error of judgment when concluding that WWTE had contested certain facts in the statement of objections. Therefore, the General Court has reduced the fine imposed on WWTE by 10%.

1.5.4. Industrial Sack Producers

1.5.4.1. T-26/06 Trioplast Wittenheim v. Commission – 13 September 2010

1.5.4.2. T-40/06 Trioplast Industrier v. Commission – 13 September 2010

On 30 November 2005, the Commission issued a decision fining industrial sack producers from the Benelux countries, France, Germany, and Spain a total of €290 million for operating a cartel in the market for plastic industrial sacks. These sacks are used to package upstream products, including raw materials, fertilisers, polymers, construction materials, agricultural and horticultural products and animal feed.

Following dawn raids in June 2002 and subsequent investigations, the Commission found that the producers of plastic industrial sacks had fixed prices and sales quotas by geographical area, shared the orders of large customers, organised collusive bidding for invitations to tender and exchanged information on their sales volumes from January 1982 to June 2002. The Commission investigated the market on the basis of information brought to its attention by a leniency applicant, British Polythene Industries (BPI).

The undertakings involved in the cartel, and their respective fines, were as follows:

<table>
<tr><th>Company</th><th>Fine</th></tr>
<tr><td>Bernay Film Plastique</td><td>€0.94 million</td></tr>
<tr><td>Bischof+Klein GmbH & Co KG</td><td>€29.15 million</td></tr>
<tr><td>Bischof+Klein France SA</td><td>€3.96 million</td></tr>
<tr><td>Bonar Technical Fabrics NV and Low & Bonar PLC</td><td>€12.24 million</td></tr>
<tr><td>British Polythene Industries PLC and Combipac BV</td><td>0</td></tr>
<tr><td>Cofira-Sac SA</td><td>€0.35 million</td></tr>
<tr><td>Fardem Packaging BV</td><td rowspan="2">€34 million</td></tr>
<tr><td>Kendrion NV</td></tr>
<tr><td>Koninklijke Verpakkingsindustrie Stempher CV and Stempher BV</td><td>€2.37 million</td></tr>
<tr><td>Nordenia International AG</td><td rowspan="2">€39.1 million</td></tr>
<tr><td>Nordfolien GmbH</td></tr>
<tr><td>Plásticos Españoles SA and Armando Álvarez SA</td><td>€42 million</td></tr>
<tr><td>RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co KGaA</td><td>€39 million</td></tr>
<tr><td>Sachsa Verpackung GmbH and Groupe Gascogne</td><td>€13.2 million</td></tr>
<tr><td>Trioplast Wittenheim SA and Trioplast Industrier AB</td><td rowspan="2">€17.85 million</td></tr>
<tr><td>FLSmidth & Co A/S and FLS Plast A/S</td></tr>
<tr><td>M-Kymmene Oyj</td><td>€56.5 million</td></tr>
</table>

On 22 April 2006, Trioplast Wittenheim ("TW") and Trioplast Industrier ("TI") appealed the decision on the basis that the Commission had wrongly assessed the duration of TW's infringement, the gravity of the infringement, and the joint and several liability of the parent company.

TI is a Swedish undertaking and the parent company of the Trioplast Group, which also includes TW, a French company which (before its bankruptcy in 2006) produced industrial sacks, films and FFS Film. TI acquired TW from the Danish company FLS Plast in January 1999. According to the decision, the successive parent companies of

TW during the infringement period would be jointly and severally liable with TW as follows: TI (€7.73 million), and FLS Plast/FLSmidth (€15.3 million).

The General Court dismissed the appeal by TW and upheld the Commission's decision. The Court affirmed that the Commission could use 1996 (rather than 2001, the last complete year of the infringement) as the reference year for assessing the seriousness of the infringement against TW in order to reflect more accurately its market position during the infringement period; TW reduced its activities in the relevant product markets significantly after 1997.

In TI's appeal, the General Court went on to clarify some points with regard to successive joint and several liability. The Court dismissed arguments that the combined amounts imposed on TI, on the one hand, and on FLS Plast and FLSmidth, on the other, exceeded the amount imposed on their subsidiary TW. The Court held that in the case of an infringement committed by a subsidiary having belonged to a series of successive parent companies during the infringement, such an excess amount is not per se inappropriate.

Moreover, the Court confirmed that the Commission is free to attribute joint and several liability to successive parent companies in the manner it sees fit. However, the actual amount to be recovered from TI may not be contingent on the amount recovered from FLS Plast/FLSmidth, separately found to be jointly and severally liable for part of the fine. As separate economic entities, the actual amount paid by TI may not, in principle, exceed the share of its joint and several liability. In the present case, as the Commission failed to specify such a share, the Court annulled the Decision on this point.

Further, the Court reduced the fine imposed to €2.73 million holding that the Commission must determine TI's share of joint and several liability on this fine level. The Court accepted TI's argument that during the period January 1999 to June 2002, when TI was TW's parent company, it had ceased to produce the relevant products, and noted that it was not present in the product market in 1996 the reference year used by the Commission to assess its liability for the infringement.

1.5.5. Gas Insulated Switchgear cartel

1.5.5.1. T-110/07 Siemens v Commission – 3 March 2011

1.5.5.2. T-117/07 and T-121/07 Areva and Others v Commission – 3 March 2011

1.5.5.3. Joined Cases T-122-124/07 Siemens and VA Tech Transmission & Distribution v Commission – 3 March 2011

On 3 March 2011, the General Court issued its judgments in the appeals of the gas insulated switchgear cartel by European companies (appeals by non European companies remain outstanding).

On 24 January 2007, the Commission issued a decision fining over €750 million on eleven groups of companies for participating in a collusive tendering cartel in the market for gas insulted switchgear projects between 1988 and 2004 on the EEA market. Gas insulated switchgear is heavy electrical equipment used to control energy flows in electricity grids. It is therefore a major component of power substations and is sold as an item of equipment to be integrated into a power substation, or as an integral part of the substation. Customers, who are often public utility companies, usually organise tenders in order to find the best switchgear for their needs at the lowest price.

The Commission found that the companies had been engaged in a range of illegal practices and agreements concerning market-sharing, quota allocation, bid-rigging, price-fixing and the exchange of sensitive information.

The cartel participants agreed that Japanese companies would not sell in Europe and European companies would not sell in Japan. European tenders were allocated according to cartel rules and European projects won by members of the cartel outside their home countries were included in agreed global cartel quotas.

The Commission fined Japanese companies, absent from the European market, due to the cartel agreement not to bid on the European market contributing to the restriction of competition in the EU.

The Commission investigated the market on the basis of information brought to its attention by a leniency applicant lodged by ABB on the basis of the 1996 Leniency Notice, which were followed up with dawn raids in the sector on 11 and 12 May 2004.

The undertakings involved in the cartel, and their respective fines, were as follows:

Company	Fine
ABB	€0
Alstom	€65.03 million
Areva	€53.55 million
Fuji	€3.75 million
Hitachi	€51.8 million
Japan AE Power Systems	€1.4 million
Mitsubishi Electronic Corporation	€118.6 million
Schneider	€8.1 million
Siemens (Germany)	€396.6 million
Siemens (Austria)	€22.05 million
Toshiba	€90.9 million

In addition, the Commission increased the fines by 50% for Siemens, Alstom and Areva for their leadership roles as secretary of the cartel and the fine imposed on ABB was increased by 50% (which was, in any event, reduced to zero under the leniency notice) because it was a repeat offender. At the time the total fine imposed of € 750,712,500 was the largest fine imposed by the Commission in relation to a single cartel and, at € 396,562,500, the fine imposed on Siemens (Germany) was the largest imposed on one company for participation in a single cartel infringement.

T-110/07 Siemens v Commission

The General Court dismissed the appeal brought by Siemens AG (Siemens Germany). On appeal, Siemens argued that: (i) the Commission failed to demonstrate and prove the alleged infringements specifically and in detail, (ii) the Commission wrongly assumed that there was a single continuous infringement and wrongly determined the duration of the infringement, (iii) the Commission erred in law in assessing the fine for: (a) seriousness and (b) duration of the infringement, (c) application of an excessive 'deterrent multiplier' to it, (d) uplift for Siemens role as a ringleader which it contested, and (e) full account not taken of Siemens' cooperation with the Commission.

First, the Court reviewed the proof relied on by the Commission in its decision, and found no error of assessment in its review of the evidence. The Court considered that the cartel did have effects within the internal market, given that the Japanese and European members of the cartel divided the markets and that the European companies discussed GIS projects within the EEA and shared them between themselves.

Second, the Court noted that the fact that Siemens interrupted its participation in the cartel was not disputed, but the length of the interruption was in dispute, which the Commission set on the basis of documentary evidence which the Court considered sufficient as Siemens had failed to provide any convincing alternative proof to dispute this conclusion. Notwithstanding such dispute, in spite of the interruption, the Court considered that the Commission rightly found that the agreement in which Siemens subsequently participated was essentially the same as the one in which it had participated prior to its interruption therefore forming part of a single and continuous infringement for the purposes of Article 25(2) of Regulation 1/2003, and time begins to run on the day on which the infringement ceases.

Third, the Commission dismissed the claims in relation to the fine calculation as unfounded.

A plea in relation to the adverse effect of a press leak on the intention to fine Siemens the evening before the Commissioners' meeting to adopt the Commission decision was dismissed as Siemens had adduced no evidence to show that the decision would not in fact have been adopted or would have been different had the leaks not been made.

T-117/07 and T-121/07 Areva and Others v Commission

The business units of the Alstom Group operating in the sector concerned participated in the cartel until the subsidiaries of which they were part were transferred to the Areva Group (business units of the subsidiaries Areva T&D SA and Areva T&D AG, now held by Areva T&D Holding SA and Areva); the business units continued to participate in the cartel during its last four months under Areva ownership.

Alstom was fined € 11.475 million individually, and €53.55 million jointly and severally with Areva T&D SA. Areva T&D SA was fined € 53.55 million jointly and severally with Alstom, € 25.5 million of which was to be paid jointly and severally with Areva, Areva T&D Holding and Areva T&D AG.

On the basis of the foregoing, the Commission joined the appeals of Alstom and Areva.

Both Alstom and Areva appealed on grounds that the Commission erred in its attribution of liability. The General Court found that the Commission had not erred in law in its attribution of liability in its decision. The Commission was correct to find Alstom jointly and severally liable with Areva T&D SA and Areva T&D AG for the participation of the undertaking in question in the infringement for the period it indirectly held the company, on the basis of the presumption of liability resulting from the fact that the parent company held the entire capital of the subsidiaries and on factual evidence submitted during the administrative procedure. The Court also found that the Commission gave adequate reasons for its finding. Further, according to the Court, the Commission was entitled to attribute liability for the participation of the undertaking in question in the infringement to the legal person who, through the intermediary of its wholly-owned subsidiaries, managed that undertaking.

As regards the attribution of liability to the Areva Group, as the parent companies of the wholly-owned subsidiaries Areva T&D SA and Areva T&D AG, for the last four months of the infringement, the General Court rejected the evidence submitted by Areva to rebut the presumption of liability arising from the fact that the parent companies held the entire capital of the subsidiaries. Areva argued that as it was inexperienced in the T&D sector, its new subsidiaries were able to determine their course of action on the market , but the Commission rejected this argument and Areva's evidence as being insufficient for determining independent action. Similar to *General Química* (see below), claims that the participation was not discovered until the Commission's investigation was not sufficient evidence to rebut the presumption of liability.

The Commission also rejected Alstom's plea in relation to an error in law in establishing Alstom's participation as a "single and continuous infringement" .

The Court also dismissed claims that the Commission erred and breached the principles of equal treatment, legal certainty and judicial protection in imposing a joint sanction on Areva and Alstom when they did not form an economic unit.

However, in relation to the fine uplift for the role of ringleader, the Court reduced the fines imposed on Alstom and Areva, on the grounds that, in applying a 50% increase in the basic amount of the fine to be imposed on them for their role of leader in the infringement, the Commission infringed the principles of equal treatment and proportionality as the Court found a substantial difference between how long Siemens carried out the duties of European secretary to the cartel, and how long those duties were carried should differ in accordance with the period during which the different undertakings played the role of leader in the infringement.

Joined Cases T-122-124/07 Siemens and VA Tech Transmission & Distribution v Commission

On 20 September 1998, Reyrolle Ltd was acquired by VA Technologie AG, becoming VA Tech Reyrolle Ltd then Siemens Transmission & Distribution Ltd (Reyrolle - Case T-123/07). On 13 March 2001, VA Technologie, through its subsidiary VA Tech Transmission & Distribution GmbH Co. KEG (KEG - Case T-122/07) transferred Reyrolle into the newly-created company VA Tech Schneider High Voltage GmbH (VAS), in which it held 60% of the shares through its subsidiary, the remainder of which were held by Schneider Electric SA.

Schneider's transfer into VAS consisted of Schneider Electric High Voltage SA, which became VA Tech Transmission & Distribution SA, then Siemens Transmission & Distribution SA (SEHV - Case T-124/07), and of Nuova Magrini Galileo SpA (Magrini - Case T-124/07). Since 1999, SEHV has regrouped the former high-tension activities of several subsidiaries of Schneider Electric.

In October 2004, VA Technologie acquired, through KEG, all of Schneider Electric's shares in VAS. In 2005, Siemens AG acquired exclusive control of the group whose parent company was VA Technologie (the VA Tech Group), via a public bid announced by a subsidiary, Siemens AG Österreich (Case T-122/07). Following that takeover, VA Technologie and, subsequently, VAS were merged with Siemens Österreich.

In relation to pleas in relation to the attribution of joint and several liability, the Court stated that legal entities that participated in their own right in an infringement and which have subsequently been acquired by another company continue to bear responsibility themselves for their unlawful conduct prior to their acquisition, where those companies have not purely and simply been absorbed by the acquiring undertaking but have continued their activities as subsidiaries. The acquiring undertaking may be held responsible only for the conduct of its subsidiary with effect from its acquisition if the subsidiary continues the infringement and if the responsibility of the new parent company can be established.

Thus, the Court amended the fines imposed by Commission (particularly decreasing the fines of Reyrolle, SEHV and Magrini as the Commission had held them jointly and severally liable for payment of a fine which clearly exceeded their joint liability, holding Siemens Österreich and KEG jointly and severally liable for payment of part of the fine imposed on SEHV and Magrini, and holding Reyrolle solely liable for a part of the fine imposed on it):

- SEHV and Magrini, jointly and severally with Schneider Electric SA: € 8,100 000 (for their participation in the cartel during the period prior to 13 March 2001, during which they belonged to the same undertaking);

- Reyrolle, jointly and severally with Siemens AG Österreich, KEG, SEHV and Magrini: € 10,350,000;

- Reyrolle, jointly and severally with Siemens AG Österreich and KEG: € 2.25 million; and

- Reyrolle: € 9.45 million.

However, the Court dismissed the parties other pleas as unfounded in relation to lack of sufficient evidence of the infringement, duration of the infringement, and calculation of the fine. The Court also dismissed a claim that the Commission infringed their right to examine the witness against them, one of the procedural guarantees stemming from Article 6(3)(d) of the European Convention on Human Rights (ECHR) and their right to a fair hearing.

Finally, the Court dismissed a plea in relation to the starting date of the running of the limitations period affirming that it runs from the date that the infringement ceases.

1.5.6. Copper fittings
1.5.6.1. T-375/06 Viega v Commission – 24 March 2011
1.5.6.2. T-376/06 Legris Industries v Commission – 24 March 2011
1.5.6.3. T-377/06 Comap v Commission – 24 March 2011
1.5.6.4. T-378/06 IMI and Others v Commission – 24 March 2011
1.5.6.5. T-379/06 Kaimer and Others v Commission – 24 March 2011
1.5.6.6. T-381/06 FRA.BO v Commission – 24 March 2011
1.5.6.7. T-382/06 Tomkins v Commission – 24 March 2011
1.5.6.8. T-384/06 IBP and International Building Products France v Commission – 24 March 2011
1.5.6.9. T-385/06 Aalberts Industries and Others v Commission – 24 March 2011
1.5.6.10. T-386/06 Pegler v Commission – 24 March 2011

On 20 September 2006, the Commission issued a decision fining over 30 companies a total of €314.76 million for operating a cartel over various periods between 31 December 1988 and 1 April 2004, in a cartel in the copper fittings sector. Copper fittings include copper alloy fittings (e.g. gunmetal, brass and other copper-based alloys). Such fittings connect tubes used to conduct water, air, gas, etc. in plumbing, heating, sanitation and other installations. There are various types of fittings known as end-feed, solder ring, compression, press and push-fit which were all covered by the cartel.

The Commission alleged that between 1988 and 2004, the companies fixed prices, discounts and rebates, agreed on mechanisms to coordinate price increases, allocated customers and exchanged commercially important and confidential information. The Commission investigated the market on the basis of information brought to its attention by a leniency applicant lodged in January 2001, Mueller on the basis of the 1996 Leniency Notice, which were followed up with dawn raids.

The undertakings involved in the cartel, and their respective fines, were as follows:

Company	Fine
Viega GmbH & Co. KG	€54.29 million

Legris Industries SA	€46.80 million * (jointly and severally liable with Comap SA for €18.56 million)
IMI	€48.30 million (jointly and severally liable with Yorkshire Fittings for €9.64 million, with VSH Italia for €0.42 million, with Aquatis for €48.30 million, and with Simplex for €48.30 million)
FRA.BO SpA	€1.58 million
Advanced Fluid Connections	€18.08 million (jointly and severally liable with IBP for €11.26 million and IBP France for €5.63 million)
Kaimer	€7.97 million (jointly and severally liable with Sanha Kaimer for €7.97 million and Sanha Italia for €7.15 million)
Tomkins plc	€5.25 million (jointly and severally liable with Sanha Kaimer for €5.25 million for Pegler)
Aquatis and Simplex	€2.04 million
Aalberts	€100.80 million (jointly and severally liable with each of Aquatis and Simplex for €55.15 million)

The General Court ruled in ten appeals against the Commission's decision regarding the copper fittings cartel. The Court dismissed appeals by Viega, Legris Industries, Comap, IMI and FRA.BO. However, it found that, in the case of IBP, the Commission erred in finding the existence of the aggravating circumstance of providing misleading information. However, this did not lead to an actual reduction of the fine.

The Court also found that the duration of the participation of Kaimer, Sanha Kaimer, Sanha Italia, Tomkins and Pegler in the infringement was less than that determined by the Commission, and their fines were reduced. The Court further reduced the fine imposed on Pegler, considering that the Commission was not entitled to apply a multiplier for deterrence when calculating the fine.

In addition, the fine imposed on Tomkins was also further reduced because the company was held liable only in its capacity as parent company for the participation of Pegler, its subsidiary, and the Court ruled that the liability of a parent company cannot exceed that of its subsidiary.

As regards Aalberts, Aquatis and Simplex, the Court also found that the Commission erred in finding that they had participated in the cartel between 25 June 2003 and 1 April 2004. According to the Court, although the Commission had established a bilateral contact in the time period, they had not established that Aquatis was aware of the fact that it had, through its conduct, joined a cartel made up of different parts that had a common purpose or the cartel in which it had already participated before March 2001 and which was ongoing. Therefore, the Court annulled the Commission's decision and cancelled the fines imposed on them in that regard.

1.5.7. T-461/07, Visa Europe Ltd and Visa International Service v Commission - 14 April 2011

On 14 April 2011, the General Court upheld the Commission's 2007 decision fining Visa €10.2 million for refusing to admit Morgan Stanley as a member.

In its decision, the Commission considered that Visa had violated Article 101 TFEU[109] by refusing, without objective justification, to admit Morgan Stanley as a member between March 2000 and September 2006. Visa's by-laws contained a rule which prevented applicants who were deemed to be competitors to Visa from becoming members of the Visa scheme. The Commission found that this rule, as applied to Morgan Stanley (which was not in fact a competitor of Visa in the EU in the cards network market but in the US), prevented Morgan Stanley from entering the UK credit and deferred debit/charge card acquiring market and had potential anti-competitive effects in that market. The Commission concluded that the application of the rule did not satisfy the conditions for exemption under Article 101(3) TFEU.

On appeal to the General Court, Visa claimed, inter alia, that the Commission erred in relation to its assessment by applying the incorrect legal and economic tests in relation to the alleged effects of the non-admission of Morgan Stanley due to the fact that it considered whether there was "scope for further competition". Visa further claimed that Morgan Stanley was not in fact prevented from entering the relevant market, but even if it had been, the Commission erred in finding that there were sufficient anti-competitive effects.

Visa also made claims that the Commission infringed essential procedural requirements by changing its case on restrictive effects at the point at which it reached its decision, without giving Visa an opportunity to respond to that new position.

Finally, Visa also made claims that the Commission erred in relation to the fine imposed due to the (i) uncertainty about the illegality of the non-admission of Morgan Stanley -- the agreement in question had been notified to the Commission under Regulation 17/62 and the power to impose a fine under Regulation 1/2003 only arose due to the Commission's serious delay in the administrative procedure; (ii) the fine was manifestly excessive and disproportionate given the reasonable doubt relating to the

[109] Case COMP/37.860.

illegality of Visa's conduct; and (iii) no multiplier for duration should have been applied to the fine as the Commission would only have been entitled to impose a fine for the period for which there was evidence that Morgan Stanley was prevented from entering the UK acquiring market.

However, the General Court rejected all claims.

In particular, the Court held that an assessment of the conditions of competition in a given market has to be based not only on the existing competition between undertakings already present in the market in question, but also on potential competition from new entrants. The Court took the view that the Commission could justifiably consider that the entry of a new player would have created scope for further competition in the UK acquiring market. Lastly, according to the Court, the essential factor on which the assessment of a potential competitor must be based is the ability of a potential competitor to enter the market. In the case of Morgan Stanley, this ability to enter the market had not been challenged and was not merely theoretical.

On the remaining pleas, the Court considered that the change in the reasoning in the contested decision as compared with that to be found initially in the statement of objections, far from disclosing an infringement of the applicants' rights of defence, proved, on the contrary, that the applicants were able to express their views on the complaint made by the Commission that, in the light of the existing level of competition in the market in question, the conduct at issue had effects which were restrictive of competition. Finally, the Court observed that the fine imposed by the Commission related to the period following the statement of objections and not based on the entire period of the infringement so the Commission did not err in its consideration of the fine pursuant to the 1998 Fining Guidelines.

1.6. <u>Judgments of the Court of Justice of the European Union</u>

1.6.1. C-413/08 P Lafarge SA v. Commission – 17 June 2010
1.6.2. C 407/08 P Knauf Gips KG v. Commission – 1 July 2010

On 27 November 2002, the Commission imposed fines totalling €478 million on Lafarge, Gyproc, BPB and Knauf Gips KG for price fixing in the plasterboard market. The Commission found that the Parties had participated in a single, continuous cartel which included exchanges of information on sales volumes, concerted action on price increases and meetings with a view to "stabilising" the plasterboard markets in Germany, the United Kingdom, France and the Benelux between 1992 and 1998. Following unsuccessful appeals to the General Court, Lafarge and Knauf both appealed to the CJEU.

C-413/08 P Lafarge SA v. Commission

On 17 June 2010, the CJEU confirmed the fine of €249.6 million imposed on Lafarge. For the purposes of calculating the amount of the fine, the Commission applied an increase of 50% because of a Lafarge's previous infringement of the competition rules. The General Court, in its judgment of 8 July 2008, affirmed the Commission's decision.

Lafarge submitted that the Commission should not have taken account of the previous infringement because the decision establishing that previous infringement had not, at that time of the plasterboard decision, become definitive. Lafarge had previously been fined, in a Commission decision of 1994, for its participation in a cement cartel, but that decision was not confirmed by the General Court until 2000, whereas the infringement on the plasterboard market had come to an end in 1998. Lafarge therefore argued that, in 1998, it was not the subject of a finding of infringement which had become definitive, since the General Court had not yet ruled on the action against the 1994 decision.

The CJEU responded that Commission decisions are presumed to be lawful until such time as they are annulled or withdrawn. Moreover, actions before the European Courts do not have suspensory effect. Consequently, even if a Commission decision is still subject to judicial review, it continues to have full effect, unless the General Court or the CJEU hold otherwise. As regards the possibility that the decision establishing a previous infringement is annulled by the European Courts after the adoption of a later decision in which the fine was increased for recidivism, the Court stated that the Commission must then take the necessary measures to comply with the Court's judgment. It may, thus, have to amend the later decision insofar as it includes an increase of the fine for repeated infringement even in the absence of a request to do so from the undertaking concerned.

C 407/08 P Knauf Gips KG v. Commission

On 1 July 2008, the General Court affirmed the Commission’s decision and the fine of €85.8 million imposed on Knauf Gips KG. Knauf Gips KG then brought an appeal before the CJEU seeking to have that judgment set aside or the fine imposed reduced.

Knauf Gips KG argued that it should not be liable for the infringement of its subsidiaries. The Knauf Group is composed, in particular, of Knauf Gips KG and Gebrüder Knauf Verwaltungsgesellschaft KG (‘GKV’) which owns, directly or indirectly, ten companies which operate on the plasterboard market. Among the arguments deployed before the Court, Knauf Gips KG submitted that GKV and its subsidiaries, on the one hand, and itself, on the other, do not constitute an economic unit for the purposes of competition law. Knauf Gips KG therefore argued that it should not be held liable for the actions of the Knauf Group.

In response, the CJEU first stated that the concept of an ‘undertaking’ under EU competition law covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal. The existence of an economic unit may thus be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit.

The Court concluded that GKV does not determine its conduct on the market independently, but is dependent in that regard on Knauf Gips KG. The fact that there is no single legal person at the apex of the Knauf Group is no obstacle to Knauf Gips KG being held liable for the actions of that group. Indeed, the legal structure particular to a group of companies, which is characterised by the absence of a single legal person at the apex of that group, is not decisive where that structure does not reflect the effective functioning and actual organisation of the group. Consequently, the CJEU found that the lack of subordinating legal links between Knauf Gips KG and GKV cannot cast any doubt on the conclusion that the former of those two companies must be held liable for the activities of the Knauf Group, since it is established that, in reality, GKV does not determine its conduct on the plasterboard market independently. The CJEU therefore upheld that the Knauf Group was a single economic entity and that Knauf Gips KG was therefore liable for any infringements of its subsidiaries.

On a separate procedural point, the General Court had found that Knauf Gips KG had presented itself during the administrative procedure as sole interlocutor with the Commission and did not challenge that capacity at any time during that procedure. In the General Court's view, the onus was on Knauf Gips KG to react during the administrative procedure, or be faced with the prospect of no longer being able to do so before the EU Courts, by demonstrating that, despite the factors relied on by the Commission, it could not be held liable for the infringement committed by other companies in the Knauf Group.

The Court reversed this section of the General Court's decision and found that there is no requirement that the addressee of the statement of objections must react during the administrative procedure or be barred from doing so later at the stage of judicial proceedings. Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, the Court found that it cannot restrict the actual exercise of the right to bring proceedings before the General Court. The Court found that "*such a restriction is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence*" and that "*the rights to an effective remedy and of access to an impartial tribunal are guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union which, under the first subparagraph of Article 6(1) TEU, has the same legal value as the Treaties*."

1.6.3. C-90/09 P General Química and Others v Commission – 20 January 2011

In a 20 January 2011 judgment, the CJEU affirmed that the presumption of parental liability is rebuttable in overturning the 2008 General Court judgment.

In a 2005 decision, the Commission fined four companies a total of € 75.86 million for a price-fixing and information sharing cartel in the rubber chemicals market: Repsol YPF SA (RPYF), its wholly owned subsidiary Repsol Quimica SA (RQ) and General

Quimica SA (GQ) (Repsol Quimica's wholly owned subsidiary) were jointly and severally fined €3.38 million.

In its decision, the Commission found that Flexsys, Bayer AG and Crompton (now Chemura and including Crompton Europe and Uniroyal Chemical Company) had been involved in a cartel in which they exchanged pricing information and/or agreed to raise prices for certain rubber chemicals from 1996 to 2001. GQ's participation in the cartel was limited to the years 1999 and 2000. GQ, RQ and RPYF appealed to the General Court seeking annulment of the Commission's decision, insofar as it found that the three companies were jointly and severally liable for the infringement. They also sought the annulment or reduction of the fine imposed.

On 18 December 2008, the General Court dismissed the appeal in its entirety confirming that the Commission was correct to find that RPYF and RQ were jointly liable with GQ.

On appeal to the CJEU, the applicants argued that the errors in law on the imputation of parental liability were two-fold: (i) the General Court erred in the criterion used for the attribution of responsibility to the parent company for the actions of its subsidiary, and (ii) the General Court erred by attributing responsibility to the parent company on the basis solely of finding that the parent company had the possibility or capacity to exercise decisive influence over its subsidiary.

In relation to the imputation of liability to the ultimate parent, the parties argued that the General Court had erred in law by automatically extending responsibility for an infringement by a subsidiary to the parent company at the head of the corporate group.

Liability of the parent company

The CJEU reiterated that the presumption of parental liability applies when a subsidiary is wholly owned, whether directly or indirectly, that it had recently affirmed in its 2008 Akzo judgment: there is a rebuttable presumption that a parent company of a wholly-owned subsidiary does exercise such decisive influence and it is for the parent company to adduce sufficient evidence to rebut that presumption. Thus, the CJEU held that the General Court did not err in law insofar as it found that, in the case of a wholly-owned subsidiary, the Commission is not required to adduce additional evidence in order to rely on the presumption of decisive influence.

However, the Court agreed with the parties' claim of an error of law ruling that the General Court had not given sufficient reasons for rejecting the parties' arguments. In particular, the General Court failed to sufficiently set out the reasons why it considered on the facts that RQ's order to GQ to cease any practice that might constitute an infringement of the competition rules, following the Commission's inspection at GQ's place of business, was in itself sufficient to prove that RQ exercised a decisive influence over GQ's policy. Rather, the General Court merely asserted the principle, without setting out in a clear and unequivocal manner the grounds which led it to its conclusion.

Liability of the ultimate parent

In relation to the pleas that the General Court had erred in law by automatically extending responsibility for an infringement by a subsidiary to the parent company at the head of the corporate group, the Court held that the General Court did not err in finding that the rebuttable presumption of decisive influence applied to the facts of this case and that the appellants could be held jointly and severally liable by the Commission, in particular as a result of GQ being wholly owned by RQ, and RQ, in turn being wholly owned by RYPF. Where a holding company holds 100% of the capital of an intermediary company which, in turn, holds the entire capital of a subsidiary of its group which has been alleged to have infringed the EU competition rules, there is a rebuttable presumption that the holding company exercises decisive influence over the lower subsidiary alleged to have infringed the EU competition rules.

The CJEU also rejected pleas in relation to errors in its assessment of the evidence as inadmissible as the applicants did not claim on appeal that the General Court had distorted the facts nor did they plead an error of law.

Court's final judgment

Due to the errors in law, the CJEU itself considered whether (i) the Commission committed an error of assessment by not considering, first, that the order given by RQ to GQ showed that RQ had no knowledge of the infringement at issue and did not participate in that infringement or encourage its subsidiary to commit it, and (ii) whether the evidence actually submitted by the appellants in relation to the competence of GQ's directors and their independence in the day-to-day running of GQ was sufficient to rebut the presumption of decisive influence.

In the case of the former, the Court considered that the fact that RQ was made aware of the infringement only after the Commission's inspection of the place of business of GQ and that it did not participate directly in that infringement or encourage it to be committed was not in itself sufficient to show that the two companies do not constitute a single economic unit nor was it sufficient to rebut the presumption that RQ actually exercised decisive influence over GQ's conduct.

In the case of the latter, the Court found that GQ did not act autonomously on the market from its parents for three reasons:

- RQ’s board of directors intervened to a significant extent in the essential strategic matters of GQ.
- The sole director of GQ, who was designated by RQ, acted as a link between these two entities.
- Information on the implementation stage of strategic and commercial plans was exchanged between the management of RQ and GQ.

Therefore, the Court considered that the attribution of liability to the parents of GQ was proper, in spite of the Commission and the lower court's errors of law on the analysis.

1.6.4. C-260/09 P Activision Blizzard Germany GmbH v. Commission – 10 February 2011

A 2002 Commission decision imposed fines on Nintendo and some of its distributors fines totalling €167.843 million for their participation in certain agreements and concerted practices in the markets for Nintendo games consoles and games cartridges. The decision concerned Nintendo and seven exclusive distributors of Nintendo products: John Menzies plc (United Kingdom); Concentra – Produtos para crianças SA (Portugal); Linea GIG SpA (Italy); Bergsala AB (Sweden); Itochu Hellas, the wholly-owned Greek subsidiary of Itochu Corporation, a Japanese undertaking; Nortec AE (Greece); and Activision Blizzard Germany GmbH, formerly CD-Contact Data GmbH (Belgium and Luxembourg).

The Commission alleged that the distribution agreements were designed to restrict parallel trade, that is to say, exports from one country to another by parallel distribution channels over a period from 1991 to 1997. Activision Blizzard was fined €1 million.

On appeal, a 2009 General Court judgment found that the Commission decision had not granted Activision Blizzard the benefit of the attenuating circumstance of its exclusively passive role in the infringement and, consequently, reduced the fine imposed on that company to €500,000. On the other hand, the General Court dismissed the application for annulment of the Commission's decision. Activision Blizzard appealed to the CJEU.

The CJEU dismissed the appeal and upheld the General Court judgment holding that the General Court neither distorted the evidence nor made a manifest error of assessment in finding that the documents relied on by the Commission constituted sufficient evidence of the existence of an agreement between Activision Blizzard and Nintendo which was contrary to the EU competition rules.

Furthermore, the CJEU held that sufficient reasons were stated for the judgment under appeal to enable Activision Blizzard to know the reasons which led the General Court to conclude that it had participated in an agreement with the object of restricting parallel trade and to enable CJEU to review that judgment.

1.6.5. Joined Cases C-201/09 P ArcelorMittal Luxembourg v Commission and C-216/09 P Commission v ArcelorMittal Luxembourg – 29 March 2011

1.6.6. Case C-352/09 P ThyssenKrupp Nirosta v Commission – 29 March 2011

In 1994, the Commission imposed fines on the companies that had participated in a cartel in the *Steel beams* market, including ArcelorMittal Luxembourg (formerly ARBED).

The Commission adopted Decision 94/215/ECSC under the European Coal and Steel Community Treaty (ECSC), which laid down special rules on competition in the steel sector. By Decision 98/247/ECSC it imposed a penalty on ThyssenKrupp Nirosta (formerly ThyssenKrupp Stainless) for participating in a cartel in the stainless steel flat products sector (alloy surcharge).

The two undertakings contested those decisions, and the Court of First Instance (now the General Court) and the Court of Justice annulled them, in 2003 and 2005 respectively, on the ground of breaches of the rights of the defence (Case C-176/99 P, Joined Cases T-45/98 and T-47/98 and Joined Cases C-65/02 P and C-73/02 P).

The Commission then decided to bring fresh proceedings in respect of those infringements of the ECSC Treaty, applying its substantive rules, even though it had expired on 23 July 2002. The General Court, before which ArcelorMittal and ThyssenKrupp brought actions, annulled the Commission's decision concerning the subsidiaries of ArcelorMittal Luxembourg because the infringement was time-barred i. However, the General Court rejected all the pleas put forward by the parent company ArcelorMittal Luxembourg and by ThyssenKrupp.

The two companies appealed in particular the General Court's finding that the Commission was entitled to fine them, after the expiry of the ECSC Treaty, for infringements committed prior to the expiry of the ECSC Treaty.

However, on appeal, the CJEU, in its judgment of 29 March 2011, upheld the General Court judgment affirming that the Commission was able, after the expiry of the ECSC Treaty, to apply procedural rules adopted on the basis of the EC Treaty to infringements of the ECSC Treaty.

1.7. Policy Developments

1.7.1. Best Practices – 6 January 2010

On 6 January 2010, the Commission published documents setting out its: (i) Best Practices in Antitrust Proceedings, and (ii) Guidance on Procedures of the Hearing Officer, and (iii) Best Practices for the Submission of Economic Evidence (together, the "Best Practices Papers").[110]

The Best Practices Papers are designed to provide detailed guidance on how the Commission's antitrust procedures work in practice. The Commission published the guidance to enhance the transparency and the predictability of Commission antitrust proceedings by making it easier for companies under investigation to understand how the investigation will proceed, what they can expect from the Commission and what the Commission will expect from them. They are being applied by the Commission provisionally from the date of their publication, but stakeholders were invited to submit comments on the documents with a view to adjusting them in the light of comments from interested parties.

Best Practices in Antitrust Proceedings: The Best Practices in Antitrust Proceedings takes the reader, in chronological order, through antitrust proceedings relating to Article 101 and 102 TFEU, starting with how the Commission decides whether to give priority

110 These documents can be found on DG COMP's website (http://ec.europa.eu/competition/consultations/2010_best_practices/index.html), although the consultation period is now closed.

to a certain case and ending with the potential adoption of a decision. These Best Practices do not, however, cover the Commission's procedures in relation to Article 106 TFEU on the application of EU competition law to public undertakings, undertakings to which Member States grant special or exclusive rights and undertakings entrusted with the operation of services of general economic interest.

The aim of the Best Practices Papers is to improve procedures by enhancing transparency, while at the same time ensuring the efficiency of the Commission's investigations and the uniform application of the antitrust procedures. They deal extensively with the Commission's practices during the investigative phase of a case, but also with procedures leading up to a prohibition decision, commitment procedures, the procedure for the rejection of complaints, the limits to the Commission's use of information and the adoption, notification and publication of decisions.

Important areas where the Commission has amended its procedures include:

- earlier opening of formal proceedings, as soon as the initial assessment phase has been concluded;

- offering state of play meetings to the parties at key points of the proceedings;

- disclosing key submissions, including giving early access to the complaint, so that parties can already express their views in the investigative phase;

- public announcements upon the opening and closure of procedures, as well as when statements of objections have been sent; and

- providing guidance on how the new instrument of commitment procedures is to be used in practice.

This paper represents a useful clarification and summary of the Commission's practice and procedure, but in certain areas it favours the interests of the Commission over those of the parties under investigation in ways that may either result in greater procedural inefficiency and delay, or will undermine the procedural rights of those under investigation. In particular, the robustness of the document would be substantially improved if it contained greater emphasis on the parties' rights of defence (in accordance with the European Convention on Human Rights and the Charter of Fundamental Human Rights), and elaborated on the internal mechanisms within DG COMP that serve those purposes.

The paper makes no reference to the Commission's duty to investigate cases in a fair and impartial manner and the Commission's role as investigator, prosecutor and, ultimately, first instance judge of Article 101 and 102 infringements, which necessitates the use of rigorous institutional checks and balances.

The publication of the Best Practices Papers has not satisfied the demands of the legal community for greater clarity of the Commission's review processes. The EU Ombudsman has received a complaint that the Commission has not published its

Antitrust Manual of Procedure. This is an internal Commission document that describes in detail the Commission's review process. The Commission refuses to publish the document and claims that its public circulation would prejudice its decision making ability. It also claims that the publication of the Best Practices Papers satisfies the need for greater clarity in its decision making process. It remains to be seen whether it will yield to demands for further transparency and openness.

Hearing Officers' Guidance Paper: Hearing Officers are the independent guardians of the rights of defence and other procedural rights of companies involved in competition proceedings. This paper is the first document laying out the hearing officer Mandate,[111] and how procedural regulations and soft law operate from a hearing officer's point of view. The document is mainly descriptive and aims to make their role and their interaction with DG COMP more transparent. The paper not only sets out the various tasks of the hearing officers as established by legislation, but it also outlines how they are usually carried out and it explains how companies can make best use of certain instruments, including an oral hearing. Additionally, it provides companies subject to investigations, complainants and other third parties with a manual of when they can turn to the hearing officers to ensure that due process is respected. This guidance relates only to Articles 101 and 102 TFEU; it does not apply to merger proceedings, although it may inspire the exercise of the hearing officer's function in that context.

Finally, the paper explains the reporting obligations and the advisory role of Hearing Officers towards the Competition Commissioner, the College of Commissioners and the addressees of Commission decisions. It should be read in conjunction DG COMP's Best Practices Papers, which it complements.

Since the publication of the Hearing Officers' Guidance Paper, we have seen the appointment of Wouter Wils[112] as Hearing Officer. He joined Michael Albers in the role on 16 September.

Best Practices on the Submission of Economic Evidence: In light of the increasing importance of economics in complex competition cases, DG COMP often requests substantial and complex economic data during its investigations. Parties often submit arguments based on complex economic theories on their own initiative. In order to streamline the submission of such economic evidence, the Best Practices on the Submission of Economic Evidence seek to outline the criteria which these submissions should fulfil. The Best Practices also explain the practice of DG COMP's case teams and the Chief Economist when interacting with parties who submit economic evidence. The Best Practices are designed to:

111 Commission Decision of 23 May 2001 on the terms and reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001, p 21. See also Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, p. 1 and Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Implementing Regulation), OJ L 123,27.4.2004, p.18.

112 Mr. Wils was previously a member of the Commission's Legal Service and a Visiting Professor at King’s College London. He was educated at Louvain, Utrecht and Harvard, and is a former referendaire of Advocate General Van Gerven at the CJEU.

- ensure that economic analysis meets certain minimum standards from the outset;

- facilitate the efficient gathering and exchange of facts and evidence, in particular any underlying quantitative data; and

- promote the use in an efficient way of reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative.

Advice is given on the content and presentation of economic or econometric analysis, to facilitate replication of empirical results by DG COMP, as well as advice on requests for quantitative data to ensure that timely and relevant input for the investigation can be provided.

This paper provides sensible guidance on the content and presentation of economic submissions, and useful clarification of DG COMP's approach towards requests for quantitative data. Opportunities for parties to liaise with the Commission in order to refine the scope of data to be provided, and to confirm how they should be presented are particularly welcome. This will help to ensure that data requests are proportionate, not only in respect of the difficulty, time and cost involved in retrieving the data, but also with relation to the necessity of the data itself.[113] As the General Court has noted, "*it is necessary that an obligation imposed on an undertaking to supply an item of information should not constitute a burden on that undertaking which is disproportionate to the requirements of the inquiry*".[114] Given the threat of fines for the incomplete or late supply of information it is unfortunate that this aspect of the principle of proportionality is not referred to in the paper.

The Commission's efforts to increase procedural transparency and efficiency, and the substantial contribution made to those aims by the three documents described above were broadly welcomed, although they still testify to the Commission's prioritisation of its prosecutorial imperative over the requirement of fairness and address, to a greater extent, the form, rather than the substance, of procedural fairness. This is an opportunity missed for the Commission to embed assurances as to its modes of investigation and issues such as evidential standards that should be adopted and the need to give appropriate consideration to exculpatory evidence and lines of inquiry.

1.7.2. New Block Exemption Regulation for the insurance sector – 24 March 2010

On 24 March 2010, the Commission partly renewed the block exemption for agreements in the insurance sector, which was due to expire on 31 March 2010. It came into force on 1 April 2010 and will be valid until 31 March 2017.

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113 It is not uncommon for those subject to investigation to expend substantial resources on collecting information that is not, in the event, considered by the Commission to be material to its final decision, or which involved a disproportionate burden on the company in question, given the relative unimportance of the facts that it sought to establish, its relevance to the establishment of those facts, the unlikelihood of the theory of harm that it sought to verify, or the availability of other data that would have been adequate for the desired purpose.

114 Case T‑145/06, *Omya AG v. Commission*, judgment of the General Court of 4 February 2009, paragraph 34.

Following research conducted by the Commission, agreements to share information on certain joint compilations, tables, and studies and certain coinsurance and reinsurance pools will continue to be granted automatic exemption from EU competition rules. The criteria for block exemption of those agreements has however been tightened.

The block exemption will no longer apply to agreements on standard policy conditions and models and agreements setting common standards for security devices and their installation. For these agreements, insurers need to carry out individual assessments of their compliance with competition law, with reference to generally applicable principles and guidelines.

Joint compilations, tables and studies: The Commission recognises that sharing information on the average costs of insuring risks reduces information asymmetries that weigh more heavily on smaller insurers and new entrants, and therefore stimulates competition by reducing barriers to entry and expansion.

It was claimed that the removal of this block exemption could create a risk that larger insurers would continue to cooperate but decline to share data with smaller rivals and new entrants, with adverse consequences for competition and, ultimately, consumers. Consequently, the Commission has decided to include joint compilations and tables within the scope of the new block exemption regulation.

The Commission has however introduced a new right of access to the results of the information exchange for customer and consumer organisations, except for public security reasons. It has also provided further clarifications to the scope of the exchange of information covered by the block exemption regulation.

Common Coverage of Certain Types of Risks ("Co(re)insurance pools"): Coinsurance pools and reinsurance pools (with the exception of co(re)insurance on subscription markets) are block exempted, provided that certain market share thresholds are met and black listed restrictions are avoided. The Commission recognised that cooperation through insurance pools is often indispensable for the coverage of large or exceptional risks. They also tend to lower barriers to entry and expansion by smaller insurers, not least because they allow them to gain an experience of risks with which they may not be familiar. The Commission considered that this enhanced need for cooperation is specific to the insurance sector, and would be harmed if the block exemption were withdrawn.

However, the Commission has decided that for the purpose of assessing whether the market share thresholds in the block exemption are met, market shares shall be calculated not only on the basis of gross premium income earned within the pool but also on the basis of gross premium income earned outside the pool. The Commission has also broadened the definition of "new risks" to cover risks the nature of which has changed so materially that it is not possible to know in advance what subscription capacity is necessary to cover such a risk.

During its review, the Commission expressed concern that many insurers mistakenly concluded that their pools fell within the block exemption, for example as a result of a misinterpretation of the block exemption (in particular, the definition of a "new risk", the coinsurance of which is not subject to a market share threshold) or due to defining incorrectly the scope of the relevant market when calculating market shares. Consequently, insurers may wish to take the revision of the block exemption as an opportunity to audit their compliance with all coinsurance and reinsurance pools in which they participate, and not just those that will fall outside the block exemption as a result of the revision.

Standard policy conditions: The Commission agreed with industry respondents to the consultation that, in many cases, standard policy conditions ("SPCs") can give rise to positive effects for competition and consumers. However, the Commission considers that the use of SPCs is not sufficiently "special" or specific to the insurance industry to merit a sector specific exemption. The Commission noted that in numerous other sectors, standardisation of non-binding terms has been possible without a specific exemption. Moreover, the Commission considers it likely that SPCs would continue to be agreed – or imposed by regulations – in the absence of a block exemption, in particular given its view that in many cases SPCs do not give rise to actual or potential anti-competitive effects.

Security devices: The Commission considers that the competition issues arising out of standard setting agreements for security devices are not sufficiently specific to the insurance sector to justify a block exemption. In addition, despite the existence of various merits of cooperation in this area (*e.g.,* efficiencies that can be achieved in identifying and testing appropriate security devices), the Commission identified several areas in which such agreements could give rise to competition concerns, such as the partitioning of markets for the supply and installation of security devices, resulting from differing standards and testing procedures in different EU Member States. Consequently, the Commission has decided not to renew the block exemption in respect of security devices.

For insurers, formulating future standards, removal of the block exemption is likely to necessitate greater reliance on the Commission's generally applicable guidelines on cooperation agreements between competitors.

1.7.3. New Vertical Restraints Block Exemption Regulation and Guidelines on Vertical Restraints – 20 April 2010

The new Vertical Block Exemption Regulation (the "New Block Exemption") and Guidelines on Vertical Agreements (the "New Guidelines") were published on 20 April 2010 and came into force on 1 June 2010. These are largely the same as the draft versions that were previously issued for consultation, subject to some minor, but important, clarifications. The consequences of the new legislation for suppliers and distributors include, among other things, that: (i) distributors with significant market shares will face increased compliance costs in relation to their sourcing arrangements; (ii) suppliers and distributors have greater clarity on the restrictions that may be placed on sales over the internet; (iii) suppliers have more scope to engage in resale price maintenance in certain limited circumstances; (iv) distributors and suppliers have some guidance on the assessment of certain common retail practices such as slotting allowances, listing fees and category management; and (v) certain developments in case law and Commission policy over the past decade are better reflected.

The new legislation comes almost a year after a consultation on draft versions of the block exemption and guidelines. That consultation resulted in a large number of comments from stakeholders, some of which have been addressed in the new legislation. However, the final version necessarily represents something of a compromise between conflicting interests in many areas, in particular as regards online sales.

Article 101(1) prohibits anticompetitive agreements between undertakings which have an effect on trade between EU Member States, and which do not meet the criteria for exemption under Article 101(3). The New Vertical Block Exemption updates and replaces Commission Regulation 2790/1999 of 22 December 1999 (the "Old Block Exemption"), which automatically exempts a wide range of distribution and supply arrangements from the application of Article 101. Agreements falling outside the scope of a block exemption are not necessarily prohibited, but instead must be individually assessed for compliance.

As is the case for the Old Block Exemption, the New Block Exemption will be binding on national courts and competition authorities of EU Member States in the way that they apply Article 101 and, in many cases, national competition rules. The New Guidelines provide updated explanations of how the Commission interprets the Block Exemption and also describes its approach to assessing agreements that fall outside the scope of the Block Exemption. The New Guidelines are not binding on national courts or competition authorities, but will nonetheless be influential in relation to the interpretation of both EU and national competition laws.

The New Block Exemption came into force on 1 June 2010, subject to a one year transition period for existing agreements that will cease to be block exempted as a result of changes introduced by the New Block Exemption.

Application of the Block Exemption to restrictions on online sales: As is the case under the Old Block Exemption, restrictions on "active" sales into a territory or to a customer group that has been exclusively allocated to another distributor or reserved to the seller fall within the scope of the New Block Exemption, while restrictions on "passive" sales to such customers and territories are viewed as hardcore restrictions that cannot benefit from the block exemption. Sales made over the internet are still viewed by the Commission as passive sales, even if a distributor's website is translated into the language of another territory. The following examples of hardcore restrictions of internet sales have been added to the New Guidelines:

- any actual or de facto ban on Internet sales;
- a requirement that a distributor must limit internet sales as a proportion of its total sales. This is subject to an important concession permitting suppliers to require distributors to have one or more brick and mortar shops or showrooms and to sell a minimum volume or value of products offline;

- a requirement that a distributor must prevent customers located in certain territories from viewing its website, to reroute them to another distributor's website or to terminate their transactions; and
- higher prices for products intended to be resold over the Internet (although suppliers can pay a fixed sum to distributors to support off-line sales).

The New Guidelines now also clarify what types of online marketing activity by a distributor will be viewed as active sales, and can therefore be restricted. These include: (i) the sending of unsolicited emails; (ii) general advertising or promotion in any format that involves investments that are attractive only because they reach customers outside the distributor's exclusive territory or customer group; (iii) territory-based banners on third party websites; and (iv) paying a search engine or search engine optimiser to make a website more easily found in a particular territory or by a particular customer group.

The New Guidelines also provide that suppliers may require quality standards for distributors' websites. However, where a supplier is operating a selective distribution system, it must ensure that those standards are "*overall equivalent to*" those that apply to sales from physical outlets. Consequently, in order to remain within the New Block Exemption, suppliers' standards for online sales must "*pursue the same objectives and achieve comparable results, and any differences between the criteria for online and offline sales must be justified by the different nature of the distribution models*." The New Guidelines give the following examples of justified differences:

- suppliers operating selective distribution networks are permitted to prevent distributors selling contract goods or services to unauthorised distributors and, in order to do so, may cap the volumes that a distributor may sell to any individual end user. If it is easier for an unauthorised distributor to obtain products over the internet, it would be permissible to impose a lower sales cap for online sales;
- differences in delivery times (given that sales through a physical outlet are, in effect, delivered instantly); and
- requirements that are specific to online sales, such as covering costs relating to customers returning the product, applying secure payment systems and making available an after-sales help line.

Restrictions on online sales falling outside the scope of the Block Exemption: If a restriction on online sales goes further than is permitted under the New Block Exemption, it will not necessarily be in breach of Article 101. Rather it would need to be assessed more carefully for compliance. In this respect, the Guidelines indicate that an absolute ban on Internet sales into any territory or to any customer group will fall foul of the Article 101 prohibition, unless it either does not restrict competition at all (*e.g.*, because there is a public ban on selling the contract goods over the internet for reasons of safety or health), or it is indispensible for the achievement of substantial consumer benefits. They also explain that restrictions on passive sales (online or otherwise) into a particular distributor's territory will generally not breach the Article 101 prohibition if that distributor is launching the contract products or services into a new market and is making substantial investments to do so, provided the restriction is limited to a duration of two years.

Removal of Exemption for Buyers with Significant Market Share: With the exception of certain hardcore agreements and agreements between competitors, the Old Block Exemption exempts all vertical agreements from the Article 101 prohibition if the supplier's market share for the contract goods or services does not exceed 30% or – where the agreement prevented the supplier from selling the contract goods or services to third parties – the buyer's share of the purchasing market is less than 30%. The New Block Exemption, however, will apply only if both the supplier and purchaser have market shares of less than 30%. In a welcome contrast to the 2009 consultation draft, it is the buyer's share of the purchasing market that is relevant, not its share of each and every related downstream market.

The new threshold will have significant practical implications for distributors with large purchasing market shares and those that sell to them:

- a number of agreements that currently enjoy block exemption will no longer be covered. As agreements falling outside the Block Exemption must be assessed more carefully for their compliance with Article 101, those agreements will entail an increase in compliance costs. For existing agreements, parties will have until 1 June 2011 to review their compliance with the New Block Exemption and effect any necessary amendments;
- in markets where accurate market shares (*e.g.*, based on point-of-sale data) are not available, parties will face increased uncertainty as to whether or not they and their counterparties exceed the thresholds. It will be necessary to assess the reliability of internal estimates (such as estimates based on the proportion of a party's own sales or purchases that the other party accounts for) or those of the counterparty (recognising that such estimates may be self serving, depending on the nature of the desired restriction).

Individual Exemption of Resale Price Maintenance: The New Guidelines continue to view Resale Price Maintenance ("RPM") as being presumptively in breach of Article 101, and it remains excluded from the scope of the New Block Exemption. However, the Guidelines now make it clear that, in certain circumstances, an RPM obligation might satisfy the Article 101(3) exemptions, for example:

- where a manufacturer introduces a product, RPM may be permitted where it provides distributors with the means and incentives to increase promotional efforts and expand overall demand for the product, so making the entry a success; and
- RPM may be necessary to organise a coordinated short term (*e.g.,* 2 to 6 week) low price campaign in a franchise system or "similar distribution system."

As is the case whenever an individual exemption under Article 101(3) is invoked, it is for the parties to the agreement to prove that the criteria for an exemption are met. For RPM, particularly compelling evidence is likely to be required. Indeed, one senior Commission official has expressed serious doubts that other common justifications for RPM could ever meet the requisite standards.

Upfront Access Payments: Upfront access payments ("UAPs") are defined by the Commission as "*fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the distributors.*" Examples include slotting allowances, "*pay-to-stay*" fees and payments for promotional activities of the distributor.

Where UAPs are not block exempted (because the supplier or the buyer has a market share in excess of 30%), the New Guidelines indicate that in many, if not most, cases UAPs give rise to beneficial effects such as efficient allocation of shelf space, but that they might give rise to concerns if, for example:

- their widespread use by retailers increases barriers to entry for small entrants, such that they result in an anticompetitive degree of foreclosure of access to shelf space. The Commission states that in such circumstances - which the New Guidelines now state will arise only "exceptionally" - it will assess UAPs as if they were "single branding" payments to induce distributors not to purchase products from other suppliers. The Commission's guidance on single branding obligations indicates that concerns are unlikely to arise if the market share of the supplier is below 30% and the combined market share of the five largest suppliers is below 50%; or
- they serve to inflate retail prices, because distributors tend to retain the UAPs in the form of increased profits. The New Guidelines indicate that this is only likely to be an issue if retail markets are highly concentrated.

UAPs may also be subject to additional regulation in some EU Member States. For example, prohibitions on various forms of UAPs apply in the Czech Republic and Slovak Republic, and major grocery retailers in the U.K. are now (since 4 February 2010) subject to a Code of Practice that regulates in some detail the circumstances in which the payment of UAPs may be required.

Category Management: The New Guidelines also contain additional guidance on the practice of category management, whereby a retailer appoints a supplier as "*category captain*" to advise on the marketing of all products sold by the retailer in a particular category (including those of the supplier's competitors). In contrast to the consultation draft, the New Guidelines now make it clear that "*in most cases category management agreements will not be problematic*," and acknowledge that "*in most cases the distributor may not have an interest in limiting its choice of products*" if a category manager were to seek to use its influence to disadvantage its competitors. The circumstances in which the Commission considers that concerns might arise are:

- where a supplier acts as category manager for all or most of the competing retailers in a market and, as a result, its recommendations become a common point of reference;

- if a retailer sells its own competing products (*e.g.*, private labels) and, as a result, has incentives to exclude certain suppliers; or

- where category management facilitates or results in the exchange of competitively sensitive information between suppliers, such as future pricing or promotional plans (in practice this risk can be mitigated by appropriate compliance training for those with category management functions, and the use of suitable non-disclosure agreements between the retailer and the category manager).

The new Block Exemption and Guidelines include various other changes, including:

- Exclusive distribution. The New Guidelines contain the important clarification that the category of "*exclusive*" distribution arrangements that fall within the block exemption includes sole distribution agreements, in which the supplier reserves the right to compete with the distributor within the relevant exclusive territory.

- Selective distribution. The benefit of the New Block Exemption will be lost if a supplier that operates a selective distribution system restricts authorised distributors from selling to unauthorised distributors located outside the territory reserved by the supplier to operate the system. Consequently, suppliers operating a selective distribution system in only part of the EU may find that their system is undermined by sales to unauthorised distributors within the selective territory from those located elsewhere.

- The New Guidelines also clarify that a supplier will not lose the benefit of the New Block Exemption if it places a restriction on the place of establishment of a distributor.

- Removal of protection for agreements between competitors where the buyer has a turnover of less than €100 million. Most vertical agreements between competitors are excluded from the scope of the Old Block Exemption, but there is an exception for non-reciprocal agreements between competitors where the purchaser has less than €100 million of turnover in the most recent financial year. The New Block Exemption removes that exception.

- Tacit agreements. Article 101 applies to agreements and concerted practices, but not to purely unilateral conduct. The New Guidelines now reflect case law of the EU courts that clarifies when seemingly unilateral conduct might nonetheless be viewed as an agreement. In particular, an agreement can arise – even in the absence of an explicit expression of a concurrence of wills between the parties – if a party requires the cooperation of another in order to implement a particular policy (*e.g.*, the prevention of parallel trading) and the other party acquiesces tacitly by implementing that policy.

- Agency agreements. Agreements that regulate the way in which an agent sells the products of a principal (such as fixing the resale price of those products) fall outside the scope of Article 101, provided the agent does not bear material risks in selling those products. The New Guidelines add that material risks might arise if the agent is required by the principal to carry out other activities "*in the same product market*," at its own expense.

- Increased emphasis on economic effects. A number of proposed amendments bring the New Guidelines into line with the Commission's guidance on exclusionary abuses under Article 82, which was published in December 2008 and which explains how the Commission now applies a more effects-based enforcement policy in that area also. So, for example, the Guidelines no longer provide that agreements requiring buyers to purchase exclusively from a dominant company are prohibited unless objectively justified – they simply state that such agreements are "*more likely to result in anticompetitive foreclosure*." In addition, the Guidelines acknowledge that, when imposed by one specific supplier, such "single branding" obligations are not in general problematic "*if competitors can compete on equal terms for each individual customer's entire demand* […], *unless the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations*".

1.7.4. Liner Shipping Consortia Block Exemption Regulation – 26 April 2010

The liner shipping consortia block exemption Regulation ("old BER")[115] expired on 25 April 2010 and was replaced by a revised block exemption ("new BER")[116], which entered into force on the following day. Similar to the old BER, the new BER applies to international liner shipping services for the carriage of cargo, but not to maritime cabotage.[117] This form of cooperation differs from conferences in that it has as its aim the rationalisation of the participating shipping companies' operations by means of technical, operational and/or commercial arrangements,[118] rather than by price- or tariff-fixing.[119] Consortia deal mainly with activities such as capacity-sharing, port facilities and equipment and must, to fall within the scope of the new BER, produce economic efficiencies by improving the service that would be offered individually by each of their members in the absence of the consortium. As consortia involve the coordination of shipping lines' behaviour designed to rationalise costs, they risk, however, leading to a lessening of competition on the market. The new BER recognises the economically beneficial effects of consortia, while seeking to prevent anti-competitive behaviour from being protected from regulatory scrutiny.

Under the new BER, the balance between these interests will shift in favour of reducing the number of activities which will be exempted from the application of Article 101(1) TFEU, while increasing the types of services which would be governed by the

115 Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 100, 20.4.2000, p. 24–30.

116 Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 256, 29.9.2009, p. 31–34.

117 The transport of goods or passengers between two points in the same country.

118 Article 2 of the new Liner Shipping Consortia BER defines a consortium as "*an agreement or a set of interrelated agreements between two or more vessel-operating carriers which provide international liner shipping services exclusively for the carriage of cargo, chiefly by container, relating to one or more trades, and the object of which is to bring about cooperation in the joint operation of a maritime transport service, and which improves the service that would be offered individually by each of its members in the absence of the consortium, in order to rationalise their operations by means of technical, operational and/or commercial arrangements*".

119 See Article 3 of the new Shipping Liner Consortia BER.

definition of consortia. An example of this is the fact that a reference to "*services carried out chiefly by container*" in the old BER has been removed, meaning that all liner shipping cargo will be covered by the exemption and specialist services, such as reefers (temperature-controlled transportation), may qualify if they are liner services.

The definition of consortia in the new BER also refers to "interrelated agreements," the implication of which is that agreements such as reciprocal slot charters will now fall within the block exemption. This is a welcome improvement on the old BER as it demonstrates a recognition of the multifarious forms and structures of consortia in existence.

The range of activities which are considered as necessary to the operation of a joint service has been pared down. Coordination will continue to be possible on sailing schedules, exchange or cross charter slots, pool vessels or port installations, shared offices and port services, and shared computer and documentation services. Activities which were previously arranged by a consortium within a conference (such as cargo, revenue or net-revenue pooling, joint marketing) will no longer be covered by the BER. Even in capacity-sharing or rationalisation, the new BER states that joint or coordinated capacity changes could not benefit from the block exemption if the intention is to influence the price offered to third parties as, in that case, any efficiency is unlikely to be brought about. It must be clear that the capacity coordination is a genuine response to fluctuations in supply and demand.

In the new BER, the Commission explains that users can benefit effectively from consortia only if there is sufficient competition in the relevant markets in which the consortia operate. Competition will be regarded as being sufficient when a consortium remains below a given market share threshold, which was, under the old BER, 35% and which has been brought down to 30% in the new BER.

1.7.5. Horizontal Guidelines – 1 January 2011

The European Commission has adopted revised guidance and block exemptions governing the application of EU competition law to "horizontal" cooperation agreements between actual and potential competitors.

The revised texts, which came into force on 1 January 2011, comprise the block exemptions for research and development ("R&D") and specialisation agreements and the Horizontal Guidelines. Block exemptions automatically exclude certain types of agreements from the prohibition on anticompetitive agreements contained in Article 101 TFEU and equivalent national competition laws of EU countries. Agreements that are not covered by a block exemption are not necessarily prohibited, but must be individually assessed for compliance with Article 101. The Horizontal Guidelines provide guidance on the Commission's approach to applying the block exemptions and on how to assess cooperation agreements that fall outside them. The new Guidelines contain substantial revisions to the wording of the version that has been in force since 2001, and also significant changes to the consultation draft that was published by the Commission in 2010.

Information exchange

The new Guidelines include a new section on information exchanges between competitors, which covers a wide range of scenarios, including disclosure of information via published materials and coordinated public announcements, through a common third party such as a trade association or via direct communication between competitors. They recognise that information exchanges are a common feature of many competitive markets, and may in many circumstances be pro-competitive. Consequently, the Guidelines seek to clarify circumstances in which such exchanges will be considered illegal regardless of their competitive effects (*i.e.*, an "object" restriction of competition, such as sharing information on future prices or volumes), and those in which information flows may be permitted, depending on the circumstances. In particular, they draw a distinction between the disclosure of information regarding an individual company's intended future prices or quantities (including future sales, market shares, territories, and sales to particular groups of consumers), which is treated as having the object of restricting competition, and the exchange of historic information, which will be considered in light of its competitive effects.

Compared to the consultation draft, the final version also contains a more explicit warning that unilateral disclosure of strategic information to a competitor can give rise to a breach, *i.e.*, there need be no "exchange" of information for liability to arise. So, for example, if a company employee receives unsolicited pricing information from a rival, whether in an email, a single meeting or an otherwise benign conversation in a chance encounter at a trade conference, they will be presumed to have accepted and acted on that information in breach of the competition rules, unless there is a clear response from the employee (or his/her employer) that they do not wish to receive such information.

Standardisation

The new guidance on standardisation represents a compromise between the strongly opposing views of the various stakeholders, who were engaged in intense lobbying efforts during the consultation process and in the period leading up to the adoption of the new Guidelines. They favour open and non-discriminatory standardisation initiatives and provide for a safe harbour for standardisation agreements meeting certain criteria, conformity with which will normally mean that these agreements are not restrictive of competition. If these criteria are not met, the standardisation process will not necessarily breach competition law, but must be assessed more carefully on the basis of the additional guidance provided in the Guidelines. The safe harbour criteria are that:

- the standard-setting process is transparent and open to all;
- the standardisation agreement imposes no obligation to comply with the resulting standard; and
- the standardisation agreement provides access to the standard on fair, reasonable and non-discriminatory (“FRAND”) terms, including by providing a fair and balanced policy for intellectual property rights ("IPR").

The Guidelines specify that in order to meet the requirement of access to the standard on FRAND terms:

- participants in the Standard Setting Organisation ("SSO") must be required to provide an irrevocable commitment to license their essential IPR to all third parties on FRAND terms, prior to the adoption of the standard, and to ensure that any third parties to which the IPR is transferred are under similar obligations. Participants can be permitted to exclude specified technology from the standard-setting process (and thereby from the FRAND commitment), provided that exclusion takes place at an early stage;
- the SSO must (unless it has a royalty free standards policy) require good faith disclosure by participants of any IPR that might be essential for implementation of the standard. It is not, however, necessary to mandate a full patent search; and
- the Guidelines suggest various methods for assessing the appropriate level of FRAND royalties.

The new Guidelines also provide that standard-setting agreements providing for ex-ante disclosures of most restrictive licensing terms, including royalty rates, will not, in principle, restrict competition under EU antitrust rules.

Standard terms

The new Guidelines contain an expanded explanation of the way in which the Commission assesses agreements on industry standards and standard contractual terms. They state that standard contractual terms will not usually give rise to concerns if they: (i) are established through a transparent and inclusive process; (ii) are non-binding and effectively accessible for anyone; (iii) are not likely to become a de facto industry standard; and (iv) do not relate to price-sensitive aspects of competition (such as prices, rates, discounts, rebates, and interest) or important characteristics of consumer goods or services. If an actual or potential restriction of competition does arise, it might be possible to justify its exception from the Article 101 prohibition if the standard terms give rise to countervailing benefits, such as the facilitation of price comparisons by consumers (and so lower switching costs for consumers) and/or the reduction barriers to entry for new competitors. The Guidelines also now cover joint wording of insurance policies which, since 1 April 2010, are no longer covered by the sector-specific insurance block exemption.

Joint ventures

The consultation draft included a useful statement that if a parent company exercises decisive influence over a joint venture, they will be considered by the Commission to be part of the same economic entity, such that agreements between them fall outside Article 101. The Commission has removed this guidance from the final version of the Guidelines, citing the need to wait for the outcome of appeals that are pending before the EU courts in relation to the "single economic entity" doctrine.

1.7.6. The Specialisation and R&D Block Exemptions – 1 January 2011

The specialisation block exemption no longer covers specialisation or joint production agreements relating to products that the parties use captively for the production of products in a downstream market, where the parties have a combined share of more than 20% of that downstream market. Interim protection for agreements that cease to be block exempted because of these changes has been extended to 31 December 2012 (a year more than was envisaged in the consultation draft).

While the basic structure of the R&D block exemption remains virtually the same, the Commission has significantly widened its scope. In particular (and in contrast to the consultation draft), it now covers paid-for R&D, provided the parties' combined market share does not exceed 25%. Commission officials expressed the view that such agreements usually fall outside Article 101 altogether (in which case no exemption is necessary), but that their inclusion in the block exemption will benefit legal certainty. Other welcome changes to the consultation draft are: (i) the decision by the Commission not to make the availability of the block exemption conditional on disclosure by the parties of their background IPR prior to starting the R&D; (ii) the statement that the parties to an R&D agreement may benefit from the block exemption, even if they limit their rights of exploitation to certain field-of-use areas; and (iii) the extension until 31 December 2012 of interim protection for agreements that cease to be block exempted as a result of changes introduced.

1.7.7. Commission Actions for Damages[120]

On 18 April 2010, the Commercial Court of Brussels issued its highly anticipated judgment in the first ever cartel civil damages claim brought by the European Commission on behalf of the EU, in relation to damages allegedly suffered in Belgium and Luxembourg by the European institutions as a result of the cartel among elevator manufacturers it had found in its 2007 *Elevators and Escalators* decision, which at the time of its issuance imposed the largest cartel fine ever by the Commission.

The Commercial Court's judgment is only interlocutory, insofar as it rejected the Commission's claims against the Luxembourg entities on the basis that it did not have the competence to adjudicate them, while at the same time postponing judgment on issues of substance while the CJEU considers questions on preliminary reference submitted by the Commercial Court related to the European Commission's ability to represent other EU institutions and the elevator companies' right to a fair trial.

In 2008, the Commission on behalf of the EU brought an action before the Commercial Court against the Belgian and Luxembourg subsidiaries of the four major elevator manufacturers, ThyssenKrupp, KONE, Otis and Schindler, whom the Commission in its decision of February 17 2007 fined for the participation in customer allocation cartels in Belgium, Luxembourg, Germany and the Netherlands. The Commission claimed damages of over seven million Euro as a result of elevators installed at EU institutions in Belgium and Luxembourg. The four elevator companies raised a variety of defences, including:

120 Commission Press Release IP/08/998.

- Lack of international competence of the Court to decide on the liability of claimants based in Luxembourg, and to adjudicate Luxembourg contracts in which a choice for Luxembourg courts has been made;
- Lack of admissibility of the claim on the basis that the Commission was not properly authorized to institute the claim or represent other EU institutions;
- Absence of proof of causality and damages; and
- Infringement of EU Treaty and ECHR fundamental rights related to a fair trial and impartial judge, in view of the fact that the Commission investigated and found the elevator cartel that is now the basis for its private damages claim.

The Commercial Court agreed with the defendants that it lacked international jurisdiction to decide the Commission's claim in relation to Luxembourg defendants, but rejected the argument that it could not consider the claims against all Belgian defendants together on the basis that some were bound by diverging choice of forum clauses, as they are in any event connected.

Regarding the Commission's representation powers, the Commercial Court asked the CJEU to clarify the relationship between the Treaty, which exclusively designates the Commission as representing the EU in law, and the Financial Regulation, which provides that in relation to administrative matters concerning their functioning, the EU institutions can act in law on their own behalf. The Commercial Court also asked the CJEU whether the Commission should not have obtained a written mandate from the institutions to represent them. Two further questions from the Commercial Court for the CJEU address relate to i) the defendants' right to a fair trial in light of the Commission's capacity as prosecutor and civil claimant and the fact that national courts are bound by a Commission cartel decision, and ii) and the ability of the Commission and other EU institutions to recover damages in cartel cases if the Commission cannot claim cartel damages without breaching the right to a fair trial. Pending the resolution of these questions, the Court postponed judgment on the other issues.

This is the first time that the Commission has sought damages in the civil courts against participants in a cartel. The Commission is widely regarded to have brought the civil claim as a means to promote cartel civil damages claims by leading by example, but the Commercial Court refused swiftly to award damages to the Commission, instead raising questions about the Commission's role in cartel investigations and civil damages cases, the answers to which may significantly impact the Commission's handling of these cases.

For many years the Commission has been criticised for performing the multiple roles of police, prosecutor, judge and jury. The Commission now wears the additional hat of civil damages claimant in this litigation. For its part, the Commission claims that it has set up Chinese walls separating the legal team that is bringing the actions from DG COMP. The Brussels Commercial Court has now questioned these practices and seeks, through its preliminary reference, to obtain more clarity on their compatibility with the EU Treaties and the European Convention on Human Rights.

2. ARTICLE 102

2.1. Commission Decisions

2.1.1. EDF[121] *– 17 March 2010*

In July 2007, the Commission opened antitrust proceedings against EDF (the incumbent electricity company in France) along with Electrabel (*see* Electrabel discussion below) over long term exclusive purchase obligations in their supply contracts with industrial consumers that make it difficult for new entrant electricity suppliers to acquire these consumers as clients in France.

In December 2008, the Commission issued a statement of objections, in which the Commission took the preliminary view that EDF may be abusing its dominant position in the market for electricity supplies to large industrial users with long term exclusive contracts and restrictions on the resale by its customers of electricity supplied by EDF.

In October 2009, EDF proposed the following commitments. For the shorter of ten years or the period in which EDF's market share is above 40% in the relevant market, EDF would ensure that competitors could compete for on average 65% of the electricity it contracts with large industrial users in France each year during the period of the commitments. This percentage would decrease should EDF's market share fall; however, the volumes for which EDF could contract for more than one year would be capped. Further, any new contract concluded with large industrial users could not exceed five years and EDF would make two distinct contractual offers to customers, one of which would be non-exclusive, *i.e.*, customers may partly source electricity needs from another supplier. Finally, as from 1 July 2010, new contracts with large industrial customers would no longer contain any restrictions on the resale of electricity supplied by EDF. Resale restrictions in existing contracts would become null and void. On 17 March 2010, the Commission made legally binding the commitments offered by EDF.

2.1.2. Svenska Kraftnät[122] *– 14 April 2010*

In April 2009, the Commission initiated formal Article 102 proceedings against Svenska Kraftnät (SvK), the Swedish electricity Transmission System Operator (TSO). SvK is the state-owned central administrative authority in Sweden, commissioned to maintain, operate and develop the national transmission grid for electrical power including the state-owned interconnectors. SvK also has exclusive rights to provide electricity transmission services in Sweden. The Commission investigated whether SvK abused its dominant position in Swedish electricity transmission services by limiting export transmission capacity on Swedish interconnectors to neighbouring countries, with the objective of relieving internal congestion on its network. This appeared to favour consumers in Sweden over consumers in neighbouring EU and EEA Member States by reserving domestically produced electricity for domestic

121 Commission press release MEMO/07/313; Case No. COMP/38.386.
122 Commission MEMO/09/191; Case No. COMP/39.351.

consumption.

The Commission expressed doubts that export restrictions were the least restrictive means to relieve any such congestion, as SvK contended. The Commission suggested that information available to it indicated that there were alternative ways of managing such congestion problems that would be compatible with the Single Market and respect EU antitrust rules. In October 2009, the Commission began market testing commitments proposed by SvK. In particular, SvK offered to subdivide the Swedish transmission system into two or more bidding zones and operate it on this basis by 1 July 2011 at the latest. The configuration of the bidding zones would be flexible enough to adapt quickly to changes in the future electricity flow patterns in the Swedish transmission system. Once the bidding zones were operative, SvK would manage congestion in the Swedish transmission system without limiting trading capacity on interconnectors, except for congestion in the West-Coast-Corridor. SvK argued that, unlike the other zones of congestion, congestion in the West-Coast-Corridor cannot be managed in an efficient manner through bidding zones and market splitting, because this area does not contain sufficient suitable generation resources to be able to set a market price by itself. However, SvK offered the commitment to alleviate this situation by reinforcing the West-Coast-Corridor section by building and operating a new 400 kV transmission line between Stenkullen and Strömma-Lindome by 30 November 2011.

Until the bidding zones become operative, SvK offered to manage internal congestion in the Swedish transmission network through counter trade, as it was cheaper to make the necessary adjustments in Sweden than in neighbouring countries. This would reduce the limitation of capacity on the interconnectors.

On 14 April 2010, the Commission announced that it had adopted a decision rendering legally binding the commitments offered by SvK, which it said will increase trade in electricity within Sweden and between Sweden and neighbouring countries.

2.1.3. E.ON Gas[123] – 4 May 2010

On 22 December 2009, the Commission opened an investigation into an alleged abuse of E.ON's dominant position on the German gas supply and transmission markets. The alleged abuse related to a refusal to supply by way of long-term capacity bookings on E.ON's gas transmission system which could have resulted in a foreclosure of competitors. Such a practice would have had the effect of harming consumers on the German gas supply markets.

In its Preliminary Assessment of 22 December 2009, the Commission came to the provisional conclusion that E.ON may have abused its dominant position on the markets for the supply of gas to end customers in the form of a refusal to supply long-term access to E.ON's gas transmission system, thereby violating Article 102. E.ON had for many years in advance booked large parts of the available firm and flexible entry capacities on its gas transmission grid, which could have lead to a foreclosure of competitors trying to transport and sell gas to customers connected to the E.ON grid

123 Case No. COMP/39.317.

and therefore could have restricted competition on the downstream gas supply markets.

Following the Commission's investigation and statement of objections, E.ON undertook to release large capacity volumes at the entry points to its gas networks by October 2010. The capacities released at different entry points by October correspond to around 15% of the pipeline capacity and were published on the website of E.ON Gastransport GmbH shortly after the adoption of the Commission's decision. From October 2015, E.ON agreed to reduce further its bookings of entry capacity in the NetConnect Germany grid to 50% and in E.ON's grid for low-calorific gas to 64% of the pipeline capacity. On 4 May 2010, the Commission adopted a decision rendering the commitments legally binding.

2.1.4. ENI[124] *– 29 September 2010*

In March 2009, the Commission issued a statement of objections to the Italian ENI group setting out the Commission's preliminary view that the management and operation of natural gas transmission pipelines by ENI may be in breach of Article 102. The behaviour concerns an alleged refusal by ENI to grant access to capacity available on the transport network (capacity hoarding), the granting of access in an allegedly less useful manner (capacity degradation) and an alleged strategic limitation of investment (strategic underinvestment) in ENI's international transmission pipeline system. These practices allegedly took place despite very significant short and long term demand from third party shippers.

ENI offered structural remedies to remedy the competition concerns identified by the Commission; it proposed to divest its shares in three international transport pipelines (the TAG, the TENP and the Transitgas pipeline). Following a market test of the Commitments, the Commission rendered them legally binding by a decision on 29 September 2010.

2.2. Ongoing Commission Investigations

2.2.1. Boehringer Ingelheim[125]

On 22 February 2007, the Commission initiated antitrust proceedings against Boehringer Ingelheim concerning an alleged misuse of the patent system in order to exclude potential competition in the area of chronic obstructive pulmonary disease drugs. It is understood that this investigation, together with the Astra Zeneca investigation, influenced the scope of the pharmaceutical sector investigation.

2.2.2. Electrabel[126]

In July 2007, the Commission opened antitrust proceedings against Electrabel (the incumbent electricity company in Belgium and part of the French SUEZ group). The Commission believes that Electrabel may have introduced long term exclusive purchase

[124] Commission MEMO/09/120; Case No. COMP/39.315.
[125] Commission announcement; Case No. COMP/39.246.
[126] Commission press release MEMO/07/313; Case No. COMP/38.387.

obligations in their supply contracts with industrial consumers that make it difficult for new entrant electricity suppliers to acquire these consumers as clients in Belgium.

The investigation is concentrating on the market for large industrial electricity consumers. The alleged infringements that are being investigated concern the contracts concluded by Electrabel with industrial customers in Belgium. It is suspected that the contracts prevent customer switching, thereby significantly foreclosing the markets concerned, in particular when considering their exclusive nature, duration and the share of the market that is tied by these agreements.

The removal of the barriers to competition is expected to make it easier for suppliers to enter and expand in the Belgian electricity market, thereby bringing more competition to markets that currently are still highly concentrated. The case will take account of the reasoning developed in the *Distrigas* case and the commitments offered by Distrigas concerning the gas markets in Belgium. The Commission has viewed the existence of long term supply contracts in both the electricity and gas markets as one of the key problems foreclosing those markets from new competition and effectively keeping energy prices higher than they should be.

2.2.3. Alcan[127]

Following the acquisition of Alcan by Rio Tinto in October 2007, the merged entities' aluminium business became the world's biggest aluminium producer. ECL, a wholly owned subsidiary of Alcan, is the major producer of equipment used in aluminium smelters in the world.

The Commission issued a statement of objections to Alcan on 21 February 2008. The statement of objections outlines the Commission's preliminary view that Alcan abused a dominant position by tying its dominant aluminium smelting technology with handling equipment sold by Alcan's subsidiary ECL. In particular, the contracts for the sale of its aluminium smelting technology provide that purchasers must also buy ECL's handling equipment for aluminium smelters, the so-called Pot Tending Assembly ('PTAs"). As a result of these contractual provisions, Alcan's customers appear to be prevented from using PTAs from other suppliers. According to the Commission, this behaviour, if proven, risks limiting innovation in the aluminium production sector and affecting competition on the €70 billion worldwide market for aluminium, an important input for many parts of European industry.

2.2.4. Standard & Poor's[128]

On 6 January 2009, the Commission initiated antitrust proceedings in *European Fund and Asset Management Association (EFAMA) and others v Standard & Poor's*. On 19 November 2009, the Commission sent a statement of objections to Standard & Poor's ("S&P") in which it argues that S&P is abusing its dominant position by requiring financial institutions to pay licensing fees for the use of International Securities

127 Commission press release MEMO/08/111; Case No. COMP/39.230.
128 Commission MEMO/09/6; Case No. COMP/39.592.

Identification Numbers ("ISINs") in their own database. The ISIN is a standard developed by the International Organization for Standardization (ISO) to provide unique cross-border identification for securities (shares, bonds, etc.) issued throughout the world. ISINs are attributed by the National Numbering Agency (NNA) of the country of issuance.

S&P runs the CUSIP Service Bureau (CSB) – the U.S. NNA – on behalf of the American Bankers Association (ABA). S&P/CSB is the only U.S. ISIN issuer and the only operator to receive first-hand information from all U.S. securities issuers. S&P/CSB includes the information gathered from securities issuers in a descriptive database ("the S&P ISIN database"), which is then licensed to information services providers such as Bloomberg, Reuters, etc.

The Commission has found that that U.S. ISINs are the only universal or common identifier for U.S. securities and that they are essential for the day-to-day business of financial institutions, including those located in the EU.

The alleged infringement consists of an abuse by S&P of its monopoly position by requesting licensing fees from financial institutions located in the EU for the use of U.S. ISINs and certain descriptive elements attached to these numbers each time such an ISIN is used in order to access value-added financial information provided by information services providers. Allegedly, financial institutions are obliged to pay for a service that they are not interested in and do not actually use, *i.e.*, the S&P's ISIN database as such. Moreover, the Commission has alleged that S&P forces its contractual partners, the information services providers, to cut off financial institutions from data feeds on U.S. securities unless the latter enter into licensing agreements with S&P for the use of U.S. ISINs.

2.2.5. IBM/T3 & TurboHercules[129]

2.2.6. IBM/Spare parts[130]

IBM is currently the subject of two complaints regarding its mainframe computer system.[131] On 20 January 2009, T3 Technologies, a U.S. firm active in the mainframe computing sector, filed a complaint with the European Commission claiming that IBM was abusing its dominance by tying the sale of its operating system to its mainframe hardware, and withholding patent licenses and certain intellectual property to the detriment of mainframe customers.

IBM also faced an additional legal challenge when TurboHercules, the developer of emulator software designed to facilitate the use of mainframe applications on non-mainframe computers using alternative operating systems, filed a complaint with the European Commission claiming that IBM was abusing its dominance by tying and refusing to license essential interface information. In its complaint, filed on 23 March 2010, TurboHercules argued that IBM was tying its mainframe hardware to its

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129 Case COMP/39.511.

130 Case COMP/39.692.

131 Commission Press Release IP/10/1006.

mainframe operating system and refusing to license its interfaces and protocols on fair terms. IBM responded that "*TurboHercules is an 'emulation' company that seeks a free ride on IBM's massive investments in the mainframe by marketing systems that attempt to mimic the functionality of IBM mainframes. This is not really any different from those who seek to market cheap knock-offs of brand-name clothing or apparel*." IBM claimed that "*the mainframe is a small niche in the overall server market, but customers benefit from an improved platform and alternatives to Unix and Windows*." Further to its suggestion that it was not dominant, IBM claimed that it is "*fully entitled to enforce our intellectual property rights and protect the investments that we have made in our technologies*."

The Commission initiated formal antitrust proceedings into these complaints on 26 July 2010.[132] The Commission also initiated formal antitrust proceedings for a second own initiative investigation into IBM's allegedly discriminatory behaviour towards competing suppliers of mainframe maintenance services, in particular by restricting or delaying access to spare parts for which IBM is the only source.

IBM's legal issues may continue to mount if NEON Enterprise Software, a Texas based software development company, follows through on its threat to lodge a complaint with the European Commission. On 24 June 2010, the company announced that its plans to submit a complaint alleging that IBM's conduct in the mainframe market forecloses NEON Enterprise Software from the market for mainframe applications.

2.2.7. Telekomunikacja Polska,[133] *Slovak Telekom*[134]*, and Deutsche Telekom*[135]

In April 2009, the Commission initiated two separate antitrust investigations against, respectively, the Polish and the Slovak incumbent telecoms operators, Telekomunikacja Polska and Slovak Telekom, for suspected breaches of Article 102. The investigation is focussing on suspicions of abusive behaviour that may prevent or hinder competition on broadband internet access and other electronic communications markets in Poland and Slovakia and may include refusal to supply, margin squeeze and tying. This follows announcements by the Commission in 2008 of dawn raids at each of the companies.[136]

On 1 March 2010, the Commission sent a statement of objections to Telekomunikacja Polska. By a Commission decision of 3 September 2009, Slovak Telekom was ordered to provide information in the framework of this case. On 13 November 2009, Slovak Telekom brought an action whereby it sought the annulment of this decision. It grounded its action on the fact that as the alleged offence took place before Slovakia became a member of the EU, the Commission did not have power to apply EU law in this case and that to do so would be an infringement of the principle of procedural fairness enshrined in Article 41(1) of the Charter of Fundamental Rights. Slovak

132 Commission Press Release IP/10/1006.

133 Commission MEMO/09/203; Case No. COMP/39.525.

134 Case No. COMP/39.523.

135 Commission MEMO IP/10/741.

136 Commission MEMO/08/22 and MEMO/08/666.

Telekom also submitted that the Commission decision breached the principle of proportionality as the Commission failed to establish the required link between the requested pre-accession information and the allegedly illegal conduct after 1 May 2004.

On 17 December 2010, the Commission extended the scope of its investigation into Slovak Telekom's behaviour on broadband internet access markets, to include its parent company Deutsche Telekom.

2.2.8. Les Laboratoires Servier (perindopril)[137]

In July 2009, the Commission initiated proceedings concerning unilateral behaviour by Les Laboratoires Servier and Servier SAS, its subsidiaries and companies under their control ("Servier"), as well as agreements between Servier and its actual or potential competitors including Krka, Lupin, Matrix, Niche, and Teva. The Commission's inquiry identified the delayed entry onto the market of cheaper, generic drugs following patent expiry as a major source of unnecessary cost for the European consumer.

This investigation was announced on the very same day that the Commission published the final report from its pharmaceutical sector inquiry. In October 2009, Commissioner Kroes again warned that her staff were "*capitalising on our pharmaceuticals sector enquiry with new cases*" in the coming months; a week later dawn raids were confirmed in France by Sanofi-Aventis, Teva, Novartis, Sandoz, Ratiopharm, and Ranbaxy for potential infringements of Article 81 and 82.

In separate proceedings, the Commission has sent a statement of objections to Servier for allegedly providing incorrect and misleading information to the Commission during the course of the Commission's earlier pharmaceutical inquiry.

2.2.9. Thomson Reuters[138]

On 30 October 2009, the Commission initiated formal antitrust proceedings of its own initiative against Thomson Reuters, a Canadian news and financial data company, for a suspected breach of Article 102. The Commission announced that it will investigate Thomson Reuters’s practices in the area of real-time market datafeeds, and consider whether customers or competitors are prevented from translating Reuters Instrument Codes (RICs) to alternative identification codes of other datafeed suppliers (so-called "mapping") to the detriment of competition.

RICs are short, alphanumerical codes that identify securities and their trading locations. They are used to retrieve information about specific companies from Thomson Reuters financial information networks. For example, a user that wished to retrieve real-time information about IBM’s stock price on the New York Stock Exchange would enter "IBM.N" into the Reuters networks and immediately gain up-to-date financial

[137] Commission MEMO/09/322, see also press releases IP/09/1098 and MEMO/09/321 on the shortcomings of the pharmaceutical sector published the same day, as well as Neelie Kroes' speech at the publication of the Commission's pharmaceutical sector inquiry final report (SPEECH/09/333) and the final report itself available on DG COMP's website; Case No. COMP/39.612

[138] Commission press release IP/09/1692.

information on IBM, including its current price on the New York Stock Exchange.

The Commission has announced that it will examine whether Thomson Reuters is preventing clients from mapping RICs to alternative identification codes of other datafeed suppliers. It is considering whether without the possibility of such mapping, customers may potentially be "locked" in to working with Thomson Reuters due to the perceived difficulties in replacing RICs by reconfiguring or by rewriting their software applications.

2.2.10. Lundbeck[139]

On 7 January 2010, the Commission opened a formal antitrust investigation into Lundbeck on the basis of Articles 101 and 102 TFEU. The Commission is, in particular, interested in unilateral behaviour and agreements that would have delayed the market entry of generic citalopram, a selective serotonin reuptake inhibitor.

2.2.11. Google[140]

On 30 November 2010, the Commission formally opened three separate antitrust proceedings into allegations that Google has abused its dominant position in online search officially launching what many see to be the next high profile battleground in antitrust enforcement. The proceedings follow complaints filed in February from Foundem (a member of an organisation called ICOMP which is funded partly by Microsoft), Microsoft's Ciao!, and 1plus V.[141]

The Commission is investigating whether Google has abused a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as price comparisons (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in order to shut out competing services. The Commission is also investigating allegations that Google lowered the 'Quality Score' for sponsored links of competing vertical search services. The Quality Score is one of the factors that determine the price paid to Google by advertisers.

Further, the Commission is investigating allegations that Google imposes exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites, as well as on computer and software vendors, with the aim of shutting out competing search tools. Finally, it is investigating suspected restrictions on the portability of online advertising campaign data to competing online advertising platforms

For its part, Google maintains that the sites were ranked low because its algorithm is

139 Case COMP/39.226. Commission press release IP/10/8.
140 Commission press release MEMO/10/47, Commission MEMO IP/10/1624.
141 Case COMP/39.740, Foundem, Case COMP/39.768 Ciao, and Case COMP/39.775 1plusV..

designed to weed out sites that are not useful for Internet users, rather than because they are competitors.

Ciao! had previously lodged a complaint with the German Federal Cartel Office in October 2009, over an alleged abuse of dominance by Google relating to Google's standard terms and conditions which Google said had been transferred to the European Commission. In February 2010, Navx, a content provider for mapping services, filed a complaint with the French Competition Authority, alleging that Google is illegally blocking its adverts. The case was settled on 28 October 2010, following the submission of remedies by Google. The Italian competition authority has also launched an investigation into Google's practices on the Italian market.

On 31 March 2011, Microsoft, no stranger to EU antitrust investigations, announced that it had lodged a complaint against Google. This was unsurprising given that Microsoft subsidiary Ciao! was one of the original three complainants. It would seem that Microsoft's direct complaint adds weight to the case, as Microsoft Bing search engine directly competes with Google's search (estimated to have approximately 90% share of online search in the EU). Microsoft is also in a partnership deal with Yahoo! Inc. in relation to search.

Microsoft has alleged that:

- Google has "put in place a growing number of technical measures to restrict competing search engines from properly accessing" its YouTube video-streaming site.
- Google has blocked Microsoft's Windows Phones "from operating properly with YouTube," but offers better services to its own Android phones and iPhones, whose producer Apple Inc. does not own a search engine.
- Google is keeping some advertisers from accessing their own data and transferring it to rival advertising platforms, such as its own adCenter. That allegation echoes complaints by other companies and is part of the Commission's probe.

2.2.12. Versata Software/SAP

On 29 June 2010, Versata, a vendor of pricing software for complex applications, lodged a complaint against SAP A.G. before the European Commission, alleging that SAP is abusing its dominant position in Enterprise Resource Planning software ("ERP software") by unlawfully foreclosing the market for pricing software that is compliant with ERP software.

ERP software comprises "back-room" critical applications that manage the optimal use of enterprise resources such as employees, assets and finances. This includes financial management systems,[142] enterprise project management[143] and human resources.[144]

142 Financial management systems applications allow companies and other organisations to maintain their general ledger, track expenses, payments, collections and receivables, balance and periodically close books, perform analytics, prepare reports, provide costing, cash management, internal audit controls, treasury and risk management capabilities.

143 Enterprise project management allows companies and other organisations to manage the resources (employees, equipment, cash) associated with a project, collaborate among internal resources and external partners assigned to a project and track project contracts, costing and billing information.

The functionality of ERP software is often enhanced by add-on software developed by third parties. Pricing software, such as that developed by Versata, is an add-on software that enables large companies to calculate their products' prices quickly and accurately where such prices are dependent on a large number of complex factors, such as product variations, customer characteristics and local taxes. The software then communicates the price to customers through the applicable sales channel, be it a sales person working from a laptop, a retailer's website, or the company's own website. As noted, pricing software works in conjunction with a company's back-office ERP software and cannot be used independently of ERP software.

Versata alleges that its pricing software once worked effectively with SAP's ERP software and was popular among SAP's customer base. Versata alleges, however, that SAP then decided to enter the pricing software market itself and foreclose competition from independent pricing software developers, *inter alia,* by refusing to supply its ERP software's APIs and tying its own pricing software with its dominant ERP software.

Versata alleges that SAP holds a dominant market position in the high-end ERP market. Versata has requested the Commission to order SAP to share its ERP software interoperability information and unbundle its pricing configuration software from its ERP software.

2.2.13. Deutsche Bahn

On 29 March 2011, the Commission undertook unannounced inspections at the premises of Deutsche Bahn AG and some of its subsidiaries.

It has been alleged that Deutsche Bahn group, and in particular Deutsche Bahn Energie, the de facto sole supplier of electricity for traction trains in Germany, would be giving preferential treatment to the group's rail freight arm. The Commission officials were accompanied by their counterparts from the German competition authority.

2.3. Judgments of the General Court

2.3.1. T-66/01 Imperial Chemical Industries – 25 June 2010

On 25 June 2010, the General Court issued its judgment in Imperial Chemical Industries ("ICI")'s appeal against a 2000 Commission decision finding that it had abused its dominant position in the soda ash market (the 2000 Commission decision re-adopted a 1990 decision annulled by the European Courts for procedural errors). The Court upheld the Commission's findings in relation to market definition, dominance and abuse by applying loyalty inducing rebates. The Court, however, reduced the fine imposed on ICI from €10 million to €8 million to reflect a 5% reduction for error in assessing the gravity of the infringement as it was not deemed to be a recidivist and a further 15% reduction to take into account the Commission's error in assessing the

[144] Human resource applications are applications that automate one or more human resources functions of an enterprise, such as personnel management, benefits administration, payroll, recruiting, employee development (*e.g.,* training, succession planning) and performance analysis and review.

duration of the infringement.

In relation to the statute of limitations, the Court held that the limitation period was suspended for the duration of the proceedings before the General Court and for the duration of the proceedings before the Court of Justice in the context of the appeal of the first Commission Decision. The limitation period was, therefore, suspended for a minimum period of eight years, eight months and 22 days. Accordingly, the Court concluded that a period of five years had not expired between the end of the infringements, or any interruption to the limitation period, and the adoption of the contested decision on 13 December 2000.

In relation to the general length of the proceedings, although spanning nearly two decades, the Court was nevertheless satisfied that there was not a breach of the principle that action must be taken within a reasonable period of time.

In relation to access to file and the fact that the Commission had lost some of its files from the first Commission Decision, the Court found that the issue of access to the file was res judicata in respect of ICI; however, ICI did not establish that the loss of the files could have influenced to its detriment the conduct of that procedure and the content of the contested decision as regards the amount of the fine.

2.3.2. T-321/05 AstraZeneca v. Commission – 1 July 2010

On 1 July 2010, the General Court upheld a 2005 Commission decision fining AstraZeneca ("AZ") €60 million for an abuse of a dominant position in breach of Article 102 TFEU.

The Commission decision found that:

- between 1993 and 2000 AZ had a dominant position in a number of national markets for Proton Pump Inhibitors ("PPIs"). In particular, the Commission found that other products - such as H2 blockers - did not pose sufficient competitive constraints;
- in that period, AZ had abused that dominant position by making misrepresentations to certain EEA national patent offices with a view to obtaining supplementary protection certificates ("SPCs") for Losec; and
- a second abuse related to the selective requests to a number of national medicines agencies for deregistration of market authorisations for Losec, which had the effect of inhibiting the ability of generic rivals and parallel importers to obtain market authorisations for their versions of Losec.

The Court upheld each of these findings, with one partial exception: it found that the Commission had not proved to the requisite standard that AZ's deregistration of Losec in Denmark and Norway was capable of restricting parallel imports.

Relevant Product Market

AZ argued that the Commission was incorrect to define the relevant product market as PPIs rather than a market encompassing PPIs and H2 blockers. PPIs are considered to be therapeutically superior to H2 blockers, but the increase of PPI prescriptions at the expense of H2 blockers was gradual. However, the Court held that while the issue was complex, the Commission was entitled to take the view that H2 blockers did not exert sufficient competitive constraints over the pricing of PPIs to be considered part of the same product market, although PPIs did exert a competitive constraint on PPIs.

Dominance

Given AZ's very significant shares of national markets for PPIs (which, for the most part, were well above 70% in all the relevant countries for the period in question), the Court confirmed that the Commission was entitled to conclude that AZ had a dominant position, notwithstanding that such market shares were achieved through the exercise of valid intellectual property rights, and that factors other than market share - such as competition on innovation and reimbursement at the national level - were relevant to the pharmaceutical sector. The court also disregarded the countervailing buyer power of the state and commented that the regulation of prices by the state in some instances reinforced AZ's dominance as it limited the scope for price competition.

Abuse of the SPC process

The Court affirmed the Commission's finding that by providing misleading information, AZ had sought to obtain additional and unjustified SPC protection in Belgium, Denmark, Germany, the Netherlands, the U.K. and Norway. SPC protection is essentially an extension to the normal life span of patent protection. The Court found that, in its application for a SPC for Losec, Astra provided the date of Losec's first price approval, rather than the date of Losec's first technical marketing authorisation, as was the normal practice. Astra's novel approach was based on a re-interpretation of the applicable SPC rules pursuant to which the relevant date was the one on which the product had obtained all regulatory approvals needed in order to be launched in a Member State. Critically, Astra did not disclose that its indicated date was based on such a re-interpretation.

The Court held that, for the purpose of identifying an abuse of dominance, it was not required to prove AZ had acted deliberately or in bad faith. Rather, it was sufficient to establish that AZ could not reasonably be unaware that, in the absence of an express disclosure of its novel interpretation of the date of "*first marketing authorisation*," the patent offices would have been misled.

Moreover, it was sufficient for the Commission to show that AZ's submission of misleading information was at least capable of successfully extending its patent protection, even if certain public authorities detected the inaccuracies and rejected AZ's applications.

The Court also considered that even if AZ had become aware of that omission only after it was made, it was incumbent on it, as a dominant undertaking, to take the action necessary to rectify the error and to prevent the resulting anticompetitive consequences.

The Court further affirmed that the Commission is not required to show that abusive conduct has an actual, direct effect on competition so long as conduct is capable of restricting competition. The fact that AZ was, in certain countries, no longer in a dominant position at the time when its conduct was able to produce its effects (*i.e.*, at the time when the SPC protection, if granted, would come into force) did not prevent that conduct from being classified as abusive.

Moreover, the Court noted that where behaviour falls within the scope of the competition rules, those rules apply irrespective of whether that behaviour may also be caught by other rules or regulations which pursue separate objectives. That was the case even if there existed specific remedies for the supply of incorrect information under the SPC regime.

Abuse of the market authorisation process

The Commission found that AZ had requested the deregistration of reference market authorisations for Losec capsules in Denmark, Norway and Sweden, having replaced the product with a tablet form. This effectively prevented generic producers and parallel traders from securing timely authorisations and import licences for their own versions of Losec capsules. AZ had, according to the Commission, taken this action with the specific intent of excluding competition.

In line with previous case law, the Court stated that a dominant company is entitled to protect its own commercial interests, and to devise a strategy to minimise erosion of its sales by competition from generic products, provided that the conduct is within the scope of competition "*on the merits*." However, it cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking engaged in competition on the merits, or in the absence of objective justification.

In this case, AZ's deregistration strategy could not be said to be justified as the legitimate protection of its investment in conducting pharmacological and toxicological tests and clinical trials, as the period within which it could legally enjoy that investment exclusively had expired. Rather, the Court found that the sole purpose of the strategy was to obstruct or delay the market entry of generic products. It was no defence to assert that it was entitled, under the market authorisation procedure, to request the withdrawal of its marketing authorisations, as "*the illegality of abusive conduct under [Article 102] is unrelated to its compliance or non-compliance with other legal rules*." AZ ought, in the Court's view, to have maintained its market authorisation for Losec capsules, even if it intended to withdraw those capsules from sale in favour of the tablet form Losec.

Again, even if AZ had no malevolent intention in deregistering the relevant authorisations, its conduct would still have been abusive if it was such as to delay or prevent the introduction of generic products and parallel imports. Moreover, the fact that AZ's generic rivals could have obtained marketing authorisations by means of an alternative procedure did not render its conduct non-abusive, since those procedures entailed longer delays and higher costs, and AZ's conduct served solely to create those costs and delays.

However, the Court overturned the Commission's findings of abuse in relation to the impact of the conduct on parallel importers. In particular, while the law had been clarified by the time of the Commission's decision, at the time of AZ's conduct it was unclear whether an import licence could legally be withdrawn or refused on the basis that there was no underlying reference authorisation in force for the product in the destination country. In that context, the Court found that the Commission had not produced any evidence in its decision that the authorities in Denmark or Norway were in fact likely to withdraw rivals' import licences (in potential violation of EU rules on the free movement of goods) following AZ's deregistration of its marketing authorisations. Even though AZ's strategy as a whole could be taken to have had anticompetitive intent, the Commission had not shown to the requisite standard that AZ's conduct was capable of restricting parallel imports into Denmark or Norway. The Court therefore reduced AZ's fine from €60 million to €52.5 million.

AstraZeneca has announced its intention to appeal the decision.

2.3.3. T-155/06 Tomra Systems ASA v. Commission – 9 September 2010

On 26 March 2006, the Commission fined Tomra Systems ("Tomra") €24 million for an abuse of its dominant position. The Commission found that Tomra abused its dominant position on the market for the supply of machines, usually installed in retail outlets, for the collection of used drink containers in return for a deposit, in Austria, Germany, the Netherlands, Norway and Sweden. The Commission concluded that Tomra's practices, consisting of a system of exclusivity agreements, quantity commitments and loyalty-inducing discounts, restricted or at least delayed the market entry of other manufacturers. The Commission argued that this constituted a serious abuse of its dominant position.

In its judgment of 9 September 2010, the General Court essentially upheld the Commission's decision. The Court confirmed its existing case law and rejected the need to analyse any actual foreclosure effects, provided the conduct in question is capable of foreclosing competition; therefore, any errors in the Commission's analysis of actual effects are complementary to its abuse of dominance finding and cannot affect the legality of the decision.

The Court confirmed the Commission's finding that Tomra had used various exclusivity clauses with national grocery stores in Germany, Austria, Sweden, Norway and the Netherlands that required these stores to purchase all or most of their machines from Tomra, thereby excluding competitors. During a total period of five years, Tomra was found to have used various different types of clauses, including minimum purchasing requirements and loyalty rebates, to induce customers to purchase all or most of their machines from Tomra. According to the Court, Tomra was generally able to anticipate each customer's total annual demand for such machines, and determine its requirements and loyalty rebates accordingly. Tomra's defences, according to which, inter alia, the Commission should have investigated whether the contracts with grocery stores were enforceable under national law, were rejected.

In relation to Tomra's fine at 8 per cent of its turnover for a "serious" infringement as compared to Microsoft's fine amounting to 1.5 per cent of its turnover for a "very serious" infringement and Astra Zeneca's fine amounting to 3 per cent of its turnover, the Court affirmed the Commission's discretion in setting fines. The Court affirmed that the Commission enjoys considerable discretion in calculating the level of the fine and "*cannot be compelled to set fines which display perfect coherence with those imposed in other cases*."

Tomra has appealed to the CJEU.[145]

2.4. <u>Judgments of the Court of Justice of the European Union</u>

2.4.1. C-441/07 European Commission v. Alrosa Company Ltd – 2 June 2010

On 29 June 2010, the Court of Justice of the European Union issued its decision in European Commission v. Alrosa Company Ltd. and ended a legal dispute that commenced in January 2003. The case related to a supply agreement between Alrosa and De Beers that was notified to the Commission on 5 March 2002 for negative clearance or an exemption under Council Regulation No. 17 of 6 February 1962. The subject-matter of that agreement, which was concluded in the context of long-standing trading relations between Alrosa and De Beers, was essentially the supply of rough diamonds. During a five year period, Alrosa undertook to sell natural rough diamonds produced in Russia to De Beers to the value of U.S.$ 800 million per year, while De Beers undertook to buy those diamonds from Alrosa. During the fourth and fifth years of the agreement, Alrosa was entitled to reduce that amount to U.S.$ 700 million.

On 14 January 2003, the Commission sent a statement of objections to Alrosa and De Beers in which it argued that the notified agreement was capable of constituting an illegal restraint of trade as prohibited by Article 101 TFEU (ex Article 81 EC). On the same day, the Commission sent a separate statement of objections to De Beers alone in which it argued that the agreement could constitute an abuse of a dominant position as prohibited by Article 102 (ex Article 82 EC).

In its statement of objections, the Commission found that, as the No. 1 supplier of rough diamonds worldwide, De Beers was in a dominant position in the market for rough diamonds. Alrosa was the No. 2 producer of rough diamonds worldwide. The Commission argued that De Beers was abusing its dominant position by securing Alrosa's output of rough diamonds to itself and thereby increasing its power to determine the price of diamonds on the worldwide market. The Commission argued

[145] Case C-549/10 P, *Tomra v Commission* (appeal pending).

that the supply arrangement prevented Alrosa from emerging as an independent competitor to De Beers and challenging De Beers pre-eminence on the worldwide rough diamond market.

On 12 September 2003, Alrosa proposed commitments which involved the progressive reduction of the quantity of rough diamonds sold to De Beers with effect from the sixth year in which the notified agreement was in force and, with effect from 2013, an undertaking to no longer sell rough diamonds to De Beers. Alrosa subsequently withdrew those commitments.

On 14 December 2004, Alrosa and De Beers jointly submitted commitments which provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, the value of which was to go down from U.S.$ 700 million in 2005 to U.S.$ 275 million in 2010, and subsequently to be capped at that level.

On 3 June 2005, the Commission published a description of the commitments in the Official Journal and requested comments and submissions from interested parties. Following publication of the commitments, 21 interested parties submitted comments to the Commission. A large majority of the observations confirmed the Commission's competition concerns, but indicated that these concerns would not be addressed by the joint commitments offered by the Parties. Several submissions suggested that the joint commitments would not bring about significant reductions in sales of rough diamonds from Alrosa to De Beers and would allow De Beers to prevent Alrosa from becoming a fully independent competitor. A majority of interested third parties stated that there should be no purchase relationship between Alrosa and De Beers whatsoever.

On 25 January 2006, De Beers offered individual commitments which provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, the value of which was to go down from U.S.$ 600 million in 2006 to U.S.$ 400 million in 2008, and their subsequent termination.

On 26 January 2006, the Commission sent Alrosa a copy of the commitments proposed by De Beers and requested Alrosa's comments. It also provided Alrosa with a copy of the non-confidential version of earlier comments from third parties. On 6 February, 2006, Alrosa provided comments on the individual commitments offered by De Beers and the earlier comments from third parties.

On 22 February 2006, the Commission adopted a Decision accepting the commitments offered by De Beers and closing the investigation. Alrosa subsequently appealed the decision to the General Court. Alrosa submitted three pleas in law – a) infringement of the right to be heard (in relation to the third party comments and De Beers's unilateral commitments), b) infringement of Article 9 of Regulation 1/2003 which, Alrosa alleged, does not provide for remedies to be made binding on undertakings that have consented to them, and c) infringement of Article 9 of Regulation 1/2003 given the excessive and disproportionate nature of the remedies.

The General Court sided with Alrosa on each of these pleas. It first addressed the substantive complaints and found that the Commission had accepted a remedy that was disproportionate and that went far beyond what was required to end the anti-competitive conduct. The General Court found that the joint commitments offered by the Parties were sufficient to end the anti-competitive conduct and that the remedies offered by De Beers and accepted by the Commission were disproportionate as they envisage the total and permanent cessation of purchases of rough diamonds from Alrosa. Regarding the procedural aspects of the case, the General Court found that the two procedures under Article 101 and 102 TPEU (ex Article 81 and 82 al) respectively constitute essentially one single procedure and that Alrosa was therefore an "undertaking concerned" for the purposes of the investigation under Article 102 (ex Article 82). The General Court found that the Commission should have provided the parties with detailed factual descriptions of third party submissions before accepting the unilateral commitments from De Beers. Accordingly, Alrosa's right to be heard had not been respected by the Commission.

The Commission appealed the General Court's decision to the Court of Justice of the European Union. The Commission put forward two grounds of appeal.

- It first argued that the General Court incorrectly found that Article 9 of Regulation 1/2003 carries an obligation of proportionality that is identical to the obligation in Article 7 of Regulation 1/2003.

- It then argued that the General Court had incorrectly found that Alrosa's right to be heard was violated. In particular, the Commission argued that Alrosa was a third party for the purposes of its Article 102 investigation and was not an "undertaking concerned" as defined by Regulation 1/2003. Accordingly, Alrosa's right to be heard was limited and was not breached during the Commission's investigation.

The Concept of Proportionality Under Article 9 of Regulation 1/2003 and the Commission's adoption of De Beers's remedies.

Article 7 of Regulation 1/2003 allows for the Commission to impose remedies on Parties that are proportionate to the offence and which bring the offending conduct to an end. While Article 9 makes no reference to proportionality, Alrosa had argued that Article 9 also carried this burden of proportionality and that the Commission is not entitled to accept remedies that are disproportionate and go beyond what is necessary to bring the offending conduct to an end.

The Commission argued that Article 9 contains no such obligation of proportionality and that it is a voluntary measure through which Parties can offer commitments that they believe are sufficient to bring the offending conduct to an end. It is for the Parties to decide whether or not the proposed commitments are excessive or suitable.

The Court sided with the Commission and found Articles 7 and 9 of Regulation 1/2003 carried different legal standards of proportionality and that "*the principle of proportionality ... has a different extent and content, depending on whether it is considered in relation to the former or latter article.*" The Court found that "*application of the principle of proportionality by the Commission in the context of*

Article 9 of Regulation 1/2003 is confined to verifying that the Commitments in question address the concerns its expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately." The Court also noted that "the Commission is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it."

In terms of whether the Parties had "*offered less onerous commitments that also address those concerns adequately,*" the Court found that the General Court had incorrectly substituted its own economic opinion for that of the Commission "*thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of the assessment.*" The Court found that "*judicial review...relates solely to whether the Commission's assessment is manifestly incorrect.*"

In light of the extensive third party comments that a) supported the Commission's position, b) cast doubt on the Parties joint commitments and c) called for a completion termination of supplies of rough diamonds by Alrosa to De Beers, the Court found that the Commission's position was well-supported and that it had not made a "*manifest error of assessment*." It therefore upheld Commission's finding.

The right to be heard.

In determining the nature of Alrosa's right to be heard and whether that right had been respected, the Court first noted that "*in the present case two sets of proceedings were started by the Commission, one under Article 81 EC concerning the conduct of De Beers and Alrosa on the market in rough diamonds, and the other under Article 82 EC concerning the unilateral practices of De Beers....It follows that Alrosa could have had the status of "undertaking concerned: only in the context of proceedings brought under Article 81 EC, in which no decision was taken.*" The implications of this was that "*Alrosa therefore enjoyed only the less extensive rights of an interested third party.*"[146] The Court found that the Commission was not obliged "*to provide Alrosa with a reasoned explanation of why the observations of the third parties had changed its position on the appropriateness of the joint commitments,*" and was not obliged *"to suggest to Alrosa that it offer new joint commitments with De Beers.*" For these reasons, the Court found that Alrosa's right to be heard was limited as a third party and that the Commission had not breached any procedural obligations.

The Court set aside the judgment of the General Court and rejected Alrosa's application.

2.4.2. C‑280/08 P Deutsche Telekom v. Commission – 14 October 2010

On 14 October 2010, the CJEU upheld the General Court's 2008 judgment dismissing an appeal of a 2003 Commission decision fining Deutsche Telekom ("DT"), the incumbent telecoms operator in Germany, €12.6 million for an abuse of a dominant

[146] The Court noted that "*only if it transpired that the Commission without an objective reason made a single factual situation the subject of two separate sets of proceedings would Alrosa have to be accorded the rights enjoyed by an undertaking concerned in relation to the proceedings brought under Article 82EC. However, the General Court did not find that the Commission misused its powers in that way in the present case, nor indeed was there any evidence in support of that view*."

position.

The 2003 Commission decision found that DT had abused its dominant position on the markets for direct access to its fixed telephony network. The Commission found that the abuse consisted of setting wholesale prices for network access services (*i.e.*, local loop access services for competitors) higher than DT charged its own end users for access. As a result, competitors were forced to offer prices that were higher than DT's prices or provide services at a loss, a so-called "margin squeeze".

On appeal to the General Court, DT argued that (i) margin squeeze did not in itself constitute abusive behaviour and therefore the Commission must demonstrate that its retail prices were abusive, (ii) wholesale charges for local loop access services were regulated by the German telecoms regulatory authority (RegTP), and (iii) the Commission should have assessed any margin squeeze on the basis of the revenues generated by competitors and not on the basis of the RegTP approved tariffs (*i.e.*, the as efficient competitor test).

However, the General Court dismissed the appeal, holding that (i) margin squeeze itself could be a standalone abuse of Article 102 TFEU, (ii) as RegTP imposed caps on wholesale charges, DT could have priced lower wholesale charges to competitors or priced higher retail prices to end users, and (iii) the Commission's use of the as-efficient-competitor test was appropriate.

On appeal to the CJEU, DT again argued that: (i) the infringement could not be attributed to it in this regulated sector, (ii) margin squeeze could not be a standalone abuse, and (iii) the Commission and General Court did not use an appropriate test for measuring margin squeeze. The CJEU affirmed the General Court 's judgment in full.

The infringement should be attributed to DT

Although RegTP regulates wholesale and retail charges, the Court held that the General Court did not err in law by attributing the abuse to DT. The Court recalled that it was well established case law that EU competition law would not apply only if (i) anticompetitive conduct is compelled by national legislation, or (ii) national legislation creates a legal framework eliminating the possibility of competition. The Court considered that DT had sufficient control to adjust its retail prices to end users in order to avoid exclusionary conduct. Therefore, the infringement could be attributed to DT.

Margin squeeze as standalone abuse under Article 102 TFEU

The Court first recalled that the list of practices contained in Article 102 TFEU is not exhaustive and that Article 102 TFEU prohibits practices having an exclusionary effect on competitors capable of preventing or hampering entry of potential competitors. Furthermore, Article 102 TFEU prohibits practices which not only pose a direct harm to competitors but also practices which may be detrimental to consumers through their impact on competition. The Court noted that DT itself did not argue that the spread between wholesale charges and retail prices to end users was not capable of having an exclusionary effect on competitors. Thus, the Court held that the General Court was correct to consider margin squeeze as a standalone theory of harm, and there was no need to demonstrate further that either wholesale charges or retail prices were themselves abusive. Furthermore, the Court rejected DT's argument that it would have had to raise end user retail prices to avoid margin squeeze. The Court reiterated that as DT had sufficient control to adjust its retail prices to end users, its failure to do so, constituted exclusionary conduct.

Application of the "as-efficient competitor" test

The Court upheld the General Court's finding that the Commission was correct to apply the "as-efficient competitor" test for determining exclusionary conduct rather than a reasonably efficient competitor test. Under the "as-efficient competitor" test the Commission showed that rivals, assuming they had DT's costs and had to pay DT's wholesale price would not have been able to meet DT's retail prices without selling below cost. In particular, the Court considered that such a test relying on the dominant undertaking's cost as a benchmark provided legal certainty since a dominant undertaking would not know its rivals' costs.

Thus, the Court held that the General Court was correct to hold that the Commission had established that DT's particular pricing practices gave rise to actual exclusionary effects on competitors who were at least as efficient as DT. It should be noted that the Court indicated that there must be some actual effect on competitors for margin squeeze to be considered an abuse.

2.4.3. C-52/08 Konkurrensverket v TeliaSonera Sverige AB – 17 February 2011

On preliminary ruling, the CJEU has provided guidance on its interpretation of 'margin squeeze' cases and the substantive test for establishing such abuse.

The Swedish Court referred the question on whether margin squeeze was a standalone abuse arising whenever the spread between input and retail prices was such as to prevent an as-efficient competitor from making a profit or only when the input product was indispensable to downstream competition, *i.e.,* another form of refusal to supply.

The Swedish court was reviewing a decision by the Swedish competition authority alleging that TeliaSonera had engaged in a 'margin squeeze'. As a vertically integrated company, TeliaSonera offered operators an ADSL product intended for wholesale users while also offering broadband services directly to end users itself. The theory of harm proposed by the Swedish competition authority was that TeliaSonera harmed its rivals by setting its prices in such a way that the spread between the cost of the upstream sale price of ADSL products (intended for wholesale users) and the retail prices of broadband services (which TeliaSonera offered to end users) was insufficient to cover the costs which TeliaSonera itself had to occur in order to provide those retail services to end users, *i.e.,* an "equally efficient" operator would have an insufficient margin to compete in the downstream market.

In contrast to last October's Deutsche Telekom judgment on 'margin squeeze', this is a preliminary ruling from a Member State rather than an appeal originating from a

Commission decision; moreover, unlike in Deutsche Telekom, there was no regulatory obligation on TeliaSonera to provide the wholesale ADSL services at issue in the present case, therefore the Court re-examined the criteria for a margin squeeze finding. In that case, the CJEU affirmed that (i) margin squeeze itself could be a standalone abuse of Article 102 TFEU, (ii) as RegTP imposed caps on wholesale charges, DT could have priced lower wholesale charges to competitors or priced higher retail prices to end users, and (iii) the Commission's use of the as-efficient-competitor test was appropriate.

Advocate General Opinion

In his opinion, Advocate General Jàn Mazák (who also authored the Deutsche Telekom opinion), on the question of whether 'margin squeeze' is to be regarded as an abuse of a dominant position under Article 102 TFEU, he opined that if the dominant undertaking is not under any obligation to provide services on a wholesale level (either because of a regulatory obligation or a "duty-to-deal" because the services are indispensable to competitors, *i.e.*, an essential facility) then there is no abuse:

"21. Therefore, I consider that if there was no regulatory obligation compatible with EU law on a dominant undertaking to provide an input which is not indispensable then the dominant undertaking should not in principle be charged with a margin squeeze abuse. If margin squeezes were prohibited purely on the basis of an abstract calculation of the prices and in the absence of any assessment of the indispensability of the input for competition in the market, dominant undertakings' willingness to invest would be reduced and/or they would be likely to raise end-user prices lest they be charged with a margin squeeze. If a dominant undertaking could lawfully have refused to provide the products in question, then it should not be reproached for providing those products at conditions which its competitors may consider not advantageous."

Notwithstanding the foregoing, on the facts, there could be scope for a finding of another abuse such as predatory pricing, foreclosure, or discrimination.

However, in its judgment and in contrast to the Advocate General opinion, the Court has confirmed that a 'margin squeeze' constitutes a standalone abuse, apart from refusal to supply.

In the absence of any objective justification, the fact that a vertically integrated undertaking, holding a dominant position on the wholesale market in ADSL services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU.

Further, 'margin squeeze' is not a 'per se' violation, therefore in assessing whether such a practice is abusive, all of the circumstances of each individual case should be taken into consideration.

As a general rule, the prices and costs of the undertaking concerned on the retail services market should be taken into consideration (whilst this affirms that the "as efficient competitor" test is the default test, the Court appears to give scope for consideration of competitors' prices and costs on the same market in the particular circumstance where it is not possible to refer to such prices and costs).

Particular account should also be taken of whether the wholesale product is indispensable (although this appears not to be dispositive for a finding of abuse in contrast to the Commission's Guidance Paper on Enforcement Priorities), the practice produces an anti-competitive effect, at least potentially, on the retail market, and any objective justification.

The Court also gave guidance on considerations that as a general rule should not be considered as relevant to the assessment of the abuse:

- the absence of any regulatory obligation on the undertaking concerned to supply asymmetric digital subscriber line input services on the wholesale market in which it holds a dominant position;
- the degree of dominance held by that undertaking in that market;
- the fact that the undertaking does not also hold a dominant position in the retail market for broadband connection services to end users;
- whether the customers to whom such a pricing practice is applied are new or existing customers of the undertaking concerned;
- the fact that the dominant undertaking is unable to recoup any losses which the establishment of such a pricing practice might cause, or
- the extent to which the markets concerned are mature markets and whether they involve new technology, requiring high levels of investment.

3. MERGERS

3.1. Commission Phase II Decisions

3.1.1. Oracle / Sun Microsystems – Notified: 30 July 2009 / decision: 21 January 2010[147]

On 21 January 2010, the Commission, following an in-depth investigation, cleared the acquisition of Sun Microsystems Inc. ("Sun"), a hardware and software vendor, by Oracle Corporation ("Oracle"), a database and applications software company. Both companies were active in the database market, Sun having acquired MySQL, the leading open source database, in 2008, while Oracle was one of the three main proprietary database vendors who collectively held approximately 85% of the market.

In first phase, the investigation had focused on issues related to Oracle's control of the cross-platform Java programming language. Oracle was active in the development of applications for Java and there was a fear that the vertical integration post merger could allow Oracle to gain a competitive advantage over and/or disadvantage its competitors in the downstream Java applications market. However, the Commission's initial fears were allayed by the realisation that Oracle could not lower the quality of the Java platform for its competitors without its own applications being impacted, and that even if it could do so, Java competed fiercely with Microsoft's .NET platform and harming the platform's broad adoption would lead to a potentially large and long term loss of revenue as users switched to .NET. Moreover, the governance structure of Java was such that its management and development control (the Java Community Process) was not purely in the hands of Oracle but also involved its competitors and other industry players, and therefore that any potential unilateral adverse change to the platform would be very difficult to carry out.

However, at the end of the first phase the Commission raised concerns about Oracle's control over the open-source Sun MySQL database, which according to the Commission acted as a maverick on the database market. The parties did not offer any remedies in phase I, arguing that the concentration created no competition concerns.

Encouraged by complainants including Microsoft, SAP and MySQL's founder, Monty Widenius, the Commission opened a Phase II investigation. The US DoJ had cleared the merger unconditionally in August, creating tension between the two agencies that culminated in the DoJ issuing a press release in response to the Commission's statement of objections noting that it considered that Oracle's acquisition of Sun Microsystems would produce no anti-competitive effects, although the same press release stated that the Commission-DoJ working relationship remained "*strong and positive*."

The Commission issued a statement of objections in November 2009. However, following an intense two-day oral hearing, and over 500 letters from customers and partners expressing support for the deal, the Commission decided to clear the transaction unconditionally, on the basis that credible open-source alternatives existed

[147] Case No. COMP/M.5529.

and further alternatives would emerge, and on the basis of informal, unilateral pledges offered by Oracle to MySQL customers and storage engine developers that provided assurances regarding MySQL – pledges that the Commission qualified as "new facts" influencing the ultimate decision.

The Commission also examined overlaps between Oracle and Sun in the market for middleware (software which acts as a connection between an operating system and applications), which were found to be small and unproblematic, as well as a concern that post merger Oracle would become one of a small number of operators able to provide the entire IT stack, though further investigation showed that there were sufficient competitive constraints to ensure that no significant anti-competitive foreclosure would occur.

Since the clearance, and following a written question by an MEP, the Commission has been drawn to explain the impact of Oracle's pledges on its investigation. According to the Commission, a unilateral declaration made by Oracle, on a standalone basis, would have been insufficient to address the Commission's concerns. However, on the day the pledges were issued, Oracle signalled its commitment to the pledges, *e.g.*, by notifying storage engine licensees in writing of its intention to renew their licenses on their existing terms. In this way, the pledges and their implementation had an effect on the possibility of alternative open-source databases emerging as a competitive force in the market, meaning that the Commission was obliged to take them into consideration in reaching its decision.

Third party complainant Monty Widenius has lodged an appeal on the following grounds:[148]

- Firstly, the Commission erred in law by classifying Oracle's ten pledges of future behaviour as new factual elements allowing the removal of all competition concerns and an unconditional clearance decision thereby infringing Article 2 of the EC Merger Regulation and the Commission notice on remedies;

- Secondly, the Commission breached the procedural rules by not following the remedies notice and not market testing Oracle's pledge, and misused its powers;

- Thirdly, the Commission committed a manifest error of assessment by incorrectly assessing the effects of the pledges on Oracle post merger and in doing so has failed to meet the standard of proof imposed on the Commission under EU law; and

- Finally, the Commission committed a manifest error of assessment in its evaluation of the competitive constraint imposed by other open source competitors on Oracle post-merger.

Oracle and Software Freedom Law Center, Inc. have been admitted as interveners in support of the Commission in the appeal. The Commission has rejected an

148 T-292/10, *Monty Program v Commission*.

application to intervene from Canonical, a software developer, for a lack of direct and existing interest in the case.

3.1.2. Unilever/ Sara Lee Body Care – Notified: 21 April 2010 / decision: 17 November 2010[149]

On 17 November 2010, the Commission, following an in-depth investigation, cleared the acquisition of Sara Lee's body and laundry care business, by Unilever, a supplier of a wide range of branded consumer goods. In the personal care sector where there were overlaps with Sara Lee, it is particularly strong in deodorants with its leading brands Axe, Dove and Rexona, present all across Europe. Sara Lee supplies deodorants under the Sanex brand in a number of European countries. Its personal care business also includes other brands such as Radox, Duschdas, Badedas or Monsavon.

In phase II, the Commission's in-depth investigation has shown that the merger would give Unilever a very strong leadership position in a number of deodorants markets by combining the parties' brands, most notably Sanex with Dove and with Rexona which presently compete against each other. The Commission found that the merger, as initially notified, would raise competition concerns in Belgium, The Netherlands, Denmark, the United Kingdom, Ireland, Spain and Portugal where it would remove an important competitive force and would likely have led to price increases.

In order to eliminate the Commission's competition concerns, the Parties committed to divesting Sara Lee's Sanex brand and related business in Europe.

The decision has not yet been published.

3.1.3. Syngenta/ Monsanto's Sunflower seed business – Notified: 28 April 2010 / decision: 17 November 2010[150]

On 17 November 2010, the Commission, following an in-depth investigation, cleared the acquisition of Monsanto's Sunflower seed business ("Monsanto"), encompasses all inventories of sunflower seed, germplasm, intellectual property rights, know-how, contracts, commercial data and some employees of Monsanto's sunflower seed business, by Syngenta Corporation ("Syngenta"), active in the agricultural sector, in particular in seeds and crop protection. Both companies were active in relation to sunflower seeds.

The transaction did not have a Community dimension and was notifiable in Spain and Hungary. The transaction completed on 31 August 2009 with a hold separate in place in Spain. However, the Commission took jurisdiction in November 2009 in accordance with Article 22 of the Merger Regulation upon full referral from Spain and Hungary.

In first phase, the investigation focused on the breeding and commercialisation of sunflower seeds and sunflower seed treatment products in Europe as the proposed

149 Case No. COMP/M.5658.
150 Case No. COMP/M.5675.

transaction would combine two leading sunflower seed suppliers active in Europe. Both are strong in the breeding of new sunflower varieties and in the commercialisation of sunflower seeds. The removal of an important competitor may have a negative impact on the level of innovation, leading to a reduction of choice for customers and to an increase in prices for sunflower seeds. In addition, foreclosure concerns were raised with regards to sunflower seed treatment products. However, the parties did not offer any remedies in phase I, asserting that the concentration created no competition concerns.

The Commission's investigation showed that the transaction, as initially notified, would have resulted in high market shares combined with limited prospects of entry and expansion in both the Spanish and the Hungarian markets for the commercialisation of sunflower hybrids. It would also have increased the ability and incentives for the merged entity to significantly reduce its activities of exchange and licensing of sunflower varieties in the EU, leading notably to a reduction in innovation, a foreclosure of competitors in the markets for the commercialisation of sunflower seeds and ultimately to a reduction of choice of sunflower seed hybrids for customers. The investigation was however able to dispel the initially identified concerns regarding the shutting out of competitors from the markets for sunflower seed treatment products.

In early phase II, Syngenta submitted a first set of commitments which were market tested and found to be insufficient.

Following the market test, the notifying party submitted an amended set of remedies on 17 September 2010:

- Syngenta offered to divest Monsanto's hybrids commercialised in Hungary and in Spain in the last two years, as well as the hybrids already under official trial for registration in these same countries.

- Syngenta offered to divest Monsanto's parental lines used to develop these hybrids, as well as the pipeline parental lines currently under development with the aim of producing hybrids for the markets of Spain and Hungary.

The commitments include notably the right to use, cross, breed and license the offered parental lines, and to commercialise and license the resulting hybrids. The geographic scope of the rights to commercialize the hybrids varies according to whether the hybrid has been already commercialised or is already under official trials or will be the result of further crossing and breeding by the acquirer of the divested businesses. These rights may extend to Spain and/or Hungary, the EU or the EU plus Russia and the Ukraine or Turkey, the most significant European sunflower growing countries outside the EU. The extension of the rights to commercialize some types of hybrids to Russia, the Ukraine and Turkey was notably necessary to fully ensure the long term viability of the divested businesses.

The Commission did not issue a statement of objections.

3.1.4. Olympic Air/ Aegean Airlines – Notified: 24 June 2010 / decision: 26 January

2011[151]

On 26 January 2011, the European Commission prohibited the proposed merger between Greek airlines Aegean Airlines and Olympic Air, following an in-depth phase II investigation. This is the first prohibition of a concentration by the European Commission since the Ryanair/Aer Lingus decision of 2007. The decision is not yet published, but the Commission's press release gives some indication on the main substantive issues.

Olympic Air and Aegean are the two main airlines in Greece. Olympic Air is the successor of the Greek national carrier Olympic Airways. Aegean Airlines joined the Star Alliance last night. In examining the proposed merger, the Commission found that the two carriers together controlled more than 90% of the Greek domestic air transport market, and that the merger would have led to a quasi-monopoly on nine routes between Athens and Thessaloniki and Athens and eight Greek island airports (Herakleion and Chania, both in Crete, Rhodes, Santorini, Mytilini, Chios, Kos and Samos).

The Commission found that ferry services in the country of over 200 inhabited islands do not constitute a sufficiently close substitute to air services to constrain the merged entity's pricing behaviour post-merger.

Moreover, according to the Commission, the market investigation revealed no prospect post-merger of a new player offering domestic flights to and from Athens on a sufficient scale to challenge the new entity. Low cost airlines focus on international air transport and unlike other European countries there are no rival airports near big cities/destinations.

The Commission itself highlighted the similarity to the prohibited RyanAir/Aer Lingus where presumably similar substantive issues arose, *e.g.*, same home airport (Olympic and Aegean 77% of flights in/out Athens airport) with the unlikely prospect of new entry.

And unlike the other recent string of airline merger cases involving Lufthansa, the remedies proposed by the merging parties were not sufficient to address the Commission's concerns. The parties had offered to release slots at Athens and other Greek airports, along with other remedies such as granting third party access to their frequent flyer programmes and interlining agreements. However, the Commission found these remedies to be insufficient, primarily because, in its view, the main problem in this case was not the availability of slots, which are already available at most Greek airports, including Athens. According to the Commission, the market test also showed that the remedies were unlikely to entice a credible new player to create a base at Athens airport and exert a viable competitive constraint on the merged entity with respect to the affected routes.

[151] Case No. COMP/M.5830.

3.2. Judgments of the General Court

3.2.1. T-342/07 Ryanair v. Commission – 6 July 2010

Since the introduction of the merger regulation in 1990, the Commission has prohibited 20 proposed concentrations. The most recent prohibition was the Ryanair/Aer Lingus decision in 2007. The case originates with the Irish Government's privatisation of the then state owned airline company, Aer Lingus, in 2006. Following the privatisation and floatation of Aer Lingus, Ryanair announced its intention to acquire an equity holding in Aer Lingus and in September 2006, began purchasing shares of Aer Lingus. Ryanair acquired 43.7 million shares on 27 September 2006, 25.05 million shares on 28 September 2006, 8.3 million shares on 29 September 2006, 7.775 million shares on 4 October 2006 and 16.56 million shares on 5 October 2006. These shares amounted to 19.16% of the share capital of Aer Lingus. On 5 October 2006, Ryanair announced a public bid for the entire share capital of Aer Lingus.

In preparation for its possible acquisition of sole control over Aer Lingus, Ryanair submitted Form CO to the European Commission on 30 October 2006. The Commission issued a decision on 27 June 2007 prohibiting the concentration. In its decision, the Commission identified 35 routes on which the Parties overlapped. The proposed concentration would have created a monopoly on 22 of those routes and would lead to the creation of a very high combined market share (greater than 60%) on 13 others. The Commission also pointed out that, on the few routes which would not be monopolised by the merged entity, the HHI index was extremely high (between 6,000 and 6,500) as was the variation in that concentration level before and after the implementation of the concentration (the delta change was between 3,000 and 3,500).

During the administrative process, Ryanair offered remedies to alleviate the competition concerns raised by the Commission. These proposed remedies included behavioural commitments to reduce Aer Lingus's fares by 10%, to eliminate fuel surcharges on Aer Lingus's long-haul flights, to "*freeze*" the parties' flight frequencies on overlap routes, and to provide slots on an "*upfront*" basis to potential entrants on overlap routes. The Commission found that the commitments offered by Ryanair were insufficient to remedy the competition concerns raised by the transaction. The Commission therefore prohibited the proposed concentration under Article 8(3) of the Merger Regulation.

On 10 September 2007, Ryanair appealed the decision to the General Court. It's appeal consisted of five pleas:

- The first plea alleged manifest errors of assessment regarding the competitive relationship between Ryanair and Aer Lingus;

- The second plea alleged errors in the Commission's assessment in the barriers to entry;

- The third plea alleged manifest errors in the Commission's route-by-route analysis;

- The fourth plea alleged manifest errors in the Commission's assessment of the claimed efficiencies resulting from the concentration;

- The fifth plea alleged manifest errors in the Commission's analysis of the commitments offered by Ryanair.

The Competitive Relationship Between Ryanair and Aer Lingus: Ryanair argued that the Commission had placed too much emphasis on the parties combined market shares and had ignored "*fundamental differences*" between Ryanair and Aer Lingus. Ryanair submitted that the Commission's conclusion that Ryanair and Aer Lingus were "*closest competitors*" could not imply that they were "*close competitors*" and that the Commission's conclusion that the parties acted as a constraint on each other was not borne out by the industry's experience, non-technical evidence, and the econometric analysis. Ryanair also claimed that the Commission overestimated the benefits of having a base at Dublin airport and placed too much importance on software operated by Ryanair that monitored the fares offered by Aer Lingus. Ryanair challenged the Commission econometric analysis and claimed that it's "fixed-effects" methodology was flawed. Ryanair also submitted that the customer survey commissioned by the Commission was leading and biased and did not create a true picture of the interaction between the Parties.

Regarding the question of market shares, the Court simultaneously found that the high combined market shares did create a presumption of dominance but also that the Commission had relied on the high market shares as only one of many factors pointing to anti-competitive effects. The court found that "*very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position*." In terms of a threshold establishing dominance, the Court stated that "*that may be the situation where there is a market share of 50% or more*."

The Court assessment of the competitive relationship between the parties closely resembled a market definition analysis. Indeed, as the only two undertakings in many of the affected markets, the discussion of "*closeness of competition*" between the Parties focused essentially on whether the Parties service offerings were substitutable. Ryanair sought to differentiate itself as a "*low-frills*" carrier from Aer Lingus which is a "*mid-frills*" carrier offering greater service to customers who are willing to pay more for the service. However, once the parties failed to define two separate markets for "*low-frills*" offerings and "*mid-frills*" offerings, it is difficult to see how, as the only two undertakings on many of the routes, they could successfully argue that there was no, or limited, competitive interaction between the Parties. The Court found that in light of the similarity of the Parties business model (and Aer Lingus gradual evolution from full service carrier to "low-frills" carrier), the similarity of their costs, and their reaction to each other's pricing and promotional activity, there was a significant competitive relationship between the Parties and they did not offer differentiated services.

In its decision prohibiting the concentration, the Commission claimed that the econometric analysis carried by the Commission supported its finding that Ryanair and Aer Lingus were close competitors. The Commission conducted a "*fixed-effects*" regression analysis which examined the difference in fares on specified routes from January 2002 to December 2006. The analysis compares the fares charged on a given route during the periods when there is competition with those charged during the period when there is no competition. Ryanair argued that a "*cross-section*" regression analysis, which examines the difference in prices across a number of different competitive and non-competitive routes at a given point in time, was more appropriate. While accepting the limitations of the "*fixed-effects*" regression analysis, the Court ultimately endorsed the Commission's approach and accepted that the analysis "*made it possible, inter alia, to validate the hypothesis that depending on the specification […] Ryanair's presence is associated with Aer Lingus charging around 7 – 8% lower prices when considering city-pairs reflecting the Commission's retained market definition and around 5% lower prices when considering airport-pairs*." The Court did not accept Ryanair's contention that a price differential of 7 – 8% was "*insignificant*" and concurred with the Commission that such a difference indicated close competition between the Parties.

In addition to its criticism of the Commission's econometric methodology, Ryanair also criticised the Commission's customer survey, which it claimed was biased, leading, and based on an insufficient sample of respondents. The Court rejected this criticism and found that the sample of 2,500 responses was adequate considering the short time limits facing the Commission. The Court also found that, while not dispositive, the survey did give an accurate picture of consumer's preferences.

The Commission's Assessment of the Barriers to Entry: In its decision, the Commission found that all of the affected markets were characterised by high barriers to entry. These barriers to entry included Ryanair's and Aer Lingus's "*strong position*" with large bases in Ireland, their strong brand image in Ireland, airport congestion in Dublin and at certain destination airports, the perceived threat of "*aggressive retaliation*" by Ryanair in response to entry by competitors, the limited size of the Irish market and the commercial opportunities elsewhere, and the strong position of the Parties at Dublin Airport.

The Commission also interpreted the absence of recent entry on many of the affected markets as evidence that barriers to entry were high. Ryanair argued that the absence of entry resulted from Ryanair's low prices and efficient service and that if it raised prices higher than its current competitive level, entry would be timely and effective. The Court found that the Commission's analysis was "*based on a targeted assessment on the affected markets and not on the air transport sector in general*" and that Ryanair had not rebutted any of the Commission's findings in relation to the specific barriers to entry identified above.

The Commission's Route-By-Route Analysis: The affected markets for the purposes of the Commission's Decision were specific Origin & Destination Routes (O&D routes) on which the parties overlapped. In its third plea, Ryanair lodged specific complaints against the Commission's analyses on many of these routes and suggested that the competitors and/or airports included in specific O&D routes were not appropriate. In each of the O&D routes, the Court sided with the Commission and found that the Commission's analysis and conclusions were appropriate.

The Commission's Assessment of Ryanair's Efficiency Claims: In its prohibition Decision, the Commission found that Ryanair's efficiency claims were not verifiable because they were in essence based on the general claim that Ryanair would be able to transfer its business model, and in particular the related cost levels, to Aer Lingus without the offsetting of downgrades in product characteristics and revenue having been sufficiently taken into account. The Commission also found that several of Ryanair's efficiency claims also relied on assumptions which could not be independently verified.

The Court ultimately found the Commission's finding that Ryanair's efficiency claims were not verifiable and therefore could not be judged as offsetting the clear anti-competitive effects of the proposed concentration. The Court commented that "*in the absence of information proving that the expected efficiencies as a result of the transfer to Aer Lingus of Ryanair's business model took into consideration the downgrades which would be the result of giving up Aer Lingus's business model, the Commission was entitled to call into question the verifiability of the efficiency claims*."

The Commission's Assessment of Remedies Offered by Ryanair: To eliminate the competition concerns raised by Commission during the administrative procedure, Ryanair offered remedies at different stages during the process. Ryanair's final package of proposed commitments comprised the following:

- The lease of slots at Heathrow airport to potential competitors
- The provision of slots on overlap routes to and from Dublin
- The provision of slots on overlap routes to and from Cork and Shannon
- An undertaking not to implement the concentration until Ryanair had found a buyer to take up slots at Dublin airport.
- An undertaking to reduce Aer Lingus's short-haul fares by at least 10%, to eliminate fuel surcharges charged by Aer Lingus, and to operate Aer Lingus as a separate brand.
- An undertaking not to increase frequencies on an overlap routes in response to entry by a competitor and not to decrease frequencies unless a route becomes unprofitable.

In its prohibition decision, the Commission found that the proposed remedies were not sufficient to remedy its competition concerns as the market test confirmed that they were not sufficient to encourage entry by competitors. The Commission found that the slot remedies were not appropriate since they were not likely to trigger any substantial entry on the overlap routes, the "*up-front*" proposal could not remedy the missing perspective of entry, the scope of the commitments was insufficient, commitments for slots at important destinations were missing, the commitments could have only led to entry by several airlines (fragmented entry), the commitments disregarded the operating model of the entrant, the commitments concerning the London Heathrow slots could not remedy the competition concerns on the Dublin-London market, and the additional commitments could not eliminate the impediment to effective competition.

After discussing the procedural aspects of the way in which Ryanair actually submitted the remedies, the Court endorsed the Commission's substantive findings. It found that the "*Commission could not be satisfied in the present case that mere slots would ensure access to a route*" and that "*the results of the market tests showed that current and potential entrants were not ready to compete with the merged entity on all of the routes affected by the transaction*." For this reason, the Court found that Ryanair had "*not put forward any arguments capable of calling into question, to the requisite legal standard, the Commission's assessment in the contest decision that…[the remedies]…would be sufficiently workable and lasting to ensure that the impairment of effective competition which those commitments are intended to prevent would not be likely to materialise in the relatively near future*."

3.2.2. T-411/0 Aer Lingus v. Commission – 6 July 2010

A noteworthy aspect of the Commission's original decision in the *Ryanair/Aer Lingus* case was the Commission's decision not to require Ryanair to divest the existing equity stakeholding that it had built up in Aer Lingus. Although Ryanair held 29.3% of Aer Lingus, the Commission found that this equity stakeholding was not sufficient to acquire control and that it did not therefore constitute a concentration. Accordingly, the Commission argued that there was no grounds for ordering Ryanair to divest its share ownership.

Aer Lingus appealed this aspect of the decision to the European General Court arguing *inter alia* that Ryanair has access to Aer Lingus's confidential information and business secrets and that Ryanair did not have a complete incentive to compete with Aer Lingus as to do so would risk undermining its own investment in Aer Lingus. Aer Lingus argued that Ryanair's equity interest in Aer Lingus represented a partial implementation of a concentration that was prohibited by the Commission and that the Commission should order Ryanair to divest its holding in accordance with Article 8 of the Merger Regulation.

The General Court rejected Aer Lingus's arguments and held that Ryanair did not have *de facto* or *de jure* control over Aer Lingus. As the legal threshold for a concentration was not met, Ryanair should not be ordered to divest its minority holding in Aer Lingus.

Following the General Court's decisions in both *Ryanair v. Commission* and *Aer Lingus v. Commission*, the OFT has opened an investigation into whether Ryanair should be obliged to sell its equity holding in Aer Lingus. The investigation is considering whether Ryanair's holdings in Aer Lingus reduces its incentive to compete fully with Aer Lingus.

3.2.3. T-237/05 Éditions Jacob v Commission – 9 June 2010
3.2.4. T-279/04 Éditions Jacob v Commission – 13 September 2010
3.2.5. T-452/04 Éditions Jacob v Commission – 13 September 2010

On 7 January 2004, the Commission cleared the acquisition of Vivendi Universal Publishing ("VUP"), the largest publisher of French language books, by Lagardère, the second largest publisher of French language books, subject to commitments to retain only 40% of the VUP assets (the "Decision"). On 30 July 2004, the Commission subsequently approved the sale of 60% of the VUP assets to Wendel (the "Wendel Decision").

Third party Editions Jacob ("EJ"), an unsuccessful bidder for the VUP assets, appealed the Decision and the Wendel Decision. With regard to the Decision, EJ argued that Lagardère could have solely or jointly exercised decisive influence prior to merger review with Natexis Banques Populaires ("NBP") which acquired the VUP assets for Lagardère on a temporary basis pending competition approval. With regard to the Wendel Decision, EJ argued that the trustee involved in the sale of the assets had links to the assets and was not sufficiently independent.

EJ also appealed a separate Commission decision denying it access as a third party to documents from the merger control proceedings.

As background, it should be recalled that, Regulation (EC) No 1049/2001 (the so-called “Transparency Regulation”) grants right of access to documents, subject to a limited number of exceptions listed under Article 4 thereof.

However, in the present case, the Commission refused to grant EJ access to documents across the board (save for one document), claiming that the disclosure would undermine: (i) the purpose of inspections, investigations and audits; (ii) the protection of commercial interests; (iii) its decision-making process (because the documents were either drawn up for internal use or related to a matter where a decision had not been taken); and (iv) legal advice received by the Commission.

T-237/05 Éditions Jacob v. Commission – 9 June 2010

The General Court confirmed its strict interpretation of the EU access to documents rule by holding that the Commission had erred by not individually examining each document pursuant to the Transparency Regulation. The Court first confirmed that a concrete and individual investigation of each document was necessary to determine if access to documents should be granted. Such obligation could only be avoided when an individual examination has already been carried out in similar circumstances, the documents are accessible in their entirety, or all the documents are protected by a particular exception.

The Commission argued that the documents requested had been gathered in the course of a merger investigation and argued the following exceptions applied to its access obligation: (i) the purpose of inspections, investigations and audits; (ii) the protection of commercial interests of the merging parties; (iii) its decision-making process (because the documents were either drawn up for internal use or related to a matter where a decision had not been taken); (iv) internal legal advice.

The Court held that the only document the Commission could legitimately withhold access to was a legal opinion prepared by its legal services.

Moreover, the Court did not consider that the detailed inventory and categorisation of the documents according to the disclosure exceptions were sufficient to prove that each document had been individually examined.

The Commission has already filed an appeal: Case C-404/10 P, *Commission v Éditions Odile* Jacob *SAS*.

T-279/04 Éditions Jacob v. Commission – 13 September 2010

On appeal, the General Court upheld the Decision. First, the Court examined the issue of whether Lagardère, from December 2002 onwards, could have solely or jointly exercised decisive influence over the target assets being held temporarily by NBP. The Court held that NBP's acquisition of VUP's assets could not be deemed to be a concentration subject to merger control by the Commission due to its temporary nature and the exceptions carved out for financial institutions in such circumstances. Second, the Court considered that insofar as the NBP acquisition of the VUP assets was not a concentration then the Decision was not fraudulent. Third, the Court rejected claims the Decision did not include an analysis of the initial positions occupied by the merging parties noting that the Commission had taken into consideration the horizontal effects of the concentration, its vertical and conglomerate effects and the checks and balances capable of containing the power of the merged entity. Therefore, it was not evident that the Commission made any errors of assessment.

On appeal by Editions Jacob at Case C-551/10 P *Éditions Jacob v. Commission.*

T-452/04 Éditions Jacob v. Commission – 13 September 2010

On appeal, the General Court annulled the Wendel Decision. According to the General Court, the trustee report assessing Wendel as a prospective purchaser, on the basis of which that second decision was adopted, was drawn up by a trustee who did not satisfy the required condition of independence in relation to the VUP assets to be divested. Therefore, this vitiates the lawfulness of the entire Wendel Decision.

On appeal by both the Commission at C-553/10 P *Commission v. Éditions Jacob* and Lagardère SCA at C-554/10 P *Lagardère SCA v. Commission.*

4. PRACTICE & PROCEDURE

4.1. Judgments of the General Court

4.1.1. T-30/10 Reagens SpA v. European Commission (Interim Measures) – 30 March 2010

On 11 November 2009, the Commission imposed fines totalling €173,864,000 on 24 companies from 10 different undertakings – Akzo, Baerlocher, Ciba, Elementis, Elf Aquitaine (Arkema France), GEA, Chemson, Faci, Reagens and AC Treuhand for price fixing, sharing customers, market allocation and exchange of sensitive commercial information for separate cartels for tin stabilisers (1987-2000) and ESBO/esters heat stabilisers (1991-2000) in the EEA (the "Decision").

Between 1987 and 2000, Akzo, Baerlocher, Ciba, Elementis, Elf Aquitaine, Chemtura, Reagens and AC Treuhand (for various periods) participated in an EEA-wide tin stabiliser cartel. Between 1991 and 2000, Akzo, Ciba, Elementis, Elf Aquitaine, GEA, Chemson Chemtura, Faci and AC Treuhand (for various periods) operated an EEA-wide ESBO/ester heat stabiliser cartel. For both products, the companies allegedly fixed prices, shared customers, allocated markets and exchanged commercially sensitive information. The Commission's fines for the tin stabiliser cartel were as follows:

Company	Fine	Reduction under the Leniency Notice
Akzo (NL)	€21,800,000	
Elementis (U.K./U.S.)	€16,834,000	
Elf Aquitaine (Arkema France) (FR)	€10,046,400	30%
Baerlocher (DE)	€1,000,000	20%
Chemtura (U.S.)	€0	100%
Ciba (CH)	€61,320,000	15%
Reagens (IT)	€10,791,000	
AC Treuhand (CH)	€174,000	

The Commission's fines for the *ESBO/ester* cartel were as follows:

Company	Fine	Reduction under the Leniency Notice
Akzo (NL)	€18,800,000	
Elementis (U.K./U.S.)	€15,741,000	
Elf Aquitaine (Arkema France)	€18,600,400	50%

(FR)		
Chemson (AT) (GEA, ACW (DE))	€3,801,600	
Chemtura (U.S.)	€0	100%
Ciba (CH)	€7,104,000	25%
Faci (IT)	€5,940,000	
AC Treuhand (CH)	€174,000	

Following the Commission's Decision, a number of undertakings indicated their intention to lodge appeals, while Reagens brought an action for interim measures to the General Court claiming an inability to pay the fine imposed by the Commission. Reagens argued that it did not have sufficient cash to pay the fines imposed by the Commission. Its arguments can be summarised in five points:

- Reagens would need to borrow to pay the fine. However, any additional borrowings would breach its debt-to-earnings ratio agreed with its main lenders and therefore terminate its credit supply. This withdrawal of credit facilities would effectively lead to the cessation of Reagens's commercial activities;

- While Reagens could potentially pay the fine through short term credit facilities, such reliance on these facilitates would most likely trigger a demand by the relevant banks for the quick repayment of the overall short-term debt and the suspension of long-term credit facilities;

- Reagens argued that its main bank providing short term credit facilities was not prepared to advance the sum necessary to pay the Commission's fine;

- The cessation of commercial activities would results in the loss of jobs and an increase in unemployment; and,

- When assessing the extent of the fine to be imposed, the Commission did not consider the impact of the fine on the viability of Reagens's business.

In its judgment issued on 30 March 2010, the General Court refused the application in its entirety. The Court's holding rested primarily on Reagens's failure to consider fully the potential for a bank guarantee. The Court noted that when the Commission issued its decision and fine, it informed Reagens that if it wished to contest the fine through an appeal, the Commission would provisionally collect the fine or request the applicant to provide a bank guarantee that covered the amount of the principal debt and the interest payable. The Court noted that "*the possibility of requiring the provisions of a financial guarantee is a general and reasonable way for the Commission to act and that, in accordance with settled case law, the party seeking interim relief can be exempted only in exceptional circumstances from the obligation to provide a bank guarantee as a condition for the Commission's not immediately recovering a fine imposed by it*." The Court continued and stated that "*the existence of such exceptional circumstances may, in principle, be regarded as established where the party seeking exemption from providing the requisite bank guarantee proves that it is objectively impossible for it to* *provide the guarantee or that the provision of the guarantee would imperil its existence*." In the circumstances of the present case, the Court found that Reagens had not applied for a bank guarantee and could not therefore argue that it was exempt from providing a bank guarantee to the Commission.

On the grounds that Reagens had not exhausted all attempts to secure short term credit or a bank guarantee and had not provided "*specific and precise particulars*" showing how a bank guarantee would imperil its existence, the General Court dismissed the action for lack of urgency.

In January 2010, Akzo Nobel, Faci, GEA Group, Elementis, Elf Aquitaine, AC Treuhand, BASF, CECA, Reagens, and Arkema all lodged appeals with the General Court challenging the Commission's substantive findings.[152]

4.1.2. T-410/09 Almamet GmbH Handel mit Spänene und Pulvern aus Metall – 7 May 2010

On 22 July 2009, the Commission issued a decision fining eight undertakings for a three year cartel where participants agreed market shares, allocated customers and agreed price increases for calcium carbide powder in at least twelve multilateral meetings in the sector for calcium carbide and magnesium based reagents for the steel and gas industries.

The undertakings involved, and their respective fines, were as follows:

Company	Fine	Reduction under the Leniency Notice
Akzo Nobel (The Netherlands/Sweden)	€0	100%
Almamet (Germany)	€3,040,000	0%
Donau Chemie (Austria)	€5,000,000	35%
Ecka Granulate (Germany/Austria)	€6,400,000	0%
Novácke chemické závody and 1.garantovaná (Slovakia)	€19,600,000	0%
SKW Stahl-	€13,300,000	0%

[152] *See* T-47/10, Akzo Nobel v Commission, T-46/10 Faci v Commission, T-189/10 GEA Group v Commission, T-43/10, Elementis and others v Commission, T-40/10 Elf Acquitaine v Commission, T-27/10 AC Treuhand v Commission, T-25/10 BASF Specialty Chemicals and BASF Lampertheim v Commission, T-24/10 CECA v Commission, T-30/10, Reagans v Commission, and T-23/10 Arkema France v Commission.

Metallurgie and ARQUES Industries (Germany)		
Evonik Degussa (Germany)	€4,680,000	20%
HSE (Slovenia)	€9,100,000	0%
TOTAL	**€61,120,000**	

Almamet was fined €3,040,000 and appealed to the General Court, claiming that it was unable to pay and that the Commission had incorrectly denied its application for a suspension of the fine. Almamet had made a payment of €650,000 on account to the Commission but had claimed that it was unable to pay anything further.

The President of the General Court stated that interim measures of the kind requested were justified if the continued existence of the firm was threatened pending the final outcome of the matter. However, the Court considered that Almamet had not demonstrated to the requisite standard that the interim measures were urgently required to prevent serious and irreparable harm. The Court considered that a dispensation from the obligation to provide a bank guarantee for suspending the part of the fine that had not already been paid on account could only be granted in exceptional circumstances. The President found that Almamet had not demonstrated that it was objectively impossible for it to obtain a bank guarantee and therefore denied the application.

4.1.3. T-432/05 EMC Development AB v Commission – 12 May 2010

On 12 May 2010, the General Court affirmed a Commission decision not to act on a complaint alleging the anti-competitive effects of standardisation in the European cement industry.

The European Committee for Standardisation ("CEN"), whose members are the national standard setting bodies of European countries, is a Standardisation Body recognised under Directive 98/34/EC. In 2000, CEN members adopted the European cement standard EN 197-1 ("Standard") which was developed by a CEN technical committee, in close cooperation with the European Cement Association ("Cembureau"), under a mandate granted by the Commission pursuant to Directive 89/106/EC on the approximation of Member States' legislation on construction products. The Standard defines each of 27 common cement products on the "traditional and well tried" basis and further groups them into five cement types.

The cement of the complainant EMC Development is energetically modified cement produced under a new technology developed in Sweden and is not covered by the Standard. Therefore, in its complaint to the Commission, EMC Development contended that CEN and Cembureau, and particularly certain cement producers who were behind these two bodies, through adopting the Standard acted as a cartel and created barriers to entry into the European cement market. However, the Commission declined to investigate the complaint.

On appeal, the Court agreed with the Commission’s two-pronged test to scrutinize standard setting under Art. 101 TFEU*:"(i) whether the procedure for adoption of the Standard had not been non-discriminatory, open and transparent, and (ii) whether the Standard was binding*". The Court also confirmed that the Commission had not made a manifest error of assessment in relation to the first prong. In relation the second prong, the Court held that the Standard was neither legally mandatory nor de facto binding.

4.1.4. T-141/08 E.ON Energie v Commission – 15 December 2010

On 15 December 2010, the General Court issued a judgment confirming the Commission's groundbreaking fine of €38,000,000 imposed on E.ON Energie for breaking a Commission seal during dawn raid inspections.

In connection with a Commission investigation into alleged anticompetitive practices on the German electricity market, the Commission carried out so-called 'dawn raid' inspections at the Munich offices of E.ON Energie AG in May 2006. As the inspection carried over to the next day, Commission officials sealed the room and took the key to the door. However, there were approximately 20 other master keys and the Commission seal appeared to be broken.

The Commission issued a decision fining E.ON Energie on 20 January 2008.

On appeal by E.ON Energie, the General Court held:

- As a matter of law, the Commission was entitled to apply a negligence standard. E.ON Energie was required to take all necessary measures to prevent any tampering with the seal, having been clearly informed of both the significance of the seal and the consequences of its breach.
- The fine imposed on E.ON Energie was not disproportionate to the infringement. The fine amounted to approximately 0.14% of the company's turnover. The court held that the Commission fine can take into account the serious nature of the infringement (*i.e.,* breaking the seal), the size of the company, as well as ensuring the deterrent effect of the fine.

4.1.5. T-427/08 CEAHR v Commission – 15 December 2010

On 15 December 2010, the General Court annulled a Commission Decision of 10 July 2008 rejecting a complaint by Confédération Européenne des Associations d'Horlogers-Réparateurs (CEAHR) alleging violations of Article 101 and 202 TFEU in connection with the refusal by watch manufacturers to supply spare parts to independent watch repairers.

The Commission Decision rejected the complaint due to lack of Community interest. In the decision, the Commission considered that: (i) the complaint concerned a market of limited size and economic importance; (ii) there was no evidence suggesting the existence of an infringement, and that it was likely that the selective distribution schemes were covered by the block exemption for vertical agreements; (iii) repair services and spare parts did not constitute independent relevant markets and rather had to be assessed within the wider market for luxury watches; (iv) the allocation of further resources to the investigation was unlikely to permit the Commission to identify any infringement; and (v) national authorities and courts are well placed to deal with such complaints.

As the starting point in its judgment, the Court observed that the Commission does not enjoy unlimited discretion to examine complaints, as it reviewed the factors considered in the Commission Decision in rejecting the complaint in the instant case.

First, the Court considered market definition of aftermarkets. Upon review of the case law as well as in the Notice on market definition regarding aftermarkets, the Court observed that the Commission had not adequately taken into consideration the relevant principles for the purpose of market definition. In particular, it noted that the Decision had not established that consumers (both new consumers and those who already own a luxury watch) had the possibility to avoid a moderate increase in price increases for spare parts by switching to another primary product. The fact that potential purchasers could potentially choose freely between several brands in the primary market was not considered relevant by the Court "unless it is established that that choice is made, among others, on the basis of the competitive conditions on the secondary market". As such, the Court held that for there to be a distinct secondary market, it must be shown that a price increase in secondary products/services would not be able to affect the volume of sales in the primary market in such way as to render such increase unprofitable.

Second, on the basis of the foregoing "manifest error of assessment" by the Commission, the Court considered the resulting consequences. Insofar as the contested decision was built on the assumption that there was a single market for "luxury watches, repair services and spare parts", its findings on the low probability of the existence of an infringement were also quashed -- the Commission had relied on that market definition in determining that the agreements were below the relevant threshold to benefit from a block exemption, inter alia.

Finally, the Court considered whether national authorities and courts were well placed to deal with the complaint. The Court noted that the conduct at stake affected various national markets. In relation to its own case law, where it previously endorsed the Commission, the Court distinguished that those cases concerned situations in which the extent of the practices complained of were essentially limited to the territory of a single Member State and proceedings had already been brought before those authorities or courts. Moreover, the Court argued that "*even if the national authorities and courts are well placed to address the possible infringement (...) that consideration alone is insufficient to support the Commission´s final conclusion that there is no sufficient Community interest*". According to the Court, the applicable test is whether "action at European Union level could be more effective than various actions at national level". In the instant case, there were reasons to believe that Commission review would be more effective in this case.

Therefore, in consideration of the foregoing, the Court annulled the Commission Decision.

4.2. Judgments of the Court of Justice of the European Union

4.2.1. C-113/09 Ziegler v. Commission - 30 April 2010

On 30 April 2010, the President of the Court of Justice of the European Union dismissed Ziegler's appeal for interim relief in connection an earlier decision of the European Commission which imposed fines on multiple undertakings for an international "*door-to-door*" removal services cartel operating in Belgium.

The undertakings involved, and their respective fines, were as follows:

Company	Fine	Leniency Reduction
Allied Arthur Pierre (Belgium)	€2,600,000	50%
Compas (Belgium)	€134,000	
Coppens (Belgium)	€104,000	
Exel Investments Ltd.,(U.K.)	€8,900,000	
Gosselin (Belgium)	€4,500,000	
Interdean (Belgium)	€3,185,000	70%
Mozer (Belgium)	€1,500	
Putters (Belgium)	€395,000	
Team Relocations (Belgium)	€3,490,000	
Transworld (Belgium)	€246,000	
Ziegler (Belgium)	€9,200,000	
TOTAL	**€32,755,500**	

When it notified its decision to the cartel participants, the Commission stated that, should the decision be appealed to the General Court, the parties should provide the Commission with a bank guarantee covering the fine and interest. The expiry date for payment of the fine was 26 June 2008.

Ziegler, fined € 9,020,000, appealed to the General Court, and made a request to suspend imposition of the fine and a dispensation from the obligation to provide a bank guarantee. On 17 June 2008, the President of the General Court agreed to a suspension of the fine, pending the outcome of interim measures proceedings and requested a settlement between the Commission and Ziegler. However, as the Commission and Ziegler failed to settle, the General Court issued an order dismissing Ziegler's application for interim measures, concluding that the claims for urgency raised by

Ziegler had not been established on 15 January 2009.

Ziegler appealed the General Court's interim order, on the following grounds:

- Ziegler first argued that the General Court had erred in not considering certain evidence presented spontaneously by Ziegler to the Court after the hearing, despite asking for such evidence and taking into account elements of fact presented to the Court by the Commission after the hearing;

- General Court breached the principle of equal treatment and Ziegler's rights of defence, again by failing to consider the evidence presented by Ziegler after the hearing and also by limiting Ziegler's submission to 25-pages in length whilst accepting 41 pages from the Commission, and stating that Ziegler could only respond to the Commission's submission orally.

- The President of the General Court exceeded its powers when deciding that Ziegler had not proven the existence of circumstances justifying the dispensation from providing a bank guarantee.

The President of the CJEU dismissed the appeal in its entirety.

4.2.2. C-550/07 Akzo Nobel Chemicals v. Commission – 14 September 2010

On 14 September 2010, the CJEU issued a ruling upholding the judgment of the General Court which, in September 2007, denied the extension of legal professional privilege ("LPP") to certain communications with Akzo's in-house counsel.

In a disappointing ruling for businesses and in-house lawyers, the Court followed the opinion of Advocate General Kokott and its previous case law stemming from the judgment in *AM&S Europe v Commission* in 1982, and refused to recognise in-house LPP in investigations by and on behalf of the European Commission. The Court affirmed its earlier case law that in-house lawyers are "*not able to ensure a degree of independence comparable to that of an external lawyer*," finding that the legal landscape in the EU has not developed since the judgment in 1982 to an extent which would justify a change in the case law and recognition for in-house lawyers of the benefit of LPP.

The Court upheld the principle set out in its *AM&S* judgment of 1982 that documents will be protected by LPP under two conditions: first, the exchange with the lawyer must be connected to "*the client's rights of defence*" and, second, the exchange must emanate from "*independent lawyers,*" that is to say "*lawyers who are not bound to the client by a relationship of employment*."

Regarding the second criterion, the Court held that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that LPP does not cover exchanges within a company or group with in-house lawyers. This confirms the Court's existing case law that lawyers in a relationship of employment with their client can never be sufficiently independent to qualify for the protection of LPP.

The Court's conclusion that *"an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client"* applies even if the lawyer in question is enrolled as a member of his or her national Bar and is subject to professional ethical obligations and regulatory and contractual protections of his or her independence. In this regard, the Court held that while such rules "*may strengthen the position of an in-house lawyer within the company, the fact remains that they are not able to ensure a degree of independence comparable to that of an external lawyer*," as the position of an employee, "*by its very nature, does not allow [an in-house lawyer] to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence*."

The Court held that the fact an in-house lawyer does not enjoy a level of professional independence equal to that of external lawyers means that to treat them differently does not infringe the principle of equal treatment.

The Court also rejected the argument that significant recent developments in the legal landscape since the *AM&S* judgment in 1982 justifies "*reinterpreting*" the principle of LPP set out in that judgment. The Court considered that the legal situation in the Member States had not evolved since the judgment in *AM&S* was delivered to an extent which would justify a change in the case law and recognition for in-house lawyers of the benefit of LPP. On the contrary, the Court found that "*no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union*."

In addition, the Court rejected the argument that the amendment of the rules of procedure for competition law investigations (set out in Regulation No 1/2003) was such as to justify a departure from the existing position set out in *AM&S*. The Court held that, far from requiring in-house and external lawyers to be treated in the same way as far as concerns LPP, Regulation 1/2003 in fact aims to *reinforce* the extent of the Commission’s powers of inspection, in particular as regards documents which may be the subject of such measures.

Nor did the Court consider that the limitation of LPP to external legal advisers infringes undertakings' rights of defence. The Court held that, "*even assuming that the consultation of in-house lawyers employed by the undertaking or group were to be covered by the right to obtain legal advice and representation, that would not exclude the application, where in-house lawyers are involved, of certain restrictions and rules relating to the exercise of the profession without that being regarded as adversely affecting the rights of the defence*."

The Court also held that differing treatment of LPP in investigations by the Commission and those conducted under national competition laws does not infringe the principle of legal certainty. This was because undertakings under investigation are able to determine their rights and obligations vis-à-vis the competent authorities and the law applicable to them, including whether they are entitled to rely on LPP in respect of communications with in-house lawyers. The Court concluded that *"the principle of legal certainty does not require that identical criteria be applied as regards legal professional privilege"* where an investigation is carried out under EU or national competition law.

Finally, the Court held that the issue of LPP during Commission antitrust investigations was exclusively a matter of EU law and therefore was unaffected by the principle of conferred powers. The Court considered that national law is applicable in the context of investigations conducted by the Commission only in so far as the authorities of the Member States lend their assistance to the Commission. "*However, the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.*"

4.2.3. C-36/09 Transportes Evaristo Molina v Commission – 11 November 2010

On 11 November 2010, the CJEU issued a ruling dismissing the appeal of Transportes Evaristo Molina against a 2006 commitments decision.

On 12 April 2006, the Commission adopted a decision based on Article 9 of Regulation (EC) 1/2003 addressed to the largest petrol supplier in Spain, REPSOL Commercial de Productos Petroliferos ('REPSOL'), making commitments entered into by REPSOL legally binding.

The Commission had launched a investigation into REPSOL in 2004 and had raised concerns under Article 101 that the supply contracts of REPSOL foreclosed the market of the supply of fuel to service stations in Spain. Following the commitments decision, the Commission ended its antitrust investigation.

As part of the commitments, Repsol accepted to offer to its service stations a concrete financial incentive to terminate the existing long-term supply agreements and to refrain from concluding further long-term exclusivity agreements. In addition, those operators with whom Repsol had concluded tenancy or usufruct agreements, granting it the ownership of the surfaces built on the operator's terrain, were permitted to re-buy this ownership prior to the termination of the contract. This option could be exercised under certain conditions, most notably the payment to Repsol of a compensatory sum calculated along a formula enshrined in the commitment decision. The decision indicated that all the service stations listed in Annex I were entitled to this repurchase option. All other service stations that, due to a later Court ruling or due to any other reason, were to fall within its field of application, would also be permitted to exercise the repurchase option. The commitments decision was made available on DG Comp's website on 26 April 2006 and was published in the Official Journal on 30 June 2006.

On 9 August 2006, the monitoring trustee, appointed in accordance with the commitment decision, was contacted by Transportes Evaristo Molina (TEV), a service station operator, which was in a legal dispute with Repsol. Due to the litigation, TEV had not been included in the Annex I list and there was further disagreement on whether TEV could benefit from the repurchase mechanism. However, on 19

November 2007, following consultations with the Commission, the monitoring trustee eventually affirmed that TEV could indeed benefit from the repurchase mechanism.

TEV nonetheless lodged a request for annulment of the commitment decision on 29 January 2008. The General Court concluded by reference to Article 263(3) TFEU and Article 102 of its Rules of Procedure, that the application had been filed after expiry of the time limit (on 25 September 2006), and dismissed the case.

On appeal to the CJEU, TEV argued: (i) it had only become directly and individually concerned by the contested decision on 19 November 2007, when the monitoring trustee had confirmed that it was an addressee of Repsol’s commitments therefore this date should be taken as the starting point for calculating the time limit of Article 263(3) TFEU, and (ii) a "vague redaction" of the Commission Decision had given rise to an 'excusable error' on the part of TEV.

First, the Court held that, regardless of the position potential applicants are in vis-à-vis the contested act, the starting date of the time limit under Article 263(3) is the publication or the notification of the act due to the principle of legal certainty. While unforeseeable events, force majeure or excusable errors may exceptionally justify a deviation from Article 263(3) TFEU, such circumstances would not impact the determination of the starting date.

Second, the Court noted that the communication of the monitoring trustee had not changed TVE's ability to act, rather it 'interpreted' the conditions set forth in the Commission commitments decision.

Third, the Court deemed the plea with regard to the 'excusable error' as inadmissible as it had been introduced on appeal to the CJEU.

C L I F F O R D

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