Major Developments and Policy Issues in EU Competition Law April 2012

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This paper offers an overview of the major EU competition law developments over the past year. 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 in the last 12 months.[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 TFEU

Cartels

From April 2011 to March 2012, the European Commission ("Commission") issued six cartel decisions, namely *Consumer Detergents*, *Exotic Fruits, Special Glass, Refrigeration Compressors*, *Mountings for windows* and *Freight Forwarding*. *Consumer Detergents*, *Special Glass* and *Refrigeration Compressors* were settlement decisions (*see infra*).

Total fines imposed by the Commission in calendar year 2011 amounted to € 614 million,[3] considerably lower than the fines of € 2.9 billion in 2010 and € 1.5 billion in 2009.

On 12 October 2011, the Commission completed its second *exotic fruits* cartel investigation, concluding that the Chiquita and Pacific Fruit groups had operated a price fixing cartel in Southern Europe from July 2004 to April 2005. Chiquita received immunity from fines for providing the Commission with information about the cartel, whereas Pacific Fruit received a fine of € 8,919,000.

On 28 March 2012, the Commission fined nine European producers of *mountings for windows* a total of € 85,876,000 for operating a cartel aimed at agreeing on common price increases. Roto received full immunity from fines, as it was the first to provide information about the cartel and the fines for Gretsch-Unitas and Maco were reduced, in view of their cooperation in the investigation, by 45% and by 25% respectively. One of the companies invoked its inability to pay the fine and the Commission granted a reduction of 45% of the fine.

On 28 March 2012, the Commission fined 14 *freight forwarding* companies a total of € 169 million for their participation in four distinct cartels. The cartel participants, covering important trade lanes, established and coordinated four different surcharges and charging mechanisms constituting component elements of the final price charged to customers. Deutsche Post received full immunity from fines under the 2006 Leniency notice for all four cartels, as it was the first to reveal their existence to the Commission, while Deutsche Bahn, CEVA, Agility and Yusen received reductions of fines ranging from 5 to 50%.

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1 This paper went to press as of 1 April 2012.

2 Despite the many interesting developments in State aid law in 2011, they are beyond the scope of this paper.

3 According to DG Competition's statistics.

Settlements

In 2011, the Commission reached settlements in its *Consumer Detergents, Special Glass* and *Refrigeration Compressors* cartel investigations.[4]

In its April 2011 settlement in the *Consumer detergents* cartel, the Commission fined two companies a total of € 315 million for their part in a cartel aimed at fixing market positions and coordinating prices. A third received full immunity as a leniency applicant.

In its *Special Glass* cartel decision, issued in October, the Commission applied 10% settlement reductions in addition to giving full immunity to Samsung, while Nippon Electric received a 50% reduction for cooperation under the leniency notice. The remaining two cartel participants – Schott AG and Asahi Glass – received fines reflecting the fact that they did not participate in all aspects of the cartel. Total fines amounted to € 129 million.

In its *Refrigeration Compressors* cartel decision, issued in December, the Commission granted full immunity to Tecumseh for revealing the existence of the cartel and applied 10% settlement reductions to the fines imposed on all the other companies involved in the cartel. In addition to the reductions under the Settlement Notice, the Commission also applied 15%, 20%, 25% and 40% reductions to the cartel participants under the Leniency Notice. In this fifth cartel settlement, total fines amounted to € 161 million.

New cartel investigations

The Commission has initiated a number of new cartel investigations, including in relation to *container shipping lines, piston engines, automotive occupant safety equipment, natural gas, euro interest rate derivatives, bearings for automotives and industrial use, Brussels Airlines / TAP Air Portugal, French water sector* and *Electricity sector.*

CJEU and General Court case law

In the past year, the number of General Court judgments in cartel cases has been extraordinary: the General Court ruled in over 70 cartel cases concerning 14 cartels, notably the *Spanish and Italian raw tobacco, Gas Insulated Switchgear, Lifts & Escalators, Bleaching Agents, Sodium Chlorate, Synthetic Rubbers, International Removals, Dutch Brewers, Acrylic Glass, Industrial plastic bags, Polymethyl-methacrylate(PMMA),* and *Chloroprene rubber cartels.*

The General Court's impressive output, fuelled by a large number of appeals requesting the General Court to review detailed points of facts and law, constitutes an important body of law on judicial review of cartel decisions. Cartel participants have successfully challenged the Commission's cartel decisions before the General Court on issues such as parental liability, calculation of the fine and in particular reductions for duration, and evidence of the existence of a cartel. More than one third of the

[4] The Commission introduced the new settlement procedure in June 2008 for companies willing to admit liability in relation to a cartel and accept the Commission's proposed fine while agreeing not to challenge the findings of the Commission's statement of objections. In return for their cooperation, the undertaking receives a 10% reduction of their fine. This reduction is provided in addition to any reduction provided under the leniency notice.

appeals brought before the General Court were at least partially successful. It should be noted, however, that some of the successful appeals may be temporary in that the Commission may be able to re-adopt the relevant decisions, fixing the problem identified by the court.

The General Court's willingness to scrutinize Commission decisions is important in the context of the current debate on whether there is sufficient judicial review of Commission decisions for the competition procedure to be compatible with the fundamental right to a fair trial, as guaranteed by the (now binding) European Charter of Human Rights (*see infra*).

Parental liability

The latest General Court's judgments confirmed the *Akzo* presumption of parental liability rule. In *Alliance One v Commission*, the General Court ruled that "*the parent's 'decisive influence' must not relate specifically to the cartel conduct for it to be liable for the subsidiary's cartel participation*".

Challenging the presumption is a difficult task. In the *Bleaching Agents* cartel, in case T-196/06 *Edison v Commission*, the General Court held that the parental liability presumption can be rebutted but significant evidence needs to be provided. The Court held that Total and Elf Aquitaine had not offered sufficient evidence to rebut the *Akzo* presumption.

By contrast, in the *International Removals* cartel judgment, the General Court found that a foundation – Stichting Administratiekantoor Portielje – did not exert decisive influence over cartel participant Gosselin.

In the *Bleaching Agents* and *Acrylic Glass* cases, the General Court clarified that the *Akzo* presumption also applies where the parent company owns slightly less than 100% of the stock of the subsidiary. On the other hand, the General Court has also provided some useful limits on the parental liability rule. In the *Dutch Brewers* cartel case, the General Court ruled that, although the Commission can use the rule to impute liability on a parent owning substantially all of the stock in a subsidiary engaged in cartel activity, the Commission must nonetheless identify parent and subsidiary and explain that it applies the parental liability rule; it cannot treat both undertakings as one and the same. Failure to do this would undermine the companies' ability to rebut the presumption. In the *Industrial Plastic Bags* cartel, the General Court found that the Commission had not established to the required legal standard that FLS Plast A/S exercised actual control over Trioplast Wittenheim throughout the year 1991, when it only held a 60% shareholding in Trioplast Wittenheim (party to the cartel).

In *Monochloroacetic acid*, the CJEU held that the Commission must, in applying the parental liability rule, discuss why it found that any evidence put forward by the parties to rebut the presumption of decisive influence was in fact insufficient to rebut that presumption. Moreover, where the Commission relies solely on the *Akzo* presumption to impute liability on a parent of a cartelist, it must additionally explain why certain evidence submitted by the firms in question is irrelevant to rebut the presumption of parental liability.

In the Commission's *Power Cables* cartel investigation, the question arose whether the parental liability rule should apply to the ownership of a cartelist by a private

equity firm. The Commission took the rare step of sending a formal charge sheet to private equity house Goldman Sachs, which owned Milan-based Prysmian at the time of its alleged participation in a cartel for submarine and underground power cables and related products and services. [5] It is a reminder that private equity firms are not immune from antitrust liabilities in the EU.

Evidentiary burden

In a number of judgments, the European courts provided more guidance on the burden and standard of proof in cartel cases, carefully reviewing the evidence relied upon by the Commission.

Thus, in Siemens' appeal of the *Gas Insulated Switchgear* decision, the General Court held that, although the Commission bears the burden of proof with respect to the duration of the cartel, where an addressee of the Commission's decision argues that it did not participate in the cartel for the full duration, it is for the relevant undertaking to offer evidence proving that it had in fact left the cartel at an earlier stage.

In its judgment in the appeal brought by Aragonesas against the Commission's *Sodium Chlorate* cartel decision, the General Court faulted the Commission for having relied on evidence that was "*unreliable and excessively sporadic and fragmented.*"

In the *Dutch Brewers* cartel, the General Court faulted the Commission for finding that the cartel, in addition to price fixing, also related to the occasional coordination of commercial conditions other than prices. Relying on handwritten notes, the Commission had concluded that the undertakings had coordinated certain commercial conditions, such as those for loans in that market segment. The Court found that the Commission relied on handwritten notes that only *sporadically* and *briefly* referred to the alleged conduct, while the companies had put forward plausible alternative explanations. In the absence of other specific evidence, the Court annulled the Commission's decision on that point, reducing the fines accordingly.

In the *Industrial Bags* cartel, the General Court held that the Commission did not produce *sufficiently precise* and *mutually corroborating evidence* to establish that Stempher continued to participate in the cartel after 20 June 1997 and subsequently annulled the Commission's decision in so far as it imposed a fine on Stempher.

Follow-on damages claims

Follow-on damage actions are an increasingly significant risk for addressees of Commission cartel decisions, and indeed the Commission's stated policy objective is to encourage such actions. As noted below, the Commission has itself brought a follow-on damages action with respect to the *Lifts & Escalators* cartel.

Fears of follow-on damages may explain why some addressees of recent cartel decisions are appealing the Commission's decision despite having avoided fines Similarly, in *Gas Insulated Switchgear,* the General Court annulled the fines imposed by the Commission for unequal treatment (*see infra*), yet several addressees sought in

[5] GS has reportedly confirmed that there is no allegation that GS or any of its personnel participated in, or were aware of, the alleged cartel. If a fine is imposed on GS, it would therefore be purely on the basis of parental liability for the activities of Prysmian.

addition to contest the cartel infringement finding itself, thereby potentially avoiding follow-on damages claims.

Follow-on damages claims are greatly facilitated by the details provided in and the scope of the Commission's cartel decision. In this respect, it should be noted that one potential advantage of the cartel settlement procedure is the typically reduced length of the decision, which may therefore contain fewer facts and details for follow-on damage claimants to rely on. Of course, the damages action may be facilitated by the fact that the cartel participant has admitted its stake in the cartel. The success of the follow-on damages action will in large part continue to be determined on the claimant's ability to prove damages, and whether or not he successfully gains access to leniency documents (*see infra*).

The Commission itself instituted a follow-on damages claim related to the *Lifts & Escalators* cartel, after it found that its own buildings, as well as those used by other EU institutions, were fitted with lifts and escalators covered by the cartel which it had unveiled in its 2007 decision. 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. However, the Brussels Commercial Court before which the Commission's action was brought has raised fundamental questions about the Commission's role in cartel investigations and civil damages cases. In a preliminary reference to the CJEU, the Brussels Commercial Court asks, *inter alia*, whether, given the Commission's role of prosecutor and judge in cartel cases, it can further accumulate the role of private damages claimant in light of the manufacturers' right to a fair trial. On the 14 March 2012, during the hearing before the CJEU, having been asked by the Advocate General Pedro Cruz Villalon in which role the Commission appeared before the Court, the Commission's representative replied that the Commission was appearing in its traditional role as "*amicus curiae*", *i.e.*, as guardian of the EU Treaties and in order to defend the Union interest. The hearing focused on "*Chinese walls*" which may have divided the officials investigating the cartel from those suing the companies and whether the Commission abused its competition powers to gain an advantage in its claim.

In *Pfleiderer*, a preliminary reference from the District Court in Bonn, Germany, the CJEU was asked to provide guidance on whether companies aggrieved by a cartel infringement (*e.g.*, customers of the cartel participants) could be granted access to relevant leniency documents in order to prepare a follow-on damages claim before a national court. The CJEU held that it is for the Member State court to decide on such requests under the relevant Member State law, weighing the interests for and against disclosure of the relevant documents. This holding may lead to divergent approaches to access to leniency documents between courts in the various Member States, thereby potentially making follow-on damage claims more difficult. The CJEU did not adopt the bright-line rule proposed by Advocate General Mázak, according to which access would be granted to leniency documents predating the leniency application, but not to documents drafted for purposes of the leniency application.

Vertical agreements

In the October 2011 preliminary reference judgments in the *Premier League* case, the CJEU answered complex questions on restrictive agreements, intellectual property rights and free movement of services in the context of satellite broadcasts of football matches. With respect to competition law, the CJEU ruled that an agreement whereby a right owner prohibits a satellite broadcaster from selling decoder cards (*i.e.*, cards identifying the viewer and his or her individual content subscriptions) or other decoding devices enabling access to that right holder's protected subject-matter outside the territory for which the content is licensed constitutes a restriction by object. Moreover, the CJEU interestingly held that such a restriction is very unlikely to be exempted under Article 101(3) TFEU, thus largely precluding a national court from making this determination, even if it may be highly fact-specific.

In *Pierre Fabre Dermo-Cosmétique*, the CJEU confirmed that an absolute ban on internet sales amounts to a restriction by object that cannot be justified for reasons of the perceived need to provide in-person advice to the customer, nor by the need to protect the prestigious image of the manufacturer.

Access to file

In its October 2011 judgments in *Solvay*, the CJEU held that violation of the right of access to file can, where it concerns a substantial number of documents, lead to the annulment of a Commission decision. The judgment follows a re-adopted decision by the Commission in which it failed to produce the entire file on which the decision was based to Solvay, admitting that some of the binders had been lost.

In *CDC Hydrogene Peroxide v Commission*, the Commission rejected an application seeking full access to the "statement of contents" of the administrative file on the basis of Article 2(1) and Article 11(1) and (2) of Regulation 1049/2001, regarding public access to European Parliament, Council and Commission documents. The General Court ruled that the Commission did not establish, to the requisite legal standard, that disclosure of the "statement of contents" would specifically and effectively undermine protection of the purpose of investigations, and subsequently annulled the Commission's decision.

Article 102 TFEU

The Commission issued only one Article 102 TFEU infringement decision in the last 12 months, namely in *Telekomunikacja Polska*, concluding that Telekomunikacja Polska abusively refused or obstructed remunerated access to its network and wholesale broadband services that would allow the effective entry of alternative operators on downstream broadband markets. The Commission was particularly concerned about this conduct in light of the limited broadband penetration in Poland.

In addition, the Commission made in November 2011 legally binding the commitments offered by *Standard & Poor*'s to abolish the licensing fees that banks pay for the use of US International Securities Identification Numbers (ISINs) within the EEA.

In its *IBM Maintenance Service* decision, the Commission made legally binding commitments offered by IBM to make spare parts and technical information swiftly

available under commercially reasonable and non-discriminatory terms to independent mainframe maintainers.

Pharmaceutical sector inquiry follow up

On 6 July 2011, the Commission announced that it had closed the investigation into allegations that *Boehringer Ingelheim* had filed for unmeritous patents regarding new treatments of chronic obstructive pulmonary disease, and had thereby abused a dominant position. The Commission suggested that Boehringer and Almirall find a mutually acceptable settlement to their dispute. It is ironic that the case, which formed a key element in shaping the EU pharmaceutical sector investigation, has been concluded by a settlement at the Commission's initiative. Meanwhile the Commission has initiated a number of new investigations in the pharmaceutical sector, including into a patent settlement between Cephalon and Teva whereby Teva agreed not to sell its generic Modafinil in the EEA; a contractual agreement between Johnson & Johnson and Novartis to exclude generic versions of Fentanyl from the Netherlands; and dawn raids in relation to Nexium (Esomeprazole).

On 6 July 2011, the Commission published its report on its second monitoring exercise. The Commission found that 89 patent settlement agreements were reached between originator and generic companies in 2010 (compared with 207 in the 8.5 years covered by the sector inquiry). It found that the number of settlements that are potentially problematic from a competition perspective had significantly decreased. The Commission considered that this reflected increased awareness of possible competition issues and said that it would continue to monitor the sector for at least another year to assess whether the trend was confirmed.

Google

The Commission is continuing its investigation into allegations that Google has abused its dominant position in online search and numerous new complaints have recently been lodged.[6] 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 UK 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 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.

6 Cases COMP/39740, 39768, and 39775.

Microsoft has alleged that:

- Google has implemented "*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.

Since Microsoft filed its complaint, several complaints have been added to the investigation, including complaints from German map service provider Hot-Map and listings association VfT - Dutch football website Elfvoetbal, the French company Interactive Labs, German, and Italian site NNTP.it, 1plusV, the developer of French legal search engine e.Justice, dealdujour.pro, Twenga, Spanish Newspaper Association AEDE, Expedia and Trip Advisor. In addition elements from antitrust complaints originally brought before the German Competition Authority (BKA) by Euro-Cities, Bundesverband Deutscher Zeitungsverleger and Verband Deutscher Zeitschriftenverleger have been referred to the Commission.

New Article 102 investigations

From April 2011 to March 2012, the Commission started three new Article 102 investigations, namely *Credit Default Swaps, Samsung* and *Mathworks*.

Court case law

In its *European Federation of Ink and Cartridge Manufacturers (EFIM)* judgment the General Court dealt with market definition and dominance issues in the context of aftermarkets. EFIM appealed against the Commission decision rejecting its complaint concerning the allegations of abuse of a dominant position by the OEMs (Hewlett-Packard, Lexmark, Canon and Epson). The Court upheld the Commission's finding that the printer market (primary market) and the ink-jet market (aftermarket) were interrelated in such a way that the competition on the printer market resulted in effective discipline in the secondary market. Since the OEMs did not have a dominant position on the secondary market for cartridges the Court did not consider it necessary to assess the alleged abuses of Article 102 TFEU and dismissed the appeal.

The General Court confirmed the fine of more than €151 million imposed by the Commission on *Telefónica* for having abused its dominant position in the market for access to broadband internet in Spain.

In *Post Danmark A/S v Konkurrencerådet* the Court, ruling on a preliminary reference, held that that Article 102 TFEU must be interpreted as meaning that a policy, by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity.

Mergers

During the calendar year 2011, 309 cases were notified – a number significantly higher than the number of notifications in 2009 and 2010 (259 and 274, respectively) but down from a record 402 in 2007 and 356 in 2006.

The Commission initiated during 2011 eight Phase II investigations, double the number of Phase II Investigations in 2010, in addition to issuing six Phase II decisions, which is double the number of the Phase II decisions in 2010. In 2011, a total of ten merger notifications were withdrawn. To date, there are five pending Phase II cases, including one for which the deadline had been suspended under Article 11(3) EUMR since 13 February 2012 (*CIN/Tirrenia*).

In 2011, only 5 cases were cleared in Phase I with commitments compared to 14 in 2010, 13 in 2009, and 19 in 2008 during the height of M&A activity.

Deutsche Börse /NYSE

On 1st February 2012, the Commission prohibited the proposed merger between Deutsche Börse and NYSE Euronext, as it found that it would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges. Deutsche Börse and NYSE Euronext, which operate the two largest exchanges for European financial derivatives in the world, Eurex and Liffe respectively, are the largest global players in these products competing head-to-head.

In this case, which raised *inter alia* significant market definition issues, the Commission found that exchange traded derivatives and over the counter derivatives belonged to different product markets due to the fact that customers used them for different purposes and in different circumstances. Moreover, due to the "closed vertical silo" operated by Liffe and Eurex, where the exchange's trading is exclusively linked to a clearing house, the Commission found that there were major barriers to entry in these markets, because customers prefer to stay on exchanges where they can pool margin and thereby save collateral. The commitments offered were very limited in scope, according to the Commission, given that the parties did not propose to divest sufficient assets so as to create an independent and significant competitor, nor did they propose full access to the clearing facilities to their competitors. In the context of this prohibition, the Commission's Vice President Joaquin Almunia, stressing the importance of the financial exchanges for the European economy, explained that " *in order to serve the real economy well, financial markets must be open, efficient and competitive*."

Priority rule

The Commission's 'first in' or 'priority' rule saw one of its most striking demonstrations to date in the context of the two merger notifications in the hard disk sector – Western *Digital/Hitachi* and *Seagate/Samsung*. Notified only one day ahead of *Western Digital/Hitachi*, the *Seagate/Samsung* review benefited from the priority rule at the expense of *Western Digital/Hitachi*. Under the priority rule, the Commission's review of *Seagate/Samsung* disregarded the subsequently notified *Western Digital/Hitachi* deal. However, in its review of *Western Digital/Hitachi*, the Commission took into account the effects brought about by the *Seagate/Samsung* transaction. Indeed, on 19 October 2011, the Commission cleared the *Seagate/Samsung* merger unconditionally – noting in its press release that the merging

entity would continue to face competition from, *inter alia*, Western Digital and Hitachi, whereas on 23 November 2011, the Commission approved, but only subject to conditions, the *Western Digital/Hitachi* transaction.

Perhaps due to the particularly striking circumstances of these two merger cases – not only were they notified one day apart, but Western Digital was understood to have engaged with the Commission informally before Samsung notified its deal, which had not been public beforehand, while the four companies involved in the two mergers together represent a substantial portion of the market for hard disks – commentators have questioned the fairness of a rule that has no formal basis in the EUMR, even if it has been consistent Commission practice. In the necessarily prospective analysis carried out by the Commission in any merger proceeding, in which the Commission's investigative powers are designed to enable the Commission to predict the likely development of the competitive landscape as closely as possible, it may seem odd entirely to disregard the effects of another pending merger in the same market that is likely to be concluded shortly. Calls for reconsideration of the priority rule in favour of a parallel review system are, however, unlikely to be answered in the short term.

Referrals

The unpredictable and unwieldy nature of the jurisdictional system established by the EU Merger Regulation ("EUMR") was painfully demonstrated by a Phase II investigation. SC Johnson & Son Inc. aborted its proposed takeover of the household insect control business of Sara Lee Corporation after the Commission initiated a Phase II investigation. The deal was originally notified in 2 Member States; however, 6 Member States (5 without jurisdiction) made an Article 22 EUMR referral request. Portugal continued its national investigation and cleared the deal unconditionally in December 2010, but the parties abandoned the deal in May 2011 after the Commission's Phase II investigation.

In *Caterpillar/MWM*, the transaction was initially filed with the German, Austrian and Slovak competition authorities. The German competition authorities, however, made a referral request to the Commission under Article 22 of the Merger Regulation which the Austrian and Slovak competition authorities subsequently joined.

The General Court's judgment in *Association belge des consommateurs test-achats v Commission*, concerned *inter alia* an application against the decision by which on 12 November 2009 the Commission rejected a request from the competent Belgian authorities for partial referral of the merger investigation (the non-referral decision). The General Court recalled in its judgment that a third party concerned by a merger is entitled to challenge the Commission's decision to uphold a national competition authority's referral request. However, the Court found that interested third parties are not entitled to challenge a non-referral decision by which the Commission rejects a request for referral brought by a national authority.

Chinese state owned entities

The Commission has reviewed a number of concentrations involving Chinese State-owned enterprises ("SOEs") during 2011, including *DSM/Sinochem/JV,*[7] *China*

[7] Case COMP/M.6113 *DSM/Sinochem/JV*.

National Bluestar/Elkem, Huaneng/OTPPB/Intergen, and *PetroChina/Ineos/JV*. [8] Recital 22 of the EU Merger Regulation encapsulates the principle of non-discrimination between public and private undertakings. In particular, it provides that for public sector undertakings the relevant question is whether the SOE concerned constitutes an economic unit "*with an independent power of decision*" irrespective of the manner in which the SOE's capital is held or of the rules of administrative supervision applicable to that SOE. Each SOE is thus subject to case-by-case analysis by the Commission. In assessing the chain of control of a particular SOE, the Commission will first consider whether that SOE has an independent power of decision, and if not, it will determine the ultimate State entity and which other companies owned by that State entity should to be regarded as one economic entity. [9] The relevant legal principles were first developed for European SOEs. In its recent cases, however, the Commission has had to apply these general principles to non-European SOEs, which has proved particularly challenging in the context of China. In *DSM/Sinochem*, the Commission concluded its appraisal by inviting the Chinese Government to explain how SOEs such as Sinochem operate in practice observing "*in the absence of representations by the Chinese state and accompanying evidence, it is not possible to conclude whether or not Sinochem enjoys an independent power of decision in the sense of the Merger Regulation.*" [10]

Waiving commitments- Hoffman-La Roche/Boehringer

On 3 May 2011, the Commission waived commitments offered by *Hoffman–La Roche* in 1998, in order to obtain clearance for the acquisition of *Boehringer Mannheim*. Hoffman-La Roche had committed, inter alia, to granting interested third parties access to its Polymerase Chain Reaction ("PCR") technology on a non-discriminatory basis. In September 2008, Hoffman-La Roche addressed a request to the Commission for the waiver of the Commitments, arguing that its PCR patent portfolio was no longer a barrier to entry to the DNA probes market, as the foundational PCR patents had expired or would expire in the coming years.

After conducting a market investigation, the Commission found that the requirements for the waiver of commitments referred to in the Remedies Notice (*inter alia*, significant change in the market circumstances, sufficient time-span between the adoption of the Decision and the request for the waiver, no impact on third parties' rights, non-opposition of third parties) were met. Even in the absence of a review clause, the Commission waived the commitments relating to DNA probes.

It was the first time the Commission waived behavioural commitments in the absence of a review clause and this decision may constitute a precedent for parties seeking to waive, modify, or suspend non-divestiture commitments, irrespective of whether the initial commitments contained a formal review clause.

Court judgments

The Commission was successful in defending itself before the General Court against allegations by Belgian consumer association ABCTA, according to which ABCTA's

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8 Case COMP/M.6082 *China National Bluestar/Elkem*; Case COMP/M.6111 *Huaneng/OTPPB/Intergen*; Case COMP/M.6151 *PetroChina/Ineos/JV*.

9 *See* also *China National Bluestar/Elkem*, paragraph 12.

10 *See* paragraph 16.

right to be heard as a consumer association was violated during the Commission's review of the *Electricité de France/Segebel SA* merger.[11] Concerned about the impending consolidation on the Belgian electricity market, and the fact that the proposed merger would result in a situation in which the French state held an interest in the first and second largest Belgian electricity companies, ABCTA had expressed its concerns in writing to the Commission several months before the notification of the deal, its publication in the Official Journal, and the accompanying call for observations by third parties. The General Court found that, having failed to express its views after notification of the merger, ABCTA's rights to be heard were not violated.

The Commission was also successful in defending itself against allegations by *Groupe Partouche*. In this case, the General Court declared inadmissible under Article 87 (2) of the Rules of Procedure an appeal brought by Groupe Partouche against a Commission's decision approving the joint venture between Française des Jeux and Groupe Lucien Barriere. The Court held that the summary of the pleas in law were not sufficiently clear and precise and that therefore, Partouche did not establish any link between the alleged infringement by the Commission of the EUMR and the request to the General Court to annul the Commission's decision. In effect, the only plea in law advanced by Partouche was that, given the possible significant effect on competition in France, the Commission should have referred the case to the French national competition authorities.

Policy Developments

Best Practices

In October 2011, the Commission published its long-anticipated revised Best Practices. Aimed at increasing transparency and procedural safeguards for companies subject to Commission investigations, the Best Practice handbook had been in the making since January 2010.

The revised Best Practices increase the role of the Hearing Officer, who, under an expanded mandate, can now hear parties' concerns about violation of their procedural rights. The new internal rules further aim to give parties a clearer picture of what to expect at different stages of an antitrust investigation and increase their ability to interact with the Commission services.

After a public consultation that was launched in January 2010, and building upon experience gained with the draft best practices, a number of improvements were introduced, including (i) informing parties in the Statement of Objections of the main relevant parameters for the possible imposition of fines; (ii) extending state of play meetings to cartel cases and complainants in specific circumstances; (iii) improving access to "key submissions" of complainants or third parties, such as economic studies, prior to the Statement of Objections; and (iv) publishing rejection of complaints, either in full or as a summary.

Antitrust manual of procedures (ManProc)

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[11] Case T-224/10 *Association belge des consommateurs test-achats v Commission* – judgment of 12 October 2011.

Practitioners argued that the Best Practices did not reveal how the Commission actually operates in antitrust proceedings, and that disclosure of the internal ManProc - as it is known in the Brussels legal circuit- could help confirm that the Commission handles cases in line with its Best Practices.

Although the Commission resisted disclosing the ManProc in full, citing a risk of undermining the effectiveness of its investigations, following a European Ombudsman's proposal, it finally released in March 2012 its internal working documents on procedures for the application of Articles 101 and 102 TFEU. The 277-page document contains 28 chapters and around 280 pages of informal guidance.

The Commission makes clear in the prologue that the ManProc should be considered as a "*purely internal guidance to staff*" and that "*the practical guidance given in the manual does not claim to be complete or exhaustive...*". The Antitrust Manual of Procedures constitutes, therefore, a practical working tool, which evolves through updates to reflect new experience gained in applying the competition rules of the Treaty, and the Regulations as well as the notices and other guidance adopted. In case of divergences between these rules and the Antitrust Manual of Procedures, the former shall apply.

The chapters contained in the public version include *inter alia* the decision reaching process, the handling of complaints and the treatment of whistleblowers. Note that two chapters on sector wide inquiries and remedies and fines have not been included, as they are still being finalised and guidance on surprise inspections has also been kept out of the guidebook, as it is considered to benefit from an exception to the transparency rules.

Best practices on submission of economic evidence

This paper formulates best practices concerning the generation as well as the presentation of relevant economic and empirical evidence that may be taken into account in the assessment of a case concerning the application of Articles 101 and 102 TFEU or merger cases. The Best Practices are organised along two themes: (i) providing recommendations regarding the content and presentation of economic or econometric analysis and (ii) providing guidance to respond to Commission requests for quantitative data to ensure that timely and relevant input for an investigation is provided.

Informal guidance paper on confidentiality claims

This document provides first some general practical information mainly regarding the way in which non-confidential information should be provided (for instance provision first of a draft non-confidential version, in which information considered as confidential should only be highlighted, and after the Commission's acceptance of the confidentiality claims, provision of the final non-confidential version in which confidential information will be blacked out). The section of general information is then followed by specific example*s* indicating *inter alia* how comprehensive justifications and meaningful non-confidential descriptions of the blacked-out information should be provided in case of confidentiality claims.

Procedure and Practice

Fundamental rights

An October 2011 judgment by the European Court of Human Rights ("*ECtHR*") in Strasbourg has intensified the debate as to the compliance of EU competition procedure, where the Commission acts as police, prosecutor, judge and jury, with the fundamental right to a fair trial. In *Menarini*, the ECtHR held that the fundamental right to a fair trial was not impeded as the relevant decision by the national competition authority imposing a fine was subjected to sufficient scrutiny by the reviewing courts, which "*examined the different allegations of fact and law*," delivering "*a detailed analysis on the suitability of the sanction*." The judgment has led General Court judge Nicholas Forwood to proclaim that the review of Commission decisions by the General Court is fully compliant with the fundamental right to a fair trial. Although this view is not universally held, the General Court has during the past year demonstrated its willingness to review the Commissions' cartel decisions in some cases (*see supra*).

Negative decisions

In its 3 May 2011 judgment in *Tele2Polska*, the Court of Justice held that a national competition authority cannot issue a decision finding that an undertaking has not infringed EU competition law (a 'negative' decision). According to the Court, only the Commission has the power to issue such decisions. With respect to the infringement of EU competition law, national competition authorities are accordingly limited to deciding that there are no grounds for action on their part.

Dawn raid conduct

On 24 May 2011, the Commission announced that it had fined Suez Environnement and its subsidiary Lyonnaise des Eaux France (LDE) € 8 million for breach of a seal affixed by the Commission during an inspection at LDE's premises, in April 2010.

On 28 March 2012, the Commission imposed a fine of € 2.5 million on Energetický a průmyslový holding and EP Investment Advisors, active in the energy sector in the Czech Republic, for obstructing an inspection carried out by Commission officials at their premises in Prague. The Commission inspectors discovered that the password they had set to ensure that they had exclusive access to the content of email accounts had been modified in order to allow the account holder to access it. They discovered that one of the employees had requested the IT department on the previous day to divert all e-mails arriving in certain blocked accounts away from these accounts to a computer server.

Prosecution and sanction of an infringement prior to and after the date of accession

In its *Slovak Telecom* judgment, the General Court ruled that the Commission was entitled to request Slovak Telekom to provide it with information on its activities, prior to the accession of Slovakia to the European Union.

On a preliminary reference from the Regional Court in Brno in the *Toshiba* case, the CJEU ruled on the issue of prosecution and sanction of an infringement for the period prior to the date of accession and the period following that date. In particular, the CJEU ruled that, although under the first sentence of Article 11(6) of Regulation 1/2003 the national competition authority is not authorised to apply Article 101

TFEU, where the Commission has opened a proceeding for the adoption of a decision, and also looses the possibility of applying its national law, the Regulation does not indicate that the opening of a proceeding by the Commission *permanently* and *definitively* removes the national competition authorities' power to apply national legislation on competition matters. The Court found that in a situation in which the national competition authority penalises, by the application of national competition law, the anti-competitive effects produced by a cartel in the territory of the Member State during periods prior to the accession of the latter to the Union, the combined provisions of Articles 11(6) and 3(1) of Regulation 1/2003 cannot, in respect of those periods, prevent the application of national competition law provisions.

In addition, with regard to the *ne bis in idem* principle, the Court ruled that the ne bis in idem principle does not preclude penalties, which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel, on account of the anti competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the EU, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted, were not designed to penalise the said effects.

The subsequent chapters set out in more detail the main Article 101 TFEU, Article 102 TFEU, merger control, and procedural developments from April 2011 to March 2012.

2. *ARTICLE 101 TFEU*

2.1 *Commission Decisions – Cartels*

2.1.1 Consumer Detergents – 13 April 2011[12]

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 and 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.[13]

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 from 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%	
Procter & Gamble[14]	€211,200,000	50%	10%
Unilever[15]	€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.

12 Case COMP/39.579; Commission Press Release IP/11/473

13 Commission MEMO/08/424.

14 The Commission press release notes that the decision was addressed to Procter & Gamble International S.à.r.l. and The Procter & Gamble Company which as parent of the P&G Group are held jointly and severally liable for the conduct of their relevant European subsidiaries.

15 Unilever NV and Unilever PLC were the addressees of the decision.

2.1.2 Heat Stabilisers; Ciba/BASF and Elementis – 4 July 2011[16]

On 4 July 2011, the Commission repealed its *Heat Stabilisers* decision in respect of Ciba/BASF and Elementis in order to comply with the CJEU's 29 March 2011 judgment in the *ArcelorMittal* case. In that case, the CJEU held that actions against final decisions and actions against investigative measures have suspensive effects only for the party that brought the action. As a result of *ArcelorMittal*, the Commission was obliged to revisit its fine imposed on Ciba/BASF and Elementis in its November 2009 cartel decision.

The 2009 *Heat Stabilisers* decision related to a cartel in which Ciba/BASF and Elementis had only participated until 1998 – meaning that the ten-year limitation period for imposing cartel fines, provided for by Article 25(5) of Regulation 1/2003 – had already expired. The Commission originally took the view that, because several other participants had challenged the Commission's investigative measures related to the cartel procedure before the EU courts, that action suspended the ten-year-limitation period for *all* companies involved in the cartel and not only for the companies that had brought court action. Thus, it argued that Ciba/BASF and Elementis could still be fined.

The *ArcelorMittal* judgment made clear, however, that the court action initiated by other cartel participants did not suspend the ten-year limitation period for Ciba/BASF and Elementis. The Commission repealed its decision with respect to these two companies accordingly.

2.1.3 Exotic fruit – 12 October 2011[17]

On 12 October 2011, the Commission completed an investigation into the exotic fruits sector, concluding that the Chiquita and Pacific Fruit groups had operated a price fixing cartel in Southern Europe from July 2004 to April 2005, and imposing a fine of €8,919,000 on Pacific Fruit. Chiquita received immunity from fines for providing the Commission with information about the cartel.

The cartel was operated by Pacific Fruit and Chiquita, two of the main importers and sellers of bananas in the EU. During the period July 2004–April 2005 they fixed weekly sales prices and exchanged price information in relation to their respective brands.

This is the second EU cartel decision in the banana sector. The cartel affected consumers in Italy, Greece and Portugal. The first cartel, established in a decision of 2008, concerned Germany and seven other northern EU countries.[18]

At the time of the infringement, annual banana sales in Italy, Greece and Portugal together amounted to an estimated €525 million. Following the parties' replies to the Statement of Objections, sent in December 2009, the Commission reduced the proven duration of the infringement by around 9 months.

In November 2007, the Commission carried out dawn raids at the premises of various producers and importers of fresh exotic fruits.[19] On 17 December 2009, the

16 Commission Press Release IP/09/1695.
17 Case COMP/39.482.
18 *See* Commission Press Release IP/08/1509.
19 Commission MEMO/07/534.

Commission sent a statement of objections to a number of companies active in the import and marketing of bananas.[20] Upon receipt of the statement of objections, Chiquita announced to the US 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 Commission, Dole had not received a statement of objections. On 18 June 2010, the Commission held an oral hearing.

Company	Fine
Chiquita	0
Pacific Fruit	€8,919,000

2.1.4 Special glass sector – 19 October 2011[21]

On 19 October 2011, the Commission announced having settled a cartel investigation with four producers of cathode ray tubes (CRT) glass used in televisions and computer screens.

Japanese firms Asahi Glass (AGC) and Nippon Electric (NEG) and Germany's Schott AG were fined a total of €128,736,000. The fine on all three companies included a reduction of 10% for acknowledging their participation in the cartel, thereby helping the Commission to conclude the case more rapidly. Samsung Corning Precision Materials (SCP) was granted full immunity under the leniency notice.

Overall, the cartel lasted from 23 February 1999 until 27 December 2004 and coordinated the prices for CRT glass in the EEA. The product concerned, also known as bulb glass, was bought by producers of cathode ray tubes to use in traditional TVs and computer screens.

For the infringement, Asahi Glass was fined €45,135,000, Nippon Electric €43,200,000 and Schott AG €40,401,000. The fines imposed by the Commission took into account the CRT glass sales of the firms in the EEA, the nature of the infringement and its geographic scope.

The decision also established the participation of SCP in the cartel, although it received full immunity under the Commission's 2006 Leniency Notice.[22] The fine on NEG reflected a 50% reduction, also for cooperation under the Leniency Notice. Schott was granted a reduction of 18% for its cooperation outside the Leniency Notice. The fines on AGC and Schott take into account that they were not involved in all aspects of the cartel.

The Special Glass decision is the fourth settlement decision in a cartel investigation, following earlier settlements in the *DRAM*, *Animal feed* and *Consumer detergents* cases.

The investigation was triggered by initial information pointing to a possible cartel in the CRT glass market. Shortly thereafter the Commission received SCP's request for

20 Commission MEMO/09/566.
21 Case COMP/39.605.
22 *See* Commission Press Release IP/06/1705 and Commission MEMO/06/469.

immunity which was followed by inspections in March 2009. It issued the Parties concerned with information requests in March 2009 and October 2009.[23]

Company	Fine	Reduction under the Leniency Notice	Reduction under the Settlement Notice
Samsung Corning Precision Materials Co., Ltd.	€ 0	100%	10%
Nippon Electric Co., Ltd.	€ 43,200,000	50%	10%
Schott AG	€ 40,401, 000		10%
Asahi Glass Co., Ltd.	€ 45,135,000		10%

2.1.5 Refrigeration compressors -7 December 2011[24]

On 7 December 2011, the Commission settled a cartel investigation among producers of household and commercial refrigeration compressors, used in fridges, freezers, vending machines and ice-cream coolers. ACC, Danfoss, Embraco and Panasonic were fined a total of € 161,198,000 for operating together with Tecumseh a cartel that covered the whole EEA from April 2004 until October 2007 (15 November 2006 for Panasonic). The fine includes a reduction of 10% for the companies' acknowledgement of their participation in the cartel and their liability in respect of such participation. Tecumseh was not fined as it benefited from immunity under the 2006 Leniency Notice for revealing the existence of the cartel to the Commission. Moreover, one of the undertakings was able to invoke its inability to pay the fine.

23 Commission MEMO/09/316.
24 Commission Press Release IP/11/1511

The individual fines were as follows:

Company	Reduction under the Leniency Notice	Reduction under the Settlement Notice	Fine
Appliances Components Companies S.p.A. (Italy) and Elettromeccanica S.p.A. (Italy)	25%	10%	€ 9,000,000
Danfoss A/S (Denmark) and Danfoss Flensburg GmbH (Germany)	15%	10%	€ 90,000,000
Embraco Europe S.r.l. (Italy) and Whirlpool S.A.(Brazil)	20%	10%	€ 54,530,000
Panasonic Corporation (Japan)	40%	10%	€ 7,668,000
Tecumseh Products Company Inc. (USA), Tecumseh do Brasil Ltda. (Brazil) and Tecumseh Europe S.A. (France)	100%	-	€ 0

2.1.6 Mountings for windows and window-doors - 28 March 2012

On 28 March 2012, the Commission fined nine European producers of mountings for windows a total of € 85, 876, 000 for operating a cartel from 1999 to 2007 by which they agreed on common price increases. The companies involved were Roto, Gretsch-Unitas, Siegenia, Winkhaus, Hautau, Fuhr, Strenger (all of Germany), Maco of Austria and AGB of Italy. They have high combined market shares in the EEA, especially for turn-and-tilt mountings where their combined market share is estimated to exceed 80%.

Roto received full immunity from fines under the Commission's 2006 Leniency Notice, as it was the first to provide information about the cartel. The fine for Gretsch-Unitas was reduced by 45% and the fine for Maco by 25% in view of their cooperation in the investigation. One of the companies invoked its inability to pay the fine and the Commission, taking into account the likely effect such a payment would have on the economic viability of the company, granted a reduction of 45% of the fine.

The individual fines were as follows:

Company	Reduction under the Leniency Notice	Fine
Roto	100%	€ 0
Gretsch-Unitas	45%	€ 20,552,000
Maco	25%	€ 18,501,000
Siegenia	0%	€ 18,995,000
Winkhaus	0%	€ 19,537,000
Hautau	0%	€ 3,179,000
Fuhr	0%	€ 2,215,000
Strenger	0%	€ 104,000
AGB	0%	€ 2,793,000

2.1.7 Freight Forwarding - 28 March 2012

On 28 March 2012, the Commission fined 14 companies a total of € 169 million for participating in four distinct cartels in the period 2002-2007. The freight forwarders which participated in this cartel covered in particular the Europe-USA and the China/Hong Kong-Europe routes. They established and coordinated four different surcharges and charging mechanisms constituting component elements of the final price charged to customers. In one of the cartels, the participants concealed the cartel behaviour by organising their contacts in a so-called "Gardening Club" and took specific measures to conceal the cartel behaviour using for instance code names based on names of vegetables, when discussing price fixing.

Deutsche Post (including its subsidiaries DHL and Exel) received full immunity from fines under the 2006 Leniency notice for all four cartels, as it was the first to reveal their existence to the Commission while Deutsche Bahn (including Schenker and BAX), CEVA, Agility and Yusen received reductions of fines ranging from 5 to 50%.

The four distinct cartels and the respective fines imposed on the participants are described further below.

A. New export system or "NES" cartel

When the UK introduced an electronic declaration for exports in 2003, freight forwarders agreed on establishing a surcharge on this reporting service and to fix its amount according to the size of the customer. The fines imposed were the following:

New Export System cartel	Reduction under the Leniency Notice	Fine
Kuehne + Nagel Ltd.and Kuehne + Nagel International AG		€ 5,320,000
Schenker Limited (as an economic successor of BAX Global Ltd. (UK))		€ 3,673,000
UPS Supply Chain Solutions, Inc. (as an economic successor of Menlo Worldwide Forwarding, Inc.)		€ 2,264,000
CEVA Freight (UK) Limited, and EGL, Inc.	35%	€ 2,094,000
DHL Global Forwarding (UK) Limited and Deutsche Post AG	100%	€ 0
Exel Freight Management (UK) Limited and Exel Limited	100%	€ 0

B. Advanced manifest system or "AMS" cartel

The AMS cartel refers to a regulatory requirement by the US customs to provide advance information on goods to be shipped to the US. In 2003-2004, a group of forwarders agreed to introduce a surcharge for the AMS service, *i.e.*, for processing the electronic transmission of such information to the US customs authorities and not to use the surcharge as a tool for competition. The fines imposed were the following:

Advanced Manifest System cartel	Reduction under the Leniency Notice	Fine
Kuehne + Nagel Management AG and Kuehne + Nagel International AG		€ 36,686,000
Panalpina Management AG and Panalpina World Transport (Holding) Ltd		€ 23,649,000
Schenker AG and Deutsche Bahn AG	25%	€ 23,091,000
UPS Supply Chain Solutions, Inc. and United Parcel Service, Inc.		€ 3,582,000
UTi Worldwide, Inc., UTi Worldwide (UK) Ltd and UTi Nederland B.V.		€ 3,068,000
Agility Logistics Limited	30%	€ 2,296,000
DSV Air & Sea SAS		€ 379,000
DHL Management (Schweiz) AG and Deutsche Post AG	100%	€ 0
Exel Limited, Exel Freight Management (UK) Limited and Exel Group Holdings (Nederland) B.V.	100%	€ 0

C. Currency adjustment factor or "CAF" cartel

In the CAF cartel, following the appreciation of the Chinese currency (RMB) against the USD in 2005, international freight forwarders agreed on a shift of contracts from USD to RMB or, if this was not possible, on the introduction of a CAF surcharge and on its level. The collusion was driven by the fact that, in general, the local services at Chinese airports were paid for by forwarders in RMB, while the customers of forwarders were billed in USD which consequently might have led to losses. The fines imposed were the following:

Currency Adjustment Factor cartel	Reduction under the Leniency Notice	Fine
UPS SCS (China) Ltd. and United Parcel Service, Inc.		€ 3,916,000
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd		€ 3,251,000
Schenker China Ltd. and Deutsche Bahn AG	20%	€ 3,071,000
Schenker China Ltd. (as an economic successor of BAX Global (China) Co. Ltd.)	20%	€ 2,444,000
CEVA Freight Shanghai Limited and EGL, Inc.	50%	€ 935,000
Nippon Express (China) Co., Ltd.		€ 812,000
Beijing Kintetsu World Express Co., Ltd.		€ 623,000
Kuehne + Nagel Ltd. and Kuehne + Nagel International AG		€ 451,000
Yusen Shenda Air & Sea Service (Shanghai) Ltd.	5%	€ 319,000
DHL Global Forwarding (China) Co. Ltd.	100%	€ 0
DHL Logistics (China) Co., Ltd.	100%	€ 0

D. Peak season surcharge or "PSS" cartel

In the PSS cartel, the freight forwarders agreed on the introduction and timing of a PSS, to be charged during the peak season transport period in the run up to Christmas (lasting generally from September to December) and, on occasions, they also discussed the level of the surcharge. The fines imposed were the following:

Peak Season Surcharge cartel	Reduction under the Leniency Notice	Fine
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd		€ 19,584,000
Kuehne + Nagel Ltd. and Kuehne + Nagel International AG		€ 11,217,000
Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG		€ 4,281,000
Expeditors Hong Kong Ltd. and Expeditors International of Washington, Inc.		€ 4,140,000
Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited		€ 2,918,000
Agility Logistics Limited (Hong Kong)	25%	€ 2,662,000
Schenker International (H.K.) Ltd. and Deutsche Bahn AG	50%	€ 2,656,000
DHL Global Forwarding (Hong Kong) Limited and Deutsche Post AG	100%	€ 0
HL Supply Chain (Hong Kong) Limited and Exel Limited	100%	€ 0

2.2 *Commission Decisions – Other*

2.2.1 CEES/AOP-Repsol – 25 April 2011

In *CEES/AOP-Repsol*, the Commission rejected a complaint by CEES alleging (i) that Repsol and CEPSA, two of Spain's leading oil companies, unlawfully fixed prices charged at petrol pumps and (ii) that members of the relevant sector association, AOP, similarly engaged in horizontal agreements to fix prices.

The Commission did not look into the complaint about AOP, as this conduct was already being assessed by the Spanish competition authority. With respect to the complaint addressing Repsol and Cepsa, the Commission found that there were insufficient grounds to open a formal investigation – in part because the relevant conduct had also already been investigated at the national level, for which fines had been imposed. That fine is currently under appeal.

2.2.2 Italian Association of Lehman Brothers' Bond Holders - 30 November 2011[25]

On 30 November 2011, the Commission rejected a complaint lodged against the Patti Chiari Consortium, the Bank Consortium and the global parent companies and Italian subsidiaries of Standard & Poor's, Moody's and Fitch ('the CRAs') regarding alleged violations of Article 101 TFEU in connection with the credit ratings given to bonds issued by companies belonging to the Lehman Brothers group. It was alleged that

[25] Case COMP/39803

these parties acted as a result of an agreement or concerted practice to maintain Lehman Brothers ratings or to disseminate incorrect or misleading information about the risk associated with Lehman Brothers bonds which resulted in losses to investors using the Patti Chiari Consortium.

The Commission considered that there was an insufficient degree of EU interest to conduct a further investigation into the alleged infringement. In particular, the Commission considered that the effects of the alleged collusion between Patti Chiari Consortium and the Bank Consortium were essentially confined to the territory of Italy. Patti Chiari Consortium is a self-regulatory consortium composed of 97 financial institutions which are of Italian nationality or at most Italian branches of foreign financial groups (Deutsche Bank for example); it is particularly aimed at Italian investors or at foreign investors in Italy and all the reported activities (the developing of programs, rules and tools concerning bank-client relationship) concerned the Italian territory. Last but not least, the Italian National Competition Authority was already conducting a preliminary investigation in this matter and thus, the Commission was able to reject the complaint pursuant to Article 13 of Regulation 1/2003.

2.3 *Public Ongoing Commission Investigations – Cartels*[26]

2.3.1 Cathode ray tubes[27]

The Commission carried out dawn raids on 8 November 2007, at the premises of manufacturers of cathode ray tubes.[28] The companies alleged to have been involved in 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.[29] 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 UK and other jurisdictions. In particular, Nokia has started damages litigation in the UK and the US 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.

2.3.2 Smart card chips[30]

On 21 October 2008, the Commission carried out dawn raids at the premises of several smart card chips producers in several Member States.[31] These chips are used

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26 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.

27 Case COMP/39.437.

28 Commission MEMO/07/453. Cathode ray tubes are used in television sets and computer monitors.

29 Commission MEMO/09/525.

30 Case COMP/39.574.

31 Commission MEMO/09/1.

for the 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.

2.3.3 Cement and related products[32]

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.[33] The Commission has followed up with further dawn raids on 22 and 23 September 2009 on undertakings in Spain.[34]

On 10 December 2010, the Commission announced it had opened formal antitrust proceedings.[35]

On 1 April 2011 the Commission sent an information request to Cemex. In June, Holcim filed an appeal against an information request sent by the Commission; Cemex followed suit. On 29 July, the General Court dismissed the appeals for interim suspension from Heidelberg Cement, followed on 1 August by further dismissals of similar appeals by Cemex, Cementos Portland Valderrivas, Holcim (Deutschland) and Holcim and Buzzi Unichem.

2.3.4 Power cables[36]

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.[37] In April 2009, both Nexans[38] and Prysmian[39] brought actions against the Commission's decision ordering the inspection. They claim *inter alia* that certain documents were obtained unlawfully.

On 6 July 2011, the Commission confirmed having sent a Statement of Objections to the 12 participants of the alleged cartel.

The Commission took the rare step of sending a formal charge sheet to private equity house Goldman Sachs ("GS"), which owned Milan-based Prysmian at the time of its alleged participation in a cartel for submarine and underground power cables and related products and services. It is a reminder that private equity firms are not immune from antitrust liabilities in the EU.

2.3.5 North Sea shrimps[40]

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.[41]

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32 Case COMP/39.520.
33 Commission MEMO/08/676.
34 Commission MEMO/09/409.
35 Commission Press Release IP/10/1696.
36 Case COMP/39.610.
37 Commission MEMO/09/46.
38 T-135/09, *Nexans v Commission* (appeal pending).
39 T-140/09, *Prysmian, Prysmian Cavi and Sistemi Energia v Commission* (appeal pending).
40 Case COMP/39.633.
41 Commission MEMO/09/142.

2.3.6 Czech electricity and lignite sector[42]

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. In December 2010 , the Commission announced having sent a statement of objections to Energetický a průmyslový holding and EP Investment Advisors. A fine of € 2.5 million was imposed on 28 March 2012 by the Commission on both companies for obstructing a 2009 dawn raid carried out by Commission officials.

2.3.7 Electrical equipment[43]

On 20 January 2010, the Commission carried out dawn raids at the premises of producers of Flexible Alternating Current Transmission Systems (FACTS).[44] FACTS are used to increase the power transfer capability of electricity transmission networks.

2.3.8 Automotive electrical and electronic components[45]

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.[46] Wiring harnesses link a car's computer to the various other mechanisms in the vehicle. Inspections were also conducted in the US and Japan.

2.3.9 Polyurethane Foam[47]

On 27 June 2010, the Commission conducted dawn raids at premises of companies active in the polyurethane foam sector in several Member States.[48] Recticel, a Brussels-based firm, confirmed that its premises in Belgium, the UK and Austria had been visited by Commission officials. Likewise, Carpenter, a firm active in Germany and the UK, 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.

2.3.10 Paper Envelopes[49]

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 coordinated price increases and allocated customers on

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42 Commission Press Release IP/10/1748.
43 Case COMP/39.459.
44 Commission MEMO/10/28.
45 Case COMP/39.748.
46 Commission MEMO/10/49.
47 Case COMP/39.801.
48 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.
49 Commission MEMO/10/439.

several European markets. Several companies have confirmed they are being scrutinized, including Bong Ljungdahl, GPV, InterMail and Tompla.

2.3.11 Truck Sector[50]

On 18 January 2011, the Commission carried out unannounced inspections at the premises of companies active in the truck sector in several Member States.

Daimler and Volvo confirmed they were both under investigation. Sweden's Scania and Germany's MAN, both allied to German auto giant Volkswagen, as well as Dutch manufacturer DAF Trucks and Fiat Industrial, maker of Iveco trucks also confirmed that they were being investigated.

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

2.3.12 Telefónica/Portugal Telecom[51]

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.

On 25 October, the Commission confirmed having sent a Statement of Objections to Telefónica and Portugal Telecom.[52]

2.3.13 Rail freight[53]

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.

2.3.14 Container shipping lines

On 17 May 2011, the Commission carried out unannounced inspections at the premises of companies active in the container liner shipping in several Member States. Inspections have since been confirmed by six companies, namely Neptune Orient Lines, Hanjin, OOCL, Hapag-Lloyd, CMA CGM and Maersk.

50 Commission MEMO 11/29.
51 Commission Press Release IP/11/58.
52 Commission Press Release IP/11/1241.
53 Commission MEMO/11/152.

2.3.15 Piston engines

On 27 May 2011, the Commission confirmed that, on 25 May, Commission officials carried out unannounced inspections at the premises of companies active in the manufacturing, supply and distribution of piston engines used primarily for industrial applications (notably generator sets, engines for industrial transportation and engines providing mechanical drive) in several Member States. Several companies have confirmed being raided, including General Electric, Caterpillar, MAN and Perkins. Another company, Tognum, received an information request.

2.3.16 Seatbelts, airbags (automotive occupant safety equipment)

On 9 June 2011, the Commission confirmed that, starting on 7 June 2011, it had carried out unannounced inspections at the premises of suppliers of car seatbelts, airbags and steering wheels, known in the industry as automotive occupant safety systems. Automotive occupant safety systems cover safety products such as seatbelts, airbags and steering wheels that are supplied to car manufacturers. Autoliv, TRW and Valeo have confirmed the dawn raids.

2.3.17 Natural Gas[54]

On 27 September 2011, the Commission announced that it had conducted unannounced inspections at the premises of companies active in the supply, transmission and storage of natural gas in ten Member States, mainly in Central and Eastern Europe. The Commission stated that its investigation is focused on the upstream supply level, where, unilaterally or through agreements, competition may be hampered or delayed. Exclusionary behaviour, such as market partitioning, obstacles to network access, barriers to supply diversification, as well as possible exploitative behaviour, such as excessive pricing. At the same time, the Commission is investigating suspicions of anti-competitive behaviour to the detriment of upstream suppliers themselves.

2.3.18 Euro interest rate derivatives[55]

On 18 October 2011, the Commission carried out unannounced inspections at the premises of companies active in the sector of financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR) in certain Member States.

2.3.19 Bearings for Automotive and Industrial use[56]

On 8 November 2011, Commission officials, accompanied by their counterparts from the relevant national competition authorities, conducted unannounced inspections at the premises of companies active in the production of bearings for automotive and industrial use in several member states.

2.3.20 Tap/Brussels airlines[57]

On 13 December 2011, the Commission undertook, accompanied by their counterparts from the relevant national competition authorities, unannounced inspections at the premises of Brussels Airlines and TAP Portugal in Belgium and

54 Case COMP/ 39816.
55 Commission MEMO/11/711.
56 Commission MEMO/11/766.
57 Commission MEMO/11/926.

Portugal. Earlier this year, the Commission started proceedings into the possible effects for consumers of the code-sharing agreements between the two airlines. The Commission is concerned that the agreements may go further than the sale of seats on routes where the two companies are expected to compete (which is in itself already a departure from the more common form of code-sharing in the industry whereby an airline sells seats on a partner's flights on routes it does not operate itself). The inspections at Brussels Airlines and TAP Portugal are related to the ongoing investigation into the code-share agreements between these airlines.[58]

2.3.21 French water sector[59]

On 18 January 2012, the Commission announced that it had opened formal antitrust proceedings to investigate whether the French companies SAUR, Suez Environnement/Lyonnaise des Eaux and Veolia, together with their trade association Fédération Professionnelle des Entreprises de l'Eau ("FP2E"), have coordinated their behaviour on French water and waste water markets in particular with respect to elements of the price invoiced to final consumers.

Note that in April 2010, the Commission had carried out unannounced inspections at the premises of several French companies active in the water and waste water services markets [60] and that in the context of these inspections, it had fined Suez Environnement and its subsidiary Lyonnaise des Eaux (LDE) € 8 million for the breach of a seal affixed by the Commission[61] (*see infra* "Practice and Procedure").

2.3.22 Electricity sector[62]

On 7 February 2012, the Commission undertook unannounced inspections at the premises of companies active in managing power exchanges in several Member States. Power exchanges provide services that facilitate electricity trading at a wholesale level. Commission officials also participated in unannounced inspections carried out by the EFTA Surveillance Authority (ESA).

2.4 *Ongoing Commission Investigations – Other*

2.4.1 Continental/United/Lufthansa/Air Canada[63]

In April 2009, the Commission opened two separate formal antitrust proceedings in relation to the compatibility with Article 101 TFEU 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 while its investigation into the Star Alliance case is ongoing.

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58 Commission Press Release IP/11/147.
59 Commission Press Release IP/12/26.
60 Commission MEMO/10/134.
61 Commission Press Release IP/11/632.
62 Commission MEMO/12/78.
63 Commission MEMO/09/168, Case COMP/39.595.

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*."

2.4.2 Perindopril (Servier[64])

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 UK Limited/Teva Pharmaceutical Industries Limited.

Moreover, on 2 July 2009 the Commission issued a decision as regards a claim of legal privilege and/or protection of confidential correspondence between external lawyers in the context of an investigation pursuant to Article 20(4) of Regulation 1/2003. The Commission stated that it was going to open a sealed envelope, containing documents that Commission officials found in the course of an inspection, between 24 and 27 November 2008, on the premises of Les Laboratoires Servier and Servier SAS and join the documents to the administrative file, after the expiry of the deadline for lodging an appeal against its decision.

On 26 July 2010, the Commission announced that it had issued a statement of objections to Les Laboratoires Servier and Servier SAS (Servier) on the basis that Servier might have provided misleading and incorrect information in reply to a questionnaire that the Commission had sent to various stakeholders in the context of the pharmaceuticals sector inquiry. However, on 27 January 2012 the Commission decided to close its investigation and to focus instead on the substantive elements of the case.

2.4.3 French generics

In October 2009, then Competition Commissioner Kroes warned that her staff was "*capitalising on [their] 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 Articles 101 and 102 TFEU. The Commission has not published any information on this case.

2.4.4 Lundbeck

On 7 January 2010, the Commission opened a formal antitrust investigation into Lundbeck on the basis of Articles 101 and 102 TFEU.[65] The Commission has stated

64 Case COMP/39.612.

65 Commission Press Release IP/10/8.

that it is particularly interested in unilateral behaviour and agreements that would have delayed the entry of generic citalopram, a selective serotonin reuptake inhibitor.

2.4.5 Stretch film for agricultural use

On 28 and 29 April 2010, Commission officials, accompanied by their counterparts from the relevant national competition authorities, conducted unannounced inspections at the premises of companies in a number of member states that are active in the bale wrap industry and on related markets. Bale wrap is plastic stretch film used for the packaging and preservation of silage, hay or straw.

2.4.6 Areva & Siemens[66]

On 2 June 2010, the Commission announced that it had opened an investigation into whether Areva and Siemens had concluded anti-competitive non-compete agreements. In 2000, Areva and Siemens combined their respective activities in the field of civil nuclear technology in a joint venture, Areva NP. The Commission had approved this transaction following a Phase II investigation. In 2009, Areva acquired sole control of Areva NP – a transaction that was also approved by the Commission. The Commission's current investigation focuses on whether non-compete clauses between Areva and Siemens relating to the period after Areva took full control of the joint venture are in breach of Article 101 TFEU.

On 14 March 2012, the Commission announced that it was inviting comments from interested parties on the commitments offered by Siemens and Areva concerning the nuclear technology markets. To address the Commission's concerns, Siemens and Areva had committed to reduce both the product scope and the duration of the non-compete obligation. The companies have also offered to limit the non-compete obligation for all Areva NP core products and services to a period of three years after Siemens' exit from the joint venture, and to remove it completely for non-core products and services. The same commitments apply to the confidentiality clause agreed between the two parties insofar as it had the same effects as the non-compete obligation.

2.4.7 P&I Clubs (marine insurance agreements)[67]

Protection & Indemnity Clubs (P&I Clubs) are mutual non-profit making associations that provide protection and indemnity (P&I) insurance to their ship-owner members. The International Group of P&I Clubs (IG) is a worldwide association of 13 P&I Clubs. The members of the IG provide P&I insurance to about 93% of the world's ocean-going tonnage.

The Commission opened formal proceedings in order to investigate the terms of two separate agreements operated by the P&I Clubs in the framework of the IG: the International Group Agreement and the Pooling Agreement. The Commission has indicated that it intends to examine whether certain provisions of the agreements may be harming ship-owners and insurers that are not members of IG by lessening competition between P&I Clubs and restricting the access of commercial insurers and/or other mutual P&I insurers to the relevant market.

2.4.8 Nexium (esomeprazole)[68]

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66 Commission Press Release IP/10/655.

67 Commission Press Release IP/10/1072.

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.

2.4.9 Lufthansa/Turkish Airlines[69]

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 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.

2.4.10 E-Books[70]

On 2 March 2011, the Commission confirmed that it had initiated unannounced inspections at the premises of companies that are active in the e-book (electronic or digital books) publishing sector in several Member States. The Commission stated that it had reason to believe that the companies active in this sector had concluded anti-competitive agency and distribution agreements.

On 6 December 2011, the Commission announced that it had opened formal antitrust proceedings to investigate whether international publishers Hachette Livre (Lagardère Publishing, France), Harper Collins (News Corp., USA), Simon & Schuster (CBS Corp., USA), Penguin (Pearson Group, United Kingdom) and Verlagsgruppe Georg von Holzbrinck (owner of inter alia Macmillan, Germany) had, possibly with the help of Apple, engaged in anti-competitive practices affecting the sale of e-books.

Until 6 December 2011, the Commission and the UK Office of Fair Trading ("OFT") were investigating in parallel and in close cooperation whether these arrangements for the sale of e-books breached competition rules. The OFT, however, closed its investigation on grounds of administrative priority before the Commission opened formal proceedings. According to the Commission, *"the OFT made a substantial contribution to the e-books investigation and will continue to co-operate closely with the Commission going forward"*.

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68 Case COMP/39.801.

69 Commission MEMO/11/147, Case COMP/39.794.

70 Commission Press Release IP/11/1509.

2.4.11 Cephalon and Teva

On 28 April 2011, the Commission opened a formal antitrust investigation to assess whether an agreement between US-based pharmaceutical company Cephalon, Inc. and Israel-based generic drugs firm Teva Pharmaceutical Industries Ltd. may have had the object or effect of hindering the entry of generic Modafinil in the European Economic Area.

Modafinil is a medicine used for the treatment of certain types of sleeping disorders.

In December 2005 Cephalon and Teva settled patent infringement disputes in the United Kingdom and the United States concerning Modafinil (brand name Provigil®). As part of the settlement agreement, Teva undertook not to sell its generic Modafinil products in the EEA markets before October 2012. A series of side deals were included into the settlement agreement, which is also subject to antitrust litigation in the United States initiated by the US antitrust authority FTC.

2.4.12 E-Payment standards

On 26 September 2011, the Commission announced an antitrust investigation into whether proposed standardization in the e-payments market could stifle competition and innovation.[71]

The investigation follows efforts by the European Payments Council ("EPC") – which includes representatives of the banking industry and the body responsible for e-payments across the EU – to develop a Single Euro Payments Area ("SEPA"). The purpose of the SEPA is to facilitate online payments across the EU. Currently, there are numerous different online payment systems in place – many of which are controlled by banks – that are often national in scope.

The Commission will in particular look into whether standardization could prevent entry by payment providers not controlled by a bank (and therefore not necessarily represented within the EPC).

2.4.13 Johnson & Johnson and Novartis

On 21 October 2011, the Commission, upon its own initiative, opened an investigation into whether contractual arrangements between Johnson & Johnson and the generic branches of the Swiss-based company Novartis may have had the object or effect of hindering the entry on to the market of generic versions of Fentanyl in The Netherlands. Fentanyl is a strong pain killer for chronic pain.

The Commission's inquiry follows its previous pharmaceutical sector inquiry,[72] which had revealed that so-called "originator" drug companies may be paying to delay the entry on to the market of generic medicines.

2.4.14 Refrigerants for car air-conditioning systems[73]

On 16 December 2011, the Commission opened antitrust proceedings concerning agreements between Honeywell and DuPont for the development of a new refrigerant for air conditioning systems in cars. The new refrigerant known as 1234yf, which is

71 Commission Press Release IP/11/1076 .
72 Commission Press Release IP/09/1098 and Commission MEMO/09/321.
73 Commission Press Release IP/11/1560.

intended for use in future car air conditioning systems, was announced as a suitable global replacement for the previous refrigerant R134a, which does not meet new EU rules. The selection of 1234yf is the result of a process conducted under the auspices of the Society of Automotive Engineers, which represents the interests of all groups involved in the automotive sector.

The Commission is investigating complaints alleging that Honeywell International Inc. and E.I. du Pont de Nemours and Company entered into anti-competitive arrangements as regards the development of the new generation of refrigerants. More specifically, the Commission is investigating whether joint development, licensing and production arrangements entered into between the two companies in relation to these refrigerants restrict competition on the markets.

The Commission is also investigating whether Honeywell may have abused a dominant position in the new refrigerant. It is examining whether Honeywell engaged in deceptive conduct during the evaluation of 1234yf between 2007 and 2009. It has been alleged that Honeywell did not disclose its patents and patent applications while the refrigerant was being assessed and then failed to grant licences on fair and reasonable (so called "FRAND") terms. Such a behaviour may also infringe Article 102 TFEU.

2.4.15 Air France/KLM/Alitalia/ Delta[74]

On 27 January 2012, the Commission opened an investigation to assess whether a transatlantic joint venture between Air France-KLM, Alitalia and Delta, all members of the SkyTeam airline alliance, breached EU antitrust rules.

SkyTeam is one of the three world-wide airline alliances. Under its umbrella, the member airlines enter into various cooperation agreements in relation to passenger and cargo air transport - the scope and intensity of which vary between alliance members. In 2009 and 2010, several members of SkyTeam (Air France-KLM, Alitalia and Delta) signed agreements establishing a transatlantic joint venture focusing on the routes between Europe and North America. Pursuant to these agreements, the parties fully coordinate their transatlantic operations with respect to capacity, schedules, pricing and revenue management. The parties also share profits and losses of their transatlantic flights.

The Commission will investigate whether the partnership may harm passengers on certain EU-U.S. routes where, in the absence of the joint venture, the parties would be providing competing services. This investigation is in line with the Commission's recent enforcement action in relation to the transatlantic joint ventures of the two other airline alliances, Oneworld[75] and Star[76].

At the same time, the Commission decided to close its initial investigation as part of the priority-setting process in light of significant changes in the circumstances on the relevant markets. In the context of this initial investigation, it had sent in 2006 a

74 Commission Press Release IP/12/79.
75 Commission Press Release IP/10/936.
76 Commission MEMO/09/168.

statement of objections to eight SkyTeam members[77] and the results of the market test had not allowed the adoption of the commitments proposed by the parties in 2007.

2.5 *Judgments of the General Court*

2.5.1 Spanish raw tobacco

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 (€ 11.9 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%.

(a) *T33/05 Cetarsa v Commission – 3 February 2011*

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.

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[77] Commission MEMO/06/243.

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 SI (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.

(b) *T-37/05 World Wide Taobacco España, S.A. v Commission – 3 March 2011*

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 Leniency 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%.

(c) *T-38/05 Agroexpansión v Commission Competition – 12 October 2011*

In its 12 October 2011 judgment on Agroexpansión's appeal, the General Court dismissed Agroexpansión's application for annulment of the Commission's decision on the basis that Dimon (now Alliance One) – the parent company of Agroexpansión – was not liable for an infringement of EU competition rules under Article 101 TFEU, because, according to the facts, Dimon was not able to exercise decisive influence over Agroexpansión.

However, the General Court reduced the fine imposed on Agroexpansión by 5%, finding that the Commission was not justified in concluding that Agroexpansión had contested the existence of the unlawful agreements where Agroexpansión had only argued that competition would not have been perfect even in the absence of the unlawful agreements.

(d) *T-41/05 Alliance One International v Commission – 12 October 2011*

In this judgment, the General Court dismissed the appeal brought by Alliance One against the Commission's *Spanish Raw Tobacco* decision insofar as it attributed parental liability upon Alliance One for its subsidiary Agroexpansión's participation in the cartel. The General Court found that the Commission had appropriately imputed parental liability upon Alliance One, and had done so not only relying on the *Akzo* presumption for parents holding 100% of the stock of their subsidiary, but also by reference to other factors showing that Alliance One did in fact exercise such decisive influence. The General Court dismissed, *inter alia*, the argument that a parent's 'decisive influence' must relate specifically to the cartel conduct for it to be liable for the subsidiary's cartel participation.

2.5.2 Gas Insulated Switchgear

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

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. A major component for electric substations, GIS is used to convert electrical current from high to low tension and *vice versa*. GIS protects power station transformers from overload while insulating the station's circuit and faulty transformer. 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.

(a) *T-110/07 Siemens v Commission – 3 March 2011*

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 his 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 Commissioner's 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.

(b) *T-117/07 and T-121/07 Areva and Others v Commission – 3 March 2011*

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.

Almsom 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 Areava 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 infra*), 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 Alsom 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.

(c) *Joined Cases T-122-124/07 Siemens and VA Tech Transmission & Distribution v Commission – 3 March 2011*

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 T122/07) 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, VAT 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 the 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 exceed 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.

(d) *T-112/07 Hitachi and Others v Commission – 12 July 2011*

(e) *T-113/07 Toshiba v Commission – 12 July 2011*

(f) *T-132/07 Fuji Electric v Commission – 12 July 2011*

(g) *T-133/07 Mitsubishi Electric v Commission – 12 July 2011*

On 12 July 2011, the General Court ruled on the appeals lodged by the Japanese undertakings involved in the GIS cartel. According to the Commission, the cartel participants concluded an unwritten understanding to reserve the European market to European undertakings and the Japanese market to Japanese undertakings. In its decision, the Commission found that the cartel had operated from 15 April 1988 to 11 May 2004.

On appeal, the Court ruled that the alleged commitment of the Japanese undertakings, under the unwritten understanding, not to enter the European market constituted an infringement of EU competition rules. The unwritten understanding was proved by statements from several undertakings involved as well as by employees of one of those undertakings.

The Court also found that the European undertakings, on their part, had committed not to compete on the Japanese and various other international markets, and to notify their Japanese counterparts about allocation of new GIS projects through a notification and account loading mechanism. The Court concluded that the European undertakings regarded the Japanese undertakings as potential competitors, which could have entered the European market but for the unlawful agreements. The Court thereby dismissed the argument, raised *inter alia* by Toshiba, that the Commission did not have jurisdiction to fine companies not active within the EEA.

With respect to the fines imposed, the Court however found that the Commission had failed to treat the Japanese and European producers equally, in particular as the Commission did not use the same reference year for Mitsubishi Electric and Toshiba (2001) and the European undertakings (2003) in calculating the fines. Although the Commission had a legitimate reason for using a different reference year for the European and Japanese companies, respectively – namely, the fact that for most of the period of infringement, Mitsubishi Electric and Toshiba participated in the cartel as individual undertakings, and not as part of their joint venture, TM T&D Corp – the Court found that the Commission could have used other methods to achieve its objective without treating the Japanese producers and the European producers unequally. Finding that the Commission breached the principle of equal treatment, the Court annulled the fines imposed on the two companies concerned.

As regards the Fuji Group, the Court found that the Commission had ignored essential information provided by Fuji and relating to the cartel for the period prior to 1 October 2002. Ruling that the Commission should have taken that information into account in calculating the fines in accordance with the Leniency Notice, the Court reduced the fine imposed on the Fuji Group.

The Court rejected the action brought by Hitachi in its entirety.

2.5.3 *Visa Europe Ltd and Visa International Service*

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[78] 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 claim, *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

[78] Case COMP/37.860

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 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.

2.5.4 Sodium Chlorate

(a) *T-299/08 Elf Aquitaine v Commission – 17 May 2011*

(b) *T-343/08 Arkema France v Commission – 17 May 2011*

On 11 June 2008, the Commission fined a number of companies, including Arkema France and, at the time of the facts, its parent company, Elf Aquitaine, for their anti-competitive conduct on the market for sodium chlorate, a product used for bleaching paper. The cartel primarily consisted in the allocation of sales volumes, price fixing

and the exchange of commercially sensitive information during the period from 17 May 1995 to 9 February 2000.[79]

The General Court dismissed the actions brought by Arkema France and Elf Aquitaine for annulment of the Commission's decision and for a reduction of the fines imposed on them. In particular, the Court noted that the presumption according to which a subsidiary which is wholly-owned by its parent company does not normally decide independently on its conduct in the market also applies when a parent company holds almost all of the capital of its subsidiary. In the present case, the Court found that the companies concerned had produced insufficient evidence to rebut that presumption.

In addition, the Court considered that the fact that the Commission did not impute to Elf Aquitaine the unlawful conduct of its subsidiary in an earlier decision did not prevent it from doing so in the decision in question.

The Court rejected arguments based misuse of powers, legal certainty, the autonomy of legal persons, or equal treatment related to the Commission's increase of the fine imposed on Elf Aquitaine by 70% for deterrence. The Court agreed with the Commission that the latter was justified in doing so given the company's particularly high turnover, making it easier for it to mobilise the funds necessary to pay the fine.

As regards the 90% increase of the basic amount of the fine imposed on Arkema France for repeated infringement, the Court found that the Commission correctly relied on three earlier decisions. In the Court's view, that series of three decisions, which were adopted in quick succession (in 1984, 1986 and 1994) and before the implementation of the cartel at issue began in 1995, constituted evidence of Arkema France's tendency to infringe the competition rules and not to draw the appropriate conclusions from previous penalties.

Moreover, the Court ruled that the fact that, in earlier decisions, the Commission increased the fine imposed on it by 50% for repeated infringement did not prevent the Commission from increasing that level further if necessary to ensure compliance. The 90% increase did not therefore infringe principles of proportionality, equal treatment or good administration.

Furthermore, the Court agreed with the Commission that Arkema France's cooperation in the administrative procedure did not justify a reduction of its fine. After examining the information provided by Arkema France to the Commission in detail, the Court took the view that that information was not of significant added value for purposes of the 2002 Leniency Notice. Second, the Court concluded that Arkema France was not entitled to a reduction outside of the scope of the 2002 Leniency Notice since it did not establish that, without its cooperation, the Commission would not have been able to impose penalties in full or in part on the cartel at issue.

[79] In that decision, Arkema France and Elf Aquitaine were jointly and severally held liable for a fine of € 22.7 million; Arkema France received a fine of € 20.43 million (for repeated infringement); and Elf Aquitaine received a fine of €15.89 million (reflecting an increase for deterrence).

(c) *T-348/08 Aragonesas Industrias y Energía v Commission – 25 October 2011*

In its judgment in the appeal brought by Aragonesas against the Commission's *Sodium Chlorate* cartel decision, the General Court faulted the Commission for having relied on evidence that was "*unreliable and excessively sporadic and fragmented*." Furthermore, in a number of paragraphs on evidence used in cartel cases, the General Court noted that informants' statements could not be dismissed merely because the informant may have an interest in disclosing the cartel. Although informants' statements may thus be relied upon, where such evidence is contested by the accused undertakings, the Commission must corroborate the informant's statement by other evidence.

Consequently, the Commission had failed to prove that Aragonesas participated in the infringement throughout the period in question, namely from 16 December 1996 to 9 February 2000. Only the acknowledgement by Aragonesas that it participated in an unlawful meeting on 28 January 1998 and the statements and notes of the other participants in that meeting were considered sufficiently reliable evidence. The Court concluded that the Commission had only proved that Aragonesas participated in the cartel in 1998, thus partly annulling the Commission's finding of infringement and the determination of the fine.

(d) *T-349/08 Uralita SA v Commission – 25 October 2011*

With regard to the arguments submitted by Uralita, the Court found that the undertaking that participated in the infringement consisted of a single economic unit composed of Aragonesas and EIA, a company which wholly owned Aragonesas. Uralita had failed to show that Aragonesas determined its course of conduct on the sodium chlorate market independently of EIA. The Court concluded that the Commission was entitled to find both of those legal persons responsible for the unlawful conduct of that undertaking. Furthermore, the Court observed that, after the period of the infringement in which that undertaking was found to have participated, Uralita absorbed all the assets of EIA, as a result of which EIA ceased to exist. The Court therefore concluded that Uralita, as legal successor to EIA, ensured legal continuity of its rights and obligations and assumed its liability for unlawful conduct in the infringement in question.

2.5.5 Acrylic glass

(a) *T-206/06 Total and Elf Aquitaine v Commission – 7 June 2011*

(b) *T-217/06 Arkema France and Others v Commission – 7 June 2011*

On 31 May 2006, the Commission found that Arkema SA (now Arkema France) and its subsidiaries – Altuglas International SA and Altumax Europe SAS – as well as their parent companies at the time, Total SA and Elf Aquitaine SA – had participated in a cartel in the methacrylates sector (commonly known as acrylic glass) from 23 January 1997 to 12 September 2002 (from 1 May 2000 to 12 September 2002 in respect of Total SA).

The Commission imposed a fine of € 219.1 million on Arkema and its subsidiaries. Total, which controlled the capital of all the companies in the group from April 2000 until the end of the infringement, was held jointly and severally liable for the payment

of € 140.4 million of the fine. Elf Aquitaine held more than 96% of Arkema's share capital throughout the period of the infringement and was held jointly and severally liable for the payment of € 181.35 million. By two separate actions, the companies brought an action before the General Court seeking annulment of the Commission's decision or a reduction in the fines imposed on them.

The General Court rejected the arguments seeking annulment of the decision, confirming, in particular, the liability of Total and Elf Aquitaine for the infringement. The Court noted that the presumption according to which a subsidiary which is wholly-owned by its parent company does not normally decide independently on its conduct in the market also applies when a parent company holds almost all of the capital of its subsidiary. In the present case, the Court found that the companies concerned had produced insufficient evidence to rebut that presumption.

The Commission had imposed an increase of 200% on Arkema France and its subsidiaries, in order to ensure that the pecuniary penalty would have a sufficient deterrent effect given the undertakings' size and economic strength. That increase was based on parent Total's worldwide turnover.

The Court took the view that, as Arkema and its subsidiaries became publicly traded (and thus no longer controlled by Total and Elf Aquitaine) only a few days before the Commission's decision, the 200% increase was not justified. In particular, the Court held that the objective of deterrence could be legitimately attained only by reference to the situation of the undertaking on the day when it is imposed (rather than the last day of the infringement). Holding that Total's resources could therefore not be taken into account in determining the deterring effect of the fine (increase), the Court found that, instead, a 25% increase was adequate to ensure a sufficiently deterrent effect of the fine. Accordingly, the Court reduced the fine imposed on Arkema France and its subsidiaries to € 113.3 million.

As regards Total and Elf Aquitaine, the Court upheld the amount of the fines imposed and dismisses their actions in their entirety. In particular, the Court rejected their request for reduction of the fines due to those companies' having recently had other substantial pecuniary penalties imposed on them due their participation in other cartels. The Court found that the imposition of a fine for various anti-competitive activities aimed at other products did not affect the existence of the infringement in question, and could not justify a reduction of the fine imposed in the present case.

(c) *T-216/06 Lucite International and Lucite International UK v Commission – 15 September 2011*

The General Court rejected the appeal brought by Lucite International, focusing mainly on whether the Commission should have taken into account certain allegedly attenuating circumstances in setting the level of the fine. In particular, the General Court rejected Lucite's argument that it in effect 'cheated' on the cartel and that that conduct qualified as an attenuating circumstance.

2.5.6 Bleaching Agents

(a) *T-185/06 L'Air liquide v Commission – 16 June 2011*

(b) *T-186/06 Solvay v Commission – 16 June 2011*

(c) *T-191/06 FMC Foret v Commission – 16 June 2011*

(d) *T-192/06 Caffaro v Commission – 16 June 2011*

(e) *T-194/06 SNIA v Commission – 16 June 2011*

(f) *T-195/06 Solvay Solexis v Commission – 16 June 2011*

(g) *T-196/06 Edison v Commission – 16 June 2011*

(h) *T-197/06 FMC v Commission – 16 June 2011*

(i) *T-189/06 Arkema France v Commission – 14 July 2011*

(j) *T-190/06 Total and Elf Aquitaine v Commission – 14 July 2011*

On 3 May 2006, the Commission imposed fines totalling €388.13 million on participants in a cartel on the market for hydrogen peroxide and sodium perborate (bleaching agents).

Amongst the companies penalised were Edison and its subsidiary at the material time (Ausimont SpA, now called Solvay Solexis), Solvay, FMC and its subsidiary (FMC Foret), as well as SNIA and its subsidiary (Caffaro). L'Air Liquide's participation in the cartel had ended more than five years prior to the Commission's first investigative measures. Consequently, because the limitation period had expired, it was not fined, but was however included among the addresses of the decision. The cartel lasted from 31 January 1994 until 31 December 2000. The companies concerned brought actions before the Court for annulment of the Commission's decision or for a reduction in their respective fines.

The Court annulled the decision with respect to L'Air Liquide and Edison, in so far as the Commission failed to adopt a detailed position on the evidence which those companies adduced in order to rebut the presumption that they exercised a decisive influence over the conduct of their subsidiaries, which were wholly owned by them. The Court pointed out that the Commission's obligation to provide a statement of reasons for its decision on that point stems from the rebuttable nature of that presumption, the rebuttal of which required the parent companies to adduce evidence relating to all the economic, organisational and legal links between themselves and their respective subsidiaries. This resulted in the annulment of the fine of €58.13 million imposed on Edison. In the case of L'Air Liquide, which did not receive a financial penalty, the decision of the Court has the effect of setting aside the finding of its participation in the infringement.

As regards Solvay, the Court found that the Commission had insufficient evidence for its finding that Solvay participated in the infringement during the period from 31 January 1994 until May 1995. The Commission found that that period lasted from 31 January 1994 until 31 December 2000. The Court reduced the fine imposed on Solvay accordingly.

The Court further rejected Solvay's argument that its leniency application had to be regarded as having been lodged at the time when it contacted the Commission by telephone and requested a meeting to make an oral statement.

Furthermore, the Court ruled that the Commission was wrong to find that the evidence provided by Solvay merely corroborated information already provided by two other cartel participants, granting Solvay a 10% reduction for cooperation. The Court noted that the information provided by Solvay was widely used in the Commission's decision

and that Solvay was the first to submit evidence with respect to certain unlawful conduct that enabled the Commission to establish certain key aspects of the cartel in question. Thus, on the basis of its cooperation, the Court reduced Solvay's fine by 20%, from € 167.06 million to € 139.50 million.

The appeal brought by Arkema France SA and its parent companies, Elf Aquitaine SA and Total SA, primarily concerned the issue of parental liability.

Arkema took part in the infringement from 12 May 1995 until 31 December 2000. The Commission had imposed on Arkema a fine of € 78.66 million. Elf Aquitaine, which held over 96% of the authorised capital of Arkema throughout the entire period of the infringement, was held jointly and severally liable for payment of the fine as to €65.1 million. Total, which, from April 2000 until 31 December 2000, controlled over 99% of Elf Aquitaine's capital, was held jointly and severally liable for payment of the sum of € 42 million.

The Court recalled that, in the situation where a parent company holds *all* the capital of its subsidiary, there is a rebuttable presumption that a subsidiary which is wholly owned by its parent company does not decide independently upon its own conduct on the market. However, Total and Elf Aquitaine, which held virtually all (but not all) the capital, did not object to the application of the same rules of evidence for imputing the unlawful conduct of their subsidiary in both situations.

Finding that Total and Elf Aquitaine had only offered unsubstantiated assertions as to the independence of their subsidiary, the Court held that these were manifestly incapable of rebutting the presumption of imputability to the parent company. Consequently, the Court found that the Commission did not err in imputing to Total and Elf Aquitaine the unlawful conduct of their subsidiary.

The Court rejected all the arguments of the other undertakings concerned, upholding the fines imposed on them.

Company	**Fine**
L'Air Liquide	€0
Solvay	€ 139.50 million (reduced from € 167.06 million)
Edison	Edison SpA – € 58.13 million (of which € 25.62 million jointly and severally with Solvay Solexis SpA)
Caffaro SNIA	€ 1.08 million
FMC Foret FMC	€ 25 million

2.5.7 International removals

(a) *T-199/08 Ziegler v Commission – 16 June 2011*

(b) *T-204/08 Team Relocations v Commission – 16 June 2011*

(c) *T-208/08 Gosselin Group v Commission – 16 June 2011*

(d) *T-209/08 Gosselin Group v Commission – 16 June 2011*

(e) *T-210/08 Verhuizingen Coppens v Commission – 16 June 2011*

(f) *T-211/08 Putters International v Commission – 16 June 2011*

(g) *T-212/08 Team Relocations v Commission – 16 June 2011*

On 11 March 2008, the Commission imposed fines totalling €32.76 million on ten undertakings for having participated, over various periods between October 1984 and September 2003, in a cartel on the international removal services market in Belgium. Five companies and a number of their parent companies requested the Court to annul the decision or reduce the amount of their respective fines.[80]

The General Court's judgments in this case, which for the first time considered issues of interpretation of the new 2006 Guidelines on the method of setting fines, rejected arguments put forward by Team Relocations, Amertranseuro International, Putters International and Ziegler, upholding the level of their fines.

With respect to Gosselin, however, the Court found that the Commission had only proved that Gosselin participated in the cartel for 7 years and 6 months, rather than for 10 years and 7 months, as concluded by the Commission. Accordingly, the Court reduced the amount of the fine from € 3.28 million to € 2.32 million.

The Court furthermore faulted the Commission for imputing Gosselin's liability to Stichting Administratiekantoor Portielje. First, the Court found that the Stichting did not constitute an undertaking for the purposes of competition law, as it had not been shown that the Stichting was directly or indirectly involved in Gosselin's management or otherwise engaged in an economic activity. Second, the Court found that the Stichting had adduced evidence to establish that it does not exert a decisive influence over Gosselin.

As regards Verhuizingen Coppens, the Court found that it participated only in part of the anti-competitive agreement, without being aware of further anti-competitive conduct by the other undertakings. Therefore, the Commission was not entitled to find that the undertaking had participated in a single and continuous infringement covering all the anti-competitive conduct. Consequently, the Court annulled the Commission's decision with regard to the fine imposed on Verhuizingen Coppens.

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80 Team Relocations (fine of € 3.49 million of which Trans Euro and Team Relocations Ltd were jointly and severally liable for € 3 million and Amertranseuro, Trans Euro and Team Relocations Ltd jointly and severally liable for € 1.3 million); Putters International (€ 395,000); Verhuizingen Coppens (€ 104,000); Gosselin Group (€ 3.28 million of which Stichting Administratiekantoor Portielje – the foundation which brings together its family shareholders – was jointly and severally liable for € 270,000), and Ziegler (€ 9.2 million).

The Commission[81] as well as Ziegler and Gosselin[82] have appealed the General Court's judgment.

2.5.8 Lifts and escalators

(a) *T-138/07 Schindler Holding and Others v Commission – 13 July 2011*

(b) *T-141/07 General Technic-Otis v Commission – 13 July 2011*

(c) *T-142/07 General Technic-Otis v Commission – 13 July 2011*

(d) *T-144/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*

(e) *T-145/07 General Technic-Otis v Commission – 13 July 2011*

(f) *T-146/07 General Technic-Otis v Commission – 13 July 2011*

(g) *T-147/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*

(h) *T-148/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*

(i) *T-149/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*

(j) *T-150/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*

(k) *T-151/07 Kone and Others v Commission – 13 July 2011*

(l) *T-154/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*

On 21 February 2007, the Commission imposed fines totalling more than €992 million on a number of companies in the Otis, Kone, Schindler and ThyssenKrupp groups for having participated in cartels on the market for the sale, installation, maintenance and modernisation of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands.

Upon appeal, only ThyssenKrupp was successful. In 1998, the Commission had penalised certain companies belonging to the ThyssenKrupp group for their participation in an alloy surcharge cartel. In the present cartel investigation, the Commission increased fines imposed on parent ThyssenKrupp AG, subsidiary ThyssenKrupp Elevator AG, and certain national subsidiaries, by 50% on grounds of recidivism.

The Court, however, found that recidivism had not been adequately established by the Commission. In the 1998 alloy surcharge cartel, the Commission had found an infringement by several subsidiaries in the ThyssenKrupp group, but not against the predecessor of parent company ThyssenKrupp AG. Moreover, in the alloy surcharge cartel decision, the Commission had not established that the subsidiaries and their parent companies formed an economic entity. Nor did the Commission make clear

[81] Case C-440/11.
[82] Case C-429/11.

that the subsidiaries on which fines were imposed in the alloy surcharge cartel were among the undertakings fined in the present lift cartel decision. Thus, the Court concluded that, as the parent company of the Thyssen group was not an addressee of the previous alloy surcharge cartel decision, a finding of recidivism was not justified. Accordingly, the Court reduced the fines imposed on the companies in the ThyssenKrupp group.

With regard to the companies in the Otis, Kone and Schindler groups, the Court rejected all the arguments put forward, thus upholding the fines imposed on them by the Commission.

In rejecting the other arguments put forward by the various applicants, the General Court confirmed, *inter alia*, the Commission's finding that, even though the cartels were national in nature, they had a significant effect on trade between Member States, thus triggering the Commission's jurisdiction. It furthermore upheld the Commission's finding of parental liability for all participating cartel subsidiaries. The Court also confirmed the Commission's margin of appreciation with regard to the value of co-operation under the Leniency Notice. In addition, the Court confirmed the Commission's finding that non-binding statements by National Competition Authorities granting provisional immunity at national level do not prevent the Commission from pursuing a case.

ThyssenKrupp, Kone, Otis and Schindler have all appealed the respective judgments by the General Court.

Company	Fine
Belgium	
Otis	€ 47.71 million
Schindler	€ 69.30 million
ThyssenKrupp	€ 45.74 million (reduced from € 68.61 million)
Germany	
Kone	€ 62.37 million
Otis	€ 159.04 million
Schindler	€ 21.46 million
ThyssenKrupp	€ 249.48 million (reduced from € 374.22 million)
Luxembourg	
Otis	€ 18.18 million
Schindler	€ 17.82 million
ThyssenKrupp	€ 8.91 million (reduced from € 13.37 million)
Netherlands	
Kone	€ 79.75 million
Schindler	€ 35.17 million
ThyssenKrupp	€ 15.65 million (reduced from € 23.48 million)

2.5.9 Synthetic Rubbers

(a) *T-38/07 Shell Petroleum and Others v Commission – 13 July 2011*

(b) *T-39/07 ENI v Commission – 13 July 2011*

(c) *T-42/07 Dow Chemical and Others v Commission – 13 July 2011*

(d) *T-44/07 Kaučuk v Commission – 13 July 2011*

(e) *T-45/07 Unipetrol v Commission – 13 July 2011*

(f) *T-53/07 Trade-Stomil v Commission – 13 July 2011*

(g) *T-59/07 Polimeri Europa v Commission – 13 July 2011*

On 29 November 2006, the Commission imposed fines totalling more than € 519 million on 13 companies for their participation over various periods between 20 May 1996 and 28 November 2002 in a cartel on the market for butadiene rubber and emulsion styrene butadiene rubber (synthetic rubbers used in tyre production).

The companies concerned brought actions before the General Court for annulment of the Commission's decision or reduction of their fines. Several of these appeals were successful.

With regard to Unipetrol, its subsidiary Kaučuk and Trade-Stomil, the Court found that the Commission lacked sufficient evidence for a finding that those companies participated in unlawful agreements, even if some of the evidence had some probative value. The Court concluded that the Commission was unable to meet its standard of proof and erred in finding that Unipetrol, its subsidiary Kaučuk and Trade-Stomil had participated in the cartel.

With regard to Eni and its subsidiary Polimeri Europa, the Court found that a 50% increase in the level of the fine on grounds of recidivism was not justified. The Court found that their alleged participation in two earlier cartels could not be used against them in the present cartel without taking into account the complex change in structure and control that these companies had undergone. The Commission had failed to produce sufficiently detailed and specific evidence to be able to show that those companies had repeated an infringement. Consequently, the Court reduced the original fine of € 272.25 million imposed jointly and severally on Eni and its subsidiary Polimeri Europa to € 181.50 million.

As regards Dow Deutschland, the Court ruled that Dow participated in the infringement during a shorter period than that determined by the Commission. Consequently, the Commission's decision was annulled in that respect. Nonetheless, the amount of the fine remained unchanged as the Court found that the Commission's error did not affect the increase applied for the duration of the infringement.

Finally, the Court rejected all arguments put forward by the Shell group companies in the Netherlands, upholding the fine of € 160.88 million imposed on them.

Company	Fine
Shell	€ 160.88 million
Dow Chemical	€ 64.58 million
Kaučuk Unipetrol	€ 0 (cancelled from € 17.55 million)
Trade Stomil	€ 0 (cancelled from € 3.8 million)
Eni Polimeri Europa	€ 181.50 (reduced from € 272.25 million)

Unlike Shell, Eni, its subsidiary Polimeri and Dow have appealed the General Court's judgment under case numbers C-508/11, C-511/11 and C-499/11, respectively.

2.5.10 Italian raw tobacco

In 2005, the Commission imposed fines totalling €56 million on several undertakings for their participation in a horizontal cartel on the Italian raw tobacco market between 1995 and 2002.

(a) *T-12/06 Deltafina v Commission – 9 September 2011*

Deltafina, an Italian company active in the processing of raw tobacco and in the marketing of processed tobacco, had been the first undertaking to reveal the existence of the cartel under the 2002 Leniency Notice, receiving conditional immunity. However, the Commission found that Deltafina had failed to fulfil its duty of cooperation as leniency applicant, as, before the Commission could carry out surprise inspections to find evidence against all presumed participants, Deltafina revealed in a meeting with other cartel participants that it had applied to the Commission for immunity, thus putting the investigation in jeopardy.

For the first time, the Commission therefore revoked a leniency applicant's conditional immunity, imposing a fine upon Deltafina. The Commission none the less assessed the cooperation provided by Deltafina in the investigation as an attenuating circumstance and granted it a 50% reduction, resulting in a fine of €30 million. In its action brought before the Court, Deltafina challenged the lawfulness of the Commission's decision.

The Court recalled that, in order to be granted full immunity under the Leniency Notice, an undertaking must, *inter alia*, cooperate with the Commission throughout the administrative procedure. Cooperation must be '[full, continuous and expeditious]'. Only where the conduct of the undertaking concerned demonstrates a genuine spirit of cooperation can a reduction in the fines, and *a fortiori* immunity from all fines, be granted. Thus, an undertaking seeking to benefit from full immunity on the basis of its cooperation in the investigation may not omit to inform the Commission of relevant facts of which it was aware and which are capable of

affecting, if only potentially, the conduct of the administrative procedure and the efficacy of the Commission's investigation.

The Court ruled that Deltafina, which disclosed the fact that it had applied for immunity from fines without informing the Commission of that disclosure, had failed to meet that standard of cooperation.

Moreover, as Deltafina was initially only granted conditional immunity, the Court found that Deltafina's arguments based on breach of a legitimate expectation failed.

Reviewing the proportionality of the fine, the Court held that the Commission was entitled to categorise the horizontal cartel in question as "very serious" and that the fine that it imposed on Deltafina was not disproportionate to the gravity of the infringement and to the other circumstances of the case.

(b) *T-25/06 Alliance One International v Commission – 9 September 2011*

With respect to the appeal of Alliance One, the Court upheld the Commission's assessment that the parent company was jointly and severally liable for the infringement, in line with previous case law. The Commission decision had found that a 100% ownership was sufficient to presume that the parent exercised a decisive influence on the conduct of its subsidiary.

The Court also agreed with the Commission on all relevant fining considerations, notably the basic amounts of the fine, the deterrence multiplier, and mitigating circumstances.

(c) *T-11/06 Romana Tabacchi v Commission – 5 October 2011*

The appeal lodged by Romana Tabacchi was successful in two respects: first, the General Court found that the Commission infringed the principle of equal treatment by wrongly determining the weight of Romana Tabacchi's participation in the cartel, and second, it found that the Commission erred in its assessment of the facts with respect to the duration of Romana Tabacchi's participation.

With respect to the first point, the Commission determined the weight of the undertakings which participated in the cartel according to their market shares during the last full year of the infringement, namely in 2001. The General Court found that the Commission was not entitled to regard that year as the last full year of its participation in the cartel. Moreover, the Commission's incorrect reliance on Romana Tabacchi's market share in 2001 resulted in its being incorrectly classified in a category of undertakings to which it did not belong and, therefore, in a starting amount of the fine which was disproportionate to its actual weight in the infringement. Accordingly, in the exercise of its unlimited jurisdiction, in view in particular of the cumulative effect of those unlawful assessments and Romana Tabacchi's limited financial resources, the General Court held that the final amount of its fine should be set at € 1 million. The Court considered that amount to be sufficiently deterrent and a higher fine would be disproportionate to the infringement alleged against Romana Tabacchi.

With respect to the duration, the Court partially annulled the Decision, in so far as the Commission found that Romana Tabacchi had participated in the infringement beyond February 1999. Accordingly, it reduced the fine imposed on Romana Tabacchi from € 2.05 million to € 1 million.

(d) *T-19/06 Mindo v Commission – 5 October 2011*

The appeal lodged by Mindo, seeking a reduction in the fines, failed as the relevant fine had already been paid by its jointly and severally liable co-debtor, Alliance One International. The Court noted that, Alliance One International, which had no legal connection with Mindo, had not claimed a contribution from Mindo, even though more than five years had elapsed since that payment was made and Mindo, had, since 2007, been the subject of pre-bankruptcy agreement procedure with assignment of the assets, a procedure in which Alliance One International had not participated as a creditor before the Bankruptcy Court of Rome.

Given that Mindo's action essentially sought a reduction of the fine, the Court considered that, in the circumstances of the present case, annulment and/or alteration of the decision would not procure any advantage for it. Moreover, in response to a written question that the Court put to Mindo after the hearing, Mindo had failed to demonstrate to the requisite legal standard that it had a vested and present interest in pursuing the proceedings. The Court therefore concluded that there was no need to adjudicate on the action.

(e) *T-39/06 Transcatab v Commission – 5 October 2011*

Transcatab's appeal was dismissed in its entirety, thus leaving the €14 million fine imposed by the Commission unaffected.

Company	Fine
Romana Tabacchi	€ 1 million (reduced from € 2.05 million)
Deltafina Universal Corp.	€ 30 million
Alliance One International Mindo	€ 10 million (Mindo jointly and severally liable for € 3.99 million)
Alliance One International Transcatab	€ 14 million

2.5.11 Dutch brewers

(a) *T-234/07 Koninklijke Grolsch v Commission – 15 September 2011*

(b) *T-235/07 Bavaria v Commission – 16 June 2011*

(c) *T-240/07 Heineken Nederland and Heineken v Commission – 16 June 2011*

On 18 April 2007, the Commission imposed fines totalling more than € 273 million on several Dutch brewers, including Heineken NV and its subsidiary – Heineken

Nederland BV – and Bavaria NV, for their participation in a cartel on the Dutch beer market from 27 February 1996 to 3 November 1999.

The Commission imposed a fine of € 219.28 million on Heineken NV jointly and severally with its subsidiary, a fine of € 22.85 million on Bavaria NV, and a fine of € 31.66 million on Koninklijke Grolsch NV. The companies' appeals before the General Court were successful to varying degrees.

In its judgments on the appeals brought by Heineken and Bavaria, the Court focused on the standard of proof for finding an infringement as well as the length of the administrative procedure.

The Court considered that the Commission had not proved that the infringement concerned the occasional coordination of commercial conditions, other than prices, offered to individual customers in the on-trade segment of the Dutch beer market. Relying on handwritten notes, the Commission had concluded that the undertakings had coordinated certain commercial conditions, such as those for loans in that market segment. The Court however found that the references in those notes were sporadic and brief, that the companies had put forward plausible alternative explanations, and that there was no other specific evidence. Consequently, the Court annulled the Commission's decision on that point and reduced the fines on Heineken NV, its subsidiary and Bavaria NV.

Another issue in this case was the length of the administrative procedure, which had continued for more than 7 years after its inspections. For that reason, the Commission had granted a flat-rate reduction in the fines of € 100,000 for each undertaking. The Court found, however, that this flat-rate reduction, which did not take into account the height of the individual fines, did not sufficiently compensate for the breach of the principle that proceedings must be completed within a reasonable period. Consequently, the Court increased the reduction to 5% of the fine.

Rejecting all other arguments put forward by the companies, the General Court set the fine imposed jointly and severally on Heineken NV and its subsidiary at € 198 million and that on Bavaria NV at € 20.71 million.

The appeal brought by Koninklijke Grolsch NV centred around the issue of parental liability. Koninklijke Grolsch NV in essence denied that it participated directly in the infringement, arguing that the employees of its wholly-owned subsidiary, Grolsche Bierbrouwerij Nederland BV, attended most of the meetings at issue. Consequently, Koninklijke Grolsch NV argued, the Commission should not have found that Koninklijke Grolsch NV participated in the infringement. If appropriate, it should instead have attributed liability to it for an infringement committed by its subsidiary.

The Court recalled the rebuttable presumption created in the case law according to which, in the case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement of the competition rules, that parent company is presumed to exercise decisive influence over the conduct of its subsidiary and can therefore be found liable for the infringement of its subsidiary.

In its decision, however, the Commission had failed to explain why or even that it sought to impose liability on the parent company. Treating the parent company, Koninklijke Grolsch NV, and the Grolsch group as one and making no mention of the economic, organisational and legal links between the parent company and its

subsidiary, whilst nowhere mentioning the subsidiary's name, the Commission had failed to explain the reasons which led it to determine the legal person responsible for running the undertaking at the time when the infringement was committed, thereby denying the parent the chance to rebut the presumption that the parent company actually exercised decisive influence over the conduct of its subsidiary. It thereby denied the parent company any opportunity to challenge the merits of the parental attribution before the Court, preventing the Court from exercising its power of review in that regard.

Consequently, the Court annulled the Commission's decision in so far as it concerned Koninklijke Grolsch NV.

2.5.12 Industrial plastic bags

(a) *T-79/06- Sachsa Verpackung v Commission - 16 November 2011*

(b) *T-78/06 Almando Alvarez v Commission -16 November 2011*

(c) *T-76/06 Plasticos Españoles, SA v Commission -16 November 2011*

(d) *T-72/06 Groupe Gascogne SA v Commission - 16 November 2011*

(e) *T-68/06 Stempher BV and Koninklijke Verpakkingsindustrie Stempher CV v Commission - 16 November 2011*

(f) *T-59/06 Low & Bonar plc and Bonar Technical Fabrics NV v Commission - 16 November 2011*

(g) *Joined cases T-55/06 and T-66/06 RKW SE and JM Gesellschaft für industrielle Beteiligungen v Commission - 16 November 2011*

(h) *T-54/06 Kendrion NV v Commission - 16 November 2011*

(i) *T-51/06 Fardem Packaging BV v Commission - 16 November 2011*

(j) *T-53/06 UPM-Kymmene Oyj v Commission - 6 March 2012*

(k) *T-64/06 FLS Plast A/S v Commission - 6 March 2012*

(l) *T-65/06 FLSmidth & Co. A/S v Commission -6 March 2012*

By decision of 30 November 2005, the Commission imposed fines totalling more than € 290 million on a number of undertakings for their participation in a cartel on the plastic industrial bags market. The infringement identified by the Commission mainly concerned the fixing of prices and the establishment of common price calculation models, the sharing of markets, the allocation of sales quotas, the assignment of customers, deals and orders and lastly the exchange of individualised information in Belgium, Germany, Spain, France, Luxembourg and the Netherlands.

Certain undertakings brought actions before the General Court seeking the annulment of the Commission's decision or a reduction in the fines imposed on them.

As regards the parent company Low & Bonar and its subsidiary Bonar Technical Fabrics (a former subsidiary of one of Bonar Phormium NV's divisions, namely Bonar Phormium Packaging – BPP), the Commission had found the period of infringement to be the period between September 1991 and 28 November 1997. However, the General Court found that the Commission had not established that BPP had participated in a single and continuous infringement before 21 November 1997

since it had not proved, that BPP knew or should have known that, by participating in certain earlier meetings, it was joining a wider cartel extending over a number of European countries. Consequently, the General Court decided to grant a reduction of 25% of the starting amount of the fine. Thus, the initial amount of the fine (€ 12.24 million) was reduced to € 9.18 million.

As regards UPM, the Commission had found that RSFE (one of UPM's subsidiaries) had participated in the cartel from 18 July 1994, the date of the first meeting dealing with block bags, until 31 January 1999. The General Court, however, found that the Commission had failed to show that RSFE participated in a single and continuous infringement before 10 October 1995 when RSFE began to take part in the 'France' sub-group. The General Court held that that RSFE's attendance at the meeting on 20 December 1994 represented an isolated infringement and that it became liable for the single and continuous infringement within the framework of Valveplast only from 10 October 1995, by reason of its participation in the meetings of the 'France' sub-group from that date and its participation in the meetings at Valveplast level from 21 November 1997. As a result, the Commission should have applied an increase of 30% of the starting amount, instead of an increase of 45%. The General Court thus reduced UPM's fine from € 56.55 million to € 50.7 million.

As regards FLSmidth & Co. A/S and FLS Plast A/S (which belongs to the FLSmidth & Co. A/S group), the General Court found that the Commission had not established to the required legal standard that FLS Plast A/S exercised actual control over Trioplast Wittenheim throughout the year 1991 when it only held a 60% shareholding in Trioplast Wittenheim (party to the cartel). The General Court thus decided to reduce the fine increase on account of duration from 80% to 70% which led to a fine reduction from € 15.3 million to € 14.45 million.

Finally, as regards Stempher BV and the limited partnership Koninklijke Verpakkingsindustrie Stempher CV (which form the undertaking Stempher), the General Court decided that the Commission had not produced sufficiently precise and consistent evidence to establish that Stempher had continued to participate in the cartel after 20 June 1997. The rule concerning the five-year limitation period thus precluded the Commission from fining Stempher. As the Commission failed to show, both in its 2005 decision and in the course of the proceedings before the General Court, a legitimate interest in a finding that Stempher committed an infringement before 20 June 1997, the Court decided to annul the Commission's decision in so far as it imposed a fine of € 2.37 million on Stempher BV and Koninklijke Verpakkingsindustrie Stempher CV.

Lastly, the General Court rejected all the arguments advanced by the other undertakings and decided, as a consequence, to uphold the fines imposed on them.

Company	Fine
Fardem Packaging BV (Netherlands)	Fine upheld
Kendrion NV (Netherlands)	Fine upheld
RKW SE (Germany) and JM Gesellschaft für industielle Beteiligungen mbH & Co. KGaA (Germany)	Fine upheld
Low & Bonar plc. (United Kingdom) and Bonar Technical Fabrics NV (Belgium)	Fine reduced to € 9.18 million
Stempher BV (Netherlands) and Koninklijke Verpakkingsindustrie Stempher CV (Netherlands)	Annulment of the Commission's decision so far as it concerns the two undertakings
Groupe Gascogne SA (France)	Fine upheld
Plasticos Españoles SA (ASPLA) (Spain)	Fine upheld
Armando Álvarez SA (Spain)	Fine upheld
Sachsa Verpackung GmbH (Germany)	Fine upheld
UPM-Kymmene Oyj	Fine reduced to € 50.7 million
FLS Plast A/S and FLSmidth & Co. A/S	Fine reduced to € 14.45 million

2.5.13 Polymethyl-methacrylate ('PMMA') products

T-208/06 Quinn Barlo Ltd, Quinn Plastics NV, Quinn Plastics GmbH v Commission - 3 November 2011

On 31 May 2006, the Commission issued a decision fining a number of undertakings for participating in a single and continuous infringement involving three polymethyl-methacrylate ('PMMA') products: PMMA moulding compounds, PMMA solid sheet and PMMA sanitary ware. The decision indicated that although those three PMMA products were physically and chemically distinct and had different uses, they could be considered as one homogenous product group due to their common raw-material input, methacrylate-monomers ('MMA').

The Commission, having considered that Quinn Barlo and Quinn Plastics NV were responsible for the conduct of Quinn Plastics GmbH during the infringement, fined the applicants € 9 million, for which they were held jointly and severally liable.

On 8 August 2006, the applicants filed an appeal with the General Court. The Court held that the contested decision according to which the appellants had participated in the infringement in the period from 30 April 1998 to 21 August 2000 must be annulled in so far as it holds the applicants liable for their participation in the cartel between 1 November 1998 and 23 February 2000. The Court considered that the applicants' continuous participation in the cartel had not been established for that

period and rejected the Commission's argument that an interruption in the participation in the cartel should give rise to two fines, the total amount of which would be even higher. The Court held instead that the applicants had participated in the one and same infringement, even if their participation was interrupted. Accordingly, the gravity of the infringement, assessed *inter alia* according to its nature and geographical scope, remained the same despite the interruption. The Court concluded that given the participation amounted to a short-term infringement (with a total duration of 11 months and 28 days), it was appropriate to reduce the amount of the fine by replacing the increase of 20% of the starting amount applied by the Commission by an increase of 10%.

Moreover, the Court observed that the Commission had not established, as required by settled case-law, that the applicants knew or should have known that, by participating in an agreement relating to PMMA solid sheet, they were joining a global cartel relating to three PMMA products and therefore did not establish their liability for the entire single infringement. The Court ruled that the contested decision must be annulled in so far as it finds that the applicants participated in a single and continuous infringement as regards PMMA solid sheet, PMMA moulding compounds and PMMA sanitary ware. However, the Court took into account the 25% reduction in the starting amount of the applicants' fine, granted by the Commission on the ground that "*it was not clear whether [the applicant] took part in any collusive contacts concerning PMMA moulding compounds or PMMA sanitary ware*". It concluded therefore that notwithstanding the error committed in the determination of the applicants' liability for the cartel, the Commission did not make a manifest error of assessment in the determination of the starting amount of their fine and it was thus not necessary to reduce the amount further in the exercise of the Court's unlimited jurisdiction. Consequently, the amount of the fine imposed on the applicants was fixed at € 8,250,000.

2.5.14 Chloroprene rubber

(a) *T-76/08 EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC, DuPont Performance Elastomers SA v Commission - 2 February 2012*

(b) *T-77/08 – The Dow Chemical Company v Commission- 2 February 2012*

(c) *T-83/08-Denki Kagaku Kogyo Kabushiki Kaisha, Denka Chemicals GmbH- 2 February 2012*

On 5 December 2007, following the communication of information from Bayer, the Commission adopted a decision (amended on 23 June 2008 due to a factual mistake) with which it imposed fines totalling more than € 247 million on 11 companies for their participation over various periods between 1993 and 2002 in a cartel on the market for chloroprene rubber (CR). The infringement consisted of agreements and concerted practices concerning the allocation and the stabilisation of markets, market shares and sales quotas for CR, coordinating and implementing several price increases, agreeing upon minimum prices, allocating customers and exchanging competitively sensitive information.

El DuPont with DPE LLC (a wholly-owned subsidiary of El DuPont) and DPE SA (a wholly-owned subsidiary of DPE LLC) brought an action before the General Court on 15 February 2008, Dow on the 18 February 2008 and Denki Kagaku Kogyo with Denka Chemicals (a subsidiary of the former responsible for distributing CR in Europe) on 19 February 2008. The companies applied for the annulment of the Commission's decisions or a reduction of the fine.

With regard to judgments T-76/08 and T-77/08, in both cases the main arguments of El DuPont and Dow, the parent companies holding equal shares of the joint venture "DDE", was that the Commission erred in imputing to them liability for the infringement committed by the joint venture. However, the Court upheld the Commission's findings that DDE's parent companies actually exercised decisive influence over DDE's conduct on the CR market and each one of them formed a single undertaking with DDE for the purposes of Article 101 TFEU despite the fact that it was a full-function joint venture . The Court explained that the operational autonomy a full-function joint venture enjoys "*... does not mean that the joint venture enjoys autonomy as regards the adoption of its strategic decision and that it is not therefore under the decisive influence exercised by its parent companies for the purposes of the application of Article 101"*. Therefore, each one was held jointly and severally liable for DDE's conduct from 1 April 1996 until 13 May 2002.

Moreover, regarding the calculation of the fine, the Court found that the Commission's choice to treat periods of less than 6 months as half a year and therefore to treat a period of 1 month and 13 days as if it was half a year, and to treat periods of 6 months, but of less than 1 year, as a full year did not exceed the limits of its discretion and did not infringe the principles of proportionality and of equal treatment. The fact that the multiplier in respect of the duration of the infringement is not strictly proportionate to the exact duration of the infringement committed by the undertaking in question cannot be censured, since it is merely the result of the method of assessing the duration of an infringement by progressive thresholds each of six months. In addition, in both judgments, the Court held that the Commission's choice to grant DDE a reduction of the fine of 25% and not the maximum possible reduction in the band applicable to its situation, as it did with Tosoh which was the first leniency applicant, did not infringe the principle of equal treatment. Since Tosoh's cooperation preceded DDE's, the Commission already possessed more evidence at the time DDE submitted its leniency application than when Tosoh submitted its application and Tosoh provided the Commission promptly with significant evidence which allowed it to establish facts it could not have otherwise established.

In its judgment T-83/08, the Court rejected the applicants' claim that the Commission breached the principles of legal certainty and non-retroactivity by applying the 2006 Guidelines instead of the 1998 Guidelines on the method of setting fines. The Court held that the principle of non-retroactivity does not preclude the application of guidelines which, *ex hypothesi*, have the effect of increasing the level of the fines imposed for infringements committed before they were adopted, on condition that the policy which they implement was reasonably foreseeable at the time when the infringements concerned were committed. In addition, the Court upheld the Commission's finding that the applicants participated in a single and continuous infringement between 13 May 1993 and 13 May 2002, stating that a gap of nine months between the various manifestations of the cartel, during which the applicants

did not distance themselves from it, is immaterial. Furthermore, the Court dismissed as non credible the applicants' assertions that they conducted themselves independently on the market and that they never took account of any information exchanged at secret cartel meetings, given that they had participated in the cartel for nine years.

Therefore, in the above mentioned cases the Court dismissed the applicants' pleas in their entirety and did not amend the fines imposed by the Commission.

Company	Fine
Bayer	€ 0
El DuPont	€59,250,000 (of which €44,250,000 jointly and severally with DPE SA and DPE LLC and Dow)
Dow	€ 4,425,000
Dengi Kagaku Kogyo and Denka Chemicals (jointly and severally)	€ 47,000,000
ENI and Polimeri Europa (jointly and severally)	€ 132,160,000
Tosoh Corp and Tosoh Europe (jointly and severally)	€ 4,800,000

2.6 *Judgments of the Court of Justice of the European Union*

2.6.1 Monochloroacetic acid

(a) *C-520/09 P Arkema SA v Commission – 29 September 2011*

(b) *C-521/09 P Elf Aquitaine v Commission– 29 September 2011*

In its judgment of 29 September 2011 in the above-mentioned cases, the CJEU clarified the rules related to the presumption of parental liability for firms owning (virtually) all stock in a subsidiary company.

The case concerned Arkema and Elf Acquitaine, both of which were fined for participation in a cartel on the market for monochloroacetic acid from 1984 to 1999. The Commission's January 2005 decision, upheld by a judgment from the Court of First Instance of 2009, found Arkema liable for direct participation in the cartel, whereas Elf Acquitaine was found liable under the presumption of parental liability for owning (virtually) all stock in Arkema.

Before the CJEU, Elf Aquitaine contested the Commission's finding of parental liability, prompting the CJEU to clarify the relevant legal framework.

In accordance with the *Akzo* judgment, the CJEU recalled the presumption according to which a subsidiary does not act autonomously from a parent company holding virtually all of its stock.

Importantly, however, the CJEU ruled that this presumption does not mean that the Commission need not justify why it imposes parental liability in a particular case. In order to allow the addressees of the decision to challenge the Commission's finding, the CJEU ruled, the Commission must justify in full why it rejects arguments presented by the firms to counter the liability presumption.

Moreover, where the Commission relies solely on the presumption as a ground for parental liability, the Commission must also explain why certain evidence submitted by the firms in question is irrelevant to rebut the presumption of parental liability.

The CJEU found that, in the present case, the Commission had not given sufficiently reasoned answers to several of the arguments put forward by Elf Aquitaine in order to establish that Arkema determined its conduct on the market independently.

The Court held that the statement of reasons for the Commission Decision on those arguments consisted solely of a series of mere assertions and negations, which were repetitive and by no means detailed. In the particular circumstances of the case, in the absence of further details, that series of assertions and negations did not suffice to enable Elf Aquitaine to ascertain the matters justifying the measure adopted or to enable the court having jurisdiction to exercise its power of review.

2.6.2 C-360/09 Pfleiderer – 14 June 2011

On 14 June 2011, on preliminary reference from the District Court (Amtsgericht) for Bonn, Germany, the CJEU held that EU Law does not prohibit access to leniency documents by third parties seeking damages. Access should be determined according to Member State law, which must weigh the interests arguing in favour and against a disclosure of documents received under leniency in line with the principles of equivalence and effectiveness.

By way of background, Pfleiderer was seeking full access to the file, including leniency documents, of the Federal Cartel Office (Bundeskartellamt) in relation to its 2008 cartel decision imposing a fine of €62 million on three European manufacturers of decor paper. Pfleiderer, a customer of the fined undertakings, was preparing an action for damages. However, the Bundeskartellamt refused access to leniency documents and the relevant evidence seized, and Pfleiderer subsequently entered into court proceedings before the District Court (Amtsgericht) for Bonn, Germany seeking access to these documents.

On 3 February 2009, the District Court ordered the FCO to grant Pfleiderer access to the leniency documents, not including confidential business information, legal documents or correspondence through the European Competition Network. Under German law, the District Court considered that Pfleiderer was an ‘aggrieved party’ and that they had a ‘legitimate interest’ in obtaining access to the documents, as they were to be used in order to recover damages; therefore, access should be granted so long as the required preconditions for viewing the file were fulfilled. However, there was uncertainty whether this would violate EU law leading the District Court to refer the question of whether a company itself (in this case Pfleiderer) (rather than external counsel) may look into the file of an application for leniency in a cartel case of the German competition authority in order to prepare a private claim for damages; in the meantime, the District Court stayed its decision pending the outcome of the preliminary reference to the CJEU.

In his opinion, Advocate General Mázak considered that, on the one hand, if private parties were to view documents of leniency applications, this might endanger the leniency programme of the FCO. On the other hand, there is a well established right of individuals to bring a claim for damages caused by an infringement of competition law (*see* Case C-453/99, *Courage Ltd. v Bernard Crehan*, and Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi et al*. v *Lloyd Adriatico Assicurazioni SpA et al*.). He considered therefore that leniency documents that existed before the cartel was uncovered could be disclosed in follow-on civil proceedings, but that submissions drafted for the purpose of revealing the infringement should be protected from disclosure.

In its judgment, the CJEU followed the Advocate General's opinion insofar as it held that there was no provision in EU law to prescribe any rules on viewing of leniency application. However, the Court held that it is for the Member States to decide on access to the leniency application on a case by case basis in line with the principles of equivalence and effectiveness rather than providing the Member States with a bright line guidance on which documents could be disclosed.

Given the essential role of leniency programmes in cartel enforcement and increasing number of private actions for damages, this judgment raises interesting questions for cartel enforcement that the EU Courts will no doubt be forced to answer, in particular, in relation to (i) the applicant's liability once it has admitted unlawful behaviour, (ii) the potential for disparate rules among the Member States for access to file, and (iii) the use of such information in non EU legal proceedings, *inter alia*.

2.6.3 C-403/08 Football Association Premier League and Others v QC Leisure and Others – 4 October 2011

2.6.4 C-429/08 Karen Murphy v Media Protection Services Ltd – 4 October 2011

In these references for preliminary rulings, the CJEU answered complex questions on restrictive agreements, intellectual property rights and free movement of services in the context of satellite broadcasts of football matches. With respect to competition law, the CJEU ruled that an agreement whereby a right owner prohibits a satellite broadcaster from selling decoder cards (*i.e.*, cards identifying the viewer and his or her individual content subscriptions) or other decoding devices enabling access to that right holder’s protected subject-matter outside the territory for which the content is licensed constitutes a restriction by object, which, moreover, is very unlikely to be exempted under Article 101(3) TFEU.

The case concerned the Football Association Premier League (‘the FAPL’), which runs the Premier League, the leading professional football league competition in England, and markets the television broadcasting rights for Premier League matches. The FAPL grants broadcasters, under an open competitive tender procedure, an exclusive live broadcasting right for Premier League matches on a territorial basis. As the territorial basis generally corresponds to a single Member State, television viewers can watch only the matches transmitted by the broadcasters established in the Member State where they reside.

In order to protect such territorial exclusivity and to prevent the public from receiving broadcasts outside the relevant Member State, each broadcaster undertakes, in the licence agreement concluded with the FAPL, to encrypt its satellite signal and to

transmit the signal, so encrypted, by satellite solely to subscribers in the territory which it has been awarded. Consequently, the licence agreement prohibits the broadcasters from supplying decoder cards to persons who wish to watch their broadcasts outside the Member State for which the licence is granted.

The disputes at issue concerned attempts to circumvent that exclusivity. The first case (C-403/08) concerned a civil action brought by the FAPL against pubs that screened Premier League matches by using Greek decoder cards and against the suppliers of such decoder cards to those pubs; the second case (C-429/08) arose from criminal proceedings against Karen Murphy, the landlady of a pub that screened Premier League matches using a Greek decoder card. In those two cases, the High Court of Justice of England and Wales referred a number of questions concerning the interpretation of European Union law to the Court of Justice.

The CJEU ruled that a system of exclusive licences is contrary to EU competition law if the licence agreements prohibit the supply of decoder cards to television viewers who wish to watch the broadcasts outside the Member State for which the licence is granted. Indeed, the CJEU ruled such an agreement constituted a restriction by object.

The CJEU found that, in principle, EU competition law does not preclude a right holder from granting to a sole licensee the exclusive right to broadcast protected subject-matter by satellite, during a specified period, from a single Member State of broadcast or from a number of Member States of broadcast. However, the licence agreements must not prohibit the broadcasters from effecting any cross-border provision of services that relates to the sporting events concerned, because such an agreement would enable each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence, would therefore eliminate all competition between broadcasters in the field of those services and would thus partition the national markets in accordance with national borders.

The CJEU found that the restriction of competition by object could not be justified either in light of the objective of protecting intellectual property rights or by the objective of encouraging the public to attend football stadiums.

So far as concerns the possibility of justifying that restriction in light of the objective of protecting intellectual property rights, the Court observed that the FAPL cannot claim copyright in the Premier League matches themselves, as those sporting events cannot be considered to be an author's own intellectual creation and, therefore, to be 'works' for the purposes of copyright in the European Union.

In addition, the CJEU found that, even if national law were to confer comparable protection upon sporting events, a prohibition on using foreign decoder cards would go beyond what was necessary to ensure appropriate remuneration for the holders of the rights concerned – *inter alia*, because, when calculating such appropriate remuneration, it would be possible to take account of the actual and potential audience both in the Member State of broadcast and in any other Member State where the broadcasts are received, thus obviating the need to limit the free movement of services within the European Union.

Notwithstanding the unlawfulness of the restrictive agreement, right holders would remain in a position to prohibit the use of decoding devices outside the licensed territory based on intellectual property rights, and the CJEU indicated that certain uses

of such decoding devices would indeed likely amount to an infringement of relevant rights.

2.6.5 C-439/09 Pierre Fabre Dermo-Cosmétique – 13 October 2011

In its judgment of 13 October 2011, the Court of Justice held that a distribution agreement banning internet sales constitutes a restriction by object and therefore violates Article 101(1) TFEU.

The case concerned Pierre Fabre Dermo-Cosmétique ('PFDC'), whose distribution contracts for several of its cosmetics and personal care products stipulated that sales must be made exclusively in a physical space and in the presence of a qualified pharmacist, thereby restricting in practice all forms of internet selling.

In October 2008, following an investigation, the French Competition Authority decided that, owing to the *de facto* ban on all internet sales, PFDC's distribution agreements amounted to anti-competitive agreements contrary to both French law and EU competition law. The Competition Authority found that the ban on internet selling necessarily had as its object the restriction of competition and could not benefit from any block exemption. The Authority also decided that the agreements could not benefit from an individual exemption under Article 101(3) TFEU.

PFDC challenged that decision before the Cour d'appel de Paris (France), which in turn asked the CJEU whether a general and absolute ban on internet selling amounts to a restriction of competition 'by object', whether such an agreement may benefit from a block exemption and whether, where the block exemption is inapplicable, the agreement may benefit from an individual exemption under Article 101(3) TFEU.

In its judgment, the Court recalled that in order to assess whether a contractual clause involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part.

As regards agreements constituting a selective distribution system, the Court recalled that such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'. Nonetheless, a selective distribution system can be compatible with EU law to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a distribution network in order to preserve the product's quality and ensure its proper use, and, finally, that the criteria laid down do not go beyond what is necessary.

Recalling that it is for the referring court to examine whether a contractual clause which *de facto* prohibits all forms of internet selling can be justified by a legitimate aim, the Court pointed out that, in the light of the freedoms of movement, it had not accepted justifications based on the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products. Similarly, the Court ruled that the need to maintain the prestigious image of PFDC's products was not a legitimate justification for restricting competition.

As to whether a selective distribution contract may benefit from a block exemption, the Court recalled that the exemption does not apply to vertical agreements which

have as their object the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade. A contractual clause which *de facto* prohibits the internet as a method of marketing has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system. It found that, consequently, the block exemption does not apply to that contract.

2.6.6 Copper plumbing tubes – 8 December 2011

(a) *C-272/09 KME Germany AG, KME France SAS, KME Italy SpA v Commission- 8 December 2011*

(b) *C-389/10 KME Germany AG, KME France SAS, KME Italy SpA v Commission- 8 December 2011*

(c) *C-386/10 P Chalkor AE Epexergasias Metallon v Commission- 8 December 2011*

In case C-272/09, KME asked the CJEU to set aside the judgment of the General Court which had dismissed in its entirety KME's action against the Commission's decision of 16 December 2003 with which the Commission had fined KME for its participation in a set of agreements and practices designed to fix prices and share markets in the industrial tubes sector (and more specifically copper tubes supplied in level wound coils).

The judgments C-389/10 and C-386/10 delivered on the same date concern the same cartel. On 3 September 2004 the Commission adopted a decision imposing fines on the undertakings concerned. Both undertakings brought proceedings against the Commission's decision and the General Court rejected KME's action in its entirety while it reduced the fine imposed on Chalkor by 10% since Chalkor had participated only in one branch of the cartel and was not held liable in respect of the other two branches. Since the appellants in both cases put forward grounds of appeal similar to those raised in the context of Case C-272/09, the Court decided in its general meeting that these cases would be determined without an Opinion and invited the parties to take into account the Opinion of the Advocate General in C-272/09.

In all cases, the CJEU dealt with the issue of whether the General Court infringed the companies fundamental right to effective judicial review by failing to examine thoroughly their arguments and deferring to an excessive extent to the Commission's decision.

The CJEU stated that the principle of effective judicial protection is a general principle of EU law to which expression is now given by Article 47 of the Charter. The judicial review of the decisions of the institutions was arranged by the founding Treaties. In addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations.

According to the CJEU, the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission’s margin of discretion – either as regards the choice of factors taken into

account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts. The review of legality is supplemented by the unlimited jurisdiction which the Courts of the EU were afforded by Article 17 of Regulation 17 and which is now recognised by Article 31 of Regulation 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.

The CJEU points out, however, that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the EU are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.

The CJEU found that the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation 1/2003, is not contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter and therefore it dismissed as unfounded the relevant ground of appeal both as far as it concerned the rules of judicial review and as far as it concerns the manner in which the General Court carried out its review of the decisions at issue.

In all the above mentioned cases, the CJEU upheld the General Court's decisions and dismissed the appeals.

3. *ARTICLE 102 TFEU*

3.1 *Commission Decisions*

3.1.1 Telekomunikacja Polska – 22 June 2011[83]

On 22 June 2011, the Commission imposed a fine of € 127,554,194 on telecoms operator Telekomunikacja Polska S.A. (TP) for abusing its dominant position in the Polish market. The Commission found that TP consistently refused or obstructed remunerated access to its network and wholesale broadband services that would allow the effective entry of alternative operators on downstream broadband markets.

The Commission's investigation, opened on the Commission's own initiative in April 2009,[84] found that, from August 2005 until at least October 2009, TP engaged in practices which prevented or at least delayed the entry of competitors onto Polish broadband markets. Alternative operators encountered numerous difficulties to obtain access to TP's broadband wholesale products. For instance, TP proposed unreasonable conditions, delayed the negotiation processes, rejected orders in an unjustifiable manner and refused to provide reliable and accurate information to alternative operators.

According to the Commission, Poland has one of the lowest broadband penetration rates in Europe – in January 2010 it reached only 13%, significantly below the EU average of 24%. Consumers have reportedly also suffered from lower connection speeds: 66% of Internet access lines in Poland do not exceed the speed of 2Mbit/s compared to an EU average of 15%. Finally, monthly prices per advertised Mbit/s were substantially higher than the prices in other Member States.

The Commission's decision follows a Statement of Objections sent in February 2010.[85]

3.1.2 Boehringer Ingelheim – 6 July 2011[86]

On 6 July 2011, the Commission announced that it had closed an antitrust investigation into allegations that the German pharmaceutical company Boehringer Ingelheim had filed for unmeritous patents regarding new treatments of chronic obstructive pulmonary disease (COPD), and had thereby abused a dominant position.

Boehringer is the market leader in the treatment of COPD, in particular through its drug Spiriva. In 2003, Boehringer filed patent applications for new treatments of CODP. These applications related to combinations of three broad categories of active substances treating COPD with a new active substance that had been discovered by Almirall. Almirall objected to these filings, alleging that the patents were unmeritous, but once granted could nonetheless block or considerably delay the market entry of its own innovative combination medicines. The patent applications allegedly also had a negative impact on Almirall's efforts to bring to market the product based on the active substance discovered by Almirall (so called mono-product).

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83 Case COMP/39525.
84 Commission MEMO/09/203
85 Commission Press Release IP/10/213.
86 Case COMP/39.246.

Boehringer initially succeeded in obtaining a European patent for one of the combination products. However, in 2009, the UK High Court of Justice revoked Boehringer's UK patent for the combination product because of obviousness (lack of inventive step) and insufficiency. In March 2010, the patent was also revoked by the European Patent Office (EPO). Boehringer appealed this decision to the next EPO instance, which would have kept the contested patent in force until the appeal had been decided. Several years earlier, Boehringer had also filed so called divisional patent applications that were based on the main patent application, which were dormant, but could have been reactivated and thus prolong the patent dispute even after the EPO annulled the contested patent.

The Commission initiated formal proceedings on 22 February 2007, investigating whether Boehringer misused the patent system in relation to combinations of three broad categories of active substances treating COPD with a new active substance that had been discovered by Almirall. Almirall had raised concerns that Boehringer's patent applications would have the potential of blocking or considerably delaying the market entry of Almirall's competing medicines. Following the conclusion of the competition inquiry into the Pharmaceutical Sector [87] the investigation was relaunched. Its main focus was to establish whether Boehringer had filed patent applications and had obtained patents by providing misleading information to the EPO.

In autumn 2010, the Commission suggested that Boehringer and Almirall find a mutually acceptable solution to their dispute, within the limits of EU antitrust rules. The settlement agreement that the parties have since concluded is understood to address the Commission's preliminary concerns. In particular, the alleged blocking positions will be removed for Europe, a licence will be granted for two countries outside Europe and pending litigation between the parties will be ended. Almirall will therefore be able to launch its combination medicines after obtaining marketing authorisation from the competent bodies. The Commission concluded that a settlement between the parties is the most efficient and speedy way to ensure that consumers will be able to benefit from Almirall's product and has closed the case. Consequently, the Commission closed its investigation. It is ironic that the case, which formed a key element in shaping the EU Pharmaceutical Sector investigation, has been concluded by a settlement at the Commission's initiative.

3.1.3 *Standard & Poor's-15 November 2011* [88]

On 15 November 2011, the Commission made legally binding commitments offered by Standard & Poor's (S&P) to abolish the licensing fees that banks pay for the use of US International Securities Identification Numbers (ISINs) within the EEA. For direct users, information services providers (ISPs) and service bureaus (*i.e.*, outsourced data management service providers), S&P committed to distribute the US ISIN record separately from other added value information, on a daily basis for USD 15,000 per year, to be adjusted each year in line with inflation.

87 Commission Press Release IP/09/1098.
88 Commission Press Release IP/11/1354.

ISINs are key identifiers for securities based on the international standard ISO 6166, generated, allocated and distributed by national numbering agencies (NNAs). They are essential for managing securities and reporting. US ISINs are derived from CUSIPs, the identifiers developed for national purposes in the US.

The Commission had concerns that S&P, which is the only NNA for US ISINs and as such enjoys a monopoly for the issuance and the first-hand distribution of US ISINs, may have charged unfairly high prices for their use and distribution in Europe, in breach of Article 102 TFEU.[89] In particular, the Commission took the view that those fees were unfairly high, with regard to the international organisation of standardisation (ISO) cost recovery principle. In accordance with the latter, which the Commission regards as a benchmark for fair prices, there should be no charges for indirect users, who receive no service from the NNA, and fees for direct users and ISPs should not exceed the distribution costs incurred. In contravention of the ISO benchmark, S&P applied charges to indirect users and its prices for ISPs and direct users were, in the Commission's view, in excess of the costs incurred, causing financial service providers in Europe undue costs.

The Commission was satisfied that the commitments, revised in light of observations received in the course of a market test,[90] were suitable to solve its preliminary competition concerns. Clients that currently have a contractual relationship with S&P for the use of US ISINs will be entitled to an early termination of their contracts. However, users will not be allowed to extract the numerically similar CUSIPs, on which US ISINs are based, from the US ISIN data nor to redistribute in bulk US ISINs to companies other than affiliates located within the EEA. ISPs and service bureaus will be allowed to redistribute US ISIN records in bulk format but not to extract CUSIPs from the US ISIN data. The Commitments will apply for five years.

3.1.4 IBM Maintenance Services - 14 December 2011 [91]

On 14 December 2011, the Commission made legally binding commitments offered by IBM in the mainframe maintenance market. IBM committed to making spare parts and technical information swiftly available, under commercially reasonable and non-discriminatory terms, to independent mainframe maintainers.

Mainframes are powerful computers used by large companies and public institutions to store and process critical business information. In order to ensure business continuity, expeditious maintenance is therefore essential. Maintenance services for IBM's mainframes are offered both by IBM and by third party maintainers. Independent maintainers need rapid access to spare parts and technical information in order to compete effectively on this market.

In July 2010 the Commission opened an investigation over concerns that IBM might be abusing a dominant position on the mainframe maintenance market by hindering the access of independent maintenance service providers to critical spare parts. Such behaviour would potentially place those providers at a competitive disadvantage and breach Article 102 TFEU.[92]

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89 Commission MEMO/09/508.
90 Commission Press Release IP/11/571.
91 Commission Press Release IP/11/1539.
92 Commission Press Release IP/10/1006.

According to the commitments provided, IBM will have to ensure the expeditious availability of certain spare parts and technical information to Third Party Maintainers (TPMs) in the EEA, on reasonable and non-discriminatory terms and conditions over a period of five years. The Commission was satisfied that the commitments, revised in light of observations received in the course of a market test[93], were suitable to solve these competition concerns.

3.2 *Ongoing Commission Investigations*

3.2.1 Alcan[94]

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 allegedly 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.

3.2.2 Les Laboratoires Servier (perindopril)[95]

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.

In separate proceedings, the Commission had 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. However, on 27 January 2012 the Commission closed this investigation and instead decided to focus on the substantive elements of the case.

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93 Commission Press Release IP/11/1044.

94 Commission MEMO/08/111; Case COMP/39.230.

95 Commission MEMO/09/322. *See* also Commission Press Release 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 COMP/39.612

3.2.3 Thomson Reuters[96]

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 TFEU. 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 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.

Thomson Reuters was reported in December 2011 to have offered commitments to address the competition concerns identified by the Commission[97].

3.2.4 Lundbeck

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.

3.2.5 Nexium (esomeprazole)[98]

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.

3.2.6 Google[99]

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

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96 Commission Press Release IP/09/1692.
97 Case COMP/D2/39.654 and Commission Press Release IP/09/1692.
98 Case COMP/39.801.
99 Commission MEMO/10/47, Commission Press Release IP/10/1624.

Foundem (a member of an organisation called ICOMP which is funded partly by Microsoft), Microsoft's Ciao!, and 1plus V.[100]

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 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 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 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 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's complaint in many respects echoes those that preceded it. In addition, 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.

[100] Case COMP/39.740, Foundem, Case COMP/39.768 Ciao, and Case COMP/39.775 1plusV.

- 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.

Since Microsoft filed its complaint, several complaints have been added to the investigation, including complaints from German map service provider Hot-Map and listings association VfT, Dutch football website Elfvoetbal, the French company Interactive Labs, German, and Italian site NNTP.it, 1plusV, the developer of French legal search engine e.Justice, dealdujour.pro, Twenga, Spanish Newspaper Association AEDE, Expedia and Trip Advisor. In addition, elements from antitrust complaints originally brought before the German Competitin Authority (BKA) by Euro-Cities, Bundesverband Deutscher Zeitungsverleger and Verband Deutscher Zeitschriftenverleger have been referred to the Commission.

3.2.7 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.

3.2.8 Credit Default Swaps

On 29 April 2011, the Commission opened two new antitrust investigations with respect to the Credit Default Swaps (CDS) market. CDS are financial instruments used to protect investors in the event a company or a state has defaulted on their payments. They are also used as speculative tools.

The first investigation concerns 16 investment banks and Markit – the leading provider of financial information in the CDS market. According to the Commission, the banks may have colluded and additionally the banks and/or Markit may hold and abuse a dominant position in order to control the financial information on CDS and foreclose access to this information by other information service providers.

The Commission is concerned that certain clauses in Markit's licence and distribution agreements could be abusive and impede the development of competition in the market for the provision of CDS information.

The second investigation relates to the alleged existence of preferential treatment by ICE Clear, a CDS clearing platform, of some well-established banks that use ICE Clear and in particular the preferential tariffs allegedly granted by ICE to nine banks, which have the effect of locking them in the ICE system to the detriment of competitors. The Commission will also investigate whether the fee structures used by ICE give an unfair advantage to the nine banks.

The Commission also suspects that the alleged lack of transparency in the relevant markets may exacerbate the anti-competitive effects of the behaviour under scrutiny.

3.2.9 Czech Electricity Companies

On 15 July 2011, the Commission announced it had opened formal antitrust proceedings to investigate whether CEZ a.s., the incumbent electricity producer in the Czech Republic, abused its dominant position on the Czech electricity market, in particular by hindering the entry of competitors.

In November 2009, the Commission carried out inspections on the premises of CEZ and other companies,[101] expressing concerns that CEZ's behaviour, in particular the hoarding of capacity in the transmission network, may have resulted in preventing the entry of competitors into the Czech wholesale electricity market.

3.2.10 ARA

On 15 July 2011, the Commission announced it had opened formal antitrust proceedings because of concerns that the Austrian waste management company ARA may hinder its competitors to enter or expand their positions on the markets for the management of household and commercial packaging waste.

The Commission stated that its investigation will focus on whether ARA may have abused its dominant position in the market, in particular by hindering access to its collection infrastructure, which is necessary to operate in the market, and by putting pressure on customers and collection service providers not to contract with ARA's competitors. If established, such behaviour could lead to higher waste management costs and consequently higher prices for packaged goods.

The market concerned covers the organisation of the collection, sorting and recycling of packaging waste including paper, plastic and other materials. ARA is the leading Austrian waste management company. Waste management companies are service companies paid by producers of packaged goods for relieving them of the obligation to take care of the collection and recycling of the packaging waste they produce.

3.2.11 Luxury watch makers

On 5 August 2011, the Commission announced it had opened formal antitrust proceedings to investigate an alleged refusal by several luxury watch manufacturers to supply spare parts to independent repairers.

In 2004, the European Confederation of Watch & Clock Repairers' Associations (CEAHR) lodged a complaint, alleging that luxury watch manufacturers were in breach of EU competition law. According to the complainant, from 2002, watch manufacturers began to refuse to supply spare parts to repairers that did not belong to their selective systems for repair and maintenance whereas luxury watches had previously traditionally been repaired by independent multi-brand repairers. CEAHR's complaint alleges that, as there are no alternative sources for most of these spare parts, this practice threatened to drive independent repairers out of business.

On 10 July 2008, the Commission rejected this complaint for lack of Community interest. However, the General Court subsequently annulled the Commission's rejection decision upon appeal by the original complainants, mainly because the Commission did not sufficiently motivate why it concluded that there was not enough Community interest to pursue the investigation. In particular, the General Court

[101] Commission MEMO/09/518.

found that the Commission had uncritically rejected the existence of an aftermarket for repairs to luxury watches based on mere 'theories', failing to rebut evidence provided by the complainants supporting their aftermarket claim. Among other points, the complainants had argued that a separate aftermarket for particular models of luxury watches existed as there were independent suppliers of repairs services for such watches, whereas the price of repair was low compared to the purchase of the primary product (*i.e.*, the watch), thus making switching between primary products in anticipation of a hypothetical price increase in repair services unlikely.

The Commission has therefore reopened its investigation, taking into account the General Court ruling.

3.2.12 Samsung[102]

On 31 January 2012, the Commission opened a formal investigation to assess whether Samsung Electronics had abusively, and in contravention of a commitment it gave to the European Telecommunications Standards Institute (ETSI), used certain of its standard essential patent rights to distort competition in European mobile device markets.

In 2011, Samsung had sought injunctive relief in various Member States' courts against competing mobile device makers based on alleged infringements of certain of its patent rights which it has declared essential to implement European mobile telephony standards.

The Commission indicated that it would investigate, in particular, whether in doing so Samsung has failed to honour its irrevocable commitment given in 1998 to ETSI to license any standard essential patents relating to European mobile telephony standards on fair, reasonable and non-discriminatory (FRAND) terms, in line with the Commission's Guidelines on standardisation agreements.[103] This commitment serves to ensure effective access to the standardised technology.

Such commitments were given to ETSI by many patent holders, including Samsung, when the third generation ("3G") mobile and wireless telecommunications system standards were adopted in Europe.

3.2.13 MathWorks[104]

On 1 March 2012, the Commission opened a formal investigation to assess whether The MathWorks Inc., a U.S.-based software company, had distorted competition in the market for the design of commercial control systems by preventing competitors from achieving interoperability with its products. The Commission is investigating whether by allegedly refusing to provide a competitor with end-user licences and interoperability information, the company has breached Article 102 TFEU.

The Commission's investigation follows a complaint alleging that MathWorks refused to provide a competitor with end-user software licences and accompanying interoperability information for its flagship products "Simulink" and "MATLAB", thereby preventing it from lawfully reverse-engineering in order to achieve interoperability with these two products. MathWorks' "Simulink" and "MATLAB"

[102] Commission Press Release IP/12/89.
[103] Commission MEMO/10/676 and Commission Press Release IP/10/1702.
[104] Commission Press Release IP/12/208.

software products are widely used for designing and simulating control systems. Control systems are deployed in many innovative industries such as in cruise control or anti-lock braking systems (ABS) for cars.

As in the *Microsoft* case[105], the issue of software interoperability is central to this investigation. The Commission's investigation will focus on whether MathWorks' behaviour has prevented competitors from achieving interoperability with its widely used products and thereby hindered competition in breach of Article 102 TFEU.

The European Directive 2009/24/EC on the legal protection of computer programmes also aims to foster interoperability by allowing for reverse-engineering for interoperability purposes provided that the software at issue was lawfully acquired.

3.3 *Judgments of the General Court*

3.3.1 T-296/09 European Federation of Ink and Ink Cartridge Manufacturers v Commission- 24 November 2011

On 24 November 2011, the General Court dismissed an appeal brought by the European Federation of Ink and Cartridge Manufacturers ("**EFIM**") against a European Commission decision to reject a complaint. EFIM had complained to the Commission that Hewlett-Packard, Lexmark, Canon and Epson (the "**OEMs**") had breached Articles 101 and 102 TFEU in the market for ink cartridges by unlawfully excluding ink-jet cartridge re-manufacturers from the ink-jet cartridges' aftermarkets. The Commission rejected this complaint in May 2009.

EFIM alleged that the Commission had made a manifest error of assessment when it rejected the complaint concerning the allegations of abuse of a dominant position by the OEMs.

EFIM agreed with the Commission that there was a primary market for printers and a secondary market for ink-jet cartridges. However, EFIM did not agree that the printer market and the ink-jet market were interrelated in such a way that the competition on the printer market resulted in effective discipline in the secondary market. EFIM considered that the OEMs had a dominant position on the secondary market for ink-jet cartridges.

However, EFIM argued that the Commission's criteria for determining a close link between primary and secondary markets did not apply to this case because there was no direct competition between the OEMs on each of the separate markets for ink-jet cartridges of the separate OEMs.

The Court did not agree with EFIM. It followed the Commission's point of view that the fact that the various markets for cartridges compatible with a certain printer brand may constitute separate relevant aftermarkets is not relevant if dominance on the aftermarket can be excluded or if competition on the primary printer market results in effective discipline in the secondary market.

EFIM also alleged that the OEMs operated a concerted practice on the market for printers in violation of Article 101 TFEU, that the OEMs were in a position of collective dominance on this same market, that there was an oligopoly between

[105] Commission Press Release IP/04/382 and Commission MEMO/04/70 and MEMO/07/359.

Hewlett-Packard and Canon and that Hewlett-Packard was also in a position of individual dominance.

As regards the allegation of operating a concerted practice in breach of Article 101 TFEU, the General Court again concluded that EFIM had not provided sufficient proof of a concerted practice. Regarding the allegation of collective dominance on the ink-jet printer market, the General Court noted that EFIM's allegations only related to the market for ink-jet cartridges and not to the primary market for ink-jet printers.

With respect to the market for ink-jet printers, the General Court found that EFIM had not provided sufficient evidence to prove a position of collective dominance on the market for ink-jet printers.

As regards claims of oligopoly and HP's dominance on the primary market, the General Court found that EFIM did not provide evidence to support them. HP's estimated 43% market share of the ink-jet printer market did not necessarily mean that Hewlett-Packard was in a dominant position on this market, as the evidence EFIM submitted showed that Hewlett-Packard's competitors exercised a competitive constraint on it.

The Court further concluded that EFIM had not substantiated its claim that customers were not able to make an informed choice about printer cartridges because of the lack of information about the price of printing per page.

The Court concluded that the Commission had not made a manifest error of judgment in concluding that the markets for ink-jet printers and ink-jet cartridges were closely linked and that therefore the OEMs did not have a dominant position on the secondary market for cartridges. In the absence of a finding of a dominant position, the Court did not consider it necessary to consider the alleged abuses of Article 102 TFEU, thus dismissing the appeal in its entirety.

3.3.2 Joined Cases T-458/09 and T-171/10 Slovak Telecom a.s. v Commission- 22 March 2012

In January 2009, the Commission conducted an inspection at the premises of Slovak Telekom, a Slovak telecommunications undertaking in which Deutsche Telekom holds the majority of the shares. By two decisions, the Commission ordered Slovak Telekom to provide it with information on its activities, not only during the period following the accession of Slovakia to the EU, but also during the period prior to its accession. The Commission stated, however, that it did not intend to find an infringement of the competition rules of the EU for the period prior to 1 May 2004, but to obtain relevant information to enable it to assess, in full knowledge of the facts and in their correct economic context, Slovak Telekom's conduct after that date.

Considering that the Commission was not competent to request information relating to the period prior to 1 May 2004, Slovak Telekom brought two actions before the General Court seeking the annulment of the Commission's decisions.

After pointing to the Commission's broad powers of investigation and review, the Court held that the Commission may require undertakings to provide it with such information as is necessary to detect any abuse of a dominant position and in that regard the Commission may have access to information which may legitimately be regarded as having a connection with the putative infringement. Given its broad

powers of investigation and assessment, it is for the Commission to decide whether the information it requests from the undertakings concerned is necessary.

The Court, therefore, after rejecting Slovak Telekom's argument that there was no *nexus* between the infringement allegedly committed by that company and the requested information, stated that that information, irrespective of the fact that it predates the alleged period of infringement, may enable the Commission to define the markets at issue, to determine whether the undertaking concerned holds a dominant position on those markets, to assess the gravity of the infringement and to describe the conduct at issue in its economic context.

Consequently, the Court found that the Commission was entitled to request Slovak Telekom to provide it with the information contained in the contested decisions and dismissed the actions brought by that company.

3.3.3 T-336/07 Telefónica and Telefónica de España v Commission and T-398/07 Spain v Commission-29 March 2012

On 29 March 2012, the General Court confirmed the fine of more than €151 million imposed by the Commission on Telefónica for having abused its dominant position in the market for access to broadband internet in Spain.

Before the liberalisation of the telecommunications markets in 1998, Telefónica was the only Spanish telecommunications operator which had a fixed telephone network throughout the country.

Between September 2001 and December 2006, Telefónica provided services throughout the broadband network *via* ADSL technology, which enables access to broadband internet by means of a landline. During that period, Telefónica marketed retail broadband products to individuals as well as wholesale broadband products to other telecommunications operators. As regards those wholesale products, three offers were available to other telecommunications operators: (i) unbundling of the local loop, giving direct access to the circuit between the customer's premises and the telecommunications operator's local switch facility, (ii) wholesale access at a regional level (GigADSL), allowing alternative operators to establish a certain degree of distinctiveness, and (iii) several offers of wholesale access at a national level marketed both by Telefónica (ADSL-IP and ADSL-IP Total) and by other operators on the basis of the unbundling of the local loop and/or the wholesale product with regional access.

Following a complaint, the Commission decided on 4 July 2007 that Telefónica had abused its dominant position in the Spanish market for wholesale access at a regional and national level during the period between September 2001 and December 2006, imposing unfair prices on its competitors in the form of a margin squeeze between the prices of retail access to broadband and the prices of wholesale access to broadband at a regional and national level. Therefore, a fine of €151,875,000 was imposed on it.

Spain and Telefónica brought an action before the General Court seeking the annulment of the Commission's decision. In its judgments the General Court dismissed the actions upholding the Commission's finding.

The General Court confirmed that the unbundling of the local loop, the regional wholesale product and the national wholesale product did not belong to the same product market, with the result that the possible existence of a dominant position held by Telefónica in each of those markets had to be evaluated separately. As a consequence, the Court rejected the argument put forward by Telefónica that the Commission ought not to have examined the existence of a margin squeeze for each wholesale product taken separately, since the alternative operators used an optimum combination of wholesale broadband products, including the unbundling of the local loop, allowing reductions in costs.

Moreover, the General Court upheld the Commission's argument that Telefónica was in a dominant position in the regional and national wholesale markets during the period covered by the infringement. It was not disputed that Telefónica had been the only operator to provide the regional wholesale product in Spain since 1999, thus having a *de facto* monopoly over that market and in the national wholesale market Telefónica possessed a market share exceeding 84% during the period covered by the infringement.

With respect to the level of the fine, the General Court rejected the arguments of Telefónica that it was not reasonably able to predict the anti-competitive nature of its conduct. Finally, as regards its regional wholesale product, the fact that CMT had laid down a pricing system for that product and had examined the existence of a margin squeeze effect in several decisions taken during the period covered by the infringement on the basis of preliminary estimates did not, according to the Court, affect the responsibility incumbent upon Telefónica under competition law as Telefónica must have known that the CMT's examination was not based on the actual costs of the undertaking, but rather on the basis of estimates which had not in actual fact been confirmed by the developments of the market.

3.4 *Judgments of the Court of Justice of the European Union*

3.4.1 C-375/09 Tele 2 Polska – 3 May 2011

In this judgment, the Court of Justice held that only the Commission, and not the National Competition Authorities ("NCA's"), is competent to issue a 'negative decision,' or a decision concluding that an undertaking has not infringed EU competition law.

At the end of a procedure against Telekomunikacja Polska SA, the President of the Polish NCA found that the conduct of that undertaking did not constitute an abuse of a dominant position. Consequently, he took a decision under national law stating that the undertaking in question had not implemented any restrictive practice, whilst, with regard to the infringement TFEU, he brought the procedure to an end.

Tele2 Polska sp. z o.o., now Netia SA – a competitor of Telekomunikacja Polska SA – challenged that decision. The Sąd Najwyższy (Supreme Court of Poland) subsequently asked the Court of Justice whether European Union law precludes an NCA, where it finds that there has been no abuse on the basis of its national law, from taking a negative decision.

The Court noted that Regulation 1/2003 provides for a cooperation mechanism between the Commission and the national competition authorities with the aim of ensuring a coherent application of the competition rules in the Member States.

Where, on the basis of the information in the national competition authority's possession, the conditions for prohibition are not met, the Regulation indicates that the power of that authority is limited to the adoption of a decision stating that there are no grounds for action.

According to the Court, empowerment of national competition authorities to take decisions stating that there has been no breach of TFEU provisions on abuse of a dominant position would call into question the system of cooperation established by Regulation 1/2003 and would undermine the power of the Commission. Such a negative decision on the merits would risk undermining the uniform application of the competition rules set up by the TFEU, as it could prevent the Commission from finding subsequently that the practice in question does amount to a breach of those rules.

The Court therefore concluded that the Commission alone is empowered to make a finding that there has been no breach of the prohibition of abuse of a dominant position, even if a relevant provision TFEU is applied in a procedure undertaken by a national competition authority. Furthermore, the Court held that European Union law precludes national provisions which provide in such circumstances only for the possibility of adoption, by a national competition authority, of a negative decision on the merits. With respect to the infringement of EU competition law, national competition authorities are accordingly limited to deciding that there are no grounds for action on their part.

3.4.2 C-209/10 Post Danmark A/S v Konkurrencerådet- 27 March 2012

In this preliminary reference, the CJEU was asked to explain under which circumstances a dominant undertaking's policy of charging low prices to certain former customers of a competitor amounts to an exclusionary abuse, contrary to Article 102 TFEU, and, in particular, whether the finding of such an abuse may be based on the mere fact that the price charged to a single customer by the dominant undertaking is lower than the average total costs attributed to the business activity concerned but higher than the total incremental costs pertaining to the latter.

The case concerned selective price reduction that Post Danmark, a dominant undertaking in the Danish market for the distribution of unaddressed mail, applied to its competitor's, Forbruger-Kontakt' s, former customers.

The Court ruled that Article 102 TFEU must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered as amounting to an exclusionary abuse merely because the price that an undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity. The Court explained that to the extent that a dominant undertaking sets its prices at a level covering the bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking, to compete with those prices without suffering losses that are unsustainable in the long term.

According to the Court, in order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary for the referring court to consider whether that pricing policy, without objective justification, produces an

actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests.

Accordingly, the Court held that the answer to be given to the questions referred is that Article 102 TFEU must be interpreted as meaning that a policy, by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings.

4. *MERGERS*

4.1 *Commission Phase II Decisions*

4.1.1 Hoffman – La Roche / Boehringer Mannheim – 3 May 2011[106]

On 3 May 2011, the Commission waived commitments offered by Hoffman–La Roche in its 1998 acquisition of Boehringer Mannheim. In order to obtain clearance from the Commission, Hoffman-La Roche had committed, *inter alia*, to granting interested third parties access to its Polymerase Chain Reaction ("PCR") technology on a non-discriminatory basis under the terms of "Broad" and "Targeted" licenses. These commitments were necessary because of Hoffman–La Roche's dominant position in the EEA-wide market for DNA probes resulting from its high market shares, its patent portfolio covering the PCR technology used for DNA probes, and the weak position of alternative technologies.

On 24 September 2008, Hoffman-La Roche addressed a request to the Commission for the waiver of the Commitments. Hoffman–La Roche argued that its PCR patent portfolio was no longer a barrier to entry to the DNA probes market as the foundational PCR patents had expired or would expire in the coming years.

Even in the absence of a review clause, the Commission, on 3 May 2011, found that it could indeed revise its decision in order to amend or waive the Commitments. After conducting a market investigation, the Commission found that the requirements for the waiver of commitments referred to in the Remedies Notice were met:

i. The circumstances in the DNA Probes market had changed significantly on a permanent basis and there had been a sufficient time span between the adoption of the Decision and the request for the waiver of the Commitments;

ii. Third parties had been consulted and did not oppose the waiver of the Commitments;

iii. The waiver of the Commitments would not affect their effectiveness as they had fulfilled their role and were no longer effective; and,

iv. The waiver of the Commitments would not affect third parties' rights.

The Commission, therefore, waived the Commitments relating to DNA probes.

4.1.2 Votorantim/ Fischer – 4 May 2011[107]

On 4 May 2011, the Commission, following an in-depth investigation, cleared a joint venture in the orange juice sector between two Brazilian groups Votorantim and Fischer. Votorantim and Fischer, through their respective subsidiaries Citrovita and Citrosuco, are two of the four main suppliers of orange juice to Europe.

The Commission opened a Phase II investigation in January 2011 as it had serious doubts with regard to the overall orange juice market and, alternatively, on the market for Frozen Concentrate Orange Juice ("FCOJ"), notably on the basis of potential non-coordinated effects. This theory of harm was based on the fact the joint venture may be able to increase prices and decrease output post transaction, without being counterbalanced by the remaining competitors. In addition, the Commission could not

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106 Case COMP/M.950.

107 Case COMP/M.5907.

exclude the possibility of coordinated effects post-transaction in the said markets, as well as of anti-competitive effects derived from the elimination of a potential competitor (Votorantim) in the Not From Concentrate Orange Juice ("NFC") segment.

The Commission's decision contains a detailed market definition analysis. The parties had indeed tried to argue that the relevant product market was the market for the production and wholesale supply of fruit juices. The Commission however found that there was no significant substitutability, from a demand-side perspective, and only limited substitutability from the supply-side, between orange juice and other type of fruit juices. It therefore rejected the market definition put forward by the parties and found the market for the production and wholesale supply of orange juice to be the relevant product market. The Commission left open whether the market should be further segmented between FCOJ and NFC.

The Commission found that the transaction would not lead to a significant impediment to effective competition in the market for the production and wholesale supply of orange juice in the EEA.

Thus, the Commission excluded non-coordinated effects on the basis that the parties were not particularly close competitors (notably due to high degree of substitutability between the Parties, Cutrale and LDC), the absence of switching costs on the part of customers and the existence of at least two credible competitors, LDC and Cutrale, which have the ability and incentive to increase their output of orange juice in case of a price increase post-transaction by the parties.

The Commission also excluded coordinated effects. Its investigation did not provide elements supporting a possible coordination between the three main remaining players and did not point to any coherent coordination mechanism that would be consistent with the facts of the industry. Finally, the Commission found that the transaction would not change the current situation in a way that would make coordination more likely, stable or effective.

The Commission furthermore examined by-products of the orange juice processing industry. It examined the four main categories or types of by-products concerned by this transaction, namely: (i) orange oil and essences; (ii) orange terpene (or d-limonene); (iii) pulp; and (iv) citrus pellets. The Commission excluded concerns in each of these segments on the basis that the joint venture would continue to face competition from other suppliers (including Cutrale and LDC) and that customers did not express any specific concerns regarding the impact of the proposed transaction.

The joint venture was unconditionally cleared.

4.1.3 SC Johnson/ Sara Lee household insect control business – 9 May 2011[108]

On 9 May 2011, the proposed acquisition by SC Johnson & Son Inc of the household insect control business of Sara Lee Corporation was aborted and the notifying parties withdrew their notification.

The transaction was originally filed in Spain and Portugal. Spain (and subsequently Belgium, Greece, France, Czech Republic and Italy), however, submitted a referral

[108] Case COMP/M.5969.

request pursuant to Article 22 of the EUMR. After accepting the referral request in September 2010, the Commission opened a Phase II investigation in December 2010. It had found that both suppliers had a strong presence on the markets for all types of insecticide products (flying insect killers, crawling insect killers and anti-moth products) and that they had substantial overlapping activities in Spain, France, Belgium, Greece and the Czech Republic. The Commission was in particular concerned that the proposed transaction might lead to increased prices and less choice for customers.

This case is particularly interesting from a procedural point of view. First, it is worth noting that Portugal did not join the Spanish referral request; the transaction was thus also being examined by the Portuguese competition authority. Second, this case illustrates the increasing interagency cooperation: whilst the proposed acquisition was only notified in Spain and Portugal, Belgium, Greece, France, Czech Republic and Italy, which did not have jurisdiction over the proposed acquisition, all intervened to support Spain's referral request.

4.1.4 UPM-Kymmene/ Myllykoski – 13 July 2011[109]

On 13 July 2011, the Commission, following an in-depth investigation, cleared the acquisition of Myllykoski Corporation and Rhein Papier GmbH ("the Myllykoski Group") by UPM-Kymmene Corporation ("UPM"). Both groups are active in the paper and pulp industries.

On 4 March 2011, the Commission opened an in-depth investigation, citing doubts about the transaction's compatibility with the internal market in relation to magazine paper and particularly in the supercalendered ("SC") paper segment where the combined entity would have high market shares.

Following its market investigation, however, the Commission found that:

- The Parties' competitors would have significant spare capacity to react to any attempts by UPM to raise prices;
- The demand for magazine paper was forecast to remain stable or even slightly decline, so sufficient capacity would remain available;
- A new type of paper, SC-B Equivalent, was recently introduced on the market and was putting significant competitive pressure on the parties.

The Commission thus unconditionally cleared the proposed transaction as the merged entity would continue to face competition from a number of other strong competitors and that customers would still have sufficient alternative suppliers in all markets concerned.

4.1.5 Caterpillar/ MWM – 19 October 2011[110]

On 19 October 2011 the Commission cleared Caterpillar's proposed acquisition of MWM, a German maker of reciprocating engine generator sets, or gensets, used for decentralised electricity production. The transaction was initially filed with the German, Austrian and Slovak competition authorities. The German competition

[109] Case COMP/M.6101.
[110] Case COMP/M.6106.

authorities, however, made a referral request to the Commission under Article 22 of the Merger Regulation which the Austrian and Slovak competition authorities subsequently joined.

Whilst Caterpillar is active in the same field and the combined entity was described by the Commission as a "formidable force to reckon with", the Commission's in-depth investigation showed that Caterpillar would continue to face competition from a number of companies in Europe and worldwide.

The Commission started an in-depth investigation in May 2011 over concerns that the remaining competitors in the market may not exert a sufficiently strong constraint on the behaviour of the combined entity and that the latter may restrict access to the installation and servicing of its gensets. However it concluded that the combined entity's market position is unlikely to give rise to unilateral anticompetitive behaviour. There will remain sufficiently strong alternative suppliers and conditions are such that new players could enter the market. The in–depth investigation also revealed that the merging parties are not close competitors, namely that other competitors compete more strongly than the merging parties between each other.

Moreover, the investigation indicated that the proposed transaction will not lead to significant changes in the structure of the market, due to the relative heterogeneity of the products and customers, and to the strong competition in research and development efforts aimed at increasing the electrical efficiency of gensets. Therefore, the merger is not likely to lead to coordinated effects.

Finally, the Commission found that the combined entity is unlikely to engage in a strategy to restrict access to bare gas engines, spare parts or gas gensets, because several other genset manufacturers represent a credible alternative for customers and none of them is capacity constrained.

The Commission, therefore, cleared the transaction unconditionally.

The absence of bidding data led the Commission to conduct dawn raids to obtain such data – a relatively rare occurrence in a merger investigation.

4.1.6 Seagate/ Samsung HDD – 19 October 2011[111]

On 19 October 2011, the Commission, following an in-depth investigation, cleared the proposed acquisition of the hard disk drive ("HDD") business of Samsung by Seagate Technology.

The Commission's preliminary investigation had found that the merged entity would have a significant market share in the overall market for HDDs, particularly in 3.5" desktop HDDs where it would only face two competitors (Western Digital and Hitachi, i.e. parties of a subsequently notified transaction mentioned below which was also cleared by the Commission subject to conditions). It found that the proposed transaction could reduce price competition and innovation. Respondents to the Commission's market investigation were also concerned about coordination between the different HDD manufacturers and a reduction of competition in heads for HDDs. Finally, the Commission was concerned by the fact that Samsung was an important supplier of HDDs to non-integrated external storage devices (ESD) manufacturers and

[111] Case COMP/M.6214.

that the merged entity might have an incentive to increase its HDD prices or restrict supply for non-integrated ESD providers, thereby privileging its own branded ESDs.

The Commission, however, whilst recognising that the markets were already highly concentrated, cleared the proposed transaction on the basis that:

- There would remain three strong suppliers on the 3.5" desktop market (the merged entity, Western Digital and Hitachi) and four strong suppliers on the 2.5" mobile market (the merged entity, Western Digital, Hitachi, and Toshiba). The Commission thus found that the existence of these rival suppliers would suffice to ensure customers retained sufficient possibilities to switch suppliers; and
- The removal of Hitachi was unlikely to lead to a risk of coordination between the different HDD manufacturers.

The Commission examined this transaction independently of the Western Digital / Hitachi transaction which concerns the same markets and which was filed only one day after the Seagate / Samsung HDD transaction (see below).

4.1.7 Western Digital/Hitachi (Vivity Technologies) - 23 November 2011[112]

On 23 November 2011, the Commission approved, subject to conditions, the proposed acquisition of Hitachi Global Storage Technology (HGST), a subsidiary of Hitachi of Singapore recently renamed Viviti Technologies, by rival Western Digital of the US.

The Commission's in-depth examination showed that there were separate worldwide markets for HDDs based on their form factor (3.5-inch or 2.5-inch) and end use (such as desktop computers, mobile computers, consumer electronics devices and enterprise business critical and mission critical applications). The Commission also identified a separate market for external HDDs (or XHDDs), which is downstream from HDDs in the EEA.

Pursuant to the priority rule ("*first come, first served*") based on the date of notification, this transaction was assessed taking into account the *Seagate/Samsung* merger in the same sector that was notified one day earlier and approved by the Commission on 19 October (see above). After the *Seagate/Samsung* merger, there remained worldwide four active HDD suppliers: Western Digital, HGST, the merged Seagate/Samsung and Toshiba. The proposed *WD / Hitachi* transaction was therefore going to reduce the number of competitors to three and in some markets to two. On the markets for 3.5-inch Desktop HDDs and Consumer Electronics HDDs, the merged entity would only face competition from the recently merged Seagate/Samsung. This raised security of supply concerns as most customers on these markets multi-sourced HDD purchases. Toshiba had only recently entered the market for 3.5-inch Business Critical HDDs and it was uncertain whether it could replace the competitive constraint presently exerted by Viviti. The Commission was concerned that the transaction would have a negative effect on prices and consumers in Europe and opened an in-depth investigation in May 2011.

[112] Case COMP/M.6203.

To gain regulatory clearance, Western Digital proposed to divest essential production assets for the manufacture of 3.5-inch HDDs, including a production plant, to transfer or license the IP rights used by the divestment business, to transfer the relevant personnel and to supply HDD components to the divested business. Western Digital would not be able to complete the acquisition of Viviti until it had found a suitable purchaser approved by the Commission.

Western Digital brought actions before the General Court against the Commission's decisions. Western Digital seeks first the annulment of the Commission's "priority decision" of 3 May 2011, claiming that the Commission lacks the powers to adopt a priority rule based on the date of notification of a concentration and second the annulment of the Commission's Phase II decision, claiming that it is vitiated by the adoption and/or application of the "priority rule", regarding the respective treatment of the Seagate/ Samsung merger and the Western Digital /Viviti merger.

4.1.8 Deutsche Borse/NYSE - 1 February 2012

On 1 February 2012 the Commission prohibited the proposed merger between Deutsche Börse and NYSE Euronext, as it found that it would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges.

Eurex, operated by Deutsche Börse, and Liffe, operated by NYSE Euronext, are the two largest exchanges in the world for financial derivatives based on European underlyings. According to the Commission, they compete head-to-head and are each other's closest competitors controlling together more than 90% of global trade in these products.

Derivatives are financial contracts whose value is derived from an underlying asset (*e.g.*, interest rate, equity) used by companies and financial institutions to manage financial risk. They are also used as an investment vehicle by retail and institutional investors – including mutual and pension funds investing on behalf of final consumers.

Derivatives can be traded on exchanges or "over-the-counter" (OTC). Exchange-traded derivatives (ETDs) are highly liquid, relatively small size (around € 100,000 per trade) and fully standardised contracts in all their legal and economic terms and conditions. In contrast, OTC derivatives typically concern much bigger contracts (around € 200,000,000 per trade) that allow customisation of their legal and economic terms and conditions.

The Commission's investigation showed that ETDs and OTCs were generally not considered as substitutes by customers, since they were used for different purposes and in different circumstances. The Commission's analysis focusing on the effects of the proposed merger on the markets for European financial derivatives (European interest rate, single stock equity and equity index derivatives) traded on exchanges showed that the proposed merger would have eliminated global competition and created a quasi-monopoly in a number of asset classes, leading to significant harm to derivatives users and the European economy as a whole.

According to the Commission, both Eurex and Liffe operate closed vertical silos linking their exchange to their own clearing house. The merger would have resulted in a single vertical silo, trading and clearing more than 90% of the global market of European financial ETDs. Although other companies, including the Chicago Mercantile Exchange (CME), provide similar services worldwide, they only do so marginally in the asset classes concerned. Moreover, the Commission found that it would have been difficult for a new player to enter the market because given the advantages of clearing similar contracts in a single clearing house, customers would have been reluctant to trade similar derivatives at another exchange. Therefore, the dynamics of the market would have reinforced the monopolistic position of the merger resulting, thus, in higher prices and lower incentives to innovate.

The two companies claimed that the customers would benefit from greater liquidity and also from having to post less collateral for security. However, the Commission found that these benefits would be significantly less than argued by the merging parties, not substantial enough to outweigh the harm to customers caused by the merger and unlikely (due to the quasi-monopolistic situation) to be fully passed on to them.

The two companies offered to sell Liffe's European single stock equity derivatives products where these compete with Eurex. However, the Commission found that divested assets would be too small and not diversified enough to be viable on a stand-alone basis. The companies did not offer to sell overlapping derivatives products, but only offered to provide access to the merged company's clearing for some categories of "new" contracts. This was considered insufficient, in particular because it did not extend to existing competing products. There were also fundamental concerns about the workability and the effectiveness of such an access remedy.

The Commission, therefore, concluded that the remedies proposed were inadequate to solve the competition concerns raised by the proposed transaction and prohibited the merger.

4.2 *Commission Phase II Investigations*

4.2.1 Johnson & Johnson/ Synthes - 4 November 2011

On 4 November 2011, the Commission opened an in-depth investigation into the planned acquisition of Synthes Inc. by Johnson and Johnson, both US companies active in the area of orthopaedic medical devices.

Johnson and Johnson and Synthes produce and/or distribute trauma devices (used to treat bone fractures), spine devices (used to correct various deformities of the spine), shoulder replacement devices (used to reconstruct shoulder joints), cranio-maxillofacial devices ("CMF" - used for the treatment of facial and skull fractures) and surgical power tools such as drill systems, drill bits, reamers and saws.

The Commission’s initial investigation showed that the proposed transaction would combine two of the leading suppliers of spine devices and would strengthen the position of Synthes as the current market leader in trauma and CMF devices and of Johnson and Johnson in shoulder devices in a substantial number of EEA Member States.

The Commission cited concerns that the remaining competitors in many of the markets might not be able to exert a sufficiently strong restraint on the behaviour of the merged entity. According to the Commission, the removal of an important competitor may also have a negative impact on the level of innovation, leading to a reduction of choice for patients and potentially an increase in prices for the orthopaedic medical devices concerned. Consequently, at this stage, the acquisition raises serious doubts as to its impact on competition. Commitments were submitted during the second phase of the investigation, on 21 February 2012 and the provisional deadline for the Commission's decision is 26 April 2012.

4.2.2 Sudzucker/ EDFM- 10 November 2011

On 10 November 2011, the Commission opened an in-depth investigation into the proposed acquisition of control over ED&F MAN by Südzucker, a German company that is Europe's largest sugar and molasses producer. ED&F MAN is the second largest sugar trader and largest molasses trader worldwide. The proposed transaction was notified to the Commission for regulatory approval on 19 September.

The Commission's preliminary investigation showed that, in particular in Italy and Greece, the acquisition would lead to high combined market shares in the already concentrated market for the supply of refined sugar. In addition, it would remove a strong alternative supplier of molasses in several Member States, in a market where alternative suppliers are scarce and barriers to entry high.

As EDFM also imports raw cane sugar into the EEA, the Commission could not exclude at this stage that the transaction could also adversely impact Südzucker's rivals' access to raw cane sugar, an essential input for the production of white sugar.

The parties submitted remedies during the first and second phase investigation and the provisional deadline for the Commission’s decision is 22 May 2012.

4.2.3 CIN/Tirrenia- 18 January 2012

On 18 January 2012, the Commission opened an in-depth investigation into the planned acquisition of joint control over a branch of the Italian state-owned ferry group Tirrenia by Compagnia Italiana di Navigazione ("CIN") of Italy.

Tirrenia provides passenger and freight maritime transport services connecting mainland Italy with some of the Italian islands, primarily Sardinia and Sicily while CIN is a company created for the purpose of the proposed transaction by Marinvest S.r.l., Grimaldi Compagnia di Navigazione S.p.A. and Onorato Partecipazioni S.r.l.

The Commission’s initial market investigation indicated serious competition concerns, in particular because the parties to the merger have very high, if not monopolistic, combined market shares on a number of maritime routes in Italy, and in particular on certain routes to and from Sardinia. Moreover, at this stage of the investigation, the Commission considered that the new entity would not appear to be sufficiently constrained by strong, viable and credible competitors on several routes and consequently that the acquisition raised serious doubts as to its impact on competition.

The deadline has been suspended under Article 11(3) EUMR since 13 February 2012.

4.2.4 Universal/EMI- 23 March 2012

On 23 March 2012, the Commission opened an in-depth investigation into the proposed acquisition of the recorded music business of EMI, part of the Vivendi group, which is an international media company, by Universal Music Group. The Commission's initial market investigation indicated that the proposed transaction may raise competition concerns in the wholesale of physical and digital recorded music in numerous Member States as well as in the EEA as a whole, particularly in light of the merged entity's high market shares and increased market power.

According to the Commission, the new entity, which would be almost twice the size of the next largest player in the EEA, would not appear to be sufficiently constrained by the remaining competitors on the market, by its customers' buyer power, and/or by the threat of illegal music consumption (so-called "piracy").

4.2.5 UTC/Goodrich- 27 March 2012

On 27 March 2012, the Commission opened an in-depth investigation into the proposed acquisition of control over Goodrich Corporation by United Technology Corporation (UTC), both US-based companies active in the production and sale of aviation equipment on a worldwide basis.

The Commission’s preliminary investigation indicated that the parties would have very high combined market shares regarding the markets for engine controls and AC power generators, a market with high entry barriers where Goodrich appeared as the strongest contender to UTC's dominant position and as a potential partner for prospective entrants.

The investigation also revealed vertical concerns for some Goodrich customers that compete with UTC's engine subsidiary Pratt & Whitney. According to the Commission, the removal of Goodrich as an independent supplier of engine controls and fuel nozzles, particularly for small engines, could result in higher input prices for engine manufacturers competing with Pratt & Whitney. In particular, switching supplier could take a long time and be costly for those currently sourcing from Goodrich. Finally, in relation to aftermarket services, the preliminary investigation indicated potential concerns as regards the access by competitors to spare parts and related inputs from UTC and Goodrich.

4.3 ***Judgments of the General Court and the Court of Justice of the European Union***

4.3.1 T-315/19 Partouche v Commission – 20 January 2011

The General Court declared inadmissible an appeal brought by Groupe Partouche against the Commission's decision to approve the joint venture between Française des Jeux and Groupe Lucien Barriere.

The case concerned Française des Jeux ("FDJ"), a company which provides gaming and sports betting services in France, and Groupe Lucien Barriere ("GLB"), a company involved in the management of casinos, hotels and spa treatment centres, catering, the management of golf courses and event solutions, mainly in France.

On 21 May 2010, the Commission approved a joint venture between FDJ and GLB. This joint venture would be responsible for designing and operating an online poker

site in France. The transaction was examined under the simplified merger review procedure.

Groupe Partouche is a company which manages casinos, hotels, restaurants, spa treatment centres, golf courses and beach resorts, and which also has an online poker site in France. On 23 July 2010, Groupe Partouche brought an action before the General Court seeking the annulment of the Commission's decision to approve the joint venture. It claimed that, given the possible significant effects on competition in France, the Commission should have referred the concentration to the French national competition authorities.

Although it was clear that Groupe Partouche was seeking the annulment of the contested decision, the Court found that the summary of the pleas in law were not sufficiently clear and precise to satisfy Article 44 (1) of the General Court's Rules of Procedure. Groupe Partouche did not establish any link between the alleged infringement by the Commission of the EUMR and the request to the General Court to annul the Commission's decision for infringing EU competition rules. In effect, the only plea in law advanced by Groupe Partouche was that, given the possible significant effect on competition in France, the Commission should have referred the case back to France. As to the other pleas of Groupe Partouche, the General Court found that they were not presented in a clear and coherent format in accordance with Article 44 of the Rules of Procedure. In any event, the annexes to the appeal did not contain any further pertinent information and offered no further clarity on the pleas in law. Consequently, the General Court concluded that Groupe Partouche's application was inadmissible under Article 87 (2) of the Rules of Procedure.

4.3.2 T-224/10 Association belge des consommateurs test-achats v Commission – 12 October 2011

In this case, the General Court ruled on the rights of a Belgian consumer association in merger proceedings.

The case concerned the *Association belge des consommateurs test-achats* (ABCTA), a non-profit consumer protection organisation. ABCTA in June 2009 expressed concerns over the intended acquisition by Électricité de France (EDF) of Segebel SA, which in turn held a 51% stake in the second largest electricity operator in Belgium, named SPE SA. Because the French state holds a majority stake in EDF, while the French state already indirectly held an interest in the largest Belgian electricity company, incumbent operator Electrabel SA, (through the French State's interest in GDF Suez SA), ABCTA was concerned that the proposed transaction would give the French state an interest in the two largest electricity companies in Belgium, thereby potentially reducing competition.

On 23 June 2009, prior to the relevant notification (which was made on 23 September 2009) and its publication in the Official Journal (on 30 September 2009), ABCTA sent a letter to the Commission expressing its concerns about the merger at issue. ABCTA did not however respond to the call in the Official Journal on interested third parties to submit their observations.

On 12 November 2009, the Commission adopted, first, a decision by which it rejected a request from the competent Belgian authorities for partial referral of the merger investigation (the non-referral decision), and, second, a decision by which it declared

the merger at issue to be compatible with the common market (the clearance decision).

ABCTA applied to the General Court to have those two Commission decisions annulled, but, before the General Court, was unsuccessful on both accounts.

With respect to the clearance decision, the General Court recalled that a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former. The locus standi of third parties concerned by a merger must however be assessed differently depending on whether they, on the one hand, rely on defects affecting the substance of those decisions ('first category' of interested third parties) or, on the other hand, submit that the Commission infringed procedural rights which are granted to them by the acts of EU law governing the monitoring of mergers ('second category' of interested third parties).

With respect to the first, substantive test, the General Court found that ABCTA was not individually concerned by the Commission's clearance decision: the decision did not affect ABCTA by reason of certain attributes which are peculiar to it or by reason of a factual situation which differentiated ABCTA from all other persons, thereby distinguishing ABCTA individually in the same way as the addressee.

With respect to the second, procedural test, the General Court ruled that, although a consumer association enjoys a right to be heard in merger proceedings, that right to be heard, is subject to two conditions: first, the merger must relate to goods or services used by final consumers and second, an application to be heard by the Commission during the investigation procedure must actually have been made in writing by the association. The Court found that although ABCTA satisfied the first condition – the merger at issue being likely to have effects, at least secondary effects, on consumers – that association did not, however, satisfy the second condition. In particular, ABCTA had failed to apply for its right to be heard following the formal notification of the merger; indeed, it had asked the Commission to be heard in the context of the merger investigation procedure two months prior to notification of the merger.

With respect to the application for annulment of the non-referral decision, the General Court recalled that a third party concerned by a merger is entitled to challenge the Commission's decision to uphold a national competition authority's referral request. By contrast, the Court found that interested third parties are not entitled to challenge a non-referral decision by which the Commission rejects a request for referral brought by a national authority. Thus, the General Court considered that the procedural rights and judicial protection that EU law confers on those third parties are not in any way jeopardised by the non-referral decision. Quite to the contrary, that decision ensures for third parties concerned by a concentration with a Community dimension, first, that that merger will be assessed by the Commission in the light of EU law, and second, that the General Court will be the judicial body having jurisdiction to deal with any action against the Commission's decision bringing the procedure to an end. Consequently, the General Court dismissed the action brought by ABCTA as being inadmissible.

5. *POLICY DEVELOPMENTS*

5.1 *Agreements - Commission's 2nd report- 6 July 2011*

On 12 January 2010, the Commission announced that, following the sector inquiry into the pharmaceutical industry, it had sent information requests to a number of pharmaceutical companies asking them to provide copies of all patent settlement agreements relevant for the EU/EEA markets concluded between 1 July 2008 and 31 December 2009. The Commission indicated being particularly concerned by patent settlements under which an originator company pays a generic competitor in return for delayed market entry of a generic drug.

The Commission published its first report on its monitoring exercise in July 2010[113]. The report covered the period from 1 July 2008 until the end of 2009. The Commission found that, although the number of settlement agreements had increased, a higher proportion of the settlement agreements did not raise competition concerns.

The second round of monitoring was launched on 17 January 2011, when the Commission asked a selected number of originator and generic companies to submit a copy of all patent settlement agreements relevant for the EU/EEA markets and concluded during 2010.

On 6 July 2011, the Commission published its report on its second monitoring exercise. The Commission found that 89 patent settlement agreements were reached between originator and generic companies in 2010 (compared with 207 in the 8.5 years covered by the sector inquiry). It found that the number of settlements that are potentially problematic from a competition perspective had significantly decreased. The Commission considered that this reflected increased awareness of possible competition issues and said that it would continue to monitor the sector for at least another year to assess whether the trend was confirmed.

5.2 *Best Practices and Commission's Antitrust Handbook – 17 October 2011*

On 17 October 2011, the Commission published its long-anticipated revised Best Practices. Aimed at increasing transparency and procedural safeguards for companies subject to Commission investigations, the Best Practice handbook had been in the making since January 2010.

The revised Best Practices increase the role of the Hearing Officer, who, under an expanded mandate, can now hear parties' concerns about violation of their procedural rights. The new internal rules further aim to give parties a clearer picture of what to expect at different stages of an antitrust investigation and increase their ability to interact with the Commission services.

After a public consultation that was launched in January 2010, and building upon experience gained with the draft best practices, a number of improvements were introduced:

- Informing parties in the Statement of Objections of the main relevant parameters for the possible imposition of fines;

[113] Commission Press Release 10/887.

- Extending state of play meetings to cartel cases and complainants in specific circumstances;
- Enhanced access to "key submissions" of complainants or third parties, such as economic studies, prior to the Statement of Objections;
- Publishing rejection of complaints, either in full or as a summary.

The package also encompasses a revised Hearing Officer's mandate which strengthens and expands the role of the hearing officer. The new mandate notably enables the hearing officer to intervene during the investigatory phase of antitrust and certain merger proceedings. In particular, the Hearing Officer has new functions in the investigation phase:

- Resolving issues regarding the confidentiality of communications between companies and their external lawyers (legal professional privilege or LPP);
- Intervening when a company considers that it has not been informed of its procedural status;
- Parties will also be able to refer the matter to the Hearing Officer if they feel that they should not be compelled to reply to questions that might force them to admit to an infringement;
- Intervening in disputes about the extension of deadlines to reply to information requests under Article 18(3) of the Antitrust Regulation 1/2003.

Other key developments include:

- Strengthened role in the preparation and conduct of the oral hearing.
- Reports to cover the effective exercise of procedural rights throughout proceedings, including the investigation phase.
- The new mandate expressly empowers parties to refer matters to the Hearing Officer in antitrust commitment procedures.

The package furthermore includes further developments to the best practices on submission of economic evidence. Due to the increasing importance of economics in complex cases, the Commission often requests substantial economic data and parties often submit arguments based on complex economic theories or provide empirical analysis. In order to streamline the submission and assessment of such evidence, the Best Practices outline the criteria economic and econometric analysis should fulfil and explains how they will be dealt with.

5.3 *Best Practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases- Staff working paper*

On 17 October 2011, the Commission published its best practices for the submission of economic evidence. According to the Commission, economic analysis plays a central role in competition enforcement and needs, therefore, to be framed in such a way that the Commission and the EU Courts can understand and evaluate its relevance and significance. By giving parties a better idea of what is expected, the Commission aspires to facilitate the effective gathering and exchange of facts and

evidence and the assessment of such data as well as to avoid the replication of any empirical results by itself and/or other parties.

These best practices concern the generation as well as the presentation of relevant economic and empirical evidence that may be taken into account in the assessment of a case concerning the application of Articles 101 and 102 TFEU or merger cases. These Best Practices are organised along two themes.

i) First of all, it provides recommendations regarding the content and presentation of economic or econometric analysis. This is meant to facilitate its assessment and the replication of any empirical results by the Commission and/or other parties.

ii) Second, the document provides guidance to respond to Commission requests for quantitative data to ensure that timely and relevant input for the investigation can be provided.

These Best Practices apply to all parties involved in proceedings concerning the application of Articles 101 and 102 TFEU and mergers, that is the parties to the case and interested third parties (including complainants), as well as the Commission. The specificity of an individual case or particular circumstances may require an adaptation of, or deviation from, these Best Practices.

5.4 *DG Competition informal guidance paper on confidentiality claims- March 2012*

On 19 March 2012, the Commission published its practical guidance on how to redact confidential data from documents submitted during an antitrust probe. The Commission's requests for information (RFI's) aim at obtaining the information necessary for the Commission to conduct its investigations. If the investigation leads to the adoption of a statement of objections, the Commission will make available documents it has obtained during the course of its investigation, as part of the "*Access to file*" procedure. Access is given to the parties of the proceeding to the non-confidential version of the submissions and documents.

The paper drafted by DG Competition staff sets informal guidance for the recipients of a request for information providing practical instructions on how to claim confidentiality for information contained in their submission. This document is without prejudice to the EU Law provisions concerning professional secrecy and claims for confidentiality (*i.e.*, Art. 339 TFEU, Regulation 1/2003 and the Notice on access to file) that apply to the submissions/documents.

This document provides first *some general practical information* in the form of "do's and don'ts"**:**

(a) *In order to claim confidentiality for information in their submissions/documents considered as business secrets or otherwise confidential, the addressees of the RFI's should provide a non-confidential version of such documents in which they will black out the information considered confidential. From the non-confidential version, it has to be clear where information has been deleted by adding - if necessary - indications such as "business secret", "confidential" or "confidential information".*

(b) *In general, confidentiality cannot be claimed for the entire or whole sections of the document as it is considered possible to protect confidential information with limited redactions.*

(c) *The non-confidential document should keep the same format as the original version. So, if the addressees of the RFI's claim confidentiality for only some parts of a document, they are requested to provide an accessible non-confidential version of the entire document.*

(d) *The Commission may ask the addressees of the RFI's to provide first a draft non-confidential version of their submissions/documents, in which they only highlight the information considered as confidential in a way that it remains legible.*

(e) *A final non confidential version in which information is blacked out will then only be submitted after the Commission has provisionally accepted the confidentiality claims.*

This guide complements the Annex on Business secrets and other confidential information that is enclosed in all requests for information sent by the Commission.

The section of general information is then followed by specific examples indicating *inter alia* how comprehensive justifications and meaningful non-confidential descriptions of the blacked-out information should be provided in case of confidentiality claims.

There is also reference to claims which cannot be accepted as confidential by the Commission such as:

i) *Oral corporate statements made in the framework of the Leniency Notice;*

ii) Public information as well as evidence pertaining to the alleged infringement ;

iii) Information pertaining to the parties' turnover, sales, market share data and similar information which has lost its commercial sensitivity, for example due to the passage of time;

iv) Possible corroborating evidence and information, the disclosure of which would not cause serious harm;

v) Employees' names involved in the alleged infringement; and

vi) Possible proof of an infringement under investigation.

5.5 *Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (Antitrust Manual of Procedures) - 30 March 2012*

The Commission has published a redacted version of its internal guide to antitrust investigations. The 277-page document- known as the Manproc- contains 28 chapters of informal guidance.

However, what the Commission makes clear in the prologue is that " *the fact that the modules are in the public domain does not change their character as purely internal guidance to staff*" and that " *the practical guidance given in the manual does not claim to be complete or exhaustive [...]*". The Antitrust Manual of Procedures does not contain binding instructions for staff. Rather, it constitutes a practical working tool, which evolves through updates made on a regular basis to reflect new experience

gained in applying the competition rules of the Treaty, and the Regulations as well as the notices and other guidance adopted. In case of divergences between these rules and the Antitrust Manual of Procedures, the former shall prevail.

The chapters contained in the public version include *inter alia* the decision-reaching process, the Commission's power to take statements, the handling of the complaints, the cooperation with the national competition authorities and exchange of information in the European Competition Network as well as cooperation with the national courts, the treatment of whistleblowers, access to file and confidentiality issues. Two chapters on sector-wide inquiries and remedies and fines have not been included, as they are still being finalised and guidance on surprise inspections has also been kept out of the guidebook, as it is considered to benefit from an exception to the transparency rules.

6. *PRACTICE & PROCEDURE*

6.1 *Commission Decisions*

6.1.1 Suez Environnement, Lyonnaise des Eaux – 24 May 2011

On 24 May 2011, the Commission announced that it had fined Suez Environnement and its subsidiary Lyonnaise des Eaux France (LDE) € 8 million for breach of a seal affixed by the Commission during an inspection at LDE's premises, in April 2010. The Commission noted that breach of a seal was a serious infringement of EU competition law as it undermined the effectiveness of inspections.

From 13 to 16 April 2010, the Commission had conducted an inspection at the premises of water management companies in France, including LDE, over suspicions of anti-competitive behaviour.[114] Returning the morning of the second day, the Commission officials found that a seal had been broken at LDE's headquarters. The Commission immediately started an investigation.[115] LDE and Suez Environnement admitted that an LDE employee breached the seal, arguing that it had been unintentional.

Although the Commission noted that breaches of seals were a serious infringement of competition law, it also took into account the immediate and constructive cooperation of Suez Environnement and LDE, which it stated provided more information than required, in setting the fine.

In 2008, the Commission similarly fined E.ON Energie € 38 million for breaking a seal affixed during an unannounced inspection.[116] That fine was confirmed by a judgement of the General Court.[117]

6.1.2 Energetický a průmyslový holding and EP Investment Advisors- 28 March 2012

On 28 March 2012, the Commission imposed a fine of € 2.5 million on Energetický a průmyslový holding and EP Investment Advisors, active in the energy sector in the Czech Republic, for obstructing an inspection carried out by Commission officials from 24 to 26 November 2009 at their premises in Prague as part of an antitrust investigation.

On 24 November 2009, after the notification of the inspection decision, the Commission inspectors requested to block e-mail accounts of key persons until further notice. This was done by setting a new password only known to the Commission inspectors. This is a standard measure taken at the beginning of inspections, to ensure that inspectors have exclusive access to the content of email accounts and prevent modifications to those accounts while they are searched. On the second day of the inspection, the Commission inspectors discovered that the password for one account had been modified in the course of the first day in order to allow the account holder to access the account. The Commission inspectors discovered that one of the employees had requested the IT department on the previous day to divert all e-mails arriving in certain blocked accounts away from these accounts to a computer server. The company admitted that this procedure had been implemented for at least

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114 Commission MEMO/10/134.
115 Commission Press Release IP/10/691.
116 Commission Press Release IP/08/108 and Commission MEMO/08/61.
117 Commission MEMO/10/686.

one e-mail account. As a result, the incoming e-mails did not become visible in the inboxes concerned, they could not be searched by inspectors and their integrity could be compromised.

6.2 *Judgments of the General Court*

6.2.1 T -437/08 CDC Hydrogene Peroxide V Commission-15 December 2011

On 15 December 2011, the General Court ruled on the issue of the access to the statement of contents of the administrative file relating to a cartel proceeding and the possible exceptions to it concerning the protection of the commercial interests of a third party as well as the protection of the purpose of investigations.

By way of background, on 3 May 2006, the Commission found that nine undertakings had taken part in a cartel in the hydrogen peroxide market in the context of which they had exchanged information on prices and sales volumes, agreed on prices and reduction of production capacity and monitored the anti-competitive agreements made. Consequently, it imposed fines amounting to € 338 million on the undertakings that had taken part in that cartel.

On 14 March 2008, the applicant, a limited company whose purpose is, *inter alia*, to defend the interests and the recovery by judicial and extrajudicial means of the claims of undertakings affected by the cartel sanctioned by the abovementioned decision, sought from the Commission, on the basis of Article 2(1) and Article 11(1) and (2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, full access to the statement of contents of the case-file in the hydrogen peroxide decision ("statement of contents"). The Commission rejected the applicant's application on the ground that that disclosure would undermine the purpose of the investigation activities and the protection of the commercial interests of the undertakings which took part in the cartel, mentioned respectively in the third and first indent of Article 4(2) of Regulation 1049/2001. The applicant, supported by Sweden, brought an action before the General Court asking for the annulment of the Commission's decision rejecting its application.

With regard to the first indent of Article 4(2) of Regulation No 1049/2001, the General Court stated that the Commission's refusal to grant access to a document which it has been asked to disclose, must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception provided for in Article 4 of Regulation 1049/2001 upon which it is relying.

The Court ruled that the statement of contents, which merely contains references to the documents in the Commission's case-file cannot be regarded itself as forming part of the commercial interests of the companies mentioned therein by name as authors of some of those documents. It is only if one of the columns in the statement of contents, which indicates, *inter alia*, according to the non-confidential version which the Commission supplied to the applicant, the origin, the addressee and the description of the documents listed, were to contain, in regard to one or more of those documents, information concerning the business relations of the companies concerned, the prices of their products, their cost structure, market share or similar information that disclosure of the statement of contents could be regarded as prejudicing the protection of the commercial interests of those companies.

Moreover, the Court stated that even if the fact that actions for damages brought against a company could undoubtedly cause high costs to be incurred, even if only in terms of legal costs, and even if the actions were subsequently dismissed as unfounded, the fact remained that the interest of a company which took part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving protection.

Therefore, the Court concluded that the Commission did not establish, to the requisite legal standard, that access to the statement of contents is likely specifically and effectively to undermine the commercial interests of undertakings which took part in the cartel.

With respect to the third indent of Article 4(2) of Regulation 1049/2001, the Court stated that the aim of the exception laid down there was not to protect the investigations as such but rather to determine whether an infringement of Article 101 TFEU or Article 102 TFEU had taken place and to penalise the companies responsible if that was the case. It is for that reason that documents relating to the various acts of investigation may remain covered by the exception in question so long as that goal has not been attained, even if the particular investigation or inspection which gave rise to the document to which access is sought has been completed. The Court ruled that the investigation in that case should be considered closed although at the date on which the contested decision was adopted, actions were pending before the Court against the hydrogen peroxide decision with the effect that, if that decision was annulled by the Court, the procedure could be re-opened.

In addition, the Court rejected the Commission's argument that the concept of "the purpose of the investigation activities" had a more general scope and included all of the Commission's policy in regard to the punishment and prevention of cartels as this would otherwise amount to permitting the Commission to avoid the application of Regulation 1049/2001, without any limit in time, to any document in a competition case merely by reference to a possible future adverse impact on its leniency programme.

It concluded that the Commission had not established, to the requisite legal standard, that disclosure of the statement of contents would specifically and effectively undermine protection of the purpose of investigations and thus annulled the Commission decision refusing full access to the statement of contents of the case file.

6.2.2 T-192/07 Comité de défense de la viticulture charentaise- 9 March 2012

On 3 April 2007, the Commission rejected, on the grounds of lack of Community interest, the Comité de défense de la viticulture charentaise ("**CDVC**")'s complaint concerning the alleged infringement of Article 101 TFEU by the Institut National des Appellations d'Origine ("**INAO**") (National Institute of Designations of Origin) and the alleged infringement of Articles 101 and 102 TFEU by the major firms trading in cognac spirit.

In its appeal, CDVC made three pleas: (i) the signatory to the contested measure lacked competence when he signed it 'on behalf of the Commission'; (ii) the decision did not contain a sufficient statement of reasons in so far as the Commission did not respond in the letter rejecting the complaint to all the information submitted by the

applicant, and (iii) the Commission did not give sufficiently serious consideration to the complaint.

The General Court, however, upheld the Commission's decision and rejected the appeal. As the decision only relates to Articles 101 and 102 TFEU, the signatory to the contested measure had the authority to sign the decision and did not lack competence. CDVC's complaint was based on Articles 101 and 102 TFEU which CDVC referred to throughout its complaint; there was nothing to suggest that the Commission should have applied other EU provisions or involved other divisions of the Commission. Moreover, the Commission enjoys a broad margin of discretion when considering whether an agreement or conduct effects trade between Member States. In the present case, the Commission had taken into account the fact that the parties were all located in France, that the complaint related to French legislation and finally that the French authorities were particularly well placed to examine the complaint. Finally, the Court held that the Commission decision did not lack adequate reasoning.

6.3 *Judgments of the Court of Justice of the European Union*

6.3.1 C-109/10 P Solvay SA v Commission-and C-110/10 P Solvay SA v Commission- 25 October 2011

In this judgment, the CJEU confirmed that violation of the right of access to file can, where it concerns a substantial number of documents, lead to the annulment of a Commission decision.

On 13 December 2000, the Commission adopted decisions imposing fines on two companies active on the soda ash market. The Belgian company, Solvay SA, was fined € 20 million for having abused its dominant position and € 3 million for its participation in a pricing agreement with one of its competitors.

Those decisions were substantially identical in content to decisions which had been adopted in 1990 but which had subsequently been annulled by the General Court – by rulings subsequently upheld by the Court of Justice – on the ground that they had not been properly authenticated in that the detailed rules for their definitive adoption by the College of Commissioners had not been followed.

Solvay brought two separate actions before the General Court for annulment of the new decisions adopted by the Commission in 2000, or for reduction of the fines imposed on it. Solvay pleaded, in particular, breach of its right of access to file since it had not been sent all the documents on which the Commission based its allegation of an infringement. The Commission admitted that it had mislaid some files and that it was unable to draw up the list of the documents which they contained, because – it explained – the indexes to those binders could not be found either. In addition, Solvay submitted that the Commission had adopted the new decisions without opening a new administrative proceeding and, accordingly, without first giving Solvay a hearing.

In its judgments of 17 December 2009, the General Court found that the fact that Solvay had not had access to all the documents covered by the investigation had not prevented it from defending itself. As regards the hearing, the General Court pointed out that the new Commission decisions were framed in terms substantively identical to those of the 1990 decisions and that, therefore, the Commission was not required to

hear Solvay again. Solvay appealed both judgments of the General Court before the Court of Justice, which overturned the General Court's holding.

The CJEU noted, first, that in accordance with the right of access to the file, the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Infringement of the right of access to the file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of the defence have been infringed.

According to the CJEU, it cannot be excluded that Solvay could have found in the missing sub-files evidence originating from other undertakings which would have enabled it to offer an interpretation of the facts different from the interpretation adopted by the Commission, which could have been of use for its defence. The CJEU considered that Solvay's claim did not relate to only a few missing documents, the content of which could have been reconstructed from other sources, but rather to entire sub-files which could have contained essential documents relating to the procedure before the Commission which might have been relevant to Solvay's defence.

Accordingly, the CJEU found that the General Court erred in law in concluding that the fact that Solvay had not had access to all the documents in the file did not constitute an infringement of the rights of the defence.

As regards the hearing of the undertaking concerned before the Commission adopts a decision, the Court found that this forms part of the rights of the defence and that it must therefore be examined in relation to the specific circumstances of each particular case. Where – following the annulment of a decision because of a procedural defect relating exclusively to the procedures governing its final adoption by the College of Commissioners – the Commission is to adopt a fresh decision, with substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned.

Nonetheless, the CJEU considered that the question of the hearing of Solvay could not be separated from the issue of access to the file. In particular, during the administrative proceeding which led to the adoption of the first decisions in 1990, the Commission had not granted Solvay access to all the documents in its file. Yet, despite those circumstances and notwithstanding the importance placed by the case-law of the CJEU and the General Court on access to the file, the Commission proceeded to adopt decisions which were the same as those which had been annulled owing to the lack of proper authentication, without opening a new administrative proceeding in which it would have had to hear Solvay after granting it access to the file.

The CJEU found that the General Court erred in law in holding that it was unnecessary, for the purposes of adopting fresh decisions, for the Commission to give Solvay a hearing.

The CJEU thus set aside the judgments of the General Court and, on the merits, annulled the decisions of the Commission.

6.3.2 C-17/10 Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže, - 14 February 2012

On 14 February 2011, on a preliminary reference from the Krajsky soud v Brne (Regional Court in Brno), the CJEU ruled on the issue of prosecution and sanction of an infringement for the period prior to the date of accession and the period following that date.

By way of background, the reference was made in the context of a dispute between various undertakings and the Úřad pro ochranu hospodářské soutěže (Czech competition authority) concerning the decision of that authority to fine them for infringement of Czech competition law. The Regional Court in Brno stayed its proceedings and referred to the CJEU two questions for a preliminary ruling.

By its first question, the referring court asked whether the provisions of Article 81 EC and Article 3(1) of Regulation 1/2003 must be interpreted as meaning that, in the context of a proceeding initiated after 1 May 2004, they can be applied to a cartel which produced effects in the territory of a Member State, which acceded to the Union on 1 May 2004, during periods prior to that date.

The Court recalled that pursuant to Article 2 of the Act of Accession, as from the date of accession, that is to say from 1 May 2004, the provisions of the original Treaties and the acts adopted by the institutions before accession are binding on the new Member States and apply in those States under the conditions laid down in those Treaties and in the Act of Accession. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force.

The Court based on its Advocate General's Opinion, ruled that Article 81 EC, contains substantive provisions which govern the assessment by the competition authorities of agreements between undertakings and therefore constitute substantive rules of EU law which cannot in principle be applied retroactively, irrespective of whether such application might produce favourable or unfavourable effects for the persons concerned. In order to ensure the principles of legal certainty and the protection of legitimate expectations, retroactive application of the rules could be accepted only in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them. Given that in that case there were no clear indications for retroactive application, the Court ruled that the provisions of Article 101 TFEU and Article 3(1) of Council Regulation 1/2003 must be interpreted as meaning that, in the context of a proceeding initiated after 1 May 2004, they do not apply to a cartel which produced effects, in the territory of a Member State, which acceded to the Union on 1 May 2004, during periods prior to that date.

By its second question, divided into two parts, the referring court asked first whether proceedings for the imposition of a fine, which are initiated by the European Commission after 1 May 2004, permanently prevent the national competition authority of a Member State, which acceded to the Union on that date, from prosecuting under domestic competition law a cartel the effects of which were produced in the territory of that State before the accession of the latter to the Union. Secondly, the referring court inquired of the CJEU as to the margin of manoeuvre

which that authority has in applying national competition law, in connection with the *ne bis in idem* principle.

The CJEU ruled that although under the first sentence of Article 11(6) of Regulation 1/2003 the national competition authority is not authorised to apply Article 81 EC, where the Commission has opened a proceeding for the adoption of a decision, and also looses the possibility of applying its national law prohibiting cartels, the Regulation does not indicate that the opening of a proceeding by the Commission *permanently* and *definitively* removes the national competition authorities' power to apply national legislation on competition matters. The Court found that in a situation, such as the present, in which the competition authority of a Member State penalises, by the application of national competition law, the anti-competitive effects produced by a cartel in the territory of the said Member State during periods prior to the accession of the latter to the Union, the combined provisions of Articles 11(6) and 3(1) of Regulation 1/2003 cannot, in respect of those periods, prevent the application of national provisions of competition law.

In addition, with regard to the *ne bis in idem* principle, the Court recalled that the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. It concluded that the Commission's decision did not cover any anti-competitive consequences of the said cartel in the territory of the Czech Republic in the period prior to 1 May 2004, whereas, according to the information supplied by the national court, the decision of the Úřad pro ochranu hospodářské soutěže imposed fines only in relation to that territory and that period.

With regard to the above, the Court ruled that the *ne bis in idem* principle does not preclude penalties which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the EU, where the fines imposed on the same cartel members by a Commission decision taken before the decision of the said national competition authority was adopted, were not designed to penalise the said effects.

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