Major developments and policy issues in European Union competition law: the year in review

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By

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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

During the 2011 calendar year, the European Commission ("Commission") issued only three cartel decisions, namely *Consumer Detergents*, *Exotic Fruits*, and *Special Glass*. Both *Consumer Detergents* and *Special Glass* were settlement decisions (*see infra*). Total fines for the three decisions amounted to €452 million, considerably lower than the fines of €2.9 billion in 2010 and €1.5 billion in 2009. Since the last version of this paper was published (on 1 November 2010), the Commission has issued a total of five cartel decisions, namely the three mentioned above and *Air Freight* and *LCD Panels*. The Commission has also repealed its *Heat Stabilisers* decision in respect of Ciba/BASF and Elementis in order to comply with the judgment of the Court of Justice of the European Union ("CJEU") in the *ArcelorMittal* case.

On 9 November 2010, the Commission announced that it had fined 11 air cargo carriers a total of €799,445,000 for operating a worldwide cartel (*Air Freight*) which affected cargo services within the EEA. The case originated from 14 and 15 February 2006, when competition authorities in the EU, US, and South Korea launched coordinated dawn raids on several air cargo operators. The case is striking for its length and complexity. The Commission faced a number of difficult jurisdictional and evidentiary hurdles and a number of companies that were investigated by the Commission were not included in the eventual decision.

With the December decision in *LCD Panels* fining exclusively Asian manufacturers for price fixing the Commission also signalled its willingness to apply the EU competition rules extraterritorially where there is a direct impact on customers in the EEA. AU Optronics has filed an appeal of the *LCD Panels* decision challenging, *inter alia*, the Commission's jurisdiction to apply the EU competition rules.[3] However, in its subsequently issued judgments in the *Gas Insulated Switchgear* cartel, the General Court ruled that Japanese manufacturers not active in the EEA could nonetheless be fined for agreeing not to enter the European market.

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1 This paper went to press as of 1 November 2011.

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

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

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.

Settlements

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

In the April settlement case 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 total the settlement negotiations lasted under a year, but still longer than the stated six-month objective, although the timeframe from the parties' acknowledgement of participation to the cartel decision was approximately four months.

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.

New cartel investigations

The Commission has initiated a number of new cartel investigations, including in relation to *trucks*, *rail freight*, *container shipping lines*, *piston engines*, *automotive occupant safety equipment*, *natural gas* and *euro interest rate derivatives*.

Visa MIF – Visa Europe Limited

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

[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.

Ordre national des pharmaciens (ONP)

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

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 no fewer than 72 cartel cases concerning 11 cartels, notably the *Spanish* and *Italian raw tobacco*, *Gas Insulated Switchgear*, *Copper Fittings*, *Lifts & Escalators*, *Bleaching Agents*, *Sodium Chlorate*, *Synthetic Rubbers*, *International Removals*, *Dutch Brewers*, and *Acrylic Glass* 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 a third of the 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 heartening and carries significant weight, including 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

In *General Química*, the CJEU refined its stance on parental liability. The Court clarified that, even though a parent company may be presumed to be liable for the conduct of its wholly-owned subsidiary (both directly or indirectly held), the parent company may adduce evidence to rebut this presumption. Once adduced, the Court has confirmed that such evidence must be analysed by the Commission. However, the judgment would seem to confirm that challenging the presumption is a difficult task. In the *Bleaching Agents* cartel case, the General Court similarly held that Total and Elf Acquitane 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, whereby a parent company owning 100% of the stock of a subsidiary company is presumed to exercise decisive influence over that subsidiary and can thus be held liable for cartel activities engaged in by the subsidiary, 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.

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 special case of ownership of a cartelist by a private equity firm. Such subsidiaries are more likely to act in a more autonomous manner. 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.[5] It is by no means certain that GS or Prysmian will be fined in this case, with GS now having the opportunity to respond to the allegations put forward in the Commission's statement of objections. At a minimum, however, 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

[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.

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 *Copper Fittings* cartel case, the General Court annulled the Commission's decision in relation to Aalberts, Aquatis and Simplex, as the Commission had erred in finding that Aalberts had participated in the cartel during the period between 25 June 2003 and 1 April 2004. According to the Court, although the Commission had established a bilateral contact in the time period, it had not established that Aquatis was aware of the fact that it had, through its conduct, joined a cartel made up of different parts that had a common purpose or the cartel in which it had already participated before March 2001 and which was ongoing. This is an interesting development which may impact the interpretation of a single and continuous infringement.

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.

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. For example, Lufthansa, the whistleblower in the *Air Freight* cartel, has appealed the decision despite having benefitted from immunity under the leniency notice. 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 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, whereas in any event 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.

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 AG 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.

Visa – Morgan Stanley

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

Vertical agreements

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

In the October 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 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 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.

ECSC

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

Article 102 TFEU

The Commission issued only one Article 102 TFEU infringement decision in 2011, 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.

The Commission issued rejection decisions relating to Article 102 TFEU complaints brought by *Si.mobil* against *Mobitel* and by *Omnis* against *Microsoft*, while market testing commitments in the *IBM* and *Standard & Poor's* cases.

Google

In November 2010, the Commission formally opened antitrust proceedings into allegations that Google has abused its dominant position in online search officially launching what many see to be the next high profile battleground in antitrust enforcement.[6] The saga started back in February 2010, when the Commission

[6] Cases COMP/39740, 39768, and 39775.

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.

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, complaints from two German companies – map service provider Hot-Map and listings association VfT, Dutch football website Elfvoetbal, French company Interactive Labs, German, and Italian site NNTP.it have been added to the investigation. Indeed, the Commission had indicated publicly that it expected further complainants.

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 (COPD), 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).

Court case law

In *TeliaSonera*, a preliminary reference from a Swedish court, the CJEU clarified the law on margin squeezes, confirming, *inter alia*, that a margin squeeze constitutes a separate abuse. The Court noted that margin squeezes are however not *per se* abusive, and that their anti-competitive effects must therefore be established. The Court reiterated the importance of the 'as efficient competitor' test, thus clarifying that the law protects competition rather than individual competitors. It also found that, in the context of exclusionary pricing practices, there is no difference whether the refusal relates to a new customer or to existing customers.[7]

Mergers

251 notifications were made between January and September 2011 – similar to 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 six Phase II investigations in addition to issuing five Phase II decisions, which is in line with the number of Phase II investigations and decisions in previous years. The outcomes of the Commission's Phase II investigations have been binary in 2011: while the *Olympic/Aegean* merger was prohibited, four other Phase II decisions were cleared unconditionally. In 2011, a total of seven merger notifications were withdrawn.

In 2011, only 4 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. Nonetheless, the Commission has been touting developments in remedies, including interoperability remedies in the IT sector such as in *Cisco/Tandberg* and *Intel/McAfee*, to counter any foreclosure theories of harm.

Olympic/Aegean Airlines – when remedies are not enough?

On 26 January 2011, the Commission prohibited the proposed merger between Greek airlines Aegean Airlines and Olympic Air, following an in-depth Phase II investigation. This is the first prohibition of a concentration by the Commission since the *RyanAir/Aer Lingus* decision of 2007.

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

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[7] Note that, in the context of refusal to supply, the Commission's Article 102 Guidelines distinguish between refusing to supply new and existing customers, noting, in paragraph 84, "*However, the termination of an existing supply arrangement is more likely to be found to be abusive than a* de novo *refusal to supply*."

The Commission noted the likely difficulties in the *Olympic* review early on, drawing parallels to the *RyanAir* prohibition decision, in which similar substantive issues arose, *e.g.*, the merging parties sharing the same home airport (Olympic and Aegean operate 77% of flights in/out of the Athens airport) with the unlikely prospect of new entry.

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

The prohibition decision does raise the question of the fate of these two airline companies. In the past, Olympic Air has been heavily reliant on aid from the Greek government to stay aloft (Olympic Airways was previously forced to return €850 million in state aid). Both airlines have public service obligations to run routes that are not economically viable. Furthermore, the parties have indicated publicly that they do not have sufficient scale to compete. The Greek competition authority is now investigating alleged co-ordination between the parties.

Priority rule

The Commission's 'first in' or 'priority' rule saw one if its most striking demonstrations to date in the context of the two merger notifications in the hard disk sector – *Western Digital/Hitachi*[8] and *Seagate/Samsung*.[9] Notified only one day ahead of *Western Digital/Hitachi*, the *Seagate/Samsung* review benefits from the priority rule at the expense of *Western Digital/Hitachi*. Under the priority rule, the Commission's review of *Seagate/Samsung* will disregard the subsequently notified *Western Digital/Hitachi* deal, yet in its review of *Western Digital/Hitachi*, the Commission will take into account the effects brought about by the *Seagate/Samsung* transaction. Indeed, on 19 October, the Commission cleared the *Seagate/Samsung* merger unconditionally – noting in its press release[10] that the merging entity would continue to face competition from, *inter alia*, Western Digital and Hitachi, whereas by that time Western Digital had offered commitments that were still under review at the time of writing.

Perhaps due to the particularly striking circumstances of these two merger cases – not only were they notified one day apart, but Western Digital is 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

8 Case COMP/M.6203.
9 Case COMP/M.6214.
10 Commission Press Release IP/11/1213.

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 unlikely to be answered in the short term, however.

Indeed, although Western Digital has appealed the Commission's application of the priority rule,[11] it may prove difficult to persuade the General Court to review the Commission's priority practice. Western Digital appears to be appealing the Commission's Phase II (6.1(c)) decision, which is not a final decision and therefore not normally subject to judicial review.

Referrals – jurisdictional chaos?

The unpredictable and unwieldy nature of the jurisdictional system established by the EU Merger Regulation ("EUMR") was painfully demonstrated by 2 Phase II investigations in the last 12 months.

Syngenta/Monsanto was cleared subject to commitments following a Phase II investigation on 17 November 2010 after referral requests from the Spanish and Hungarian competition authorities. However, 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.[12] 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.

Behavioural commitments

In January of 2011, the Commission cleared the *Intel/McAfee* merger,[13] a transaction of some significance in the information technology industry, after the parties had offered commitments aimed at ensuring interoperability between Intel's chipsets and rival security software products. Rival security software developers were particularly concerned that close 'hardware' integration of Intel's chipsets with McAfee's security software would present an insurmountable advantage to competitors. In response to these concerns, the parties committed to providing interoperability information well ahead of the launch of new chipsets, allowing rivals sufficient time to adapt their security software products accordingly.

The effect of interoperability on competition often requires a complex analysis – as evidenced, for example, by the Commission's 2004 *Microsoft* decision,[14] which may be difficult to assess conclusively within the time constraints of a Phase I investigation.

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11 Western Digital has appealed application of the priority rule in *Western Digital/Hitachi* under case number T-452/11; *see* page 108.

12 Case COMP/M.5969.

13 Case COMP/M.5984.

14 Case COMP/C-3/37.792.

Indeed, it is conceivable that a Phase II investigation in *Intel/McAfee* would have revealed that interoperability commitments were not in fact necessary.

Chinese state owned entities

The Commission has reviewed a number of concentrations involving Chinese State-owned enterprises (SOEs) this year, including *DSM/Sinochem/JV*,[15] *China National Bluestar/Elkem*, *Huaneng/OTPPB/Intergen*, and *PetroChina/Ineos/JV*.[16] 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.[17] 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."*[18]

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 right to be heard as a consumer association was violated during the Commission's review of the *Electricite de France/Segebel SA* merger.[19] 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.

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15 Case COMP/M.6113 *DSM/Sinochem/JV*.

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

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

18 *See* paragraph 16.

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

Policy Developments

Best Practices

In October, 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.

Separately from the published Best Practices, however, the Commission has been under pressure to disclose its internal procedural guidelines known as the ManProc. Practitioners have argued that the Best Practices do not reveal how the Commission actually aims to operate in antitrust and merger proceedings, and that disclosure of the internal ManProc could help confirm that the Commission handles cases in line with its Best Practices. Although the Commission has resisted disclosing the ManProc in full, citing a risk of undermining the effectiveness of its investigations, it is understood that it will disclose part of the manual in due course.

Horizontal Cooperation Guidelines

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

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

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

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

The Specialisation and R&D Block Exemptions

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

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

Procedure and Practice

Fundamental rights

An October 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 ECHR 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 detail (*see supra*).

Negative decisions

In its 3 May 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.

Filing annulment actions

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

Dawn raid conduct

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

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.

Commission discretion in rejecting antitrust complaints

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

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

2. ARTICLE 101 TFEU

2.1 Commission Decisions – Cartels

2.1.1 *Air freight – 9 November 2010*[20]

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

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

The Commission issued a statement of objections in December 2007 to a number of companies concerning their alleged participation in the cartel.[21] An oral hearing with the Commission was held over several days from 30 June 2008 to July 4 2008. On 9 November 2010, the Commission issued its decision and imposed the following fines.

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

[20] Case COMP/39.258.
[21] Commission MEMO/07/622.

Swiss International Airlines	€0	100%
TOTAL	€799,445,000	

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

In addition to the Commission's investigation, US DoJ has collected fines from airlines totalling more than $1.5 billion – the most ever collected during a criminal antitrust investigation. Moreover, the case has given rise to civil claims for damages in the UK and other jurisdictions. Following a class action settlement in the US on 12 July 2010, several claimants suggested that they would launch several class action suits in other European countries in an attempt to recover damages allegedly incurred as a result of the cartel. An attempted class action suit in the English High Court against British Airways failed on 17 November 2010.

In January 2011, Lufthansa, the whistleblower in the case, appealed the Commission's decision, despite having benefitted from immunity – presumably for fear of follow-on damages actions. Other members of the cartel, who were fined, who have also appealed include Air Canada, Japan Airlines, Air France, KLM, SAS, British Airways, LAN Chile and Cathay Pacific.

2.1.2 *LCD Panels – 8 December 2010*[22]

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

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

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

The Commission issued a statement of objections in May 2009 to a number of companies concerning their alleged participation in the cartel.[23]

[22] Case COMP/39.309.

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

Company	Fine	Reduction under the Leniency Notice
Samsung	0	100%
LG Display	€215,000,000	50% + partial immunity
AU Optronics	€116,800,000	20%
Chimei Innolux Corporation	€300,000,000	0%
Chunghwa Picture Tubes	€9,025,000	5%
Hannstar Display Corporation	€8,100,000	0%
TOTAL	€648,925,000	

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

AU Optronics has appealed to the General Court challenging, *inter alia*, the Commission's jurisdiction to apply the EU competition rules against it.[24] Chimei InnoLux is seeking annulment of the decision insofar as it finds that the infringement extended to LCD panels for television applications.[25] LG Display followed suit on 23 February.

2.1.3 *Consumer Detergents – 13 April 2011*[26]

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

The Commission launched its investigation following a leniency application from Henkel in 2008. On 17, 18 and 19 June 2008, the Commission carried out dawn raids at the premises of several producers of consumer detergents.[27]

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23 Commission MEMO/09/934.

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

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

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

27 Commission MEMO/08/424.

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

Company	Fine	Reduction under the Leniency Notice	Reduction under the Settlement Notice
Henkel AG & Co. KGaA	0	100%	
Procter & Gamble[28]	€211,200,000	50%	10%
Unilever[29]	€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.

2.1.4 *Heat Stabilisers; Ciba/BASF and Elementis – 4 July 2011*

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.[30]

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, however, 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, 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

[28] 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 parents of the P&G Group are held jointly and severally liable for the conduct of their relevant European subsidiaries.

[29] Unilever NV and Unilever PLC were the addressees of the decision.

[30] Commission Press Release IP/09/1695.

and Elementis. The Commission repealed its decision with respect to these two companies accordingly.

2.1.5 *Exotic fruit – 12 October 2011*[31]

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.[32]

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.[33] On 17 December 2009, the Commission sent a statement of objections to a number of companies active in the import and marketing of bananas.[34] 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

2.1.6 *Special glass sector*[35] *– 19 October 2011*

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.

31 Case COMP/39.482.
32 *See* Commission Press Release IP/08/1509.
33 Commission MEMO/07/534.
34 Commission MEMO/09/566.
35 Case COMP/39.605.

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.[36] 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 immunity which was followed by inspections in March 2009. It issued the Parties concerned with information requests in March 2009 and October 2009.[37]

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%	-

[36] *See* Commission Press Release IP/06/1705 and Commission MEMO/06/469.
[37] Commission MEMO/09/316.

2.2 Commission Decisions – Other

2.2.1 *Visa MIF-Visa Europe Limited – 8 December 2010*[38]

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

In March 2008, the Commission announced that it had opened formal antitrust proceedings against Visa Europe Limited in relation to its default multilateral interchange fees (MIF) for cross-border point of sale transactions within the EEA using Visa branded consumer payment cards, and the "Honour-All-Cards-Rule" as it applies to these transactions.[39] It then confirmed, at the beginning of April 2009, that it had sent a statement of objections to Visa.[40]

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

The case has a long history. In 2002, the Commission granted Visa an exemption[41] after Visa offered to reduce progressively the level of its fees from an average of 1.1% to 0.7% until the end of 2007 and to cap fees at the level of costs for specific services. Visa also improved the transparency of its fees. The exemption, however, expired on 31 December 2007 and the Commission issued Visa with an statement of objections in April 2009.

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

38 Case COMP/39.398.
39 Commission MEMO/08/170.
40 Commission MEMO/09/151.
41 Commission Press Release IP/02/1138.

2.2.2 *Ordre national des pharmaciens– 8 December 2010* [42]

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

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

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

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

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

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

- Where the infringement of an association of undertakings relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.

- When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

However, any undertaking which can show that they did not implement the infringing decision of the association and either were not aware of its existence or actively distanced themselves from the association before the Commission began its investigation may not be liable for the infringement of the association.

[42] Commission Press Release IP/10/1683.

2.2.3 *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.

2.3 Ongoing Commission Investigations – Cartels[43]

2.3.1 *Mountings for Windows*[44]

In July 2007 the Commission carried out unannounced inspections at the premises of a number of European producers of mountings.[45] The mountings concerned are the mechanical parts that allow the opening and closing of a window or window door and attach a window to its frame. On 22 June 2010, the Commission announced that it had sent statements of objections to nine producers of mountings for windows.[46]

2.3.2 *Freight forwarding*[47]

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

DHL Global Forwarding has claimed that it first notified the Commission of the alleged abuse and has therefore received conditional immunity before the Commission.[48] In February 2010, the Commission sent a statement of objections[49] to a number of companies including Panalpina, Kuehne + Nagal, Expeditors, DSV, UTi Worldwide, UPS, and DHL Global Forwarding. An oral hearing was held from 6 to 8 July 2010.

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43 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.

44 Case COMP/39.452.

45 Commission MEMO/07/276.

46 Commission Press Release IP/10/776.

47 Case COMP/39.462.

48 *See* http://www.dp-dhl.com/en/media_relations/press_releases/2010/dhl_global_fowarding_cooperates_investigations.html.

49 Commission Press Release IP/10/149.

In January 2011, the Commission sent information requests to various members of the alleged cartel, including Expeditors International, DB Schenker and UPS. Additional requests for information are understood to have been sent in late October 2011.

2.3.3 *Cathode ray tubes*[50]

The Commission carried out dawn raids on 8 November 2007, at the premises of manufacturers of cathode ray tubes.[51] 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.[52] 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.

2.3.4 *International airline passenger services*[53]

On 11 March 2008, the Commission carried out dawn raids at the premises of a number of international airline passenger carriers.[54] These airline carriers provide scheduled passenger air transport services on long-haul routes between Europe and a third country. The JFTC is also investigating the suspected cartel in Japan. Lufthansa and Air France confirmed that the Commission conducted inspections of their respective premises.

2.3.5 *Smart card chips*[55]

On 21 October 2008, the Commission carried out dawn raids at the premises of several smart card chips producers in several Member States.[56] These chips are used 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.

50 Case COMP/39.437.
51 Commission MEMO/07/453. Cathode ray tubes are used in television sets and computer monitors.
52 Commission MEMO/09/525.
53 Case COMP/39.419.
54 Commission MEMO/08/158.
55 Case COMP/39.574.
56 Commission MEMO/09/1.

2.3.6 *Cement and related products*[57]

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.[58] The Commission has followed up with further dawn raids on 22 and 23 September 2009 on undertakings in Spain.[59]

On 10 December 2010, the Commission announced that it had opened formal antitrust proceedings.[60]

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 HeidelbergCement, followed on 1 August by further dismissals of similar appeals by Cemex, Cementos Portland Valderrivas, Holcim (Deutschland) and Holcim and Buzzi Unichem.

2.3.7 *Power cables*[61]

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.[62] In April 2009, both Nexans[63] and Prysmian[64] brought actions against the Commission's decision ordering the inspection. They claim *inter alia* that certain documents were obtained unlawfully.

On 7 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 by no means certain that GS or Prysmian will be fined in this case, with GS now having the opportunity to respond to the allegations put forward in the Commission's statement of objections. At a minimum, however, it is a reminder that private equity firms are not immune from antitrust liabilities in the EU.

2.3.8 *Refrigeration compressors*[65]

On 17 February 2009, the Commission carried out dawn raids at the premises of producers of compressors, used mainly for domestic refrigeration and freezers and

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57 Case COMP/39.520.
58 Commission MEMO/08/676.
59 Commission MEMO/09/409.
60 Commission Press Release IP/10/1696.
61 Case COMP/39.610.
62 Commission MEMO/09/46.
63 T-135/09, *Nexans v Commission* (appeal pending).
64 T-140/09, *Prysmian, Prysmian Cavi and Sistemi Energia v Commission* (appeal pending).
65 Case COMP/39.600.

commercial refrigeration, in several Member States.[66] Dawn raids also took place in the US and Brazil. Tecumseh initiated this global antitrust investigation and is reported to have received "*conditional immunity*" from the Commission and the Brazilian regulator and to have reached a "*conditional amnesty agreement*" with the US DoJ.

2.3.9 *North Sea shrimps*[67]

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.[68]

2.3.10 *Czech electricity and lignite sector*[69]

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 May 2010, the Commission opened a formal investigation into whether Energetický a průmyslový holding and J&T Investment Advisors had obstructed a 2009 dawn raid. In December of the same year, the Commission announced having sent a statement of objections to both companies.

2.3.11 *French generics*

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

2.3.12 *Electrical equipment*[70]

On 20 January 2010, the Commission carried out dawn raids at the premises of producers of Flexible Alternating Current Transmission Systems (FACTS).[71] FACTS are used to increase the power transfer capability of electricity transmission networks.

2.3.13 *Automotive electrical and electronic components*[72]

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.[73] Wiring harnesses link a car's computer

66 Commission MEMO/09/73.
67 Case COMP/39.633.
68 Commission MEMO/09/142.
69 Commission Press Release IP/10/1748.
70 Case COMP/39.459.
71 Commission MEMO/10/28.
72 Case COMP/39.748.
73 Commission MEMO/10/49.

to the various other mechanisms in the vehicle. Inspections were also conducted in the US and Japan.

2.3.14 *French water and sanitation*[74]

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

On 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.

2.3.15 *Polyurethane Foam*[75]

On 27 June 2010, the Commission conducted dawn raids at premises of companies active in the polyurethane foam sector in several Member States.[76] 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.

2.3.16 *Paper Envelopes*[77]

On 14 September 2010, Commission officials carried out unannounced inspections at the premises of several European manufacturers of paper envelopes in France, Denmark, Spain and Sweden. The Commission states that it has reason to believe that the companies may have co-ordinated price increases and allocated customers on several European markets. Several companies have confirmed they are being scrutinized, including Bong Ljungdahl, GPV, InterMail and Tompla.

2.3.17 *Truck Sector*[78]

On 18 January 2011, the Commission carried out unannounced inspections at the premises of companies active in the truck sector in several Member States.[79]

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74 Commission MEMO/10/134.

75 Case COMP/39.801.

76 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.

77 Commission MEMO/10/439.

78 Case COMP/39.824.

79 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.

Daimler and Volvo confirmed they were both being investigated. 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.

2.3.18 *Telefónica/Portugal Telecom*[80]

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.[81]

2.3.19 *Rail freight*[82]

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.

2.3.20 *Container shipping lines*

The Commission has confirmed that, on 17 May 2011, it 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.

2.3.21 *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

80 Commission Press Release IP/11/58.
81 Commission Press Release IP/11/1241.
82 Commission MEMO/11/152.

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.

2.3.22 *Seat belts, 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.

2.3.23 *Natural gas*

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.

2.3.24 *Euro interest rate derivatives*[83]

The Commission has confirmed that, starting on 18 October 2011, its officials 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. The Commission indicated having preliminary concerns that the companies concerned may have engaged in restrictive business practices.

2.4 Ongoing Commission Investigations – Other

2.4.1 *Continental/United/Lufthansa/Air Canada*[84]

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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83 Commission MEMO/11/711.

84 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 *Servier*[85]

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.

2.4.3 *Lundbeck*

On 7 January 2010, the Commission opened a formal antitrust investigation into Lundbeck on the basis of Articles 101 and 102 TFEU.[86] The Commission has stated that it is particularly interested in unilateral behaviour and agreements that would have delayed the entry of generic citalopram, a selective serotonin reuptake inhibitor.

2.4.4 *Areva & Siemens*[87]

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.

2.4.5 *Nexium (esomeprazole)*[88]

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.

85 Case COMP/39.612.
86 Commission Press Release IP/10/8.
87 Commission Press Release IP/10/655.
88 Case COMP/39.801.

2.4.6 *Brussels Airlines/TAP Air Portugal*[89]

2.4.7 *Lufthansa/Turkish Airlines*[90]

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.

2.4.8 *E-Books*

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.

2.4.9 *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.

89 Commission MEMO/11/147, Case COMP/39.860.
90 Commission MEMO/11/147, Case COMP/39.794.

2.4.10 *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.[91]

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).

2.4.11 *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, thereby violating Article 101 TFEU.

The Commission's inquiry follows its previous pharmaceutical sector inquiry,[92] which had revealed that so-called "originator" drug companies may be paying to delay the entry on to the market of generic medicines.

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%.

91 Commission Press Release IP/11/1076 .
92 Commission Press Release IP/09/1098 and Commission MEMO/09/321.

2.5.1.1 *T-33/05 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.

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

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

2.5.1.2 *T‑37/05 World Wide Tobacco 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%.

2.5.1.3 *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.

2.5.1.4 *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.

2.5.2.1 *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 this conclusion. Notwithstanding such dispute, in spite of the interruption, the Court considered that the Commission rightly found that the agreement in which Siemens subsequently participated was essentially the same as the one in which it had participated prior to its interruption therefore forming part of a single and continuous infringement for the purposes of Article 25(2) of Regulation 1/2003, and time begins to run on the day on which the infringement ceases.

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

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

2.5.2.2 *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.

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

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

Both Alstom and Areva appealed on grounds that the Commission erred in its attribution of liability. The General Court found that the Commission had not erred in law in its attribution of liability in its decision. The Commission was correct to find Alstom jointly and severally liable with Areva T&D SA and Areva T&D AG for the

participation of the undertaking in question in the infringement for the period it indirectly held the company, on the basis of the presumption of liability resulting from the fact that the parent company held the entire capital of the subsidiaries and on factual evidence submitted during the administrative procedure. The Court also found that the Commission gave adequate reasons for its finding. Further, according to the Court, the Commission was entitled to attribute liability for the participation of the undertaking in question in the infringement to the legal person who, through the intermediary of its wholly−owned subsidiaries, managed that undertaking.

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

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

2.5.2.3 *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 T-122/07) transferred Reyrolle into the newly-created company VA Tech Schneider High Voltage GmbH (VAS), in which it held 60% of the shares through its subsidiary, the remainder of which were held by Schneider Electric SA.

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

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

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

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

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

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

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

- Reyrolle: €9.45 million.

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

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

2.5.2.4 *T-112/07 Hitachi and Others v Commission – 12 July 2011*
2.5.2.5 *T-113/07 Toshiba v Commission – 12 July 2011*
2.5.2.6 *T-132/07 Fuji Electric v Commission – 12 July 2011*
2.5.2.7 *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 *Copper fittings*
2.5.3.1 *T-375/06 Viega v Commission – 24 March 2011*
2.5.3.2 *T-376/06 Legris Industries v Commission – 24 March 2011*
2.5.3.3 *T-377/06 Comap v Commission – 24 March 2011*
2.5.3.4 *T-378/06 IMI and Others v Commission – 24 March 2011*
2.5.3.5 *T-379/06 Kaimer and Others v Commission – 24 March 2011*
2.5.3.6 *T-381/06 FRA.BO v Commission – 24 March 2011*
2.5.3.7 *T-382/06 Tomkins v Commission – 24 March 2011*
2.5.3.8 *T-384/06 IBP and International Building Products France v Commission – 24 March 2011*
2.5.3.9 *T-385/06 Aalberts Industries and Others v Commission – 24 March 2011*
2.5.3.10 *T-386/06 Pegler v Commission – 24 March 2011*

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

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

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

Company	Fine
Viega GmbH & Co. KG	€54.29 million
Legris Industries SA	€46.80 million * (jointly and severally liable with Comap SA for €18.56 million)
IMI	€48.30 million (jointly and severally liable with Yorkshire Fittings for €9.64 million, with VSH Italia for €0.42 million, with Aquatis for €48.30 million, and with Simplex for €48.30 million)
FRA.BO SpA	€1.58 million

Advanced Fluid Connections	€18.08 million (jointly and severally liable with IBP for €11.26 million and IBP France for €5.63 million)
Kaimer	€7.97 million (jointly and severally liable with Sanha Kaimer for €7.97 million and Sanha Italia for €7.15 million)
Tomkins plc	€5.25 million (jointly and severally liable with Sanha Kaimer for €5.25 million for Pegler)
Aquatis and Simplex	€2.04 million
Aalberts	€100.80 million (jointly and severally liable with each of Aquatis and Simplex for €55.15 million)

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

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

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

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

2.5.4 *T-461/07, Visa Europe Ltd and Visa International Service v Commission – 14 April 2011*

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

In its decision, the Commission considered that Visa had violated Article 101 TFEU[93] by refusing, without objective justification, to admit Morgan Stanley as a member between March 2000 and September 2006. Visa's by-laws contained a rule which prevented applicants who were deemed to be competitors to Visa from becoming members of the Visa scheme. The Commission found that this rule, as applied to Morgan Stanley (which was not in fact a competitor of Visa in the EU in the cards network market but in the US), prevented Morgan Stanley from entering the UK credit and deferred debit/charge card acquiring market and had potential anti-competitive effects in that market. The Commission concluded that the application of the rule did not satisfy the conditions for exemption under Article 101(3) TFEU.

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

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

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

93 Case COMP/37.860.

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.

2.5.5 *Sodium Chlorate*
2.5.5.1 *T-299/08 Elf Aquitaine v Commission – 17 May 2011*
2.5.5.2 *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 its parent company at the time of the facts, 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.[94]

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.

[94] 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).

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.

2.5.5.3 *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.

2.5.5.4 *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.

2.5.6 *Acrylic glass*
2.5.6.1 *T-206/06 Total and Elf Aquitaine v Commission – 7 June 2011*
2.5.6.2 *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.

2.5.6.3 *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.

2.5.7 *Bleaching Agents*
2.5.7.1 *T-185/06 L'Air liquide v Commission – 16 June 2011*
2.5.7.2 *T-186/06 Solvay v Commission – 16 June 2011*
2.5.7.3 *T-191/06 FMC Foret v Commission – 16 June 2011*
2.5.7.4 *T-192/06 Caffaro v Commission – 16 June 2011*
2.5.7.5 *T-194/06 SNIA v Commission – 16 June 2011*
2.5.7.6 *T-195/06 Solvay Solexis v Commission – 16 June 2011*
2.5.7.7 *T-196/06 Edison v Commission – 16 June 2011*
2.5.7.8 *T-197/06 FMC v Commission – 16 June 2011*
2.5.7.9 *T-189/06 Arkema France v Commission – 14 July 2011*
2.5.7.10 *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

2.5.8 *International removals*
2.5.8.1 *T-199/08 Ziegler v Commission – 16 June 2011*
2.5.8.2 *T-204/08 Team Relocations v Commission – 16 June 2011*
2.5.8.3 *T-208/08 Gosselin Group v Commission – 16 June 2011*
2.5.8.4 *T-209/08 Gosselin Group v Commission – 16 June 2011*
2.5.8.5 *T-210/08 Verhuizingen Coppens v Commission – 16 June 2011*
2.5.8.6 *T-211/08 Putters International v Commission – 16 June 2011*
2.5.8.7 *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.[95]

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

95 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).

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.

The Commission[96] as well as Ziegler and Gosselin[97] have appealed the General Court's judgment.

2.5.9 *Lifts and escalators*
2.5.9.1 *T-138/07 Schindler Holding and Others v Commission – 13 July 2011*
2.5.9.2 *T-141/07 General Technic-Otis v Commission – 13 July 2011*
2.5.9.3 *T-142/07 General Technic-Otis v Commission – 13 July 2011*
2.5.9.4 *T-144/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*
2.5.9.5 *T-145/07 General Technic-Otis v Commission – 13 July 2011*
2.5.9.6 *T-146/07 General Technic-Otis v Commission – 13 July 2011*
2.5.9.7 *T-147/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*
2.5.9.8 *T-148/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*
2.5.9.9 *T-149/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*
2.5.9.10 *T-150/07 ThyssenKrupp Liften Ascenseurs v Commission – 13 July 2011*
2.5.9.11 *T-151/07 Kone and Others v Commission – 13 July 2011*
2.5.9.12 *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

96 Case C-440/11.
97 Case C-429/11.

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 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)

2.5.10 *Synthetic Rubbers*
2.5.10.1 *T-38/07 Shell Petroleum and Others v Commission – 13 July 2011*
2.5.10.2 *T-39/07 ENI v Commission – 13 July 2011*
2.5.10.3 *T-42/07 Dow Chemical and Others v Commission – 13 July 2011*
2.5.10.4 *T-44/07 Kaučuk v Commission – 13 July 2011*
2.5.10.5 *T-45/07 Unipetrol v Commission – 13 July 2011*
2.5.10.6 *T-53/07 Trade-Stomil v Commission – 13 July 2011*
2.5.10.7 *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.

2.5.11 *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.

2.5.11.1 *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.

2.5.11.2 *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.

2.5.11.3 *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.

2.5.11.4 *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.

2.5.11.5 *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

2.5.12 *Dutch brewers*
2.5.12.1 *T-234/07 Koninklijke Grolsch v Commission – 15 September 2011*
2.5.12.2 *T-235/07 Bavaria v Commission – 16 June 2011*
2.5.12.3 *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.

2.6 Judgments of the Court of Justice of the European Union

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

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

In a 2005 decision, the Commission fined four companies a total of €75.86 million for a price-fixing and information sharing cartel in the rubber chemicals market: Repsol YPF SA (RPYF), its wholly owned subsidiary Repsol Quimica SA (RQ) and General Quimica SA (GQ) (Repsol Quimica's wholly owned subsidiary) were jointly and severally fined €3.38 million.

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

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

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

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

Liability of the parent company

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

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

Liability of the ultimate parent

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

rules, there is a rebuttable presumption that the holding company exercises decisive influence over the lower subsidiary alleged to have infringed the EU competition rules.

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

Court's final judgment

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

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

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

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

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

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

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

(Greece); and Activision Blizzard Germany GmbH, formerly CD-Contact Data GmbH (Belgium and Luxembourg).

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

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

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

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

2.6.3 *Steel beams*

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

2.6.3.2 *C-352/09 P ThyssenKrupp Nirosta v Commission – 29 March 2011*

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

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

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

The Commission then decided to bring fresh proceedings in respect of those infringements of the ECSC Treaty, applying its substantive rules, even though it had expired on 23 July 2002. The General Court, before which ArcelorMittal and ThyssenKrupp brought actions, annulled the Commission's decision concerning the

subsidiaries of ArcelorMittal Luxembourg because the infringement was time-barred. However, the General Court rejected all the pleas put forward by the parent company ArcelorMittal Luxembourg and by ThyssenKrupp.

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

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

2.6.4 *Monochloroacetic acid*
2.6.4.1 *C-520/09 P Arkema SA v Commission – 29 September 2011*
2.6.4.2 *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.

2.6.5 *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*.

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

2.6.7 *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, however, 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.

2.6.8 *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.

2.6.9 *C-109/10 P Solvay SA v Commission – 25 October 2011*

2.6.10 *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 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 abuse of 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 adopted by the Commission in 1990, which had 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 the 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.

2.7 Policy Developments

2.7.1 *Horizontal Guidelines – 1 January 2011*

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

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

Information exchange

The new Guidelines include a new section on information exchanges between competitors, which covers a wide range of scenarios, including disclosure of information via published materials and coordinated public announcements, through a common third party such as a trade association or via direct communication between competitors. They recognise that information exchanges are a common feature of many competitive markets, and may in many circumstances be pro-competitive. Yet, it is the only "horizontal agreement" discussed in the guidelines for which no safe harbour exists. Consequently, the Guidelines seek to clarify circumstances in which such exchanges will be considered illegal regardless of their competitive effects (*i.e.*, an "object" restriction of competition, such as sharing information on future prices or volumes), and those in which information flows may be permitted, depending on the circumstances. In particular, they draw a distinction between the disclosure of information regarding an individual company's intended future prices or quantities (including future sales, market shares, territories, and sales to particular groups of consumers), which is treated as having the object of restricting competition, and the exchange of historic information, which will be considered in light of its competitive effects.

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

Standardisation

The new guidance on standardisation represents a compromise between the strongly opposing views of the various stakeholders, who were engaged in intense lobbying efforts during the consultation process and in the period leading up to the adoption of

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

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

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

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

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

Standard terms

The new Guidelines contain an expanded explanation of the way in which the Commission assesses agreements on industry standards and standard contractual terms. They state that standard contractual terms will not usually give rise to concerns if they: (i) are established through a transparent and inclusive process; (ii) are non-binding and effectively accessible for anyone; (iii) are not likely to become a de facto industry standard; and (iv) do not relate to price-sensitive aspects of competition (such as prices, rates, discounts, rebates, and interest) or important characteristics of consumer goods or

services. If an actual or potential restriction of competition does arise, it might be possible to justify its exception from the Article 101 TFEU prohibition if the standard terms give rise to countervailing benefits, such as the facilitation of price comparisons by consumers (and so lower switching costs for consumers) and/or the reduction barriers to entry for new competitors. The Guidelines also now cover joint wording of insurance policies which, since 1 April 2010, are no longer covered by the sector-specific insurance block exemption.

Joint ventures

The consultation draft included a useful statement according to which a parent company exercising decisive influence over a joint venture would be considered by the Commission to be part of the same economic entity, such that agreements between them fall outside Article 101 TFEU. In other words, in the context of joint ventures held for 50% by each of two parents, the joint venture would be considered a single economic entity with either parent. The Commission has removed this guidance from the final version of the Guidelines, citing the need to wait for the outcome of appeals that are pending before the EU courts in relation to the "single economic entity" doctrine.

2.7.2 *The Specialisation and R&D Block Exemptions – 1 January 2011*

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

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

2.7.3 *Commission Actions for Damages*[98]

On 18 April 2010, the Commercial Court of Brussels issued its highly anticipated judgment in the first ever cartel civil damages claim brought by the Commission on

[98] Commission Press Release IP/08/998.

behalf of the EU, in relation to damages allegedly suffered in Belgium and Luxembourg by the European institutions as a result of the cartel among elevator manufacturers it had found in its 2007 *Elevators and Escalators* decision, which at the time of its issuance imposed the largest cartel fine ever by the Commission.

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

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

- Lack of international competence of the Court to decide on the liability of claimants based in Luxembourg, and to adjudicate Luxembourg contracts in which a choice for Luxembourg courts has been made;

- Lack of admissibility of the claim on the basis that the Commission was not properly authorized to institute the claim or represent other EU institutions;

- Absence of proof of causality and damages; and

- Infringement of TFEU and ECHR fundamental rights related to a fair trial and impartial judge, in view of the fact that the Commission investigated and found the elevator cartel that is now the basis for its private damages claim.

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

Regarding the Commission's representation powers, the Commercial Court asked the CJEU to clarify the relationship between the TFEU, which exclusively designates the Commission as representing the EU in law, and the Financial Regulation, which provides that in relation to administrative matters concerning their functioning, the EU institutions can act in law on their own behalf. The Commercial Court also asked the CJEU whether the Commission should not have obtained a written mandate from the institutions to represent them. Two further questions from the Commercial Court for the CJEU address relate to i) the defendants' right to a fair trial in light of the Commission's capacity as prosecutor and civil claimant and the fact that national courts

are bound by a Commission cartel decision, and ii) and the ability of the Commission and other EU institutions to recover damages in cartel cases if the Commission cannot claim cartel damages without breaching the right to a fair trial. Pending the resolution of these questions, the Court postponed judgment on the other issues.

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

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

2.7.4 *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;
- 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.

Separately from the published Best Practices, however, the Commission has been under pressure to disclose its internal procedural guidelines known as the ManProc. Practitioners have argued that the Best Practices do not reveal how the Commission actually aims to operate in antitrust and merger proceedings, and that disclosure of the internal ManProc could help confirm that the Commission handles in line with its Best Practices. Although the Commission has resisted disclosing the ManProc in full, citing a risk of undermining the effectiveness of its investigations, it is understood that it will disclose part of the manual in due course.

3. ARTICLE 102 TFEU

3.1 Commission Decisions

3.1.1 *Omnis/Microsoft – 1 December 2010*[99]

On 1 December 2010, the Commission issued a decision rejecting a complaint by Omnis Group ("Omnis") against Microsoft. That complaint, lodged in December 2009, alleged that Microsoft abused a dominant position and engaged in anti-competitive agreements in the market for Enterprise Resource Planning ("ERP") or the broader market for Enterprise Application Software ("EAS").

With respect to Article 102 TFEU, Omnis claimed that Microsoft had abused its dominance in the relevant markets, *inter alia*, by (a) refusal to deal with Omnis, (b) a refusal to supply information to Omnis, (c) discriminating against Omnis, and (d) illegal tying with a view to foreclosing the market for ERP or EAS software, and in particular to eliminate competition by Omnis. Omnis had not provided details substantiating these allegations. With respect to Article 101 TFEU, Omnis alleged that Microsoft had entered into an illegal strategic partnership with the Romanian Government that conferred an illegal monopoly on Microsoft in Romania.

The Commission concluded that the complaint did not provide enough evidence showing that Microsoft held a dominant position in the relevant market, or that Microsoft had entered into a restrictive agreement with the Romanian Government.

The Commission defined the relevant product market with reference to its previous merger decisions in *Oracle/Peoplesoft* and *SAP/Business Objects*. In both decisions, the Commission had left open whether the market included all EAS software, or whether ERP software is considered a sub-division of the EAS market. It also noted that these markets were worldwide in geographical scope. The Commission concluded that "*Microsoft does not appear to have significant market shares on either of these markets and therefore the assessment of the case will not change regardless of whether the relevant market is that of EAS or ERP software*," adding that there was rigorous competition on both the EAS and ERP software markets. In light of Microsoft's low market share in these markets, the Commission did not look into the allegations of abusive conduct, and rejected those claims.

With respect to the allegations of cartel behaviour by Microsoft, the Commission found that the relationship between Microsoft and the Romanian Government should be assessed under relevant public procurement laws rather than under Article 101 TFEU. Furthermore, it found that, in any event, the contracts did not contain any concrete provisions supporting the allegations made by Omnis.

Omnis has lodged an appeal with the General Court seeking annulment of the Commission's rejection decision.[100]

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99 Case COMP/39784.

100 The reference to the case is Case *T-74/11 – Omnis Group v Commission* (OJ 2011 C95/10).

3.1.2 *Si.mobil/Mobitel – 24 January 2011*[101]

On 24 January 2011, the Commission published its decision rejecting a complaint brought by Si.mobil against Mobitel in August 2009, regarding the Slovenian mobile communications retail and wholesale markets.

With respect to the retail market, Si.mobil alleged that Mobitel engaged in abusive conduct leading to foreclosure, in particular, through a margin squeeze. That allegation was followed by a supplementary submission alleging predatory pricing. However, the Commission considered that these issues were already being actively investigated by the Slovenian competition authority (UVK) was actively dealing with the case. It did not accept allegations about institutional shortcomings in the UVK or that the UVK was not well placed to deal with the case.

In relation to the alleged abuses on the wholesale market, Si.mobil complained that Mobitel reinforced the effects of its actions at retail level by applying a foreclosure strategy at the wholesale mobile access and call origination (MACO) market, by enlarging the pool of on-net calls so as to inhibit the possibility for Si.mobil to compete for wholesale customers, *inter alia*, by selling wholesale MACO at unrealistically low rates. In addition, Si.mobil claimed that Mobitel discriminated amongst wholesale buyers and making wholesale on-net calls artificially cheap. However, the Commission concluded that there was insufficient EU interest in conducting a further investigation given the limited impact that the alleged conduct would have on the functioning of the internal market (the anti-competitive effects being mostly confined to Slovenia), the complexity of the investigation required and the limited likelihood of establishing proof of an infringement of Article 102 TFEU in light of the limited evidence put forward by Si.mobil.

3.1.3 *Telekomunikacja Polska – 22 June 2011*[102]

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,[103] 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

101 Case COMP/39707.
102 Case COMP/39525.
103 Commission MEMO/09/203

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.[104]

3.1.4 *Boehringer Ingelheim – 6 July 2011*[105]

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).

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[106] 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.

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104 Commission Press Release IP/10/213.

105 Case COMP/39.246.

106 Commission Press Release IP/09/1098.

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.

3.2 Ongoing Commission Investigations

3.2.1 *Alcan*[107]

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 *Standard & Poor's*[108]

On 6 January 2009, the Commission initiated antitrust proceedings in *European Fund and Asset Management Association (EFAMA) and others v Standard & Poor's*. On 19 November 2009, the Commission sent a statement of objections to Standard & Poor's ("S&P") in which it argues that S&P is abusing its dominant position by requiring financial institutions to pay licensing fees for the use of International Securities Identification Numbers ("ISINs") in their own database. The ISIN is a standard developed by the International Organization for Standardization (ISO) to provide unique cross-border identification for securities (shares, bonds, etc.) issued throughout

107 Commission MEMO/08/111; Case COMP/39.230.
108 Commission MEMO/09/6; Case COMP/39.592.

the world. ISINs are attributed by the National Numbering Agency (NNA) of the country of issuance.

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

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

The alleged infringement consists of an abuse by S&P of its monopoly position by requesting licensing fees from financial institutions located in the EU for the use of US ISINs and certain descriptive elements attached to these numbers each time such an ISIN is used in order to access value-added financial information provided by information services providers. Allegedly, financial institutions are obliged to pay for a service that they are not interested in and do not actually use, *i.e.,* the S&P's ISIN database as such.

On 16 May 2011, S&P offered to change its pricing policy in Europe with regard to the distribution of US ISINs. Under the commitments, S&P offers to distribute US ISINs separately from other added value information to information service providers for redistribution in Europe and to financial institutions wishing to source US ISINs directly from S&P for a maximum initial price of $15,000 per year. Moreover, S&P committed to abolish all charges to users that source US ISINs not directly from S&P but from information service providers.

The commitments would be valid for five years, which is the usual duration of such commitments in antitrust cases. S&P also offered to submit to the Commission a yearly report on the implementation of the commitments.

3.2.3 *IBM mainframe business*[109]
3.2.3.1 *IBM/T3 & TurboHercules*[110]
3.2.3.2 *IBM/Spare parts*[111]

On 20 September 2011, the Commission invited interested stakeholders' comments on commitments offered by IBM aimed at ensuring the availability of certain spare parts and technical information on reasonable and non-discriminatory terms over five years.

The purpose of these commitments is to resolve antitrust concerns by the Commission that IBM may have imposed unreasonable conditions for supplying competing mainframe maintenance service providers with IBM spare parts, thereby putting independent service providers at a disadvantage *vis-a-vis* IBM's own maintenance

109 Commission Press Release IP/10/1006.
110 Case COMP/39.511.
111 Case COMP/39.692.

services. The Commission had opened a formal investigation into IBM's spare parts practices in July 2010 on its own initiative.

Under the draft commitments now offered, IBM undertakes to ensure the prompt availability of certain spare parts, as well as technical information, to Third Party Maintainers in the EEA on the same terms as those enjoyed by its own mainframe maintenance service, for a period of five years.

Earlier, the Commission had already closed a parallel investigation into IBM's mainframe practices. Acting upon complaints from T3, TurboHercules and Neon Enterprise Software – some of whom are understood to be closely linked to Microsoft – the Commission in July 2010 opened another formal investigation into whether IBM abusively tied its dominant mainframe operating software with its mainframe hardware, thereby foreclosing competition from other mainframe hardware manufacturers as well as suppliers of mainframe emulator software, such as TurboHercules, whose software allows customers to combine multiple PCs to serve as a single (emulated) mainframe computer. The three competitors withdrew their complaint in July and August, prompting the Commission to close its investigation.

3.2.4 *Slovak Telekom*[112] *and Deutsche Telekom*[113]

In April 2009, the Commission initiated an antitrust investigation against the Slovak incumbent telecoms operator, Slovak Telekom, for suspected breaches of Article 102 TFEU. The investigation focused on suspicions of abusive behaviour that may prevent or hinder competition on broadband internet access and other electronic communications markets in Slovakia and may include refusal to supply, margin squeeze and tying. This followed announcements by the Commission in 2008 of dawn raids.[114]

By a Commission decision of 3 September 2009, Slovak Telekom was ordered to provide information in the framework of this case. On 13 November 2009, Slovak Telekom brought an action whereby it sought the annulment of this decision. It grounded its action on the fact that as the alleged offence took place before Slovakia became a member of the EU, the Commission did not have power to apply EU law in this case and that to do so would be an infringement of the principle of procedural fairness enshrined in Article 41(1) of the Charter of Fundamental Rights. Slovak Telekom also submitted that the Commission decision breached the principle of proportionality as the Commission failed to establish the required link between the requested pre-accession information and the allegedly illegal conduct after 1 May 2004.

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

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112 Case COMP/39.523.

113 Commission Press Release IP/10/741.

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

A parallel investigation into Polish incumbent operator Telekomunikacja Polska was concluded on 22 June 2011, when the Commission found that Telekomunikacja Polska had abused a dominant position, imposing a fine of €128 million (*see supra*).

3.2.5 *Les Laboratoires Servier (perindopril)*[115]

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

This investigation was announced on the very same day that the Commission published the final report from its pharmaceutical sector inquiry. In October 2009, Commissioner Kroes again warned that her staff were "*capitalising on our pharmaceuticals sector enquiry with new cases*" in the coming months; a week later dawn raids were confirmed in France by Sanofi-Aventis, Teva, Novartis, Sandoz, Ratiopharm, and Ranbaxy for potential infringements of Articles 101 and 102 TFEU.

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

3.2.6 *Thomson Reuters*[116]

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,

115 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

116 Commission Press Release IP/09/1692.

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.

3.2.7 *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.

3.2.8 *Versata Software/SAP*

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

ERP software comprises "back-room" critical applications that manage the optimal use of enterprise resources such as employees, assets and finances. This includes financial management systems,[117] enterprise project management[118] and human resources.[119]

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

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

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

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

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

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

3.2.9 *Nexium (esomeprazole)*[120]

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.

3.2.10 *Google*[121]

On 30 November 2010, the Commission formally opened three separate antitrust proceedings into allegations that Google has abused its dominant position in online search officially launching what many see to be the next high profile battleground in antitrust enforcement. The proceedings follow complaints filed in February from Foundem (a member of an organisation called ICOMP which is funded partly by Microsoft), Microsoft's Ciao!, and 1plus V.[122]

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

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

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

120 Case COMP/39.801.

121 Commission MEMO/10/47, Commission Press Release IP/10/1624.

122 Case COMP/39.740, Foundem, Case COMP/39.768 Ciao, and Case COMP/39.775 1plusV.

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.

- 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, complaints from two German companies – map service provider Hot-Map and listings association VfT, Dutch football website Elfvoetbal, French company Interactive Labs, German, and Italian site NNTP.it have been added to the investigation.

3.2.11 *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.

3.2.12 *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.

3.2.13 *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,[123] 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.

3.2.14 *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.

123 Commission MEMO/09/518.

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.

3.2.15 *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 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 will therefore reopen its investigation, taking into account the General Court ruling.

3.3 Judgments of the General Court

There were no Article 102 TFEU judgments from the General Court in the last 12 months. Judgments relating to practice and procedure are analysed in Section 5.

3.4 Judgments of the Court of Justice of the European Union

3.4.1 *C‑52/08 Konkurrensverket v TeliaSonera Sverige AB – 17 February 2011*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4.2 *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 of the 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 of the 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.

4. MERGERS

4.1 Commission Phase II Decisions

4.1.1 *Unilever/ Sara Lee Body Care – Notified: 21 April 2010 / decision: 17 November 2010*[124]

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

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

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

4.1.2 *Syngenta/ Monsanto's Sunflower seed business – Notified: 28 April 2010 / decision: 17 November 2010*[125]

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

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

In first phase, the investigation focused on the breeding and commercialisation of sunflower seeds and sunflower seed treatment products in Europe as the proposed transaction would combine two leading sunflower seed suppliers active in Europe. Both are strong in the breeding of new sunflower varieties and in the commercialisation of sunflower seeds. The Commission claimed removal of an important competitor may

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124 Case COMP/M.5658.
125 Case COMP/M.5675.

have a negative impact on the level of innovation, leading to a reduction of choice for customers and to an increase in prices for sunflower seeds. In addition, foreclosure concerns were raised with regards to sunflower seed treatment products. However, the parties did not offer any remedies in Phase I, asserting that the concentration created no competition concerns.

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

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

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

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

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

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

The Commission did not issue a statement of objections.

4.1.3 *Olympic Air/ Aegean Airlines – Notified: 24 June 2010 / decision: 26 January 2011*[126]

On 26 January 2011, the Commission prohibited the proposed merger between Greek airlines Aegean Airlines and Olympic Air, following an in-depth Phase II investigation. This is the first prohibition of a concentration by the Commission since the *Ryanair/Aer Lingus* decision of 2007.

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

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

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

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

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

126 Case COMP/M.5830.

4.1.4 *Hoffman – La Roche / Boehringer Mannheim – 3 May 2011*[127]

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 timespan 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.

4.1.5 *Votorantim/ Fischer – 4 May 2011*[128]

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

127 Case COMP/M.950.
128 Case COMP/M.5907.

able to increase prices and decrease output post transaction, without being counterbalanced by the remaining competitors. In addition, the Commission could not 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.

4.1.6 *SC Johnson/ Sara Lee household insect control business – 9 May 2011*[129]

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 request pursuant to Article 22 of the Merger Regulation. 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.

4.1.7 *UPM-Kymmene/ Myllykoski – 13 July 2011*[130]

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.

129 Case COMP/M.5969.

130 Case COMP/M.6101.

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.

4.1.8 *Caterpillar/ MWM – 19 October 2011*[131]

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 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.

131 Case COMP/M.6106.

4.1.9 *Seagate/ Samsung HDD – 19 October 2011*[132]

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.*, the parties to the *Western Digital/ Hitachi* transaction which the Commission is also reviewing). 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 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 infra*).

4.2 Commission Phase II Investigations

4.2.1 *Western Digital/ Hitachi – 30 May 2011*[133]

On 30 May 2011, the Commission opened an in-depth investigation into the following two transactions: (i) the acquisition of the HDD business of Samsung by Seagate Technology; and (ii) the acquisition of the storage business of Hitachi by Western Digital Corporation.

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132 Case COMP/M.6214.

133 Case COMP/M.6203.

Because of the priority rule the Commission follows, the *Western Digital/Hitachi* review has to take into account the *Seagate/Samsung* deal (which was unconditionally cleared on 19 October 2011; *see supra*).

The Commission found that for 3.5" desktop HDDs, the only remaining competitor would be the combined Seagate/Samsung entity, and for 2.5" mobile HDDs, the merged entity would only face Seagate/Samsung and Toshiba. In addition to a reduction of price competition, the market investigation showed that the proposed concentration would impact innovation and that there was a risk of coordination between HDD manufacturers. The market investigation also showed that the combined entity would source fewer heads from the merchant market which may impact TDK's ability to invest in the development of more innovative heads and Toshiba's ability to compete in the HDD market. Lastly, the market investigation revealed concerns that the proposed transaction would reduce the available sources of HDDs to the detriment of ESD manufacturers so as to strengthen the combined entity's leading role in the ESD market.

Western Digital received a Statement of Objections in August 2011 and offered commitments to the Commission in October 2011. The Commission is currently market testing the commitments that Western Digital has offered. The current provisional deadline is 30 November 2011.

On 8 August 2011, Western Digital lodged an appeal to the General Court claiming that (i) the Commission lacked the powers to adopt a priority rule based on the date of notification of a concentration, (ii) the Commission committed an error of law and violated the general principles of fairness and good administration by applying the priority rule, (iii) the Commission breached Western Digital's legitimate expectations that the proposed acquisition would be assessed against the market structure that prevailed when it was signed, announced and pre-notified to the Commission, and (iv) the Commission breached the principles of good administration, fairness, proportionality and non-discrimination, by imposing additional burdens on Western Digital, and by not disclosing the fact that there was a parallel transaction affecting the same relevant markets.

4.2.2 *Deutsche Börse/ NYSE Euronext – 4 August 2011*[134]

On 4 August 2011, the Commission opened an in-depth investigation into the proposed merger between Deutsche Börse AG and NYSE Euronext Inc, two leading stock exchange groups active worldwide. The Commission's initial market investigation identified a number of competition concerns, particularly in the field of derivatives trading and clearing. It thus found that:

- The removal of such an important competitor would have a negative impact on innovation in derivatives products and technology solutions; and

- Entry by rival derivatives platforms would be made more difficult in a market already characterised by high barriers to entry.

134 Case COMP/M.6166.

The Commission's market investigation also identified concerns in a number of other areas (*e.g.*, equities trading and settlement and index licensing).

On 5 October 2011, the notifying parties confirmed having received a Statement of Objections, and a hearing took place in late October.

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

4.3.1 *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. PRACTICE & PROCEDURE

5.1 Commission Decisions

5.1.1 *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.[135] 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.[136] 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.[137] That fine was confirmed by a judgement of the General Court (*see infra*).[138]

5.2 Judgments of the General Court

5.2.1 *T-141/08 E.ON Energie v Commission – 15 December 2010*

On 15 December 2010, the General Court issued a judgment confirming the Commission's groundbreaking fine of €38,000,000 imposed on E.ON Energie for breaking a Commission seal during dawn raid inspections.

In connection with a Commission investigation into alleged anticompetitive practices on the German electricity market, the Commission carried out dawn raid inspections at the Munich offices of E.ON Energie AG in May 2006. As the inspection carried over to the next day, Commission officials sealed the room and took the key to the door. However, there were approximately 20 other keys and the Commission seal appeared to be broken.

The Commission issued a decision fining E.ON Energie on 20 January 2008.

On appeal by E.ON Energie, the General Court held:

- As a matter of law, the Commission was entitled to apply a negligence standard. E.ON Energie was required to take all necessary measures to prevent any tampering with the seal, having been clearly informed of both the significance of the seal and the consequences of its breach.

- The fine imposed on E.ON Energie was not disproportionate to the infringement. The fine amounted to approximately 0.14% of the company's turnover. The court held that the Commission fine can take into account the serious nature of the infringement (*i.e.*, breaking the seal), the size of the company, as well as ensuring the deterrent effect of the fine.

135 Commission MEMO/10/134.
136 Commission Press Release IP/10/691.
137 Commission Press Release IP/08/108 and Commission MEMO/08/61.
138 Commission MEMO/10/686.

5.2.2 *T-427/08 CEAHR v Commission – 15 December 2010*

On 15 December 2010, the General Court annulled a Commission Decision of 10 July 2008 rejecting a complaint by Confédération Européenne des Associations d'Horlogers-Réparateurs (CEAHR) alleging violations of Article 101 and 102 TFEU in connection with the refusal by watch manufacturers to supply spare parts to independent watch repairers.

The Commission decision rejected the complaint due to lack of Community interest. In the decision, the Commission considered that: (i) the complaint concerned a market of limited size and economic importance; (ii) there was no evidence suggesting the existence of an infringement, and that it was likely that the selective distribution schemes were covered by the block exemption for vertical agreements; (iii) repair services and spare parts did not constitute independent relevant markets and rather had to be assessed within the wider market for luxury watches; (iv) the allocation of further resources to the investigation was unlikely to permit the Commission to identify any infringement; and (v) national authorities and courts are well placed to deal with such complaints.

As the starting point in its judgment, the Court observed that the Commission does not enjoy unlimited discretion to examine complaints, as it reviewed the factors considered in the Commission decision in rejecting the complaint in the instant case.

First, the Court considered market definition of aftermarkets. Upon review of the case law as well as in the Notice on market definition regarding aftermarkets, the Court observed that the Commission had not adequately taken into consideration the relevant principles for the purpose of market definition. In particular, it noted that the decision had not established that consumers (both new consumers and those who already own a luxury watch) had the possibility to avoid a moderate increase in price increases for spare parts by switching to another primary product. The fact that potential purchasers could potentially choose freely between several brands in the primary market was not considered relevant by the Court "*unless it is established that that choice is made, among others, on the basis of the competitive conditions on the secondary market*". As such, the Court held that for there to be a distinct secondary market, it must be shown that a price increase in secondary products/services would not be able to affect the volume of sales in the primary market in such way as to render such increase unprofitable.

Second, on the basis of the foregoing "manifest error of assessment" by the Commission, the Court considered the resulting consequences. Insofar as the contested decision was built on the assumption that there was a single market for "luxury watches, repair services and spare parts", its findings on the low probability of the existence of an infringement were also quashed -- the Commission had relied on that market definition in determining that the agreements were below the relevant threshold to benefit from a block exemption, *inter alia*.

Finally, the Court considered whether national authorities and courts were well placed to deal with the complaint. The Court noted that the conduct at stake affected various national markets. In relation to its own case law, where it previously endorsed the

Commission, the Court distinguished that those cases concerned situations in which the extent of the practices complained of were essentially limited to the territory of a single Member State and proceedings had already been brought before those authorities or courts. Moreover, the Court argued that "*even if the national authorities and courts are well placed to address the possible infringement (...) that consideration alone is insufficient to support the Commission´s final conclusion that there is no sufficient Community interest*". According to the Court, the applicable test is whether *"action at European Union level could be more effective than various actions at national level"*. In the instant case, there were reasons to believe that Commission review would be more effective in this case.

Therefore, the Court annulled the Commission Decision.

5.3 Judgments of the Court of Justice of the European Union

5.3.1 *C-36/09 Transportes Evaristo Molina v Commission – 11 November 2010*

On 11 November 2010, the CJEU issued a ruling dismissing the appeal of Transportes Evaristo Molina against a 2006 commitments decision.

On 12 April 2006, the Commission adopted a decision based on Article 9 of Regulation (EC) 1/2003 addressed to the largest petrol supplier in Spain, REPSOL Commercial de Productos Petroliferos ('REPSOL'), making commitments entered into by REPSOL legally binding.

The Commission had launched a investigation into REPSOL in 2004 and had raised concerns under Article 101 TFEU that the supply contracts of REPSOL foreclosed the market of the supply of fuel to service stations in Spain. Following the commitments decision, the Commission ended its antitrust investigation.

As part of the commitments, Repsol accepted to offer to its service stations a concrete financial incentive to terminate the existing long-term supply agreements and to refrain from concluding further long-term exclusivity agreements. In addition, those operators with whom Repsol had concluded tenancy or usufruct agreements, granting it the ownership of the surfaces built on the operator's terrain, were permitted to re-buy this ownership prior to the termination of the contract. This option could be exercised under certain conditions, most notably the payment to Repsol of a compensatory sum calculated along a formula enshrined in the commitment decision. The decision indicated that all the service stations listed in Annex I of the decision were entitled to this repurchase option. All other service stations that, due to a later Court ruling or due to any other reason, were to fall within its field of application, would also be permitted to exercise the repurchase option. The commitments decision was made available on DG Comp's website on 26 April 2006 and was published in the Official Journal on 30 June 2006.

On 9 August 2006, the monitoring trustee, appointed in accordance with the commitment decision, was contacted by Transportes Evaristo Molina (TEV), a service station operator, which was in a legal dispute with Repsol. Due to the litigation, TEV had not been included in the Annex I list and there was further disagreement on

whether TEV could benefit from the repurchase mechanism. However, on 19 November 2007, following consultations with the Commission, the monitoring trustee eventually affirmed that TEV could indeed benefit from the repurchase mechanism.

TEV nonetheless lodged a request for annulment of the commitment decision on 29 January 2008. The General Court concluded by reference to Article 263(3) TFEU and Article 102 of its Rules of Procedure, that the application had been filed after expiry of the time limit (on 25 September 2006), and dismissed the case.

On appeal to the CJEU, TEV argued: (i) it had only become directly and individually concerned by the contested decision on 19 November 2007, when the monitoring trustee had confirmed that it was an addressee of Repsol's commitments therefore this date should be taken as the starting point for calculating the time limit of Article 263(3) TFEU, and (ii) a "vague redaction" of the Commission decision had given rise to an 'excusable error' on the part of TEV.

First, the Court held that, regardless of the position potential applicants are in vis-à-vis the contested act, the starting date of the time limit under Article 263(3) is the publication or the notification of the act due to the principle of legal certainty. While unforeseeable events, force majeure or excusable errors may exceptionally justify a deviation from Article 263(3) TFEU, such circumstances would not impact the determination of the starting date.

Second, the Court noted that the communication of the monitoring trustee had not changed TVE's ability to act, rather it 'interpreted' the conditions set forth in the Commission commitments decision.

Third, the Court deemed the plea with regard to the 'excusable error' as inadmissible as it had been introduced on appeal to the CJEU.

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