Major Developments and Policy issues in EU Competition Law

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By Tony Reeves Partner, Clifford Chance LLP
MAJOR DEVELOPMENTS AND POLICY ISSUES
IN EU COMPETITION LAW

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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 twelve months.\(^1\)

In this introductory section, a brief overview of some of the main developments in EU competition law is set out then the subsequent sections analyse in detail the main developments in Article 101 of the Treaty on the Functioning of the European Union ("TFEU") ("Article 101"), Article 102 TFEU ("Article 102"), merger control, cases related to practice and procedure and competition law policy developments.\(^2\)

1.1 **Article 101 TFEU**

**Cartels**

The period from April 2012 to April 2013 saw the European Commission ("Commission") issue only three cartel decisions, *Water Management Products*, *Cathode Ray Tubes* and *Iberian Telecoms*. There was also one re-adoption decision, *Gas Insulated Switchgear*.

Considering that the number of cartel decisions was one of the lowest in the last decade, fines were relatively high for the 2012 calendar year, coming in at €1,876 million. This compares to €614 million in 2011.\(^3\) This is explained by the fact that the *Cathode Ray Tubes* fine of €1,471 million has broken the record previously held by the *Car Glass* cartel for the highest cartel fine.

The *Cathode Ray Tubes* decision involved seven producers of tubes for TV screens and computer monitors. Two participants, Philips and LG Electronics now have the dubious honour of holding second and third place respectively in the list of highest cartel fines *per* undertaking. However, it should be noted that the *Cathode Ray Tubes* decision in fact related to two closely linked cartels for TV tubes and computer monitor tubes. Not all of the seven addressees of the decision of 5 December 2012 were implicated in both of the two sub-cartels.

The *Water Management Products* decision, handed down on June 27 2012, was the sixth settlement decision thus far. Flamco and Reflex were fined €13,661,000 for violation of Article 101, including a 10% discount for having settled while the whistle blower, Pneumatex, received full immunity.

The *Gas Insulated Switchgear* re-adoption decision imposed fines of €131,610,000 on Mitsubishi and Toshiba, based on a different sales time period than the original decision as

\(^1\) The period covered by this paper is 1 April 2012 – 31 March 2013.

\(^2\) State aid law is beyond the scope of this paper.

\(^3\) Source: DG Comp Cartel Statistics, updated 22 March 2013.
the General Court had held that the equal treatment principle had been breached when the Commission used a different reference period for those two companies to that used for the other cartelists.

The first decision of 2013 was that of Iberian Telecoms, which fined Telefónica and Portugal Telecom almost €80 million for the inclusion of a non-compete agreement in a transaction giving Telefónica sole control of Brazilian mobile phone operator Vivo, a joint venture between the Iberian telecommunication companies until 2010. The parties revoked the non-compete after four months, as soon as the Commission made its objection known, and had never kept the agreement secret.

**New Cartel Investigations and Statements of Objections**

The Commission has begun investigations into the following sectors in the last year: car air conditioning; plastic pipes and pipe fittings; maritime transport services; and lead recycling.

Statements of objections were received by companies in the investigations into the North Sea shrimp industry (13 July 2012), the computer CD and DVD drives industry (24 July 2012) and the retail food packaging industry (28 September 2012).

**Non-Cartel Article 101 Matters**

Three non-cartel decisions were also issued under Article 101 this past twelve months: Areva & Siemens, English-Language Teaching Books and e-Books. The decision in English-Language Teaching Books rejected a complaint that the sales of English language teaching books had been restricted and minimum prices set between EU Member States, after the Commission had carried out a preliminary investigation. In both Areva & Siemens and e-Books, commitments were offered by the companies concerned and made binding by the Commission after conducting market investigations. No fines were therefore issued under this head.

The Areva & Siemens decision pertained to concerns related to a non-compete clause between the two companies in the civil nuclear technology sector following the acquisition by Areva of a JV, Areva NP, formerly under joint control. The commitments promised to limit the non-compete to three years for Areva NP's core products and services, and to abolish it for non-core products and services.

In the e-Books decision, the commitments offered addressed the Commission's concerns that a change in the way e-books were sold to retailers was engineered to enable publishers Hachette Livre, Harper Collins, Simon & Schuster, Holzbrinck and Penguin to exercise more control over the price of the electronic books. Apple was also implicated as facilitating the collusion. The agreements at issue have now been terminated. Penguin did not partake in the commitment decision but is currently engaged in discussions with the Commission.
New Non-Cartel Investigations and Statements of Objections

Two investigations – P&I Clubs (Marine Insurance Agreements) and e-Payments Standards – have been closed without any further action having been taken.

Statements of objections were issued in investigations in three sectors, all pharmaceutical and related to the delay of the entrance of generic drugs on the market: Perindopril (Servier); Citalopram (Lundbeck); and Fentanyl (Johnson & Johnson and Novartis).

CJEU and General Court Case Law

The General Court's output these last twelve months has slowed in comparison with the previous (record) period covered by this paper. In total, thirty-four cartel-related judgments were handed down so the General Court has remained very busy. Appellants have not been as successful as in previous years. Of those thirty-four judgments, there was no complete annulment of a Commission decision and in only five cases did the General Court grant a partial annulment, reducing the fine imposed on companies in four instances.

One point of note was that three of the cartels that gave rise to appeals at both General Court and Court of Justice of the European Union (“CJEU”) level pertained to the agricultural sector, those being the Banana Importers cartel cases and the Spanish and Italian Raw Tobacco cartel decisions. Spanish Raw Tobacco was one of the first ever cartel decisions in the agricultural sector. As a result of the Common Agricultural Policy, activity in this sector is very heavily regulated, often including legitimate provisions for fixing prices and supply volumes. Cartels are therefore relatively rare. Indeed, in the Spanish Raw Tobacco decision, the Commission imposed a slightly lower fine due to the existence of a Spanish law that may have permitted a certain level of collusion between tobacco processors.

Re-Adoption

The General Court decision of 27 June 2012 in Bolloré was a challenge to the Commission's re-adoption decision addressed to the appellant in the Carbonless Paper cartel. The original decision had been annulled as the Commission had not made it clear in its Statement of Objections that the company was being held liable for both its own participation in the cartel as well as for its subsidiary's involvement. Following the 2009 CJEU judgment, the Commission re-adopted a decision against Bolloré, this time clearly stating that the company was being held liable for both personal and parental liability. Bolloré challenged this based on a number of fundamental rights-focussed arguments, as well as arguing that the Commission's second decision was time-barred and communicated to it unreasonably long after the infringement. The General Court was not convinced by any of these arguments but Bolloré has appealed to the CJEU.
Parental Liability

Parental liability continues to be the source of much litigation. The imposition of such liability was challenged in many cases this year at both General Court and CJEU level, including in the Banana Importers cartel, the Dutch Bitumen cartel, the Calcium Carbide cartel, the Chloroprene Rubber cartel, the Copper Fittings cartel and both the Italian and Spanish Raw Tobacco cartels. Some cases were of particular note, such as the Del Monte (Banana Importers) decision where parental liability was imposed despite the parent only holding an 80% indirect shareholding as a limited partner. The Court, however, was satisfied that decisive influence had been exercised and upheld the Commission's finding.

In the Shell decision from the Dutch Bitumen cartel, the parental liability presumption was affirmed by the General Court even though Shell Nederland had two parent companies – together they were considered as one, with a single 100% shareholding. The existence of intermediary companies between Shell Nederland and the parent companies did not negative the finding of parental liability. In Total, an attempt was made to rebut the parental liability presumption by evidence that supervisory powers over a subsidiary had been delegated to another subsidiary but the Court did not accept this argument. The only successful appeal was in Ballast, although this was not an appeal of parental liability stricto sensu. There, the Commission had not made it sufficiently clear in its Statement of Objections that Ballast was being held liable on the basis of parental liability, thus vitiating the company's right to defence.

Parental liability was also a recurring theme in the Copper Fittings cartel appeals to the CJEU. In the Comap and Legris decisions, it was held that a 99.9% shareholding will raise the presumption of parental liability. Arguments that the presumption was impossible to rebut were dismissed, the Court acknowledging that it was not easy but distinguishing impossibility and difficulty. In Tomkins, the decision of the Grand Chamber was more focussed on the implications of such liability. Despite the Commission's arguments, it was held that the General Court may reduce the fine of a jointly and severally liable parent company when the fine of the subsidiary is reduced. This would appear to be the case, based on this decision, even if the parent company does not itself raise the argument.

In the Raw Tobacco cartel appeals (Spanish and Italian), parental liability came into play. In both, challenges were brought by Alliance One on that basis. In Alliance One (Spain), an argument that the subsidiary was jointly controlled by the appellant and another was rejected by the Grand Chamber of the CJEU on the basis that the Commission had demonstrated that Alliance One had exercised decisive influence. In Alliance One (Italy), the company argued that the Commission had breached the duty to give reasons by not properly responding to the arguments in defence of a decisive influence finding. This was rejected by the Court, which held that the Commission is not obliged to respond to every argument put forward by a company "exhaustively and one-by-one".
Single and Continuous Infringement

Single and continuous infringement arose as an issue in the Acrylic Glass, Zips and Fasteners (Berning decision) and Removal Services cartel appeals. The first two cases were of little novelty, the appellant companies arguing in Acrylic Glass that they had not been involved in all branches of the cartel and in Berning that too much time had elapsed between cartel meetings to be a single and continuous infringement. However, the General Court sided with the Commission in both instances, holding that enough evidence to back up a single and continuous infringement had been advanced by the authority.

The Removal Services decision is of significant interest. Here, the Commission appealed a General Court judgment annulling its decision against Verhuizingen Coppens as the company had not been involved in or aware of one part of the bi-partite cartel. While the Commission had acknowledged the company's limited involvement, it had nonetheless held it liable on the basis of a single and continuous infringement. The General Court had held the Commission was not entitled to do this as it had not demonstrated the company's awareness of the entire activity of the cartel. The CJEU, however, overruled the General Court. It acknowledged that the annulment of part of the decision was well-founded but that complete annulment was erroneous as Verhuizingen Coppens should have been held liable for the part of the cartel of which it was a participant. It therefore itself gave final judgment, breaking the Commission's decision into two parts and fining the company for its participation in one of those branches of the cartel.

Equal Treatment Between Cartels

An interesting argument that arose in two groups of cases in the past twelve months was that of a claim of unequal treatment based on comparisons between separate Commission decisions in similar but distinct cartels. The applicants in both the Italian Raw Tobacco and the Dutch Brewers cartels were of the opinion that they had been unfavourably treated in comparison with the Spanish Raw Tobacco and Belgian Brewers cartelists respectively. The Raw Tobacco argument was dismissed based on two different fact scenarios; a national law unique to Spain had resulted in the Commission imposing a lower fine in that cartel, as it had permitted a certain level of collusion between tobacco processors. In the Dutch Brewers decisions, however, the CJEU was more explicit in emphasising that the Commission, while under an obligation to be consistent in its fine calculation, need not fine companies on exactly identical criteria. The argument that the Commission had not sufficiently compared the Dutch decision with the previous Belgian one was therefore dismissed completely.

Cartel Duration

The past twelve months have seen several appeals mounted on the grounds of cartel duration-based arguments, specifically in the appeals related to the Zips and Fasteners, Natural Gas, Flat Glass, Copper Fittings and Dutch Brewers cartels.
In the Flat Glass appeal, the Kaimer decision from the Copper Fittings cartel and the Dutch Brewers decisions, in question were simple matters of fact and evidence as to cartel duration. In all cases, the Commission's original decision was upheld although in Kaimer, the argument was inadmissible as the CJEU does not rule on fact but only on law.

The Natural Gas cases were also partially fact based. That infringement decision related to gas market allocation by French and German gas companies through an agreement which became operational in 1980 and was abandoned in 2004. The Commission, however, considered that the Article 101 violation continued until 2005. In the case of the French company GDF, the General Court held that the Commission had not provided enough evidence of this and so reduced the fine. For German E.ON, the fine was also reduced but because of incorrect calculation of duration at the other end of the infringement period; the General Court held that agreements between gas companies and local councils were equivalent to a state-imposed exclusive supply system and therefore there was no infringement until these agreements expired in 1998.

In both the Berning (Zips and Fasteners) decision and the Tomkins (Copper Fittings) case, the arguments were more complex. In the former, the General Court was faced with an argument that the Commission's single and continuous infringement theory was flawed as the time between Berning's last appearance at a cartel meeting and the Commission decision was so long that the decision was time-barred. However, the Court agreed with the Commission that Berning had not sufficiently distanced itself from the cartel – despite not attending meetings regularly – and therefore the Commission's duration calculations were correct. In Tomkins (Copper Fittings), the Grand Chamber of the CJEU upheld the interesting decision of the General Court whereby after a simple error of duration decision in the Pegler appeal, that Court unilaterally reduced the fine of Tomkins, its parent, in its separate appeal. The CJEU supported this decision, despite the fact that Tomkins had not itself raised the plea and its appeal pertained to a different period of the cartel, as it was jointly and severally liable with Pegler.

1.2 Article 102 TFEU

The Commission issued three Article 102 infringement decisions in the last 12 months. Two of these were commitment decisions, taken in December 2012. The first was Rio Tinto Alcan which had allegedly abused its dominant position on the market for the licensing of aluminium smelting technology by tying the licensing of this technology to handling equipment.

The second commitment decision involved Thomson Reuters. The Commission had expressed competition concerns because Thomson Reuters was allegedly prohibiting customers from using Reuters Instrument Codes ("RICs") for retrieving data from alternative data providers.
The final Commission decision, in March this year, was the first of its kind. The Commission imposed a fine of €561 million on Microsoft for non-compliance with a commitment. Microsoft had committed to offer users a browser choice screen enabling them to easily choose their preferred web browser. Microsoft had failed to roll out the browser screen from May 2011 until July 2012 resulting in 15 million Windows users in the EU possibly not having seen the choice screen. Microsoft acknowledged that the choice screen was not available during this time.

*Statements of Objections in the Pharmaceutical Sector*

Following the pharmaceutical sector inquiry which was launched in 2008, the Commission has issued Statements of Objections against pharmaceutical companies in two patent settlement cases, both in July 2012. The Commission is now pursuing the *Lundbeck* case only under Article 101. However, it is pursuing Servier under both Article 101 and 102.

In the *Servier* case, the Commission is investigating agreements between Les Laboratoires Servier and a number of its actual or potential competitors. In its Statement of Objections, the Commission details its objections to two specific sets of practices by Servier, which is alleged to be dominant on the market for perindopril. Firstly, Servier acquired the scarce competing technologies used in the production of the drug, allegedly rendering generic market entry more difficult or delayed. Secondly, Servier induced its generic challengers to conclude patent settlement agreements, thus potentially limiting competition. The Commission views these practices as preserving Servier's position in the perindopril market, as the drug was about to reach the end of its patent protection. The oral hearing is scheduled for 15 April 2013.

*Google*

The Google saga – which began in February 2010 when the Commission publically confirmed that it had received three complaints against the company – continues.

On 21 May 2012, Vice-President of the European Commission responsible for competition Joaquin Almunia ("Vice-President Almunia") took the unusual step of publicly announcing an invitation to Google to submit proposals for remedies to address four concerns about Google's business practices. These four concerns relate firstly to Google demoting competing services in its ranking algorithm, thus reducing competitors user traffic dramatically, and simultaneously preferring its own services. Second, to Google copying content from competing vertical search services that it uses in its own offerings, sometimes without attribution. Third, to the agreements Google concludes with partners on the websites of which Google delivers search advertisements which result in *de facto* exclusivity. Fourth, to the restrictions that Google puts on the portability of online search advertising campaigns from its platform AdWords to the platforms of competitors.
On 25 January 2013, Google submitted its proposed remedies on the basis of the Article 9 commitments procedure, which the Commission is now examining to assess whether these remedies appropriately address the four concerns.

It is interesting to note that the Federal Trade Commission in the US ruled earlier this year that Google did not engage in anticompetitive conduct and its "primary reason for changing its look and feel or algorithm was to improve search results".4

Standard Essential Patents

On 21 December 2012, the Commission sent a Statement of Objections to Samsung detailing its preliminary view that Samsung's seeking of injunctive relief against Apple in various EU Member States on the basis of patents that it had (i) declared to be essential to mobile standards ("SEPs"); and (ii) subjected to a commitment to license on FRAND terms, amounts to an abuse of a dominant position. The Commission adopted this position despite Samsung's announcement on 18 December 2012 that it had begun withdrawing the injunctions it had filed against Apple in Europe.

On 3 April 2012, the Commission opened formal investigations into whether Motorola Mobility Inc (which was acquired by Google in 2012) has abused a dominant position by virtue of its seeking to enforce certain of its standard essential patent rights. The Commission received complaints from Apple and Microsoft about Motorola seeking and enforcing injunctions against both companies' flagship products on the basis of patents which it had declared essential to the relevant standards. Therefore, the Commission is investigating whether Motorola has failed to honour the commitments it gave to the relevant standard-setting authorities by seeking injunctive relief and by offering unfair licensing conditions.

Energy Sector

In Gazprom, the Commission opened formal proceedings in September 2012 to determine whether the Russian supplier of natural gas abused its dominant position in the upstream gas supply markets in Central and Eastern Europe. The Commission raised concerns over three potentially anticompetitive practices: (i) whether Gazprom might have divided gas markets by hampering the free flow of gas across Member States; (ii) whether it may have inhibited gas supply diversification; and (iii) whether it may have imposed unfair prices. Following the Commission's opening of the investigation, Russian President Vladimir Putin signed a decree requiring companies to first obtain government clearance before cooperating with foreign investigations.

In December 2012, the Commission opened formal antitrust proceedings to investigate whether Romania's sole power exchange OPCOM and its parent company Transelectrica have abused a dominant position by discriminating against businesses on the basis of

4 Jon Leibowitz, FTC Chairman, 3 January 2013.
nationality or place of business. OPCOM has a requirement that 'spot market' participants on the exchange possess a Romanian VAT registration and are established in Romania. The Commission has concerns that this could deter foreign companies from entering the Romanian electricity wholesale market.

The Commission has also opened formal antitrust proceedings to investigate whether Bulgarian Energy Holding has abused its dominant position in the wholesale electricity market in Bulgaria and other nearby Member States by imposing territorial restrictions.

Finally, in the Commission's on-going investigation (initiated in July 2011) against Czech Electricity Companies ("CEZ") to determine whether it abused its dominant position on the Czech electricity market – in particular by hindering the entry of competitors – CEZ offered to sell its coal-fired power generation capacity by way of remedy.

**CJEU and General Court Case Law**

There were two General Court judgments and three CJEU judgments handed down under Article 102 in the past 12 months.

**General Court**

In *Microsoft v Commission*, the General Court upheld the Commission's decision to impose a periodic penalty payment of €899 million on Microsoft for failing to allow its competitors to have access to interoperability information on reasonable terms. However, the General Court did reduce the fine to €860 million.

In *DEI v Commission*, the General Court annulled the Commission's 2008 decision that Greece had infringed Article 106(1) TFEU ("Article 106(1)") in conjunction with Article 102 by maintaining the quasi-exclusive rights for access to lignite granted to the state-owned electricity company Dimosia Epikhirisi Llektrismou ("DEI"). The decision was annulled because, according to the General Court, the Commission had failed to establish that privileged access to lignite was capable of creating a situation in which, by the mere exercise of exploitation rights, the applicant could have been able to commit abuses of a dominant position.

**Court of Justice of the European Union**

In April 2012, the CJEU handed down its judgment in the case *Tomra Systems et al v Commission*. The Court rejected all of Tomra's grounds of appeal and upheld the judgment of the General Court. In 2006 the Commission fined Tomra Systems €24 million for allegedly abusing its dominant position on the market for reverse vending machines between the period 1998-2002. The CJEU held that the General Court did not make an error of law in its analysis of the Commission's conclusion that there existed an anti-competitive intent to foreclose competition on the market, or in its review of the fine imposed as the Commission’s
practice in previous decisions does not serve as a legal framework for the fines to be imposed in competition matters in the future. Furthermore, the Court dismissed Tomra's claim of a procedural irregularity and an error of law in the assessment of retroactive rebates and also concluded that the General Court had not erred in finding that Tomra's agreements had foreclosed a considerable amount of total demand. The Court held that there was no need to determine an exact threshold of foreclosure of the market beyond which the practices would be deemed abusive.

In July 2012 in the case Compass-Datenbank, the CJEU ruled on a preliminary reference from an Austrian Court on the question of whether a public authority acts as an undertaking, for the purposes of Article 102, where it stores data reported by companies and allows inspections to be made in return for payment, but prevents more extensive use of the data. The CJEU held that this does not constitute an economic activity and therefore Article 102 was inapplicable.

In AstraZeneca v Commission, the CJEU dismissed an appeal brought by AstraZeneca against the judgment of the General Court in 2010 which upheld the 2005 Commission decision fining the undertaking €60 million for abusing its dominant position relating to its best-selling anti-ulcer medicine Losec. Two main abuses were identified, namely making misleading representations before patent offices in a number of countries and requests for deregistration of marketing authorisations for Losec capsules in Scandinavia combined with the withdrawal from the market of Losec capsules and the launch of Losec tablets in those countries. This was allegedly done to prevent the entry of generic products.

This was the first time the CJEU ruled on a Commission decision on abuse of a dominant position in the pharmaceutical sector. The CJEU clarified a number of issues of principle in relation to market definition, dominance and the concept of abuse. In particular, it confirmed that misuses of regulatory procedures can constitute abuses of dominant position in certain circumstances. In the context of the first abuse, the Court found that the assessment of whether representations made to public authorities with the intention of improperly obtaining exclusive rights are misleading must be made in concreto and may vary according to the specific circumstances of the particular case in question. With regards to the second abuse, the Court referred to the "special responsibility" of undertakings which are in a dominant position under Article 102. The Court's judgment makes it clear that in the absence of grounds relating to the defence of legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification, even perfectly legal regulatory procedures may lead to antitrust risk.

1.3

Mergers

During 2012, 283 proposed mergers were notified to the Commission, ending the trend toward an increasing number of notifications in the previous four years (rising from 259 in
In 2012 also, half the number of notifications were withdrawn than in the previous year (five in 2012, ten in 2011).

The Commission initiated ten Phase II investigations during this year, the highest number of Phase II proceedings initiated since 2008. Eight Phase II decisions were taken in 2012, compared to six in 2011, three in 2010 and three in 2009 – but 14 in 2008. Currently, there are three ongoing Phase II investigations, with one proposed transaction being aborted at the Phase II stage in April 2012.

Two Article 8.3 prohibition decisions have been taken so far in 2013, a stark contrast to the one in 2012, one in 2011 and none in 2010, 2009 and 2008.

**Ryanair/Aer Lingus**

It was Ryanair’s third attempt to take over the Irish flag-carrier Aer Lingus but even after the most generous commitments package yet, the Commission prohibited the proposed transaction on 27 February 2013.

The commitments offered by Ryanair included divesture of Aer Lingus’ operations on 43 overlap routes to Flybe and cession of take-off and landing slots to IAG/British Airways at London airports. Additional slot divestures on London-Ireland routes were also offered. However, the Commission deemed these offerings to have fallen short of what was necessary to address the competition concerns. According to the Commission, Flybe did not constitute a suitable purchaser capable of competing adequately with the merged entity and the investigation also showed that IAG/British Airways would not provide sufficient competitive constraint and would have little incentive to stay on the routes beyond the agreed three year period. It was not certain that the commitments would be put in place in a timely manner nor was it certain they would work in practice.

**UPS/TNT Express**

In the market for express deliveries of small packages to another European country, the Commission prohibited the proposed acquisition of TNT Express by UPS on 30 January 2013. UPS offered a number of commitments but these were insufficient. The Commission found that competition would have been restricted in 15 Member States. The number of significant players would have been reduced from two to three and in some cases, customers would have been left with DHL as the only alternative to UPS.

In order to address the competition concerns in these 15 Member States, UPS offered to divest TNT subsidiaries in these countries and, under certain conditions, TNT subsidiaries in Spain and Portugal. It also offered access to its air network for five years. However, potentially suitable purchasers were limited. There was also doubt expressed as to the ability of the purchaser to exert sufficient competitive constraint on the merged entity. The Commission concluded that the remedies proposed fell short of solving the competition concerns raised and therefore, the transaction was prohibited.
Other Phase II Decisions

Between April 2012 and April 2013, the Commission took a total of seven other Phase II decisions: Johnson & Johnson/Synthes; Süd Zucker/ED&F MAN; United Technologies Corporation/Goodrich Corporation; Telefónica UK, Vodafone UK and Everything Everywhere; Universal Music Group/EMI; Outokumpu/Inoxum; and Hutchison 3G Austria/Orange Austria.

The Standstill Obligation

On 12 December 2012, the Commission welcomed a judgment of the General Court in the case Electrabel v Commission. It was the first time that an EU Court ruled on a Commission decision to impose a fine for implementing a concentration of EU dimension without prior notification to – and approval of – the Commission. In June 2009, the Commission established that Electrabel had acquired de facto sole control over Compagnie Nationale du Rhône in December 2003 when it became the largest shareholder. Electrabel argued that the Commission had made a number of errors but the General Court upheld both the finding of a breach of the standstill obligation and the €20 million fine. It is worth noting that neither the fact that Electrabel's acquisition of control was not ultimately found to raise any competition concerns nor the fact that the infringement was committed through negligence was considered sufficient to give rise to a reduction of fine.

Disclosure of Documents Relating to Merger Control Proceedings

On 28 June 2012, there were two judgments handed down by the CJEU regarding the disclosure of documents to third parties relating to merger control proceedings. These were; Commission v Editions Odile SAS and Commission v Agrofert Holdings. Both were appeals by the Commission against General Court judgments annulling the Commission's decisions to refuse access in each case.

The CJEU set aside the General Court's judgment in both cases stating that the Commission was justified in its presumption that the disclosure of documents exchanged with notifying parties and third parties in merger control proceedings undermines both the protection of the commercial interests of the undertakings involved and the protection of the purpose of the investigations.

1.4 Practice and Procedure

Third Party Access to Documents

In EnBW Energie Doden-Wurttemburg v Commission a follow on damages litigant appealed a Commission decision refusing access to documents. The General Court held that the
Commission had conducted a manifest error of assessment and annulled the Commission decision. The Court rejected the Commission's argument that to undertake a concrete, individual examination would have provided an unreasonable administrative burden and held that the Commission had failed to investigate alternative options and to explain in its decision why the amount of work was unreasonable. Furthermore, the General Court held that because the investigation was closed at the time of the request, disclosure could not threaten the investigation and that disclosure would not jeopardise the commercial interests of the parties because they dated from at least five years before – the passage of time is likely to gradually reduce the need for protection on grounds of commercial interests of the information held in case files.

**Insufficient Community Interest**

In the case *Protégé International v Commission*, the General Court upheld the decision of the Commission to reject a complaint by Protégé. Protégé had complained that legal proceedings initiated by Pernod Ricard against it had the aim of eliminating Protégé as a competitor in the Irish whiskey market and that Pernod Ricard had abused its dominant position by refusing to supply whiskey to Protégé.

**Obstruction of Inspection**

In September 2012, KWS failed in its appeal to the General Court regarding a decision by the Commission to fine it and another road construction company €27.36m for infringing Article 101. On 1 October 2002, KWS had refused Commission officials entry into their building and had demanded that they wait until external lawyers had arrived. Access was granted to the Commission after 47 minutes, following the arrival of the police. KWS also refused to grant the inspectors access to a company director's office on the grounds that no relevant documents were present there. As a result of these actions the Commission increased the amount of the fine by 10% on the grounds that KWS had refused to cooperate with the Commission's inspection. KWS lodged an appeal with the General Court to challenge that decision.

The General Court found that the exercise of the right to counsel cannot undermine the proper conduct of an investigation and that the presence of an in-house or external lawyer is not a condition of the inspection's legality. The General Court also found that the refusal to grant access to a particular office constituted a refusal to submit to the inspection. KWS also argued that the increase in the fine by 10% was disproportionate. The General Court found that refusing to permit entry could be considered an aggravating circumstance in the calculation of the fine. The increase of the fine by 10% was not disproportionate given the applicant's conduct and repeated attempts to obstruct the inspection.

**Commission Powers of Inspection**

The Commission carried out inspections at the premises of Nexans and Prysmian (both are active in the electric cable sector) whilst investigating the supply of high voltage underwater/underground cables. The appellants challenged the legality of the Commission's
conduct during inspections in which they took copies of documents and hard drives of computers of certain key individuals and – in the case of Nexans – asked for explanations of documents from a particular individual. The appellants argued that the inspection decision was insufficiently precise as it referred to all cables rather than just the market for high voltage cables and as such amounted to 'fishing expeditions'. Although the General Court found that the Commission's inspection decision lacked the reasonable grounds required to justify an inspection covering all electric cables, it did conclude that the Commission had reasonable grounds for ordering inspections covering high voltage cables. Therefore, in so far as the inspection decision concerned non high voltage cables the General Court upheld the applicants' appeals.

**Intervening Party**

*Schenker AG* applied to the General Court for leave to intervene in support of the Commission in response to appeals which had been brought by eleven air cargo carriers who were fined a total of €799 million for their involvement coordinating surcharges for fuel and security between 1999 and 2006. The application was rejected by the General Court and Schenker appealed to the CJEU. The CJEU ruled that customers of cartel members who wish to bring follow on damages claims cannot, on that specific ground, become an intervening party to appeal proceedings before the EU Courts. The Court ruled that although being a party to such proceedings may provide access to evidence which could assist any damages claim, this was not the purpose of annulment actions – annulment actions are not pursued in order to facilitate bringing civil actions in national courts.

**Broken Seal**

In *E.ON Energie AG v Commission*, the CJEU dismissed all of the grounds raised by E.ON in its appeal against a General Court judgment upholding the Commission decision to impose a €38m fine for breaking a seal during an investigation. This was the first case in which the Commission fined an undertaking for breaching a seal under Article 23(1)(e) of Regulation 1/2003. During unannounced inspections at various energy companies in Germany, the Commission placed a seal on a locked door at E.ON's premises which was broken when the Commission returned the following day. The Commission fined E.ON €38 million for intentional or negligent breach of a seal under Article 20(2) of Regulation 1/2003. E.ON brought an action before the General Court in June 2008 to challenge the Commission's decision. This action was dismissed entirely and E.ON appealed to the CJEU. The CJEU dismissed the appeal in its entirety, holding that the fine was proportionate and noting that it could have imposed a fine of 10% of turnover but only imposed a fine of 0.14%.
1.5  

**Policy Developments**

*Merger Policy*

The Commission has commenced a consultation on a proposal to simplify certain procedures for notifying mergers under the EU Merger Regulation. The proposed changes would allow up to 70% of all notified mergers to qualify for review under the Commission's simplified procedure – this would be approximately 10% more than currently. The market share threshold for treatment under the simplified merger procedures for mergers between firms competing in the same market would be raised from 15% to 20% and for mergers between firms active in upstream and downstream markets, the threshold would rise from 25% to 30%. Additionally, the Commission proposed a reduction in the amount of information required to notify all mergers.

*Procedure for Seizing IT Data in Dawn Raids*

In a Notice largely codifying what has become EU practice in dawn raids in recent years, the Commission set out in March 2013, guidance on how it will seize information held on computers and storage devices when raiding companies suspected of anticompetitive conduct. The Notice states, *inter alia*, that EU officials visiting corporate premises will copy documents in electronic form and take them to Brussels for further sorting if required. The Notice also emphasizes that companies must cooperate fully with inspectors and provide staff to explain how their IT systems work. EU officials are also permitted to keep any storage devices until the end of the raid and copies of documents can be made and taken – in an envelope – for further processing.

*Revised Competition Regime for Technology Transfer Agreements*

The Commission launched a public consultation on 20 February 2013 on its draft proposal for a revised block exemption for technology transfer agreements (TTBER) and for revised accompanying guidelines. A new test is proposed for deciding whether certain provisions surrounding a technology transfer agreement (in particular concerning purchases for material or equipment from a licensor or the use of the licensor's trademark) are exempted from Article 101. The Commission is also proposing applying a market share threshold of 20% up to which agreements between competitors are deemed unproblematic to the situation where, in an agreement between non-competitors, the licensee owns a technology which it only uses for in-house production and which is suitable for the licensed technology. Further proposals include treatment of all exclusive grant backs, all falling outside the scope of the TTBER and termination clauses falling outside the block exemption's safe harbour. The Commission has also proposed Draft Guidelines for technology transfer agreements which include changes in both the settlements sections and the technology pools section.
Non-Renewal of Maritime Transport Antitrust Guidelines

The Commission announced earlier in the year that it will not prolong or renew a set of specific guidelines on the application of Article 101 to maritime transport services. According to the Commission, the principal initial function of these guidelines was to facilitate the transition from a specific to a general competition regime for maritime transport following the 2006 repeal of the liner conferences block exemption regulation. This transitional objective has now been achieved. Therefore, the current maritime guidelines which were adopted in July 2008, will expire on 26 September 2013.

FAQs in the Car Sector

On 27 August 2012, the Commission published a set of frequently asked questions on the application of the EU antitrust rules in the motor vehicle sector. These come as a result of requests from stakeholders and national competition authorities for further practical guidance on the application of the Motor Vehicle Block Exemption Regulation and accompanying Guidelines, published by the Commission in May 2010.
2. **ARTICLE 101 TFEU**

2.1 **Commission Decisions – Cartels**

2.1.1 **Water Management Products**\(^8\) - **27 June 2012**

On 27 June 2012, the Commission fined three producers of water management products used in heating, cooling and sanitation systems for participation in a price coordination cartel on the German market from June 2006 to May 2008. Pneumatex and Reflex also expanded their anti-competitive behaviour to thirteen other Member States for a limited period of three months. The participants informed each other through bilateral contracts of the amount and date of planned price increases and exchanged sensitive market information.

The fine, totalling €13,661,000, took into account the companies' sales of water management products in the relevant markets and the very serious nature of the infringement. However, this sum included a reduction of 10% as the companies concerned fully acknowledged their participation in the cartel as the parties agreed to a settlement. This is the sixth EU settlement case. Furthermore, Pneumatex – the whistle blower – received full immunity under the 2006 Leniency Notice.

The individual fines were as follows:

<table>
<thead>
<tr>
<th>Company</th>
<th>Reduction under the Leniency Notice</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flamco GmbH, Flamco Holding B.V., voestalpine Polynorm B.V. and voestalpine AG (Flamco)</td>
<td>-</td>
<td>€3,870,000</td>
</tr>
<tr>
<td>Reflex Winkelmann GmbH &amp; Co. KG and Winkelmann Group GmbH &amp; Co. KG (Reflex)</td>
<td>-</td>
<td>€9,791,000</td>
</tr>
<tr>
<td>TA Hydronics Switzerland AG (Pneumatex)</td>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

2.1.2 **Gas Insulated Switchgear (Re-Adoption)**\(^9\) – **27 June 2012**

In 2007, the Commission imposed fines exceeding €750 million on twenty undertakings for their participation in a cartel on the gas insulated switchgear ("GIS") market. GIS is a type of electronic equipment used to control energy flows in electricity grids. The cartel was

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\(^8\) Commission Press Release IP/12/704.

\(^9\) Commission Press Release IP/12/705.
operative on the EEA market between 1988 and 2004, commencing with a written agreement between the cartelists in 1988. The undertakings engaged in prohibited behaviour such as bid rigging and minimum prices. Tenders and projects in Europe were allocated according to the cartel's rules. A number of Japanese undertakings were included in the Commission's decision because, as part of the cartel arrangements, European companies agreed not to sell in Japan and Japanese companies abstained from bidding on the European market.

In setting the €751,000,000 fine, the Commission used sales figures for a year different to that used for the other eighteen participants for Mitsubishi and Toshiba, as they had operated via a joint venture for the year in question. The General Court fully upheld the Commission's finding that the two undertakings had violated Article 101 through their participation in the cartel. However, the fine was annulled on the basis that the use of a different year of reference had violated the principle of equal treatment.

For this reason, on 27 June 2012, the Commission re-imposed fines on Mitsubishi and Toshiba for their participation in the cartel. In so doing, it took the General Court's judgement into account, calculating the fines on all the same parameters as the 2007 decision except for the reference year. This decision demonstrates that the Commission will not permit undertakings found guilty of infringing competition law to escape sanction on the basis of procedural shortcomings on the Commission's part.

Both Mitsubishi and Toshiba have appealed the re-adoption decision to the General Court on 12 September 2012 on the basis that the Commission has breached, inter alia, the principles of proportionality and good administration in the re-imposition of fines on the companies by making a number of procedural and legal errors in both its decision and the calculation of the new fine.

<table>
<thead>
<tr>
<th>Company</th>
<th>Original Fine</th>
<th>Re-Adoption Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mitsubishi Electric Corporation</td>
<td>€118,575,000</td>
<td>€74,817,000</td>
</tr>
<tr>
<td>Toshiba Corporation</td>
<td>€90,900,000</td>
<td>€56,793,000</td>
</tr>
</tbody>
</table>

2.1.3 Cathode Ray Tubes\textsuperscript{10} - 5 December 2012

Cathode ray tubes ("CRT") are component parts of older models of television screens and computer monitors. They account for 50-70% of the price of a screen. In 2007, the Commission carried out dawn raids at the premises of manufacturers of cathode ray tubes.\textsuperscript{11}

\textsuperscript{10} Case COMP/39437.
\textsuperscript{11} Commission MEMO/07/453.
Two years of investigation followed and in 2009, a Statement of Objections was issued to a number of companies in the CRT industry.\textsuperscript{12}

On 5 December 2012, the Commission issued its decision, fining the seven international groups of companies a total of €1.47 billion for their participation in the related cartels for over a decade.\textsuperscript{13} The companies fined were Philips, LG Electronics, Chunghwa and Samsung, for participation in both cartels, and Panasonic, MTPD (currently a subsidiary of Panasonic), Toshiba and Technicolor (formerly Thompson) for participation in the television tube cartel only. The cartel involved alleged price fixing, market sharing, customer allocation, capacity and output coordination and exchanges of commercially sensitive information. The cartel was highly organised; the implementation of agreements was monitored through visits to factories and meetings, dubbed "glass meetings", were held on a regular basis. Top-level management meetings to decide on the cartel's orientation were also held, under the guise of "greens meetings" as they were often followed by golf. The companies were aware of the fact their conduct was illegal; documents found during the investigation included warnings to keep the dealings secret. The cartel aimed primarily at addressing the decline of the CRT market as old-fashioned screens were replaced by LCD "flat screens".

This is the largest ever fine for a cartel infringement, although it does pertain to two individual but linked cartels, \textit{i.e.} CRT for TV screens and CRT for computer monitors. As the whistle blower, Chunghwa received full immunity, escaping a total fine of €847,094,000 for its participation in the two cartels. Samsung, Philips and Technicolor all received reductions through the Commission's leniency programme for cooperating with the investigation. One company successfully invoked the inability to pay the fine and duly received a reduction. In addition to their individual fines, Philips and LG Electronics, Panasonic, Toshiba and MTPD and Panasonic and MTPD were fined jointly and severally for the participation of their respective joint ventures in the illicit behaviour.

Philips, LG Electronics, Samsung, Panasonic and Toshiba have all filed appeals. Technicolor has however decided not to challenge the Commission's decision.

The cartel prompted civil litigation beyond the EU, notably through damages actions taken by Nokia both in the UK and the US. These law suits ultimately ended in settlement.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
\textbf{Company} & \textbf{Reduction under the Leniency Notice} & \textbf{Fine (TV tubes cartel)} & \textbf{Fine (Computer monitor tubes cartel)} & \textbf{Fine (Total)} \\
\hline
Chunghwa & 100\% & 0 & 0 & 0 \\
Samsung SDI & 40\% & €81 424 000 & €69 418 000 & €150 842 000 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{12} Commission MEMO/09/525.
\textsuperscript{13} Commission Press Release IP/12/1317.
<table>
<thead>
<tr>
<th>Philips</th>
<th>30%</th>
<th>€240 171 000</th>
<th>€73 185 000</th>
<th>€313 356 000</th>
</tr>
</thead>
<tbody>
<tr>
<td>LG Electronics</td>
<td>0%</td>
<td>€179 061 000</td>
<td>€116 536 000</td>
<td>€295 597 000</td>
</tr>
<tr>
<td>Philips and LG</td>
<td>30%</td>
<td>€322 892 000</td>
<td>€69 048 000</td>
<td>€391 940 000</td>
</tr>
<tr>
<td>Electronics (Reduction only for Philips)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Technicolor</td>
<td>10%</td>
<td>€38 631 000</td>
<td>-</td>
<td>€38 631 000</td>
</tr>
<tr>
<td>Panasonic</td>
<td>0%</td>
<td>€157 478 000</td>
<td>-</td>
<td>€157 478 000</td>
</tr>
<tr>
<td>Toshiba</td>
<td>0%</td>
<td>€28 048 000</td>
<td>-</td>
<td>€28 048 000</td>
</tr>
<tr>
<td>Panasonic, Toshiba</td>
<td>0%</td>
<td>€86 738 000</td>
<td>-</td>
<td>€86 738 000</td>
</tr>
<tr>
<td>and MTPD</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Panasonic and MTPD</td>
<td>0%</td>
<td>€7 885 000</td>
<td>-</td>
<td>€7 885 000</td>
</tr>
</tbody>
</table>

### 2.1.4 Iberian Telecoms – 20 January 2013

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.\(^{14}\) Both companies are the largest operators in their respective home countries, Spain and Portugal, but they have a limited presence on each others' territories. The non-compete agreement came into being during Telefónica's 2010 acquisition of sole control over the Brazilian mobile operator Vivo, which was previously jointly owned by the two Iberian telecoms incumbents. The Commission received a copy of both the agreement and of the non-compete clause, which was to run from September 2010 to the end of 2011. However, when the Commission opened antitrust proceedings against the companies in early 2011, the non-compete agreement was terminated (the Vivo transaction was not affected). A Statement of Objections was sent in October 2011 and the Commission's investigation cumulated with a decision on 23 January 2013 to fine Telefónica €66,894,000 and Portugal Telecom €12,290,000 respectively.\(^{15}\)

The non-compete agreement was seen as a barrier to the creation of a "genuine single market" in the telecoms sector which would protect home markets, harm consumers through higher prices and less choice and delay market integration by preserving the status quo between the companies. However, when fining the companies, the Commission also took into account a number of mitigating factors, including the short four-month duration of the infringement, its

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\(^{14}\) Commission Press Release IP/11/58.

\(^{15}\) Commission Press Release IP/13/39.
termination upon notice that the Commission had begun an investigation and the fact that it
was notified to the Commission.

<table>
<thead>
<tr>
<th>Company</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telefónica</td>
<td>€66 894 000</td>
</tr>
<tr>
<td>Portugal Telecom</td>
<td>€12 290 000</td>
</tr>
</tbody>
</table>

2.2  Commission Decisions – Other

2.2.1  Areva & Siemens – 18 June 2012

On 2 June 2010, the Commission announced an investigation into alleged restrictions of
competition by Areva and Siemens in the civil nuclear technology sector. In 2000, Areva
and Siemens combined their respective activities in that field in a joint venture, Areva NP.
The Commission approved this transaction following a Phase II merger investigation. In
2009, Areva acquired sole control of Areva NP – a transaction that was also notified to and
approved by the Commission.

The Commission's anticompetitive concerns were focused on a non-compete clause agreed
between Areva and Siemens for the period following Areva's acquisition of full control of the
joint venture. The Commission believed that this clause was overly restrictive in scope and
in duration: it prevented Siemens competing on markets where the joint venture acted as re-
seller of Siemens products and, in markets where it sold its own products, while acceptable in
principle, the clause was considered to last too long. The rationale behind the clause was to
prevent Siemens using information gleaned via the joint venture to its advantage in its future
competition with Areva NP. The Commission was of the opinion that due to the dynamic
nature of the market, such information would become useless or irrelevant after three years.

To address the Commission's concerns, Siemens and Areva offered commitments. The
companies offered to limit the non-compete obligation for all Areva NP's own core products
and services to a period of three years after Siemens' exit from the joint venture and to
remove the non-compete completely for non-core products and services. The same
commitments applied to the confidentiality clause agreed between the two parties, insofar as
it had the same effects as the non-compete obligation.

The commitments were market tested in March 2012.  

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17  Commission Press Release IP/12/618.
2.2.2 English-Language Teaching Books – 10 October 2012

In 2010, a Greek company, Floras Bookshops, accused Pearson, Oxford University Press and Burlington Books of restricting sales between EU countries and setting minimum prices for English-language teaching books and filed a complaint with the Commission to this effect. The Commission conducted a preliminary investigation but concluded that it would be "disproportionate" to pursue the matter any further. In a decision of 10 October 2012, it rejected the complaint on the grounds that the conduct was likely to only have a limited effect on the functioning of the internal market. Furthermore, the Greek competition authority had already looked into this area and imposed fines under Greek and EU competition law. The Commission suggested that the national authority would be best placed to deal with any further concerns in this area.

2.2.3 e-Books – 13 December 2012

On 2 March 2011, the Commission confirmed that it had initiated unannounced inspections at the premises of companies active in the e-book (electronic or digital books) publishing sector in several Member States. On 6 December 2011, the Commission announced that it had opened formal antitrust proceedings to investigate whether international publishers Hachette Livre (Lagardère Publishing, France), Harper Collins (News Corp., USA), Simon & Schuster (CBS Corp., USA), Penguin (Pearson Group, United Kingdom) and Verlagsgruppe Georg von Holzbrinck (owner of, inter alia, Macmillan, Germany) had, possibly with the help of Apple, engaged in anti-competitive practices affecting the sale of e-books. 18 Up until that point, the Commission and the UK Office of Fair Trading ("OFT") had together investigated whether these arrangements for the sale of e-books breached competition rules. The OFT, however, closed its investigation on grounds of administrative priority just before the Commission opened formal proceedings.

The Commission also worked closely with the US Department of Justice ("DOJ") in the investigation, the authorities announcing in parallel that five of the parties involved had offered commitments to the Commission and three of these had settled with the DOJ. Penguin did not offer commitments and the market investigation into its conduct continued. The Commission's concerns revolved around the switching from a wholesale model to an agency model for the sale of e-books to retailers. While the agency model had the same key terms (including an unusual most favoured nation clause ("MFN") for retail prices, maximum retail prices and an across-the-board 30% commission to Apple), it allowed publishers to exercise more control over retail prices. The Commission therefore suspected that the move may have resulted from collusion between competing publishers with the help of Apple, the ultimate aim being to raise the price of e-books, a rapidly expanding market, in the EEA.

The four publishers, Hachette Livre, Harper Collins, Simon & Schuster, and Holzbrinck, offered to terminate all existing agency agreements containing price restrictions and MFN

clauses and to refrain from the adoption of agreements containing MFN clauses for five years. They also committed to allow retailers to set the retail prices of e-books for two years in any new agency agreements that would be entered into, on the condition that the overall value of price discounts offered by retailers would not exceed the total amount of commission received from the publisher. Apple promised to terminate its agency agreements with the four publishers plus Penguin, as well as not to enter into or enforce MFN clauses in new or existing agreements for five years. The Commission opened a market investigation on the basis of these commitments.

On 13 December 2012 after conducting a market investigation, the Commission accepted the commitments and made them binding on the four publishers and Apple. While Penguin did not offer commitments like its peers, the Commission did announce that it was engaging in constructive discussions in order to agree on commitments that would enable all of the e-books proceedings to be closed amicably in the near future.¹⁹

2.3  

Public Ongoing Commission Investigations – Cartels²⁰

2.3.1 Smart Card Chips²¹

On 21 October 2008, the Commission carried out dawn raids at the premises of smart card chip producers in several Member States.²² These chips are used in the production of so-called "smart cards", such as telephone SIM cards, bank cards and identity cards. A year later, the Commission followed up on the raid by issuing the parties under investigation with information requests. The companies implicated in the investigation include Infineon, STMicroelectronics, NXP and Renesas.

2.3.2 Cement and Related Products²³

On 4 and 5 November 2008, the Commission carried out dawn raids at the premises of companies active in cement and related products industries in several Member States.²⁴ The Commission then followed up with further dawn raids on 22 and 23 September 2009 on undertakings in Spain.²⁵

On 10 December 2010, the Commission announced it had opened formal antitrust proceedings against these companies.²⁶

¹⁹ Commission Press Release IP/12/1367.
²⁰ 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.
²¹ Case COMP/39.574.
²² Commission MEMO/09/1.
²³ Case COMP/39.520.
²⁴ Commission MEMO/08/676.
²⁵ Commission MEMO/09/409.
²⁶ Commission Press Release IP/10/1696.
On 1 April 2011, the Commission sent an information request to CEMEX. In June, Holcim filed an appeal against an information request sent by the Commission; CEMEX followed suit. On 29 July, the General Court dismissed the appeals for interim suspension from Heidelberg Cement, followed on 1 August by further dismissals of similar appeals by CEMEX, Cementos Portland Valderrivas, Holcim (Deutschland) and Holcim and Buzzi Unicem.

In February 2012, French cement producer Lafarge lodged an appeal also disputing the amount of information requested by the Commission in its investigation of the alleged cartel. However, the appeal was dropped in early March 2013.27

In February 2013, the General Court heard another appeal by CEMEX against the eighth information request the company had received since the formal investigation began in 2010, this time a 67-page questionnaire. It accused the Commission of engaging in a "fishing expedition", criticised both the nature and the volume of data requested and argued that the company was being ordered to process data in a manner that was in fact the task of the Commission in the context of its investigation. There was also an argument based on the deadline imposed to respond to the request and the Commission's failure to translate requests into the various languages of the subsidiaries receiving the questionnaires.

2.3.3 Underwater Cables28

On 28-30 January 2009, the Commission carried out dawn raids at the premises of over a dozen industrial cable companies including Prysmian, Nexans, General Cable, NKT, Hitachi Cable, ABB and Sumitomo Electric.29 These companies are all involved in the manufacture of submarine and underwater electric cables, the product of the alleged cartel. In April 2009, both Nexans30 and Prysmian31 brought actions against the Commission's decision ordering the inspection.

On 6 July 2011, the Commission confirmed that it issued a Statement of Objections to twelve companies. 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 the cartel and related products and services. This serves as a reminder that private equity firms are not immune from antitrust liability in the EU for the actions of companies they hold stakes in.

In June 2012, the Commission conducted a six-day hearing where over twelve companies were given an opportunity to present their defences to the accusation of having violated antitrust law. The participants included cable manufacturers from both Europe and the far East, joint-venture partners and investment firms.

27 CaseT-49/12.
28 Case COMP/39610.
29 Commission MEMO/09/46.
30 T-135/09, Nexans v Commission.
31 T-140/09, Prysmian, Prysmian Cavi & Sistemi Energia v Commission.
2.3.4 North Sea Shrimps\textsuperscript{32}

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.\textsuperscript{33}

On 13 July 2012, the Commission announced that it had sent a Statement of Objections informing four traders (whose names have not yet been disclosed) that they may have infringed Article 101 by colluding to fix prices and allocate markets and customers in at least the Netherlands, Germany, France and Belgium.\textsuperscript{34}

2.3.5 Czech Electricity and Lignite Sector\textsuperscript{35}

From 24 to 26 November 2009, the Commission carried out inspections at the premises of Czech companies active in the electricity and lignite sectors, investigating a potential violation of EU antitrust rules. In December 2010, the Commission announced that it sent a Statement of Objections to Energetický a průmyslový holding and EP Investment Advisors. The Commission imposed a fine of €2.5 million on both companies on 28 March 2012, for obstructing a dawn raid carried out by Commission officials in 2009.

See Section 5, Practice and Procedure, for more information on the litigation that followed the Commission's 2012 fine.

2.3.6 Automotive Electrical and Electronic Components\textsuperscript{36}

On 24 February 2010, the Commission carried out unannounced inspections at the premises of companies that manufacture automotive electrical distribution systems (also known as "wiring harnesses") and other components for automotive electronic and electrical distribution systems.\textsuperscript{37} Wiring harnesses link a car's computer to the various other mechanisms in the vehicle. Inspections were also conducted in the US and Japan.

On 9 August 2012 the Commission opened an investigation into the suspected cartel in the EEA.\textsuperscript{38} This is part of a wider effort to investigate possible cartels in the automotive sector. As such, the Commission carried out unannounced inspections in the occupant safety system sector,\textsuperscript{39} the bearings sector\textsuperscript{40} and the thermal systems sector.\textsuperscript{41}
2.3.7 Polyurethane Foam\textsuperscript{42}

On 27 July 2010, the Commission conducted dawn raids at premises of companies active in the polyurethane foam sector in several Member States.\textsuperscript{43} 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.

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. It did not specify whether Commission officials had visited any of its premises. Kabelwerk, an Eupen-based firm, also confirmed that it had received a questionnaire about the enquiry despite not having been visited.

In March 2011, Recticel announced that it would cooperate with the Commission under the leniency procedure. A Statement of Objections is still awaited.

2.3.8 Paper Envelopes\textsuperscript{44}

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

2.3.9 Truck Sector\textsuperscript{45}

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

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

The dawn raids followed a UK OFT probe into the sector which opened in September 2010 and closed in June 2012 when the national authority handed the case over to the European Commission.

\textsuperscript{42} Case COMP/39801.
\textsuperscript{43} Commission MEMO/10/359.
\textsuperscript{44} Commission MEMO/10/439.
\textsuperscript{45} Commission MEMO 11/29.
2.3.10 **Baltic Rail Freight**\(^46\)

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.

The Commission has opened a formal investigation into the Lithuanian state-owned rail company Lietuvos geležinkeliai. See below, Section 3.2, Ongoing Commission Investigations under Article 102, for more details.

2.3.11 **Container Shipping Lines**

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

2.3.12 **Industrial Engines**

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

In June 2012, Caterpillar announced that it had received formal notification that the Commission had closed its investigation.

2.3.13 **Seatbelts, Airbags (Automotive Occupant Safety Equipment)**

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

These inspections form part of the wider investigation into the automotive industry.

2.3.14 **Natural Gas**\(^47\)

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. It is worried about possible exclusionary behaviour such as market partitioning, obstacles to network access, barriers to supply diversification, as well as possible exploitative behaviour, such as excessive pricing.

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\(^{46}\) Commission MEMO/11/152.

\(^{47}\) Case COMP/ 39816.
The Commission is simultaneously investigating suspected anti-competitive behaviour to the detriment of the upstream suppliers themselves.

On 4 September 2012, the Commission opened formal proceedings investigating whether Gazprom is abusing a dominant position in the upstream gas supply market in Central and Eastern Europe, in violation of Article 102.\(^{48}\) See below, Section 3.2, Ongoing Commission Investigations under Article 102, for more information.

2.3.15 **Euro Interest Rate Derivatives**\(^{49}\)

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

2.3.16 **Bearings for Automotive and Industrial Use**\(^{50}\)

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

On 1 April 2013, it was announced that the Japanese Fair Trade Commission had fined three bearings manufacturers $142.4 million after being ordered to "cease and desist" from fixing prices. These companies are also subject to the European Commission's probe, amongst others. Investigations into this industry are also underway in the US.

2.3.17 **French Water Sector**\(^{51}\)

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

Note that in April 2010, the Commission carried out unannounced inspections at the premises of several French companies active in the water and waste water services markets.\(^{52}\) In the context of those inspections, it fined Suez Environnement and its subsidiary Lyonnaise des Eaux (LDE) €8 million for the breach of a seal affixed by the Commission in the course of the dawn raid\(^{53}\).

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\(^{48}\) Commission Press Release IP/12/937.
\(^{49}\) Commission MEMO/11/711.
\(^{50}\) Commission MEMO/11/766.
\(^{52}\) Commission MEMO/10/134.
2.3.18 **Electricity Sector**\(^{54}\)

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

2.3.19 **Car Air Conditioning**\(^{55}\)

On 22 May 2012, the Commission carried out dawn raids on certain companies active in the thermal systems and related products industry. This industry makes air conditioning and engine cooling products which are sold to car manufacturers.

This inspection is part of the wider, ongoing inquiry into alleged cartels in the car parts sector.

2.3.20 **Plastic Pipes and Pipe Fittings**\(^{56}\)

On 26 June 2012, the Commission conducted unannounced inspections in several Member States at the premises of companies active in the sector of plastic pipes and plastic pipe fittings used in the sewage industry.

2.3.21 **Computer CD and DVD Drives**\(^{57}\)

On 24 July 2012, the Commission announced that it sent statements of objections to thirteen companies which supply optical disk drives in the EEA. These disk drives read or write data on CDs and DVDs. The Commission is concerned that the suppliers have coordinated their behaviour at bidding events organised by two of the major original equipment manufacturers of the disk drives for at least five years.

2.3.22 **Maritime Transport Services**\(^{58}\)

On 6 September 2012, the Commission raided the premises of maritime transport services for cars and construction and agricultural rolling machinery across the Member States. The inspections were in coordination with actions by the US and Japanese Competition Authorities.

2.3.23 **Lead Recycling Sector**\(^{59}\)

On 26 September 2012, the Commission conducted unannounced inspections across several Member States at the premises of purchasers of scrap batteries and other lead scrap for the production of recycled lead.

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54 Commission MEMO/12/78.
55 Commission MEMO/12/563.
56 Commission MEMO/12/549.
58 Commission MEMO/12/655.
59 Commission MEMO/12/722.
2.3.24 Retail Food Packaging

The Commission has confirmed sending statements of objections to thirteen companies in the retail food packaging industry on 28 September 2012, informing them of its preliminary view that they may have participated in a cartel in the EEA over the past eight years.

The undertakings in question manufacture or distribute polystyrene foam trays and polypropylene rigid trays used for packaging food such as meat, fish and cheese in the retail sector. The Commission suspects them of having engaged in price fixing, market sharing, customer allocation, exchanges of commercially sensitive information and bid-rigging, which would directly affect these companies' customers – supermarkets – and thus ultimately the end consumer.

2.4 Ongoing Commission Investigations – Other

2.4.1 Continental/United/Lufthansa/Air Canada

In April 2009, the Commission opened two separate formal antitrust proceedings in relation to the compatibility with Article 101 of cooperation agreements between certain airlines on transatlantic routes. The first investigation concerned 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 related to proposed cooperation between three members of the "Oneworld Alliance" – American Airlines, British Airways and Iberia. The Commission adopted a decision in the Oneworld Alliance case but its investigation into the Star Alliance matter is ongoing.

When opening the investigation, the Commission stated that the "agreements provide for the coordination of the airlines' commercial, marketing and operational activities on transatlantic routes (principally routes between the EU and North America). The level of cooperation in question appears far more extensive than the general cooperation between these airlines and other airlines which are part of [the] alliances. In particular, the parties to each agreement intend to jointly manage schedules, capacity, pricing and revenue management on transatlantic routes, as well as share revenues and sell tickets on these routes without preference between these carriers."

In December 2012, the Commission published a number of commitments proposed by the airlines and began a market investigation as to the suitability of those commitments.

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60 Commission Press Release IP/12/1044.
61 Commission MEMO/09/168, Case COMP/39595.
2.4.2 Perindopril (Servier)\(^{63}\)

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

Furthermore, on the same day, the Commission issued a decision as regards a claim of legal privilege and/or protection of confidential correspondence between Servier and its external lawyers, in the context of an investigation pursuant to Article 20(4) of Regulation 1/2003.

The Commission stated that it was going to open a sealed envelope containing documents that Commission officials found in the course of an inspection between 24 and 27 November 2008 on the premises of Les Laboratoires Servier and Servier SAS. It intended to join the documents to the administrative file once the deadline for lodging an appeal had expired.

On 30 July 2012, the Commission informed Servier and its above-mentioned competitors of its objections to practices potentially delaying the entry of a generic version of perindopril (a cardio-vascular drug) onto the market.\(^{64}\) The objections relate to two specific sets of practices by Servier, which appears to be dominant on the perindopril market. Firstly, Servier acquired the scarce competing technologies used in the production of the drug, allegedly rendering generic market entry more difficult or delayed. Secondly, Servier induced its generic challengers to conclude patent settlement agreements, thus potentially limiting competition. The Commission views these practices as preserving Servier's position in the perindopril market, as the drug was about to reach the end of its patent protection.

This Statement of Objections followed upon the sending of objections to Lundbeck and other generic pharmaceutical companies, and forms part of a wider inquiry into the pharmaceutical sector. Together, the Servier and Lundbeck investigations are the first dealing with so-called "pay-for-delay" agreements.

A three-day oral hearing to allow Servier to present its defence to the Statement of Objections is scheduled for April 15 2013.

This investigation is also listed in Section 3.2, Ongoing Commission Investigations under Article 102.

2.4.3 French Generics

In October 2009, the then Competition Commissioner Kroes warned that her staff was "capitalising on [the] 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 competition law. Mylan has also made known that it

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\(^{63}\) Case COMP/39612.

\(^{64}\) Commission Press Release IP/12/835
is implicated by the investigation. Collusion via the French national generics association is being considered. The Commission has not published any information on these inspections and no Statement of Objections has yet been filed.

2.4.4 Citalopram (Lundbeck)

On 7 January 2010, the Commission opened a formal antitrust investigation into Lundbeck and a number of generic pharmaceutical groups. The Commission stated that it was particularly interested in unilateral behaviour and agreements that would have delayed the entry of generic citalopram, a selective serotonin re-uptake inhibitor typically used as an anti-depressant and Lundbeck’s best-selling medicine.

On 25 July 2012, the Commission sent a Statement of Objections to Lundbeck regarding agreements dealing with citalopram concluded with four generic competitors. The Statement was also addressed to Merck KGaA, Generics UK, Arrow, Resolution Chemicals, Xellia Pharmaceuticals, Alpharma, A.L. Industrier and Ranbaxy, all of which belong to the four competitors. In the Statement, the Commission takes the view that the agreements aimed to prevent the entry of generic citalopram onto the market which became possible upon the expiry of some of Lundbeck’s patents.

Under the agreements, the Commission claims Lundbeck made direct payments to its competitors, bought generic citalopram stock for destruction and guaranteed profits in distribution agreements. In return, the other companies refrained from entering the market with generic citalopram.

An oral hearing of Lundbeck and other generic pharmaceutical companies' responses to the Statement of Objections was held in Brussels on 14 and 15 March 2013.

2.4.5 P&I Clubs (Marine Insurance Agreements)

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

The Commission opened formal proceedings on 26 August 2010, in order to investigate the terms of two separate agreements operated by the P&I Clubs in the framework of the IG, more specifically the International Group Agreement and the Pooling Agreement. The Commission had indicated that it intended to examine whether certain provisions of the agreements may be harming ship-owners and insurers that are not members of IG by lessening competition between P&I Clubs and restricting the access of commercial insurers and/or other mutual P&I insurers to the relevant market.

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66 Commission Press Release IP/12/834.
On 1 August 2012, the Commission announced that it was closing the file as the results of the market investigation were not sufficiently conclusive to confirm the Commission's initial concerns.\(^{68}\)

### 2.4.6 Lufthansa/Turkish Airlines\(^{69}\)

On 11 February 2011, the Commission opened two separate, own-initiative, formal antitrust proceedings in relation to two code-share deals between Lufthansa and Turkish Airlines; and Brussels Airlines and TAP Air Portugal (see below) 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 its reach of services and broaden the choice for its customers.

The Commission considers that such 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. The routes subject to the investigation are Munich-Istanbul and Frankfurt-Istanbul, on which Lufthansa and Turkish Airlines are the major operators.

### 2.4.7 Modafinil (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 the generic Modafinil into the European Economic Area. Modafinil is 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 (registered as 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.

In October 2011, Teva acquired Cephalon, the deal being approved by the Commission when Cephalon offered to divest its generic Modafinil product.\(^{70}\)

### 2.4.8 e-Payment Standards

On 26 September 2011, the Commission announced an antitrust investigation into whether proposed standardisation in the e-payments market could stifle competition and innovation.\(^{71}\)

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\(^{68}\) Commission Press Release IP/12/873.

\(^{69}\) Commission MEMO/11/147, Case COMP/39794.


\(^{71}\) Commission Press Release IP/11/1076.
The investigation follows standardisation efforts by the European Payments Council ("EPC"), which includes representatives of the European banking industry for payments, concerning electronic payments. The Commission is investigating whether the standardisation process related to the development of an electronic payments framework unduly restricts competition. The Commission is in particular examining whether standardisation could prevent entry by payment providers not controlled by a bank and therefore not necessarily represented within the EPC.

On 22 February 2013, Vice-President Almunia announced that, following the abandonment of the electronic payments framework by the EPC, the Commission would close its investigation "because alternative non-bank systems could remain in, or enter the market". Vice-President Almunia pointed out that they will "remain very attentive to the evolution of this sector, in close cooperation with the national competition authorities."

The relevant regulatory framework is currently being revised, and the legislative proposal is expected to be adopted before summer 2013.

2.4.9 Fentanyl (Johnson & Johnson and Novartis)

On 21 October 2011, the Commission, on 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 onto the Dutch market of generic versions of Fentanyl. Fentanyl is a strong pain killer for chronic pain.72

The Commission's inquiry follows its previous pharmaceutical sector inquiry,73 which had revealed that so-called "originator" drug companies may be paying to delay the entry on to the market of generic medicines.

On 31 January 2013, Johnson & Johnson and Novartis received a Statement of Objections from the Commission setting out its preliminary view that the agreements concluded between the parties were in breach of Article 101.74

2.4.10 TAP/Brussels Airlines75

On 13 December 2011, the Commission, accompanied by their counterparts from the relevant national competition authorities, undertook unannounced inspections at the premises of Brussels Airlines and TAP Portugal in Belgium and Portugal. Earlier that year, the Commission started proceedings investigating the code-sharing agreements between the two airlines as well as between Lufthansa and Turkish airlines (see above).

The Commission is concerned that the agreements may go further than the sale of seats on routes where the two companies are expected to compete. Indeed, this is already in itself a departure from the more common form of code-sharing in the industry, whereby an airline

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72 Case COMP/39685.
75 Commission MEMO/11/926.
sells seats on a partner's flights on routes it does not operate itself. The inspections at Brussels Airlines and TAP Portugal are related to the ongoing investigation into the code-share agreements between these airlines.\textsuperscript{76} The particular route under investigation is Brussels-Lisbon, on which Brussels Airlines and TAP Air Portugal are the only operators.

2.4.11 Refrigerants for Car Air-Conditioning Systems\textsuperscript{77}

On 16 December 2011, the Commission opened antitrust proceedings concerning agreements between Honeywell and DuPont for the development of a new refrigerant for air conditioning systems in cars. The new refrigerant, known as 1234yf and intended for use in future car air conditioning systems, was announced as a suitable global replacement for the previous refrigerant R134a, which does not meet new EU rules. The selection of 1234yf is the result of a process conducted under the auspices of the Society of Automotive Engineers, which represents the interests of all groups involved in the automotive sector.

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

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

See also Section 3.2, Ongoing Commission Investigations under Article 102.

2.4.12 European Minibulk and Container Feeder Cooperatives

In January 2012, the Commission opened an investigation into two cooperative schemes of ship owners, European Minibulk eG and Container Feeder eG, after complaints from the market. It was concerned that two aspects of the cooperation schemes, that is, a compensation system for ship owners laying up their vessels (i.e. leaving them idle) and the provision of charter rate recommendations would negatively impact upon competition on the shipping market. The companies involved agreed to drop these aspects from the schemes and the Commission issued a statement closing the investigation on 31 January 2013, without having to open formal proceedings.\textsuperscript{78}

\textsuperscript{76} Commission Press Release IP/11/147.
\textsuperscript{77} Commission Press Release IP/11/1560.
\textsuperscript{78} Commission Press Release IP/13/82.
On 27 January 2012, the Commission opened an investigation to assess whether a transatlantic joint venture between Air France-KLM, Alitalia and Delta, all members of the SkyTeam airline alliance, breached EU antitrust rules.

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

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

At the same time, the Commission decided to close its initial investigation as part of the priority-setting process in light of significant changes in the circumstances on the relevant markets. In the context of this initial investigation, in 2006 it had sent a Statement of Objections to eight SkyTeam members. The outcome of the market test had not allowed the adoption of the commitments proposed by the parties in 2007.

2.5 Judgments of the General Court

2.5.1 MasterCard – 24 May 2012


In 2007, after a lengthy investigation the Commission issued a decision ordering MasterCard to cease applying default cross-border Interchange Fees ("IF") for MasterCard- and Maestro-branded consumer payment card transactions in the EEA. IF are charges per transaction that share the payment system costs between financial institutions participating in a four-party payment card system (typically the cardholders’ and merchants’ banks). They are considered
by the payment networks as an essential part of the payments system. While the Commission did not find the fees to be "illegal as such", it considered that they were restrictive of competition and that MasterCard had failed to satisfy the conditions for individual exemption in relation to the methodology applied in establishing the default IF.

On the day the Commission's decision was handed down, MasterCard almost immediately announced its intention to appeal. The General Court's ruling five years later brought no relief to the payment system provider. The Court upheld the Commission's decision finding that, despite its 2006 initial public offering, MasterCard qualified as an association of undertakings and referring to a commonality of interest in a high IF and an "institutionalised form of coordination" between participating financial institutions. The Court did not consider that the default IF were objectively necessary and decided that they restricted competition between merchant banks by setting a de facto floor on their charges to merchants.

Within hours of the Court ruling, it was made known that MasterCard would appeal to the CJEU. The company continues to defend the payment, claiming that the General Court judgment, if left standing, would in fact "tip the balance decidedly against consumers" and threaten to undermine the entre payment system in Europe.

Visa is also currently the subject of an ongoing Commission investigation in relation to its default cross-border credit IF and Visa Europe-set domestic credit IC. Visa provided commitments to the Commission in 2010 in relation to its debit MIF arrangements.

These cases are of particular importance given the number of commenced and anticipated national probes into domestic default IF arrangements, including in the UK, Germany, Italy, Poland and Hungary. Private litigation has also been initiated in the UK and Belgium. The Commission has also announced that it intends to propose legislation on inter-bank fees for payment cards before summer 2013.

2.5.2 Acrylic Glass – 5 June 2012

Case T-214/06, Imperial Chemical Industries Ltd v Commission – 5 June 2012

In 2006, five producers of acrylic glass (also known as "PMMA"), a component product in cars, DVDs, lenses, household appliances, electronics, baths and showers, were fined €344.6 million for their involvement in a five-year cartel in the EEA. The whistle blower, Degussa, received full immunity and two companies, one of which was ICI, had their fines increased by 50% as they were repeat cartel offenders. All appealed the Commission's decision unsuccessfully and some are in the course of pursuing their cases to the CJEU; Imperial Chemical Industries ("ICI") was the last to be heard in the General Court.

The cartel involved three types of acrylic glass products, but ICI claimed it had only participated in price coordination for two of these. It emphasised that the Commission's incriminating evidence had been based mainly on statements by Degussa, the immunity

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84 Case T-214/06.
applicant. However, the Court felt that the evidence suggesting that ICI had in fact been active in the cartels for all three products was convincing as it was also corroborated by other information, and that at the very least, the company must have been aware of the third strand of the cartel. It therefore agreed with the Commission's theory that the three facets of the cartel made up one single and continuous infringement, for which ICI was as liable as the other four cartelists. This is an example of the General Court's willingness to recognise single and continuous infringements, even in circumstances where some elements of the cartel have not been proven as well as others.

ICl also challenged the basis on which its fine had been calculated, as part of ICI's business had been sold to another of the cartelists during the cartel period. ICI claimed that by not taking this into account, the Commission had effectively set the base fine twice. The Court acknowledged the fact that this was a potentially interesting argument, but in the end dismissed it as the base premise of the claim was incorrect. The Court also refused to reduce the fine on the grounds that the fact the Commission informed ICI of its investigation a year after it informed the other cartelists.

Finally, the Court was unmoved by pleas that the fine should be lessened because the investigative and judicial proceedings had taken so long. ICI had failed to prove that a speedy outcome would have been "significant importance" to it. ICI's claims that it deserved a reduction for having assisted the Commission in uncovering the cartel were also dismissed as ICI had acknowledged that it could have applied for leniency but it failed to do this.

In conclusion, the Court dismissed the appeal in its entirety and upheld the €91 million fine the Commission had imposed on the company in 2006.

2.5.3 Carbonless Paper – 27 June 2012

Case T-372/10, Bolloré v Commission – 27 June 2012

On 20 December 2001, the Commission fined ten companies – Bolloré SA ("Bolloré"), Arjo Wiggins Appleton Plc, Papierfabrik August Koehler AG ("Papierfabrik"), Zanders Feinpapiere AG, Mitsubishi HiTech Paper Bielefeld GmbH, Torraspapel SA, Papeteries Mougeot SA, Distribuidora Vizcaina de Papeles S.L. ("Vizcaina"), Carrs Paper Ltd., Papelera Guipuzcoana de Zicuñaga SA – €313.7 million for their participation in a cartel on the carbonless paper market. Carbonless paper is used to make duplicates of documents, common uses include business forms, delivery dockets and bank transfer forms. The price fixing cartel was suspected to have begun as far back as the early 1980s and continued until as late as Spring 1997, but the Commission confined its investigation to the period between 1992 and 1995 because of a lack of concrete evidence for the time before and beyond this.

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85 Case T-372/10.
All of the companies appealed the decision to the Court of First Instance ("CFI") – now the General Court.87 On 26 April 2007 the CFI handed down its judgement,88 upholding the Commission’s findings as regards the existence and duration of the cartel and completely dismissing all of the appeals bar two, where a reduction of the amount of the fines was ordered.89

Three companies, Bolloré, Papierfabrik and Vizcaina, then appealed the decision of the CFI to the CJEU.90 Confirming the Advocate General’s opinion, the latter two appeals were dismissed and the CJEU considered that the CFI had breached Bolloré’s rights of defence in its judgement of 3 September 2009. That Court had found in its judgement that the Statement of Objections issued by the Commission had not been sufficient to enable Bolloré to know that the Commission was holding it liable for the infringement of its 100% subsidiary, Copigraph as well as its own participation in the cartel – neither the double liability nor the facts upon which the Commission based its objections were clear from the Statement's wording. This meant that Bolloré was unable to defend itself during the administrative procedure. However, despite this defect, the CFI still upheld the Commission’s decision, an action Bolloré claimed and the CJEU confirmed was in breach of its fundamental rights of defence.

The Commission responded to this by sending a new Statement of Objections to Bolloré on 15 December 2009, making it clear both parental liability and direct involvement in the cartel were included. On 23 June 2010, the Commission re-adopted a decision against Bolloré, the €21 million fine a €1.4 million reduction on the original punishment, to take into account the fact that Bolloré did not this time contest any of the participation of Copigraph in the cartel.91 Bolloré lodged yet another appeal three months later, of which the judgment was handed down on 27 June 2012. Bolloré’s arguments were heavily focussed on alleged breaches of its fundamental rights under both the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and the Charter of Fundamental Rights of the European Union ("Charter"), including the right to a fair trial, the right to be heard by those who judge you (no Commission member took part in Bolloré’s hearing), equality of treatment (the parent of another company involved in the cartel had not been sanctioned) and the prohibition on retrospective criminalisation. It also claimed that the Commission's decision was time-barred and that the second Statement of Objections was communicated to it an unreasonable period of time after the actual events, as well challenging the imposition of parental liability. However, none of these arguments found favour with the General Court and the appeal was dismissed in its entirety.

87 Joined Cases T-109/02; T-118/02; T-122/02; T-123/02; T-125/02; T-126/02; T-128/02; T-129/02; T-132/02 and T-136/02.
88 Note that the Carrs Paper appeal (T-123/02) was dismissed in 2006 for being devoid of purpose, as the company had gone into insolvency.
89 Arjo Wiggins Appleton Plc and Papelera Guipuzcoana de Zicuñaga SA benefitted from a reduction.
90 Joined Cases C-327/07P, C-322/07P and C-338/07P.
Bolloré lodged its final possible appeal against the General Court's unfavourable decision on 13 September 2012. It is putting forward three pleas: that the principle of equal treatment and the obligation to state reasons have been infringed; that Article 41 of the Charter and Article 6 of the ECHR (the right to a fair trial) have been violated and; that the General Court breached the principles of proportionality and fairness in its June 2012 decision.

2.5.4 **Zips and Fasteners – 27 June 2012**


In September 2007, the Commission fined six haberdashery companies and a German trade association a total of €303,644,000 for their participation in four related cartels on the markets for various types of fasteners, such as zips and snap buttons, and their attaching machines. The investigation into the cartels began with dawn raids in 2001. These in turn triggered leniency applications from the Prym Group, the Coats Group and the YKK Group for immunity or fine reductions under the leniency programme. Ultimately, all three succeeded in reducing their respective fines in acknowledgment of their cooperation.

Evidence gathered during the initial inspection and also provided by the leniency applicants showed that the web of the four cartels involved various combinations of the six companies and the trade association. The longest spanned over two decades, from 1977 to 1998, and the shortest lasted just over a year. The cartels consisted of typical anti-competitive behaviour such as minimum price fixing, coordinated price increases, customer allocation, market sharing and the exchange of confidential information. There was evidence that the highest levels of management in the companies were involved in the organisation of the cartels and that they were aware their behaviour was illegal.

Three of the cartelists, YKK Group, Coats Group and Berning & Söhne (Berning), appealed the Commission's decision to the General Court, seeking either annulment of the decision or a reduction in the fine.

YKK based their appeal around the fact that the Commission's evidence was insufficient to point to an actual consensus or agreement between the companies. However, it did not dispute that a series of tripartite meetings had occurred and that sensitive topics were discussed at the meetings. However, it maintained that much of this information was publically available and that there was no consensus between the parties regarding prices or any sensitive information. The company also challenged the Commission's method of calculating its fine. However, the appeal was rejected in its entirety, the court holding that none of the pleas were "well founded". YKK lodged an appeal to the CJEU on 5 September 2012.

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The *Coats* appeal was primarily focussed on the finding by the Commission that they had participated in a 21-year agreement with another manufacturer, Prym, to keep off the market for certain types of fasteners. The Commission's most convincing evidence was a 2004 self-incriminating confession from Axel Prym, company executive of the Prym group, whereby he also implicated Coats. That confession resulted in a €9 million fine for the financially challenged Prym company in a related hard haberdashery cartel. However, the Court found that "none of the pleas raised by [Coats] can be upheld" and dismissed the action for annulment in its entirety.

*Berning's* appeal was more concerned with the procedural aspects of the Commission's decision in the context of their participation in "working circle" meetings of the cartel. It claimed that its rights of defence were breached on the basis that the charge sheets issued to the company were too imprecise and that the fine imposed on it was disproportionate considering its market size and role in the cartel. It also challenged the Commission's theory of single and continuous infringement, claiming that so much time had lapsed between the company's last attendance at a meeting and the Commission decision that it was time-barred. The Commission responded to this point by demonstrating that, while it had in some regards distanced itself from the cartel in later years, this was not done to such a degree that it could be considered as having put the illegal behaviour behind it. None of these arguments succeeded in convincing the Court and ultimately this appeal, as with the others, was rejected.

The fines therefore remained the same, as set out in the table below.

<table>
<thead>
<tr>
<th>Company</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>YKK group</td>
<td>Fine upheld (€150,250,000)</td>
</tr>
<tr>
<td>Coats group</td>
<td>Fine upheld (€122,405,000)</td>
</tr>
<tr>
<td>Berning &amp; Söhne GmbH &amp; Co. KG 1</td>
<td>Fine upheld (€123,000)</td>
</tr>
</tbody>
</table>

2.5.5 **Natural Gas – 29 June 2012**

a) Case T-360/09, *E.ON Ruhrgas and E.ON v Commission* – 29 June 2012


The Commission imposed a fine of €553 million on both E.ON and GDF Suez for infringing EU competition law on the French and German markets for natural gas in July 2008. In 1975, there was a joint Franco-German effort by Ruhrgas AG and GDF (now part of E.ON and GDF Suez respectively) to construct the MEGAL pipeline. This pipeline allowed for the import of Russian gas into Germany and France.
The Commission found that, by the MEGAL Agreement, the companies committed not to sell gas on each others’ national markets, thereby infringing EU competition law rules. The Agreement became operational on 1 January 1980. It ended ostensibly on 13 August 2004, by an agreement of the parties that they had long considered the anti-competitive sections as null and void. However, the Commission held that the infringement began on different dates on the two national markets. It also considered that it did not end until September 2005, as it continued to produce effects for at least a year after the parties publically denounced the anti-competitive elements.

In France, the Commission opined that, as GDF benefitted from a legal monopoly at the time of the conclusion of the Agreement, the period of infringement did not begin until 10 August 2000, the date that the First Gas Directive (which provided for the liberalisation of gas markets) should have been transposed. This Directive was not in fact transposed in France until 2003 but the Commission was of the belief that there was a potential restriction of competition as of the earlier date as other companies could have technically begun to supply GDF’s customers from that date.

For the German market, the Commission found that the infringement began on 1 January 1980, i.e. the commencement date of the MEGAL Agreement. Unlike in France, before the liberalisation Directive there was no legal monopoly in Germany. There were, however, a number of agreements between energy companies dividing the German gas and electricity markets along territorial lines (demarcation agreements) as well as exclusive concession agreements between energy companies and local authorities whereby those companies were allowed to use public terrain to exclusively construct and operate electricity and gas distribution networks. Through an exemption, these agreements were regarded as legal until 24 April 1998. Despite this, the Commission held that GDF should have been considered as a potential competitor of Ruhrgas from the signing of the MEGAL Agreement.

Both energy companies challenged the Commission's decision, seeking its annulment or a reduction in the fines imposed on them. On 29 June 2012, the General Court handed down its judgment rejecting the majority of the applicants' arguments and confirming the main elements of the Commission decision. However, the Court held that two separate errors had been made by the Commission regarding the duration of the infringement on both markets.

In terms of the infringement in France, the Court found that the Commission had not provided enough evidence to prove that the anti-competitive behaviour had continued on this market after the signing of the agreement in August 2004. This contrasts with the situation on the German market, where it was upheld that the infringement did indeed continue until September 2005. The Court therefore annulled Article 1 of the decision in so far as it found an infringement to have been committed in France between 13 August 2004 and September 2005.

The error as to duration on the German market was found by the General Court to have been at the other end of the timeline. While the Commission had considered that the infringement stretched from the beginning of the MEGAL Agreement until September 2005, the General
Court disagreed. It found the web of agreements between the energy companies and the local councils to be tantamount to a system of exclusive supply, despite the lack of an official legal monopoly. The Court therefore held that there was no potential competition between the two companies until 24 April 1998, the date on which the exemption for the demarcation and exclusive concession agreements expired, and accordingly the relevant part of Article 1 of the contested decision was annulled. This, then, was found to be the relevant start date for the anti-competitive conduct, i.e. from 24 April 1998 to September 2005. However, it is important to note that in any event, the earlier period had not been taken into account by the Commission in calculating the applicable fine.

To reflect the partial annulment of Article 1, the General Court decided to reduce fines payable by the applicant companies. However, the Court considered that to recalculate the fines based on the revised infringement periods following the Commission's methods would result in a greater reduction than the error merited, a reduction of nearly 50%. The Court therefore set the final amount of the fine at €320 million for each company, emphasising that the Court is not bound by the Commission's calculations and considering that figure more appropriate in the circumstances in question.

The Commission, in welcoming the judgment, highlighted that such decisions confirm that firms may not use legitimate cooperation projects, such as the MEGA pipeline project, as a cover-up for market division or non-compete arrangements. It saw the case as a "strong message" that anti-competitive measures will not be allowed to counteract the liberalisation of the gas sector.

<table>
<thead>
<tr>
<th>Company</th>
<th>Fine</th>
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<tbody>
<tr>
<td>E.ON</td>
<td>Fine reduced from €553 million to €320 million</td>
</tr>
<tr>
<td>GDF Suez SA</td>
<td>Fine reduced from €553 million to €320 million</td>
</tr>
</tbody>
</table>

2.5.6 **Dutch Bitumen – 27 September 2012**


f) Case T-359/06, Heijmans Infrastructuur BV v Commission – 27 September 2012
On 13 September 2006, the Commission adopted a decision fining a number of Dutch companies (suppliers of bitumen and road construction companies who purchased that product) for their participation in a cartel. The Dutch Bitumen cartel, active from 1994 to 2002, engaged in price fixing, the fixing of rebates and the operation of a monitoring system. It was unusual in that the cartelists were not only suppliers but also purchasers of bitumen. The bitumen purchasers were not involved in price fixing but rather in capping rebates offered to smaller rivals, thus creating a competitive disadvantage for them. For this reason, the Commission considered the purchasers' involvement to be a "very serious" infringement, in the same category as price fixing.

There were sixteen appeals to the General Court of the Commission decision. On 27 September 2012, the Court handed down its judgments, rejecting the appeals in fourteen of the sixteen cases and partially annulling the Commission decision in the remaining two (see table below).

Many of the appeals were based around the presumption of parental liability for the participation of subsidiaries in the cartel. In Shell, the presumption was upheld despite the fact Shell Nederland had two parent companies. The Court considered that they were in the same position as one single company with a 100% shareholding. Furthermore, the existence of intermediaries between the parents and Shell Nederland did nothing to rebut the presumption. In the Total judgment, the Court did not agree with the applicants that the delegation of supervisory powers over one subsidiary to another could rebut the presumption. Arguments in the other judgments that the parents did not participate in the cartel, were unaware of it and did not directly influence subsidiaries' market conduct were all unsuccessful. Claims that the presumption of liability infringed various fundamental rights.

such as the presumption of innocence and the principle of non-discrimination were also rejected.

The only partially successful appeal on this ground was in *Ballast Nedam Infra BV*. However, it was not a rebuttal of the presumption in itself. The applicant argued that the Commission did not make it sufficiently clear in its Statement of Objections that it intended to hold the applicant liable on the basis of parental liability, as opposed to direct participation in the breach. A general statement in the Statement of Objections on the Commission's intention to hold parents liable for the conduct of their subsidiaries was held to be insufficiently clear. As a result, the applicant was held unable to fully respond to the Statement of Objections and therefore unable to fully exercise its rights of defence, leading to a reduction in its fine.

The fine reduction in *Shell* resulted from a finding that the Commission had not satisfactorily proven that Shell had been the leader and the instigator of the cartel. Much of the evidence relating to the leadership accusation was uncorroborated, provided by the other parties who had an interest in playing down their own involvement. It also related more to the beginning of the agreement thus failing to prove that the company had played a leadership role after this initial phase. Moreover, while there was evidence that Shell had submitted proposals regarding the rebate agreement and that it had tried to persuade ExxonMobil to join the cartel, this was held to be too vague to prove that the company had actually initiated the entire arrangement. This is in contrast to *Koninklijke Wegenbouw Stevin*, where the allegation of instigator was not upheld but the finding of leadership was. The General Court held that this alone justified the fine that had been imposed by the Commission and the appeal was dismissed.

Other arguments that were advanced by the appealing parties included claims that they had been unfairly denied access to responses of other parties to the Commission's Statement of Objections, which may have contained evidence that would have exculpated them. However, the General Court distinguished Statement of Objections from the investigation file the Commission keeps on each party and which the party has a right to examine if the documents are relevant to their defence. It also excluded other parties' Statement of Objections from case law which holds that it is for the party, not the Commission, to decide what evidence may potentially be exculpatory.

The final argument of note in these appeal cases concerned the claim in *Koninklijke Wegenbouw Stevin* that the Commission had unfairly increased its fine for obstruction of a dawn raid. The company had refused the authority entry for 47 minutes while it awaited arrival of its external competition counsel. While the Court recognised the right of companies to have a lawyer present during a raid and acknowledged that the Commission was obliged to allow for a limited delay before beginning its investigation, it upheld the fine as it stood. The reasoning was that the Commission should at least have been granted access to the premises to ensure that no evidence was destroyed or contact made to warn other companies of the Commission's presence while awaiting the arrival of the company's legal
advisors. For more information on this case, see below at Section 5.2, Practice and Procedure – Judgments of the General Court.

With the exception of the two aforementioned cases, all appeals were dismissed and the fines were upheld by the General Court, as follows.

<table>
<thead>
<tr>
<th>Company</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shell Petroleum NV</td>
<td>Fine reduced from €108 million to €81 million</td>
</tr>
<tr>
<td>Ballast Nedam Infra BV</td>
<td>Fine from €4.65 million to €3.45 million</td>
</tr>
<tr>
<td>Kuwait Petroleum</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Ballast Nedam NV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Heijmans NV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Heijmans Infrastructuur BV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Koninklijke Wegenbouw Stevin BV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Koninklijke Volker Wessels Stevin NV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Koninklijke BAM Groep NV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>BAM NBM Wegenbouw BV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Vermeer Infrastructuur BV</td>
<td>Fine upheld</td>
</tr>
<tr>
<td>Dura Vermeer Infra BV</td>
<td>Fine upheld</td>
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<tr>
<td>Dura Vermeer Groep NV</td>
<td>Fine upheld</td>
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<tr>
<td>Total Nederland NV</td>
<td>Fine upheld</td>
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<tr>
<td>Nynäsv Petroleum AB and Nynäsv Belgium AB</td>
<td>Fine upheld</td>
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<tr>
<td>Total SA</td>
<td>Fine upheld</td>
</tr>
</tbody>
</table>

2.5.7 **Flat Glass – 27 September 2012**


On 28 November 2007, following an inquiry into the flat glass industry, the Commission adopted a decision imposing a fine of €148 million on the applicants for the infringement of
Article 101 in the EEA for the period 20 April 2004 to 22 February 2005. The infringement consisted of participation in a cartel engaged in fixing price increases, minimum prices, target prices, price freezing and other commercial conditions in respect of sales to independent customers of four categories of flat glass products used in the building industry (float glass, low-e glass, laminated glass and unprocessed mirrors) as well as in the exchange of commercially sensitive information.

The applicant lodged a challenge to this decision at the registry of the General Court on 12 February 2008 claiming that the Court should partially annul the Commission's decision, reduce the amount of the fine imposed and order the Commission to pay the costs. The basis of the demand of annulment was an alleged error of fact regarding the duration and geographic scope of the cartel while the demand for reduction of the fine was based on three pleas: necessity in light of the demanded partial annulment; infringement of the principle of non-discrimination and the need to state reasons in the calculation of the fine; and an error of assessment based on the very limited and passive role of the applicant company in the infringement and infringement of the principle of non-discrimination. At the hearing, both parties also advanced arguments relating to the admissibility of certain documents. However, the Court either rejected those arguments or decided that there was no need to adjudicate on the matter.

Regarding the first head of challenge, the applicants claimed that the Commission had failed to establish that they joined the cartel prior to 11 February 2005 and also that the cartel extended to the whole of the EEA territory. However, the Court rejected the attempts to undermine the Commission's evidence of three anti-competitive meetings in 2004, holding that the alternative explanations offered by the applicants for the contact between the companies were insufficient. The Court then confirmed the Commission's finding that the geographic scope of the cartel was the entirety of the EEA as the evidence presented by the Commission to this effect was either uncontested or supported by further evidence. The applicants were equally unsuccessful in contesting the amount of the fine imposed on them. As their first plea was linked to the success of the above head of challenge, it was rejected by extension by the General Court. The second plea was based around the exclusion of sales of flat glass to vertically integrated members of the cartel in the calculation of fines. However, the Court emphasised the Commission's power of discretion in fine calculation and distinguished such internal sales from sales to independent customers, which the Commission had chosen to use as their reference for deciding on the fine. As such, the Commission was found to have given sufficient reasons for its method of calculation. The third plea was based on the applicant's claim that their participation in the cartel had been very limited and passive and that as a result, the Commission discriminated against them by treating them similarly to the other, more active undertakings. However, the Court held that the Commission had indeed taken into account the relative roles played by the companies and once again emphasised the discretion of the Commission in the calculation of fines.
All heads of challenge advanced by the applicants failed, the action was dismissed and the applicants were ordered to pay the fine of €148 million imposed by the Commission in the original decision.

2.5.8 Underwater Cables\textsuperscript{94} - 14 November 2012


b) Case T-140/09, Prysmian, Prysmian Cavi and Sistemi Energia v Commission – 14 November 2012

On 7 April 2009, two manufacturers of underwater electric cables, Nexans and Prysmian, brought actions against the Commission's decision ordering inspection of their premises in the context of an investigation into an alleged cartel in the underwater and submarine cable industry.\textsuperscript{95} (See above, Section 2.3, Public Ongoing Commission Investigations – Cartels, for more information on the investigation.) The companies sought, inter alia, the annulment of the Commission's inspection decision, the return of the documents taken from their premises during the raid and declarations that the copying of entire hard disks by the Commission was illegal. The basis for their demands was that the investigation decisions were too vaguely worded and that the Commission only had "reasonable grounds" to inspect high-water cables and not any other products.

The General Court handed down very similar judgments in both cases on 14 November 2012, upholding the majority of the Commission's decision but annulling one element of it. The Court held that the Commission's decision was not too vaguely worded in terms of the relevant products or countries, thus meeting its obligation to define the subject-matter of its investigation and not violating the applicant's rights of defence through overly imprecise wording. The Court also refused to rule that specific actions on the Commission's part such as copying entire hard drives or interviewing employees were distinct, challengeable acts, instead considering them measures implementing the inspection decision itself.

Arguably the most interesting element of the case, however, was the decision to annul the part of the inspection decision not concerning high-voltage underwater and underground electric cables. The Court noted that the Commission was aware of the differences between the various strength cables (i.e. high-, medium- and low-voltage) and that, as the Commission had confirmed that its inspection was restricted to high-voltage cables, it had not demonstrated reasonable grounds for inspecting any products beyond these and their related materials. This confirms that the Commission may not engage in "fishing expeditions" under the guise of dawn raids.

The rest of the companies' pleas were rejected in both cases, the Court not specifying the effect that its ruling would have on the investigation which is still on-going. On 24 January 2013, Nexans brought an appeal against the General Court's decision, demanding that the

\textsuperscript{94} Case COMP/39610.

\textsuperscript{95} Commission MEMO/09/46.
inspection decision be set aside on the basis that the geographical scope was too wide and that the Commission be ordered to pay all costs.\(^\text{96}\)

2.5.9 **Calcium Carbide & Magnesium – 12 December 2012**


On 22 July 2009, the Commission fined nine companies – some, manufacturers and some, related companies – €61.12 million for their involvement in a cartel in all but four of the EEA countries.\(^\text{97}\) The companies were Akzo Nobel, Almamet, Donau Chemie, Ecka Granulate, Novácke chemické závody ("NCHZ") and 1.garantovaná ("1G"), SKW Stahl-Metallurgie ("SWK") and ARQUES Industries ("Arques"), Evonik Degussa and HSE. The products in question were calcium carbide powder and granules and magnesium granules, which are used in the steel industry and in the production of welding gas, a combined market worth around €175 million in 2009. The cartel or, more specifically, the three related cartels operated between April 2004 and January 2007 and involved coordinated price increases, market sharing and agreements on market shares. The calcium carbide powder market share table was known as the "Bible" and was used as a template for the other two limbs of the cartel.

Two companies, Akzo Nobel and Evonik Degussa, saw their fines increased for recidivism but both also benefitted from reductions under the leniency notice, as did Donau Chemie. However, as first past the post, Akzo Nobel's fine was reduced 100%.

All of the companies with the exclusion of Akzo Nobel appealed the Commission's decision to the General Court. The heavy fines caused severe financial problems for many of the cartelists, with some filing for bankruptcy. NCHZ\(^\text{98}\), Arques\(^\text{99}\) and Almamet\(^\text{100}\) all unsuccessfully applied for interim relief against payment of the fine, with Almamet pursuing the matter as far as the CJEU\(^\text{101}\) to no avail. In a national German court, Arques then sued its former subsidiary, SWK, to recoup the fine imposed on it on the basis of parental liability, pursuing the matter as far as the German Supreme Court. Evonik, which was also held liable for SWK's behaviour due to a majority shareholding in SWK at a different time during the

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\(^{97}\) Commission Press Release IP/09/1169.  
cartel period, pursued a similar case but did not progress beyond an unsuccessful higher regional court appeal.

On 12 December 2012, the General Court handed down four decisions on the appeals of the Commission's 2009 decision finding violation of Article 101. All four companies argued different variations of an inability to pay argument, accusing the Commission of having acted disproportionately and burdened the companies with fines that would jeopardise their future viability. The Court emphasises that it is not enough for a company to claim that the imposition of a fine would result in the company going bankrupt, but instead that the company must both explain and prove that a fine "would jeopardise its economic viability as an undertaking and would cause its assets to lose all their value". In the same vein, the Court held that the risk that a fine may render a company insolvent was "not sufficient to establish that that fine is disproportionate". The Court found that in fact the fine was appropriate, given the gravity and duration of the illicit activity.

IG also put forward that it should not have been held liable for NCHZ's conduct. However, the Court held that the parent company had not only influenced but even imposed "decisions on significant and strategic issues" on NCHZ.

The saga is not over, however. Some of the appeals of the other cartelists are still pending, for example SKW's hearing is scheduled for 16 April 2013. Furthermore, the Slovak investment fund IG, which successfully applied for an interim order in March 2011 relieving it from having to put up a bank guarantee to cover the fine while its appeal was pending, brought another action against the Commission on 28 January 2013. The company is challenging the Commission's imposition of a penalty interest rate on the fine, the payment of which was suspended by the European courts. Such interest is normally reserved for companies which fail to meet a payment deadline with the Commission; IG argues that the General Court order should prevent the imposition of this penalty interest rate. Finally, IG has appealed the December 2012 decision to the CJEU.

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2.5.10 Chloroprene Rubber – 13 December 2012

Case T 103/08, Versalis SpA & ENI SpA v Commission – 13 December 2012

On 13 December 2012, the General Court handed down its judgement in the appeal by ENI against the fines levied on it by the Commission as part of its decision four years previously in the Chloroprene Rubber cartel. In December 2007, the Commission imposed a fine of €247.6 million on the Bayer, Denka, DuPont, Dow, ENI and Tosoh groups for involvement in a cartel on the market for chloroprene rubber in the EEA. Chloroprene rubber is an elastic, synthetic rubber used in industrial products, as an adhesive and in the production of latex. Between 1993 and 2002, the companies in question participated regularly in meetings where they fixed prices, discussed specific clients and agreed on each others' markets. Both Bayer and ENI saw their fines increased for recidivism by 50% and 60% respectively. However, as whistle blower, Bayer benefitted from a 100% reduction of its fine. DuPont and Dow were also allowed 25% reductions under the leniency notice. At just over €132 million, ENI was hit with the heaviest fine and was refused a reduction for cooperation with the Commission.

DuPont, Dow and Denka all appealed unsuccessfully to the General Court, which upheld the Commission's decision. DuPont and Dow currently have further appeals pending before the CJEU.

ENI also appealed the Commission's decision to the General Court. ENI's appeal was based on three main points: the presumption of parental liability that enabled the Commission to find them liable for the participation of their subsidiary Polimeri (now known as Versalis) in the cartel; the Commission's refusal to accept their leniency application and the 60% increase in their fine due to the involvement of other companies connected to ENI in cartels already investigated by the Commission in the 1980s and 1990s. This last argument found favour with the General Court; the increase was reduced to 50%. The court also held that the Commission erred in the calculation of ENI's fine which, according to the Court, had been unfairly increased to reflect the size of the company.

On 4 March 2013, the Commission announced its intention to appeal the General Court's decision to reduce the fine to the CJEU. Despite the reduction in the size of the fine, ENI has also appealed.110

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110 Case C-93/13 P and Case C-123/13 P.
2.5.11 **Banana Importers – 14 March 2013**

a) Case T-588/08, Dole Food & Dole Germany v Commission – 14 March 2013

b) Case T-587/08, Fresh Del Monte Produce v Commission – 14 March 2013

On 15 October 2008, the Commission issued a decision that the banana importers Chiquita, Dole Food Company ("Dole") and Internationale Fruchtimport Gesellschaft Weichert ("Weichert") (trading Fresh Del Monte Produce-branded bananas ("Del Monte")) had participated in a cartel between 2000 and 2002 in a number of Northern European Member States.\(^{111}\) The latter two companies were fined €60.3 million, with Del Monte being made jointly and severally liable for Weichert's sanction. The regulatory regime in place at the time was considered as a particular circumstance and resulted in a 60% reduction in the fine. Chiquita, having blown the whistle on the cartel in 2005, avoided sanction.

The companies had taken advantage of the practice in the banana industry of making weekly announcements of a reference price for the coming week. It was discovered that the companies had been ringing each other the day before to discuss prices.

Appeals were brought against the Commission's decision in December 2008 by Dole and Del Monte followed by Weichert on 2 January 2009. However, on 15 December 2009, the General Court ruled that the German company's appeal was inadmissible as it should have been lodged by midnight of 31 December 2008.\(^{112}\) Despite the company pleading that it had committed an excusable error as a result of a "genuine misunderstanding" of the Court's rules, it was held that there were no exceptional circumstances justifying an extension of the submission deadline. The General Court's decision was upheld by the CJEU on 25 November 2010, citing the need to strictly apply the EU's procedural rules for the sake of "legal certainty and equality of persons before the law".\(^{113}\)

The *Dole* appeal was heard on 25 January 2012 and centred around two main pleas.\(^{114}\) Firstly, Dole contested the very substance of the Commission's decision. It argued that the conduct that the Commission considered violated Article 101, *i.e.* bilateral communication between the parties, was no more than general market gossip between two particular individuals that ceased upon their retirement. In addition, the contact took place before the weekly quotation prices were announced and Dole argued that this was a stage far removed from the actual setting of prices for the consumer. The Commission, however, argued in response that based on the communication between the parties, the companies were able to calculate market trends and indications for the actual end-consumer prices.

The banana importer also argued that the two companies were in fact dealing with different products as Dole's pricing was for green bananas, to be sold on to ripeners before reaching

\(^{111}\) Commission Press Release IP/08/1509.
the consumer, while Chiquita (the whistle blower) mentioned prices for ripe, yellow bananas only. However, the Commission replied that the price of one could be calculated from the price of the other, by adding or deducting the ripening fee. Dole's second argument concerned the fine imposed by the Commission; it claimed that it was not properly calculated and that it was disproportionate as it was based on sales not directly connected to the cartel.

Del Monte's appeal, heard on 1 February 2012, revolved around contesting the imposition of joint and severable liability on it for the conduct of Weichert, in which it held an indirect 80% interest as a limited partner. It claimed that this stake and the distribution agreement it had with the German banana company did not give it the decisive influence needed for the imposition of parental liability. Indeed, counsel for the company argued that Weichert had refused to abide by Del Monte's instructions to the point that the latter was eventually forced to end the relationship. The Commission, on the other hand, argued that Del Monte had exercised a position of decisive influence over a number of years by cutting supplies, holding Weichert accountable to it, criticising policy moves and obliging it to report to Del Monte. Also, Weichert had described itself as Del Monte's subsidiary. Del Monte also submitted a number of other pleas, some in the alternative, based on, inter alia, rights of defence, misapplication of Article 101 by concluding that Weichert was engaged in an illegitimate concerted practice and a breach of legitimate expectation in not taking Weichert's cooperation into account. Weichert also presented arguments as an intervener, having missed the deadline for its own appeal.

The General Court handed down its judgement on 14 March 2013. It dismissed Dole's argument, agreeing with the Commission that both green and yellow bananas could be considered as part of the same product market. Dole announced that it will appeal to the CJEU.

Del Monte, however, was more successful; its €14.7 million fine was reduced to €8.82 million. While the Court held that the Commission had not erred in holding Del Monte jointly and severally liable with Weichert, it cited Del Monte's cooperation in the investigation and its lesser involvement in the infringement, which the Commission had not given enough weight to in calculating the fine, as the reason for the reduction.

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<td>Dole</td>
<td>Fine upheld</td>
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<td>Del Monte</td>
<td>Fine reduced from €14.7 million to €8.82 million</td>
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2.6.1 Copper Fittings – May 2012-March 2013

a) Case C-290/11 P, Comap v Commission – 3 May 2012\(^{117}\)

b) Case C-289/11 P, Legris Industries v Commission – 3 May 2012\(^{118}\)

c) Case C-264/11 P, Kaimer, Sanha Kaimer and Sanha Italia v Commission – 19 July 2012\(^{119}\)

d) Case C-286/11 P, Commission v Tomkins – 22 January 2013\(^{120}\)

e) Case C-276/11 P, Viega v Commission – 14 March 2013\(^{121}\)

In September 2006, the Commission fined thirty companies belonging to eleven company groups €314.76 million for participation in a cartel.\(^{122}\) The industry in question was that of copper fittings, which connect tubes used to conduct water, air, gas and other substances in various installations such as plumbing, heating and sanitation. The cartel had its origins in price increases in the UK in the 1980s but by the time Mueller, the whistle blower, came forward in 2001, it had expanded to include many other EU countries. Four companies (Aalberts, Delta, Advanced Fluid Connections and Legris) saw their fines increased by 60% as they continued to participate in the cartel even after the Commission had conducted inspections at their premises. Advanced Fluid Connections’ fine was increased by a further 50% as a punishment for providing misleading information to the authority.

Numerous appeals were brought in December 2006 against the Commission decision and the General Court handed down judgment in these cases on 24 March 2011.\(^{123}\) In six of the cases, including the appeals taken by Comap,\(^{124}\) Legris\(^{125}\) and Viega,\(^{126}\) the Court maintained the level of the companies’ fines imposed by the Commission. These companies all appealed onwards to the CJEU.

For the members of two company groups (Kaimer along with Sanha Kaimer and Sanha Italia,\(^{127}\) and Tomkins\(^{128}\) plus Pegler,\(^{129}\) its subsidiary) the fine was reduced on the basis that the companies had participated in the cartel for less time than that determined by the Commission. Tomkins’ fine was also reduced as the General Court held that the liability of a

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\(^{117}\) Case C-290/11 P.
\(^{118}\) Case C-289/11 P.
\(^{119}\) Case C-264/11 P.
\(^{120}\) Case C-286/11 P.
\(^{121}\) Case C-276/11 P.
\(^{122}\) Commission Press Release IP/06/1222.
\(^{123}\) General Court Press Release No 24/11.
\(^{124}\) Case T-377/06.
\(^{125}\) Case T-376/06.
\(^{126}\) Case T-375/06.
\(^{127}\) Case T-379/06.
\(^{128}\) Case T-382/06.
\(^{129}\) Case T-386/06.
parent company cannot exceed that of its subsidiary and Pegler's liability had been reduced, as just explained, therefore Tomkins was entitled to a corresponding reduction. Finally, for three other companies, the Court held that they had not participated in the cartel for a certain period and therefore the corresponding part of the Commission decision and its fines were annulled. The Commission appealed the General Court's decision pertaining to Tomkins, and Kaimer and the related companies also appealed the judgment in their case to the CJEU.

The Comap and Legris appeal judgments were both handed down by the CJEU on 3 May 2013. Comap is a subsidiary of Legris and was held jointly and severally liable for its parent's fine as both companies had participated in the Article 101 infringement. The CJEU firstly rejected the arguments put forward by the parties that related to the factual circumstances of the cartel, as the CJEU rules on questions of law only and not of fact. The Court then held that a 99.9% shareholding in the subsidiary was enough to raise the rebuttable presumption that the two companies formed one single undertaking in so far as the conduct of the subsidiary can be attributed to the parent company for competition law purposes. Legris' argument that it was impossible to rebut the presumption was rejected, the Court holding that being difficult to rebut was not analogous to being impossible. The appeals of both companies were therefore dismissed in their entirety.130

The Kaimer appeal which followed on 19 July 2012 was equally unsuccessful. Again, the CJEU considered that it was being asked to review matters of fact, which is outside its jurisdiction, and so Kaimer's arguments based on erroneous assessment of evidence to do with leniency statements and the start date of the cartel were held inadmissible. The company also accused the Commission and the General Court of breaching the provisions of the ECHR and the Charter pertaining to effective legal remedy. This plea was held inadmissible for a number of practical reasons related to appeal formalities and the Court's Rules of Procedure.

The appeal brought by the Commission against the Tomkins judgment was yet another victory for the General Court. On 22 January 2013, the Grand Chamber of the CJEU affirmed the General Court judgment in the Tomkins case and held that when the Court reduces a company's fine, it may also reduce the fine of the parent company held jointly and severally liable in a cartel. The Commission had taken issue with the fact that the argument used by Pegler to diminish its fine had been applied by the General Court to its parent, Tomkins, despite that company not having raised the argument itself and the fact that the two appeals dealt with different periods of the cartel duration. However, the CJEU held that the General Court was entitled to find that the two appeals were of identical object and therefore dismissed the Commission's appeal of the lower Court's judgment.

The most recent decision in this cartel was the Viega appeal of 14 March 2013. Like the other appeals before it, this too was unsuccessful and the plumbing giant's attempts to have the Commission's fine annulled were brought to an unfruitful close. The inability of the CJEU to review facts was at issue again. Arguments that the General Court had not

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130 CJEU Press Release No 56/12.
adequately examined the Commission's decision and that Viega's right to be heard had not been respected did not find favour and the case was dismissed in its entirety.

The final CJEU appeal in this cartel is that of Aalberts Industries & Others. The opinion of AG Paolo Mengozzi was made available on 28 February 2013 and the judgment is still awaited.

1.1.1 Raw Tobacco (Spain) – May-July 2012


b) Case C-181/11 P, Compañía española de tabaco en rama SA (Cetarsa) v Commission – 12 July 2012


In 2004, five companies active on the Spanish raw tobacco processing market were fined €20 million for involvement in a cartel, in tandem with four tobacco-grower unions who were fined the symbolic amount of €1,000 each. The companies implicated were the raw tobacco processors Compañía Española de Tabaco en Rama ("Cetarsa"), Agroexpansión, World Wide Tobacco España ("WWTE"), Tabacos Españoles (Taes) and the Italian tobacco-buyer and purported ring-leader, Deltafina. Throughout the five-year long cartel (one of the first on the heavily regulated agricultural market), the companies fixed the prices that growers would receive and determined the quantity that each entity would buy from them, while the growers agreed amongst themselves upon price ranges and minimum selling prices.

In late January 2005, six appeals were brought against the Commission's decision by four of the cartelists and two parent companies of the decision addressees (those being Standard Commercial, which owned WWTE, and DIMON Inc. which owned Agroexpansión). Also in 2005, Standard Commercial (and thus WWTE) and DIMON (and through it, Agroexpansión) merged to form Alliance One International, Inc ("Alliance One").

The first of the appeals, handed down on 10 September 2010, saw a 51% fine reduction for Deltafina on the basis that the Commission had erred in finding it to be the cartel leader and also had not fully acknowledged its cooperation in the investigation. However, complete annulment of the Commission's decision was refused. Seventeen days later, the Standard Commercial appeal was also partially successful; while the General Court upheld the principle of parental liability, it held that for one of WWTE's three parent companies (Trans...
Continental Leaf Tobacco Corp, a subsidiary of Standard Commercial Tobacco Co., Inc, which is in turn a subsidiary of Standard Commercial), the Commission had not proven that decisive influence had actually been exercised. However, the liability and the amount of the fine of the other two parent companies (Standard Commercial Tobacco Co., Inc, and Standard Commercial) remained unaltered.\(^\text{137}\) Cetarsa also saw a reduction of its fine in a decision of 3 February 2011. The General Court found that a further 10% reduction on top of the reduction already granted by the Commission was appropriate to better reflect the company's cooperation during the administrative procedure.\(^\text{138}\) WWTE and Agroexpansións' fines were reduced for almost identical reasons.\(^\text{139}\) On the same day, the Alliance One (formerly DIMON) appeal was also handed down, upholding the overall finding of parental liability but reducing the fine in light of the fact that the parent company should not have been liable for the part of the cartel in operation prior to November 1997.\(^\text{140}\)

Deltafina and Cetarsa lodged appeals with the CJEU. However, Deltafina withdrew its appeal in July 2011.\(^\text{141}\) Alliance One appealed in four cases; those related to the companies previously known as WWTE, Standard Tobacco, Agroexpansion and DIMON. Furthermore, the Commission appealed the Standard Tobacco decision, claiming that the General Court had misapplied the principle of equal treatment.

The first CJEU judgment to be handed down was that of WWTE on 3 May 2012. The company argued that the fine was too large, as the Commission and the General Court had incorrectly applied the deterrent factor to increase the fine and did not take sufficient account of the fact that the cartel agreement was not implemented. Amongst other arguments, it also challenged the imposition of liability on some of its parent companies. However, the CJEU dismissed all of its pleas, including those previously dismissed by the General Court as lacking in clarity. The CJEU also dismissed a cross-claim by the Commission that the General Court should not have reduced WWTE's fine for cooperation under the 1996 Leniency Notice. The CJEU therefore upheld the General Court's decision in its entirety and dismissed all elements of the appeal.

The Cetarsa decision was delivered on 12 July 2012. Cetarsa advanced two main arguments; firstly, that the principle of equality had been breached in finding the conduct of the five tobacco processors more harmful to competition that that of the tobacco producers (represented by their trade unions and fined a symbolic €1,000 each in the 2004 decision) and, secondly, that the General Court had erroneously assessed the impact of Spanish national law on the legality of the cartel conduct. It was claimed in particular that insufficient consideration was given to the complacent attitude of the Minister for Agriculture towards the illicit conduct, something that should have been considered a mitigating circumstance. However, as in the previous case, the appeal was dismissed in its entirety, including dismissal

\(^\text{137}\) Case T-24/05.  
\(^\text{138}\) Case T-33/05.  
\(^\text{139}\) Case T-37/05 and Case T-38/05.  
\(^\text{140}\) Case T-41/05.  
\(^\text{141}\) Case C-537/10 P.
of a cross-claim by the Commission that the General Court should not have reduced the fine imposed on Cetarsa to take its cooperation under the Leniency Notice into account.

A week later, the Grand Chamber of the CJEU handed down its decision in the joined cases of *Alliance One & Standard Tobacco v Commission* and *Commission v Alliance One & ors*. As in the above cases, the appeals were dismissed in their entirety, in harmony with the opinion handed down by AG Kokott. The Alliance One and Standard Tobacco pleas were grouped around three arguments.

The first pertained to parental liability. The tobacco producers claimed that such liability should not have been imposed on them for the infringement committed by WWTE prior to May 1998 as the subsidiary was jointly controlled by themselves and WWTE's president and, in order to form a single economic unit for parental liability, both of the joint control parents should be taken into account. However, the Court found sufficient evidence had been advanced to prove the exercise of decisive influence.

Secondly, the applicants claimed that various procedural rights had been infringed as the General Court had permitted the Commission to introduce a new argument and amend its pleadings. However, the CJEU held that the General Court had correctly applied all procedural rules.

The final claim made by the tobacco companies was that the principle of equal treatment had been breached, as the same method had not been used to attribute liability to the various parent companies of the undertakings active in the cartel. These arguments too were dismissed.

In the case taken by the Commission, the principle of equal treatment also came into play; the authority challenged the fact that the General Court had annulled the part of the Commission's decision imposing parental liability on Trans-Continental Leas Tobacco. The overruling had been on the basis that the Commission had not treated the company in the same manner as other parent companies in similar situations. The CJEU upheld the reasoning of the General Court and also rejected arguments made by the Commission pertaining to procedural rights and fairness.

The Alliance One appeal brought against the General Court judgment resulting from the 2004 decision addressed to DIMON was heard on 10 January 2013 and the Commission cross-appealed the General Court’s decision to grant Alliance One an automatic fine reduction, because in a separate appeal Agroexpansión’s sanction was reduced. The decision has not yet been delivered. The other Alliance One appeal, against the Agroexpansión General Court decision, was lodged on 27 December 2011 and is still outstanding.

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142 Opinion of Advocate General Kokott, delivered on 12 January 2012.
143 Case C-679/11 P.
144 Case C-668/11 P.
1.1.2 Removal Services – 6 December 2012

Case C-441/11 P, Commission v Verhuizingen, Coppens – 6 December 2012

In March 2008, the Commission fined eleven international removal service providers operating on the Belgian market over €32 million for a cartel that was in operation for almost nineteen years. The cartel, which the Commission initially began investigating on its own initiative, was very complex and comprised a particular scheme of market sharing through bid-rigging and subsequent compensation, on top of more standard price fixing arrangements. Removal contracts were attributed through a system of bid rigging, by issuing bogus "cover quotes" that made clients falsely believe they were making a competitive choice between removal services. In parallel, there was a system of compensation for the companies that lost the bids, through "commissions" that were invoiced by the losers to the winning service company and then built into the final price charged by that company to the consumer.

One company, Allied Arthur Pierre, received a 50% reduction under the Leniency Notice for cooperation, although its parent company, Exel Investments Limited, was specifically excluded from the benefit. Interdean saw its fine reduced by 70% due to its inability to pay and other particular circumstances.

A number of appeals to the General Court followed, with judgments being handed down on 16 June 2011. The four cases taken by Team Relocations, Amertranseuro International, Putters International and Ziegler were dismissed completely but the other actions were more successful. Gosselin saw its fine reduced because the General Court held that the Commission had erred in its assessment of the duration of its participation. Stichting Administratiekantoor Portielje, in a joined case, was held not to be an undertaking for competition law purposes so the Commission was mistaken in imputing Gosselin's liability to it and its decision imputed to that entity was annulled. Finally, the Court annulled the part of the Commission's decision applicable to Verhuizingen Coppens. The Commission acknowledged that the company had not been involved in the part of the cartel that related to commissions for companies that missed out on bids but nonetheless held it liable for participation in all aspects of the cartel as a "single and continuous infringement". The Court, however, found the Commission was not entitled to do this as it had not demonstrated that the company was even aware of the anti-competitive conduct in which it was not involved.

Despite the reduction, Gosselin appealed the General Court's decision, as did Zeigler and Team Relocations. The Commission also appealed the Gosselin and Stichting Administratiekantoor Portielje and the Verhuizingen Coppens decisions. Verhuizingen Coppens is the only decision to have been handed down so far.

The CJEU was critical of the General Court's complete annulment of the Commission's decision. It held that a finding by the General Court that an action for annulment is partially well-founded does not mean that it should annul the Commission's decision in its entirety. If the company in question was aware of and/or engaged only in certain aspects of a cartel,
without participating in other elements of the overall cartel, it should nonetheless be held liable for the part that it was involved in, so long as the Commission made it sufficiently clear it was attributing that particular conduct to the company. Here, therefore, the General Court should only have annulled the part of the Commission decision holding it liable for participation in the compensatory commissions system and not the decision in its entirety. As a result, the CJEU considered the General Court's judgment to be flawed by an error of law and set it aside.

The CJEU then itself gave final judgment on the matter. It noted that the Commission's infringement decision could be broken into an agreement on bid-rigging cover quotes and an agreement on compensatory commissions. The Court confirmed that Verhuizingen Coppens participated in the former but not in the latter agreement, nor was it aware of it. The cover quote agreement alone consisted of a breach of Article 101, however, and the CJEU accordingly fined the removals company but reduced the amount in compared with the original Commission decision from €104,000 to €35,000, to reflect the narrower scope of its infringement.

1.1.3 Raw Tobacco (Italy) – 13 December 2012


On 20 October 2005, a year after its decision in the Spanish raw tobacco cartel, the Commission issued a decision fining Italian tobacco processors Deltafina, Dimon Italia (now known as Mindo), Transcatab and Romana Tabacchi €56 million for their participation in a six-year cartel on the Italian raw tobacco market. Two Italian trade associations were fined €1,000 a piece for the parallel collusion of tobacco producers. The processing companies agreed on purchase prices, allocated suppliers and rigged bids at public tobacco sale auctions while the trade associations negotiated minimum prices on behalf of their tobacco-producer members. As Italian law provides for some collective price negotiation in the agriculture sector, the fines of the trade associations were merely symbolic. However, the behaviour of the tobacco processors was far beyond the scope of anything required by either national law or the Common Agricultural Policy. Mindo and Transcatab benefitted from reductions under the 2002 Leniency Notice. Deltafina, as whistle blower, was granted conditional immunity at the beginning of the investigation but this was withdrawn when the company informed the other cartelists of its immunity application before the Commission had conducted inspections of these companies' premises. The Commission therefore imposed a €30 million fine on Deltafina, this figure including a reduction to take into account some of the company's contribution to the Commission's inspection.

146 Case C-593/11 P.
147 Case C-654/11 P.
148 Commission Press Release IP/05/1315.
This decision led to numerous appeals to the General Court by Deltafina, Romana Tabacchi, Mindo, Transcatab and Alliance One (the parent company of Mindo and Transcatab). Both the Deltafina and the Alliance One appeal judgments were handed down on 9 September 2011.

The Deltafina appeal gravitated around the Commission's decision to withdraw immunity when the company made known to the other cartelists the fact that it had applied for leniency.149 Their application was made under the 2002 Leniency Notice, which was unclear as to how the various conflicting duties of cooperation with the Commission and cession of participation by the whistle blower were to be reconciled. This issue was clarified by the 2006 Leniency Notice, making the outcome of this case a somewhat moot point from the point of view of the evolution of leniency procedure. The Deltafina appeal had honed in on a "rules of the game" meeting between the Commission and the company a month after they had blown the whistle, where it was claimed the Commission had relieved the company of its obligation to remain silent. At the hearing, neither side could agree on what had been decided at that meeting. The General Court finally ruled that the Commission was correct to have withdrawn Deltafina's leniency privileges. However, it emphasised the tobacco processor's failure to inform the Commission of its action in informing the other companies rather than the outcome of the March meeting in its rationale. Deltafina then appealed to the CJEU and the case was heard on 13 November 2012. The judgment has not yet been handed down.150

Alliance One's appeal was based around the issue of parental liability: it was fined €10 million jointly and severally with Mindo (Alliance One being responsible for the whole, Mindo only being jointly and severally liable for €3.99 million) and €14 million jointly and severally with Transcatab.151 It claimed that the Commission had breached the established rules of parental liability for Article 101, in particular because of the Commission's reliance on the presumption of parental liability for 100%-owned subsidiaries as established in the Akzo Nobel case.152 Its arguments that the Commission must prove the exercise of decisive influence were dismissed, however, and the General Court was satisfied that the Commission had rightly concluded that the company had not succeeded itself in rebutting the presumption of having exercised decisive influence on its wholly owned subsidiaries. Arguments related to the rights of the defence and the miscalculation of fines were all equally unsuccessful.153 Alliance One appealed the finding to the CJEU.

Decisions were made on the Romana Tabacchi, Mindo and Transcatab appeals on 5 October 2011. Romana Tabacchi saw its fine cut by more than half, the General Court holding that the Commission had not adequately proven the involvement of the company in the cartel for the entire duration it was fined for and also had erred in calculating the base amount of the

149 Case T-12/06.
150 Case C-578/11 P.
151 Case T-25/06.
152 Case C-97/08, Akzo Nobel NV v Commission.
153 General Court Press Release No 87/11.
The other two appeals were not as successful. Transcatab's €14 million fine was upheld and there was held to be no need to adjudicate on Mindo's appeal as the company, which had gone into liquidation since the original Commission decision, had had its fine paid in full by Alliance One and therefore could not demonstrate any interest in pursuing the case. Transcatab and Mindo both filed appeals with the CJEU.

The Mindo appeal was heard on 15 October 2012. Mindo, among other arguments, put forward that the General Court judgment completely reversed the established legal standard for the burden of proof with regard to standing, as it was based on the inference that "it cannot be ruled out that Alliance One has taken it upon itself to pay the applicant's share of the fine or that it has since waived its right to claim a contribution from the applicant". However, according to the European case law, legal interest or standing exists so long as it could not be ruled out that a decision could be beneficial to the party. The judgment is due to be handed down on 11 April 2013.

Universal, the mother company of Deltafina, also took action against the decision but then withdrew its appeal for strategic reasons related to the Deltafina proceedings. However, it lodged a different appeal in early 2011, challenging the Commission's request to pay the fine imposed on it jointly and severally for Deltafina's illegal behaviour. It argued that a bank guarantee lodged to cover the Deltafina sanction while its appeal is pending before the EU courts was sufficient to cover the liability of both companies. However, in a decision of 12 March 2012, the General Court rejected this argument and ordered Universal to make the payment demanded by the Commission.

The Transcatab and Alliance One CJEU judgments were both handed down on 13 December 2012.

Transcatab's appeal was considered in light of the CJEU's Rules of Procedure, which allow for the dismissal of an appeal by reasoned order before the oral hearing if it is manifestly inadmissible or unfounded. Despite the arguments put forward by the tobacco producer, which included breaches of various rights and principles including rights of the defence, administrative principles and the principle of equal treatment, the CJEU dismissed Transcatab's appeal as being in part manifestly inadmissible and in part manifestly unfounded. The equal treatment argument was centred around a comparison between the Italian cartel and the Spanish raw tobacco cartel decision that preceded it by a few months. However, the existence of a law in Spain that may have permitted a certain level of collusion led to the Commission imposing a fine on the Spanish cartelists that was lower than that of their Italian counterparts.

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154 Case T-11/06.
155 Case T-39/06 and Case T-19/06, General Court Press Release No 103/11.
156 See, for example, Case C-519/07, Commission v Koninklijke Friesland Campina; Case C-111/99 P, Lech-Stahlwerke GmbH v Commission; and Case T-141/03, SNIACE v Commission.
157 Case C-652/11 P.
158 Case T-34/06.
159 Case T-42/11.
Alliance One's appeal was similarly dismissed as both manifestly inadmissible and unfounded. It claimed that the General Court breached its duty to give reasons by rejecting the applicant's evidence that it had not exercised decisive influence over Transcatab and Mindo. The CJEU was unconvinced, however, stating that the General Court is not obliged to treat each of the arguments put forward "exhaustively and one-by-one". It also based arguments on infringements of the presumption of innocence and the principles of legality and individual liability as well as breaches of other rights of the defence. None of these were successful and the General Court judgment was upheld.

1.1.4 Dutch Brewers — 19 December 2012


Following an own-initiative Commission investigation into illegal practices on the Belgian beer market, Belgian brewery group InBev approached the Commission to blow the whistle on similar cartels in other EU Member States, including the Netherlands. After a period of investigation, the Commission issued a decision on 18 April 2007 fining Heineken, Grolsch and Bavaria €273.783 million for their involvement in a four-way beer cartel with InBev. The cartel coordinated and increased prices in both the on-trade (consumption on the premises, i.e. in cafes, hotels and restaurants) and off-trade (consumption off the premises, i.e. through supermarkets) market segments of branded and private label (i.e. supermarket own-brands or brands unsupported by advertising) beer. The cartel was organised through a series of meetings, often including representatives of high-ranking management. There was awareness that the behaviour was illegal; hand-written notes, code names and acronyms were used to avoid detection.

The three penalised breweries all appealed the Commission's decision to the CFI, which had become the General Court by the time the decisions were handed down in 2011. Core arguments included the fact that the six-year period that elapsed between the Belgian beer cartel decision (which led to InBev's leniency application) and the date of the Commission's Dutch beer decision contravened the principle of conducting proceedings within a reasonable period of time.

Other arguments included that the Commission breached the principle of sound administration by not conducting a full and impartial investigation and that procedural rights were violated in refusing the parties access to the replies to each others' statements of objections. The level of the fines were also challenged; the Heineken legal team argued that fines became "radically higher" under the Kroes administration. The investigation into the

160 Case C-445/11 P.
161 Case C-452/11 P.
The cartel had lain dormant until Neelie Kroes took over as Competition Commissioner in 2005, marking the beginning of an era of a new, more punishing fining policy. It was evident that the fine would have most likely been lower had the case been dealt with earlier, by comparing the sanctions imposed on the Belgian Beer cartelists in 2001 with those of their Dutch equivalents in 2007.

The General Court reduced the fines imposed on Heineken (from €219.3 million to €198 million)\(^\text{163}\) and Bavaria (from €22.9 million to €20.7 million)\(^\text{164}\), on the basis that the Commission had not proven that the scope of the cartel was as wide as it had claimed, and also on the grounds that the length of the administrative procedure had been unreasonable. Grolsch, however, saw the Commission's decision annulled in its entirety, the General Court holding that the Commission had not proved its direct participation in the infringement.\(^\text{165}\) Despite the fine reduction, on 28 October 2011 Heineken and Bavaria both lodged appeals to the CJEU.

Both breweries advanced analogous arguments in their challenge to the General Court's decisions. They argued that the Court erred in law in determining the start date of the cartel, in refusing to grant the parties access to InBev’s Statement of Objections and in finding that the Commission had not breached the principle of equal treatment by refusing to sufficiently compare this case with the Belgian Beer cartel decision. Both claimed that the fine imposed was unreasonably large, as a result of the Commission's excessive delay in investigating the cartel.

Bavaria also claimed that the principles of non-retroactivity, legality and proportionality were all infringed by the application of the 2005 stricter fining policy in a procedure that was opened in 2001, as well as challenging the manner by which the Commission calculated its fine.

Heineken queried its fine too, considering that the 5% reduction was an insufficient decrease to reflect the delay in the administrative procedure by the Commission. It also advanced the argument that the General Court erred in law in deciding that the Commission correctly considered that the conduct of the breweries in the off-trade segment could be characterised as a complex of agreements and/or concerted practices.

None of these arguments found favour with the CJEU, however; both appeals were dismissed in their entirety. In particular, regarding the equal treatment argument, the Court held that while the Commission must be consistent in its fine calculation, it was not bound to fine companies on exactly identical criteria, as this would risk "skewing" the calculation of the fine.

\(^{163}\) Case T-240/07.
\(^{164}\) Case T-235/07.
\(^{165}\) Case T-234/07.
3. **ARTICLE 102 TFEU**

3.1 **Commission Decisions**

3.1.1 **Alcan**\(^{166}\) - 20 December 2012

On 20 December 2012, following an August 2012 market test, the Commission adopted a decision that accepted legally binding commitments offered by Rio Tinto Alcan to address the Commission's competition concerns about aluminium smelting equipment markets following the acquisition of Alcan by Rio Tinto in October 2007. An independent expert has been tasked with monitoring Rio Tinto Alcan's compliance with its commitments.

The Commission issued its Statement of Objections on 21 February 2008 following a complaint submitted by crane manufacturer, Reel. The SO outlined the Commission's preliminary view that Rio Tinto Alcan had abused its dominant position by tying the licensing of its dominant aluminium smelting technology with handling equipment (pot tending assemblies or "PTAs") sold by Alcan's subsidiary Electrification Charpente Levage ("ECL"). Specifically, there were concerns over the existence of contracts for the sale of aluminium smelting technology which stipulated that purchasers must also buy ECL's PTAs. As a result of these contractual provisions, Alcan's customers allegedly appeared to be prevented from sourcing PTAs from other suppliers. According to the Commission, this behaviour risked limiting innovation in the aluminium production sector and affecting competition on the €70 billion worldwide aluminium market.

The commitments establish an objective and non-discriminatory method of identifying qualified PTA providers, which then allows users of Rio Tinto Alcan's technology to pick from the selected suppliers. Furthermore, the company will supply the required technical specifications to competing PTA suppliers to make sure that their PTAs are able to function in smelters that use Rio Tinto Alcan's technology.

3.1.2 **Thomson Reuters**\(^{167}\) - 20 December 2012

On 20 December 2012, after two market tests and various changes to the original offer, the Commission adopted a decision making binding commitments offered by Thomson Reuters (a Canadian news and financial data company) to create a new licence that permits customers to utilise Reuters Instrument Codes ("RIC"s) for data sourced from Thomson Reuters' competitors. 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 wishing to retrieve real-time information about IBM’s stock price on the New York Stock Exchange would enter "IBM.N"

\(^{166}\) Commission MEMO/08/111; Case COMP/39230.

\(^{167}\) Commission Press Release IP/12/1433.
into the Reuters networks and immediately gain up-to-date financial information on IBM, including its current price on the New York Stock Exchange.

On 30 October 2009, the Commission initiated formal antitrust proceedings on its own initiative against Thomson Reuters, examining whether Thomson Reuters was preventing clients from translating RICs to alternative identification codes of other datafeed suppliers (so-called "mapping"). It considered whether, without the possibility of such mapping, customers may potentially be "locked" into working with Thomson Reuters due to the perceived difficulties in replacing RICs by reconfiguring or by rewriting their software applications. In September 2011, the Commission notified Thomas Reuters of its preliminary view that the latter had violated Article 102.

Thomson Reuters was reported to have offered commitments to address the competition concerns identified by the Commission in December 2011.168

3.1.3 Microsoft – 27 March 2013

On 27 March 2013, the Commission imposed a fine of €561 million on Microsoft for non-compliance with its commitments to offer users a browser choice screen enabling them to choose their preferred web browser. This is the first fine imposed by the Commission for non-compliance with a commitment decision.

According to the Commission, Microsoft failed to roll out the browser screen with its Windows 7 Service Pack 1 from May 2011 until July 2012 resulting in 15 million Windows users in the EU possibly not having seen the choice screen. Microsoft has acknowledged that the screen was not displayed during that period.

In 2009, Microsoft offered commitments in order to address the Commission's competition concern that it may have tied its web browser Internet Explorer to its operating system Windows in breach of Article 102. The commitments included Microsoft making available, until 2014, a 'choice screen' in Windows from which users in the EEA could choose which web browser they wanted to install in addition to – or instead of – Internet Explorer. The Commission made these commitments legally binding in December 2009.

3.2 Ongoing Commission Investigations

3.2.1 Les Laboratoires Servier (Perindopril)\(^{169}\)

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

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

On 30 July 2012, the Commission informed Servier and its above-mentioned competitors of its objections to practices potentially delaying the entry of a generic version of perindopril (a cardio-vascular drug) onto the market.\(^{170}\) The objections relate to two specific sets of practices by Servier, which appears to be dominant on the perindopril market. Firstly, Servier acquired the scarce competing technologies used in the production of the drug, allegedly rendering generic market entry more difficult or delayed. Secondly, Servier induced its generic challengers to conclude patent settlement agreements, thus potentially limiting competition. The Commission views these practices as preserving Servier's position in the perindopril market, as the drug was about to reach the end of its patent protection.

This Statement of Objections followed upon the sending of objections to Lundbeck and other generic pharmaceutical companies under Article 101, and forms part of a wider inquiry into the pharmaceutical sector. Together, the Servier and Lundbeck investigations are the first dealing with so-called "pay-for-delay" agreements.

A three-day oral hearing to allow Servier to present its defence to the Statement of Objections is scheduled for April 15 2013.

In separate proceedings, the Commission sent a Statement of Objections to Servier for allegedly providing incorrect and misleading information to the Commission during the

\(^{169}\) 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/39612.

\(^{170}\) Commission Press Release IP/12/835.
course of the Commission's previous pharmaceutical inquiry. However, on 27 January 2012, the Commission closed this investigation and instead decided to focus on the substantive elements of the case.

This case is also listed in Section 2.4, Ongoing Commission Investigations – Other under Article 101.

3.2.2 **Google** \(^{171}\)

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 consider the next high profile battle in antitrust enforcement. The proceedings follow complaints filed in February 2010 by Foundem, Microsoft's Ciao!, and 1plusV.

The Commission is investigating whether Google has abused a dominant market position in online search by lowering the ranking of unpaid search results of competing services that provide 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 determines the price paid to Google by advertisers.

Furthermore, 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! already lodged a complaint with the German Federal Cartel Office in October 2009, over an alleged abuse of dominance by Google relating to its standard terms and conditions which Google said had been made known to the Commission.

In February 2010, Navx, a content provider for mapping services, filed a complaint with the French Competition Authority, alleging that Google illegally blocks its adverts. The case was settled on 28 October 2010, upon the submission of remedies by Google. However, subsequently Navx brought a claim in the Paris Commercial Court against Google for damages (which Navx estimated at €23 million) caused by Google's decision to block its adverts. In December 2012, the Commercial Court in Paris ordered Google to pay Navx €70,000 for failing to give enough notice before blocking its advertising account. However,

\(^{171}\) Commission MEMO/10/47, Commission Press Release IP/10/1624.
the Court concluded that Google had not breached competition laws and had not abused a dominant position. In particular, the Court held that Navx had failed to prove that there was a link between its difficult financial position and the cancellation of its advertising account and that its stated loss figures were "totally unrealistic and disproportionate." In January 2013, Navx lodged an appeal against the decision to the Court of Appeal in Paris.

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. It would seem that Microsoft's direct complaint (Ciao!, one of the original three complainants, is Microsoft's subsidiary) adds weight to the case, as Microsoft's Bing search engine directly competes with Google search (which is estimated to have approximately a 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," offering better services to its own Android phone users and iPhone users. Notably, iPhone's producer Apple Inc. does not own a search engine.
- Google prevents some advertisers from accessing their own data and transfers it to rival advertising platforms, such as its own adCenter. This allegation echoes complaints by other companies and is part of the Commission's probe.

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

On 21 May 2012, Vice-President Almunia publicly announced its invitation to Google to submit proposals on remedies to address four concerns about Google's business practices that "may be considered as abuses of dominance." These four concerns relate:

- First, to Google demoting competing services in its ranking algorithm, thus reducing competitors user traffic dramatically, and simultaneously preferencing its own services;
• Second, to Google copying content from competing vertical search services that it uses in its own offerings, sometimes without attribution;
• Third, to the agreements Google concludes with partners on the websites of which Google delivers search advertisements which result in de facto exclusivity;
• Fourth, to the restrictions that Google puts on the portability of online search advertising campaigns from its platform AdWords to the platforms of competitors.

On 25 January 2013, Google submitted proposed remedies on the basis of the Article 9 commitments procedure, which the Commission is now examining to assess whether these remedies appropriately address the four concerns set out by Vice-President Almunia in May 2012.

3.2.3 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.

On 26 March 2013, the Commission extended the scope of its investigation to include the International Swaps and Derivatives Association (“ISDA”), a professional organisation of financial institutions involved in the over-the-counter (OTC) trading of derivatives. The Commission's inquiry found preliminary indications that ISDA may have been involved in a coordinated effort of investment banks to delay or prevent exchanges from entering the credit derivatives business. Such behaviour, if established, would stifle competition in the internal market in breach of EU antitrust rules.

The second investigation relates to the alleged existence of preferential treatment given to some well-established banks by ICE Clear, a CDS clearing platform. In particular, it is claimed that ICE grants preferential tariffs to nine banks, which has the effect of locking these banks into 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.

In September 2012, the Commission confirmed that this investigation would be put on hold.
3.2.4 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, 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.

On 26 June 2012, CEZ offered to sell its coal-fired power generation capacity by way of remedy. On 4 March 2013, this remedy package was altered and a deal is expected soon.

3.2.5 ARA

On 15 July 2011, the Commission announced it had opened formal antitrust proceedings because of concerns that the Austrian waste management company ARA was preventing its competitors from entering or expanding 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 on the relevant market, and by putting pressure on customers and collection service providers not to contract with ARA's competitors. Such behaviour, if proven, would lead to higher waste management costs and, consequently, to higher prices for packaged goods.

The market concerned covers the organisation of the collection and the 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.

3.2.6 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. Luxury watches had traditionally been repaired by independent multi-brand repairers. CEAHR's complaint alleges that, as there are no alternative sources for

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172 Commission MEMO/09/518.
most of these spare parts, this practice threatened to drive independent repairers out of business.

On 10 July 2008, the Commission rejected this complaint on the basis of a 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 on the basis of mere "theories", failing to rebut the evidence provided by the complainants to support their aftermarket claim. The complainants had argued, *inter alia*, that a separate aftermarket for particular models of luxury watches existed as there were independent suppliers of repairs services for such watches, whereas the price of repair was low compared to the purchase of the primary product (*i.e.*, the watch), thus making switching between primary products in anticipation of a hypothetical price increase in repair services unlikely.

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

3.2.7 **Refrigerants for car air-conditioning systems (Honeywell)**

On 16 December 2011, the Commission opened antitrust proceedings concerning agreements between Honeywell and DuPont for the development of a new refrigerant for air conditioning systems in cars. The new refrigerant, known as 1234yf and intended for use in future car air conditioning systems, was announced as a suitable global replacement for the previous refrigerant R134a, which does not meet new EU rules.

Further to its Article 101 investigations, the Commission is also investigating whether Honeywell engaged in deceptive conduct during the evaluation of 1234yf between 2007 and 2009. It has been alleged that Honeywell did not disclose its patents and patent applications while the refrigerant was being assessed and then failed to grant licences on fair, reasonable and non-discriminatory (so called "FRAND") terms. Such behaviour may infringe Article 102.

See also Section 2.4, Ongoing Commission Investigations – Other under Article 101.

3.2.8 **Samsung**

On 21 December 2012, the Commission sent a Statement of Objections to Samsung. The Commission informed Samsung of its preliminary view that the company's seeking of injunctive relief against Apple in various EU Member States on the basis of patents that it had (i) declared to be essential to mobile standards (so called "SEPs"), and (ii) subjected to a commitment to license them on FRAND terms, amounts to an abuse of a dominant position.

The Commission stated that while it is normally legitimate to seek and obtain injunctive relief as a remedy against patent infringements, such conduct can amount to an abuse where SEPs

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173 Commission Press Release IP/12/89.
are concerned and the potential licensee is willing to negotiate a licence on FRAND terms. According to the Commission, recourse to injunctive relief risks excluding products from the market without justification as it generally involves a prohibition on selling any standards-compliant products. Alternatively, threats of injunctive relief can be used to demand excessive royalties.

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

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

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

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

On 18 December 2012, Samsung announced that it had begun withdrawing the injunctions it had filed against Apple in Europe. However, the Commission does not consider that this alters its preliminary conclusions about the anti-competitive nature of Samsung’s actions.

3.2.9 **MathWorks**

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

The Commission's investigation follows a complaint that MathWorks refused to provide a competitor with end-user software licences and accompanying interoperability information for its flagship products "Simulink" and "MATLAB", thereby preventing it from lawfully reverse-engineering in order to achieve interoperability with these two products. MathWorks' Simulink and MATLAB software products are widely used for designing and simulating control systems. Control systems are deployed in many innovative industries, such as in cruise control or anti-lock braking systems (ABS) for cars.

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As in the *Microsoft* case\(^{175}\), the issue of software interoperability is central to this investigation. The Commission's investigation will focus on whether MathWorks' behaviour has prevented competitors from achieving interoperability with its widely used products and thereby hindered competition in breach of Article 102.

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

3.2.10 **Motorola**

On 3 April 2012, the Commission opened formal investigations into whether Motorola Mobility Inc (acquired by Google in 2012) has abused a dominant position by virtue of seeking to enforce certain of its standard essential patent rights. The Commission will assess whether Motorola has abusively, and in contravention of commitments it gave to standard setting organisations, used certain of these patents to distort competition in the Internal Market. The concerns are understood to be similar in nature to those underlying the Commission's investigation into Samsung (see *supra*).

In line with the Commission's guidelines on horizontal cooperation agreements, standard setting organisations require the owners of patents that are essential for the implementation of a standard to commit to licence their patents on FRAND. At the time of the adoption of the second and third generation (2G and 3G respectively) mobile and wireless telecommunications system standards, the H.264 video compression standard and the standards for wireless local area network (WLAN) technologies, Motorola gave commitments to the relevant standard-setting organisations that it would licence any patents that are essential to the implementation of these standards on FRAND terms.

However, between 18 and 22 February 2012, the Commission received complaints from Apple and Microsoft about Motorola seeking and enforcing injunctions against Apple's and Microsoft's flagship products such as iPhone, iPad, Windows and Xbox, on the basis of patents which it had declared essential to the relevant standards.

The Commission is therefore investigating whether Motorola has failed to honour its commitments to the relevant standard-setting organisations by seeking injunctive relief and by offering unfair licensing conditions for its standard-essential patents in breach of Article 102.

Proceedings have been initiated in two separate cases: 1. Whether Motorola has failed to honour the commitments it gave to the International Telecommunication Unit (ITU), the International Organisation for Standardisation/International Electrotechnical Commission (ISO/IEC) and the Institute of Electrical and Electronics Engineers (IEEE) that it would licence patents it declared essential on FRAND terms; and 2. Whether Motorola failed to honour the commitment it gave to the European Telecommunications Standards Institute (ETSI) that it would licence patents it declared essential on FRAND terms.

\(^{175}\) Commission Press Release IP/04/382 and Commission MEMO/04/70 and MEMO/07/359.
3.2.11 Deutsche Bahn

On 13 June 2012 the Commission announced the opening of formal antitrust proceedings to investigate whether the German railway incumbent Deutsche Bahn AG and several of its subsidiaries operate an anticompetitive pricing system for traction current (a type of electricity needed to move electric locomotives and trains on the railway network) in Germany. This follows from inspections at the premises of Deutsche Bahn in 2011 by the Commission, in response to a number of complaints.

A subsidiary of Deutsche Bahn AG, DB Energie GmbH, is the only supplier of traction current on the German market. The Commission will focus its investigation on whether discounts on the price of traction current applied by DB Energie GmbH to railway undertakings active in Germany lead to higher prices for competitors of Deutsche Bahn and place them at a competitive disadvantage on the rail freight and passenger markets. This behaviour, if established, would constitute the abuse of a dominant position.

On 9 April 2013, the General Court will hear an appeal brought by Deutsche Bahn and others against the Commission's 2011 decision ordering inspections.

3.2.12 Bulgarian Energy Holding

On 3 December 2012, the Commission opened formal antitrust proceedings to investigate whether Bulgarian Energy Holding ("BEH") has abused its dominant position in the wholesale electricity market in Bulgaria and other nearby Member States by imposing territorial restrictions.

The investigation will focus on whether particular provisions contained in electricity supply agreements between BEH subsidiaries restrict their trading partners' freedom to deliver electricity bought by BEH by imposing territorial restrictions on resale. For example, BEH-provided electricity cannot be exported and can only be resold within Bulgaria.

3.2.13 Romanian Power Exchange/OPCOM and Transelectrica

On 11 December 2012, the Commission opened formal antitrust proceedings to investigate whether Romania's sole power exchange, OPCOM and its parent company, Transelectrica (the operator of the Romanian transmission system), have abused a dominant position by discriminating against businesses based on nationality or place of business.

The Commission is concerned over OPCOM's requirement that 'spot market' participants on the exchange possess a Romanian VAT registration and are established in Romania. Such a requirement could deter foreign companies from entering the Romanian electricity wholesale market due to increased costs, which could result in a decrease of market efficiency.

3.2.14 Gazprom

On 4 September 2012, the Commission opened formal proceedings against Gazprom, the Russian producer and supplier of natural gas, to determine if it abused its dominant position in upstream gas supply markets in Central and Eastern Europe. The Commission has raised concerns over the following potentially anticompetitive practices:
• Whether Gazprom might have divided gas markets by hampering the free flow of gas across Member States;

• Whether it may have inhibited gas supply diversification; and

• Whether it may have imposed unfair prices.

The Commission believes such practices may result in higher prices and the weakening of security and supply and, in the end, would harm consumers.

In September 2011, the Commission carried out dawn raids at the premises of companies involved in the supply, transmission and storage of natural gas located across various Member States primarily in Central and Eastern Europe.

Russia has not responded favourably to the investigation. Shortly after the Commission launched its investigation, President Vladimir Putin signed a decree requiring companies to first obtain government clearance before cooperating with foreign investigations.

3.2.15 Slovak Telekom/Deutsche Telekom

On 7 May 2012 the Commission sent a Statement of Objections to Slovak Telekom and Deutsche Telekom. The Commission objects to the companies' behaviour on broadband markets in Slovakia. The Commission has formed the preliminary view that Slovak Telekom may have refused to supply unbundled access to its local loops and wholesale services to competitors and that it may have imposed a margin squeeze on alternative operators by charging unfair wholesale prices. Deutsche Telekom may also be liable for the conduct of its subsidiary.

The market for the supply of broadband to end users in Slovakia is dependent upon access to Slovak Telekom's wholesale broadband services. Competitors in the retail market simply cannot enter without the cooperation of Slovak Telekom. Potential competitors in the wholesale market are being prevented from entering the market by Slovak Telekom's policy of predatory pricing. Furthermore, Slovak Telekom is alleged to have imposed unreasonable commercial and technical terms on retail competitors and set its prices on the wholesale market at a level that made it impossible for alternative providers to enter.

Slovak Telekom and Deutsche Telekom have rejected the allegations and attended an oral hearing on 6 and 7 November 2012. They argue that the Slovakian market is one of the most dynamic and competitive markets in the EU and that the Commission has ignored the competitive pressure from mobile offerings.

The Commission has been investigating the activities of Slovak Telekom for some time. On 22 March 2012 the General Court dismissed appeals by Slovak Telekom against a Commission decision which required it to provide information in the context of a Commission investigation and imposed penalty payments for a failure to comply with the request. The General Court found that the Commission had not erred in law by requesting the information (even though it pre-dated the accession of Slovakia to the EU) furthermore it
held the view that the Commission's requests were not disproportionate or procedurally unfair.

3.2.16 AB Lietuvos geležinkeliai
On 6 March 2013, the Commission opened formal antitrust proceedings against the Lithuanian railway incumbent AB Lietuvos geležinkeliai ("LG") to investigate whether it limited competition on the rail markets in Lithuania and Latvia by removing a railway track. Following a complaint, the Commission carried out inspections at the premises of LG in 2011, amongst other Baltic rail freight and related product companies.

In September 2008, LG suspended traffic on a railway track running between Lithuania and Latvia and the track was dismantled. This limits the number of rail connections between the two countries for international freight traffic. These actions could limit competition on rail markets in both Latvia and Lithuania by preventing customers from redirecting their railway freight to Latvia using the other services of other rail operators.

3.3 Judgments of the General Court

3.3.1 Microsoft – 27 June 2012
Case T-167/08, Microsoft v Commission, 27 June 2012

On 27 June 2012, the General Court handed down its decision essentially upholding the Commission's decision imposing a periodic penalty payment on Microsoft for failing to allow its competitors access to interoperability information on reasonable terms. The General Court did, however, reduce the amount of the periodic payment from €899 million to €860 million to take account of the fact that the Commission had permitted Microsoft to apply, until 17 September 2007, restrictions concerning the distribution of 'open source' products.

On 24 March 2004, the Commission adopted a decision finding that Microsoft had abused its dominant position by engaging in two separate types of conduct. Therefore the Commission imposed a fine of over €497 million on the company.

The conduct found to constitute an abuse which is relevant to this case was Microsoft's refusal to make available to its competitors certain 'interoperability information' and to authorise them to use that information to develop and distribute products competing with Microsoft's products on the work group server operating systems market. The Commission held that the abuse occurred between October 1998 and 24 March 2004. As a remedy, the Commission required Microsoft to grant access to that particular information and to allow the use of it on reasonable and non-discriminatory terms. Provision was made for the appointment of a monitoring trustee who was to be paid by Microsoft. This trustee was to have power to have access, independently of the Commission, to Microsoft's assistance,
information, documents, premises and employees and to the source code of the relevant products.

In the interim, a number of developments took place.

- In December 2005, the Commission announced that it had issued a Statement of Objections to Microsoft alleging its failure to comply with the interoperability remedy by virtue of its failure to comply with its obligation to supply complete and accurate interoperability information.
- In July 2006, the Commission imposed penalty payments of €280.5 million on Microsoft in relation to the failure to provide complete and accurate interoperability information.
- In March 2007, the Commission announced that it had sent a further Statement of Objections to Microsoft alleging that it had not complied with the obligation to provide interoperability information on reasonable and non-discriminatory terms.
- In September 2007, the General Court essentially upheld the Commission's 2004 decision.
- In October 2007, the Commission announced that Microsoft had agreed to take the steps that the Commission considered necessary for it to comply fully with the remedial interoperability obligations.

However, the contested decision in this case was the Commission's decision of 27 February 2008, in which it announced that it had imposed a penalty payment of €899 million on Microsoft for non-compliance with its obligation in the 2004 decision to provide the interoperability information on reasonable terms. The decision concerned alleged non-compliance between 21 June 2006 to 21 October 2007. Microsoft brought an action for annulment before the General Court.

The General Court rejected all the arguments put forward by Microsoft in support of annulment and therefore essentially upheld the Commission's decision. It held that Microsoft was in a position to assess whether the remuneration rates it was seeking up until 21 October 2007 were reasonable for the purposes of the 2004 decision. The General Court also held that the criterion relating to the innovative character of the technologies in question (used by the Commission in the assessment of the reasonableness of Microsoft's remuneration rates) provides an indicator of whether those rates reflect the intrinsic value of a technology rather than its strategic value, namely the value which comes from their ability to operate with Microsoft's operating systems.

The Court also held that the Commission is entitled to assess those technologies' innovative character by reference to its constituent elements, namely novelty and inventive step. The Court stated that the effect of assessing the innovative character of the technologies covered by the contested decision by reference these elements is not to extinguish the value of intellectual property rights or trade secrets, let alone make innovative character a precondition for a product or information to be covered by such a right or to constitute a trade secret in general.
Finally, the General Court held that Microsoft had failed to disprove the Commission's assessment that 166 of the 173 technologies relating to the interoperability information were not innovative.

The Court reduced the amount of the periodic payments in order to take account of the fact that the Commission, in June 2005, accepted that Microsoft could restrict distribution of products developed by its 'open source' competitors on the basis of non-patented and non-inventive interoperability information until September 2007. The Court considered that as the Commission was essentially allowing Microsoft to apply, for a certain period, a practice that could have entailed the preservation of a situation which the 2004 judgment was intended to put a stop to could be taken into account in determining the gravity of the conduct found to be unlawful and therefore, the amount of the periodic penalty payment.

3.3.2 **DEI v Commission – 20 September 2012**

Case T-169/08, *DEI v Commission*, 20 September 2012

On 20 September 2012, the General Court handed down its judgment on an appeal by Dimosia Epikhirisi Llektrismou ("DEI") against a decision of the Commission to accept commitments from Greece to ensure fair access to Greek lignite deposits. The General Court also annulled the Commission's original decision that Greece infringed Article 106(1), in conjunction with Article 102, by maintaining the quasi-exclusive rights for access to lignite granted to the state-owned electricity company DEI.

In 2004, the Commission sent Greece a letter of formal notice expressing its concerns about the 91% exploitation rights granted to DEI for access to lignite, namely that DEI could protect its *de facto* monopoly on the Greek electricity market as a result of the exclusive rights in the lignite sector. As other potential suppliers of lignite do not possess the same level of access, the Commission believed there was a potential abuse of DEI's dominant position. In March 2008, the Commission announced its decision that the measures adopted by Greece amounted to a breach of Article 106(1) in conjunction with Article 102.

In May 2008, DEI lodged an appeal with the General Court seeking annulment of the Commission's decision. In August 2009, the Commission announced that it had accepted commitments offered by Greece to ensure fair access to Greek lignite deposits. Greece agreed to hold public tenders to grant exploitation rights to four lignite deposits. On 16 January 2012, DEI lodged an appeal with the General Court against the Commission's decision accepting commitments from Greece. It claimed that the Commission had erred in law and manifestly misinterpreted the facts with regards to the market definition and that it did not take account of certain legal arguments and factual material provided in determining the scope of the corrective measures. DEI claimed that the Commission failed to provide full reasons for its decisions and that the Commission breached the principles of freedom of contract and proportionality. DEI also claimed that the Commission had not established the
existence of an actual or potential abuse of dominant position on the markets concerned whereas it was obliged to do so in order to be able to apply Article 102 in conjunction with Article 106(1).

On 20 September 2012, the General Court annulled the Commission's decision which found that Greece had infringed Article 106(1) in conjunction with Article 102. The General Court stated that the question arises as to the extent to which an abuse, even if only potential, of the dominant position by an undertaking must be identified, that abuse having a link with a State measure. The Court concluded that the Commission had not established that privileged access to lignite was capable of creating a situation in which, by the mere exercise of its exploitation rights, the applicant would have been able to commit abuses of a dominant position. The General Court held that by simply finding that the applicant – a former monopolistic undertaking – continues to maintain a dominant position on the wholesale electricity market by virtue of the advantage conferred upon it by privileged access to lignite and that that situation creates an inequality of opportunities on the market between the applicant and other undertakings, the Commission had neither identified nor established to a sufficient legal standard, what abuse within the meaning of Article 102, the State measure in question has led or could lead the applicant to commit. The General Court therefore annulled the Commission's decision.

As the Commission's 2009 commitments decision was based on the Commission's 2008 decision, it follows that the commitments decision was also annulled by the General Court.

On 2 February 2013, it was announced that the Commission has lodged appeals against the two judgments of the General Court which annulled its decision finding that Greece had infringed Article 106(1), in conjunction with Article 102, by maintaining the quasi-exclusive rights for access to lignite granted to a state-owned company. The Commission has also lodged an appeal against the General Court's judgment that set aside the commitments accepted by Greece.\(^{176}\) The Commission claims that the General Court erred in law, applied insufficient reasoning and misinterpreted the evidence with regards to the annulment of the Article 106 infringement decision. In particular, the Commission argued that it did establish that the state measures led to an abuse of dominance by the state-owned company.
3.4  

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

3.4.1  

**Tomra Systems – 19 April 2012**

Case C-549/10, *Tomra Systems et al v Commission* – 19 April 2012

On 19 April 2012, the CJEU dismissed an appeal by Tomra against a finding of abuse of dominance.

In 2006, the Commission fined Tomra Systems ASA –parent company of the Tomra Group– and a number of other Tomra Group Companies €24 million for allegedly abusing a position on the market for reverse vending machines. The Commission concluded that abuse occurred between the period 1998 to 2002 and consisted of the implementation of exclusionary strategies in various national reverse vending machine markets that involved the use of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes.

In February 2009, the Commission published a Guidance Paper on its enforcement priorities when applying Article 102 to abusive exclusionary conduct. Tomra's 2010 appeal to the General Court was the General Court's first judgment on Article 102 following the publication of the Guidance (2010). The appeal was made on six separate grounds, each of which were rejected and the General Court therefore upheld the Commission's decision.

Tomra subsequently appealed to the CJEU on five grounds:

1. An error of law in the review undertaken by the General Court of the Commission's finding of an anti-competitive intent to foreclose competition on the market;

2. An error of law and failure to provide adequate reasoning with regard to the portion of total demand which the agreements had to cover in order to constitute abuse;

3. A procedural irregularity and error of law in the assessment of retroactive rebates;

4. An error of law and failure to provide adequate reasoning in the analysis of whether the agreements in which the appellants are named as 'preferred, main or primary supplier' could be characterised as 'exclusive'; and


The CJEU rejected all five grounds of appeal and upheld the General Court's judgment. It found that the General Court was correct to reject Tomra's argument based on comparison of the fine imposed on the Tomra group and the penalties imposed by the Commission in other decisions. It held that neither the Commission nor the General Court were obliged to examine whether prices charged by Tomra were below long-run average incremental costs as the Commission had established the existence of an abuse by relying on other considerations, including that Tomra had failed to show that its conduct was objectively justified, or that it
generated significant efficiency gains which outweighed the anti-competitive effects on consumers.

3.4.2 Compass-Datenbank – 12 July 2012

Case C-138/11, Compass-Datenbank v Austria – 12 July 2012

On 12 July 2012, the CJEU ruled on a preliminary reference from an Austrian Court. The question asked was whether a public authority acts as an undertaking, for the purposes of Article 102, when it stores data reported by companies and allows inspections to be made in return for payment, but prevents more extensive use of the data.

Under Austrian national law, companies are required to submit certain information about themselves and their activities on a companies register (the Firmenbuch) which is a protected database owned by the Austrian State. The information submitted is made available to the public and can be searched upon payment of a fee.

Compass-Datenbank is a limited liability company established under Austrian law which operates a database containing economic data for the purposes of providing information services which require access to daily updates from the data in the companies register which is then added to its own research.

In 1999, the Austrian State gave a number of undertakings the task of establishing billing agencies for the transmission of data in the companies register in return for payment. They may charge the final customer a reasonable supplementary fee in addition to that which must be returned to the Austrian State. The billing agencies and the final customers are prohibited from making their own data collections which reproduce the data in the Firmenbuch, from supplying that data themselves or from adding advertising to the content or presentation of that data.

In 2001, the Austrian State lodged proceedings before the Vienna Commercial Court seeking an injunction against Compass-Datenbank to prohibit it from using the data from the register. In 2002, the Court directed Compass-Datenbank to refrain from re-using the Firmenbuch to update its own database and from storing or otherwise reproducing it for third parties.

In 2006, Compass-Datenbank brought an action before the Regional Civil Court in Vienna requesting an order requiring the Austrian State to make available certain documents from the register to it, in return for payment. Compass-Datenbank relied on a number of competition law arguments including that the Austrian State was acting as an undertaking with a dominant position for the purposes of Article 102 and was therefore obliged under the 'essential facilities' doctrine to make the data from the companies register available.

The Austrian Supreme Court referred three questions to the CJEU:

1. Is Article 102 to be interpreted as meaning that a public authority acts as an undertaking if it stores in a database ("the Register") the information reported by undertakings on the basis of statutory reporting obligations and allows inspection
and/or printouts to be made in return for payment, but prohibits any more extensive use?

2. If Question 1 is answered in the negative, does a public authority act as an undertaking where, in its capacity as owner of the information, it prohibits uses which go beyond that of allowing inspection and the creation of printouts?

3. If the public authority is considered to be an undertaking on either of the above grounds, is Article 102 to be interpreted as meaning that the essential facilities doctrine should be applied if there is no "upstream market" because the protected data is collected and stored in the Register in the course of a public-authority activity?

The CJEU concluded that "the activity of a public authority consisting in the storing, in a database, of data which undertakings are obliged to report on the basis of statutory obligations, in permitting interested persons to search for that data and/or in providing them with printouts thereof does not constitute an economic activity and that public authority is not, therefore, to be regarded, in the course of that activity, as an undertaking, within the meaning of Article 102 TFEU". (Para 51) Whether or not the searches and/or provision of printouts are carried out for remuneration is immaterial to the classification as the fees in this case are provided for by law and are not set by the entity concerned. The CJEU also held that the fact that a database-creating public entity relies on intellectual property rights in order to protect the data in that database does not mean that the public entity acts as an undertaking.

3.4.3 AstraZeneca – 6 December 2012

Case C-457/10 P, AstraZeneca v Commission – 6 December 2012

On 6 December 2012, the CJEU dismissed an appeal brought by AstraZeneca against the judgment of the General Court of 2010 which had upheld the 2005 Commission decision fining the undertaking €60 million for abusing its dominant position relating to its best-selling anti-ulcer medicine, Losec. This was the first time the CJEU ruled on a Commission decision on abuse of a dominant position in the pharmaceutical sector.

AstraZeneca, an Anglo-Swedish pharmaceutical group, markets Losec, a drug used for gastrointestinal conditions and based on the active ingredient omeprazole. Losec was revolutionary in the treatment of stomach ulcers and other acid-related diseases.

In June 2005, the Commission adopted a decision fining AstraZeneca for misuses of public procedures and regulations in a number of EEA States aimed at excluding generic firms and parallel traders from competing against AstraZeneca's product Losec, thereby infringing Article 102 and Article 54 of the EEA Agreement. Two main abuses were identified:

1. Making misleading representations before patent offices in a number of countries and national courts in Germany and Norway with the aim of obtaining supplementary protection certificates for Losec; and
2. Submission of requests for deregistration of the marketing authorisations for Losec capsules in Denmark, Norway and Sweden combined with the withdrawal from the market of Losec capsules and the launch of Losec MUPS tablets in those countries. This was done to intentionally prevent the entry of generic products.

On 1 July 2010, the General Court dismissed AstraZeneca's appeal to a large extent but found that the Commission had failed to establish (to the requisite legal standard) that the deregistration of the Losec capsule marketing authorisations was capable of restricting parallel imports of Losec capsules in Denmark and Norway and reduced the fine from €60 million to €52.5 million.

AstraZeneca appealed to the CJEU which upheld the General Court's ruling and clarified a number of important issues of principle in relation to market definition, dominance and the concept of abuse. In particular, it confirmed that misuses of regulatory procedures can – in certain circumstances – constitute abuses of a dominant position. Furthermore, the judgment confirmed the Commission's definition of the relevant product market and existence of a dominant position in this instance.

In the context of the first abuse, the Court found that the assessment of whether representations made to public authorities with the intention of improperly obtaining exclusive rights are misleading must be made *in concreto* and may vary according to the specific circumstances of the particular case in question. With regards to the second abuse, the Court referred to the "special responsibility" of undertakings which are in a dominant position under Article 102. The Court's judgment makes it clear that in the absence of grounds relating to the defence of legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification, even perfectly legal regulatory procedures may lead to antitrust risk.
4. MERGERS

4.1 Commission Phase II Decisions

4.1.1 Johnson & Johnson/Synthes – 19 April 2012\textsuperscript{177}

On 19 April 2012, the Commission cleared the proposed acquisition of Synthes Inc by Johnson & Johnson. Both are US companies active in the area of orthopaedic medical devices.

The Commission examined the competitive effects of the proposed acquisition in various affected markets. The Commission found that there were no competitive concerns for spine and shoulder replacement, cranio-maxillofacial devices and surgical power tools. However, results of the investigation showed that the transaction would considerably impede effective competition in a number of other markets in various Member States. The reason the Commission had these concerns was because the merging entities had very high combined market shares on this market. The mature nature of the products and the strong position of the AO Foundation, a highly-reputed Swiss-based, surgeon-led organisation with an exclusive relationship with Synthes were also cause for concern. It was found that surgeons are generally unwilling to switch to other suppliers of trauma devices, making entry by competitors difficult and unattractive.

Johnson & Johnson submitted commitments to the Commission which included the divestment of its entire trauma business in the EEA.

4.1.2 Südzucker/ED&F MAN – 16 May 2012\textsuperscript{178}

On 26 July 2012 the Commission approved, subject to conditions, the proposed acquisition of ED&F MAN by Südzucker. Südzucker is a German food company active in sugar production and marketing, food additives, frozen food and bioethanol production, and is Europe's largest sugar producer. ED&F Man is primarily a commodity trading company with a portfolio comprising sugar, sugar by-products such as molasses, coffee, tropical oils and biofuels. It is also the second largest sugar trader worldwide. European sugar markets are subject to production quotas and import restrictions as a result of the EU Common Agricultural Policy.

The Commission opened an in-depth investigation on 9 November 2011. The Commission was particularly concerned about the impact of the proposed acquisition on the Italian sugar production market. The proposed acquisition would have brought ED&F MAN's participation in the Brindisi refinery (the second biggest raw cane sugar refinery in Europe) under the control of the Südzucker, the current market leader. As a result the transaction would have eliminated current and potential competition between the two parties and created

\textsuperscript{177} Case COMP/M.6266.
\textsuperscript{178} Case COMP/M.6286.
a dominant player with a market share of over 50%. The Commission was also concerned about the current scarcity and high price of preferential raw cane sugar.

In order to respond to these concerns, the parties offered to fully divest ED&F MAN’s shareholding in the Brindisi refinery. The parties also committed to transfer to the purchaser the long-term contracts through which Brindisi obtains sufficient raw cane sugar input from providers at competitive prices. The Commission was satisfied that in adopting these conditions the Brindisi refinery will remain a viable and competitive force in Italy, independent of the newly merged entity. The Commission also held that the proposed transaction raised no competition concerns for the supply of raw cane sugar and molasses in the EU, the supply of refined sugar in Greece and the wholesale supply of refined sugar to retailers in Italy.

4.1.3 United Technologies Corporation/Goodrich Corporation – 26 July 2012

On 26 July 2012 the Commission approved, subject to conditions, the proposed acquisition of Goodrich Corporation by United Technologies Corporation ("UTC"). The UTC group is active in the production of a broad range of high-technology products and support services for the buildings systems and aerospace industries worldwide. It also has a number of major businesses in heating and air conditioning (Carrier), elevators (Otis), fire and security systems (UTC Fire & Security) and power cells (UTC Power).

The Commission's in-depth investigation showed that the proposed transaction would have reduced market competition in the aerospace markets for electrical power generation (AC) and had detrimental effects for engine producers through its effects on the markets for engine controls for small engines and fuel nozzles for engines. Whilst the Commission also investigated the competitive effect of the proposed acquisition in other affected markets it concluded that the acquisition did not raise competitive concerns in this respect.

The markets for AC power generation are characterised by high barriers to entry and both parties to the proposed acquisition are each other's closest competitors. As such the Commission was concerned that the transaction would have left the merged entity without sufficient competitive constraint. To gain regulatory clearance with regard to this concern, UTC proposed to divest Goodrich's business in aircraft electrical power generation and distribution systems.

The Commission was also concerned that competing engine suppliers, which depend on Goodrich for certain components, could be shut out from access to these components as a result of the acquisition. In particular, some engine producers, such as Williams Honeywell, depend on engine controls provided by Goodrich to compete. Rolls Royce is also relying on Goodrich to develop a new lean-burn fuel nozzle, to be used on future environmentally-responsible gas turbine aircraft engines. To remove these concerns, UTC proposed to divest

\[\text{\footnotesize \cite{179}}\]

\[\text{\footnotesize Case COMP/M.6410.}\]
Goodrich's business in engine controls for small aircraft engines and offer Rolls Royce an option to acquire Goodrich's lean-burn fuel nozzle R&D project.

Both proposals made by UTC fully addressed the Commission's concerns and the Commission concluded that the merged entity would continue to face competition from a number of strong competitors. They also found that customers would still have sufficient alternative suppliers as a result of the merger. As such the Commission approved the acquisition subject to the commitments outlined above.

4.1.4 **Telefónica UK, Vodafone UK and Everything Everywhere – 5 September 2012**

On 5 September 2012, the Commission, following an in-depth investigation, cleared a joint venture in the field of mobile commerce in the UK between Telefónica UK, Vodafone UK and Everything Everywhere (a joint venture between T-Mobile UK and Orange UK). These three operators are three of the four mobile network operators in the UK.

The Commission opened a Phase II investigation in April 2012 as it had concerns that there were potential competition issues in the nascent markets of mobile payment transaction services (so-called "mobile wallets"), mobile advertising and related data analytics services. This was based on a concern that the proposed joint venture may have the technical and commercial ability and incentive to block future competitors from offering their own mobile wallet services to customers in the UK or to degrade the quality of these competing mobile wallets so that they became less attractive.

The Commission found that the joint venture would not produce a significant impediment to effective competition in the market for mobile wallets. Members of the proposed joint venture relied on technology which allowed data to be securely stored on the SIM card of mobile handsets – access to which was controlled by the mobile network operators. As the joint venture contained three of the four mobile network operators in the UK, there was a risk that the joint venture could block routes to market using technical or commercial means. However, the Commission concluded that there were a number of already existing alternatives and more alternatives likely to emerge in the near future to ensure that there was competitive pressure on the joint venture's mobile wallet platform.

The Commission concluded that with regard to advertising and data analytics activities that there will be various other competitors in the market who have access to comparable data and who will be able to provide services in competition with the joint venture.

The joint venture was unconditionally cleared.

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180 Case COMP/M.6314.
4.1.5 Universal Music Group/EMI\(^{181}\) – 21 September 2012

On 21 September 2012, the Commission approved, subject to conditions, the proposed acquisition of EMI's recorded music business by Universal Music Group ("Universal"). Both Universal and EMI are active in discovering, developing and promoting recording artists and in the wholesale distribution recorded music market. Universal (part of the Vivendi group – an international media company) is the world's leading music recording company and is also prominent in online music retail, music publishing, artist management and merchandising. The acquisition brought together two of the four major, global record companies.

The Commission opened an in-depth investigation on 23 March 2012 with a particular focus on both national- and EEA-wide markets for digital music. The Commission alleged that Universal's increased size would enable it to impose higher prices and more onerous licensing terms on digital music providers thereby reducing innovation, diversity and consumer choice in the digital music market.

To respond to the Commission's concerns Universal engaged in a long and difficult remedies discussion process with the Commission. Eventually, Universal offered the following commitments. Universal offered to divest EMI Recording Limited, which holds the iconic Parlophone label (home to artists such as Coldplay, David Guetta, Lilly Allen, Tinie Tempah, Blur, Pink Floyd, David Bowie and Tina Turner), Chrysalis (home to the Ramones), Mute (home to Depeche Mode, Moby and Nick Cave and the Bad Seeds) and Co-Op (a label licensing business selling artists such as Mumford and Sons). Universal have also committed to selling EMI's 50% stake in the 'Now! That's What I Call Music' compilation joint venture and have agreed to continue to license its repertoire for that compilation for the next ten years. Finally, Universal agreed to not include Most Favoured Nation ("MFN") clauses in its favour in any new or renegotiated contract with digital music customers in the EEA for ten years. These clauses oblige digital customers to extend any favourable term granted to Universal's competitors to Universal.

Since the Commission approved the merger Universal has satisfied a number of the conditions of the acquisition. BMG Rights Management acquired the Mute label on 21 December 2012. On 7 February 2013 it sold Parlophone and Chrysalis to Warner Music for £478m. On 27 February 2013 Universal sold 'Now! That's What I Call Music' to Sony Music for just under £40m and Co-Op to PIAS Recordings for under £500k.

The deal is also notable for the inclusion of antitrust risk-shifting measures from seller to buyer. As was widely reported in the press at the time, Vivendi had agreed to a so-called "take or pay" clause, requiring the Purchaser to pay the full purchase price on a given date irrespective of antitrust clearances.

As a result of the commitments, the Commission finally concluded that competition in the digital music markets in the EEA will be adequately preserved and that the transaction could proceed without a negative impact on consumers.

\(^{181}\) Case COMP/ M.6458.
4.1.6 **Outokumpu/Inoxum – 7 November 2012**182

On 7 November 2012, the Commission approved, subject to conditions, the proposed acquisition of Inoxum, the stainless steel division of ThyssenKrupp of Germany by Outokumpu, the Finnish stainless steel company.

The in-depth investigation carried out by the Commission focused on the market for the production of cold rolled stainless steel products in the EEA and found that, on this market, the merger would have combined the two largest suppliers, creating an entity three times as big as the third player Aperam of Luxembourg and five times as big as the fourth player, Spain's Acerinox.

The investigation found that imports are insufficient to inhibit price increases, despite accounting for a substantial part of the EEA market, because they are generally not seen as fully substitutable by final consumers. Furthermore, it is unlikely that that the two closest competitors mentioned above would have found it more profitable to follow price increases rather than competing sufficiently aggressively to prevent them.

The parties to the proposed mergers offered a number of commitments in order to address the Commission’s concerns. The main commitment offered was that the following would be divested: Inoxum's production units at the stainless steel production site in Terni (Italy), Inoxum's stainless steel service centre in Ceriano Laghetto (Italy) and Outokumpu's stainless steel service centre in Willich (Germany) and, at the option of the purchaser, the parties’ stainless steel service centres in France and the UK and Ternunox warehouses in Padova, Ancona, Florence and Bologna. At the option of the purchaser, the divestiture package will also include Terni's forgoing business. The divestment will provide the purchaser with a fully integrated, stand-alone production and distribution business, having access to all major EEA Countries.

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4.1.7 **Hutchison 3G Austria/Orange Austria – 12 December 2012**183

On 12 December 2012, the Commission approved, subject to conditions, the proposed acquisition of Orange's mobile telephony business in Austria by Hutchison 3G, an indirect wholly owned subsidiary of Hutchison Whampoa Limited, Hong Kong, which provides mobile telecommunications services as well as mobile broadband and multimedia products such as mobile television, music and video calling in Austria.

The Commission focused its investigation on the Austrian market for mobile telecommunications services to end consumers. This investigation showed that the Austrian telecoms market is highly concentrated. The proposed merger would bring together two of the four mobile network operators in Austria and the merged entity would face competition from only Telecom Austria and T-mobile. The investigation also showed that competitors face high barriers to entry on this market and consumers have very little bargaining power in

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182 Case COMP/M.6471.
183 Case COMP/M.6497.
terms of negotiating contracts with operators. The Commission's economic analysis, which took into account the parties' particular strength in the private customer and data market segments, showed that the market power of the merging parties would have been higher than what their market shares suggested.

The Commission therefore had concerns that the elimination of one out of only four mobile network operators in Austria could lead to less competition and higher prices, harming the end consumer.

In order to address these concerns, Hutchison 3G proposed a number of commitments. It committed to divest radio spectrum and additional rights to an interested new entrant in the Austrian mobile telephony market. The potential new mobile network operator will have the right to acquire spectrum from Hutchison 3G and also additional spectrum at a 2013 auction planned by the Austrian telecom regulator. The regulator will reserve spectrum for a new entrant, in order to enable such an operator to build up a physical network for mobile telecommunication services in Austria. The new entrant will also benefit from privileged conditions for the purchase of sites for building up its own network in Austria. Hutchison 3G has also committed to provide, on agreed terms, wholesale access to its network for up to 30% of its capacity to up to sixteen mobile virtual network operators ("MVNOs") in the coming 10 years. This will enable MVNOs to offer mobile telecommunications services to end customers in Austria at competitive terms and conditions. MVNOs generally need to enter into a business agreement with a mobile network operator in order to provide mobile telephony services to their customers.

The Commission believes that the commitments take account of the various competitors and business models present in European mobile telephony markets and ensure that competition will be safeguarded. Therefore, the Commission concluded that the transaction would no longer raise competition concerns.

4.1.8 UPS/TNT Express – 30 January 2013

On 30 January 2013, the Commission prohibited the proposed acquisition of TNT Express by UPS. The Commission found that it would have restricted competition in fifteen Member States in the area of the express delivery of small packages to another European country, reducing the number of significant players to three or two and leaving DHL as the only alternative to UPS in some cases.

Small package deliveries form a network industry, relying on the integration of a number of assets including, \textit{inter alia}, local sorting centres, ground and air hubs, road vehicles and aircrafts. Express services are those for which a provider commits to delivering small packages in one day.

\footnote{Case COMP/M.6570.}
The Commission's investigation focused on the markets for international express deliveries of small packages in the EEA. The main providers of these services are so-called 'integrators' that control international integrated air and ground small package delivery networks. There are only four integrators in Europe: UPS, TNT, DHL and FedEx. FedEx has low market shares in a number of countries in which it does not exercise a significant competitive constraint on UPS and TNT due to the lack of density and scale of its European network. Other market players, for example national postal operators, are only able to compete to a restricted extent because they do not reach comparable efficiency or reliability, given their heavy dependence on road rather than air transport.

The Commission found that markets for intra-EEA express deliveries were national in scope and defined by reference to the location of the customer. Competition concerns were identified in fifteen of these national markets. If the notified acquisition had been allowed, many customers in these fifteen Member States would only have been able to choose between UPS, DHL and (occasionally) FedEx, which would likely have led to price increases.

UPS proposed to divest TNT's subsidiaries in the fifteen relevant Member States and, under certain conditions, TNT's subsidiaries in Spain and Portugal. UPS claimed that this would further increase the volume of small package express deliveries that would be transferred to the purchaser. Furthermore, it offered access to its air network for five years should the purchaser not be a so-called 'integrator'. However, doubt was cast over the effectiveness of the remedies due to the fact that in order to provide intra-EEA express deliveries from the seventeen countries covered by the remedy package, the purchaser would have needed suitable networks or partners in these other countries, a requirement which severely limited the number of potentially suitable purchasers. A last minute attempt by UPS to sign a binding agreement with a suitable purchaser did not materialise. In addition, the Commission expressed serious doubts as to the ability of the few potential purchasers to exercise a sufficient competitive constraint on the merged entity in intra-EEA express delivery markets. This was because a buyer that is not already an integrator would need both the ability and incentive to invest in its own air transport solution and to upgrade its ground network in order to become a sufficient competitive threat. Without sufficient volume in express deliveries it is doubtful that such an incentive would exist.

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

4.1.9 Ryanair/Aer Lingus – 27 February 2013

On 27 February 2013, the Commission prohibited the proposed takeover of Aer Lingus, the Irish flag carrier, by Ryanair as it found it would have resulted in a monopoly or dominant position on 46 routes where, currently, Aer Lingus and Ryanair compete against each other.

185 Case COMP/M.6663.
The remedies offered by Ryanair during the investigation were not sufficient to address the competition concerns raised by the Commission.

This was the third time that the proposed acquisition of Aer Lingus by Ryanair was notified to the Commission; in 2007 the first attempt was prohibited by the Commission and this prohibition was upheld by the General Court and in 2009, Ryanair's second notification was withdrawn.

During the investigation, the Commission took into account the changes in market circumstances since 2007 for example the market positions of Ryanair and Aer Lingus have become even stronger with their combined market shares raising from 80% to 87% in 2012 for short-haul flights outbound from Dublin. The number of routes to and from Ireland operated in competition by Ryanair and Aer Lingus has also increased from 35 to 46 in this five year period. Very high market shares would have resulted on all 46 routes if the acquisition was permitted. An outright monopoly would have been created on 28 routes, on eleven further routes, the only present competitive constraint would have come from charter airlines but would have remained weak due to clear differences in business model. Finally, on seven routes, Ryanair and Aer Lingus operate alongside other scheduled carriers. Both airlines are very close competitors, if not each other's closest competitors on these routes. This is because Ryanair and Aer Lingus offer a point-to-point service whereas the competing scheduled carriers operate from a business model which focuses on bringing connecting passengers to their own network hubs, for example British Airways to London Heathrow. The proposed merger would therefore have removed the competition that currently exists between Ryanair and Aer Lingus on the routes where their activity overlaps.

Furthermore, the investigation affirmed the existence of high barriers to entry stemming from both airlines' strong market positions in Ireland. The market investigation confirmed that there was no prospect that any new carrier would enter the Irish market following the merger and provide a sufficient challenge to the new entity.

In an attempt to address the competition concerns flagged by the Commission, Ryanair offered various sets of remedies during the course of the investigation. The final remedy package consisted mainly of the divestiture of Aer Lingus' operations on 43 overlap routes to Flybe and the cession of take-off and landing slots to IAG/British Airways at London airports, so IAG/British Airways would operate on three routes. Flybe and IAG committed to operate the routes for three years. Additional slot divestures on London-Ireland routes were also offered.

However, according to the Commission, these remedies fell short of ensuring that customers would not be harmed, taking into account the scope and magnitude of the competition concerns raised by the proposed transaction on the 46 routes. The Commission concluded that Flybe did not constitute a suitable purchaser capable of competing adequately with the merged entity.

The investigation also indicated that IAG/British Airways would not constrain the merged entity to a sufficient degree and would have little incentive to stay on the routes beyond the
agreed three year period. Finally, the Commission failed to conclude with the requisite
degree of certainty that the proposed commitments could be put in place in a timely manner,
nor was it certain they would work in practice and for a sustained period of time. For these
reasons, the third notified proposed acquisition of Aer Lingus by Ryanair was prohibited by
the Commission.

4.2 Commission Phase II Investigations

4.2.1 Compagnia Italiana di Navigazione/Tirrenia – 27 April 2012

On 18 January 2012, the Commission opened an in-depth investigation into the planned
acquisition of joint control over a branch of the Italian state-owned ferry group Tirrenia by
Compagnia Italiana di Navigazione ("CIN") of Italy. Tirrenia provides passenger and freight
maritime transport services connecting mainland Italy with some of the Italian islands,
primarily Sardinia and Sicily. CIN was created as a joint venture between Tirrenia's main
competitors Marininvest S.r.l., Grimaldi Compagnia di Navigazione S.p.A. and Onorato
Partecipazioni S.r.l. for the purpose of the aborted transaction.

The Commission's initial investigation indicated serious competition concerns, in particular
because the proposed transaction would lead to very high, if not monopolistic, market shares
on several maritime routes in Italy. During the initial stage the Commission was concerned
that the new entity would not be sufficiently constrained by strong, viable and credible
competitors on several routes and consequently that the acquisition raised serious doubts as to
its impact on competition.

The deadline for adopting a decision on the compatibility of the planned transaction was
suspended under Article 11(3) EUMR on 13 February 2012 because CIN and its shareholders
had failed to provide information necessary to the Commission's assessment.

On 27 April 2012, the proposed acquisition by CIN of the Italian state-owned ferry group
Tirrenia was aborted after the notifying parties abandoned the transaction.

4.2.2 Munksjö/Ahlstrom – 7 December 2012

On 7 December 2012, the Commission opened an in-depth investigation into the planned
merger of Munksjö AB, a Swedish-based manufacturer of high value-added paper products,
and the European label and processing business of Alhstrom Corporation (ALP), a Finnish
manufacturer of high performance materials.

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186 Case COMP/M.6362.
187 Case COMP/M.6576.
The Commission's preliminary investigation indicated that the proposed transaction would combine two leading suppliers of pre-impregnated paper and abrasive paper backings, both in the EEA and worldwide. The Commission has concerns that the remaining competitors in both markets may not have the ability to exert sufficiently strong constraints on the behaviour of the new company.

4.2.3 Syniverse/Mach – 20 December 2012\(^{188}\)

On 20 December 2012 the Commission opened an in-depth investigation into the proposed acquisition of Mach (based in Luxembourg and owned by private equity firm Warburg Pincus) by Syniverse (a U.S. company which is part of the Carlyle investment group). Both parties are data clearing houses ("DCHs") that settle the usage records of subscribers that roam on mobile operators' networks. Mobile phone operators use these services to determine the wholesale payments to make to each other for the roaming of these subscribers which are ultimately incorporated into consumer phone bills.

The initial investigation showed that the merger will create the largest DCH by a very wide margin at both the EEA and global levels. The Commission is concerned that customers and competitors will be unable to constrain the merged entity after the merger. As such mobile phone operators are likely to become vulnerable to price increases and a reduction in the quality of service provided. In addition the Commission is concerned that the merged entity's market power in the market for the settlement of invoices that mobile operators send to each other for the roaming of their subscribers ("financial clearing") will be significant. Furthermore, the merged entity will control important data feeds that mobile operators use to detect roaming fraud and, as such, the merger would leave the market without a credible competitor in these services.

The provisional deadline for the Commission's decision is 15 May 2013.

4.2.4 Nynas/Shell – 26 March 2013\(^{189}\)

On 26 March 2013, the Commission opened an in-depth investigation into the planned acquisition by Nynas AB – a Swedish producer and seller of naphthenic base oils for industrial lubricants, process oils and transformer oils – of refinery assets currently owned by Shell Deutschland Oil GmbH and located in Hamburg.

The initial investigation pointed toward possible competition concerns in the markets for naphthenic process oils and transformer oils where the resulting entity would have high market shares in the EEA. The Commission believes that the transaction would leave the merged entity as the only producer of naphthenic base oils, leaving no competitor to supply these oils for use in some end applications like industrial rubber, fertilisers and de-foamers.

\(^{188}\) Case COMP/M.6690.
\(^{189}\) Case COMP/M.6360.
With respect to other segments, including greases, metalworking fluids or cold-set inks and transformer oils, the few remaining competitors who are importing into the EEA may not have the ability to exercise sufficient competitive constraint on the merged entity.

4.3 Judgments of the General Court

4.3.1 TI Media – 21 September 2012

Case C-501/10, TI Media Broadcasting and TI Media v Commission – 21 September 2012

On 22 October 2010, TI Media lodged an appeal against the Commission claiming that the Commission had breached the EU Merger Regulation and Commission Notice on Remedies. They argued that the Commission had misused its power and failed to state reasons when it granted Sky's request to permit it to participate in the public Digital Terrestrial Television (DTT) tendering procedure, thereby going beyond the objective scope of the original commitments. TI Media argued that the Commission had erred in finding that TI Media was in a strong market position. Furthermore, TI Media also claimed that the decision was unlawful because it failed to investigate adequately and state reasons for its decision. In particular, TI Media argued that the decision was based on an incorrect and misleading interpretation of two Italian cases.

The General Court concluded that because TI media withdrew their application to participate in the public tender they had lost their standing in bringing an appeal. The General Court also held that the decision of the Commission to describe TI Media as dominant in the market did not have a binding legal effect. In particular, the Commission's characterisation of TI as a strong market player was not contained within the operative part of the judgment and as such even if the appeal was well founded – it could not result in the annulment or partial annulment of any part of the decision. As such the General Court concluded that the appeal should be dismissed in its entirety as inadmissible on 21 September 2012.

4.3.2 Electrabel – 12 December 2012

Case T-332/09, Electrabel v Commission – 12 December 2012

On 12 December 2012, the General Court dismissed Electrabel's appeal of the Commission's decision of June 2009 which imposed a fine of €20 million on Electrabel for acquiring control over Compagnie Nationale du Rhône without prior approval under the EU Merger Regulation. This was the first decision of its kind, whereby an EU Court ruled on a Commission decision to impose a fine for implementing a concentration of EU dimension without prior notification to and approval by the Commission.
The case concerned Electrabel, a company governed by Belgian law and active, essentially, in the production, sale, trading and operational management of networks in the electricity and natural gas sectors. It carries out its activities in France through its subsidiary Electrabel France. The case also involves Compagnie Nationale du Rhône (CNR), a French public undertaking which produces and markets electricity and has the task of developing and managing the Rhône Valley under a concession granted by the French State. It also provides river engineering services in France and approximately twenty other countries.

On 10 June 2009, the Commission established that Electrabel acquired de facto sole control over CNR in December 2003 when Electrabel became the largest shareholder of CNR, holding slightly less than 50% of CNR's shares and voting rights. With this acquisition of shares, the Commission found that Electrabel was expected to have a stable majority at shareholder meetings and that a shareholders' agreement between Electrabel and CNR's second largest shareholder Caisse des Dépôts et Consignations, guaranteed Electrabel control of CNR's Board of Directors. Electrabel notified its acquisition of sole control over CNR to the Commission more than four years after the actual implementation of the concentration.

Although the Commission unconditionally cleared the notified transaction, in a separate decision it imposed a fine of €20 million on Electrabel for violation of the standstill obligation.

The General Court upheld both the finding of a breach of the standstill obligation and the €20 million fine that was imposed. The applicant claimed that the Commission made a number of errors in concluding that the applicant had acquired de facto sole control. However, the General Court upheld the Commission's finding, thereby confirming that a minority shareholder may be considered to hold de facto sole control of a company within the meaning of the EU Merger rules. The fact that French law prohibits a private company from holding more than 50% of CNR's shares did not preclude the acquisition of de facto sole control by Electrabel under the EU Merger Regulation. The General Court also emphasized the fact that early implementation of a concentration is likely to bring about significant changes in the competition situation and is therefore not a mere formal or procedural infringement. The fact that Electrabel's acquisition of control was ultimately found not to raise any competition concerns was not a decisive factor for determining the gravity of the infringement nor was the fact that the infringement was committed through negligence considered sufficient to give rise to a reduction of fine.

4.3.3 **MyTravel – 10 January 2013**

Case T-403/05, *MyTravel v Commission* – 10 January 2013

MyTravel Group plc (formerly Airtours) brought an action against the Commission in 2003, suing it for damages over its 1999 prohibition of a planned acquisition of rival First Choice. On 15 November 2005, MyTravel lodged a separate action for annulment of the Commission's decision contained in two letters dated 5 September and 12 October 2005.
refusing to grant MyTravel access to certain documents connected with the Commission's investigation into the Airtours/First Choice merger. The basis for this action was MyTravel's claim that the Commission had erred in its application of Regulation 1049/2001. In particular, MyTravel claimed that the Commission should not be able to rely on the need to protect historic court proceedings in order to resist the disclosure of documents that are relevant to separate ongoing proceedings. It argued that the exception contained in Article 4(2) of Regulation 1049/2001 does not apply to internal documents or enquiries that were closed. Furthermore, MyTravel argued that disclosure would not undermine its decision-making process in similar investigations as the requested report did not relate to the way in which future decisions would be taken but rather to the way in which they had been incorrectly taken in the past.

On 9 September 2008, the General Court found that the Commission had been entitled to refuse to disclose a working group report and various preparatory documents on the basis that such disclosure would undermine the Commission's decision-making process. It also held that the Commission was entitled to refuse to disclose other internal documents and legal advice. However, it found that the Commission had not provided sufficient justification for the refusal to disclose one of the requested documents and, as such, the Commission decision was annulled in so far as it related to that document.

In July 2011, the CJEU annulled the General Court's decision in relation to issues raised by Sweden regarding the Commission's application of the protection of decision-making and the protection of legal advice exceptions. The CJEU upheld the aspects of Sweden's appeal relating to the protection of the decision-making process. The Court held that once the decision by the Commission has been adopted, the requirements for protecting decision-making processes are less acute. As such, the disclosure of documents (other than those containing opinions used internally as part of deliberations) can never undermine the decision-making process. The CJEU also upheld the aspects of Sweden's appeal relating to the protection of legal advice. The Court found that where the Commission decides to refuse access to a document, it is under a duty to explain how access to that document might actually and specifically undermine the interest in the protection of legal advice. The General Court had not verified whether the argument made by the Commission had been supported by concrete and detailed evidence. The CJEU referred back to the General Court issues that were raised by MyTravel in relation to the application of other exceptions to the obligation to disclose working papers.

MyTravel subsequently informed the General Court that it no longer had any interest in the outcome of the action. As a result, on 10 January 2013, the General Court ruled that the action had become devoid of purpose and that there was no longer any need to adjudicate on it. The General Court ruled that MyTravel and the Commission should each pay half of the other's respective costs of the appeal to the General Court. However, the Commission must pay Sweden's costs of appeal to the CJEU.
4.4  Court of Justice of the European Union Judgements

4.4.1  Commission v Editions Odile SAS – 28 June 2012

Case C-404/10 P, Commission v Editions Odile SAS – 28 June 2012

This case concerns the Commission's refusal to disclose documents relating to merger control proceedings to the French publishing company Odile Jacob, who was a third party in relation to the merger which formed the subject-matter of the Commission's procedure. The Commission relied on the exceptions to the right of access laid down in the Regulation on access to documents relating to the protection of commercial interests and the protection of the purpose of investigations.

Odile Jacobs brought an action against the Commission's decision before the General Court and on 9 June 2010, the General Court annulled the Commission's decision. It held that even if it were accepted that the documents requested could be covered by the exceptions relied on, the Commission had failed in its obligation to demonstrate, in a concrete and individual manner, that those documents did in fact undermine the interests protected by those exceptions.

In its appeal to the CJEU, the Commission claimed that the General Court misinterpreted various articles of Regulation 1049/2001, including, inter alia, the assumption that the Commission had an obligation to carry out a concrete, individual examination of each of the documents covered by a request for access, even in cases manifestly covered by an exception and also the annulment of the decision to refuse access to internal documents, where those documents are within the scope of the exception "the decision-making process" mentioned in Article 4(3) of the Regulation.

The CJEU held that the General Court had erred by failing to take into account the secrecy rules in the EU Merger Regulation when considering the application of the exceptions to disclosure. The CJEU was of the view that the General Court should have acknowledged the existence of a general presumption that disclosure of documents exchanged between the Commission and undertakings during merger control proceedings undermines, in principle, both the protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in the merger control procedure.

In the context of the disclosure of internal Commission documents, where court proceedings are pending, there is a general presumption that disclosure would seriously undermine the Commission's decision-making process and the protection of legal advice.

The CJEU therefore set aside the judgment of the General Court in so far as it annulled the decisions of the Commission refusing access to those documents.
4.4.2 Agrofert Holdings – 28 June 2012

Case C-477/10, Commission v Agrofert Holdings – 28 June 2012

This case concerned the Commission's refusal to disclose documents to Agrofert in relation to a merger between PKN Orlen and Unipetrol. On 20 April 2005, the Commission approved the acquisition of Unipetrol, a Czech company active in the fuels and petroleum sector, by the Polish oil company PKN Orelan. Agrofert, a third party, had sought access to all the unpublished documents concerning the notification, a request that was refused by the Commission on 13 February 2007.

On 7 July 2010, the General Court annulled the Commission's decision to refuse access. It found that the Commission had not conducted a concrete and individual examination of each of the requested documents to justify the refusal. Instead it had relied on general and abstract assumptions about the type of documents requested to support its decision. The Commission subsequently lodged an appeal with the CJEU.

The CJEU found that the Commission was not required to undertake a concrete and individual examination of each of the documents. The Commission was justified in its presumption that the disclosure of documents exchanged with notifying parties and third parties in merger control proceedings undermines both the protection of the commercial interests of the parties involved and the protection of the purpose of investigations. In particular, the Court found that Agrofert had not demonstrated an overriding public interest in disclosure of these documents. The 'public' interest that Agrofert had claimed – that it would suffer as a minority shareholder in Unipetrol – was in fact a private interest.

This decision by the CJEU provides greater security to those companies involved in merger proceedings that the sensitive information they provide to the Commission will not be disclosed. In addition, the Court clarified that the protection relating to internal documents and legal advice only applies where a merger case is still open (due to ongoing appeals). Where a Commission decision is definitive, the Commission must provide individual justification for relying on the exceptions to disclosure based on the protection of legal advice and the protection of its decision-making.

4.4.3 Editions Odile Jacob v Commission – 6 November 2012

Case C-551/10 P, Editions Odile Jacob v Commission – 6 November 2012

On 6 November 2012, the CJEU dismissed an appeal brought by Odile Jacob to have the judgment of the General Court of 13 September 2010 set aside. The General Court had dismissed Odile Jacob's action for annulment of the Commission decision of 2004 clearing the acquisition by Lagardère SCA ("Lagardère"), through Natexis Banques Populaires SA ("NBP") and its subsidiaries Segex SARL ("Segex"), Écrinves 4 SA ("Écrinves 4") and Investima 10 SAS ("Investima 10"), of publishing assets of Vivendi Universal Publishing SA ("VUP"), on condition that Lagardère complied in full with its commitments. This case is part of a series of actions brought by the various parties involved in the sale of publishing
assets held in Europe by VUP which were sold to Lagardère and Wendel Investissement SA ("Wendel Investissement").

Odile Jacobs raised four grounds of appeal. The first was that it claimed that the General Court erred in its assessment of the meaning of a concentration and of the characterisation of the nominee holding arrangement. It alleged that the General Court failed to ascertain the economic reality underlying the transactions relating to the holding agreement thereby undermining the effectiveness of 3(5)(a) of Regulation 4064/89. The CJEU rejected this argument and confirmed that, even if the transactions carried out enabled Lagardère to acquire earlier sole control – or control jointly with NBP – of target assets, that circumstance did not have any consequences other than that the notification of the concentration might be found to have been made late. This cannot result in the annulment of a Commission decision as it has no relevance to the compatibility of the concentration with the common market, but it may however entail penalties, such as fines.

Odile Jacobs alleged that the General Court made an error of law by failing to find that the Commission had breached the procedural requirement to state reasons regarding the holding arrangement. However, the CJEU concluded that the General Court did not err as the Commission had in fact provided an adequate statement of reasons. The Court stated that the characterisation of the nominee holding arrangement had no impact on the legality of the Commission's decision and noted that when the Commission approves a concentration, its duty to state reasons is satisfied when the decision clearly sets out the reasons for which the Commission considers that the concentration in question does not create or strengthen a dominant position which would distort competition on the common market. The General Court had clearly examined the reasons for the Commission's decision and had not erred in concluding they were sufficient.

Odile Jacobs also argued that the General court committed errors of law and assessment in disregarding the relevant legal criteria for assessing the creation or strengthening of a dominant position and in considering whether the commitments were appropriate for restoring effective competition and that the General Court manifestly erred in its assessment of the capacity of a financial buyer to constitute an actual or potential competitor, stating that candidates with no experience in the market should be rejected. Again, the CJEU dismissed Odile Jacobs' claims as unfounded for a number of reasons and upheld the decision of the General Court, dismissing the arguments of the appellants as unfounded.
5. **PRACTICE & PROCEDURE**

5.1 **Commission Decisions**

No Commission decisions relevant under this heading have been issued in the last twelve months.

5.2 **Judgments of the General Court**

5.2.1 **EnBW Energie – 22 May 2012**

Case T-344/08, *EnBW Energie Doden-Wurttemburg v Commission – 22 May 2012*

A Commission decision of 24 January 2007 imposed fines totalling €750 million on groups of companies for participating in a cartel in the market for gas insulated switchgear projects between 1988 and 2004. EnBW is an energy distribution company which considers itself to have been affected by the behaviour of the cartel. After submitting a number of applications to the Commission to be provided with access to documents related to the cartel investigation, the Commission finally rejected EnBW’s application on 16 June 2008. As a result, EnBW sought to annul the decision of the Commission at the General Court.

The General Court found that the Commission had adopted a restrictive interpretation of the scope of EnBW's request for access to certain documents and had thus conducted a manifest error of assessment. The General Court examined the extent to which the Commission's decision fell under the exceptions to the right of access to documents under Article 4 of Regulation 1049/2001. The Commission relied on two exceptions to the right of access: that these documents were (i) manifestly covered in their entirety by an exception and (ii) groups of documents which contained the same type of information. In both cases, the General Court found that the Commission had relied on these exceptions in an abstract and general way, failing to indicate to which documents the exceptions applied and why such exceptions were applicable. Furthermore, the Court rejected the Commission's claim that to undertake a concrete, individual examination would have provided an unreasonable administrative burden. The Court held that the Commission had failed to investigate alternative options and to explain in detail in its decisions the reason why the amount of work was unreasonable.

The Court also examined whether the Commission was correct in refusing to provide access on the basis of the need to protect investigations, prevent the disclosure of commercially sensitive information and also because some of the documents were prepared for internal use only. With regard to the protection of investigations, the Court found that because the investigation was closed at the time of the request, disclosure could not threaten the investigation. Furthermore, the Court found that cases must be regarded as closed once a decision is adopted – even if that decision is still technically capable of annulment by the
Courts. The Commission's argument that the "purpose of investigations" should be interpreted more generally was judged to be incompatible with the purpose of the regulation: to give the fullest possible effect to the right of public access to documents. The General Court also supported EnBW's argument that disclosure of these documents could not jeopardise the commercial interests of the parties because they dated from at least five years before. The Court held that the passage of time is likely to gradually reduce the need for protection on grounds of commercial interests of the information held in case files. Finally, the Court found that the Commission had failed to establish the required legal standard to demonstrate that these were internal documents. The contested decision was therefore annulled.

5.2.2 Protégé International – 13 September 2012

Case T-119/09, Protégé International v Commission – 13 September 2012

Protégé filed a formal complaint with the Commission arguing that legal proceedings initiated by Pernod Ricard against it had the aim of eliminating Protégé as a competitor in the Irish whiskey market and not of protecting Pernod Ricard's intellectual property rights in its trade mark 'Wild Turkey' product as Pernod Ricard had alleged. Protégé also claimed that Pernod Ricard had abused its dominant position by refusing to supply whiskey to Protégé. On 23 January 2009, the Commission rejected the complaint because it found that there was insufficient Community interest in continuing with the investigation.

Protégé sought to appeal the decision of the Commission. The Court stated that in rejecting a complaint, the Commission is under an obligation to state reasons which are sufficiently precise and detailed to enable the Court to effectively review the Commission's discretion to define priorities. The Court found that only in wholly exceptional circumstances can the fact that legal proceedings are brought be capable of constituting an abuse of a dominant position. In this circumstance, Protégé had failed to show that the proceedings either constituted sham litigation designed to harass Protégé or were designed to eliminate competition. The Court also found that the Commission had correctly decided that the continuation of the investigation would be disproportionate – Pernod Ricard was irrelevant to the question of the impact on the functioning of the Internal Market. Finally, the Court rejected the allegation of a refusal to supply. The General Court noted that refusal to supply only constitutes an abuse of dominance where there are no alternative sources of product and if the refusal is of such a nature as to exclude all competition. The Court found that such circumstances did not exist in this case. The contested decision was therefore upheld.
5.2.3 KWS (Obstruction of Inspection) – 27 September 2012

Case T-357/06, Koninklijke Wegenbouw Stevin v Commission – 27 September 2012

Koninklijke Wegenbouw Stevin ("KWS") failed in its appeal to the General Court regarding a decision by the Commission to fine it and another road construction company €27.36 million for an infringement of Article 101.

On 1 October 2002, KWS had refused Commission officials entry into their building and had demanded that they wait in a ground-floor room for the arrival of external lawyers (KWS had no in-house lawyer). Access was granted after 47 minutes, once the police had arrived. Later that afternoon KWS also refused to grant the inspectors access to a company director's office on the grounds that no relevant documents were present there. As a result of these actions the Commission increased the amount of the fine by 10%, on the grounds that KWS had refused to cooperate with the Commission's inspection. KWS lodged an appeal with the General Court to challenge that decision.

KWS argued that it had the right to request that the Commission await the arrival of its external lawyers as it had no in-house lawyer. As a result of the Commission failing to accede to such a request, KWS argued that its rights had been breached. However, in its judgment of 27 September 2010, the General Court found that the exercise of the right to counsel cannot undermine the proper conduct of an investigation. Furthermore, the presence of an in-house or external lawyer is not a condition of the inspection's legality. In any inspection, the inspectors must immediately be granted entry and be allowed to occupy the offices of their choice. In so far as the Commission allows the company to contact its lawyer before the Commission begins its inspections, any such delay may only be extremely limited. The General Court also found that the refusal to grant access to a particular office constituted a refusal to submit to the inspection. The Court confirmed that a decision authorising an inspection gave inspectors the authority to enter any premises, land and means of transport of a company during normal business hours. As such the Commission did not breach the rights of KWS by requesting to inspect an office and by ignoring KWS's plea to wait until its external lawyers had arrived.

KWS also argued that the increase in the fine by 10% was disproportionate. The General Court found that refusing to permit entry (both in general and to a specific office) could be considered an aggravating circumstance in the calculation of the fine. The increase of the fine by 10% was not disproportionate given the applicant's conduct and repeated attempts to obstruct the inspection. The General Court also emphasised the importance of inspections to the Commission's duties and the need to ensure that undertakings comply with the rules. As such the General Court rejected the appeal lodged by KWS.
Nexans and Prysmian (Inspection Decision) – 14 November 2012

a) Case T-135/09, Nexans France SAS and Nexans SA v Commission

b) Case T-140/09, Prysmian and Prysmian Cavi e Sistemi Energia v Commission

Nexans and Prysmian are active in the electric cable sector. Whilst investigating the supply of high voltage underwater and underground cables the Commission decided to inspect the premises of the companies in January 2009. During the inspections, the Commission examined and took copies of documents and hard drives of computers of certain key individuals (which were to be inspected at a later date). In the case of Nexans, the inspectors also asked for explanations of documents from a particular individual. The appellants challenged the legality of the conduct of the inspections, with a particular focus on the copying of hard drives and the request for explanations. They argued in particular that the product scope of the inspection decision was too broad and vague. The appeals were heard separately by the General Court but the conclusions reached were substantively the same.

The appellants argued that the inspection decision was insufficiently precise (they referred to all cables rather than just the market for high voltage cables) and, as such, the inspections amounted to 'fishing expeditions'. The General Court found that the Commission's inspection decision therefore lacked the reasonable grounds required to justify an inspection covering all electric cables. However, the General Court did conclude that the Commission had reasonable grounds for ordering inspections covering high voltage cables. Therefore, insofar as the inspection decision concerned non-high voltage cables, the General Court upheld the applicants' appeals. The Commission must therefore ensure that the scope of its inspections reflect the activities which are reasonably suspected of causing an infringement.

The appellants also sought the annulment of the individual acts (copying electronic files and asking for explanations) conducted under the inspection decision. However, the General Court rejected this aspect of the appeal. The General Court agreed with the Commission that the acts challenged were intermediate measures designed to pave the way for an eventual Commission decision. Because such acts had no binding legal effect (they were merely part of a process leading to a final decision), they could not be challenged in their own right. As such the Court found that the legality of the contested actions could only be examined in the context of an action challenging any penalty imposed for non-compliance or in the context of challenging the final decision adopted by the Commission.
5.3  

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

5.3.1  

**Schenker (Intervening Party) – 8 June 2012**

a) Case C-589/11 *Schenker v Air France and Commission*

b) Case C-590/11 *Schenker v Air France-KLM and Commission*

c) Case C-596/11 *Schenker v KLM and Commission*

d) Case C-598/11 *Schenker v Cathay Pacific Airways and Commission*

e) Case C-600/11 *Schenker v Lan Airlines and Others*

f) Case C-602/11 *Schenker v Deutsche Luftansa and Others*

In these judgments, the CJEU denied that customers of cartel members who wish to bring follow on damages claims can, on that specific ground, become an intervening party to appeal proceedings before the EU Courts. Whilst being a party to such proceedings may provide access to evidence which could assist any damages claim, this is not the purpose of annulment actions. Annulment actions are not pursued in order to facilitate bringing civil actions in national courts.

On 9 November 2010, the Commission fined eleven air cargo carriers a total of €799 million for coordinating surcharges for fuel and security between 1999 and 2006. Schenker AG applied to the General Court for leave to intervene in support of the Commission in response to a number of appeals which had been brought by the airlines. It maintained that, as a customer of the companies involved in the cartel, it was directly affected by the collusive practices because it had suffered heavy losses as a result of paying fuel and security surcharges. Furthermore, it argued that it had a direct and existing interest in ensuring that the contested decision was upheld as the decision formed the legal basis of any follow on damages claims before national courts.

The General Court dismissed Schenker’s applications in October 2011. It found that Schenker had not demonstrated either (i) that it had either a direct and existing interest in the result of the appeals or (ii) that the outcome of such appeals would affect its commercial activities. The mere fact that it might have been impacted by high prices was an insufficient basis for a right to intervene. Schenker lodged appeals against the General Court's decisions on two grounds. The CJEU dismissed each of the appeals brought by Schenker on substantially the same grounds as the General Court.

Schenker argued that the General Court had made an erroneous assessment of its interest in the final determination of the cartel. The CJEU held that Schenker did not fall into one of the standard categories of undertakings which have previously been granted leave to intervene. Schenker was neither a part of nor a competitor of the entity fined; it had not participated in the administrative procedure and it was not an association representing a large number of operators in the sector affected by the cartel. The CJEU found that there was no basis for the
assumption that the cartel would resume its anticompetitive activities if the decision were annulled. In particular, the cartel members had not sought leave to appeal the operative part of the Commission's decision. The Court held that the mere fact that an undertaking might be affected by high prices does not distinguish it sufficiently from other economic operators in the sector who might also have been affected by the cartel activity. Whilst the CJEU stated that active participation in the administration procedure of the Commission before the filing of a complaint might, in certain circumstances, establish an interest in the case, Schenker did not fulfil those criteria.

Additionally, Schenker argued that the General Court had failed to assess its direct and existing interest compared to other consumers of airfreight services. The CJEU found that Schenker was in no different position to any other direct or indirect customer of members of the cartel. The General Court had therefore been correct to state that the purpose of actions seeking annulment was not to facilitate the bringing of civil actions in national courts. Were any person who could potentially bring a civil case in a national court to be permitted to intervene in appeals, it would undermine the effectiveness of the appeal procedure before the EU courts.

The CJEU thus upheld the judgments of the General Court.

5.3.2  **E.ON Energie (Broken Seal) – 22 November 2012**

Case C-89/11, *E.ON Energie AG v Commission* – 22 November 2012

The CJEU dismissed E.ON's appeal against a General Court judgment upholding the Commission decision to impose a €38 million fine for breaking a Commission seal during an investigation. This was the first case in which the Commission fined an undertaking for breaching a seal under Article 23(1)(e) of Regulation 1/2003.

On 29 and 30 May 2006, the Commission carried out unannounced inspections at various energy companies in Germany. During the course of the inspection, the Commission placed a seal on a locked door at E.ON's premises which, upon their return the following day, they discovered had been broken. As a result of the breach of the seal, the Commission fined E.ON €38 million for intentional or negligent breach of a seal under Article 20(2) of Regulation 1/2003.

E.ON brought an action before the General Court in June 2008 to challenge the Commission's decision. On 15 December 2010, the General Court entirely dismissed the appeal. The General Court held that the Commission was not required to prove that the seal was broken, nor that someone had entered the room and manipulated evidence through the break in question. The General Court also found that the fine imposed by the Commission was proportionate. As a result E.ON appealed the General Court's decision to the CJEU raising six grounds of appeal, all of which were dismissed.

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The first ground of appeal related to the burden of proof. E.ON argued that the evidence of a broken seal (which had in fact passed its shelf life) did not constitute sufficiently precise proof to establish evidence of an infringement. However, the CJEU held that the Commission had determined that the seal had been broken on the basis of evidence. As such, it was for E.ON to provide evidence to challenge the finding in its appeal to the General Court. Therefore, the General Court had not reversed the burden of proof or set aside the principle of the presumption of innocence in its decision.

Secondly, the CJEU considered whether the General Court had erred by requiring E.ON to establish a direct causal link between the fact that the seal had exceeded its shelf life and the appearance of a false positive result on the seal. The CJEU held that the General Court had considered whether there was such a causal link and therefore also rejected this ground of appeal.

In its third ground of appeal, E.ON alleged that the General Court had distorted the evidence with regard to whether the seal had been properly affixed. The CJEU held that E.ON had failed, in its submissions, to reveal any material inaccuracy in the General Court's assessment of the report.

E.ON's fourth ground of appeal alleged that the General Court had erred when it drew the logical conclusion that the seal functioned effectively because the other seals affixed during the investigation had functioned properly. The CJEU supported the Commission's argument that if an undertaking could challenge the probative value of a seal by alleging it was merely 'possible' that it was defective then the Commission would no longer be able to rely on seals in its investigation. As such this ground of appeal was also dismissed.

The appellants also argued that the General court infringed the rules on the administration of evidence, the laws of logic and the principle of *in dubio pro reo* by dismissing E.ON's arguments as irrelevant in relation to the state of the void messages on the broken seal. The CJEU held that E.ON had failed to explain the errors of law that had allegedly been made. The Court confirmed that the General Court was – and remains – the sole judge of whether it requires supplemental information. As such, the CJEU felt it could not criticise the General Court for not acceding to E.ON's request for further enquiry.

Finally, E.ON challenged the proportionality of the fine because the Commission had not established that the door had been opened or that documents had been removed. The CJEU confirmed that the General Court retains jurisdiction to rule on the amount of fines unless the fine was inappropriate or excessive to the point of being inappropriate. In the opinion of the CJEU, the infringement arose from the breach of the seal and such an infringement was serious enough in its own right to warrant a fine. The CJEU commented that the General Court could have imposed a fine of up to 10% of E.ON's annual turnover if the Commission had demonstrated that it had been involved in anti-competitive behaviour. In contrast the fine handed down represented only 0.14% of E.ON's annual turnover. The CJEU dismissed the appeal submitted by E.ON in its entirety.
6. POLICY DEVELOPMENTS

6.1 Commission consults on proposal for simplifying procedures under the EU Merger Regulation – 27 March 2013

On 27 March, the Commission announced that it was opening a public consultation on its proposal to simplify certain procedures for notifying mergers under the EU Merger Regulation. The proposed changes could permit up to 70% of all notified mergers to qualify for review under the simplified procedure, approximately 10% more than the current figure.

The Commission proposes extending the scope of the simplified procedure. In particular, the market share threshold for treatment under the simplified procedure for mergers between firms competing on the same market would be raised from 15% to 20%. For mergers between firms active in upstream and downstream markets, the threshold would rise from 25% to 30%. The Commission is also hoping to make it possible to treat a case as simplified where the combined market share of two firms active in the same market is above the 20% threshold but the increase in market share which results from the merger is particularly small.

Finally, the Commission is proposing to amend the regulation implementing the Merger Regulation so that in cases which fall outside the ambit of the simplified procedure, merging firms would only have to submit detailed information for those markets where their market share actually exceeds the threshold for applying the simplified procedure.

6.2 Commission sets out procedure for seizing IT data in dawn raids – 19 March 2013

On 19 March 2013 the Commission updated its guidance on how it will seize information held on computers and storage devices when raiding companies suspected of anticompetitive conduct. EU officials visiting corporate premises will copy documents in electronic form and take them to Brussels for further sorting if required. The notice largely codifies what has become the EU’s approach to dawn raids in recent years.

The Commission has developed advanced forensic techniques for identifying and seizing data held electronically and the notice clarifies a number of points. The notice emphasises that companies must cooperate fully with inspectors and provide staff to explain how their IT systems work. In some specific circumstances, companies must block access to email accounts. The notice also states that EU officials will keep any storage devices until the end of the raid and copies of documents can be made and taken – in an envelope – for further processing.
6.3 **Commission consults on proposal for revised competition regime for technology transfer agreements – 20 February 2013**

On 20 February 2013, the Commission launched a public consultation on the draft proposal for a revised block exemption for technology transfer agreements ("TTBER") and for revised guidelines. The objectives of the proposal are threefold: the Commission wants to update the current regime in order to strengthen incentives for research and innovation; the Commission wants to facilitate the diffusion of intellectual property; and the Commission wants to stimulate competition.

The Commission launched a first public consultation on 6 December 2011 and, based on the results of this, it has proposed certain changes to the current regime.

In the context of the TTBER, the Commission clarifies that it will apply if the block exemption on R&D agreements or the block exemption regulation on specialisation agreements are not applicable. A new test for deciding whether certain provisions surrounding a technology transfer agreement, in particular concerning purchases for material or equipment from a licensor or the use of the licensor's trademark, are exempted from Article 101 along with the technology transfer agreement itself is proposed. The new test only looks at whether the provisions are 'directly and exclusively related' to what the licensee produces with the licensed technology.

Second, a market share threshold of 20% up to which agreements between competitors are deemed unproblematic is applied also to the situation where, in an agreement between non-competitors, the licensee owns a technology which it only uses for in-house production and which is substitutable for the licensed technology. This is to capture the higher potential for anticompetitive effects of those particular types of agreement on the downstream product market or the upstream innovation market.

Third, the Commission proposes to remove passive sales restrictions protecting a licensee from passive sales from other licensees into its exclusive territory during the first two years of an agreement between non-competitors from the automatic exemption of the TTBER, thereby aligning it with the Block Exemption Regulation for Vertical Restraints.

Fourth, all exclusive grant-backs will now be treated equally and will fall outside the scope of the TTBER and will therefore require an individual assessment.

Finally, the Commission also proposes that termination clauses fall outside the safe harbour of the block exemption regulation.

The Commission has also proposed Draft Guidelines for technology transfer agreements which include changes on two main sections. In the section on settlements, the Commission clarifies that settlement agreements involving a licence may run counter to Article 101, in particular pay-for-delay agreements. Second, the Commission had proposed changes in the section on technology pools. It clarifies that the definition of essentiality in terms of complementary technology covers not only essentiality in relation to producing a particular product but also in relation to complying with a standard.
This public consultation will close on 5 May 2013 and the Commission plans to adopt a new regime before April 2014.

6.4 **Commission decides not to prolong maritime transport antitrust guidelines – 19 February 2013**

On 19 February 2013, the Commission announced that it will not prolong or renew a set of specific guidelines on the application of Article 101 to maritime transport services. Therefore, the current maritime Guidelines which were adopted in July 2008, will expire on 26 September 2013.

The decision follows the results of a public consultation which was launched in May 2012. This confirmed the Commission's preliminary view that specific antitrust guidelines in the maritime transport sector were no longer needed. According to the Commission, the principal initial function of these Guidelines was to facilitate the transition from a specific to a general competition regime for maritime transport following the 2006 repeal of the Liner Conferences Block Exemption Regulation. This transitional objective has now been achieved.

This decision comes as part of a wider, more general Commission policy of phasing out sector-specific antitrust rules.

6.5 **Commission publishes guidance on application of competition rules in car sector – 27 August 2012**

The Commission published, on 27 August 2012, a set of frequently asked questions on the application of the EU antitrust rules in the motor vehicle sector. These come as a result of requests from stakeholders and national competition authorities for further practical guidance on the application of the Motor Vehicle Block Exemption Regulation and accompanying Guidelines, published by the Commission in May 2010.

The frequently asked questions aim to provide stakeholders with guidance on how the Commission applies these rules, in particular on the markets for repair and maintenance services and spare parts.