# Major Events and Policy Issues in EU Competition Law 2016–2017: Part 1


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Access to documents; Cartels; Competition law; Confidential information; Delay; EU law; European Competition Network; National competition authorities; Private enforcement



## Abstract

*John Ratliff and his colleagues set out their annual review of major events of 2016–17, dealing here with legislative developments and most European Court judgments. They first outline the European Commission's ECN+ Empowerment Directive for national competition authorities. Then they summarise: AG Wahl's Opinion in Coty Germany, dealing with selective distribution and online marketplace bans; various EU court judgments on damages for excessive delay at the General Court; and various cartel appeal cases dealing with settlements, parental liability, evidence and rights of the defence. Finally, they summarise the ECJ Grand Chamber's judgment in Evonik Degussa—Hydrogen Peroxide, dealing with the Hearing Officer's right to consider legitimate expectations and equal treatment issues in confidentiality claims.*


This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU[1] from November 2016 until the end of October 2017.[2]

This article is divided into an overview of:

- legislative/EC practice developments;
- European Court judgments;
- European Commission decisions;
- sectoral reviews; and


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[1] "TFEU" is the abbreviation for Treaty on the Functioning of the European Union; "TEU" is Treaty on European Union; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court, "ECJ" for the European Court of Justice and "CJEU" for the overall Court of Justice of the European Union; "AG" for Advocate-General; "NCA" is the abbreviation for National Competition Authority; "SO" is the abbreviation for Statement of Objections; "BE" is the abbreviation for Block Exemption; "Article 27(4) Notice" refers to the EC's Communications under that article of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. References to the "ECHR" are to the European Convention of Human Rights and references to the "CFR" are to the EU Charter of Fundamental Rights.

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to Directorate-General (DG) Competition's specific competition page available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 9 January 2018]. References to "I.C.C.L.R." are to previous articles in the series "Major Events and Policy Issues in EU Competition Law" published in the *International Company and Commercial Law Review*.

- selected policy issues.

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

*Box 1*

- **Major themes/issues in 2016/17**

  — ECN+: towards a more independent and uniform NCA enforcement system.
  — *Intel* and economic evidence of effect in rebate cases.
  — Online marketplace bans and selective distribution:
    * *Coty Germany:* AG Wahl's Opinion, GC in *CEAHR* (and more …)
  — EC's final e-commerce report.
  — Hearing Officer's powers: *Evonik Degussa*.
  — Google—a fine of €2.42 billion (and a precedent).
  — Disruptive innovation and antitrust.

## Legislative/EC practice developments

*Box 2*

- **Legislative/EC practice developments**

  — ECN+ "NCA Empowerment Directive":
    * Proposed Directive, following from:
      - EC 10-year review of operation of Regulation 1/2003.
      - ECN studies.
      - Consultations.
    * A major step in European Competition law enforcement.
      - N.B. impact on EU Competition rule enforcement *and national competition rules*.
    * Aim: to adopt by spring 2019 (with a two-year implementation period).
  — Key points:
    * Aims to ensure NCAs are independent and have effective powers.
    * Underlines that NCA defence rights should at least meet the standards of general principles of EU law and the CFR (confirming *Eturas* etc) (e.g. SO, right to be heard etc).
    * Carries over/widens many EU cases (e.g. *Automec II*,[3] NCAs to be able to set priorities).
    * Harmonises some core notions in fining (fine on an "undertaking"; economic successor liability).
    * Addresses "under-enforcement" (situation where no administrative/civil fine, if criminal sanctions apply).
    * Sets a "minimum maximum" fine! (10% of turnover.)

[3] *Automec Srl v Commission of the European Communities* (T-24/90) EU:T:1992:97; [1992] 5 C.M.L.R. 431.

- **Legislative/EC practice developments (continued)**
  - Key points:
    - Seeks to clarify the NCA/EC leniency correlation problem.
    - Member States to establish leniency programmes in line with main principles of ECN model.
    - Explicit rules for NCA "summary applications"/full leniency applications.
    - Requirement to extend immunity to employees/directors (as well as company).
    - Expansion of mutual assistance rules between NCAs (e.g. re inspections, notification of decisions, enforcement of fines).
    - Safeguard/limitation rules.
    - Member States "shall ensure …":
      - Requires legislation, funding.
      - May also lead to NCA guidance "endorsed by the ECN".
    - Debate in European Parliament (e.g. re need for minimum standard privilege).
    - Respects those Member States systems with a judicial rather than administrative enforcement system.

## *ECN+*

In March 2017, the European Commission (EC) adopted a Proposed Directive "to empower the competition authorities of the Member States to be more effective enforcers" (the "Proposed Directive").[4]

The EC notes that since the entry into force of Regulation 1/2003,[5] the EC and the National Competition Authorities (NCAs) have adopted over 1,000 enforcement decisions, with the NCAs responsible for 85%.[6] However, Regulation 1/2003 did not address the means and instruments through which NCAs apply the EU competition rules.

According to the EC, many NCAs still do not have all the means to effectively enforce arts 101 and 102 TFEU.[7] Therefore, with the Proposed Directive, the EC aims to further enhance the NCAs' enforcement of the EU competition rules. The proposal identifies areas for improvement and proposes solutions based on the EC's model.

The main points are as follows:

First, the main objectives of the Proposed Directive are set out in the Preamble: (1) to ensure that NCAs have the necessary guarantees of independence, resources, and enforcement and fining powers to effectively enforce EU competition law, and national competition law in parallel to arts 101 and 102 TFEU; and (2) to ensure the effective functioning of the internal market and the European Competition Network (ECN).[8] The key point to note is that the Proposed Directive also addresses national competition law powers (insofar as they are related).

[4] With thanks to Virginia Del Pozo and Álvaro Mateo Alonso. IP/17/685, 22 March 2017 and EC Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market COM(2017) 142 final available at: *https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-142_en* [Accessed 15 January 2018]. For the previous consultation, see last year's article: John Ratliff, "Major Events and Policy Issues in EU Competition Law 2015–2016: Part 2" [2017] I.C.C.L.R. 119, 145.

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

[6] Proposed Directive, Explanatory Memorandum, p.2.

[7] Proposed Directive, Explanatory Memorandum, p.2.

[8] Proposed Directive, Preamble, Recital 48.

Secondly, the Proposed Directive states that the exercise of powers conferred to NCAs shall be subject to appropriate safeguards, "including respect of undertakings' rights of defence and the right to an effective remedy before a tribunal", in line with the standards of the general principles of EU law and the Charter of Fundamental Rights of the European Union (CFR).[9] In particular, in the Preamble of the Proposed Directive, it is stated that:

- NCAs should inform the parties under investigation of the preliminary objections raised against them under art.101 or art.102 TFEU prior to taking an adverse decision;
- those parties should have the opportunity to make their views known on these objections before such a decision is made;
- those parties should have the right to access the relevant file of an NCA;
- the addressees of final decisions of NCAs applying art.101 or art.102 TFEU should have the right to an effective remedy before a tribunal; and
- such final decisions of NCAs should be reasoned to allow addressees of such decisions to ascertain the reasons for the decision and to exercise their right to an effective remedy.[10]

Thirdly, in order to guarantee that all NCAs can enforce EU competition rules independently and with the necessary resources, the Proposed Directive provides that Member States shall ensure that: (1) NCAs (including the staff and the members of the decision-making body) act independently; (2) NCAs have the power to set their priorities[11]; and (3) NCAs have a guarantee of human, financial and technical resources.[12]

Fourthly, the EC considers that many NCAs do not have all the necessary tools to effectively detect and tackle infringements. The Proposed Directive also notes that divergences between enforcement tools may lead to ineffective co-operation within the ECN. Thus, the proposal aims to ensure that all the NCAs have core minimum effective powers. Notably that they can:

- investigate, including carrying out inspections in business[13] and non-business premises (with prior authorisation of a national judicial authority)[14];
- gather evidence which is accessible to the entity irrespective of the medium on which it is stored (i.e. (data) clouds)[15];
- conduct interviews[16] and send requests for information[17];
- adopt decisions, including prohibition decisions (or decisions requiring behavioural or structural remedies)[18] and interim measures[19];

[9] Proposed Directive art.3.
[10] Proposed Directive, Preamble, Recital 12.
[11] Proposed Directive art.4.
[12] Proposed Directive art.5.
[13] Proposed Directive art.6(1)(a).
[14] Proposed Directive art.7.
[15] Proposed Directive art.6(1)(b).
[16] Proposed Directive art.6(1)(d).
[17] Proposed Directive art.8.
[18] Proposed Directive art.9.
[19] Proposed Directive art.10.

- resolve cases through commitments[20]; and
- adopt effective sanctions for non-compliance.[21]

Fifthly, the EC notes that not all the NCAs have powers to impose deterrent fines both for substantive and procedural breaches of antitrust rules, or to enforce their payment. The Proposed Directive therefore aims to ensure that fines are sufficiently deterrent for both substantive and procedural breaches of antitrust rules:

- NCAs shall calculate the fine amount on the basis of the same common parameters (as in Regulation 1/2003)[22]: the gravity and the duration of the infringement[23]; and
- in terms of the level of the fines, the Proposed Directive provides that the maximum fine should be 10% of the worldwide turnover of the undertaking.[24] NCAs shall be able to impose fines on associations of undertakings and to consider the turnover of their members. NCAs should also be able to enforce against members (at least where they are involved in the management of the associations).[25]

Importantly, the EC aims to ensure that "undertakings" do not escape liability for fines. The Proposed Directive therefore requires that the EU notion of "undertaking" is applied for the purposes of imposing fines. Accordingly, NCAs should be able to find liable both parent companies and legal or economic successors of the undertaking.[26]

Sixthly, the Proposed Directive states that Member States shall ensure that there is a route to address "under-enforcement" in Member States with criminal or quasi-criminal judicial proceedings. As a result, NCAs should have the power to impose fines either directly themselves in administrative proceedings or to seek the imposition of fines in non-criminal judicial proceedings.[27] The co-ordination and attribution of competences between criminal/quasi-criminal proceedings and administrative/non-criminal proceedings is to be decided at a national level.

Seventhly, the Proposed Directive aims to clarify the interplay between parallel applications for leniency to multiple NCAs (and the EC) and to harmonise the leniency programmes across Europe.

The Proposed Directive translates the core principles of the ECN Model Leniency Programme into law to ensure that companies benefit from leniency in the same way across the EU[28]:

- all NCAs should be able to grant immunity and reductions from fines and accept summary applications under the same conditions;
- applicants will have five working days to file summary applications and NCAs cannot make parallel intensive requests to the applicants while the EC is investigating; and

[20] Proposed Directive art.11.
[21] Proposed Directive arts 12(2), 15.
[22] Regulation 1/2003 art.23.3.
[23] Proposed Directive art.13(1).
[24] Proposed Directive art.14(1).
[25] Proposed Directive art.13(2).
[26] Proposed Directive art.12(3).
[27] Proposed Directive art.12(1)–(2).
[28] Proposed Directive arts 16–22.

- should the EC decide it will not act on a case, summary applicants should have the opportunity to submit full leniency applications to the relevant NCAs. If correctly done (i.e. there are detailed rules on summary applications to be followed), such an application would then be deemed to have been submitted on the day of the EC application for leniency.

The Proposed Directive also foresees that NCAs' leniency and settlement submissions should have the same level of protection as before the EC and, importantly, to protect immunity applicants' employees and directors from individual sanctions if they co-operate.

Eighthly, the Proposed Directive intends to improve mutual assistance between NCAs by enhancing the notification and execution of NCAs' decisions in other Member States.[29] For example, when one NCA carries out an inspection to gather evidence located in its jurisdiction for another NCA, the requesting NCA would have the right to attend and actively assist in this inspection.

Similarly, the proposal provides for arrangements to assist an NCA with the notification of decisions and enforcement of fines, when the company being fined has no legal presence in its territory or does not have sufficient assets for the fine to be enforced against it in that Member State.

In this regard, the Proposed Directive provides the following safeguards:

- notification and enforcement will be carried out in accordance with the laws of the requested Member State;
- decisions imposing fines can only be enforced once they are final and can no longer be appealed by ordinary means;
- limitation periods will be governed by the law of the applicant Member State;
- the requested authority is not obliged to enforce fining decisions if this is manifestly contrary to the public policy of that Member State;
- disputes concerning the lawfulness of a measure will fall within the competence of the applicant Member State; and
- disputes concerning the notification or enforcement measures taken in the requested Member State will fall within the competence of the requested Member State.

Ninthly, the EC sets out in its proposal a mandatory suspension of the NCA limitation period to impose a fine while another NCA or the EC is investigating the same infringement.[30] The other NCAs will not be prevented from subsequently acting, although this suspension is "without prejudice to absolute limitation periods provided under national law" (and the EC also notes that these limits should not render the effective enforcement of the EU rules practically impossible or excessively difficult).[31]

Tenthly, the Proposed Directive includes the following general provisions[32]:

[29] Proposed Directive arts 23–26.
[30] Proposed Directive art.27.
[31] Proposed Directive, Explanatory Memorandum, p.19.
[32] Proposed Directive arts 28–31.

- the NCAs will have the right to bring and defend their cases before courts;
- the information gathered pursuant to the Proposed Directive may only be used for the purpose for which it is acquired and may not be used for the imposition of sanctions on natural persons; and
- evidence collected will be admissible irrespective of the medium on which the relevant information is stored.

The Proposed Directive is now with the European Parliament and the EU Council. The EC's goal is for the Proposed Directive to be adopted by Spring 2019, before the next EU elections.

The key stakeholders have discussed several aspects of the proposal since the EC adopted it. These include the meaning of the "manifestly contrary to public policy" justification to refuse mutual assistance,[33] the possibility to enforce fines imposed by one Member State in another Member State[34] and the calculation base for fines (e.g. worldwide turnover as compared with relevant turnover).[35]

Interestingly, Andreas Schwab, the Rapporteur of the European Parliament, also has declared his aim to further integrate fundamental rights of defence into the text to ensure companies can protect themselves,[36] notably by establishing an EU-wide minimum standard of legal privilege.[37]

## *Comment*

In many ways this is welcome, notably insofar as: (1) companies may expect more consistent enforcement rules and practices; (2) the EC is trying to sort out complex issues such as multiple applications for cartel immunity, and criminal/administrative enforcement; and (3) given the EC's emphasis on the need for respect of EU-level defence rights.

However, the EC's initiative is still controversial. In particular because it involves: (1) EU legislation harmonising *national procedural rules*, beyond the case law promoting that[38]; and (2) the issue of NCA independence, which has been topical (and controversial) for some time now. The Proposed Directive focuses on NCAs' powers, without focusing on standardisation of defence rights. It is important (and welcome) that the Proposed Directive addresses the issue and includes provisions on defence rights and rights of appeal. These complement cases such as *Eturas*,[39] which have underscored that the CFR applies to EU-wide enforcement of the EU rules. Increased and uniform enforcement powers can only go hand in hand with equivalent increased and uniform defence rights.

It has been a surprise to many to learn that a Member State like Poland did not have a Statement of Objections system[40] and to be reminded that respect for legal

[33] *Mlex*, 11 October 2017.
[34] *Mlex*, 21 September 2017.
[35] *Mlex*, 9 October 2017.
[36] *Mlex*, 9 October 2017.
[37] *Mlex*, 25 September 2017.
[38] Such as, *Vlaamse Federatie van Verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW v Raad voor de Mededinging* (C-439/08) EU:C:2010:739; [2011] 4 C.M.L.R. 12.
[39] *Eturas UAB v Lietuvos Respublikos Konkutencijos Taryba* (C-74/14) EU:C:2016:42; [2016] 4 C.M.L.R. 19.
[40] UoKiK, "Statement of objections and the evaluation committee—Poland's competition Authority enacts new procedures", Press Release (3 August 2015) available at: *https://uokik.gov.pl/news.php?news_id=11822* [Accessed 9 January 2018].

professional privilege is not standard and uniform. It may well be that there are already effective defence rights in most national competition enforcement proceedings. The issue here is whether they all meet the EU and CFR standards.

### *Insurance block exemption*

In December 2016, the EC announced that it would not renew Regulation 267/2010,[41] the insurance block exemption, after its expiry at the end of March 2017.[42] The Regulation exempted agreements from competition rules which relate to: (1) joint compilations, tables and studies; and (2) co-insurance or co-reinsurance pools.

Following a review started in 2010, the EC concluded that its 2011 Horizontal Guidelines[43] offered sufficient guidance to assess the conformity of joint compilations, tables and studies. In addition, the public consultation and a study showed that the exemption for pools was not much used in practice.[44] The EC noted that it would continue to monitor the market to assess how insurers deal with the new rules.

## European Court judgments

### *General*

*Box 3*

- **Court cases—General**
  - — *Coty Germany*[45]: AG Wahl Opinion:
    - * Online marketplace ban not unlawful in a luxury watch selective distribution system, where distributors can make other online sales.
    - * *Pierre Fabre* applies to total online sales bans.
    - * Necessary for "network head" to have control over presentation of products.
    - * Amsterdam court has agreed in the *Nike v Action Sport* SDSs case.[46]
  - — *Swiss Watch Repairers*:
    - * EC entitled to reject complaint of independent repairers about alleged concerted practice, abuse of dominant position with refusal to supply.
    - * *Pierre Fabre*[47] only against SDSs designed to protect brand image, otherwise *Metro*[48] applies.
    - * If designed to preserve quality of goods and protect proper use a SDS is lawful.

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

[42] EC, "Daily News", *Midday Express*, 13 December 2016.

[43] *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* [2O11] OJ C11/1.

[44] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2015–2016: Part 1" [2017] I.C.C.L.R. 75, 77.

[45] *Coty Germany GmbH v Parfumerie Akzente GmbH* (C-230/16) EU:C:2017:603.

[46] *Nike European Operations Netherlands v Action Sport Soc. Coop A.R.L.* (Case No.C/13/615474/HA ZA 16-959) NL:RBAMS:2017:7282.

[47] *Pierre Fabre Dermo-Cosmétique SAS v President de l'Autorite de la Concurrence* (C-439/09) EU:C:2011:649; [2012] Bus. L.R. 1265.

[48] *Metro SB-Gromärkte GmbH & Co KG v Commission of the European Communities* (C26/76) EU:C:1977:167; [1978] 2 C.M.L.R. 1.

### *Eurosaneamientos*

In December 2016, the ECJ ruled on two requests for preliminary rulings from the Spanish courts concerning the compatibility of the Spanish system of *procuradores*' fees with EU law and EU competition law.[49] *Procuradores* are specialised legal representatives, distinct from lawyers (*abogados*) charged with working effectively with the courts to facilitate the proper progress of the proceedings.

Under the Spanish system, the fees of the *procuradores* are governed by fee schedules with mandatory amounts according to the amount involved in the dispute. The fee can then be negotiated between the *procurador* and his client but it cannot be reduced or increased by more than 12% of the mandatory amount. There is also an overall ceiling for the fees received by a procurador in a single case. The courts review the strict application of the system of the *procuradores*' fees and would only derogate from the 12% limit under exceptional circumstances.

The referring courts queried whether such rules were contrary to art.101 TFEU and art.4(3) TEU (among other things).

The ECJ found not. The court noted that the legal provision establishing this system was drafted and enacted by the state and not by the professional associations of *procuradores*. Moreover, the ECJ found that the determination of the fees remained under the state's control.

As a result, the ECJ concluded that Spain did not require or encourage the professional associations of *procuradores* to conclude agreements contrary to art.101 TFEU, or to abuse a dominant position contrary to art.102 TFEU.[50] Consequently, the ECJ ruled that the system of the *procuradores*' fees was not caught by this combination of EU competition law and EU law.

### *Coty Germany*

In July 2017, AG Wahl issued his Opinion in *Coty Germany*.[51] This case deals with the compatibility of selective distribution systems (SDSs) for luxury goods with online marketplace bans (i.e. a prohibition to sell on websites such as Amazon or eBay offering an online marketplace for goods) with art.101 TFEU. The issue is highly topical. It is also dealt with in the EC's e-commerce inquiry which we will summarise in Part 2 of this article, published in the next issue of this journal.

## Background

Coty Germany (CG) is one of Germany's leading suppliers of luxury cosmetics. CG sells its products on the basis of a selective distribution contract employed uniformly throughout Europe.[52] Parfumerie Akzente (PA) has distributed CG's products for many years, both in brick and mortar locations (actual physical shops) and over the internet, partly through its own online store and partly via Amazon.[53]

[49] With thanks to Virginia Del Pozo. *Eurosaneamientos v Arcelor Mittal Zaragoza SA* (C-532/15) EU:C:2016:932.
[50] *Eurosaneamientos* EU:C:2016:932 at [37]–[41].
[51] With thanks to Itsiq Benizri. Opinion of AG Wahl in *Coty Germany* EU:C:2017:603, ECJ Press Release 89/17 (26 July 2017).
[52] Opinion in *Coty Germany* EU:C:2017:603 at [17].
[53] Opinion in *Coty Germany* EU:C:2017:603 at [18].

CG justifies its SDS by the need to support the luxury image of its brands.[54] As a result, each point of sale must be authorised by CG and meet certain standards to promote the luxury character of Coty's brands.[55] A supplemental agreement on internet sales provides that the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised.[56]

In March 2012, Coty revised the supplemental agreement and provided that retailers can only sell on the internet provided that they do so on their own website and that they preserve the luxury character of Coty's products. Coty also prohibited the use of a different business name and the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty.[57]

PA refused to approve those amendments and CG brought an action before the *Landgericht* Frankfurt, seeking an order prohibiting PA from distributing products bearing the brand in issue via Amazon.[58]

In July 2014, the *Landgericht* Frankfurt dismissed CG's action. The court relied on the ECJ's judgment in *Pierre Fabre*[59] to state that the objective of preserving a prestige brand image does not justify the introduction of a SDS.

The *Landgericht* also found that CG's amendments constituted a hardcore restriction within the meaning of art.4(c) of the Vertical Block Exemption Regulation (VBER), which prohibits restrictions of active or passive sales to end users by members of a SDS operating at the retail level of trade.[60]

The *Landgericht* also found that the marketplace ban could not benefit from an individual exemption because it was an unnecessary restriction. It would have been sufficient for Coty to apply specific quality criteria to third-party platforms to preserve the luxury character of Coty's brands.[61]

CG appealed and the *Oberlandesgericht* Frankfurt requested a preliminary ruling from the ECJ.[62] The *Oberlandesgericht* asked four questions:

(1) Are SDSs for luxury and prestige goods compatible with art.101 TFEU?

(2) Are bans on using online marketplaces which are discernible to the public for luxury goods in a SDS compatible with art.101 TFEU?

(3) Is an absolute online marketplace restriction a hardcore restriction within the meaning of VBER art.4(b)?

(4) Is such a ban a hardcore restriction under VBER art.4(c)?

[54] Opinion in *Coty Germany* EU:C:2017:603 at [19].
[55] Opinion in *Coty Germany* EU:C:2017:603 at [21].
[56] Opinion in *Coty Germany* EU:C:2017:603 at [23].
[57] Opinion in *Coty Germany* EU:C:2017:603 at [24].
[58] Opinion in *Coty Germany* EU:C:2017:603 at [25].
[59] Opinion in *Coty Germany* EU:C:2017:603 at [27]. *Pierre Fabre* (C-439/09) EU:C:2011:649; [2012] Bus. L.R. 1265.
[60] Opinion in *Coty Germany* EU:C:2017:603 at [27]. See Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1 art.4(c).
[61] Opinion in *Coty Germany* EU:C:2017:603 at [28]. The *Landgericht* also found that no individual exemption could apply because CG did not demonstrate the marketplace ban's efficiency gains.
[62] Opinion in *Coty Germany* EU:C:2017:603 at [29].

## AG Wahl's suggested answers

As regards the first question ("Are SDSs for luxury and prestige goods compatible with art.101 TFEU?"), AG Wahl first emphasised that price is not the only effective form of competition.[63]

He also recalled that the ECJ has consistently recognised the legality of SDSs based on qualitative criteria (e.g. in *Metro* in 1977).[64] Notably on the case law, purely qualitative SDSs are compatible with art.101 TFEU when the following conditions are met: (1) the properties of the product require a SDS to preserve its quality; (2) resellers are chosen based on objective criteria applied in a non-discriminatory manner; and (3) these criteria do not go beyond what is necessary.[65]

In his view, the main issue here is the first criterion, i.e. the necessity of a SDS to preserve the quality of a product owing to its properties. According to AG Wahl, luxury goods may require the implementation of a SDS for that purpose and to ensure that they are properly used. As a result, SDSs relating to luxury goods and seeking mainly to preserve the brand image of those goods are compatible with art.101 TFEU.[66]

The AG noted that this appeared to be settled case law until the ECJ's judgment in *Pierre Fabre* created some confusion. In that judgment, the ECJ stated that

> "the aim of maintaining a [prestige] image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU".[67]

In AG Wahl's view, that statement must be read in light of the facts in *Pierre Fabre*. In that case, a manufacturer of cosmetics and personal care products required its selected distributors to have at least one pharmacist physically present at their outlets. This excluded *any* possibility to sell the products via the internet.[68] AG Wahl therefore considered that *Pierre Fabre* only applies to a specific clause that *totally* prevents online sales, not to SDS in general.[69] So in AG Wahl's view, *Pierre Fabre* did not call into question the ECJ's case law, according to which SDSs relating to luxury goods and seeking to protect their brand image are compatible with art.101 TFEU.[70]

As regards the second question ("Are bans on using online marketplaces which are discernible for the public for luxury goods in a SDS compatible with art.101 TFEU?"), AG Wahl noted that the answer requires consideration of the *Metro* conditions, noted above. In this case, it was not argued that resellers were chosen in a discriminatory way, so AG Wahl focused on the two other conditions, i.e.

[63] Opinion in *Coty Germany* EU:C:2017:603 at [33]. See *Metro* (C26/76) EU:C:1977:167; [1978] 2 C.M.L.R. 1 at [21]: "[A]lthough price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded."
[64] Opinion in *Coty Germany* EU:C:2017:603 at [37]. See *Metro* EU:C:1977:167; [1978] 2 C.M.L.R. 1 at [20].
[65] Opinion in *Coty Germany* EU:C:2017:603 at [66]. See *Metro* EU:C:1977:167; [1978] 2 C.M.L.R. 1 at [20]–[21].
[66] Opinion in *Coty Germany* EU:C:2017:603 at [74].
[67] *Pierre Fabre* (C-439/09) EU:C:2011:649; [2012] Bus. L.R. 1265 at [46].
[68] Opinion in *Coty Germany* EU:C:2017:603 at [78]–[79].
[69] Opinion in *Coty Germany* EU:C:2017:603 at [84].
[70] Opinion in *Coty Germany* EU:C:2017:603 at [75].

whether the properties of the product require a SDS to preserve its quality and whether the conditions defined under the SDS are proportionate.[71]

AG Wahl noted that "the objective of preserving the image of luxury and prestige products is *always* a legitimate objective for the purposes of justifying a SDS of a qualitative nature"[72] (emphasis added).

AG Wahl also considered that an online marketplace ban *is necessary* to preserve the luxury image of luxury products because otherwise the network head (here CG) would not have any control over the presentation and image of the products and, in particular, those platforms frequently display their logos very prominently at all stages of the purchase of the contract goods.[73]

Finally, AG Wahl considered that the situation here was different from that in *Pierre Fabre* because the marketplace ban here does not amount to an absolute online sales ban. Notably, under CG's contract, retailers are still allowed to sell *via their own internet websites*.[74] Since the EC's e-commerce sector inquiry showed that, at this stage of the development of e-commerce, distributors' online stores are the preferred distribution channel for distribution via the internet, a discernible third-party marketplace ban could not be assimilated to an absolute online sales ban.[75]

As regards the third question ("Is an absolute online marketplace ban a hardcore restriction under VBER art.4(b)?") (restricting the territory into which, or the customers to whom, a buyer may sell the goods is a hardcore restriction under VBER art.4(b)), AG Wahl's answer was "no". This provision refers to market-sharing or customer-sharing measures, which tend to partition the markets.[76] AG Wahl considered that a marketplace ban did not constitute such a restriction for two reasons:

- first, it is not possible a priori to identify a customer group or a particular market to which users of third-party platforms would correspond[77]; and
- secondly, a restriction of customers or of the market can be identified only where it is apparent that the distributor is exposed to a loss of market or of customers.[78] This is not the case here. Since CG only imposed an online *marketplace* ban, retailers could still sell online and access clients through other means (i.e. a marketplace which is not discernible).[79]

As regards the fourth question ("Is an absolute online marketplace ban a hardcore restriction under VBER art.4(c)?") (restricting active or passive sales to end users by members of a SDS operating at the retail level of trade is a hardcore restriction under VBER art.4(c)), AG Wahl again suggested "no". AG Wahl considered that

[71] Opinion in *Coty Germany* EU:C:2017:603 at [98].
[72] Opinion in *Coty Germany* EU:C:2017:603 at [99].
[73] Opinion in *Coty Germany* EU:C:2017:603 at [104].
[74] Opinion in *Coty Germany* EU:C:2017:603 at [110].
[75] Opinion in *Coty Germany* EU:C:2017:603 at [111]. See also the EC Staff Working Document accompanying the*Final Report on the E-commerce Sector Inquiry* (COM(2017) 229 final) SWD(2017) 154 final, para.978 and our discussion below.
[76] EC, Guidelines on Vertical Restraints [2010] OJ C130/1, para.50.
[77] Opinion in *Coty Germany* EU:C:2017:603 at [143].
[78] Opinion in *Coty Germany* EU:C:2017:603 at [144].
[79] Opinion in *Coty Germany* EU:C:2017:603 at [145]–[149].

a marketplace ban is not such a restriction because it is not an absolute online sales ban.[80] It authorised online sales *as a distribution channel* but only via an electronic shop window belonging to the distributor or a non-discernible online marketplace.

## Comment

Clearly, all this is highly topical, given the importance of SDSs, debate about the internet and SDSs, and debate about the scope of *Pierre Fabre*. AG Wahl's Opinion suggests a number of clarifications as regards SDSs and marketplace bans, which it will be interesting to see if the ECJ follows.

First, importantly, AG Wahl suggests that the scope of *Pierre Fabre* is limited and that this judgment should be confined to absolute bans of online sales. As a result, SDSs meeting the *Metro* criteria would still be valid.

Secondly, as regards marketplace bans, AG Wahl's view that such bans are compatible with art.101 TFEU if the *Metro* conditions apply and that they are not hardcore restrictions is echoed by the EC's final report in the e-commerce sector inquiry. There the EC concluded that marketplace bans should not be considered as hardcore restrictions within the meaning of these provisions.[81] However, it may be noted that the EC specified that the EC or a NCA could decide to withdraw the protection of the VBER in particular cases when justified by the market situation.[82] The *Bundeskartellamt* takes a stricter view and considers such bans unlawful.[83]

Thirdly, it is interesting to see AG Wahl emphasising the need to protect non-price competition as well as price competition, a point also echoed in the EC's final e-commerce report, discussed below.

Fourthly, there is some debate as to whether AG Wahl's view would be the same if the products had been non-luxury but highly technical, justifying SDSs criteria. It will be interesting to see if the ECJ in *Coty* gives guidance on that also, even though not strictly required, i.e. if it upholds *Metro* generally (that case dealing with high-quality or highly technical goods).

Finally, there is discussion about the way that AG Wahl links his assessment in part to the EC's finding in its e-commerce report that, at this stage of the development of e-commerce, distributors' own online stores are the preferred distribution channel for the distribution via the internet.[84] He argued therefore that the restriction should not be assimilated to an outright ban on or substantial restriction of internet sales.

Some argue that this sort of consideration should be irrelevant to the classification of the restriction. Rather, what matters is the ban's nature and justification. Others have latched on to AG Wahl's point and argue that in some regions (e.g. Germany) online marketplaces are more significant than the e-commerce report found overall.[85]

See now also the *Swiss Watch Repairers* case below.

[80] Opinion in *Coty Germany* EU:C:2017:603 at [155].
[81] EC, *Final Report on the E-commerce Sector Inquiry* COM(2017) 229 final, para.42.
[82] EC, *Final Report on the E-commerce Sector Inquiry* (2017), para.43.
[83] See the discussion of the EC E-commerce Report below and *Mlex*, 8 September 2017.
[84] Opinion in *Coty Germany* EU:C:2017:603 at [111].
[85] For example, the *Bundeskartellamt* as reported in *Mlex*, 8 September 2017.

## *Amsterdam court judgment on Nike partial marketplace ban*

In October 2017, interestingly, the Amsterdam Court of First Instance relied on AG Wahl's Opinion in *Coty* to consider that Nike's partial marketplace ban was compatible with EU law.[86]

Nike European Operations Netherlands BV (Nike) is responsible for distributing Nike's products in Europe through a SDS. Pursuant to Nike's Selective Retailer Distribution Policy (Nike's policy), retailers can sell Nike's products either on their own websites or on Nike's authorised retailers own websites (e.g. Zalando, La Redoute or Otto).

Action Sport, a retailer located in Sicily, started selling Nike's products on Amazon, which is not one of Nike's authorised retailers. Nike asked Action Sport to stop selling its products on Amazon and considered that its commercial relationship with Action Sport was terminated. As a result, the retailer was no longer able to submit orders on Nike's platform.

Nike asked the Amsterdam court to declare that it was entitled to terminate its contract with Action Sport. In this context, the court had to determine whether Nike's partial marketplace ban was compatible with EU law.

Like AG Wahl in *Coty Germany*, the court relied on the ECJ's *Metro* judgment and recalled that purely qualitative SDSs are compatible with art.101 TFEU when the three *Metro* conditions noted above are met.[87]

In this case, the court found that the only issue was the third criterion, i.e. whether the SDS was necessary.[88] The court referred to AG Wahl's Opinion, insofar as he considered that SDS relating to luxury goods and seeking mainly to preserve the brand image of those goods are compatible with art.101 TFEU.[89] The court considered Nike's products to be luxury products and found that Nike's policy was designed to protect their luxury image.[90]

The court then considered whether Nike's restriction to sell on unauthorised marketplaces could be justified by the need to protect its products' luxury image. The court found AG Wahl's Opinion persuasive. In particular, the court's judgment reflects two points of AG Wahl's Opinion.

First, because Amazon is not an authorised retailer, Nike does not have any control over the presentation and image of the products based on the criteria it set out in its SDS.[91] The court noted that Amazon was free to request Nike to approve it as an authorised retailer and that, should Amazon meet the relevant criteria, Nike would be required to do so. However, as long as Amazon is not one of Nike's authorised retailers, Amazon falls outside its SDS.[92]

Secondly, Nike's policy did not prevent Action Sport from selling its products on the internet, as Action Sport could offer its products on its own websites or on marketplaces which had been approved by Nike as authorised retailers.[93]

[86] With thanks to Itsiq Benizri. *Rechtbank* Amsterdam, Judgment of 4 October 2017, *Nike v Action Sport* NL:RBAMS:2017:7282; *Mlex*, 9 October 2017.

[87] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.9.1]; *Metro* EU:C:1977:167; [1978] 2 C.M.L.R. 1 at [20]; Opinion in *Coty Germany* EU:C:2017:603 at [66].

[88] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.9.2].

[89] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.9.2]; Opinion in *Coty Germany* EU:C:2017:603 at [74].

[90] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.9.3].

[91] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.11]; Opinion in *Coty Germany* EU:C:2017:603 at [104].

[92] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.11].

[93] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.12]; Opinion in *Coty Germany* EU:C:2017:603 at [110]–[111].

The court also pointed out that this case was different from *Coty Germany*. While *Coty Germany* applied a ban on all sales via online marketplaces, Nike had identified several marketplaces as authorised retailers.[94] In light of this difference, the court considered that it did not have to wait for the ECJ's judgment in *Coty Germany* to rule on the case.

As a result, the court concluded that Nike's partial online marketplace ban was compatible with art.101(1) TFEU.[95]

## Excessive court delay

*Box 4*

- **Court cases—Excessive GC Delay**
  - — GC focusing on period between closure of written pleadings and opening of oral procedure.
  - — GC considers a reasonable review period to be 15 months, with one month more per additional applicant (and longer if case complex, parties' pleadings are long etc).
  - — Generally, bank guarantee costs (material damage) awarded but not default/late payment interest thereon.
  - — One case not successful, *Aalberts*.[96]
  - — Some interest is awarded (e.g. for depreciation in value of money).
  - — Little awarded for non-material damage: e.g. *ex aequo et bono* payments of €5,000 and €6,000.
  - — Court applies *ultra petita* rules strictly (i.e. does not award more than has been claimed).

In January and February 2017, the GC ruled on four actions for damages as a result of the excessive length of proceedings before the GC.[97] The first of these judgments, an action brought by two Gascogne companies (the Group parent and its German subsidiary) in relation to the *Industrial Bags cartel*, marked the first time the GC awarded compensation for a breach of the fundamental right to adjudication within a reasonable time. The GC followed the same approach as regards the actions brought by Kendrion and, jointly, by ASPLA and Armando Álvarez.

However, the court came to the opposite conclusion when ruling on the action brought by *Aalberts*, in relation to the *Copper Fittings cartel*, owing to the different circumstances of that case.

In *Guardian*, the GC essentially followed the *Gascogne* and *Kendrion* judgments.[98] However, it rejected an additional claim for loss because the GC had failed to remove the unequal treatment in the EC's decision earlier.

[94] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.9.5].
[95] *Nike v Action Sport* NL:RBAMS:2017:7282 at [4.9.10].
[96] *Aalberts Industries NV v European Union* (T-725/14) EU:T:2017:47.
[97] With thanks to Georgia Tzifa. *Gascogne Sack Deutschland GmbH v European Union* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10; GC Press Release 1/17 (10 January 2017); *Kendrion NV v European Union* (T-479/14) EU:T:2017:48; *Aalberts* EU:T:2017:47; and *Plásticos Españoles SA (ASPLA) v European Union* (T-40/15) EU:T:2017:105; [2017] 5 C.M.L.R. 12.
[98] *Guardian Europe Sàrl v European Union* (T-673/15) EU:T:2017:377; [2017] 5 C.M.L.R. 8; *Gascogne Sack Deutschland GmbH v European Union* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [82] (judgment of 10 January 2017); *Kendrion NV v European Union* (T-479/14) EU:T:2017:48 (judgment of 1 February 2017).

## *Gascogne and Kendrion*

It may be recalled that in November 2005, the EC imposed a fine of some €290 million on 16 firms, including Kendrion and Gascogne, for operating a cartel in the plastic industrial bags market for over 20 years.[99]

Both Kendrion and Gascogne brought actions for annulment before the GC which were dismissed in their entirety,[100] as were their subsequent appeals before the ECJ.[101] In those appeals, Kendrion and Gascogne argued that the GC's failure to adjudicate within a reasonable time on their actions for annulment was unlawful and should lead to the setting aside of the judgments under appeal.[102] The length of the proceedings before the GC had amounted to some five years and nine months.

The ECJ rejected the claims. The court referred to its case law according to which, where there are no indications that the excessive length of the proceedings before the GC affected their outcome, such a breach could not lead to the setting aside of the judgments under appeal. The sanction should be an action for damages.[103]

As regards the criteria for assessing whether the GC has observed the reasonable time of adjudication principle, the court noted that the reasonableness of the period for delivering judgment is to be assessed in light of the circumstances specific to each case, such as its complexity and the conduct of the parties. Taking these criteria into account, the court found that the length of proceedings in the cases in question could not be justified and that the GC therefore had breached art.47(2) of the CFR.[104]

Kendrion and Gascogne then brought actions for damages before the GC. In its two, almost identical, judgments, the GC listed the three cumulative conditions that must be fulfilled for the EU to incur non-contractual liability, namely: (1) the unlawfulness of the conduct of the EU institutions; (2) the suffering of actual damage; and (3) the existence of a causal link between the conduct and the alleged damage.[105]

The GC noted that in the field of competition law (a field which is characterised by a greater degree of complexity than that in other types of cases), a period of *15 months* between the end of the written part of the court's procedure and the opening of the oral part of the procedure is generally appropriate. The parallel treatment of related cases may justify an increase in the length of the proceedings, by a period of *one month per additional related case*.[106]

[99] Decision relating to a proceeding pursuant to Article 81 of the EC Treaty (COMP/38354-*Industrial bags*) [2007] OJ L282/41.

[100] *Kendrion NV v European Commission* (T-54/06) EU:T:2011:667; *Groupe Gascogne SA v Commission* (T-72/06) EU:T:2011:671; and *Sachsa Verpackung GmbH v Commission* (T-79/06) EU:T:2011:674.

[101] *Kendrion* (T-479/14) EU:T:2017:48; *Groupe Gascogne SA v European Commission* (C-58/12 P) EU:C:2013:770; [2014] 4 C.M.L.R. 14; and *Gascogne Sack Deutschland GmbH v European Commission* (C-40/12 P) EU:C:2013:768; [2014] 4 C.M.L.R. 12.

[102] *Kendrion* (C-50/12 P) EU:C:2013:771 at [73], [102]; *Gascogne* (C-58/12 P) EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [59], [91]; *Gascogne* (C-40/12 P) EU:C:2013:768; [2014] 4 C.M.L.R. 12 at [67], [97].

[103] *Kendrion* (C-50/12 P) EU:C:2013:771; [2014] 4 C.M.L.R. 13 at [82]–[83], [92]–[93]; *Gascogne* (C-58/12 P) EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [73]–[74], [81]–[82]; *Gascogne* (C-40/12 P) EU:C:2013:768; [2014] 4 C.M.L.R. 12 at [81]–[82], [87]–[88].

[104] *Kendrion* (C-50/12 P) EU:C:2013:771; [2014] 4 C.M.L.R. 13 at [96]–[106]; *Gascogne* (C-58/12 P) EU:C:2013:770; [2014] 4 C.M.L.R. 14 at [85]–[96]; *Gascogne* (C-40/12 P) EU:C:2013:768; [2014] 4 C.M.L.R. 12 at [91]–[102].

[105] *Kendrion* (T-479/14) EU:T:2017:48 at [35]; *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [52].

[106] *Kendrion* (T-479/14) EU:T:2017:48 at [47], [51]–[52], [55]; *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [62], [66]–[67], [70].

So, in the *Industrial Bags* cases, the parallel treatment of 12 actions brought against the same EC decision justified an increase of 11 months in the length of the proceedings. This meant that a period of 26 months (15 plus 11 months) between the end of the written part and the opening of the oral part of the procedure was appropriate in order to deal with the cases in question, *considering also that their degree of factual, legal and procedural complexity did not justify a longer period*.

In both of these cases, however, a period of 46 months had occurred between the end of the written part of the procedure and the opening of the oral part. The court considered that this showed an unjustified period of inactivity of 20 months. Since the length of the proceedings could not be justified by the circumstances of the cases, the GC held that the CJEU had breached art.47(2) of the CFR, confirming the finding made previously by the ECJ in the context of the appeals.[107]

As for the actual material damage suffered by the applicants, both Kendrion and Gascogne argued that it consisted of: (1) the payment of bank guarantee costs during the period which corresponded to the excessive length of the proceedings; and (2) the interest on the fine that had been imposed by the EC's decision. Additionally, Gascogne submitted that it had been deprived of the opportunity to find an investor earlier, given the uncertainty surrounding the final amount of the fine.[108]

The GC stressed that the fine that had been imposed was due to be paid to the EC despite the lodging of actions for annulment against the EC decision. Therefore, the interest on the fine was "default interest". Neither company had paid the fine in question or the default interest during the action for annulment proceedings.

Furthermore, the applicants had not shown that the accumulated default interest during the period which corresponded to the excessive length of the proceedings, which was paid to the EC afterwards, exceeded the advantage to Gascogne and Kendrion of the possession of the sum equal to the fine, plus the default interest. As a result, the court considered that Gascogne and Kendrion had not suffered any actual and certain damage in relation to the interest on the fine.[109]

Gascogne's argument regarding the loss of an opportunity to find an investor earlier was also dismissed by the GC, for lack of evidence.[110]

However, the GC accepted that the costs which the companies had to pay in relation to the bank guarantees they had provided to the EC, during the period which corresponded to the excessive length of proceedings, constituted actual and certain material damage. Moreover, there was a causal link between that damage and the unlawful conduct of the CJEU since the companies would not have had to pay additional bank guarantee costs had the proceedings before the GC not exceeded the reasonable time for adjudication.[111]

The GC also rejected the argument that the damage was the consequence of the companies' own decisions to provide a bank guarantee so as not to pay the fine within the period specified in the EC decision (relying on other cases where that

[107] *Kendrion* (T-479/14) EU:T:2017:48 at [57]–[63]; *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [72]–[78].
[108] *Kendrion* (T-479/14) EU:T:2017:48 at [67]; and *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [82].
[109] *Kendrion* (T-479/14) EU:T:2017:48 at [75]–[80]; *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [106]–[110].
[110] *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [84]–[94].
[111] *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [114]–[116].

argument had been accepted). The GC distinguished those cases on the basis that, at the time when the companies brought their appeals and paid their guarantees, the breach of the obligation to adjudicate within a reasonable time was unforeseeable. Further, the companies could legitimately expect those actions to be dealt with within a reasonable time. The reasonable time for adjudicating was also exceeded after the decisions to provide bank guarantees.[112]

As a result, the GC awarded Kendrion €588,769 in damages, a sum which corresponded to the bank guarantee costs it had to pay from 26 August 2010 until 16 November 2011, when the GC's judgment was given. One of the Gascogne companies was also awarded €47,064 for the bank guarantee costs which it had to pay from 30 May 2011 until 16 November 2011.[113]

Regarding the starting date for the calculation of the material damage, the GC stressed that, under the EU courts' procedural rules, the dispute is, in principle, determined by the parties and the EU courts may not rule *ultra petita*. Consequently, the court calculated the damage based on the dates submitted by the parties themselves. Kendrion had asked for damages from 26 August 2010, when, in the company's view, the GC should have rendered its judgment; and Gascogne from 30 May 2011, when, in its view, the EC decision would have become final, up to the delivery of the Court's judgment on the company's appeal. (The court took a similarly strict approach on other claims, repeating that it could not award more than was claimed.)

In addition to the claims for material harm, both Kendrion and Gascogne alleged that they had suffered non-material damage, as the failure of the GC to adjudicate within a reasonable time harmed their reputation and placed them in a prolonged state of uncertainty which negatively affected their management and the planning of their decisions.

The GC generally denied these claims. However, the GC found that the state of uncertainty in which the companies found themselves went beyond that usually caused by litigation. For that reason, the GC decided *ex aequo et bono* to award €6,000 to Kendrion and €5,000 to each of the two applicants in the Gascogne case.[114]

Finally, the GC awarded compensatory interest on the material damage, at the rate of inflation; and default interest, from the date of its judgment until the EU paid the damages.

Both judgments have been appealed by the EU. Gascogne has also lodged an appeal against the GC's decision.[115]

## *ASPLA and Armando Álvarez*

The GC followed the same approach in the action brought by ASPLA and Armando Álvarez, by which these companies claimed that the GC failed to adjudicate within

[112] *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [117]–[122].

[113] *Kendrion* (T-479/14) EU:T:2017:48 at [81]–[109]; and *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [111]–[143]. The GC upheld the claim of Gascogne (formerly Groupe Gascogne) but dismissed the claim of Gascogne Sack Deutschland GmbH as it had not been proved that that company had also paid bank guarantee costs.

[114] *Kendrion* (T-479/14) EU:T:2017:48 at [121]–[135]; and *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [151]–[165].

[115] *European Union v Gascogne Sack Deutschland* (C-138/17 P) [2017] OJ C151/25; *European Union v Kendrion* (C-150/17 P) [2017] OJ C161/14; and *Gascogne Sack Deutschland and Gascogne v European Union* (C-146/17 P) [2017] OJ C151/26.

a reasonable time in their actions for annulment, again in the *Industrial Bags* cartel case.[116]

Following the same reasoning as Gascogne and Kendrion, the GC repeated that a period of 15 months between the end of the written part of the procedure and the opening of the oral part of the procedure is generally appropriate in competition law cases. This period can be extended by one month per each additional related case.[117]

Furthermore, given that Armando Álvarez had been held liable as parent company of ASPLA, there was an extremely close connection between the two actions for annulment, which justified dealing with them "in tandem" and "at the same pace". Therefore, even though the written part of the procedure in the case brought by Armando Álvarez was closed four months before the written part of the procedure in the case brought by ASPLA, the oral part of both cases had to start at the same time, a fact which justified an additional extension of four months.[118]

As a result, the GC found that a period of 30 months would have been appropriate for dealing with each of the actions: 15 plus 11 months for the related additional cases, plus four months for the simultaneous opening of the oral part. The fact that 46 and 50 months, respectively, separated the end of the written part of the procedure from the opening of the oral part in these two cases therefore indicated an unjustified period of inactivity of 20 months in each, which delay was contrary to art.47(2) of the CFR.[119]

The GC awarded ASPLA €44,951 and Armando Álvarez €111,042 in damages, which sums corresponded to the bank guarantee costs that each of these companies had to pay from 16 March 2010, when the judgments should have been given, until 14 January 2011, when both companies were notified of the date of the hearing for their actions for annulment.[120]

Both the EU and the companies have appealed the judgment.[121]

## *Aalberts*

It is interesting to compare the above judgments with that of the GC in the *Aalberts* case.

Aalberts Industries (Aalberts), together with other companies, had appealed an EC decision in which they had been fined for participation in the *Copper Fittings* cartel.[122] The GC annulled the decision and the subsequent appeal by the EC was

[116] With thanks to Georgia Tzifa. *Industrial Bags* Decision [2007] OJ L282/41. Both companies brought actions for annulment, *Plásticos Españoles SA (ASPLA) v Commission* (T-76/06) EU:T:2011:672 and *Armando Álvarez SA v Commission* (T-78/06) EU:T:2011:673 (judgments of 16 November 2011), and subsequently the appeals *Plásticos Españoles SA (ASPLA) v Commission* (C-35/12 P) EU:C:2014:348 and *Armando Álvarez SA v Commission* (C-36/12 P) EU:C:2014:349 (judgments of 22 May 2014), which were dismissed by the ECJ.

[117] *Plásticos Españoles* EU:T:2017:105; [2017] 5 C.M.L.R. 12 at [69], [72].

[118] *Plásticos Españoles* EU:T:2017:105; [2017] 5 C.M.L.R. 12 at [78]–[80].

[119] *Plásticos Españoles* EU:T:2017:105, [2017] 5 C.M.L.R. 12 at [81], [83].

[120] The GC took into account that date instead of the date of the judgments in the actions for annulment since the parties themselves had referred to it in their claims. Again the court noted that it may not rule *ultra petita*. See *Plásticos Españoles* EU:T:2017:105; [2017] 5 C.M.L.R. 12 at [125]–[128].

[121] *European Union v ASPLA and Armando Álvarez* (C-174/17 P) unreported 22 May 2017 [2017] OJ C161/16; *ASPLA and Armando Álvarez v European Union* (C-222/17 P) unreported 3 July 2017 [2017] OJ C213/22.

[122] With thanks to Georgia Tzifa. Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/F-1/38121-*Fittings*) [2007] OJ L283/63.

dismissed by the ECJ.[123] Aalberts then brought an action for damages caused by the GC's failure to adjudicate on its appeal within a reasonable time.

The GC accepted that the proceedings in that case, which had lasted more than four years and three months from the application for annulment until the delivery of the decision, were at first sight of a very long duration.[124]

However, in contrast to the cases noted above, the GC found that the specific circumstances were such as to justify this length. The assessment of the case required a detailed examination of complex and numerous facts, some of which preceded the infringement period relied on against the applicant in the EC decision. Some of the pleas relied on in that case also raised difficult legal questions relating, in particular, to the concept of single, complex and continuous infringement. Moreover, the case had links with the nine other actions brought against the same EC decision, in several different languages.[125]

Aalberts and the other parties were also considered partly to blame for the length of the proceedings, notably insofar as they had submitted twice a version of the application which exceeded the number of pages laid down by the GC's Practice Directions to Parties, and they had requested and obtained extensions for the lodging of their replies. These factors led the EC to submit longer pleadings and to obtain extensions in turn.[126]

As a result, the GC found that there had been no infringement of CFR art.47(2) and dismissed Aalberts' application in its entirety.

## *Guardian*

In June 2017, the GC delivered its judgment in Guardian Europe's (Guardian) claim for damages for unreasonable delay in adjudicating on Guardian's appeal of the EC's *Flat Glass* cartel decision.[127] Guardian claimed damages based on: (1) infringement of its right to a judgment within a reasonable time under CFR art.47; and (2) the breach of the principle of non-discrimination by the EC and the GC with respect to an earlier EC decision and an earlier GC judgment.

The GC awarded Guardian damages of €654,523, plus interest, to compensate for additional bank guarantee costs paid by Guardian owing to the GC's failure to rule within a reasonable time, but the court rejected the other claims for damages.

It may be recalled that, in November 2007, the EC adopted its decisions in the *Flat Glass* cartel case, imposing a €148 million fine on companies in the Guardian group for having infringed art.101 TFEU. In February 2008, Guardian lodged an application for partial annulment of the decision. The GC gave judgment in September 2012 (the 2012 GC judgment) and rejected the application.[128]

Guardian appealed the 2012 GC judgment to the ECJ. The ECJ annulled it in part and ruled that Guardian's fine should be reduced by 30% (€44.4 million) since

[123] *Aalberts Industries v Commission* (T-385/06) EU:T:2011:114; and *European Commission v Aalberts Industries NV* (C-287/11 P) EU:C:2013:445; [2013] 5 C.M.L.R. 26.

[124] *Aalberts Industries NV v European Union* (T-725/14) EU:T:2017:47 at [34].

[125] *Aalberts* EU:T:2017:47 at [48]–[49].

[126] *Aalberts* EU:T:2017:47 at [57]–[61].

[127] With thanks to Cormac O'Daly. Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39165-*Flat Glass*) [2008] OJ C127/9. *Guardian* EU:T:2017:377; [2017] 5 C.M.L.R. 8.

[128] *Guardian Industries Corp v European Commission* (T-82/08) EU:T:2012:494; [2012] 5 C.M.L.R. 26.

the GC, by not reducing the fine that the EC had imposed, had breached the principles of non-discrimination and equal treatment.[129]

Guardian had also requested that the ECJ reduce Guardian's €148 million fine because of the GC's alleged unreasonable delay in dealing with the case. The ECJ agreed that there had been such a delay but, applying the *Gascogne* and *Kendrion* judgments noted above,[130] ruled that Guardian had to begin a new action before the GC to seek damages for the infringement of its rights.

In November 2015, Guardian lodged an application with the GC seeking damages.

As regards the CFR art.47 claim, the GC ruled that the GC had infringed that article.[131] In the GC's view, the court had exceeded by 26 months the reasonable time for adjudicating[132] and the length of the proceedings could not be justified by any specific circumstances relating to the case.[133] In particular, the GC noted that none of the dispute's complexity, the parties' conduct or supervening procedural matters accounted for the delay.[134]

The GC considered the undue delay a sufficiently serious breach of a rule of EU law intended to confer rights on individuals,[135] and held that there was a causal link between the delay and additional bank guarantee costs paid by Guardian during this period of delay.[136] The GC applied the reasoning in *Gascogne*[137] that, when Guardian first provided the bank guarantee, the GC's infringement of its obligation to rule within a reasonable time was not foreseeable and that the reasonable time for adjudicating was exceeded only after Guardian's initial decision to obtain a guarantee.[138]

The GC awarded damages of €654,523, plus interest,[139] to compensate for the additional guarantee costs paid by Guardian during the period of the GC's unreasonable delay.[140]

Guardian had also claimed damages to compensate for loss of profits incurred during the period of the GC's unreasonable delay. These damages allegedly were the difference between: (1) the interest that the EC reimbursed to Guardian following the ECJ's reduction of Guardian's fine in November 2014; and (2) the potential return that Guardian could have achieved if, instead of wrongfully having to pay money to the EC, Guardian had invested it in its business.

The GC rejected this claim and found that Guardian did not itself suffer any loss of profits. The GC requested various documents from Guardian.[141] According to the GC, the documents showed that other companies in the Guardian group had

[129] *Guardian Industries Corp v Commission* (C-580/12 P) EU:C:2014:2363; [2015] 4 C.M.L.R. 5.

[130] *Gascogne* (C-40/12 P) EU:C:2013:768; *Kendrion* (C-50/12 P) EU:C:2013:771; and *Gascogne* (C-58/12 P) EU:C:2013:770; [2015] 4 C.M.L.R. 5 (judgments of 26 November 2013).

[131] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [128]–[139].

[132] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [137], [139].

[133] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [131].

[134] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [134]–[139].

[135] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [139].

[136] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [155]–[161].

[137] *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 12.

[138] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [160].

[139] This was: (1) compensatory interest for monetary depreciation due to the delay reflected by the annual rate of inflation in the Member State where *Guardian* is established up to a value not exceeding that claimed; and (2) default interest until the EC paid the damages in full: see *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [168]–[169].

[140] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [155]–[173].

[141] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [99]–[103].

paid the fine to the EC and Guardian had therefore not had to "incur the burden linked to the payment of the fine".[142]

Guardian also argued that it had suffered non-material damage in the form of damage to its reputation owing to its wrongfully being perceived, during the period of the GC's unreasonable delay, as having a disproportionate responsibility for the infringement of art.101 TFEU in the *Flat Glass* Decision. The GC rejected this, on the basis that Guardian had not advanced any proof of this damage.[143] Moreover, the GC recalled that it had found that there had been an unreasonable delay in the earlier proceedings and considered that this finding was "sufficient to make good" any damage.[144]

As regards the claimed breach of the principle of equal treatment, Guardian claimed damages on the basis that the EC discriminated against it in its *Flat Glass* Decision and the GC had exacerbated the associated damage by dismissing Guardian's application to annul in 2012.

It will be recalled here that the ECJ's *Guardian* judgment found that the EC in its *Flat Glass* Decision had wrongly excluded captive sales when calculating the fines imposed on the decision's other addressees and that the GC had not rectified the resulting discrimination against Guardian, which, as a non-integrated producer, did not have any captive sales that could be excluded.

Guardian claimed three types of damage:

(1) first, damages resulting from having paid additional guarantee fees. The GC ruled that there was not a sufficient causal link between these fees and the discrimination. Guardian had chosen to avail itself of a guarantee to cover its fine and this choice was not obligatory[145];

(2) secondly, damages resulting from loss of profits. For the reasons explained above, namely that Guardian itself did not pay the EC's fine, the GC also rejected this claim[146]; and

(3) thirdly, damages for non-material loss in the form of damage to its reputation. For reasons similar to those outlined above, the GC rejected this.[147]

While considering these claims, the GC had to decide whether one of its judgments could ever give rise to liability for breach of EU law (insofar as it could be appealed). The GC ruled that

> "the European Union cannot incur liability for the content of a judicial decision that has not been delivered by an EU court adjudicating at last instance and could, therefore, be subject to an appeal".[148]

[142] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [153]. For similar reasons, the GC only awarded Guardian Europe 82% of the guarantee costs that it had claimed. See [158]–[159] and the calculations at [163]–[165].
[143] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [145].
[144] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [146]–[147]. A similar point was made in *Gascogne* (T-577/14) EU:T:2017:1; [2017] 5 C.M.L.R. 12 at [154].
[145] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [89]–[94].
[146] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [99]–[107].
[147] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [112]–[115].
[148] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [122].

Exceptionally, the GC could make the EU liable for damages for "serious failure in the judicial process, in particular of a procedural or administrative nature", but the GC considered that Guardian had not alleged such failures.[149]

Both the EU and Guardian have appealed the GC's judgment.

## Cartel appeals

*Box 5*

- **Court cases—Cartel Appeals (1)**
  - — Restrictions by object:
    - * *Philips—Smart Card Chips:* claims that information exchange did not amount to a restriction by object:
      - - Upheld for some contacts (e.g. because information exchanged general).
      - - Generally not successful.
  - — Settlements:
    - * *Printeos—Envelopes:* EC must give an adequate statement of reasons re fines in its settlement decision, allowing parties (and the EU courts) to assess equality of treatment:
      - - EC referred to mono-product/equality of treatment issue but also need for equitable treatment (one company not a mono-product producer).
      - - Not clear.
    - * *Timab—Phosphates:* leniency admissions completed during settlements talks can be used as evidence:
      - - Distinguish from alleged facts in settlement "non-papers".
      - - *Pometon—Steel Abrasives and ICAP—Yen Interest Rate Derivatives*: issue whether EC prejudges position of non-settling undertaking in a settlement decision?

### *Smart Card Chips*

In September 2014, the EC found that there was a cartel in the smart card chip sector from September 2003 to September 2005.[150] The EC found that Infineon, Philips, Samsung and Renesas (a successor to a JV created by Hitachi and Mitsubishi) exchanged information on pricing generally, prices charged to specific customers, contract negotiation, production capacity and their future conduct on the market. The EC imposed a total fine of €138 million on these companies.

Infineon and Philips, which had been fined respectively €82.7 million and €20.15 million, appealed the EC decision. The GC dismissed their appeals.[151]

### Infineon

Infineon raised a number of arguments on appeal. Many concerned the fact that the EC had excluded an email from Samsung from the file on the basis that it was

[149] *Guardian* EU:C:2014:2363; [2015] 4 C.M.L.R. 5 at [124].

[150] With thanks to Itsiq Benizri and Lukas Šimas. Decision relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/39574-*Smart Card Chips*). See the summary of the EC decision below.

[151] GC, Press Release 136/16 (15 December 2016); *Infineon Technologies AG v European Commission* (T-758/14) EU:T:2016:737; [2017] 4 C.M.L.R. 14; *Koninklijke Philips NV v European Commission* (T-762/14) EU:T:2016:738; [2017] 4 C.M.L.R. 15.

not reliable[152] and might have been tampered with. Infineon argued that various pieces of evidence from Samsung also should be considered unreliable.

Other arguments focused on the idea that the EC had failed to give Infineon its full defence rights, as it hurried forward to avoid a time-bar on fines.

Infineon also argued that the EC had wrongly found it to be in a single and continuous infringement, when the evidence only showed involvement in limited contacts. Moreover, Infineon argued the contacts were not restrictive of competition, or at least not restrictions by object.

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

First, Infineon claimed that the EC infringed its rights of defence. The EC sent some evidence (an email sent by Samsung) to Infineon in a second letter of facts some time after the SO and granted a period of only five working days (in a holiday period)[153] for Infineon to respond to the letter. Infineon claimed that this was an insufficient period to enable it to defend itself properly.

The GC also considered such a period to respond to be "extremely short".[154] However, the court held that Infineon's defence rights had not been infringed: (1) because Infineon did not seek an extension of the period set from the Hearing Officer; and (2) because Infineon in fact responded within the period set.[155]

Infineon also claimed that the EC did not communicate its forensic assessment on the authenticity of Samsung's email. Interestingly, the court held that the EC should have done so, because the report was not just an internal one, but relevant to the establishment of inculpatory evidence.[156] The court gave Infineon access to the report in the court proceedings.[157] However, the court considered that the issue was not decisive because (among other things) other factors such as corroboration by another email suggested that the meeting referred to in the email had happened. Infineon had not established that the result would have been different if the EC had provided this report.[158]

Secondly, Infineon complained that the EC had conducted a "fast-track" procedure. The EC decision was adopted five weeks after the second letter of facts to ensure that the imposition of a fine on Philips would not be time-barred in September 2014.[159] Infineon claimed that it had not been able to present a proper defence against the new evidence, that its reply could not have been taken into account and that the EC failed to take the necessary additional investigative steps.[160]

However, the GC found that Infineon did not demonstrate that such speedy measures had denied Infineon the ability to present its defence (as shown above) or that the failure to take additional investigative steps led the EC not to examine the case carefully and impartially.[161]

Thirdly, Infineon claimed that the EC did not find any evidence that Infineon had contacts with Philips or that it had the subjective impression of participating in the whole of the infringement. Accordingly, Infineon stated that it could be held

[152] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [26]. Several different versions of it had been found.
[153] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [114].
[154] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [61].
[155] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [63]–[64], [90].
[156] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [78], [80].
[157] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [76].
[158] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [84]–[85].
[159] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [103]–[109].
[160] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [109].
[161] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [110].

liable for the infringement only insofar as it participated in collusive arrangements with Samsung and Renesas.[162] Yet, even though the EC said that Infineon could not be held liable for the bilateral contacts among the other participants, the EC had found that Infineon participated in a single and continuous infringement. Infineon therefore claimed that the EC contradicted itself.

The GC recalled the case law on how an undertaking may participate in a single and continuous infringement, yet only be liable for its activities in part of it.[163] The GC noted that the EC had found a single and continuous infringement, insofar as all the addressees of the decision, including Infineon, participated knowingly in an infringement whose objective was identical.[164] Yet Infineon had been distinguished as only liable for its contacts with Samsung and Renesas. The GC considered this lawful, even if, as the EC had put it, the formulation in the decision was awkward.[165]

Fourthly, the GC considered Infineon's claim that there was no restriction of competition. Infineon's points focused here on the fact that public capacity information had been exchanged, often in bilateral contacts at fairs and this was not enough for an infringement.

The GC disagreed, looking at evidence of various alleged contacts and noting that exchanges dealt with pricing, the ability to meet orders and future strategy.

Interestingly, the court noted that even if certain points of the evidence might not be restrictive by object, it was sufficient if the EC showed that the practices in question taken together constituted such a restriction.[166]

This was all the more so given the state of the market, with overcapacity, falling prices because of aggressive market entry, with concentrated supply and demand, and where contacts on such issues could influence the commercial strategy of competitors.[167]

Further, the court noted at various stages that, even if an email might have been tampered with, this did not undermine other corroborated evidence of meetings.[168]

## Philips

Philips' appeal had many similarities to that of Infineon but some differences. The main points are as follows:

First, Philips also argued that the EC had not shown that it had engaged in conduct amounting to a restriction by object. Philips argued that the information exchanged was mere gossip, not competitively sensitive and not such as to remove strategic uncertainty.[169]

The GC disagreed. As in *Infineon*, the court considered that the market circumstances were such that the undertakings concerned would take advantage of an exchange of sensitive information concerning their competitors' strategic policies in terms of prices, capacity and technological development. That exchange

[162] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14; *Smart Card Chips* Decision, paras 314, 424.
[163] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [216]–[223].
[164] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [227].
[165] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [227]–[231].
[166] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [185].
[167] *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [166], [173]–[174].
[168] For example, *Infineon* EU:T:2016:737; [2017] 4 C.M.L.R. 14 at [150].
[169] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [50]–[51].

was capable of enabling the competitors to limit the impact of a challenging market, to manage the continued price drops and squeezed margins and to slow down the price decrease inherent to the market.[170]

Secondly, the court reviewed the evidence as to whether the contacts and exchanges in which Philips participated constituted a restriction by object.[171] The court found that four out of five of the meetings concerned were properly so classified. The court also considered that if this were the case for *only one such meeting* that was enough for the EC's case.[172]

Thirdly, in relation to one contact, the court confirmed the EC's position that a contact had occurred but found that the evidence supported a finding that Philips and Samsung had exchanged information of an exclusively general nature, in term of price and volume, without however indicating the specific prices and volumes envisaged. As a result, the court found that the exchange of information corroborated the finding of Philips' involvement in unlawful information exchanges but that it was on its own insufficient to establish the existence of a restriction by object.[173]

Fourthly, before the court, the EC argued that Philips participated in other anti-competitive contacts apart from the five which the court had reviewed, and that it was in light of those other contacts that the evidence of the anti-competitive nature of the information exchanges should be considered.[174] The court rejected that, stating that the EC could not rely on the unlawfulness of contacts which it had not penalised in its decision, to claim that the contacts in question infringed art.101 TFEU.[175]

Fifthly, Philips claimed that the practices in question did not amount to a single and continuous infringement. Philips argued that the contacts had been bilateral and its participation limited. The GC disagreed, finding that there was evidence of a common anti-competitive aim to slow down the fall in prices, complementarity of behaviour as among the participants' behaviour and sufficient evidence that Philips was aware of the anti-competitive conduct of its competitors.[176]

Sixthly, Philips claimed that where an undertaking provides information for a leniency application, after the EC has held settlement discussions, that information should be treated as not having the same probative value as information supplied before because the submissions are not "spontaneous".[177]

The GC confirmed the EC's view that such material should still be considered credible because, if the information were false, the undertaking providing it would lose its leniency reduction.[178] The court also accepted that, in such circumstances, an undertaking might conduct focused searches revealing information previously undetected. The mere fact that the information came after the failure of a settlement did not call into question its intrinsic credibility.[179]

[170] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [70]–[71].
[171] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [78]–[79].
[172] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [79], [104].
[173] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [129]–[130].
[174] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [138].
[175] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [138].
[176] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [167], [178]–[183], [186], [199], [201]–[205].
[177] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [229].
[178] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [230]–[231].
[179] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [232].

Finally, Philips argued that access to documents relating to the authenticity of the email which the EC considered unreliable evidence would have enabled it to assess the reliability of the other documents submitted by Samsung after failure of the settlement proceedings. However, the GC held that, even on the assumption that Philips could have demonstrated, on the basis of the documents at issue, that the email had been tampered with, that would still have no bearing on the finding that as regards the five contacts on which the EC relied to find the existence of the infringement, Philips had not shown that the evidence on which the EC had relied was not credible.[180]

## Comment

These are interesting appeals, in particular because of the treatment of information exchange issues and what amounts to a restriction by object. The cases also deal with a classic compliance situation. In other words, the importance of addressing even limited bilateral contacts in which the exchanges of information may not be extensive, yet are relevant to future commercial strategy.

## *Methacrylates—Total Elf Aquitaine*

This is a long story which we will treat briefly for present purposes.[181]

In the *Methacrylates* (*Acrylic Glass*) Decision, the EC imposed fines on Arkema and its subsidiaries.[182] Total and Elf Aquitaine were also held jointly and severally liable as Arkema's parents during the period of the infringement. However, in fact, Arkema was no longer controlled by Total and Elf Aquitaine when the fine was imposed. As a result, Arkema successfully challenged the deterrent amount of its fine, so that its fine was reduced by €105.8 million. However, Total and Elf Aquitaine's liability was upheld by the EU courts.

Arkema paid the original fine in full. After its successful challenge at court, the EC reimbursed the amount by which its fine was reduced, plus interest. However, by letters, the EC claimed payment from Total and Elf Aquitaine of the principal amount reimbursed, plus interest of some €31.3 million. Total and Elf Aquitaine paid the principal amount but appealed, objecting to payment of the default interest on the basis that Arkema had previously paid the fine in full for all.

The ECJ agreed. The court also rejected the EC's claim[183] that the letters in question were not challengeable acts but mere enforcement of the *Methacrylates* decision since, on the facts, the EC was seeking to modify a pecuniary obligation for which those undertakings were liable.[184]

[180] *Philips* EU:T:2016:738; [2017] 4 C.M.L.R. 15 at [277].
[181] With thanks to Álvaro Mateo Alonso.
[182] Decision relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (COMP/F/39645-*Methacrylates*) [2006] OJ L322/20.
[183] *Commission v Total and Elf Aquitaine* (C-351/15 P) EU:C:2017:27.
[184] *Total* EU:C:2017:27 at [39]–[49].

## *Envelopes—Printeos*

In December 2016, the GC annulled for the first time a settlement decision adopted by the EC owing to a failure to state reasons when departing from the EC Guidelines on fines (the EC Fining Guidelines).[185]

It may be recalled that, in December 2014, the EC found that five envelopes producers had infringed art.101 TFEU by participating in a cartel in several European countries from 2003 to 2008. The EC decision was adopted through a settlement procedure. Four of the undertakings involved were also granted a fine reduction under the EC Leniency Notice. The EC imposed a fine of €4.7 million on Printeos, a Spanish company (formerly Tompla) and its related undertakings.

In its decision, the EC stated that, as most of the parties' sales were generated on a single market, in practice, all the fines could have reached the ceiling of 10% of the total turnover and that the application of that limit "would be the rule rather than the exception".[186] The EC added that such an approach could raise possible concerns as it could lead to a situation where any distinction based on gravity or mitigating circumstances would no longer have any impact on the amount of the fine (applying *Putters International*).[187] The EC therefore considered it appropriate to exercise its discretion and to apply para.37 of the EC Fining Guidelines.

More specifically, the EC stated:

> "In this case, the basic amount is adapted in a way that takes into account the proportion that the value of sales of the cartelised product represents of the total turnover, as well as the differences between the parties in view of their individual participation in the infringement."[188]

Printeos appealed to the GC. Printeos claimed that the EC infringed its duty to state reasons insofar as it failed: (1) to justify the need to apply an adjustment of the basic amount of the fines pursuant to para.37 of the EC Fining Guidelines; and (2) to provide explanations on the percentage applied to each undertaking. In addition, Printeos claimed that the EC infringed the principle of equal treatment when determining the different amounts of the fines.

The EC argued that in the context of a cartel settlement, its duty to state reasons is less onerous, in the sense that its statement could be much more succinct as the undertakings were informed of all the relevant factors in the settlement procedure.[189]

Subsequently, in proceedings before the GC, the EC disclosed that the reduction granted to the one undertaking, which was not a "mono-product" producer, was granted on

> "equitable grounds in order to reflect its involvement in the infringement and to redress the balance as regards the fines imposed on the various undertakings after the adjustments indicated".[190]

[185] With thanks to Maude Vonderau and Sophie Prinz. *Printeos SA v European Commission* (T-95/15) EU:T:2016:722; [2017] 4 C.M.L.R. 9. For the *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003* (EC Fining Guidelines), see [2006] OJ C210/2.

[186] Decision relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.39780-*Envelopes*), Recital 88.

[187] *Putters International NV v European Commission* (T-211/08) EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [75].

[188] Envelopes Decision, Recital 91.

[189] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [37], [53].

[190] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [32], [35].

The GC upheld Printeos' claims. First, the court noted that the EC could not remedy a failure to state reasons in its decision, through reasons disclosed during proceedings before the EU courts.[191]

Secondly, the EC's obligation to state reasons applied to a decision imposing fines at the end of the settlement procedure.[192]

Thirdly, the court stated that when the EC departs from the general methodology set out in the EC Fining Guidelines and relies on para.37 of the EC Fining Guidelines, the requirements relating to the duty to state reasons "must be complied with all the more rigorously".[193] In particular, the EC must give reasons which are compatible, among other things, with the principle of equal treatment.[194]

The reasons must be all the more specific as para.37 of the EC Fining Guidelines simply makes a vague reference to fine variations for "the particularities of a given case" and thus leaves the EC with a broad discretion to make an exceptional adjustment on the basic amount of the fines imposed.[195]

Fourthly, the GC held that the EC had not explained why it had applied different rates of reduction to the undertakings concerned. The adjusted basic amounts disclosed clear discrepancies, namely 4.5% and 4.7% in the case of Hamelin and Bong, and 9.7% in the case of Printeos.[196]

Fifthly, the court rejected the EC's claim that Printeos had been sufficiently notified of the EC's position in the settlement procedure.

The court concluded that it was impossible to understand or assess whether the undertakings were in comparable or different situations, whether the EC had treated them equally or differently, or whether the reductions on mono-product or equitable grounds were objectively justified.[197]

*Box 6*

- **Court cases—Cartel Appeals (2)**
  - — Parental liability:
    - * *Akzo Nobel—Heat Stabilisers:* parent liable for infringement even though fines on subsidiaries time-barred, since parent was part of the undertaking with its subsidiaries and involved in other infringements in same cartel.
  - — Evidence:
    - * *FSL Holdings and others—Exotic Fruit:* EC can use information from other authorities than competition authorities, provided credible and rights of defence respected.
    - * *Keramag—Bathroom Fittings:* one leniency statement can corroborate another; and a piece of evidence which in itself does not prove an infringement can still be mutually supporting to the overall assessment.
  - — Fines:
    - * LG Electronics, Philips—Cathode Ray Tubes: JV sales *to* parents in an "undertaking" could be part of reference base for fine.

[191] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [46].
[192] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [47].
[193] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [48].
[194] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [48].
[195] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [48]–[49].
[196] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [52].
[197] *Putters* EU:T:2011:289; [2013] 4 C.M.L.R. 22 at [55].

## *Exotic Fruit (Bananas)—FSL Holdings*

In April 2017, the ECJ upheld a GC judgment providing that the EC could use evidence from Italy's tax authorities to build a case against a cartel that undertakings had fixed prices for bananas in Greece, Italy, and Portugal.[198]

It may be recalled that, in October 2011, the EC found an unlawful price-fixing agreement between Chiquita and several other companies involved in the supply of bananas in Greece, Italy and Portugal between 2004 and 2005. The EC imposed fines totalling some €8.9 million on Pacific Fruit for its involvement and held FSL Holdings and Firma Leon Van Parys jointly and severally liable.[199]

The companies (FSL Holdings) appealed against the EC decision. The GC found in June 2015 that the EC had not provided sufficient evidence of facts sufficiently proximate in time with regard to the alleged cartel duration. Therefore, the infringement was "single and repeated", not "single and continuous". The GC reduced the fine imposed on Pacific Fruit, FSL Holdings and Firma Leon Van Parys from €8.9 million to €6.7 million.[200]

In its decision, the EC had relied on documents provided by the Italian tax authorities that were obtained while investigating suspected tax irregularities committed by FSL Holdings. The undertakings alleged in their further appeal to the ECJ that the GC had been wrong to find that these documents were used lawfully and admissible. They argued that the EC was not entitled to rely on them.

The main points are as follows:

First, the ECJ rejected these claims and confirmed that documents transmitted by national authorities other than competition authorities are admissible as long as their transfer is lawful under national law. The EU courts had no jurisdiction to rule on the lawfulness of a measure adopted by a national authority.[201]

Secondly, the ECJ noted that the rules on co-operation between ECN authorities do not prevent the EC from using information transmitted by national authorities other than competition authorities, solely on the ground that that information was obtained for other purposes.[202] The ECJ therefore found that the documents were legally transferred and they were admissible in the EC's competition case.[203]

Thirdly, the ECJ emphasised that the companies' rights of defence had not been compromised. Their defence rights had been respected by the notification of the SO in the case and access to file. As a result, the EC had no obligation to inform FSL Holdings about the possession of this evidence before the notification of the SO.[204] In fact, the GC had noted that the EC had transmitted the documents to FSL Holdings several months before the SO. FSL Holdings' point was that it should have been much earlier.

Fourthly, FSL Holdings argued that the GC had failed to carry out a full judicial review and reduce the fine, noting that in the northern Europe *Bananas* case, the

[198] With thanks to Virginia Del Pozo. *FSL Holdings NV v European Commission* (C-469/15 P) EU:C:2017:308; [2017] 4 C.M.L.R. 29.

[199] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (COMP/39482-*Exotic Fruit (Bananas)*) [2012] OJ C64/10.

[200] *FSL Holdings v European Commission* (T-655/11) EU:T:2015:383; [2015] 5 C.M.L.R. 6.

[201] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [32].

[202] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [33]–[35].

[203] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [32]–[35].

[204] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [38], [42]–[45].

EC had reduced the fine by 60%.[205] The ECJ upheld the GC's ruling. The court noted that the GC had been wrong to say that, since the EC had only set the basic amount at 15% (the bottom of the range for a cartel), the court did not need to look at other factors. However, the court noted that in fact the GC had done so.[206]

Finally, FSL Holdings argued that its conduct should not have been considered as a restriction by object. The ECJ rejected this. The court noted that the GC had upheld the EC's review of the facts and evidence, finding a price-fixing cartel. The court noted that in respect of such pricing agreements, the analysis of the economic and legal context may be limited to what is strictly necessary to establish the existence of a restriction by object and that the GC had addressed FSL Holdings' arguments in that respect.[207]

## *Heat Stabilisers—Akzo Nobel*

In April 2017, the ECJ dismissed the appeal brought by Akzo Nobel, as regards part of its participation in the *Heat Stabilisers* cartel.[208] Akzo Nobel claimed that the GC had been wrong to uphold the EC's decision, insofar as it attributed liability and imposed a fine on Akzo Nobel on account of the unlawful conduct of two of its subsidiaries for the first period of this cartel (February 1987 to June 1993).

### Background

It may be recalled that, in November 2009, the EC imposed fines of some €173.9 million on 24 companies (for direct participation or as a parent company). The EC found two sets of anti-competitive agreements and concerted practices covering the territory of the European Economic Area (EEA) relating: (1) to the tin stabilisers sector; and (2) to the epoxidised soybean oil and esters sector (the ESBO/esters sector).[209]

In its decision, the EC divided Akzo Nobel's participation in the cartel into three separate infringement periods.

As regards the first infringement period, before June 1993, the EC found that Akzo Nobel Chemicals GmbH, a subsidiary of Akzo NV (which became Akzo Nobel), had participated in the infringement relating to tin stabilisers; and a second subsidiary, Akzo Nobel Chemicals BV, had been involved in an infringement relating to the ESBO/esters sector.[210]

As regards the second infringement period, from June 1993 to October 1998, the EC found that the direct participant in the infringement had been the Akcros Chemicals Partnership (which did not have a legal personality) into which the heat stabilisers production and sales activities of the Akzo Group had been centralised.[211]

As regards the third infringement period, from October 1998 to March 2000, in the case of tin stabilisers, and from October 1998 to March 2000, in the case of

[205] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [68].
[206] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [83].
[207] *FSL Holdings* EU:T:2015:383; [2015] 5 C.M.L.R. 6 at [106]–[111].
[208] With thanks to Lukas Šimas. *Akzo Nobel NV v European Commission* (C-516/15 P) EU:C:2017:314; [2017] 5 C.M.L.R. 7.
[209] Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38589-*Heat Stabilisers*).
[210] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [13].
[211] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [14].

ESBO/esters, the EC found that Akcros Chemicals, which had absorbed the business of the Akcros Chemicals Partnership, had participated directly in the infringements.[212]

Akzo Nobel and its subsidiaries brought an action for annulment of the fines imposed in the EC's 2009 decision.

In July 2015, the GC annulled the fines imposed on the German and Dutch subsidiaries of Akzo Nobel, on the basis that the EC was time-barred from imposing a fine on them for the period ending in June 1993 under art.25(1) of Regulation 1/2003.[213] The GC noted that the procedural safeguard of the limitation period applies to each legal person separately. Action against subsidiaries in a group might thus be time-barred, while action against a parent company would not be.[214] The GC therefore annulled the fine imposed on the subsidiaries but upheld the fine imposed on *Akzo Nobel*.[215]

## The ECJ judgment

Akzo Nobel then appealed the GC's ruling on the basis that its liability was solely derivative of that of its subsidiaries and that, since the imposition of any fine on its two subsidiaries was time-barred, this should have led to the annulment of its fine as well as the parent company for the first period of the infringement.

In support of its appeal, Akzo Nobel relied upon the judgments in *Total* and *Tomkins*,[216] in which it was held that, if the liability of a parent company is purely derivative of its subsidiary, the parent company must benefit from any reduction in the liability of its subsidiary which has been imputed to it.

In April 2017, the ECJ dismissed the appeal. The court noted first that EU competition law is based on the principle of the personal responsibility of the economic unit which has committed the infringement.[217] Thus, the fact that an action is time-barred for a subsidiary does not preclude an action against another company, which is considered personally responsible and jointly and severally liable with other companies for the same anti-competitive conduct and in respect of which the limitation period has not expired.[218]

Secondly, the court noted that Akzo Nobel indirectly owned the entire share capital of Akzo Nobel Chemicals GmbH and of Akzo Nobel Chemicals BV and exercised decisive influence over them, with the result that, during the first infringement period, the three companies formed one and the same undertaking for the purposes of EU competition law. Akzo Nobel was therefore considered to have engaged in the anti-competitive activities itself during the first infringement.[219]

Thirdly, the court noted that the participation of Akzo Nobel in the cartel continued beyond the first infringement period, up until March 2000.[220] In other

[212] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [15].
[213] *Akzo Nobel NV v European Commission* (T-47/10) EU:T:2015:506; [2015] 5 C.M.L.R. 9.
[214] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [126].
[215] *Akzo Nobel* EU:T:2015:506; [2015] 5 C.M.L.R. 9 at [113].
[216] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [29]; *Total SA v European Commission* (C-597/13 P) EU:C:2015:613; [2015] 5 C.M.L.R. 23; *European Commission v Tomkins Plc* (C-286/11 P) EU:C:2013:29; [2013] 4 C.M.L.R. 15.
[217] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [57].
[218] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [71].
[219] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [64]–[66].
[220] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [67].

words, there were factors specific to Akzo Nobel which justified assessing its parent company liability and that of its subsidiaries differently, even if the liability of the parent was based exclusively on the unlawful conduct of the latter.[221]

Accordingly, even though the fines against Akzo Nobel subsidiaries were time-barred, this did not prevent the parent company from being fined.

## *Phosphates—Timab Industries*

In January 2017, the ECJ rejected Timab's further appeal as regards its fine in the *phosphates* cartel case.[222]

It may be recalled that, in 2010, the EC closed its first hybrid settlement case by imposing fines amounting to some €175 million on 13 companies which the EC found had participated in a cartel for phosphate used in animal feed. The EC undertook two parallel but separate procedures for the same cartel following the withdrawal from the settlement discussions by Timab Industries SA and Compagnie Financière et de Participation Roullier (collectively Timab).[223] In other words, the EC undertook a settlement procedure for the parties wishing to settle; and an ordinary procedure for Timab.

In the initial settlement discussions, the EC informed Timab that a fine in the range of €41–44 million would be imposed on it for its participation in a single and continuous infringement in the cartel from 1978 to 2004.[224] This was on the basis of Timab's leniency application before the settlement procedure, although it was then completed during that procedure.[225]

However, after Timab withdrew from the settlement procedure, during the ordinary procedure, Timab argued in response to the SO that the EC had not shown its participation in the cartel for the period from 1978 to 1993. In particular, it appears that Timab argued that there had been several distinct practices in the earlier period, which were time-barred.[226]

As a result, the EC reassessed its case and reduced the duration of the infringement found to a shorter, more recent period. Notably, the EC concluded that the evidence did not serve to prove Timab's earlier period of infringement.[227]

Then, in its decision as regards Timab in 2010, the EC imposed a fine of almost €60 million.[228]

Timab challenged that decision before the GC, claiming, among other things, that the EC had infringed its legitimate expectation regarding the amount of the fine and its right not to self-incriminate. Both challenges were unsuccessful.[229]

Timab then appealed again to the ECJ. The Court rejected Timab's claims. The main points of interest are as follows:

[221] *Akzo Nobel* EU:C:2017:314; [2017] 5 C.M.L.R. 7 at [74]–[75]. See also the Opinion of AG Wahl of 21 December 2016: *Akzo Nobel* EU:C:2016:1004 at [58]–[59].
[222] With thanks to Lukas Šimas. *Timab Industries v European Commission* (C-411/15 P) EU:C:2017:11; [2017] 4 C.M.L.R. 12.
[223] Timab is a subsidiary of the Roullier group, of which CFPR is the holding company.
[224] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [27].
[225] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [25].
[226] *Timab Industries v European Commission* (T-456/10) EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [113].
[227] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [57].
[228] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [34].
[229] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1.

First, Timab argued that the GC had been wrong to reject its argument that the EC should not have imposed a higher fine during the ordinary procedure than the range of the potential fine indicated during the settlement discussions, specifically since the relevant period was 15 years shorter than initially considered.[230] This had infringed its legitimate expectations.

However, the ECJ confirmed that the EC was not bound by the range of fines that it had indicated to Timab during the settlement procedure since, at that time, the EC had relied on elements specific to the settlement procedure.[231] The ECJ confirmed that outside of the settlement procedure, the EC is only bound by the contents of its SO, which does not provide a range of fines.[232]

Secondly, it was only after Timab withdrew from the settlement procedure that Timab had put forward evidence of the reduced duration of its infringement. Timab could not have a legitimate expectation then that a fine in the range of fines proposed by the EC during the settlement process would be imposed on it. Moreover, when Timab withdrew, it had all the elements to foresee that disputing the earlier period of its involvement would necessarily affect the reductions that it had been granted by the EC in the EC's proposed range of fines for settlement purposes.[233]

Thirdly, Timab argued that the EC infringed its right not to self-incriminate by treating leniency statements and information communicated in the settlement procedure as "admissions", when Timab had not made a formal settlement proposal acknowledging liability.[234]

The EC stressed that the statements in question had been made voluntarily in Timab's leniency application and used in the settlement procedure. The statements did not arise from the settlement discussions. The EC considered that, as a result, it was entitled to rely on them.[235] However, the EC noted that, after Timab changed its position, the "admissions" then had no "intangible" value.[236]

The ECJ agreed with the EC. The court noted that, while the EC cannot force a company to admit its participation in an infringement, it is not prevented from taking into account, when setting the amount of the fine, of assistance given by an undertaking on a purely voluntary basis.[237] That was the case here.

Fourthly, the ECJ considered Timab's claims that the GC had reversed the burden of proof and had not verified the standard of proof (and thereby infringed its rights of the defence) by endorsing a "mere belief" by the EC that Timab had participated in the cartel since 1978.[238] This related to the GC's review of the evidence, after which it had stated that the EC was "entitled to believe" that, in the circumstances, Timab was involved in a single and continuous infringement from 1978 onwards when proposing fines for purposes of settlement.[239]

The ECJ held that, even if such arguments were well founded, Timab's claims were "ineffective" in the sense that they could not affect the outcome of the case

[230] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [128]–[133].
[231] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [135]–[136].
[232] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [136].
[233] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [138]–[143].
[234] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [70].
[235] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [78], [82].
[236] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [80].
[237] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [83]–[85].
[238] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [50]–[52], [91]–[92].
[239] *Timab* EU:T:2015:296; [2015] 5 C.M.L.R. 1 at [114].

because Timab had not been sanctioned for the period before 1993. As a result, it upheld the GC's ruling on that ground.[240]

## *Cathode Ray Tubes*

### Toshiba

It may be recalled that, in December 2012,[241] the EC fined producers of cathode ray tubes (CRTs) for participating in infringements of art.101(1) TFEU, constituting a single and continuous infringement. These infringements concerned a cartel in the market for colour display tubes for computer monitors (CDTs); and a cartel in the market for colour picture tubes for television sets (CPTs).

The EC considered that Toshiba had bilateral contacts between 2000 and 2002 with undertakings which actively participated in the CPT cartel and attended some CPT cartel meetings from 2002.

Another undertaking, Matsushita Toshiba Picture Display Co Ltd (MTPD), was found to have infringed from 2003, after Toshiba's transfer of its whole CRT business to MTPD. The latter was a joint venture (JV) created between Toshiba and Matsushita Electric Industrial Co Ltd (MEI) in which MEI had a 64.5% stake and Toshiba a 35.5% stake. In 2007, Toshiba sold its shares in the JV to MEI. MEI subsequently changed its name to Panasonic Corporation (Panasonic). The EC found that MTPD participated directly in the collusive behaviour concerning CPTs.[242]

As a result, the EC fined Toshiba some €28 million individually for the earlier period; and some €87 million with Panasonic and MTPD, with joint and several liability, for the later period. Toshiba appealed the decision to the GC.

In September 2015, the GC considered that the EC had not proved Toshiba's direct participation in the infringement prior to the creation of the MTPD JV with Panasonic.[243] As a result, the GC annulled the fine imposed individually on Toshiba. However, the GC confirmed Toshiba's joint and several liability for MTPD's infringement, although it reduced the fine to some €83 million.[244]

Toshiba then appealed further to the ECJ, claiming that the EC decision should be annulled as regards Toshiba's joint and several liability for MTPD's infringement.

In January 2017,[245] the ECJ dismissed Toshiba's appeal. First, the ECJ held that the GC had correctly found that, where it follows from statutory provisions or contractual stipulations that the commercial conduct of a joint subsidiary must be determined jointly by several parent companies (here, Toshiba and Panasonic), it may reasonably be concluded that that conduct was indeed determined jointly,

[240] *Timab* EU:C:2017:11; [2017] 4 C.M.L.R. 12 at [65]–[66], [93]–[95].

[241] With thanks to Maude Vonderau. Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/39437-*TV and Computer Monitor Tubes*).

[242] *TV and Computer Monitor Tubes* Decision, paras 928–930.

[243] *Toshiba Corp v European Commission* (T-104/13) EU:T:2015:610; [2015] 5 C.M.L.R. 21.

[244] *Toshiba* EU:T:2015:610; [2015] 5 C.M.L.R. 21 at [235]; and *Panasonic Corp v European Commission* (T-82/13) EU:T:2015:612; [2015] 5 C.M.L.R. 17 at [190].

[245] *Toshiba Corp v European Commission* (C-623/15 P) EU:C:2017:21; [2017] 4 C.M.L.R. 17.

with the result that, in the absence of evidence to the contrary, the parent companies must be regarded as having exercised decisive influence over their subsidiary.[246]

Secondly, the ECJ found that the GC had correctly assessed the evidence of Toshiba's right to exercise decisive influence over the MTPD JV.[247] Notably, that Toshiba's right to approve the business plan of the JV had been extended beyond the start-up period to the full duration of the JV.[248] The GC was also not required to determine whether Toshiba in fact had influenced the JV's operational management in order to conclude that those two companies formed part of a single economic unit.

Thirdly, the GC had been correct in considering that Toshiba's right to veto outlays which were modest in light of Toshiba's initial investment in the JV could constitute an indication that Toshiba was in a position to exercise decisive influence over the JV.[249] The fact that Toshiba never exercised its veto was irrelevant, the point being that it had a right to be consulted over such decisions.[250]

## Samsung

In December 2012,[251] the EC also fined Samsung SDI for participation in the two *Cathode Ray Tubes* cartels, both directly and through its subsidiaries Samsung SDI (Malaysia) and Samsung SDI Germany.

The EC considered that Samsung SDI had participated in the CDT cartel directly and through its subsidiary Samsung SDI (Malaysia) from 1996 to 2006; and in the CPT cartel directly and through its subsidiaries Samsung SDI (Malaysia) and Samsung SDI Germany from 1997 to 2006.[252]

The EC imposed fines of some €70 million jointly and severally on Samsung SDI and Samsung SDI (Malaysia) for the CDT cartel; and of some €81 million jointly and severally on Samsung SDI, Samsung SDI (Malaysia) and Samsung SDI Germany (together, Samsung) for the CPT cartel. Samsung appealed.

In September 2015, the GC dismissed Samsung's appeal.[253] Samsung further appealed to the ECJ.

In March 2017, the ECJ dismissed Samsung's appeal and confirmed the fines imposed by the EC jointly and severally on Samsung.[254]

First, as regards the CPT cartel, the ECJ found that the GC gave sufficient reasons to reject Samsung's argument that the sales of products which were not concerned by the CPT cartel should not have been included in the calculation of the fine.

Samsung argued that not all CPT types and sizes should be considered, whereas the GC found that all CPTs were concerned by the collusive contacts that constituted a single and continuous infringement. The ECJ also upheld the GC's ruling that there was a link of complementarity between the various conducts in question and

[246] *Toshiba* EU:C:2017:21; [2017] 4 C.M.L.R. 17 at [51]–[52].
[247] *Toshiba* EU:C:2017:21; [2017] 4 C.M.L.R. 17 at [70].
[248] *Toshiba* EU:C:2017:21; [2017] 4 C.M.L.R. 17 at [65]-66].
[249] *Toshiba* EU:C:2017:21; [2017] 4 C.M.L.R. 17 at [71]–[72].
[250] *Toshiba* EU:C:2017:21; [2017] 4 C.M.L.R. 17 at [73].
[251] With thanks to Maude Vonderau. *TV and Computer Monitor Tubes* Decision.
[252] *TV and Computer Monitor Tubes* Decision, paras 744–753.
[253] *Samsung SDI Co Ltd v European Commission* (T-84/13) EU:T:2015:611; [2015] 5 C.M.L.R. 18.
[254] *Samsung SDI Co Ltd v European Commission* (C-615/15 P) EU:C:2017:190; [2017] 4 C.M.L.R. 27.

that they formed part of an overall plan, so that the EC was entitled to characterise them as a single infringement.[255]

Secondly, the ECJ held that the GC had not been wrong to consider that an undertaking on which a fine has been imposed for its participation in a cartel cannot request the annulment or reduction of that fine because another member of the cartel was not sanctioned for all or part of its participation in that cartel.[256] This was not contrary to the principle of equal treatment.

The issue here was that only Samsung had been found liable for a period because the EC had not found liable for that period LPD, a JV involved in the cartel, because LPD was bankrupt. Samsung argued that this amounted to a finding that Samsung participated alone in a cartel.

The ECJ also rejected this, noting that the GC had found that at least two undertakings participated in the CPT cartel for the period in question: Samsung and LPD. The fact that the EC chose not to include LPD in the procedure, because it had been declared bankrupt, did not mean that Samsung did not continue to participate in the cartel.[257]

Thirdly, as regards the CDT cartel, the ECJ agreed with the GC's view that, in order to determine the value of sales within the EEA for the assessment of fines, it was necessary to take into account all sales made within the EEA, even if those sales were negotiated outside the EEA.[258]

Samsung's point was that the relevant sales had been negotiated in South Korea, even though delivered in the EEA. So the place where competition was affected was South Korea.

Relying on *Innolux*,[259] the court noted that the GC found that the place of delivery had a real impact on the level of sales made by Samsung. Although the prices and quantities of CDTs to be supplied were negotiated in South Korea, the CDTs were delivered directly from Samsung SDI warehouses in the EEA to Samsung Electronics warehouses in the EEA. Moreover, Samsung Electronic's European subsidiaries ultimately had the possibility of changing their production plans and the number of CDTs that they needed. In that case, the level of sales made by Samsung SDI to Samsung Electronics would be altered.

## LG Electronics and Royal Philips Electronics

In September 2017, the ECJ rejected the appeals by LG Electronics (LGE) and Royal Philips Electronics (Philips) against the GC's rulings upholding the EC's decision in the CRTs cartels.[260] The main points are as follows:

First, LGE and Philips argued that the EC should also have sent an SO to the LPD group, a JV between them, which was also involved in the CRTs cartels.

[255] *Samsung* EU:C:2017:190; [2017] 4 C.M.L.R. 27 at [16]–[21].
[256] *Samsung* EU:C:2017:190; [2017] 4 C.M.L.R. 27 at [29]–[42].
[257] *Samsung* EU:C:2017:190; [2017] 4 C.M.L.R. 27 at [32].
[258] *Samsung* EU:C:2017:190; [2017] 4 C.M.L.R. 27 at [49]–[56].
[259] *InnoLux (formerly Chimei InnoLux Corp) v European Commission* (C-231/14 P) EU:C:2015:451; [2015] 5 C.M.L.R. 13.
[260] With thanks to Virginia Del Pozo. *LG Electronics Inc v European Commission* (C-588/15 P) EU:C:2017:679; [2017] 5 C.M.L.R. 20; see also *LG Electronics Inc v European Commission* (T-91/13) EU:T:2015:609; [2015] 5 C.M.L.R. 19; *Koninklijke Philips Electronics NV v European Commission* (T-92/13) EU:T:2015:605; [2015] 5 C.M.L.R. 20.

It will be recalled (from the *Samsung* case noted above) that the EC did not do so because LPD was bankrupt. LGE and Philips claimed that as a result they lost the benefit of LPD's defence.

The ECJ rejected this, stating that the rights of the defence did not require that an SO be sent to the LPD group because the EC had no intention of establishing an infringement by that entity. Moreover, the ECJ noted that the obligation to send an SO to a given company only seeks to ensure that that company's rights of defence are respected and not those of a third party, even if the administrative proceedings affect the latter.[261]

Secondly, LGE and Philips alleged in their appeals that the GC had been wrong to confirm that the EC could include LPD's "direct EEA sales through transformed products" in its fine calculation.

The idea here was that it was wrong to include LPD's sales in the value of sales[262] for LGE and Philips' fines, on the basis that LPD, LGE and Philips were not a vertically integrated undertaking, save insofar as LGE and Philips were parents of LPD. Moreover, that LPD's sales were not sales of cartelised CRTs but sales of transformed products (i.e. television sets and computer monitors).[263]

The ECJ rejected this, applying *Innolux* and noting that vertically integrated participants in a cartel cannot, solely because they incorporated the cartelised goods into products finished outside the EEA, expect to exclude from the fine calculation the proportion of the value of their sales of those finished products within the EEA that corresponded to the value of the cartelised goods (i.e. CRT).[264] The LPD JV and the controlling shareholders were part of a single undertaking and an economic unit, so they were a vertically integrated undertaking.[265]

Thirdly, LGE and Philips argued that, when calculating Samsung's fine, the EC should have considered the sales between Samsung Electronics and Samsung to be intra-group sales and to include them also as "direct EEA sales through transformed products made with SEC as intermediary".[266] As a result, the GC had infringed the principle of equal treatment by not reducing the appellants' fines to compensate for Samsung's favourable treatment.

The ECJ also rejected this. The court noted that LGE and Philips could not invoke, for their own benefit, EC's alleged unlawful acts as regards others.[267]

The ECJ also noted that the EC had applied the same methodology to all the undertakings involved in the cartel and therefore had not discriminated against LGE and Philips by applying different methods of calculation. The EC did so by taking into account the "first real sale" and by identifying three categories based on that criterion: (1) direct EEA sales; (2) direct EEA sales through transformed products; and (3) indirect sales. In this case, the EC only considered the first two categories when calculating the amount of the fine.

The ECJ recognised that the second category, "direct EEA sales through transformed products", was applied only to some of the companies involved in the cartel. However, the EC only applied this category to companies which it could

[261] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [44]–[47], [53].
[262] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [58].
[263] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [59].
[264] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [69].
[265] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [71]–[73], [77].
[266] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [82].
[267] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [91]–[92].

prove belonged to a vertically integrated undertaking.[268] The ECJ found, therefore, that the applicability of that category to all participants was based on the same objective criteria and was made without discrimination.[269]

Fourthly, as regards the intra-group aspect of Philips' claim, the ECJ held that Philips' claim was ineffective.[270] The point here is that the court considered that the EC was entitled not to take into account sales between Samsung and Samsung Electronics, if it could not prove they were in the same group. The EC had taken the position that it would treat sales between entities where one had a decisive influence over the other as within the same group.[271]

## *Bathroom Fittings*

In January 2017, the ECJ issued 14 judgments in relation to appeals against the EC's *Bathroom Fittings* cartel decision.[272] The court dismissed 12 appeals in their entirety and upheld: (1) the EC's appeal against the GC's judgment by which the GC partially annulled the EC's findings of infringement by Keramag Keramische Werke; and (2) an appeal by Laufen Austria against the GC's ruling that its fine had been correctly assessed by the EC. We focus here on these two cases.

## *Keramag Keramische Werke*

There were five main issues in the EC's appeal.[273]

First, the EC argued that the GC had wrongly held that the corroboration of a piece of evidence, in this case the statement made by American Standard Inc (Ideal Standard) in connection with its leniency application, required another piece of evidence that would confirm the co-ordination of prices at a trade association (AFICS) meeting in February 2004.[274]

The ECJ disagreed, holding that the GC merely applied the rule derived from the case law, when it held that a leniency statement on its own was not sufficient proof of the anti-competitive nature of the discussions that took place at the AFICS meeting in February 2004, when contested.[275]

Secondly, the EC argued that the GC had failed to provide an adequate statement of reasons as it had failed to examine the probative value of the leniency statement made by Roca Sàrl (Roca), while mentioning instead, out of context, Roca's reply to the SO.[276] According to the EC, Roca's reply to the SO was not even part of the case file. Moreover, the GC had come to a completely opposing conclusion as regards the leniency statement in its judgment of 16 September 2013, *Roca*,[277] in which that reply was part of the case file. The EC thus argued that the GC had

[268] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [94]–[96].
[269] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [94].
[270] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [97]–[98].
[271] *LG Electronics* EU:C:2017:679; [2017] 5 C.M.L.R. 20 at [83], [87].
[272] See, generally, GC Press Release 8/17 (26 January 2017). *European Commission v Keramag Keramische Werke GmbH* (C-613/13 P) EU:C:2017:49; [2017] 4 C.M.L.R. 18; and *Laufen Austria AG v European Commission* (C-637/13 P) EU:C:2017:51; [2017] 4 C.M.L.R. 26.
[273] With thanks to Lukas Šimas. *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18.
[274] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [24].
[275] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [29]–[30].
[276] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [34].
[277] *Roca v Commission* (T-412/10) EU:T:2013:444.

been wrong to annul part of the decision in reliance on a document that was not before the court.[278]

The ECJ agreed with the EC. The court found that it was clear from the GC's judgment that, for the purpose of considering the probative value of the statements made by Roca in its leniency application, the GC relied exclusively on a Recital in the cartel decision which summarised Roca's reply to the SO. It concluded that the EC could not rely on those statements in the absence of evidence corroborating them.[279]

The court stated that the GC could not deny that the statements made by Roca in the context of its leniency application had any probative value whatsoever by relying only on a Recital of the decision at issue, which summarised another document, without considering another Recital of that decision, which related to those statements or indeed the content of those statements. In so doing, the GC infringed the obligation to state reasons and the rules applicable to the taking and appraisal of evidence.[280]

Thirdly, the EC argued that the GC had distorted evidence and erred in law in finding that one leniency statement cannot corroborate another.[281]

The ECJ agreed with the EC. The concept of corroboration means that one piece of evidence can be reinforced by another. There is no rule in the EU legal order that corroborating evidence cannot be of the same nature as the evidence corroborated, that is to say, that a statement made in connection with a leniency application may not corroborate another.[282]

Fourthly, the EC argued that the GC had been wrong to require that a chart relating to a meeting of the French Ceramic Sanitary Ware Association in February 2004 should prove the existence of the infringement by itself, without taking into account the other evidence and additional explanations, notably those contained in Ideal Standard's leniency application.[283]

The ECJ agreed with the EC. The court held that the GC imposed requirements in respect of that chart which, had they been fulfilled, would have meant that the chart would have constituted sufficient evidence to show that prices had been fixed by itself. However, the chart was put forward by the EC only as a piece of corroborating evidence. By requiring such evidence to contain all the information needed to show that prices were fixed at the meeting, the GC had not considered whether the evidence, viewed as a whole, could be mutually supporting in line with the case law.[284]

Finally, the ECJ upheld the EC's claim that the GC should have considered whether the leniency statements of Ideal Standard and Roca could be corroborated by tables containing confidential sales figures.[285]

The Sanitec/Keramag group cross-appealed, arguing that the GC had been wrong to dismiss its other claims and that, in particular, the SO in the case had been too vague and imprecise. The ECJ rejected these claims.

[278] *Roca* EU:T:2013:444 at [33].
[279] *Roca* EU:T:2013:444 at [40].
[280] *Roca* EU:T:2013:444 at [41]–[42].
[281] *Roca* EU:T:2013:444 at [34].
[282] *Roca* EU:T:2013:444 at [44].
[283] *Roca* EU:T:2013:444 at [47].
[284] *Roca* EU:T:2013:444 at [54]–[55].
[285] *Roca* (T-412/10) EU:T:2013:444 at [64].

The case has now been returned to the GC for further review.

## *Laufen Austria*

Laufen Austria (Laufen) argued first that the GC had incorrectly applied the rules on individual liability in relation to the fine imposed individually on Laufen for its infringement committed prior to its acquisition by Roca Sanitario.[286] Notably, the GC had accepted that the EC could take into account the total turnover of Roca Sanitario in calculating the 10% fine ceiling provided for in art.23(2) of Regulation 1/2003, including for the period in which Laufen was held solely liable for the infringement.

Laufen argued that it did not form an economic unit with Roca Sanitario during that period of the infringement. As a result, the ceiling should have been calculated solely on the basis of its turnover as the undertaking liable for that infringement.[287]

The ECJ agreed. The court confirmed that, inasmuch as a parent company cannot be held responsible for an infringement committed by its subsidiary prior to the acquisition of that subsidiary, the EC must take account, for the purpose of calculating the 10% ceiling, of the subsidiary's own turnover in the business year preceding the year in which the decision penalising the infringement was adopted.[288]

Secondly, Laufen argued that the GC failed to take into account the fact that Laufen did not belong to the "hard core" of the cartel because, among other things, it had not played a part in creating and maintaining the cartel.[289] Laufen argued that the lesser gravity of its role in the infringement should have been taken into account as a mitigating circumstance to reduce the fine, notably to apply a multiplier of less than 15% for "gravity" and the "additional amount" of the fine.[290]

The ECJ rejected this. The court noted that a 15% multiplier was warranted by the very nature of the infringement. In particular, there was no rule that, if the geographic scope of an infringement was more extensive than that of another, the first infringement had to be classified as more serious than the second.[291]

Further, the lesser gravity of Laufen's part in the cartel had been taken into account, insofar as the EC had used the value of sales in calculating the basic amount of the fine. That value reflected, for each undertaking, the scale of its involvement in the infringement. In this case, the basic amount of the fine imposed on Laufen was determined by reference to the value of the sales made by it in Austria.[292]

As a consequence, the court annulled the GC's judgment and referred the case back to that court.

Since then, in a quick follow-up, the GC has reassessed the fine on Laufen for the infringement committed prior to its acquisition by Roca Sanitario.[293] The GC noted that a fine of some €14.3 million had been imposed on the company

[286] With thanks to Itsiq Benizri. *Laufen Austria AG v European Commission* (C-637/13 P) EU:C:2017:51; [2017] 4 C.M.L.R. 26.
[287] *Laufen* EU:C:2017:51; [2017] 4 C.M.L.R. 26 at [39]–[40].
[288] *Laufen* EU:C:2017:51; [2017] 4 C.M.L.R. 26 at [46]–[50].
[289] *Laufen* EU:C:2017:51; [2017] 4 C.M.L.R. 26 at [64].
[290] *Laufen* EU:C:2017:51; [2017] 4 C.M.L.R. 26 at [52].
[291] *Laufen* EU:C:2017:51; [2017] 4 C.M.L.R. 26 at [57], [68], correcting a contrary indication in the GC's ruling.
[292] *Laufen* EU:C:2017:51; [2017] 4 C.M.L.R. 26 at [72]–[73].
[293] With thanks to Georgia Tzifa. *Laufen Austria AG v Commission* (T-411/10 RENV) EU:T:2017:598 Judgment of 12 September 2017.

individually.[294] Taking into account Laufen's turnover in the preceding business year (some €47.8 million), the GC imposed a new fine of €4.78 million on the company.

## Paraffin Wax/Candle Wax

In February 2017, the ECJ ruled on three appeals against GC judgments,[295] upholding the EC's decision to fine several groups of undertakings for their participation in the *Candle Wax* cartel in the EEA.[296]

It may be recalled that the *Candle Wax* cartel was discovered when Shell applied for leniency in 2005. Afterwards, the EC carried out on-site investigations on nine groups' premises and found that they had engaged in market-sharing and price-fixing. As a result, the EC fined the wax producers some €676 million in total.

Hansen & Rosenthal KG and H&R Wax Company Vertrieb GmbH (H&R), Tudapetrol Mineralölerzeugnisse Nils Hansen KG (Tudapetrol) and H&R ChemPharm GmbH (H&R ChemPharm) appealed the EC decision to the GC, which rejected their claims. The three companies then appealed further to the ECJ.

H&R is the holding company of the H&R group. H&R ChemPharm belongs to that group of companies and is the parent company of H&R Chemisch-Pharmazeutische Spezialitäten GmbH which operates a wax refinery. Tudapetrol is a sales and distribution company of paraffin waxes for the H&R group.

### *H&R*

The main point of interest in this appeal is that H&R claimed that the GC violated the principle of proportionality by holding that the EC had correctly determined a coefficient of 17% of the value of sales for it (both for the entry fee and the gravity of the infringement) even though H&R had participated in only one part of the infringement, whereas the EC had set a coefficient of 18% for the companies that had participated in both parts.[297]

The court rejected this, noting that the main part of the infringement was price-fixing, in which H&R had participated. The market-sharing and customer-allocation part did not pursue a separate anti-competitive goal and the agreements in that context were only sporadic.[298]

[294] *Laufen* EU:T:2017:598 at [38].

[295] *Hansen & Rosenthal KG v Commission* (T-544/08) EU:T:2014:1075; *Tudapetrol Mineralölerzeugnisse Nils Hansen KG v Commission* (T-550/08) EU:T:2014:1079; and *H&R ChemPharm v Commission* (T-551/08) EU:T:2014:1081.

[296] With thanks to Geoffroy Barthet and Georgia Tzifa. Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39181-*Candle Waxes* [2009] OJ C295/17 available at: *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39181/39181_1908_8.pdf* [Accessed 16 January 2018].

[297] *Candle Waxes* Decision, para.86.

[298] *Candle Waxes* Decision, paras 92–96.

## *Tudapetrol*

In this appeal,[299] Tudapetrol argued that there was a contradiction in the way that the GC had accepted that Tudapetrol and the H&R Group were a single economic unit, yet had fined them separately, not jointly.[300] The GC should have verified if the two were such a single economic unit.[301]

The ECJ rejected this as a misreading of the GC's judgment.[302] The GC (and the EC) had both treated the H&R Group and Tudapetrol as distinct and independent undertakings. Moreover, before the GC, Tudapetrol had not challenged a hypothetical finding by the EC that the two entities formed a single economic unit but rather that the EC had not treated them distinctly. Such an appeal ground was therefore inadmissible.[303]

In any event, insofar as an employee of Tudapetrol had been involved in the unlawful meetings, Tudapetrol could be held responsible, even if at the relevant time the employee also acted for the H&R Group. It could not be ruled out that a person would act simultaneously for two companies involved in a cartel.[304]

## *H&R ChemPharm*

Much of the appeal by H&R ChemPharm is similar to that of Tudapetrol.[305]

H&R ChemPharm also raised arguments about the amount of the fine imposed, notably considering that the GC had been wrong to accept that a company called Klaus Dahleke should be included in the H&R Group for purposes of fines. H&R ChemPharm argued that Klaus Dahleke was not part of its single economic unit.[306]

The story is rather confusing but it appears that H&R ChemPharm had treated the company as part of its group in the EC proceedings, but changed its position before the GC.[307] The GC had then sought clarifications from H&R ChemPharm but not received precise answers. The ECJ therefore ruled that the GC had been entitled to consider that H&R ChemPharm had not adequately made out its claim.[308]

H&R ChemPharm also argued that the EC should not have included, for the purpose of setting the fine, the sales of certain companies which it had acquired during the period of the infringement.[309] H&R ChemPharm relied on *Esso*, in which the GC held that the EC should have made such a distinction in the sense that it should not have applied an annual average of sales based on sales after an acquisition to a period before an acquisition.[310]

The ECJ noted that it was not necessary to make such a distinction in all cases and distinguished *Esso*.[311] The court found that the GC had correctly verified the

[299] *Tudapetrol Mineralölerzeugnisse Nils Hansen KG v Commission* (C-94/15 P) EU:C:2017:124 at [24]. See also *Tudapetrol* EU:T:2014:1079.
[300] *Tudapetrol* EU:C:2017:124 at [11].
[301] *Tudapetrol* EU:C:2017:124 at [13].
[302] *Tudapetrol* EU:C:2017:124 at [23].
[303] *Tudapetrol* EU:C:2017:124 at [24]–[26], [32].
[304] *Tudapetrol* EU:C:2017:124 at [29]–[31].
[305] *H&R ChemPharm GmbH v Commission* EU:C:2017:125. See also *H&R ChemPharm GmbH v Commission* EU:T:2014:1081.
[306] *H&R* EU:C:2017:125 at [49].
[307] *H&R* EU:C:2017:125 at [55], [63].
[308] *H&R* EU:C:2017:125 at [54]–[67].
[309] *H&R* EU:C:2017:125 at [73].
[310] *Esso Société anonyme française v European Commission* (T-540/08) EU:T:2014:630; [2014] 5 C.M.L.R. 15.
[311] *H&R* EU:C:2017:125 at [77]–[81].

average value of sales for the H&R Group used to assess the importance of the infringement and the economic weight of the undertaking.[312]

In any event, the ECJ found again that H&R ChemPharm had not made out its claim sufficiently on the facts.[313]

## Gas Insulated Switchgear—Toshiba

In July 2017, the ECJ ruled on a further appeal as regards Toshiba's liability for this cartel.[314]

It will be recalled that Toshiba had been partly sanctioned for its individual participation in the *Gas Insulated Switchgear* (GIS) cartel[315] and partly as parent of a JV with Mitsubishi into which they transferred their interests in 2002. On appeal, the GC found that the EC had used the wrong method to determine Toshiba's fine because it had used a different reference year to the European undertakings in the cartel (2001 as opposed to 2003). However, the GC did not invalidate the finding of infringement.

The EC then reassessed the fine. It sent Toshiba a letter of facts setting out the facts that it considered relevant to that calculation and Toshiba commented thereon.[316] As a result, a fine of €56.79 million was imposed on Toshiba individually (some €30 million less than before), while Toshiba's joint and several liability for the JV with Mitsubishi remained €4.65 million.

In order to remedy the unequal treatment found by the GC, the EC focused on GIS turnover in 2003 as reference year for Toshiba's fine. In that year, Toshiba's GIS activities were carried out via the JV. As a result, the EC took the JV's turnover in 2003 to determine its market share and placed it in a second group for purposes of weighting of fines in terms of gravity, giving a starting amount for the JV.

Then, given that Toshiba and Mitsubishi had different market shares prior to the creation of the JV, the starting amount was divided between them based on their sales in 2001, the last year that they sold individually before creating the JV.

Then the EC applied a deterrence multiplier to Toshiba and account was taken of the duration of Toshiba's involvement in the infringement before the JV was formed. Finally, account was taken of Toshiba's joint and several liability in the period where it was liable via the JV.[317]

On appeal to the GC, the court upheld the approach taken, procedurally and substantively.

Toshiba appealed further to the ECJ. The main points of interest are as follows:

First, Toshiba argued that it should have been sent a new SO, rather than a letter of facts. The ECJ disagreed, confirming that in the circumstances the EC's second decision was just an extension of its earlier procedure and the EC could continue from where the unlawfulness occurred, i.e. the setting of the fine.[318]

[312] *H&R* EU:C:2017:125 at [82].
[313] *H&R* EU:C:2017:125 at [83]–[88].
[314] With thanks to Álvaro Mateo Alonso. *Toshiba Corp v European Commission* (C-180/16 P) EU:C:2017:520; [2017] 5 C.M.L.R. 11; ECJ Press Release 74/17 (6 July 2017).
[315] Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/F/38899-*Gas insulated switchgear*) [2008] OJ C5/7.
[316] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [2].
[317] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [2].
[318] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [22]–[24].

Secondly, the ECJ noted that the GC had stated incorrectly that the EC had to inform Toshiba as to how it intended to ensure the deterrent effect of the fine. That was not required in law.[319] However, that did not make the judgment invalid since Toshiba's defence rights had not been infringed.

The court noted that, in certain circumstances, such as if the EC intended to apply new fining guidelines and provided that it did not anticipate its decision in an inappropriate manner, "it may be desirable" if the EC explains how it proposes to apply the gravity and duration criteria for setting the fine. However, an undertaking does not have a right to be heard on such issues.[320] In any event, such issues did not have to be put in a new SO.

Thirdly, Toshiba argued that the EC should have assessed its fine by taking the JV's turnover in 2003, dividing it by 35% (its share of sales made by itself and Mitsubishi in 2001) and then attributing to it an individual weighting for gravity to assess the starting amount, rather than taking the JV's turnover to assess that weighting. This would have put Toshiba in a lower gravity weighting. Toshiba argued that this was less artificial than what the EC had done.[321]

The ECJ disagreed, supporting the GC's (and EC's) approach. The court noted that in 2003 Toshiba had no GIS turnover, whereas the JV did. That was an objective ground for differentiating Toshiba's position from that of the European undertakings. The GC had been correct to take into account the JV's actual turnover, rather than the "virtual turnover" of Toshiba that year.[322] Moreover, the EC's approach appropriately reflected the combined weight of Toshiba and Mitsubishi in the infringement in 2003, through their JV.[323]

Finally, Toshiba argued that the GC should have accepted that Toshiba's "level of culpability" was less than the European participants in the cartel.[324]

The EC argued that this was res judicata, a matter already ruled on by the GC when it upheld the infringement, save for finding that the wrong data had been used to determine the fine.[325]

However, interestingly, the ECJ disagreed. The court noted that Toshiba was not challenging the existence of the infringement but the amount of the fine.[326] Further, when the GC ruled, Toshiba was not in a position to appeal that judgment further, because it could not challenge the ground of that judgment, without also calling into question the operative part, which had annulled the fine imposed on it.[327] Since a party could not be compelled to act against its own interests to safeguard its procedural rights, the court found Toshiba's claim admissible.[328]

Nevertheless, the ECJ then rejected the claim on the substance. Toshiba's non-participation in the European (market-sharing) agreement was a mere consequence of its participation in the common understanding not to enter the

[319] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [29]–[32], [34].
[320] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [33].
[321] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [36]–[44].
[322] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [51]–[52].
[323] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [54].
[324] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [58].
[325] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [64].
[326] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [69]–[70].
[327] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [77].
[328] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [78]–[79].

European market. This was not less serious conduct than that of the European producers.[329]

*Box 7*

- **Court cases—Cartel Appeals (3)**
  - Essential procedural requirements:
    - EC *Italian Reinforcing Bars* Decision overturned again.
    - Under EC procedure, the defence has a right to a hearing to which Member States are invited.
    - EC had not done that because it relied on the earlier ECSC hearing, to which Member States were not invited.
  - Defence rights:
    - *Global Steel Wire and Others—Pre-stressing Steel:* no right to a hearing on EC ability to pay decision, given that based on material from defence.
    - *Infineon—Smart Card Chips:* EC should have disclosed forensic report on authenticity of an email because relevant to inculpatory evidence.

## *Italian Reinforcement Bars*

In September 2017, the ECJ issued three judgments in relation to the *Concrete Reinforcing Bars* cartel.[330]

This is a long story. Between 1989 and 2000 the EC found that eight firms took part in an agreement aimed at fixing the prices of concrete reinforcing bars in Italy. The EC launched dawn raids and carried out inspections in 2000. The relevant product was covered by the Treaty establishing the European Coal and Steel Community 1951 (the ECSC Treaty) and therefore the EC pursued the infringement based on art.65(4) of that Treaty.

In March 2002, the EC sent its first SO to the undertakings concerned, with a hearing held in June of that year (the first hearing). In July 2002, the ECSC Treaty expired. In order to address the legal consequences of that expiry, the EC issued a supplementary SO under the newly adopted Regulation 1/2003. A supplementary hearing, relating to the legal consequences of the expiry of the ECSC Treaty was held in September 2002 (the second hearing). Then the EC adopted its prohibition decision in December 2002, based on the ECSC Treaty, imposing a fine of some €85 million.

In October 2007, the GC annulled the EC's decision because it was adopted on the wrong legal basis, the ECSC Treaty, instead of Regulation 17/62[331] (the predecessor of Regulation 1/2003).

In September 2009, the EC readopted the decision (the EC decision) based, this time, on Regulation 1/2003. In December 2014, the GC dismissed actions for annulment, brought by four of the undertakings involved in the cartel against the EC decision.

The undertakings then appealed further. The main points are as follows:

[329] *Toshiba* EU:C:2017:520; [2017] 5 C.M.L.R. 11 at [83].

[330] With thanks to Geoffroy Barthet and Sophie Prinz. Decision relating to a proceeding under Article 65 of the ECSC Treaty (COMP/37956-*Reinforcing bars*) [2011] OJ C98/16. *Feralpi Holding SpA v European Commission* (C-85/15 P) EU:C:2017:709; [2017] 5 C.M.L.R. 23; *Ferriera Valsabbia SpA v European Commission* (C-86/15 P) EU:C:2017:717; [2017] 5 C.M.L.R. 24; *Ferriere Nord SpA v Commission* (C-88/15 P) EU:C:2017:716; and *Riva Fire SpA v Commission* (C-89/15 P) EU:C:2017:713: all judgments of 21 September 2017.

[331] Regulation 17/62: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

First, the appellants claimed that under the procedural rules provided for by Regulations 1/2003 and 773/2004,[332] the EC was required to arrange a hearing in the presence of the competition authorities of the Member States before readopting the decision at issue.[333]

They claimed that this had not occurred. Notably, as regards the second hearing, the representatives of the Member States were invited in accordance with the EC Treaty, but only the SO and the legal consequences of the expiry of the ECSC Treaty were discussed (not the substance of the cases).[334] However, as regards the first hearing on the substance of the cases, the representatives of the Member States were not invited (since that was not provided for under the ECSC Treaty rules).[335]

The ECJ agreed. The court held that, when a decision such as this is adopted based on Regulation 1/2003, the procedure must follow the procedural rules in that Regulation.[336] In particular, in application of arts 12 and 14 of Regulation 773/2004, the EC was required to give an opportunity to the parties to express their views in a hearing to which representatives of the NCAs were invited.[337]

The first hearing on the substance of the case had not met this requirement. As a result, the ECJ concluded that the GC had been wrong to hold that the EC was not obliged to organise a new hearing before adopting the contested decision on the ground that the substantive hearing of June 2002 had been conducted in conformity with the ECSC rules.[338]

Secondly, the court held that the failure to hold a hearing, with the participation of the NCAs, constituted an infringement of an essential procedural requirement.[339] As a result, it was not necessary for the undertakings concerned to demonstrate that such an infringement might have influenced the course of the proceedings and the content of the contested decision.[340] The ECJ ruled that the procedure was necessarily vitiated, regardless of any possible detrimental consequences for the appellants that could result from the infringement.[341]

As a result, the court set aside the GC's judgment and annulled the EC decision on the basis that the parties' rights of defence had been breached.

Thirdly, the ECJ rejected claims by the undertakings that the EC should have issued a new SO.[342] Although the procedure had been initiated before Regulation 1/2003 came into force, the EC decision in question had been adopted on the basis of that Regulation and Regulation 773/2004.

While art.10 of Regulation 773/2004 provides that the EC should send an SO to the undertakings concerned, it was not necessary to send a new SO. The GC had correctly noted that the EC had already sent an SO and a supplementary SO and the undertakings had submitted their observations. Moreover, as AG Wahl

[332] Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.
[333] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24; *Ferriere* (C-88/15 P) EU:C:2017:716 at [19].
[334] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [43].
[335] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [43].
[336] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [45].
[337] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [46].
[338] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [47].
[339] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [48].
[340] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [49].
[341] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [50].
[342] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [40].

had noted, there was no major difference in content between an SO adopted under the ECSC rules and one adopted in accordance with Regulation 1/2003.[343]

The GC had also correctly applied the case law[344] which provides that the annulment of an EU measure does not necessarily affect the preparatory acts; and, in principle, the procedure for replacing such a measure may be resumed at the point where the illegality occurred. That was when the EC took its decision in 2002 on the basis of the ECSC Treaty. So the annulment of that decision did not affect the SO or the supplementary SO.[345]

## *Pre-stressing Steel—Celsa Group*

In October 2016, the ECJ issued two judgments dealing with the further appeals of four companies belonging to the Celsa Group against the GC judgment in the *Pre-stressing Steel* cartel case.[346]

The first judgment focuses on the EC's rejection of the second application to the EC by these Spanish companies regarding their claimed inability to pay. The second judgment focuses on the criteria used by the EC to assess liability for the infringement within the Celsa Group, which was subject to various types of restructuring during the infringement period (i.e. decisive influence and successor liability issues); and the EC's ruling on inability to pay in the infringement decision.

### Background

In June 2010, the EC fined producers of pre-stressing steel a total of €518.5 million for participating in an 18-year price-fixing and market-sharing cartel.

In June 2016, the GC dismissed appeals of Trenzas y Cables de Acero PSC (TCA), Moreda-Riviera Trefilerias (MRT), Trefilerias Quijano (TQ) and Global Steel Wire (GSW), all members of the Celsa Group. The four companies appealed.[347]

### The ECJ's first judgment

In the first judgment, the four companies criticised the EC's rejection of their second application regarding ability to pay. They argued that their second application constituted a new demand under para.35 of the EC's Fining Guidelines, rather than a demand to reassess their first application and that its rejection by letter from the Director-General for Competition therefore constituted a new "act".

The ECJ rejected this. The court held that there was no rule of law which obliged the EC, when it has adopted a decision refusing to reduce the amount of a fine, to ensure an effective follow-up on the ability to pay of the parties, reconsidering its

[343] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [34].

[344] *Limburgse Vinyl Maatschappij NV (LVM) v Commission of the Euorpean Communities* (C-238/99 P) EU:C:2002:582; [2003] 4 C.M.L.R. 10 at [73].

[345] *Ferriera* EU:C:2017:717; [2017] 5 C.M.L.R. 24 at [35]–[36].

[346] With thanks to Sophie Prinz. *Global Steel Wire v Commission, Trenzas y Cables de Acero v Commission, Trefilerías Quijano v Commission, Moreda-Riviere Trefilerías v Commission* (C-454/16 P to C-461/16 P), EU:C:2017:818 and EU:C:2017:819 Judgments of 26 October 2017. In June 2017, the GC also rejected, as manifestly unfounded, a claim for damages by Ori Martin, on the basis that the ECJ would not have examined its parental liability claim correctly. *PaRR*, 20 June 2017; *Ori Martin v CJEU* (T-797/16) unreported Order of 1 July 2017.

[347] *Moreda-Riviere Trefilerias v Commission* (T-426/10) EU:T:2016:335.

decision de novo whenever the applicant gave the EC new information on its financial situation.[348]

The ECJ considered that the GC had been right to find that the EC only had to reassess its decision if there were new facts which substantially modified the financial situation of the applicant.[349] As a result, the GC had correctly upheld the EC's rejection of the request for a new assessment of the ability to pay, when the EC considered that the only change in their financial situation was an improvement thereof. New elements invoked by the parties were not likely to substantially modify the applicants' ability to pay.[350]

As the GC had been correct to find that the conditions justifying a new assessment of the companies' ability to pay were not met, it was also correct in ruling that the EC's rejection of the companies' second request was not a decision challengeable in court.[351]

## The ECJ's second judgment

In the second judgment, the companies challenged the assessment of their liability in the infringement through the presumption of decisive influence, as well as through the criteria of corporate succession. They also challenged the EC's first ruling on ability to pay.

Regarding the assessment of decisive influence by GSW on the subsidiaries involved in the infringement, the ECJ noted that the GC had reviewed whether the companies had rebutted the presumption of decisive influence by GSW by virtue of its corporate structure and the other evidentiary factors considered by the EC.

The ECJ considered that the GC had done so correctly and that the elements raised by the companies on appeal to question that ruling in fact amounted to a request that the court reconsider factual issues which were for the GC. The companies had argued, among other things, that GSW had delegated executive powers to its subsidiaries, whereas the GC had found that fact of delegation in itself as indicative of GSW's control of its subsidiaries.[352]

The applicants further argued that the GC erred in law in applying the legal standard of corporate succession. The ECJ recalled that an undertaking which did not commit an infringement can be held liable when the undertaking which committed the infringement has ceased to exist legally or economically. A fine imposed on an undertaking which still legally exists but does not have any economic activity would not have any deterrent effect.[353]

As the companies which participated in the cartel ceased to exist following various restructurings within the Celsa Group, the GC had not been wrong to hold their corporate successors liable.[354]

Further, the GC had been correct to hold that, when two entities form a single economic unit, the fact that the entity which committed the infringement still exists, does not prevent the EC from holding responsible the entity to which it has

[348] *Global Steel Wire v Commission* EU:C:2017:818 at [32].
[349] *Global Steel Wire* EU:C:2017:818 at [34].
[350] *Global Steel Wire* EU:C:2017:818 at [35].
[351] *Global Steel Wire* EU:C:2017:818 at [71].
[352] See, e.g. *Global Steel Wire* EU:C:2017:818 at [39]–[40].
[353] *Global Steel Wire* EU:C:2017:819 at [116].
[354] *Global Steel Wire* EU:C:2017:819 at [119].

transferred its economic activities. Notably, when the two entities are under the control of the same person and apply the same commercial directives.[355]

The companies also argued that the EC breached their rights of defence as the EC neither communicated in advance its reasons for rejecting their first request to reduce the amount of the fine, nor gave them the opportunity to be heard on this. The ECJ held that, since the decision adopted by the EC was exclusively based on elements submitted by the parties, the GC had been correct to find that the rights of the defence had been respected. Further, that the EC did not have to communicate to the parties the reasons for the EC's decision in advance or to hold a hearing on the issue.[356]

The ECJ therefore rejected the appeals.

## Confidentiality of decisions

*Box 8*

- **Court cases—Confidentiality of decision issues**
  - — Hearing Officer role not limited to review of business secrets and professional secrecy:
    - * may look at any objection raised to claim confidentiality, including legitimate expectations and equal treatment.
    - * (*Evonik Degussa—Hydrogen Peroxide*: ECJ Grand Chamber).

### *Hydrogen Peroxide*

In March 2017, the ECJ, sitting in Grand Chamber, ruled on an action brought by Evonik Degussa (Evonik) against the publication of an extended non-confidential version of the *Hydrogen Peroxide* cartel decision.[357] Evonik was the immunity applicant in that case.

In the course of 2007, the EC published a redacted public version of the cartel decision. Then, in 2011, the EC informed Evonik that it intended to publish a more extensive version, setting out the entire content of that decision apart from the confidential information.

Evonik objected, arguing that the information from its leniency application should remain confidential. As a result, the EC decided to delete part of the information that would directly or indirectly allow the identification of the source of the information communicated pursuant to the 2002 Leniency Notice and the names of Evonik's collaborators. Otherwise, the EC decided to disclose the rest of the leniency information.

Evonik then referred the matter to the Hearing Officer and, in particular, argued that publication of the extended version of the decision violated the principles of legitimate expectations and equal treatment. Evonik also argued that a considerable part of the information that the EC intended to make public was confidential, as

[355] *Global Steel Wire* EU:C:2017:819 at [120]–[121].
[356] *Global Steel Wire* EU:C:2017:819 at [147].
[357] With thanks to Lukas Šimas. Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38620-*Hydrogen Peroxide and Perborate*) [2006] OJ L353/54. *Evonik Degussa GmbH v European Commission* (C-162/15 P) EU:C:2017:205; [2017] 4 C.M.L.R. 28.

it was derived from Evonik's leniency submissions and satisfied the requirements for the protection of confidential information

The Hearing Officer rejected Evonik's request on the basis that it had not shown that publication of the information was likely to cause it serious harm.[358] Moreover, the Hearing Officer considered that he was not competent to rule on Evonik's claim that disclosing this information would also breach the principles of legitimate expectations and equal treatment.[359]

In 2012, Evonik appealed to the GC against the EC's decision. The GC rejected the appeal in its entirety and confirmed that the Hearing Officer was not competent to examine Evonik's arguments that the publication of the extended version of the decision would infringe the principle of the protection of legitimate expectations and equal treatment.

In 2015, Evonik appealed further to the ECJ.

Interestingly, the ECJ held that the GC had erred in law in holding that the Hearing Officer had been correct to decline competence to answer Evonik's objections.[360] According to the ECJ, the Hearing Officer has to examine any objection relied on by the interested person in order to claim protection of the confidentiality of the contested information and based on a ground arising from rules or principles of EU law. His competence is therefore not limited to the technicalities of the concept of business secrets or professional secrecy.[361]

The ECJ dismissed the remaining grounds of appeal concerning whether the information submitted by Evonik in the context of the leniency programme was confidential and whether that information should be protected against publication on other grounds.

With regard to the treatment of leniency information in public versions of EC's decisions, the ECJ indicated a number of principles:

- the publication of verbatim quotations of information taken from documents produced by Evonik in support of its application for leniency could be permitted, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information[362];
- the publication of verbatim quotations from the relevant statements themselves is not permitted in any circumstances[363]; and
- information which was secret or confidential but which is older than five years is presumed to be historical and no longer confidential, unless the party claiming confidentiality can rebut that presumption by showing that the information still constituted an essential element of its commercial position or that of interested third parties.[364]

[358] *Evonik* EU:C:2017:205; [2017] 4 C.M.L.R. 28 at [27].
[359] *Evonik* EU:C:2017:205; [2017] 4 C.M.L.R. 28 at [28].
[360] *Evonik* EU:C:2017:205; [2017] 4 C.M.L.R. 28 at [56].
[361] *Evonik* EU:C:2017:205; [2017] 4 C.M.L.R. 28 at [51]–[55].
[362] *Evonik* EU:C:2017:205; [2017] 4 C.M.L.R. 28 at [87].
[363] *Evonik* EU:C:2017:205; [2017] 4 C.M.L.R. 28 at [87].
[364] *Evonik* EU:C:2017:205; [2017] 4 C.M.L.R. 28 at [64].

## *Car Glass*

The approach of the ECJ as regards the Hearing Officer's powers has been confirmed since by the ECJ in *AGC Glass*,[365] which concerned an analogous factual scenario. In that case, the ECJ stated that such an error[366] was not of such nature so as to justify overturning the GC's judgment since the Hearing Officer in fact had examined the claims regarding the breach of the principles of legitimate expectations and equal treatment in any event.[367]

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

- **European Court judgments on art.102 TFEU, notably:**
  - *Intel* on exclusive rebates; EU jurisdiction; and the EC's duties when interviewing in investigations; and
  - the *Latvian Collecting Society* case on how to assess excessive pricing.
- **Several European Court judgments on EC complaint rejections.**
- **EC decisions on cartels.**
- **EC decisions on art.102 TFEU, notably:**
  - The €2.42 billion fine on *Google* for giving an unfair advantage to its own comparison shopping services, as compared with rivals, in internet searches.
  - The EC's *Lithuanian Railways* Decision concerning the removal of track, which made it more difficult for a rival rail operator to offer services.
- **The EC's E-commerce Sector Inquiry Report.**
- **Selected policy issues this year:**
  - Algorithms and EU competition law; "Big Data"; and disruptive innovation and antitrust.

[365] *AGC Glass Europe SA v European Commission* (C-517/15 P) EU:C:2017:598; [2017] 5 C.M.L.R. 13.

[366] The GC upholding the Hearing Officer's position that he had to decline competence on issues of legitimate expectations and equal treatment.

[367] *AGC Glass* EU:C:2017:598; [2017] 5 C.M.L.R. 13 at [56]–[58].