Latest developments in Anti-Cartel Enforcement in the European Union (June 2015 - June 2016)

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This article summarises the developments of the last year in anti-cartel enforcement by the European Commission, and the subsequent scrutiny by the European Courts. It covers the period June 2015 - June 2016. Although the Commission has not been very active in the last year, the Court of Justice and the General Court have continued to adopt a steady stream of cartel-related judgments. We have classified the most relevant cases by theme, starting with the issues surrounding immunity and leniency applications, which continue to trigger the vast majority of cartel cases in the EU. We will then turn to a number of investigation issues and due process in administrative proceedings before assessing the Courts' approach in relation to cartel facilitation. Finally, we will be discussing the most recent case law of the Courts in relation to the concept of single and continuous infringement, parental liability and fining issues.

1. European Commission decisions

2015 was not a particularly productive year for the European Commission, with only 5 cartel decisions, involving 21 undertakings, imposing fines for a total amount of € 364 531 000. The first half of 2016 continued at a similar pace, with 3 decisions involving 5 undertakings resulting in total fines of € 149 180 000. All decisions adopted in 2015 and 2016 were based on immunity applications.

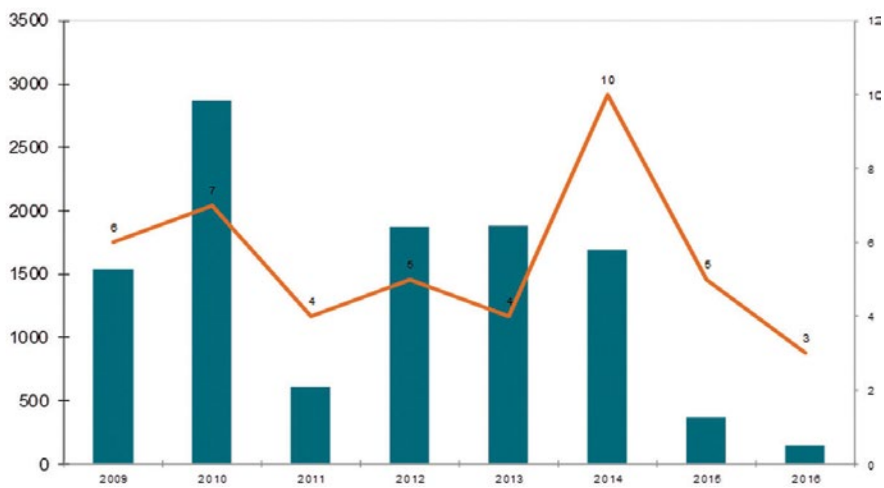

Figure 1 - Total fines and number of cartel decisions 2009-2016

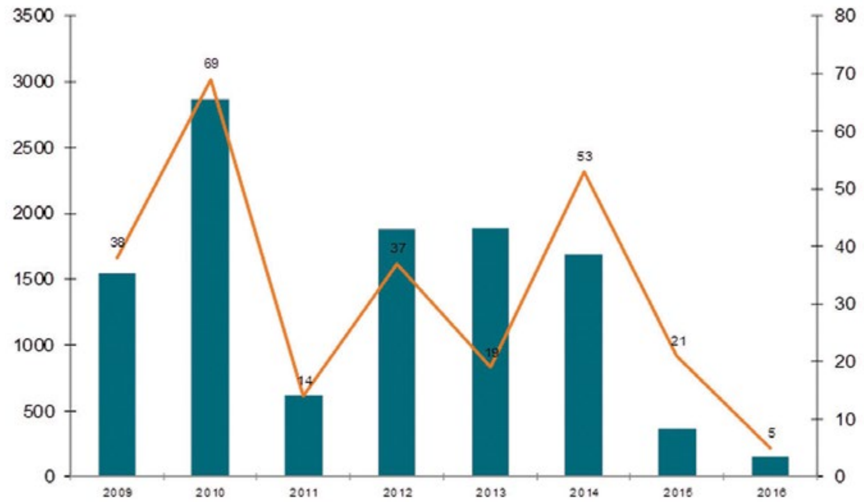

Figure 2 - Total fines and number of undertakings 2009-2016

There has been a balanced mix of cases under the normal procedure and settlement cases. The settlement procedure now covers about half of the cases, with the process getting substantially shorter and the settlement decisions being subject to only few appeals.

Two of the 3 decisions in 2016 followed a prior hybrid settlement - a € 6.2 mio fine was imposed on Pometon in *Steel abrasives*, and a fine of € 5.2 mio on Riberebro in *Canned mushrooms* - meaning that the Commission has only adopted one "new" decision so far in 2016, in *Alternators and starters*.[1]

There has been continued scrutiny of the automotive, financial services, transport and food sectors.

The statistics can be found in figures 1 and 2.

2. Immunity and leniency: Court rulings on parallel applications to the Commission and NCAs

The past year has shown that the Courts continue to apply a very strict standard as to the interpretation of the conditions for granting leniency reductions.

Interplay within ECN

DHL[2] illustrates the serious consequences of any inconsistencies between the immunity application to the Commission and parallel summary applications to national competition authorities ('NCAs') within the context of the European Competition Network ('ECN') framework.

DHL had submitted an immunity application concerning several infringements in the sector of international freight forwarding to the Commission and was awarded conditional immunity for the entire sector, covering maritime, air and road transport. In parallel, it also submitted a summary application for immunity to the Italian competition authority, the AGCM, but without explicitly referring to road transport. Almost a year later, it submitted an additional summary application which expressly extended to road freight. In the meantime, however, Schenker had submitted a summary immunity application to the AGCM concerning road freight forwarding in Italy. Ultimately, in the AGCM's infringement decision in relation to the international road freight forwarding sector to and from Italy, Schenker was awarded full immunity for road freight forwarding as it was the first to have applied for immunity. DHL disagreed, appealed the decision of the AGCM and claimed that it should have been accorded full immunity, as it had been the first to apply under the national leniency programme. It argued that the rules and instruments of the ECN are binding on the AGCM and that the principles of EU law require a national authority which receives a summary leniency application to assess it, taking into account the main application for immunity which that company submitted to the Commission

1 In 2015, the Commission took "new" decisions in *Optical disk drives*, *Blocktrains*, *Retail food packaging*, and *Parking heaters*.

2 Court of Justice of the European Union ('ECJ'), Judgment of 20 January 2016, Case C-428/14 *DHL (Italy) v Autorità Garante della Concorrenza e del Mercato*.

(which, *in casu*, did include the road freight forwarding sector).

In the context of a request for a preliminary ruling by the Consiglio di Stato (Italian Council of State), the European Court of Justice ('ECJ'), however, held that the instruments adopted in the context of the ECN, in particular the ECN Model Leniency Programme, are not binding on NCAs.[3] Moreover, the ECJ held that, due to the independent nature of leniency programmes, there is no legal link between a leniency application submitted to the Commission and a summary application submitted to an NCA concerning the same cartel. Hence there is no requirement on the NCA to assess the summary application in light of the application submitted to the Commission, irrespective of whether the content of both applications is identical.[4] The ECJ also added that NCAs are allowed, under EU law, to accept a summary application for immunity, not only from immunity applicants but also from second-in leniency applicants.[5] Against the background of *DHL*, it is now even more important for immunity applicants who seek to make applications both with the Commission and with NCAs, to align their summary applications as much as possible with the main application.

Added value contributions

In 2007, the Commission adopted a decision fining 13 companies who had participated in market-sharing agreements and price coordination for bitumen in Spain (excluding the Canary Islands).

After a first appeal to the General Court ('GC'), Repsol claimed that the Commission and the GC should have granted Repsol partial immunity from the fine since it had produced the information about the actual duration of the cartel to the Commission. The ECJ, however, came to the conclusion that the Commission had already been in possession of documents showing the actual duration of the alleged infringement. The ECJ, referring to the wording of point 23(b) of the 2002 Leniency Notice, held that the provision must be interpreted - in line with the Notice's general scheme - as meaning that evidence provided by an undertaking may be considered to be evidence relating to 'facts previously unknown to the Commission' only if it objectively presents significant added value with respect to the evidence already in the Commission's possession.[6] The ECJ concluded that, for the purposes of the application of that provision, the Commission's possession of evidence amounted to knowledge of its content, regardless of whether that evidence had actually already been examined and analysed by its services.[7]

> Leniency applicants should align their national summary applications with their main application

3. Investigation issues

In the past year, the ECJ rendered two judgments addressing the extent of the Commission's investigation powers, both in the context of requests for information ('RFIs') and inspections.

Commission investigation powers: RFIs

Pursuant to inspections carried out by the Commission in 2008 and 2009, the Commission initiated proceedings for alleged infringements against several cement producers on 6 December 2010. Those alleged infringements consisted in '*restrictions on trade flows in the European Economic Area (EEA), including restrictions on imports in the EEA coming from countries outside the EEA, market-sharing, price coordination and related anti-competitive practices in the cement market and related product markets*'.

By decisions adopted on 30 March 2011[8], the Commission required a number of cement companies to answer RFIs of between 78 and 94

3 *Ibid*, paras. 31-44.
4 *Ibid*, paras. 54-67.
5 *Ibid*, paras. 74-84.
6 ECJ, 9 June 2016, Case C-617/13 P, *Repsol v Commission*, paras. 65-71.
7 *Ibid*, para. 72.
8 European Commission Decisions C (2011) 2356 final, C (2011) 2361 final, C (2011) 2364 final and C (2011) 2367 final of 30 March 2011 — Case COMP/39520 — *Cement and related products*.

pages within 12 weeks. The addressees brought actions for the annulment of the Commission decisions, arguing *inter alia* that the decisions infringed the principle of proportionality as well as their rights of defence and lacked an adequate statement of reasons. In 2014, the GC had, however[9], dismissed their appeals and confirmed the lawfulness of the Commission's RFIs.

The cement companies appealed these judgments before the ECJ. After a scathing opinion of Advocate-General Wahl, the ECJ concluded that the GC had erred in law in finding that the Commission decisions were adequately reasoned.[10] It held that "*according to settled case law, the statement of reasons required under Article 296 TFEU for measures adopted by EU institutions must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to review its legality*."[11] According to the ECJ, "*[the excessively brief, vague and generic statement in the decisions, having regard in particular to the considerable length of the questionnaire,] did not make it possible to determine with sufficient precision either the products to which the investigation relates or the suspicions of infringement justifying the adoption of the investigation*" and, hence, did not enable the undertakings nor the EU judicature to determine whether the information was necessary for the purpose of the investigation.[12] The ECJ set aside the GC's judgments as well as the Commission decisions.[13]

Cement shows that Commission RFIs need to be properly motivated but the required level of precision and motivation depends on a number of factors : the timing of the RFI, the information that is already available to the Commission at the time of the adoption of the RFI, the nature and extent of the requested information, etc. The ECJ requires a higher - and more detailed - motivation requirement where substantial amounts of information are requested and the investigation has been ongoing for a considerable amount of time. In any event, it would seem that the Commission cannot confine itself in RFIs to a generic explanation of the purpose of the request and the suspected conduct. Although the judgment applies to RFIs adopted by decision, an argument could be made that the same principles apply to regular RFIs - although they may not be challengeable acts in themselves - as the wording of the duty to state reasons in Article 18 (2) and 18 (3) Reg. 1/2003 is identical.

Overlapping inspections in different cases

In 2011, the Commission conducted no less than three inspections into the Deutsche Bahn group, based on three different inspection decisions concerning Deutsche Bahn (in the first inspection decision) and its subsidiary DUSS (in the following two inspection decisions). The Commission officials conducting the first inspection at Deutsche Bahn had been briefed during the various preparatory team meetings on the allegations against DUSS, but the allegation had not been included in the (first) inspection decision. Deutsche Bahn claimed that these inspections had violated its fundamental right to the inviolability of the home (Article 7 Chapter, Article 8 ECHR), its right to effective judicial protection (Article 47 Chapter, Article 6(1) ECHR) and its rights of defence, due to alleged irregularities, vitiating the conduct of the first inspection. The GC had dismissed these claims.

On the principle of inspections, the ECJ supported the view that the absence of prior judicial authorisation for an inspection does not infringe the fundamental right to the inviolability of private premises and the right to effective judicial protection. The ECJ held that, in light of the ECtHR's case law, the lack of prior judicial authorisation was not capable, in itself, of rendering the inspection measure unlawful, and the absence of prior judicial authorisation may

9 General Court ('GC'), Judgments of 14 March 2014, Cases T-297/11, *Buzzi Unicem v Commission*, T-302/11 *Heidelberg Cement v Commission*, T-305/11 *Italmobiliare v Commission and* T-306/11 *Schwenk Zement v Commission*.

10 ECJ, Judgments of 10 March 2016, Cases C-247/14P *Heidelberg Cement v Commission*, para. 40; C-248/14P *Schwenk Zement v Commission*, para. 44; C-267/14P *Buzzi Unicem v Commission*, para. 41; C-268/14P *Italmobiliare v Commission*, para. 42.

11 C-247/14P *Heidelberg Cement v Commission*, para. 16; C-248/14P *Schwenk Zement v Commission*, para. 20; C-267/14P *Buzzi Unicem v Commission*, para. 17; C-268/14P *Italmobiliare v Commission*, para. 18 - referring to Cases C-367/95P, *Commission v Sytraval and Brink's France* (para. 63) and C-37/13P, *Nexans and Nexans France v Commission* (paras. 31-32).

12 C-247/14P *Heidelberg Cement v Commission*, para. 31; C-248/14P *Schwenk Zement v Commission*, para. 35; C-267/14P *Buzzi Unicem v Commission*, para. 32; C-268/14P *Italmobiliare v Commission*, para. 33.

13 Cases C-247/14P *Heidelberg Cement v Commission*, C-248/14P *Schwenk Zement v Commission*, C-267/14P *Buzzi Unicem v Commission*, C-268/14P *Italmobiliare v Commission*.

be counterbalanced by a post-inspection appeal covering both questions of fact and questions of law. This review is guaranteed by Article 20(8) of Regulation No 1/2003 which provides that the lawfulness of the Commission's inspection decision is subject to review by the ECJ.[14]

As to the specific circumstances of the case, however, the ECJ held that the Commission informing its officials about the existence of the DUSS complaint before the first inspection, where it does not fall within the subject-matter of the first inspection decision, disregarded the safeguards which the Commission has to respect. The prior information regarding Deutsche Bahn's subsidiary DUSS, was not part of the general background information on the case but rather related to a separate complaint. Accordingly, the lack of reference to that complaint in the subject-matter of the first inspection decision infringes the Commission's obligation to state reasons and the parties' rights of defence. Since the second and third inspections were triggered by information gathered during the first inspection, the ECJ also annulled the second and third Commission inspection decisions.[15]

4. Due process : Admissibility of evidence

In the context of the banana cartel in Southern Europe, Pacific Fruit had appealed to the GC arguing that the Commission had largely based its findings on documents transmitted by the Italian tax authority Guardia di Finanza, seized during a national tax investigation. Pacific Fruit had not been informed of the transfer of those documents, so that they were unable to rely on the Italian procedural safeguards to prevent the disclosure of those documents to the Commission or to exercise their rights of defence.[16]

The GC found that the Commission had correctly relied on documents from the Guardia di Finanza. Article 12 of Regulation No 1/2003 is intended to regulate the exchange of information within the ECN - while ensuring that the procedural safeguards for companies are respected - but does not impose a general prohibition on the use of evidence by the Commission, of information obtained by another national authority in exercise of its mandate. Such a general prohibition would render unsustainable the burden of proof incumbent on the Commission. Moreover, the GC held that the lawfulness of the transmission to the Commission, by a national prosecutor, of information obtained in application of national criminal law, is a question governed by national law over which the EU judicature has no jurisdiction. Consequently, if the transmission of the documents at issue was not declared unlawful by a national court, the documents could not be considered inadmissible evidence.[17]

> The Commission had correctly relied on documents from the Italian tax authority Guardia di Finanza

As to Pacific Fruit's rights of defence, the GC emphasised that the notification of the statement of objections and ensuing access to file are the key instruments that ensure that rights of defence are respected. If the applicants' rights of defence were extended to the period before the statement of objections, the effectiveness of the Commission's investigation would be undermined, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission and, hence, the information that could still be concealed. The GC therefore held that the Commission was not required to inform Pacific Fruit of the transmission of documents by the Guardia di Finanza before the notification of the statement of objections.[18]

14 ECJ, Judgment of 18 June 2015, Case C-583/13P, *Deutsche Bahn AG v Commission,* paras. 25-26, 32-36 and 46-48.
15 *Ibid,* paras. 61-69.
16 GC, Judgment of 16 June 2015, T-655/11, *FSL Holdings and others v Commission,* paras. 59-62.
17 *Ibid*, paras. 74-90.
18 *Ibid,* paras. 91-97.

5. Substantive assessment: Facilitation

On 22 October 2015, the ECJ ended the saga that started with the 2009 Commission decision holding AC Treuhand, a consultancy firm, liable under EU antitrust rules for facilitating the heat stabiliser cartel.[19] Zurich-based AC Treuhand is a consultancy firm which supported the cartelists in collecting, processing and assessing market data, presenting market statistics and auditing the reported figures at the cartelists' premises. The Commission decision was upheld by the GC. AC Treuhand's main argument was that for a company to infringe the cartel prohibition, it must itself have a relationship with the markets affected by the competition restriction.[20]

Advocate-General Wahl - somewhat surprisingly - held that there was currently no legal basis under EU law to hold AC Treuhand liable under Article 101(1) TFEU - given that Treuhand never exerted any competitive pressure on the other cartel participants prior to the agreement and therefore could not bring about a restriction of competition.[21]

The ECJ did not follow the opinion of the Advocate-General and concluded that the service agreements between AC Treuhand and the cartelists did constitute illegal agreements under EU competition law, infringing Article 101 TFEU. The ECJ reviewed the issue from the other perspective concluding that nothing in the wording of Article 101 TFEU indicates that the cartel prohibition only applies to the companies who are active on the markets affected.[22] The ECJ held that it was apparent from the case law that Article 101 TFEU refers to all agreements and concerted practices distorting competition on the common market, "*irrespective of the market on which the parties operate*."[23] It recalled that, based on previous case law, the Commission, in order to establish liability under Article 101 TFEU, must demonstrate that "*the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all participants to the cartel and that it was aware of the actual conduct planned or put into effect by the other undertakings or that it could reasonably have foreseen it and was prepared to take the risk*".[24] In that context, the ECJ also recalled that "*passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anti-competitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion and capable of rendering the undertaking liable under [Article 101 TFEU].*"[25]

The ECJ supported the Commission and GC in their view that AC Treuhand had played an essential role in the cartel and held that where a consultancy firm facilitates and actively contributes, in full knowledge of the relevant facts, to the implementation and continuation of a cartel among producers active on a separate market, it may be held liable under Article 101 TFEU; otherwise, the full effectiveness of that provision would be undermined.[26] In essence, the ECJ held that companies that "aid and abet" an infringement of the competition rules can be held liable as part of the same infringement.

As to the fact that this was the first time that the facilitator concept had been applied, the ECJ stated that the principle that offences and penalties must be defined by law cannot preclude the gradual, case-by-case clarification of the rules on liability by judicial interpretation, provided that the result was reasonably foreseeable.[27] It held that AC Treuhand could have reasonably foreseen that its conduct was incompatible with EU competition law, especially given the broad scope of the terms 'agreement' and 'concerted practice' established by the Courts' case law.[28]

19 European Commission Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (COMP/38589 - *Heat Stabilisers*), finding that AC and various suppliers of heat stabilisers participated in a cartel on tin stabilisers between 1987-2000 and in a cartel on ESBO/esters between 1991-2000.

20 ECJ, Judgment of 22 October 2015, Case C-194/14 P, *AC Treuhand AG v Commission*, para. 20.

21 *Ibid*, Opinion of Advocate-General Wahl of 21 May 2015, paras. 47-76.

22 ECJ, Judgment of 22 October 2015, Case C-194/14 P, *AC Treuhand AG v Commission*, para. 27.

23 *Ibid*, para. 35 - referring to cases C-56/65, *LTM*, p. 358 ; C-56/64 and C-58/64, *Consten and Grundig v Commission*, pp. 492-493; C-100/80-103/80, *Musique Diffusion française v Commission*, paras. 72-80; C-243/83, *Binon*, paras. 39-47; C-306/96, *Javico*, paras. 10-14.

24 *Ibid*, para. 30 - referring to Case C-49/92P *Commission v Anic Partecipazioni*, paras. 86-87; Cases C-204/00 to C-219/00, *Aalborg Portland and Others v Commission*, para. 83.

25 *Ibid*, para. 31.

26 *Ibid*, para. 36.

27 *Ibid*, paras. 40-41.

28 *Ibid*, para. 43.

6. Single and continuous infringement

The concept of a single and continuous infringement ('SCI') is critical for the application of the statute of limitations and the calculation of fines and follow-on damages claims. It remains among the most litigated issues before the Courts. In *Siemens*[29] the ECJ summarised the principal conditions for the finding of an SCI : (i) there has to be an overall plan pursuing a common objective; (ii) the undertaking must intentionally contribute to that plan - which need not be made from the start of the infringement nor must the plan be pursued in exactly the same way by all cartelists;[30] and (iii) the fact that an undertaking had reservations on whether to participate or an intention to cheat does not prevent its participation in the SCI - it is sufficient that the undertaking was aware of the plan.[31] The Courts applied these principles in a number of cases over the past year :

Insufficiently precise knowledge

On 9 September 2015, the GC partially annulled the *TV and Computer Monitor Tubes*[32] decision in relation to Toshiba's direct participation in the SCI during the period before the creation, in March 2003, of a joint venture which participated in the CPT cartel. In its decision, the Commission had fined Toshiba for participating directly in the CPT cartel, *inter alia* through maintaining bilateral contacts with the majority of the undertakings forming the core of the cartel.

In line with *Soliver*[33] and the ECJ's previous case law[34], the GC recalled that the fact that there is an SCI does not necessarily mean that an undertaking participating in one or more aspects can be held liable for the infringement as a whole, as the Commission still has to establish that the undertaking was aware of the other undertakings' anti-competitive activities or that it could reasonably have foreseen them.[35]

> The Commission should have demonstrated that Toshiba knew, or could reasonably be considered to have known, that the contacts formed part of an overall cartel

In this case, the GC held that the Commission had not properly proven that the applicant was aware of the overall CPT cartel during the period before March 2003. It was not sufficient for the Commission to establish the identity of the object between the meetings in which Toshiba participated and the overall CPT cartel, or that the contacts between Toshiba and its competitors were anti-competitive, or that Toshiba had contacts with participants to the cartel.[36] On the contrary, the Commission should have demonstrated, with sufficiently credible, precise and consistent evidence, that Toshiba knew or could reasonably be considered to have known of (i) the fact that the contacts formed part of an overall cartel and were designed to contribute to the achievement of the objectives of the overall cartel, and (ii) the general scope and essential characteristics of that cartel.[37]

The GC held that the Commission had failed to demonstrate that Toshiba was aware or had been kept informed, for the period before March 2003, of the existence of the CPT cartel and that it had intended to contribute by its own conduct to all the

29 ECJ, Judgment of 19 December 2013, Case C-239/11 P, *Siemens AG v Commission*, para. 242.

30 ECJ, Judgment of 11 July 2013, Case C-444/11, *Team Relocations NV and Others v Commission*, para. 56.

31 ECJ, Judgment of 7 January 2004 in Joined Cases C-204/00 P (*Aalberg Portland A/S v Commission*), C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, paras. 83-86.

32 European Commission Decision C(2012) 8839 final of 5 December 2012, Case COMP/39.437 — *TV and Computer Monitor Tubes*. The Commission found that the main global producers of cathode ray tubes (CRTs) had participated in two separate infringements, each constituting a single and continuous infringement. Those infringements related, first, to the CDT market ('the CDT cartel') and, second, to the CPT market ('the CPT cartel').

33 GC, Judgment of 10 October 2014, Case T-68/09 *Soliver v Commission* [2014] ECR, para. 63.

34 C-49/92 P, *Commission v Anic Partecipazioni*, paras. 83, 87 and 203; C-441/11 P *Commission v Verhuizingen Coppens* [2012] ECR, para. 42; Case C-444/11 P Team *Relocations and Others v Commission*, para. 50.

35 GC, Judgment of 16 June 2015, Case T-104/13 *Toshiba Corp. v Commission*, para. 52.

36 *Ibid*, paras. 55-56.

37 *Ibid*, paras. 51-55.

common objectives pursued by the participants in the cartel or that it could reasonably have foreseen those objectives.[38] Accordingly, Toshiba could not be considered as having directly participated in the SCI during that period and, hence, could not be held liable individually for such alleged participation.

Inconsistencies between grounds and operative part

In *Airfreight*[39], it is the first time since *German banks*[40] that a decision is annulled vis-à-vis all of the applicants. The key point was that there was a fundamental inconsistency between the grounds of the decision, which described one SCI, and the operative part, which determined there were 4 distinct SCIs.

The GC recalls the settled case law requiring a statement of reasons in a clear and unequivocal fashion.[41] It is not necessary for the reasoning to go into all the relevant facts and points of law, but it should at least set out the facts and considerations of decisive importance.[42] In addition, the motivation should be logical, and should not contain internal inconsistencies that would prevent a proper understanding of the underlying reasons.[43] Pursuant to the principle of effective judicial protection, particularly the operative part of a decision should be clear and precise, so that the undertakings held liable and penalised are in a position to understand and contest the imputation of liability and the imposition of the penalties.[44] Only if the operative part lacks clarity, reference should be made, for the purpose of interpretation, to the statement of reasons.[45]

The GC emphasised the consequences of uncertainty for damages actions. When national courts rule on anti-competitive practices which are already the subject of a Commission decision, they cannot take decisions running counter that decision.[46] Consequently, clear wording of the operative part is essential to allow national courts to understand the scope of the infringement and identify the liable undertakings.[47]

Subsequently, the GC analyses in detail the wording of the decisions, and finds they are vitiated by inconsistencies (i) between the grounds and the operative part, and (ii) within the grounds, all relating to the question whether the Commission found one SCI or four distinct SCI's.

The GC goes on to investigate whether these inconsistencies amount to a violation of the rights of the defence. According to earlier case law, this is not the case if (i) the decision taken as a whole allows the applicant to identify and plead the inconsistency, (ii) the wording of the operative part is sufficiently clear to allow the applicant to ascertain the exact scope of the decision, and (iii) the evidence demonstrating the applicant's liability is clearly identified in the grounds.[48] In *Airfreight*, the GC determined that none of the possible interpretations of the operative part of the decision is consistent with the grounds of the decision. As a consequence, the decision is vitiated by a defective statement of reasons.

British Airways filed an appeal with the ECJ to challenge this judgment even though the airline's initial appeal did not contest its role in all aspects of the cartel.[49] British Airways is also currently the target of several lawsuits in the UK, where customers are claiming damages allegedly suffered as a result of the higher cargo prices.

7. Parent and successor liability

In 2012, the Commission found that *LG Electronics* and *Philips Electronics*, having merged their worldwide CRT activities in the 'LPD Group', a 50/50 joint venture, were liable, both as direct participants as well as parent companies, for participating in two separate cartels involving

38 *Ibid*, paras. 59-78 and 82-86.
39 GC, Judgments of 16 December 2015 in Cases T-9/11 *Air Canada*, T-28/11 *Koninklijke Luchtvaart Maatschappij*, T-36/11 *Japan Airlines*, T-38/11 *Cathay Pacific Airways*, T-39/11 *Cargolux Airlines International*, T-40/11 *Latam Airlines Group and Others*, T-43/11 *Singapore Airlines and Others*, T-46/11 *Deutsche Lufthansa and Others*, T-48/11 *British Airways*, T-56/11 *SAS Cargo Group and Others*, T-62/11 *Air France-KLM*, T-63/11 *Société Air France* and T-67/11 *Martinair Holland v Commission*.
40 GC, Judgment of the 27 September 2006 in Joined Cases T-44/02 OPPO, T-54/02 OPPO, T-56/02 OPPO, T-60/02 OPPO and T-61/02 OPPO, *Dresdner Bank and Others v Commission*.
41 GC, Judgment of 16 December 2015, Case T-48/11, *British Airways plc v. Commission*, para. 30.
42 *Ibid*, paras. 31-32.
43 *Ibid*, para. 33.
44 *Ibid*, para. 36.
45 *Ibid*, para. 37.
46 *Ibid*, para. 39.
47 *Ibid*, para. 42.
48 *Ibid*, para. 77.
49 C-122/16 P, *British Airways v Commission*.

price fixing, market sharing, customer allocation and output restrictions.[50] In line with the *Dow Chemical* and *El du Pont* case,[51] the Commission considered that the companies should, as parent companies, be held jointly and severally liable for the LPD group's participation in both cartels.[52] Both companies appealed. They claimed *inter alia* that the Commission was wrong to hold the companies liable for infringements committed by the LPD group as it failed to prove that they had exercised decisive influence over its conduct.

First, the GC stated that, in order to impute to a parent company liability for the acts undertaken by its subsidiary, there is no requirement to prove that that parent company was directly involved in, or was aware of, the offending conduct.[53] In the context of a joint venture, where the *Akzo* presumption[54] does not automatically apply, it is not sufficient that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary; such influence must actually be exercised having regard to the economic, organisational and legal links between both undertakings.[55] The GC concluded that the Commission had provided proof to the requisite legal standard of the actual exercise of decisive influence by the applicants over the conduct of their joint venture.[56] It pointed out that, under the joint venture agreement, Philips and LGE both appointed (key) members of the supervisory board, management board and executive board of the JV and, hence, were in a position to control the adoption of strategic commercial decisions, the drawing up of operational and strategic plans as well as the supervision of day-to-day management. They also had the right to be informed of the operations of the group.[57] The finding of decisive influence was also supported by the fact that (i) several members of the joint venture's supervisory board held management positions within the parent companies; (ii) at the meetings of the supervisory board during the infringement period, matters relevant to the cartel were discussed; (iii) the supervisory board took decisions which influenced the operation and organisation of the JV; and (iv) under the joint venture agreement, the JV was the preferential supplier of CRT products for its parent companies.[58] Consequently, the GC upheld the Commission's decision that the applicants were jointly and severally liable for the participation of the JV in the cartels.[59]

> In JVs, the actual exercise of decisive influence is required, having regard to economic, organisational and legal links

In *Toshiba*, the GC went even further by finding that a minority shareholder, holding only 35,5% of a joint venture, could be held jointly and severally liable for the joint venture's participation in a cartel. In its appeal in the CRT cartel, Toshiba claimed that the other parent company (MEI) had sole control of the joint venture (MTPD) through its 64.5% shareholding and the appointment of the majority of the members of its Board of Directors

The GC, referring to its previous case law[60], held that even a minority interest may enable a parent company to exercise decisive influence on its subsidiary's market conduct, if it is linked to rights which are greater than those normally granted to minority shareholders with a merely financial interest. Proof of the actual exercise of decisive influence may be adduced by the Commission by relying on a body of consistent legal or economic indicia, even if each of these indicia taken in isolation would not be sufficient proof.[61]

50 European Commission Decision C(2012) 8839 final of 5 December 2012 - Case COMP/39.437 - *TV and Computer Monitor Tubes*.
51 ECJ, Judgment of 26 September 2013, Case C-179/12 P, *The Dow Chemical Company v Commission;* C-172/12 P, *El du Pont de Nemours and Company v Commission.*
52 GC, Judgments of 9 September 2015 in Cases T-91/13, *LG Electronics Inc. v Commission*, para. 15; and T-92/13, *Koninklijke Philips Electronics NV v Commission*, para. 16.
53 T-91/13, *LG Electronics Inc. v Commission*, para. 57; T-92/13, *Koninklijke Philips Electronics NV v Commission*, para. 67.
54 ECJ, Judgment of 10 September 2009, C-97/08 P, *Akzo Nobel and Others v Commission,* para. 60.
55 T-91/13, *LG Electronics Inc. v Commission,* paras. 36-37; T-92/13, *Koninklijke Philips Electronics NV v Commission,* paras. 36 and 41.
56 *Ibid.,* paras. 56 and 69.
57 *Ibid.,* paras. 45-50.
58 T-91/13, *Ibid.*, paras. 51-55.
59 T-91/13, *Ibid.*, para. 57.
60 GC, Judgment of 12 July 2011, Case T-132/07, *Fuji Electric v Commission*, para. 183.
61 GC, Judgment of 9 September 2015, Case T-104/13, *Toshiba Corp. v*

The GC recalled that the exercise of decisive influence does not require proof of interference in the day-to-day management of the joint venture's operation, nor of influence over its commercial policy in the strict sense, but rather the influence over the general strategy which defines the orientation of the joint venture. The parent company can exercise decisive influence, even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions, since a single commercial policy may also be inferred indirectly from economic and legal links between the parent company and its subsidiaries.[62]

The GC noted that the joint venture agreement provided that both companies had veto rights, beyond the normal rights accorded to minority shareholders, with respect to matters of strategic importance which were essential for the pursuit of MTPD's activities (notably business plans, budgets, major investment decisions, rights concerning senior management approval and dismissal), which proves the exercise of joint control of MTPD.[63] Since the two parent companies, under the agreement, had to agree beforehand on decisions in areas influencing MTPD's commercial strategy, the veto rights necessarily had an - even indirect - impact on the management of MTPD.[64] The question whether the applicant actually ever made use of those rights was not relevant to the assessment.

The finding of decisive influence was further supported by the fact that (i) one of MTPD's four directors appointed by Toshiba simultaneously occupied a management position within Toshiba, and (ii) MTPD would be the preferred supplier of the parent companies for the production of television sets.[65]

The GC concluded that both parent companies, including Toshiba, exercised decisive influence over MTPD jointly, as it was clear from the joint venture agreement that Toshiba's cooperation was necessary for the management of the joint venture. As a result they therefore formed a single economic unit and, hence, were jointly and severally liable for MTPD's participation in the CRT cartels.[66]

8. Fining issues

In the past year, both the Commission and the Courts dealt with a number of fining issues which significantly impact the fining calculation, notably:

a. Determination of the basic amount : calculation of value of sales

According to the 2006 Fining Guidelines[67], the first step in the fining calculation is the determination of the value of the sales of goods or services "*to which the infringement directly or indirectly relates in the relevant geographic area within the EEA*".[68]

Inclusion of sales from transformed products incorporated outside the EEA

In 2010, the Commission imposed a fine on Innolux, a Taiwanese company, and other producers of liquid crystal display ('LCD') panels, the main components of flat screens used in televisions and computers, for their participation in the LCD cartel. In the decision, the Commission had made a distinction between three categories of sales: (i) direct EEA sales, which are direct sales of cartelised LCD panels into the EEA; (ii) 'direct EEA sales through transformed products' which are sales of cartelised LCD panels incorporated by the LCD panel producer himself into a finished product (TV, computer, mobile phone, etc.), sold into the EU; and (iii) indirect sales, which are sales of cartelised LCD panels to a company located outside the EEA which then incorporates the panel into a finished product which is then sold into the EEA. The first two categories of sales were considered relevant for the calculation of the value of sales. The third category was not.

In *Guardian*, the ECJ had held that the exclusion of internal EEA sales of cartelised products within vertically integrated companies in the value of sales would constitute an unfair advantage for those vertically integrated undertakings - and give rise to discrimination against the non-vertically integrated Guardian.[69] *Innolux* extrapolates this

Commission, para. 97.

62 *Ibid*, para. 121.

63 *Ibid*, paras. 106-107.

64 *Ibid*, para. 112.

65 *Ibid*, paras. 115-116 and 119.

66 *Ibid*, paras. 118 and 122.

67 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), OJ C 210, 1.9.2006, p. 2–5.

68 *Ibid*, para. 13.

69 ECJ, Judgment of 12 November 2014, Case C-580/12 P, *Guardian*

principles to intra-group sales that take place outside the EEA.

In its judgment, the ECJ acknowledged, firstly, that the sales at issue were not made on the market for LCD panels, but rather on the market for finished products, which constitutes a different product market.[70] In line with its previous judgment in *Guardian*,[71] the ECJ held that vertically-integrated companies active on the separate market for finished goods may also benefit from the cartel. Because the prices of the cartelised products affect the prices of the finished products, the sales of the finished products in the EEA are also related to the cartel and are liable to affect competition on that product market.[72] The ECJ pointed out that excluding those sales when calculating the fine would have the effect of artificially minimising the economic significance of the cartel and impose a fine which bore no relation to the scope of application of that cartel in that territory.[73] In particular, it would grant an undue advantage to vertically integrated companies, such as Innolux, who incorporate the cartelised components into finished products outside the EEA.[74] Hence, the ECJ held that the Commission and GC were fully entitled to take into account, for the purpose of calculating the fine, the sales of the finished products incorporating the LCD panels, even if the market for the finished products constitutes a separate market from the cartelised product market.[75]

The ECJ thus affirmed the Commission's power to impose fines based on foreign sales of cartelized components outside the EEA, where those components are sold and incorporated internally within the same corporate group into finished products that, in turn, are sold into the EEA.

Obligation to base the calculation on the best available figures

In 2012, the Commission imposed a fine on several undertakings, including Panasonic, for their participation in cartels on the market for cathode ray tubes ('CRTs').[76] In response to an RFI, Panasonic and its joint venture (MTPD) had submitted exact turnover data for their CPT sales incorporated into transformed products, which the Commission acknowledged was more accurate. However, the Commission adopted a different approach relying on the average of the value of direct EEA sales multiplied by the number of CPTs concerned.[77] The Commission considered that applying a different methodology to the applicants in relation to the other addressees of the contested decision, who did not hold such precise data, would have led to an infringement of the principle of equal treatment.[78] The applicants complained that, although the Commission did not contest the accuracy of its data, it had not taken these into account in its calculation of the fine.[79]

The GC held that since the Commission did not take account of the data which most accurately reflected the value of the direct EEA sales through transformed products by Panasonic, it had departed, without justification, from the 2006 Guidelines on the method of setting fines[80], requiring the Commission to take that undertaking's best available figures.[81] It held that, following previous case law, the Commission cannot depart from the Guidelines, unless it provides a justification compatible with the principles of equal treatment and of legitimate expectations.[82] The GC exercised its unlimited jurisdiction and reduced the fines imposed on Panasonic by taking into account, in its calculation, the data provided by the applicants in response to the Commission's RFI.[83]

Industries and Guardian Europe v Commission, paras. 59-66.

70 ECJ, Judgment of 9 July 2015, Case C-231/14 *Innolux Corp. v Commission,* para. 52.

71 ECJ, Judgment of 12 November 2014, Case C-580/12 P, *Guardian Industries and Guardian Europe v Commission,* para. 60.

72 ECJ, Judgment of 9 July 2015, Case C-231/14 *Innolux Corp. v Commission,* paras. 59-61.

73 *Ibid,* para. 62.

74 *Ibid,* para. 63.

75 *Ibid,* para. 57.

76 European Commission Decision C(2012) 8839 final of 5 December 2012 — Case COMP/39.437 — *TV and Computer Monitor Tubes*: the Commission found that the main global producers of CRTs had infringed Article 101 TFEU and Article 53 of the EEA Agreement ('the EEA Agreement') by participating in two separate infringements, each constituting a single and continuous infringement. Those infringements related, first, to the CDT market ('the CDT cartel') and, second, to the CPT market ('the CPT cartel').

77 GC, Judgment of 9 September 2015, Case T-82/13, *Panasonic Corp. and MT Picture display v Commission*, para. 164.

78 *Ibid,* para. 163.

79 *Ibid,* para. 153.

80 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 2010, p. 2), point 15.

81 GC, Judgment of 9 September 2015, Case T-82/13, *Panasonic Corp. and MT Picture display v Commission*, para. 167.

82 *Ibid,* para. 168 - referring to Joined Cases C-198/02 P, C-202/02 P, C 205/02 P to C 208/02 P and C-213/02.

83 *Ibid,* para. 190.

On 6 April 2016, the fine of € 445.9 million of Société Générale in the Euro interest rate derivatives cartel was substantially reduced by the European Commission.[84] Following the imposition of this fine in the context of a settlement procedure, Société Générale appealed the Commission's decision on the basis of the fact that the Commission manifestly erred in determining the method of calculating the value of sales. Société Générale, the first company to appeal a cartel settlement decision, argued that the values adopted by the Commission did not reflect the respective positions of the banks on the relevant market during the infringement period and that the Commission had, consequently, disregarded the principle of equal treatment.

> In the fining calculation, the Commission is required to take the undertaking's best available figures

On the basis of Société Générale's amended value of sales data, the Commission ultimately reduced the initial fine to € 227.7 million and the appeal was withdrawn. The Commission still applied the same methodology of its original decision, but used different figures to calculate the value of sales. This case highlights the importance of providing accurate sales data during the administrative procedure, but also the risks of potential discrimination in settlement procedures, where the undertakings involved are given limited access to evidence and the fining methodologies used by the Commission for the other parties.

84 European Commission Decisions — Case COMP/39914 — *Euro Interest Rate Derivatives*.

Lump sum fine

In *AC Treuhand*, the ECJ confirmed the possibility of imposing a lump sum fine, in line with point 37 of the 2006 Guidelines, where an undertaking is not active on the market affected by the cartel, so that the value of its sales is unrepresentative of its participation. This is notably the case when the company is a consulting firm providing services to the cartel participants (*supra*, Section 5).

b. Entry fee

Point 25 of the 2006 Fining Guidelines provides that the Commission will include in the basic amount an amount set at 15-25 % of the value of sales in order to deter companies from entering into cartels, referred to as the 'entry fee'.[85] In *Retail Food Packaging*,[86] the Commission applied a differentiated methodology in a case where a company was solely liable for a part of the infringement, and jointly and severally liable with its parent company for the remainder of the infringement. The entry fee was only applied "*in respect of the part of the fine for which it established joint and several liability*".[87] Although the summary decision does not precisely identify the reasons for this differentiation, one could assume that the Commission considered the company, on its own, to be too small for an entry fee to be justified.

c. Mitigating circumstances

In *Toshiba*,[88] the GC took an unusually aggressive approach when assessing the Commission's discretion in taking into account mitigating circumstances. As Toshiba had participated in an infringement covering the whole of the EEA and aimed at agreeing on prices and production and exchanging sensitive commercial information, the GC found that, "*in the light of all those factors*" and "*in view of its discretion when setting the amount of the fines*", the Commission was entitled not to apply the benefit of any mitigation.[89] The GC seems to have confused the gravity factor - which is to be applied on the base fine - and the application of mitigating circumstances which should remain

85 COLOMBANI, A., KLOUB, J. & SAKKERS, E. 'Part II: Specific Practices, 8 Cartels, G Cartel Fines.' In FAULL, J. & NIKPAY, A. *The EU Law of Competition* (3rd Edn.), paras. 8.578-8.580.

86 European Commission Decision C(2015) 4336 - case AT.39563 – *Retail Food Packaging*.

87 *Ibid*, para. 14.

88 GC, Judgment of 9 September 2015, Case T-104/13 *Toshiba v Corp. v Commission*, para. 52.

89 *Ibid*, para. 203.

available, independently of the seriousness of the infringement.

Toshiba also seemed to support the view that a passive role can no longer be considered to be a mitigating circumstance. In 2006, the passive role was no longer mentioned in point 29 of the 2006 Fining Guidelines (where it still was in the 1998 Guidelines). The GC concluded that this "*manifests a deliberate political choice to no longer "encourage" passive conduct by those participating in an infringement of the competition rules. That choice falls within the discretion of the Commission in determining and implementing competition policy*."[90] Toshiba has filed an appeal with the ECJ.[91]

In *Spanish Bitumen*, however, the Commission did grant a fine reduction in the light of Galp's limited participation in the infringement, because of the lack of evidence of its participation in the compensation mechanism and the monitoring system. The GC and the ECJ further reduced this fine on that basis.[92]

In *Retail Food Packaging*, the Commission granted an exceptional 5% reduction of the fine to each of the addressees to reflect "*the considerable duration of the proceeding and the special circumstances of this case*".[93] The investigation had lasted 7 years from the date on which the immunity application was filed until the adoption of the final decision.

d. Scope of the General Court's unlimited jurisdiction

According to Article 31 of Regulation 1/2003, the Courts have unlimited jurisdiction in actions brought against decisions in which the Commission imposed a fine.

In 2007, the Commission had fined Galp for its participation in the Spanish bitumen cartel. Galp was found to have participated in an SCI, which included the establishment of a monitoring and compensation scheme. Galp appealed, claiming it had never participated in the monitoring and compensation scheme. annexing a statement of Mr. V.C., who was responsible for the bitumen sales of Galp from 1992 to 2007. In his statement, Mr. V.C. stated that Galp was never involved in the monitoring and compensation schemes, but was aware of their existence.

The GC had concluded, relying solely on contemporaneous evidence in the file, and not taking into account the statement of Mr. V.C., that it was not established that Galp had ever participated in the monitoring and compensation scheme. Consequently, the GC annulled the decision in so far as it found that Galp was involved in the SCI, to the extent that it included the monitoring and compensation scheme. However, the GC went on to state that, in view of Mr. V.C.'s statement, Galp was aware of the existence of the scheme, could foresee the participation of the other members of the cartel, and hence *could* have been held liable in respect of those two aspects of the infringement. Therefore, in light of its unlimited jurisdiction, the GC did not deem it necessary to vary the starting amount of the fine, but instead increased the reduction on the basis of mitigating circumstances, awarding the applicant an extra 4% reduction in addition to the 10% reduction already awarded by the Commission for its limited participation in the monitoring and compensation scheme.[94]

Upon appeal by Galp, the ECJ recalled the distinction between the scope of judicial review on the basis of Article 263 TFEU, which concerns the legality of the act, and the unlimited jurisdiction of the GC on the basis of Article 261 TFEU, which only relates to penalties. This distinction can be summarised as listed in table 1.

The ECJ concluded that "*the unlimited jurisdiction enjoyed by the General Court [...] concerns solely the assessment by that Court of the fine imposed by the Commission, to the exclusion of any alteration of the constituent elements of the infringement lawfully determined by the Commission*"[95], and set aside the judgment under appeal in so far as it fixed a new amount for the fine.

90 *Ibid*, para. 207.

91 Case C-623/15 P, *Toshiba v Commission*.

92 Commission Decision C(2007) 4441 final of 3 October 2007 - Case COMP/38.710 — *Bitumen (Spain)*); T-462/07 paras. 635-636 and C-603/13 P, para. 93, *Galp Energía España and others v. Commission*: The Commission reduced the fine by 10% , the GC by an additional 4%, and the ECJ increased the addition to 10%.

93 Decision C(2015) 4336 in case AT.39563 – *Retail Food Packaging*, para. 21.

94 ECJ, Judgment of 21 January 2016, Case C-603/13 P, *Galp Energía España and others v. Commission*, paras. 27-31.

95 *Ibid*, para. 77.

Following the first paragraph of Article 61 of the Statute of the ECJ, if a judgment under appeal is set aside, the ECJ may give final judgment in the matter where the state of proceedings so permits. On this basis the ECJ adopted the assessment of the Commission and the GC as to the basic amount of the fine and the 10% reduction for the appellants' limited participation, and awarded an additional 10% reduction for the lack of evidence relating to the participants' participation in the monitoring and compensation scheme.[96]

Judicial review **Art. 263 TFEU**	**Unlimited jurisdiction** **Art. 261 TFEU and Art. 31 Reg. 1/2003**
• Review of the legality of the act • Extends to all elements of Commission decisions, in law and in fact, in light of the pleas raised by the appellant and taking into account all the evidence submitted, either previously before the Commission, or for the first time before the GC • EU Courts cannot substitute their own reasoning for that of the Commission	• Only with regard to penalties • Substitution of the Court's assessment in relation to the determination of the amount of the penalty for that of the Commission • Scope is strictly limited to determining the amount of the fine

Table 1 *- distinction between the scope of judicial review on the basis of Article 263 TFEU and the unlimited jurisdiction of the GC on the basis of Article 261 TFEU*

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Thanks goes to Julie Adyns and Kathlynn Hinnekens for their valuable input.

96 *Ibid*, para. 93.