Developments under the Treaty on the Functioning of the European Union, articles 101 and 102, in 2008/2009

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Developments under the Treaty on the Functioning of the European Union, articles 101 and 102, in 2008/2009

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As regards the Treaty on the Functioning of the European Union (TFEU), arts 101 and 102 in particular, the years 2008 and 2009 brought a large number of important developments, particularly in the legislative field and in the European courts. This contribution summarises the most important developments.

Legislation

The impact of the Treaty of Lisbon

The Treaty of Lisbon, which finally entered into force on December 1, 2009, has effected a fundamental overhaul of the European Union's institutional framework: the European Community with its three pillars has been merged into the European Union; the Treaties have been recast into the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The notion "Common Market" has been universally replaced by the more recent term "Internal Market", the Court of First Instance has become the General Court.

The Treaty of Lisbon has left the operative rules of EU competition law substantially unchanged: arts 81 to 86 EC became arts 101 to 106 TFEU with merely semantic changes. Most notable from a competition law perspective, rather, are two other developments:

The role of competition in the European Union

Article 3(1)(g) EC had obliged the European Community to establish a "system ensuring that competition in the internal market is not distorted". That provision has been a reference point for the EU courts, which regularly invoked it to justify the application of competition rules to new areas such as the requirement that Member States legislation conform with EU competition law[1] or the liability of persons facilitating cartels under EU competition law.[2]

The Treaty of Lisbon has eliminated art.3(1)(g) EC. The "competition is not distorted" language has now been shifted to Protocol 27 to the Treaties where the system ensuring undistorted competition is specifically linked to establishing a fully-effective Internal Market. This change reflected an intervention by the French President Sarkozy, intended to downgrade the importance of competition as a policy objective. The Commission considers, however, that this change has no substantive legal effect since the Protocols to the Treaties have the same legal status as the Treaties themselves.[3]

Human rights

Once the Union accedes to the European Convention on Human Rights (ECHR), as contemplated in the Treaty, the ECHR and the interpretation given to its provisions by the European Court of Human Rights (ECtHR) will become directly binding on the Union institutions. The ECJ will need to adjust its case law even more closely to the fundamental rights standard set by the Strasbourg court,[4] as it will be possible to appeal judgments of the ECJ to the ECtHR, where an infringement of fundamental rights guaranteed by the ECHR is alleged. While the impact of this change is of course difficult to predict, it is not inconceivable that the increased emphasis on human rights will lead to a closer scrutiny of Commission procedure from the courts, especially in cases where high fines are being imposed on companies.

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[1] cf. *GB-INNO-BM NV v Vereniging van de Kleinhandelaars in Tabak* (13/77) [1977] E.C.R. 2115; [1978] 1 C.M.L.R. 283.

[2] See the discussion of the judgment *AC-Treuhand AG v Commission of the European Communities* (T-99/04) [2008] E.C.R. II-1501; [2008] 5 C.M.L.R. 13, below.

[3] The TFEU, in addition, contains two references to competition: art.3(1)(b) codifies for the first time the exclusive competence of the Union to establish the competition rules necessary for the functioning of the internal market, and art.120 TFEU obliges the Member States and the Union to act in accordance with the "principle of an open market economy with free competition" when pursuing their economic policies.

[4] Except for cases where the ECJ intends to provide a higher standard of protection, see art.52(3) of the EU Charter of Fundamental Rights.

Reform of vertical agreements regime

Regulation 2790/1999 [1999] OJ L336/21, the vertical-distribution block-exemption, expires in May 2010. The Commission has conducted a public consultation on the revision of both the regulation and the accompanying Guidelines.[5] Two features of the draft documents are particularly worth noting: first, to qualify for the block exemption, both the market share of the supplier and the market share of the purchaser (as a supplier on the market downstream from the market affected by the agreement) must not exceed 30 per cent. The new requirement regarding the purchaser reflects concern on the part of the Commission over the market power of large distributors.

Secondly, the draft Guidelines address for the first time the extent to which vertical agreements can limit the purchasers' freedom to sell goods online. The draft treats the sales of a distributor via the internet as passive sales, as long as the distributor does not target internet customers actively, e.g. by sending mass advertising by email. The draft would allow suppliers to require resellers to operate at least one physically existent outlet (so-called brick-and-mortar shop requirement), to meet objective quality requirements and to make a minimum number of sales by traditional methods.

Reform of motor vehicle distribution and aftermarket regime

The motor vehicle distribution regime established in Regulation 1400/2002 [2002] OJ L203/30—which will also expire on May 31, 2010—is likewise under review. In December 2009, the Commission published a draft Regulation and draft Guidelines.[6] The Commission proposes to separate regulation of new vehicle distribution (where the Commission consider that special rules are no longer necessary) from regulation of the "aftermarket" (maintenance and repair services and provision of spare parts). Regulation 1400/2002 will remain applicable to new car sales for a phase-out period until June 2013. The new Regulation will expand the current rules regarding restrictions on aftermarket sales and will apply to both direct effects and indirect effects (through new vehicle-distribution agreements). In particular the new Regulation would treat most restrictions concerning the sale of spare parts to independent repairers or distributors as hard-core restrictions.[7]

New insurance block-exemption

On March 24, 2010 the Commission adopted a new block-exemption Regulation concerning the insurance sector.[8] The revised Regulation reduces the number of exempted categories of agreements between insurance companies from four to two[9]: agreements on the exchange of statistical information for the calculation of risks and agreements governing the creation and operation of insurance pools, in which insurers jointly cover a risk, continue to be exempted by the sector-specific regulation, albeit under modified conditions compared to the previous Regulation.

Reform of competition regime for maritime transport

Regulation 4056/86,[10] which had exempted common business practices in the maritime shipping sector, expired on October 18, 2008. The block exemption for liner shipping consortia[11] has, however, been renewed, with minor modifications, for five years, starting in April 2010.[12] Regulation 4056/86 had allowed the shipping companies to operate in liner-shipping conferences, in which two or more carriers operated international services under uniform freight rates and uniform conditions of carriage. The Commission has now issued Guidelines on maritime transport,[13] which state that such conference activity will not be tolerated where they concern shipping services to or from the European Union, regardless of the legal system in the country of origin or destination.

Introduction of settlement procedure

On June 30, 2008, the Commission formally adopted the settlement procedure in cartel cases by amending Regulation 773/2004,[14] the Implementing Regulation to

[5] The drafts are available at *http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html* [Accessed April 16, 2010]. The new regulation and guidelines have now been adopted: See Regulation 330/2010 of 20 April 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, and Commission Notice – Guidelines on Vertical Restraints [2010] OJ C130/1.

[6] The relevant documents are available at *http://ec.europa.eu/competition/sectors/motor_vehicles/block_exemption.html* [Accessed April 16, 2010].

[7] For a more detailed discussion of the reform see S. Zuehlke and G. De Stefano, "EC motor vehicle block exemption reform: are you ready for the new regime?" [2010] E.C.L.R. 93.

[8] Regulation 267/2010 of 24 March 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.

[9] Agreements on non-binding standard policy conditions and agreements on security devices/safety equipment will therefore in future be subject to the general competition law regime.

[10] Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [1986] OJ L378/4.

[11] See Regulation 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2000] OJ L100/24. In a consortium, carriers co-operate with a view to providing a joint service on a particular route. This does not involve price fixing, and all members of a consortium market their services individually.

[12] Regulation 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L256/31.

[13] Guidelines on the application of Article 81 of the EC Treaty to maritime transport services [2008] OJ C245/2, point 4.

[14] Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty (the "Implementing Regulation") [2004] OJ L123/18; amendment effected by Regulation 622/2008 amending Regulation (EC) 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3.

Regulation 1/2003,[15] and by publishing a Notice on the procedure.[16] The rules adopted follow closely the Commission proposals published in October 2007.[17] The Commission ultimately opted to put the settlement discount at 10 per cent, at the lower end of the discussed range. As of March 2010, no decision has been adopted by way of settlement, although two settlement decisions appear close to completion. This extremely slow start may in part reflect the teething troubles of any newly introduced procedure, but it also may suggest that the 10 per cent fine reduction on offer is not sufficiently attractive for defendants.

Article 101 TFEU—Commission practice

Cartel enforcement

Cartel enforcement by way of fining decisions remains one of the most visible parts of the Commission's activities in the competition sector. However, the total sum of the fines imposed on cartel participants gradually decreased from its all-time high of €3,334 million in 2007 to €2,271 million in 2008 and €1,623 million in 2009. In total, there were seven decisions in 2008[18] and six decisions in 2009.[19]

The following two cases are particularly significant:

Record fines—Car Glass

The Car Glass Decision of November 2008[20] imposed the largest total fine so far on a single cartel (€1,383 million) as well as the largest fine so far on a company for a single infringement of art.101 TFEU (€896 million on Saint-Gobain). The magnitude of the fine is due to the size of the market as well as to the fact that the fine against Saint-Gobain was increased by 60 per cent because that company had been sanctioned for participating in cartels before (in 1984 and 1988).[21] In contrast to most recent cartel cases, there was no immunity applicant and the Commission launched the investigation into the car glass industry on its own initiative after receiving information from an anonymous source.

Multi-jurisdictional investigations—Marine Hoses

In January 2009, the Commission imposed a fine of €131.5 million on five companies, including Bridgestone and Dunlop Oil & Marine, for operating a cartel for marine hoses between 1986 and 2007.[22] Marine hose is a flexible rubber hose used to transfer oil between tankers and storage facilities. The cartel involved allocation of tenders, price-fixing, market sharing and the exchange of sensitive information. Yokohama Rubber escaped a fine because it had informed the Commission about the cartel.

The case is notorious for the secret filming of a cartel meeting at an industry conference in Houston in May 2007 and the subsequent arrest by US authorities of cartel (and conference) participants from foreign jurisdictions. As regards the European Union, this was the first case in which Commission authorities co-operated with authorities in the United Kingdom conducting joint dawn raids with UK authorities acting to enforce the criminal penalties that exist under UK law.

Other enforcement of article 101 TFEU—"Antitrust"

The Commission now refers to the enforcement of art.101 TFEU outside the hardcore cartel area and to the enforcement of art.102 TFEU collectively as the area of "antitrust". As regards art.101, the following developments are particularly noteworthy:

Standard-setting in ship classification—IACS

In October 2009, the Commission accepted binding commitments from the International Association of Classification Societies (IACS) that relate to its work on

[15] 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.
[16] Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Regulation 1/2003 in cartel cases [2008] OJ C167/1.
[17] Described in J. Kallaugher and A. Weitbrecht, "Microsoft and More—Developments under Articles 81 and 82 EC in 2007" [2008] E.C.L.R. 418.
[18] Decision of 23 January 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38.628-*Nitrile Butadiene Rubber*) [2009] OJ C86/7 (total fine of €34.2 million); Decision of 11 March 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38.543-*International Removal Services*) [2009] OJ C188/16 (€32.7 million); Decision of 11 June 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38.695-*Sodium Chlorate*) [2009] OJ C137/6 (€79 million); Decision of 25 June 2008 (COMP/39.180-*Aluminium Fluoride*) Commission press release IP/08/1007 (€4.97 million); Decision of 1 October 2008 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (COMP/C.39.181-*Candle Waxes*) [2009] OJ C295/17 (€676 million); Decision of 15 October 2008 relating to a proceeding under Article 81 of the EC Treaty (COMP/39.188-*Bananas*) [2009] OJ C189/12 (€60.3 million); Decision of 12 November 2008 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (COMP/39.125-*Car Glass*) [2009] OJ C173/13 (€1,383 million).
[19] Decision of 28 January 2009 relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (COMP/39.406-*Marine Hoses*) [2009] OJ C168/6 (total fine of €131.5 million); Decision of of 8 July 2009 relating to a proceeding under Article 81 of the EC Treaty (COMP/39.401-*E.ON/GDF*) [2009] OJ C248/5 (€ 1,106 million); Decision of 22 July 2009 in relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.396-*Calcium Carbide and magnesium based reagents for the steel and gas industries*) [2009] OJ C301/18 (€61.1 million); Decision 2006/894 relating to a proceeding under Article 65 of the ECSC Treaty (C.37.956-*Reinforcing Bars*) [2006] OJ L353/1 (€83.2 million); Decision of 7 October 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.39.129-*Power Transformers*) [2009] OJ C296/21 (€67.6 million); Decision of 11 November 2009 (COMP/38.589-*Heat Stabilisers*) Commission press release IP/09/1695 (€173.8 million).
[20] COMP/39.125-*Car Glass* [2009] OJ C173/13. All companies fined except for Asahi have appealed the Decision.
[21] Decision 84/388 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.988-*Flat Glass (Benelux)*) [1984] OJ L212/13; and Decision 89/93 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.906-*Flat Glass (Italy)*) [1989] OJ L33/44. Saint Gobain was again fined for participating in a cartel for flat glass in 2007; see Decision of 28 November 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.165-*Flat Glass*) [2008] OJ C127/9. This cartel was not taken into account for an increase of the fine in COMP/39.125-*Car Glass* [2009] OJ C173/13.
[22] COMP/39.406-*Marine Hoses* [2009] OJ C168/6. Two companies, Trelleborg and Parker, have appealed the Decision.

ship classification standards.[23] This ended an investigation into a possible infringement of art.101 TFEU which had started with inspections at IACS and several classification societies in January 2008. Standards set by IACS cover approximately 90 per cent of the world's cargo carrying tonnage, making IACS rules and procedures the de facto industry standard, thus creating a significant competitive advantage for ship classification societies that offer compliance with IACS rules.

The Commission was concerned that IACS, which has 10 classification societies as members, was not willing to grant membership to other societies; that it did not allow other societies to participate in its technical working groups; and that it did not disclose to other societies its resolutions and technical background documents. In response, IACS committed inter alia to detailed rules of procedure governing applications for membership and to objective and transparent qualitative membership criteria. An independent appeal board will supervise IACS' compliance with these commitments.

The decision has a certain model character and is part of the Commission's overall focus on standard setting by industry associations.

Territorial restrictions practiced by collecting societies—CISAC

Collecting societies, which bundle the copyrights of authors and license the authors' copyrights to users, such as producers of media content, have historically been organised as monopolies along national lines. Through reciprocal cross-licensing agreements they make available to a user in a Member State the worldwide repertoire of all authors, but limited to use in that Member State. As a result, media companies which are active on a pan-European basis need to obtain licences in every Member State where they operate. This problem becomes particularly acute in the case of distribution of music via online and satellite broadcasting, where the place of ultimate use of the copyright cannot be controlled.

Following a lengthy investigation, the Commission has concluded that the system of territorially limited reciprocal licences is the result of a concerted practice[24] and ordered the 24 national collecting societies in the EEA to terminate that practice.

Article 102 TFEU—Commission practice

Guidance on enforcement priorities

In December 2008, the Commission finally adopted its Guidance on its enforcement priorities in applying Article 82 (EC) to abusive exclusionary conduct by dominant undertakings.[25] This document incorporates the "more economic approach" to art.102 TFEU set out in the Commission's 2005 Discussion Paper.[26] The status of the final document as a statement of enforcement priorities, rather than guidelines on interpretation of art.102, reflects the tension between an approach focused on real competitive harm that is the hallmark of the paper and the traditional and more permissive approach to proving and finding abuse that is part of the existing case law of the courts.

The Commission claims that it now bases its own enforcement activities on the approach set out in the Guidance, referring to the extensive economic analysis in the *Intel* Decision [2009] OJ C227/13 as an example of how this approach will work in practice. The impact of the Guidance on enforcement by Member State authorities or in national courts is less certain.

Intel

In its *Intel* Decision of May 13, 2009,[27] the Commission found that Intel has infringed art.102 TFEU by abusive practices such as fidelity rebates which, according to the Commission, were aimed at excluding competitors, in particular the American firm AMD, from the market of central processing units for personal computers. The Decision has attracted a lot of attention because of the record fine of €1.06 billion imposed—the highest fine ever on an individual company for an infringement of the EU competition rules.

Microsoft

A development worth noting is the final resolution of pending issues at the Commission level regarding Microsoft.[28] In January 2009, the Commission had announced that it was commencing new proceedings against Microsoft relating to alleged tying of the Microsoft browser and interoperability concerns. In the summer of 2009, Microsoft moved to address these issues both through negotiation of art.9 commitments and through unilateral changes in its practices and these issues are now resolved.[29]

[23] Decision of 14 October 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/39.416-*Ship Classification*) [2010] OJ C2/5.
[24] Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C-2/36.698-*CISAC*) [2008] OJ C323/12.
[25] Guidance on its enforcement priorities in applying Article 82 (EC) to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.
[26] DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, available at *http://ec.europa.eu/competition/antitrust/art82/index.html* [Accessed April 16, 2010].
[27] Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990-*Intel*) [2009] OJ C227/13.
[28] Microsoft is, however, appealing the Commission Decision of February 2008, imposing €899 million periodic penalty payments on Microsoft for non-compliance with remedies in the 2004 Decision (case T-167/08).
[29] Decision of 16 December 2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/39.530-*Microsoft (Tying)*) [2010] OJ C36/7.

Sanctions and procedure—Commission practice

Report on Functioning of Regulation 1/2003

On April 29, 2009, the Commission presented its *Report on the Functioning of Regulation 1/2003* during the first five years of operation.[30] The report finds that the change from a system of notification and administrative authorisation to a system of direct application of art.101(3) TFEU worked very well in practice, with the direct application of art.101(3) widely welcomed by stakeholders. As regards areas for further examination, the report points in particular to divergence of substantive rules in the area of unilateral conduct (permitted by art.3 of Regulation 1/2003) as well as to procedural divergences within the European Competition Network.

Sector inquiry into the pharmaceutical industry

On July 8, 2008, the Commission concluded with a final report its pharmaceutical-sector inquiry launched with dawn raids on a number of pharmaceutical companies in January 2008.[31] The report focuses on the competitive relationship between originator and generic companies. As a fall-out from the sector inquiry, the Commission is now investigating a number of pharmaceutical companies, focusing in particular on settlements of patent disputes between these two groups of companies.

Use of the article 9 procedure

Another noteworthy development during the review period concerned the use of art.9 of Regulation 1/2003 as a basis for dealing with art.102 TFEU cases. This has been particularly evident in the energy sector, where the Energy Sector Enquiry (which concluded in 2007) triggered a series of art.102 cases against firms in electricity and gas markets regarding control of bottlenecks, favouring of production subsidiaries for transmission, favouring domestic supply for balancing over foreign supply, increasing own generation costs and passing on through distribution affiliates or long-term customer commitments. Many of these cases have now been resolved through commitments decisions.[32] Typically these commitments focus on ensuring access to key facilities, and a limitation on contractual commitments to ensure that a significant proportion of supply and demand comes on the market every year. In some cases, however, the Commission has also accepted divestiture of generating or transmission assets as a remedy.

The Commission has also accepted art.9 commitments as a basis for concluding its investigation of Rambus for alleged failures to disclose technology in standard-setting.[33]

Private follow-on actions for damages

In April 2008, the Commission presented its White Paper on private damages actions.[34] The White Paper supports a number of legislative changes, in particular concerning collective redress, improvements for victims of infringements as regards discovery and the statute of limitations. A legislative instrument had been discussed between the Parliament and the Commission in 2009, but it ended up not being introduced into the legislative process. The new Commission has now decided that further consultation of stakeholders is necessary to ensure coherence between the various initiatives concerning collective redress—for infringements of the competition rules as well as for infringements of other rules of consumer protection, such as product safety and securities laws. This consultative process will result in significant delay before any legislative measures, if any, will ultimately be introduced.

Judicial review

Article 101 TFEU

Restriction of competition by object—ECJ in Irish Beef and T-Mobile Netherlands

Two preliminary references from national courts gave the ECJ occasion to clarify whether agreements or concerted practices constituted restrictions of competitions by object.

In *Irish Beef*,[35] the ECJ considered a reference from the Irish Supreme Court in a case involving an agreement between Irish beef and veal processors with the aim to reduce overcapacity in the meat processing sector. The parties to the agreement argued that these arrangements were not restrictive by object, since they did not involve "hard core restrictions" where the damaging effects on competition are obvious.[36] The parties relied in this regard on the findings of the trial court that the agreements would not lead to a reduction in output or an increase in prices.[37]

[30] *Report on the Functioning of Regulation 1/2003* COM(2009) 206 final, available, together with the accompanying staff working paper, at *http://ec.europa.eu/competition/antitrust/legislation/regulations.html* [Accessed April 16, 2010].
[31] Report available at *http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html* [Accessed April 16, 2010]
[32] See Decisions of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/39.388-*German Electricity Wholesale Market*) and (COMP/39.389-*German Electricity Balancing Market*) [2009] OJ C36/8; Decision of 18 March 2009 in relating to a proceeding under Article 82 of the EC Treaty and Article 53 of the EEA Agreement (COMP/B-1/39.402-*RWE Gas Foreclosure*); Decision of 3 December 2009 relating to a proceeding under Article 102 of the Treaty on the functioning of the European Union and Article 54 of the EEA Agreement (COMP/39.316-*GDF*) [2010] OJ C57/13.
[33] Decision of 9 December 2009 relating to a proceeding under Article 102 of the Treaty on the functioning of the European Union and Article 54 of the EEA Agreement (COMP/38.636-*RAMBUS*) [2010] OJ C30/17.
[34] See *White Paper on private damages actions* COM(2008) 165 final of April 2, 2008.
[35] *Competition Authority v Beef Industry Development Society Ltd* (C-209/07) [2008] E.C.R. I-8637; [2009] 4 C.M.L.R. 6.
[36] This argument followed the approach taken in the Commission's Guidelines on Application of Article 81(3) [2004] OJ C101/97, para.21.
[37] The arguments are summarised in the Opinion of A.G. Tristenjak, *Competition Authority v Beef Industry* [2008] E.C.R. I-8637, paras 25–26.

The ECJ addressed this question by considering the nature of a restriction of competition between competitors for purposes of art.101 TFEU. The Court considered that an agreement restricts competition if it leads to a reduction in rivalry between the parties to the agreement.[38] According to the Court, this reflects the concept inherent in the competition rules, that economic entities must determine their policy on the market independently. Where the nature of the agreement and its economic context support the conclusion that the alternative to the agreement is increased competition, then the agreement is restrictive by object. Since the alternative to the Irish beef producers' agreement was increased rivalry (or consolidation through concentrations that would also fall outside art.101), the Court concluded that the arrangements in this case were restrictive by object.

This judgment appears to be at odds with the Commission's Guidelines on the Application of Article 81(3),[39] which define a restriction of competition on the basis of the impact of an agreement either directly on consumer welfare or indirectly in terms of a negative effect on market structure. According to the Guidelines and in line with a widely held view, the concept of "restriction by object" is limited to those agreements or concerted practices where such negative effects could be presumed. By equating a restriction of competition with any restriction on rivalry and then considering any agreement that is likely to lead to a lessening of rivalry restrictive by object, the Court would render almost any agreement between competitors restrictive by object. This has the effect of shifting the analysis of agreements between competitors immediately to art.101(3).

In *T-Mobile Netherlands*,[40] the Dutch competition authority had fined the five operators of GSM networks in the Netherlands for colluding with respect to the commissions that they paid to resellers of their mobile telephone services. The five operators had met once in a meeting at which they discussed legitimate issues such as the reduction of fraud by customers as well as the fact that, in their common view, the commissions that they were paying to resellers of their services were too high. Subsequent to this meeting, these commissions were reduced by each of the participants.

The ECJ clarified that a concerted practice may consist of only one meeting and that it is not necessary for participants to have engaged in a continuous course of conduct. The ECJ also confirmed that where the concerted practice has the object of restricting competition there was a presumption, also applicable before nationals authorities and courts, of a causal connection between the contacts among competitors and the subsequent conduct on the market. Likewise, it was irrelevant whether the conduct had any effect on consumers, since art.101:

> "is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[41]

Restriction of parallel trade in pharmaceuticals—ECJ in GSK Spain

In October 2009, the ECJ issued its judgment regarding the 1998 application by GlaxoSmithKline ("GSK") for exemption of its dual-pricing system in Spain.[42] The Court overturned the CFI's ruling[43] that an agreement can only be restrictive by object under art.101(1) TFEU if it will clearly give rise to harm to consumers. The Court endorsed, however, the CFI's finding that the Commission had failed to give proper consideration to GSK's arguments for exemption. In doing so, the Court provided useful guidance on interpretation of art.101(3) TFEU.

GSK had sought exemption under the Regulation 17/62 [1962] OJ 13/204 notification system for a pricing policy according to which products destined for final sale in Spain were priced significantly lower than prices for products that were exported. GSK argued that because parallel sales of products sold in Spain (where prices were low due to state intervention) reduced GSK's ability to fund research and development ("R&D") efforts, the dual-pricing system would lead to significant benefits in terms of innovation and product development. The Commission issued its decision rejecting the exemption in 2001.[44]

In 2006, the CFI ruled that the Commission had incorrectly considered the system to have the object of restricting competition; however, it concluded (in the alternative) that the system had anti-competitive effects. The CFI also found that the Commission had failed to give sufficient consideration to GSK's arguments regarding the economic benefits of the arrangements, the CFI therefore annulled the Commission's decision.

On appeal by the Commission, the ECJ rejected the CFI's suggestion that an agreement could have the object of restricting competition only where the agreement was likely to lead to negative effects for consumers. As in *T-Mobile Netherlands*, the Court observed that the competition rules, including art.101, aim "to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such". The Court therefore concluded that

[38] Opinion of A.G. Tristenjak, *Competition Authority v Beef Industry* [2008] E.C.R. I-8637, paras 34–35.
[39] Guidelines on the Application of Article 81(3) [2004] OJ C101/97.
[40] *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (C-8/08) [2009] 5 C.M.L.R. 11.
[41] *T-Mobile Netherlands* [2009] 5 C.M.L.R. 11 at [38].
[42] *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (C 501, 513, 515 & 519/06 P) [2010] 4 C.M.L.R. 2.
[43] *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (T-168/01) [2006] E.C.R. II-2969; [2006] 5 C.M.L.R. 29.
[44] Decision of 8 May 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/36.957/F3-*Glaxo Wellcome (notification)*); (IV/36.997/F3-*Aseprofar and Fedifar (complaint)*); (IV/37.121/F3-*Spain Pharma (complaint)*); (IV/37.138/F3-*BAI (complaint)*) and (IV/37.380/F3-*EAEPC (complaint)*) [2001] OJ L302/1.

in principle agreements aimed at limiting parallel trade constitute a restriction by object and that this principle was also applicable in the pharmaceutical sector.

As regards art.101(3), the ECJ agreed with the CFI that the Commission had failed to give adequate consideration to GSK's application. The Court observed that, while the applicants had the burden of providing convincing arguments and evidence that the requirements of art.101(3) have been satisfied, there will be circumstances where the evidence is sufficient to satisfy the requirements of art.101(3) in the absence of an explanation or justification on the part of the Commission for rejecting that evidence. The Court rejected the Commission's argument that art.101(3) requires an applicant to show that economic benefits are "probable". The Court approved the CFI's conclusion that the applicants only need to show that an agreement is "likely" to generate economic benefits—which the Court then describes as "more likely than not". Finally, the Court rejected the Commission's argument that there must be a direct relationship between the effects of the agreement and the claimed economic benefits, affirming the CFI's conclusion that it was sufficient that some of the additional funds generated by the pricing system be dedicated to incremental R&D.

This case, together with the ECJ's ruling on application of art.102 TFEU to parallel trade in *Lelos*,[45] has clear ramifications for the future policy of the Commission regarding application of the competition rules to cases involving parallel trade in pharmaceuticals. The case may be more important, however, because of its impact on application of art.101(3). As noted above, as a consequence of the *Irish Beef* judgment, the category of "restrictions by object" has expanded to include almost all agreements between competitors. The *GSK* case itself determined that any vertical agreement intended to impact parallel trade is also restrictive by object. The result of these rulings has been to shift the focus of analysis to art.101(3). According to this view, art.101(3) must also be applied to agreements where real economic harm has not been established; in this case, the rigid requirements for proof of benefits and indispensability incorporated in the Commission's Guidelines on the Application of Article 81(3) are probably not appropriate. By signalling a more flexible approach to application of art.101(3), the Court has to some degree re-established the analytical balance.

Article 102 TFEU

The European courts dealt with important aspects of the interpretation of art.102 TFEU in three preliminary references as well as in a number of other cases.

Fair access to activities controlled by dominant firms with special or exclusive rights—ECJ in MOTOE

In *MOTOE*, the ECJ considered a reference from a Greek court concerning the application of arts 102 and 106 TFEU to a grant of special rights for authorisation of motorcycling events.[46] Since the grantee (the Greek motoring association) was itself active in organising motorcycle events, the Court concluded that the special rights could lead the grantee to abuse its dominant position, by excluding organisations that would organise competing events. The Court ruled that:

> "[A] system of undistorted competition, such as that provided for in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators."

The fact that both the grantee and the potential competitor were non-profit organisations did not affect this result.

Excessive pricing and discrimination by copyright collecting societies—ECJ in Kanal 5

In *Kanal 5*, the ECJ dealt with preliminary questions from a Swedish court concerning application of the art.102 TFEU rules on unfair pricing and discrimination to the relations between the national copyright collecting society and commercial broadcasters.[47] The Court ruled that a royalty for a commercial broadcaster based on a percentage of total turnover was not "unfair", unless an alternative method for calculation was available that would allow a more precise calculation of actual usage without imposing significant additional costs. The Court also ruled that different methods for calculating royalties for commercial broadcasters and for the state-owned public broadcaster were not necessarily discriminatory, suggesting the national court needed to consider the different revenue streams of the broadcasters, the possibility of objective justification, and whether public broadcasters and commercial broadcasters compete on a relevant market.[48]

Restriction of parallel trade by dominant pharmaceutical producer—ECJ in Lelos (GSK Greece)

In *Lelos*,[49] the ECJ again dealt with restriction of parallel trade in pharmaceuticals. In this context, it addressed for the first time the question of whether unilateral conduct by a dominant firm intended to limit or prevent parallel trade is prohibited by art.102 TFEU. The Court ruled that

[45] *Sot Lelos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton (formerly Glaxowellcome AEVE) (Lelos)* (C-468/06 to C-478/06) [2008] E.C.R. I-7139; [2008] 5 C.M.L.R. 20.
[46] *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Greece* (C-49/07) [2008] E.C.R. I-4863; [2008] 5 C.M.L.R. 11.
[47] *Kanal 5 Ltd v Foreningen Svenska Tonsattares Internationella Musikbyra (STIM) upa* (C-52/07) [2008] E.C.R. I-9275; [2009] 5 C.M.L.R. 18.
[48] This final point is particularly important as it signals the need to treat seriously the final part of art.102(c) TFEU—the requirement that dissimilar treatment lead to a competitive disadvantage.
[49] *Lelos* [2008] E.C.R. I-7139; [2008] 5 C.M.L.R. 20.

a dominant firm does not have a duty to supply customers engaged in parallel trade with quantities that significantly exceed that customer's previous orders. The Court reached this conclusion despite strong submissions from the Commission arguing that refusals to supply intended to limit parallel trade are inherently abusive.

The case arose because Greek regulation of pharmaceutical products manufactured by GlaxoSmithKline ("GSK") led to prices in Greece being significantly below prices in Northern Europe. In order to take advantage of the opportunity for profitable parallel trade, Greek wholesalers increased orders and shifted supply from Greek customers. When this led to a shortage of GSK products for Greek hospitals and pharmacies, GSK terminated supply of wholesalers and shifted to direct sales. Once exports from Greece "normalised", GSK made limited supplies available to wholesalers. On complaint from the affected wholesalers, GSK's conduct was investigated by the Greek Competition Commission.[50] On appeal of a decision by the National Authority in favour of GSK, the appellate court referred the issue of application of art.102 to the ECJ.

The ECJ ruled that a refusal to supply existing customers would constitute a prima facie abuse where it eliminates the customer as a competitor in the market where resale occurs[51] or where it leads to "elimination of effective competition from [the customers] in distribution of the products on the markets of the other Member States".[52] The Court observed in this regard that in other sectors, practices that "aim to restrict parallel trade" have been ruled abusive.

The ECJ then considered the circumstances where the refusal to supply might be objectively justified. According to the Court, the impact of Member State regulation imposing different price levels, while not providing a blanket justification, "cannot be ignored". Noting that the competition rules are intended to ensure that competition is not distorted, the Court stated that, where competition is distorted by governmental intervention, those rules cannot be interpreted so that the:

> "only choice left for a pharmaceutical company in a dominant position is not to place its medicines on the market at all in a Member State where the prices are set at a relatively low level."

The Court ruled that in this context the dominant firm is entitled to protect its interests by restricting existing customers to "ordinary orders" (based on requirements of market and previous orders from that customer).[53]

This judgment, together with the *GSK Spain* judgment under art.101 TFEU, clearly has significant implications for the Commission's long campaign to use competition law as a tool for facilitating parallel trade in the pharmaceutical industry. In considering the broader implications of *Lelos*, however, two considerations should be noted. On the one hand it is clear that the nature of Member State regulation in the pharmaceutical sector was an important factor in the Court's judgment. A similar scheme in another sector might not be viewed so favourably. On the other hand, it is important to note that the case was argued on the basis that the GSK scheme was clearly designed to prevent parallel trade. The judgment does not apply in cases where a refusal merely *affects* parallel trade, but does not have the goal of preventing parallel trade.[54]

Role of recoupment for predatory pricing—ECJ in France Télécom ("Wanadoo")

In April 2009, the ECJ issued its ruling[55] on the Commission's 2003 "*Wanadoo*" Decision[56] regarding predatory pricing for access to broadband internet services in France. For procedural reasons, the ECJ did not reach a number of the important issues addressed in the CFI's 2007 judgment,[57] such as the "right" by dominant firms to align their pricing on competitors (denied by the CFI) or the finding of an "anti-competitive plan" based on careless language in internal documents.

The key issue addressed by the ECJ was whether the ability of a dominant firm to "recoup" the costs of a successful predatory strategy was a requirement for proving predatory pricing under art.102 TFEU. The Court ruled that the possibility of recoupment was not necessary for application of art.102, since competition can be weakened even if no recoupment is possible.[58] The Court indicated, however, that recoupment may be a relevant criterion for determining abuse where the intent to eliminate competition is not clear.

Licensing fees for use of trade mark charged by dominant operator of recycling system—ECJ in Duales System Deutschland GmbH

In July 2009, a Grand Chamber of the ECJ issued its ruling[59] affirming the Commission's 2001 DSD Decision.[60] In that Decision the Commission had found that DSD

[50] An earlier attempt by the Greek Commission to refer the issue of application of art.102 TFEU was rejected by the ECJ on grounds of admissibility—*Synetairismos Farmakopoion Aitolias & Akarnanias (SYFAIT) v Glaxosmithkline Plc* (C-53/03) [2005] E.C.R. I-4609; [2005] 5 C.M.L.R. 1.
[51] Citing *Istituto Chemioterapico Italiano SpA v Commission of the European Communities* (6/73 & 7/73) [1974] E.C.R. 223; [1974] 1 C.M.L.R. 309 and *United Brands Co v Commission of the European Communities* (27/76) [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429.
[52] *Lelos* [2008] E.C.R. I-7139; [2008] 5 C.M.L.R. 20 at [35].
[53] Citing *United Brands* [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429.
[54] Under these circumstances, dominant firms should be able to restructure distribution to improve efficiency as long as they act in proportionate manner.
[55] *France Télécom SA v Commission of the European Communities* (C-202/07 P) [2009] 4 C.M.L.R. 25.
[56] Decision of 16 July 2003 relating to a proceeding under Article 82 of the EC Treaty (COMP/38.233-*Wanadoo Interactive*).
[57] *France Télécom v Commission of the European Communities* (T-340/03) [2007] E.C.R. II-107; [2007] 4 C.M.L.R. 21.
[58] *France Télécom SA v Commission* [2009] 4 C.M.L.R. 25 at [112].
[59] *Der Grüne Punkt—Duales System Deutschland GmbH v Commission of the European Communities* (C-385/07 P) [2009] 5 C.M.L.R. 19.
[60] Decision 2001/463 to a proceeding pursuant to Article 82 of the EC Treaty (COMP D3/34.493-*DSD*) [2001] OJ L166/1.

had a dominant position in the market for provision of recycling services in Germany, where manufacturers are legally required to arrange recycling for the packaging of their products. Participation in the DSD system required that manufacturers affix DSD's "green dot" trade mark. The Commission had ruled that by charging for each item bearing the trade mark regardless of whether the products were in fact recycled using the DSD system, DSD had engaged in unfair pricing that infringed art.102(a). This position was approved by the CFI in 2007.[61]

The ECJ endorsed the position of the CFI and the Commission, ruling that charging for unused services does constitute unfair pricing. The ECJ rejected the argument that the right to charge for affixing the trade mark was protected under the Trade Mark Directive [1989] OJ L40/1,[62] observing that the exclusive right protected by the Directive was exhausted where a licensee uses a trademark with the consent of proprietor. Since the abuse involved the method for charging companies that were and would remain licensees, it affected the use of the trademark by licensees and therefore did not affect the rights protected by the Directive.

Margin squeeze—CFI in Deutsche Telekom

In April 2008, the CFI upheld[63] the Commission's 2003 Decision[64] fining Deutsche Telekom for charging "unfair monthly and one-off charges for access to the local network". The abuse involved a margin squeeze for broadband access. According to the Commission, retail prices for certain DT products were either lower than wholesale prices or insufficient to cover DT's product-specific costs for its own retail products.

The Court indicated that under these circumstances, a margin squeeze constitutes a form of "unfair pricing" for purposes of art.102(a) TFEU, without any need to show actual anti-competitive effects in the downstream markets. The Court rejected the argument that it was necessary to show that the retail prices themselves were abusive, stating:

> "[T]he abusive nature of applicant's conduct is associated with the unfairness of the spread between its prices for wholesale access and its retail prices."[65]

The Court also rejected the argument that regulatory approvals from the German telecoms regulator or regulatory obligations could affect the abusive nature of the conduct, even though the regulator had specifically considered art.102, since DT had sufficient scope to alter prices to eliminate margin squeeze (including by application to regulator).

Refusal to supply and discrimination by dominant provider of settlement services for securities—CFI in Clearstream

In September 2009, the CFI issued its judgment[66] on review of the Commission's 2004 *Clearstream* Decision.[67] In that Decision, the Commission had ruled that Clearstream had abused its dominant position in respect of providing primary clearing and settlement services for securities subject to German law by: (i) refusal to supply downstream rivals with direct access to these services; and (ii) charging higher prices for one customer compared to those charged to other intermediaries. The Decision had emphasised that this conduct harmed innovation and ultimately harmed consumers.

CFI endorsed the Commission conclusions. On refusal to supply the CFI rejected arguments that continuing related contractual disputes between parties constituted an objective justification for refusal to provide access. In particular, the Court rejected the contention that access could be conditioned on reciprocal access for Clearstream to services of French clearing system. On discrimination, the CFI rejected the argument that the transactions were not "equivalent" for purposes of art.102(c) TFEU because of differences in cost of supply, observing that the burden was on Clearstream to provide evidence showing that costs of supplying customers was different.

Fidelity rebates and other loyalty schemes—CFI in Solvay

In December 2009, the General Court issued a judgment[68] regarding the Commission's *Solvay* Decision, first issued in 1990[69] and re-adopted in 2000,[70] following annulment of the original Decision on procedural grounds.[71] The original Decision had found that between 1982 and 1988 Solvay had abused its dominant position on the market for sale of soda ash in the European Community, excluding the United Kingdom and Ireland, through progressive rebate schemes, loyalty rebates, and exclusive supply agreements. The Court endorsed the Commission's substantive analysis.

As regards rebates, the Court referred to the well-established distinction between quantity rebates that reflect the efficiencies for the seller associated with higher quantities and fidelity rebates that are intended to induce

[61] *Der Grüne Punkt—Duales System Deutschland GmbH v Commission of the European Communities* (T-151/01) [2007] E.C.R. II-1607; [2007] 5 C.M.L.R. 4.
[62] Directive 89/104 of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks [1989] OJ L40/1.
[63] *Deutsche Telekom AG v Commission of the European Communities* (T-271/03) [2008] E.C.R. II-477; [2008] 5 C.M.L.R. 9. The judgment has been appealed to the ECJ.
[64] Decision 2003/707 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/37.451, 37.578, 37.579-*Deutsche Telekom*) [2003] OJ L263/9.
[65] *Deutsche Telekom* [2008] E.C.R. II-477 at [167].
[66] *Clearstream Banking AG v Commission of the European Communities* (T-301/04) [2009] 5 C.M.L.R. 24.
[67] Decision of 2 June 2004 relating to a proceeding under Article 82 of the EC Treaty (COMP/38.096-*Clearstream (Clearing and Settlement)*) [2009] OJ C165/7; see also Kallaugher and Weitbrecht, "Developments under Articles 81 and 82 EC — The Year 2004 in Review" [2005] E.C.L.R. 188, 192.
[68] *Solvay v Commission of the European Communities* (T-57/01), judgment of 17 December 2009, not yet reported.
[69] Decision 91/297 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-A-*Soda Ash-Solvay, ICI*) [1991] OJ L152/1.
[70] Decision 91/299 relating to a proceeding under Article 86 of the EEC Treaty (COMP/33.133-C-*Soda Ash-Solvay*) [2003] OJ L10/10.
[71] *Solvay et Cie v Commission of the European Communities* (T-30/91) [1995] E.C.R. II-1775; [1996] 5 C.M.L.R. 57.

fidelity on the part of the buyer. The Court noted with approval the Commission's reliance on documentary evidence showing a strategy on the part of Solvay to obtain a favoured or exclusive position with customers through rebates, in particular through high rebates for the customer's incremental demand.

Sanctions and procedure

Commission fines and the rule of law—ECJ in Degussa

In May 2008, the ECJ[72] confirmed the rejection in part by the CFI[73] of Degussa's appeal against the fine imposed on it for its participation in the methionine cartel.[74] Among other things, Degussa claimed that Regulation 17/62, the predecessor to Regulation 1/2003, did not provide for a sufficiently precise basis for the large fines imposed by the Commission in cartel cases, and that fines therefore infringe the principle of the rule of law.[75] The ECJ rejected that argument, referring to three grounds already cited by the CFI: first, the fact that art.15(2) of Regulation 17/62 caps fines at an absolute level, namely at 10 per cent of annual turnover; secondly, the fact that the Commission is bound by general principles of Union law when imposing fines, in particular by the principles of equal treatment and proportionality; thirdly, the fact that the Commission has bound itself by publishing Fining Guidelines,[76] which have made the calculation of fines more transparent.

Presumption of parental liability for wholly-owned subsidiary—ECJ in Akzo Nobel

In a judgment of September 10, 2009, the ECJ confirmed the Commission's long-standing practice as regards the liability of parent companies for infringements of Union competition rules committed by wholly owned subsidiaries. The judgment concerned the fine imposed by the Commission on Akzo Nobel NV, among others, for the participation of three of its wholly-owned subsidiaries in the choline chloride cartel,[77] and marked the first occasion since the 2000 judgment in *Stora*[78] that the ECJ commented on the issue of parental liability.

It may be recalled that an "undertaking" in the sense of art.101(1) TFEU can be made up of several different legal entities if they form what the ECJ calls an "economic unit". It is this economic unit which commits the infringement of art.101(1) TFEU, and consequently all legal entities in the unit can be held jointly and severally liable. In this case, Akzo Nobel NV was itself not involved in the cartel, but was held by the Commission to be part of an economic unit together with the wholly owned subsidiaries that participated in the cartel.

The ECJ has now confirmed that the fact of a 100 per cent shareholding alone is sufficient to trigger a presumption that parent and wholly-owned subsidiary form one economic unit.[79] The presumption shifts the burden to the parent company to rebut the presumption by proving that the subsidiary has been independent. The ECJ briefly touched on the relevant factors to assess the independence of a subsidiary: it is not sufficient that the subsidiary independently determines its commercial policy, and the fact that the parent had no knowledge of the cartel is likewise irrelevant. According to the ECJ, the rebuttal of the presumption must include "all relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company". The ultimate justification for this rule, if there is a justification, lies in the fact that parent and subsidiaries also benefit from being considered as one undertaking: agreements within the corporate group do not fall under art.101.

Quality of a statement of objections—ECJ in Bolloré and ADM

The ECJ appears to be following a stricter approach with regard to the rights of the defence, as is evidenced by two occasions where it considered statements of objections issued by the Commission to be insufficient to support the respective final decision: in *Bolloré*,[80] the Court annulled a Commission Decision which imposed a fine of over €22 million on an alleged participant of the carbonless paper cartel,[81] overturning a CFI judgment to the extent it had confirmed the fine on that undertaking.[82] The ECJ held that a statement of objections must clearly indicate whether its addressee is to be held liable as a direct participant in a cartel or as parent company deemed

[72] *Evonik Degussa GmbH v Commission of the European Communities* (C-266/06 P) [2008] E.C.R. I-81.
[73] *Degussa AG v Commission of the European Communities* (T-279/02) [2006] E.C.R. II-897; [2008] 5 C.M.L.R. 1.
[74] Decision 2003/674 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (C.37.519-*Methionine*) [2003] OJ L255/1.
[75] Under Regulation 17/62, the relevant provision was art.15(2), which has a comparable wording to art.23(2), the fining provision of Regulation 1/2003. The judgment is therefore relevant for both provisions.
[76] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C210/2.
[77] Decision 2005/566 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (C.37.533-*Choline Chloride*) [2005] OJ L190/22, confirmed by the CFI in *Akzo Nobel NV v Commission of the European Communities* (T-112/05) [2007] E.C.R. II-5049; [2008] 4 C.M.L.R. 12. On the different appeals against the choline chloride decision before the CI see Kallaugher and Weitbrecht, "Microsoft and More—Developments under Article 81 and 82 EC in 2007" [2008] E.C.L.R. 418, 423.
[78] *Stora Kopparbergs Bergslags AB v Commission of the European Communities* (C-286/98) [2000] E.C.R. I-9925; [2001] 4 C.M.L.R. 12.
[79] See *AEG Telefunken AG v Commission of the European Communities* (107/82) [1983] E.C.R. 3151; [1984] 3 C.M.L.R. 325.
[80] *Papierfabrik August Koehler AG v Commission of the European Communities* (C-322/07 P) [2009] 5 C.M.L.R. 20.
[81] Decision 2004/337 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/36.212-*Carbonless paper*) [2004] OJ L115/1.
[82] *Bolloré SA v Commission of the European Communities* (T 109, 118, 122, 125, 126, 128, 129, 132 & 136/02) [2007] E.C.R. II-947; [2007] 5 C.M.L.R. 2.

to exert decisive influence over a cartel participant. The subsequent decision must then not deviate from that charge.

In the second case, the ECJ reduced the fine imposed on Archer Daniels Midland (ADM) for its participation in the citric acid cartel from €39.7 to €29.4 million.[83] The Commission had annexed to the statement of objections evidence on which it relied on in its subsequent decision[84] to establish ADM's role as leader of the cartel, where it should have referred to that evidence as facts in the statement itself.

Fines against cartel facilitators—CFI in AC-Treuhand

A judgment of the CFI of July 8, 2008[85] addressed for the first time the question whether a company which facilitates the operation of a cartel infringes art.101(1) TFEU and can be fined for such infringement. The company in question, the Swiss consultancy trading under the name AC-Treuhand, a successor to FIDES AG, had performed various services for the organic peroxides cartel fined by the Commission in 2003.[86] In particular, it had stored the original of cartel agreements, organised cartel meetings, and helped in disguising travel expenses of the cartel participants' employees so that these could not be linked to the cartel.

The Commission had found that AC-Treuhand had infringed art.81 EC along with the actual participants in the cartel, and had imposed on it a symbolic fine of €1,000 since this case marked the first occasion that a cartel facilitator was actually fined. In a previous Decision, the Commission had only ordered a consultancy to cease the support of a cartel.[87]

Before the Court, AC-Treuhand argued that the principle of "nullum crimen, nulla poena sine lege" prevented the Commission from holding AC-Treuhand liable, because art.101 TFEU does not catch conduct of a company that facilitates the implementation of anti-competitive agreements among others.

The Court rejected this argument by ostensibly subjecting art.81 EC to a "grammatical, contextual and teleological interpretation". In the Court's view, nothing in the wording of art.81 EC points to a requirement that the addressee of the prohibition has to be active on the market on which the restriction of competition occurs. Any other interpretation would jeopardise the Community objective of undistorted competition in the Internal Market according to art.3(1)(g) EC.[88]

While from the point of view of competition policy it is difficult to quarrel with this result, the way in which the court has dealt with the issue of "nullum crimen sina lege" remains unsatisfactory. In particular, the court missed the opportunity to base its reasoning on a comparison of the general principles of Member State law as regards the sanctioning of facilitators of unlawful behaviour.

Given the merely symbolic fine, AC-Treuhand has not appealed the judgment, so that the ECJ will not soon have a chance to rule on the issue. However, the Commission in November 2009 has imposed a fine of €174,000 on AC-Treuhand as a facilitator of the Heat Stabilisers cartel.[89] AC-Treuhand is appealing that decision before the General Court.

Conclusion and outlook

The era of Competition Commissioner Kroes, which ended in February 2010, will probably be remembered for extremely high fines being assessed on companies that infringe arts 101 and 102 TFEU, for instituting a settlement procedure, and otherwise for continuing the policy of her predecessor. Commissioner Almunia is likely to make few changes as regards the substantive body of competition policy, including the emphasis on consumer welfare; he may instead put remedies, both administrative and private, at the top of his agenda. And in years to come the European courts may finally be ready to truly make their mark in the areas of due process and of behavioural control as much as they have done with respect to merger control.

[83] *Archer Daniels Midland Co v Commission of the European Communities* (C-511/06 P) [2009] 5 C.M.L.R. 15. The judgment partly annulled CFI, *Archer Daniels Midland Co v Commission of the European Communities* (T-59/02) [2006] E.C.R. II-3627; [2006] 5 C.M.L.R. 28.
[84] Decision 2002/742 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/36.604-*Citric acid*) [2002] OJ L239/18.
[85] *AC-Treuhand AG v Commission* [2008] E.C.R. II-1501; [2008] 5 C.M.L.R. 13.
[86] Decision 2005/349 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-2/37.857-*Organic Peroxides*) [2005] OJ L110/44.
[87] Decision 80/1334 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.869-*Italian Cast Glass*) [1980] OJ L383/19.
[88] For the corresponding provision under the Treaty of Lisbon, see the discussion above.
[89] Decision of 11 November 2009 (COMP/38.589-*Heat Stabilisers*) Commission press release IP/09/1695.