

Survey

The Law on Fines Imposed in EU Competition Proceedings: Faster, Higher, Harsher

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I. 2012 at a glance

In numerical terms, 2012 was a relatively average year for the application of the law on fines imposed in EU competition law proceedings. The European Court of Justice (ECJ) and the General Court delivered 59 judgments and orders concerning fines, which obviously is not insignificant but marks a serious decrease compared to the 84 judgments and orders issued in 2011. This decrease was not compensated by a flurry of new Commission decisions, as in 2012 there were only four decisions imposing fines for infringements of Article 101 TFEU.¹ In 2012 the Commission has apparently not adopted any decision fining a company for an infringement of Article 102 TFEU. This does not come as a surprise, as the development of the commitment procedure has meant that decisions finding infringements of Article 102 TFEU are now exceptional.

Nonetheless, 2012 remains an important year for the application of EU law on fines. In *TV and computer monitor tubes*, the Commission imposed a record aggregate fine of €1.47 billion on seven groups of companies for two decade-long cartels.² According to press reports, in the same decision the Commission granted a huge reduction of the fine—€219 million—on account of an undertaking's inability to pay the fine.³ In 2012 the Commission also took the still relatively rare step of imposing a procedural fine to sanction obstruction during a dawn raid.⁴

At the judicial level, 2012 has also seen the consolidation of the body of law on the 2006 Guidelines.⁵ The

Key Points

- Although in 2012 the Commission adopted few decisions imposing fines, in *TV and computer monitor tubes* it imposed a record aggregate fine of €1.47 billion and granted a record reduction of the fine for inability to pay.
- The General Court has delivered important judgments on the *ne bis in idem* principle, partial immunity, recidivism, and inability to pay, as well as the calculation of fines for obstruction, non-compliance with a decision finding an infringement, and gun jumping.
- The EU Courts have become increasingly harsh with offenders, and less inclined to exercise their theoretically broad powers of review on fines.

General Court has delivered important judgments on the *ne bis in idem* principle, the conditions for partial immunity and recidivism. It has also clarified issues on which there is still little case law, such as inability to pay and the calculation of fines for obstruction, non-compliance with a decision finding an infringement, and gun jumping.

On substance, 2012 will remain a gloomy year for undertakings. Obviously, not all new developments concerning fines were adverse to offenders. Undertakings will certainly welcome the Commission's relative openness on inability to pay, which, as the *TV and computer*

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1 Case COMP/39.452—*Mountings for windows and window-doors*, Commission Decision of 28 March 2012; Case COMP/39.462—*Freight forwarding*, Commission Decision of 28 March 2012; Case COMP/39.611—*Water management products*, Commission Decision of 27 June 2012; Case COMP/39.437—*TV and computer monitor tubes*; Commission Decision of 5 December 2012. The Commission also adopted one decision to amend a previous decision and impose a new fine on Toshiba following annulment of the initial decision by the General Court (Case COMP/39.966—*Gas insulated switchgear re-adoption*, Commission Decision of 27 June 2012). This article is based on the publicly available versions of these decisions available at the time of publication

2 *TV and computer monitor tubes* (n 2).

3 'Antitrust: Commission fines producers of TV and computer monitor tubes EUR 1.47 billion for two decade-long cartels', IP/12/1317, 5 December 2012. See *GCR*, 18 December 2012, 'CRT cartelists obtains record inability-to-pay fine cut'.

4 Case COMP/39.793—*EPH and others*, Commission Decision of 28 March 2012.

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

monitor tubes case shows, can result in gigantic reductions. In times of crisis, this is a positive sign of political and economic realism. The fact remains that, in 2012, very few judgments came as good news for undertakings.

In fact, more than the Commission, the EU Courts have become increasingly harsh with offenders, and, more worryingly, less inclined to exercise their theoretically broad powers of review on fines. The previous edition of this survey underlined that in 2011 the EU Courts appeared to be in the process of redefining their role with respect to fines, albeit with conflicting trends. As a whole, in 2012 the repressive and deferential trends have prevailed.

For instance, as this survey will show, in certain cases the EU Courts are taking a more restrictive stance than the Commission with respect to the calculation of the duration taken into account to set the amount of the fine. Some judgments also tend to illustrate the regrettable unwritten rule according to which, in EU competition law, extensive concepts such as those of ‘*single complex infringements*’ and ‘*undertaking*’ broadly apply to the detriment of undertakings, but much more rarely when they could benefit them, for instance for the purpose of the *ne bis in idem* principle or to determine the beneficiaries of leniency applications (see Sections IV and V.B.5 below). The EU courts have also sent signals that they would not shy away from increasing fines. This may deter some undertakings from appealing decisions which, in any event, are probably not always reviewed in-depth as far as they should be. In this regard, 2012 shows that, in spite of the positive signs underlined in the 2011 edition of this survey, the ECJ and the General Court may be in the process of gradually limiting the scope of their review of fines, including when they exercise their unlimited jurisdiction.

After a brief review of the developments concerning the statute of limitations (Section II), the principles of legality and legal certainty as applied to fines (Section III), and the *ne bis in idem* principle (Section IV), this survey gives an overview of the case law concerning the calculation of fines, with a special focus on developments relevant to the application of the 2006 Guidelines (Section V). The three following sections examine the rules on joint and several liability for the payment of fines (Section VI), the calculation of fines imposed for competition law infringements other than breaches of

Articles 101 and 102 TFEU (Section VII), and the procedural issues related to fines (Section VIII). The final section, which once again is of major importance this year, deals with fines before the EU Courts, in particular the extent of their control (Section IX).

II. The statute of limitations

Under Article 25 of Regulation No 1/2003, the Commission cannot impose a fine more than five years after the infringement was committed, unless a formal step to investigate or prosecute the infringement has been taken by the Commission or a national competition authority during that period.⁶ In spite of its practical importance, this statute of limitations does not apply to infringements that are not covered by Regulation No 1/2003, and in particular infringements—such as gun jumping—that concern the implementation of the Merger Regulation.⁷ In the absence of specific rules concerning these fines, Council Regulation No 2988/74 continues to apply.⁸ This has a significant impact on certain procedural infringements, as Article 1 of this Regulation provides for a limitation period of three years for ‘*infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying-out of investigations*’, and five years (like Regulation No 1/2003) for ‘*all other infringements*’.

In *Electrabel*, the first case concerning the review of a decision imposing a fine for gun jumping, Electrabel relied on Regulation No 2988/74 to argue that a three-year limitation period applied to its failure to notify a reportable transaction. In view of the wording of Regulation No 2988/74, this was undoubtedly a serious argument. Yet the General Court found that, in light of the substantial changes of the conditions of competition on the market that they are liable to cause, neither the failure to notify a concentration nor a breach of the obligation to suspend the concentration until it has been declared compatible can be considered as a procedural infringement subject to a three-year limitation period.⁹ Importantly, the Court also held that such infringements are not instantaneous: they last for as long as the control acquired in breach of the Merger Regulation remains and the concentration has not been authorised by the Commission.¹⁰ This implies that an undertaking that

6 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003, L 1, p. 1).

7 See Article 14 of Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, p. 1).

8 Council Regulation No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974, L 319, p. 1).

9 Case T-332/09 *Electrabel v Commission*, paras 201–206.

10 *Ibid.*, para. 212.

has failed to notify a merger cannot simply wait for five years to avoid the imposition of a fine: before the five-year statute of limitations actually starts running, it must either cease control or obtain the Commission's approval.

III. Principle of legality and principle of legal certainty

As far as the ruling in *Microsoft*¹¹ is concerned, the title of this section could well have been '*the endorsement by the General Court of an ultra-restrictive notion of legal certainty*'. Antitrust specialists will be aware that in 2004 the Commission found that Microsoft had abused its market power by restricting interoperability between Windows PCs and non-Microsoft work group servers. Microsoft was ordered to disclose to competitors, within 120 days, the interfaces required for their products to be able to communicate with the ubiquitous Windows operating system, so as to allow competitors to develop products that could compete on a level playing field in the work group server operating system market. The Commission indicated that Microsoft was entitled to a reasonable remuneration in consideration of such interface documentation. This decision was upheld by the General Court in 2007.

This was not the end of the story, as in 2006 and 2008 the Commission took two decisions pursuant to Article 24(2) of Regulation No 1/2003, imposing penalty payments of €280.5 million and €899 million on Microsoft for failing to comply with the 2004 decision, by charging unreasonable prices for access to interface documentation for work group servers. On 27 June 2012 the General Court upheld the 2008 decision. One of the arguments put forward by Microsoft to contest the decision contended that the Commission could not impose a penalty payment on Microsoft for charging unreasonable prices for access to interoperability documentation without having determined beforehand by way of decision the rate it deemed reasonable. This argument was firmly rejected by the General Court on the ground that '*the use of imprecise legal concepts in making rules, breach of which entails the civil, administrative or even criminal liability of the person who contravenes them, does not mean that it is impossible to impose the remedial measures provided for by law, provided that the individual concerned is in a position, on the basis of the working of*

the relevant provision and, if need be, with the help of the interpretation of it given by courts, to know which acts or omissions will make him liable'.¹² In substance, the Court seems to have considered that such requirement of legal certainty was fulfilled by the indication by the Commission that the remuneration should reflect the intrinsic, as opposed to the strategic, value of the information provided, and the—still very general—principles negotiated with the Commission after the adoption of the 2004 Decision.¹³ Considering how difficult it is to determine what a '*fair compensation*' is by competition law standards, this does not appear to us as a sufficiently demanding test. Last but not least, the Court supported its reasoning by a surprising remark according to which, if the use of imprecise concepts prevented liability from being established, '*an infringement of Article 101 or 102 TFEU—which are themselves drawn up using imprecise legal concepts, such as distortion of competition or “abuse” of a dominant position—could not give rise to a fine without the prior adoption of a decision establishing the infringement*'.¹⁴ In our view the Court was wrong to take for granted that the law on Article 101 TFEU—and even more on Article 102 TFEU—always complies with the principle of legal certainty.

The *Telefónica* case also gave rise to important—although probably less controversial—developments on this issue.¹⁵ In this case the General Court insisted on the fact that the absence of clear precedent does not prevent the Commission from imposing a fine. In other words the novelty of an anticompetitive conduct cannot grant immunity to its author.¹⁶ However, as will be mentioned in Section V.B.2.v. below, the Commission has a broad discretion as to whether or not to impose a fine on a novel anticompetitive behaviour.

In the same case, on a related issue the General Court clarified the concept of deliberate infringement in Article 23(2) of Regulation No 1/2003 in the context of Article 102 TFEU. Traditionally, the Courts have asserted that a deliberate infringement does not necessarily imply awareness on the part of the author that it was committing such infringement, the mere awareness of the anticompetitive nature of the conduct being sufficient. More specifically, in the context of Article 102 TFEU, '*an undertaking is aware of the anti-competitive nature of its conduct where it is aware of the essential facts justifying both the finding of a dominant position on the relevant market and the finding by the Commission of an abuse of that position*'.¹⁷

11 Case T-167/08 *Microsoft v Commission*.

12 *Ibid.*, para. 84.

13 *Ibid.*, paras 85–88.

14 *Ibid.*, para. 91.

15 Case T-336/07 *Telefónica v Commission*.

16 *Ibid.*, para. 357.

17 *Ibid.*, para. 320.

IV. *Ne bis in idem*

According to settled case law, the *ne bis in idem* principle precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anticompetitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision. This principle must be complied with in proceedings for the imposition of fines under competition law.¹⁸

In *Toshiba*¹⁹ the anticompetitive behaviour had been committed by Toshiba both in the EU, where it had led to a decision of the Commission, and in the Czech Republic, prior to the entry of the latter into the EU. However, the Czech Republic had already joined the EU when the proceedings against Toshiba were opened and therefore the Czech competition authority had to assess whether the *ne bis in idem* principle prevented it from punishing Toshiba. Notwithstanding the recommendation of Advocate General Kokott in her Opinion, the ECJ reasserted the traditional threefold principle that requires (i) an identity of facts, (ii) a unity of offender, and (iii) a unity of the legal interest protected and provided important additional indications on the assessment of these conditions. More importantly, according to the ECJ, '[w]hether undertakings have adopted conduct having as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract, but must be examined with reference to the territory, within the Union or outside it, in which the conduct in question had such an object or effect, and to the period during which the conduct in question had such an object or effect'.²⁰

As the decision of the Commission did not apply to the Czech territory prior to its entry into the EU, this allowed the ECJ to consider that the *ne bis in idem* principle was not applicable. Such breaking up of what was supposed to be a single complex infringement into several smaller offences may well have dire procedural consequences on leniency proceedings for instance, and therefore make the use of such procedure much more complex. However, it is unclear from the judgment whether the Court's interpretation was conditioned by the very specific circumstances of the case, and in

particular the fact that it concerned an infringement partly committed (at that time) outside the EU.

V. Calculation of fines imposed for substantive infringements

A. Determination of the basic amount

Although in the General Court's view '*the 2006 Guidelines are based on criteria which were already taken into account in the 1998 Guidelines*',²¹ the latter have significantly changed the way the Commission calculates the basic amount of fines. To determine this amount, the Commission first calculates '*the value of sales*' (subsection 1). It then applies to that figure a percentage reflecting the degree of gravity of the infringement (subsection 2), which is multiplied by the number of years of infringement (subsection 3). In cartel cases, the Commission also applies an '*entry fee*' (subsection 4).

1. Calculation of the value of sales

The first step in the calculation of the fine is the determination of the value of the undertaking's sales of goods or services '*directly or indirectly relat[ed]*' to the infringement '*in the relevant geographic market within the EEA*', normally during the last full business year of the undertaking's participation in the infringement.²²

As illustrated by the previous editions of this survey, this has become a crucial step in the calculation of the fine, due to both its impact on the final amount of the fine and the Commission's willingness to adapt its general methodology to specific situations. Yet in 2012 there was surprisingly little case law on this issue, with only two main developments. First, in *Guardian Industries*, the Court unsurprisingly confirmed that captive sales ought to be excluded from the determination of the value of the undertaking's sales of goods or services when the existence of anticompetitive conduct is established only in respect of sales to independent customers.²³ Second, the summary of the Commission decision in *Freight forwarders* tends to show that when the infringement lasted less than one year or when there are clear peak seasons, the Commission will calculate a proxy based on the actual value of the undertaking's sales during their participation in the infringement.²⁴

18 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P, and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para. 59.

19 Case C-17/10 *Toshiba*, paras 94 to 99.

20 *Ibid.*, para. 99.

21 Case T-83/08 *Denki Kagatu v Commission*, paras 114 and 118.

22 2006 Guidelines (n 6), para. 13.

23 Case T-82/08 *Guardian Industries v Commission*, para. 104.

24 Case COMP/39.462—*Freight forwarding*, summary decision, paras 1, 15, and 16.

2. Gravity—Percentage applied to the value of sales

The second step of the calculation of the fine consists in applying a gravity percentage to the value of sales. Pursuant to paragraphs 19 to 22 of the 2006 Guidelines, the assessment of gravity is made on a case-by-case basis for all types of infringements, taking into account all the relevant circumstances of the case, such as the nature of the infringement, the combined market share of the undertakings concerned, the geographic scope of the infringement and whether or not it has been implemented. As a general rule, the proportion taken into account is set at ‘a level of up to 30 per cent’ of the total value of sales.

In 2012, the Commission seems to have maintained the gravity percentage at the lower level that generally applies in cartel cases (ie, 15–16 per cent),²⁵ although the percentage applied in *TV and computer monitor tubes* is not known yet and may well be higher in view of the Commission’s insistence on the gravity of the infringement in its press release.²⁶

It is now clear that the assessment of gravity is based on a wide variety of considerations which cannot be and are not required to be exhaustively listed by the Commission, as in any case the fines are calculated to reflect the individual situation of each undertaking with respect to the specific circumstances of each case.²⁷ However there is clearly a form of hierarchy of the type of considerations taken into account to set the gravity percentage. Be it under the 1998 or the 2006 Guidelines, the Court considers cartels and certain abuses of a dominant position as anticompetitive by their very nature and therefore considers that the analysis of their effects (impact on the market, geographical scope) is not decisive to establish such infringements, as opposed to less serious offences.²⁸ In the same vein, the General Court interprets the secrecy of an anticompetitive agreement as an indication of the participants’ intent to commit a serious offence, which adds to the gravity of their behaviour.²⁹

In most cases, at this stage of the calculation of the fine, the EU Courts and the Commission assess the gravity of the infringement as a whole, ie, irrespective of the individual involvement of each participant. The General Court has sometimes taken different views on this issue, including as recently as 2011,³⁰ but in 2012 *Novácke chemické závody* strengthened what is probably the dominant line of case law according to which the relative gravity of the participation in the infringement of each of the undertakings concerned has to be examined in the context of the possible application of aggravating or mitigating circumstances, which means that the gravity percentage and the entry fee may be determined at the same level for all participants. In the Court’s view this does not mean that the same sum is determined for all participants: insofar as that sum is a percentage of the value of each cartel participant’s sales in relation to the infringement, it will be different for each participant, depending on the differences in the value of the participants’ sales.³¹

3. Duration

Article 23(3) of Regulation No 1/2003 expressly mentions the duration of the infringement as one of the criteria that the Commission must take into account when it sets the amount of fines. According to the General Court, this means that the impact of the duration of the infringement on the basic amount of the fine must, ‘as a general rule, be significant’. Except in special circumstances, ‘that militates against a purely symbolic increase of the starting amount on account of the duration of the infringement’.³² Indeed duration now plays a crucial role in the determination of the amount of fines: once defined, the value of sales is multiplied by the number of years of participation in the infringement (and not increased by 10 per cent, as under the 1998 Guidelines).³³ However, as underlined in the previous editions of this survey, the Commission is often ready to adapt the methodology to

25 Ibid., para. 17 (15 per cent and 16 per cent depending on the infringement); Case COMP/39.452—*Mountings for windows and window-doors*, summary decision, para. 12 (16 per cent for all undertakings, except for Alban Giacomo, which apparently was imposed a lower percentage due to the fact that its sales were limited to Italy); Case COMP 39.611—*Water management products*, para. 68 of the decision (15 per cent for all undertakings).

26 ‘Antitrust: Commission fines producers of TV and computer monitor tubes EUR 1.47 billion for two decade-long cartels’, IP/12/1317, 5 December 2012.

27 Case C-452/11 P *Heineken v Commission*, paras 111–115; Case C-445/11 P *Bavaria v Commission*, paras 56–60.

28 See, concerning the 2006 Guidelines (n 6), Case T-370/09 *GDF Suez v Commission*, paras 417–423, although in this last case, despite insisting on the importance of the object of the behaviour, the Court also took into account considerations such as the geographical scope of the infringement. See, in relation to the 1998 Guidelines, Case T-336/07 *Telefonica v Commission*, paras 378, 390, 413; Case T-353/06 *Vermeer*

Infrastructuur v Commission, paras 115–131; Case T-362/06 *Ballast v Commission*, paras 100–116; Case T-448/07, *YKK v Commission*, paras 122–143; Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 175–189; Case T-348/06 *Total Nederland v Commission*, paras 60 and 74; Case T-214/06 *ICI v Commission*, paras 116–117; Case T-53/06 *UPM Kymmene Oyj v Commission*, para. 145; Case C-457/10 P *AstraZeneca v Commission*, paras 164–166.

29 Case T-362/06 *Ballast v Commission*, para. 106; Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, para. 180; Case T-354/06 *BAM NBM Wegenbouw v Commission*, paras 118–123 (all concerning the 1998 Guidelines).

30 Case T-79/06 *Sachsa v Commission*, not yet reported, paras 135–138, and Case T-208/06 *Quinn Barlo v Commission*, not yet reported, para. 200.

31 Case T-352/09 *Novácke chemické závody v Commission*, para. 58.

32 Case T-439/07 *Coats Holdings v Commission*, para. 189.

33 2006 Guidelines (n 6), para. 24.

take into account the specific circumstances of certain cases. It did so again in 2012, as in the *Water management products* case it decided not to take into account periods of limited activity of the cartel.³⁴

In 2012, at the judicial level, the General Court recalled that the amount of the fines is based on both the gravity and the duration of the infringement, which are two separate criteria.³⁵ The Court has drawn several consequences from this principle. First, in *Koninklijke BAM Groep* and *Ballast*, it confirmed that the amount of the fines imposed is not necessarily proportionate to the duration of the participation of an undertaking imputed to each company.³⁶ Second, in *Telefónica*, it considered that since the variable intensity of the infringement had already been taken into account when assessing the gravity of the infringement, it was not to be taken into account when determining the increase applied for the duration.³⁷ By contrast, in *GDF Suez*, the General Court listed the exceptional duration of the infringement as one of the considerations to be taken into account when assessing the gravity of the infringement,³⁸ which shows that in practice duration may be taken into account twice, in this case to the detriment of the offender.

Literally, a period of less than six months should be counted as a half-year and a period longer than six months but shorter than one year should be counted as a full year. However, as already noted in the previous editions of this survey, the Commission abandoned its practice on this point by taking into account the exact number of months.³⁹ The Commission has maintained this more flexible approach in 2012.⁴⁰ Regrettably the General Court appears less open than the Commission in this respect, as in 2012 it refused to apply this new methodology to undertakings that had been imposed fines following the Commission's former approach. For instance, in *EI du Pont de Nemours*, it accepted that an infringement that effectively lasted six years, one month and thirteen days be treated as having lasted six years and a half. In this case and in *Dow Chemical*, the General Court expressly validated the methodology formally pruned by the 2006 Guidelines, which was also

upheld as an illustration of the Commission's margin of discretion.⁴¹

It nonetheless remains to be seen whether the Commission's departure from its own practice would not justify, for reasons of equality of treatment, that the General Court modify the decisions in which the Commission did not apply this more generous methodology. Admittedly, the decision-making practice of the Commission cannot serve as a legal framework for the imposition of fines.⁴² However, as recalled by the General Court in *GDF Suez*, '*previous decisions by the Commission imposing fines can be relevant from the point of view of observance of the principle of equal treatment . . . where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case.*'⁴³ It seems to us that the criteria listed by the Court in *GDF Suez* do not justify variations in the computation of periods shorter than one year, and that therefore the more generous approach adopted by the Commission, which is also more in line with the principle of proportionality, should be applied uniformly, be it retroactively at the judicial level.

4. Entry fee

Since the adoption of the 2006 Guidelines there has been very little case law about the entry fee. The Commission's practice in this regard does not seem to give rise to many objections. This is probably a result of the quasi-systematic alignment of the entry fee percentage on the gravity percentage, which the Commission's practice in 2012 seems to confirm.⁴⁴

B. Adjustment of the basic amount

1. Aggravating circumstances

The Commission may increase the basic amount of the fine where it finds aggravating circumstances such as recidivism, obstruction, and playing the role of leader/instigator.⁴⁵ The 2006 Guidelines provide a non-exhaustive list, thus implying that circumstances mentioned in the 1998 Guidelines and absent from the 2006 Guidelines

34 Case COMP/39.611—*Water management products*, paras 21, 25, 54, and 71.

35 Case T-355/06 *Koninklijke BAM Groep v Commission*, para. 81.

36 *Ibid.*, para. 82; Case T-362/06 *Ballast v Commission*, para. 142.

37 Case T-336/07 *Telefónica v Commission*, para. 450.

38 Case T-370/09 *GDF Suez v Commission*, para. 415.

39 See eg, Case COMP/39.406 *Marine Hoses*, Commission Decision of 28 January 2009, para. 448.

40 Case COMP/39.462—*Freight forwarding*, paras 18–22 of the summary decision.

41 Case T-76/08 *EI du Pont de Nemours v Commission*, paras 127–133; Case T-77/08 *Dow Chemical Company v Commission*, paras 142–148.

42 See eg, Case C-549/10 P *Tomra v Commission*, paras 104–111.

43 Case T-370/09 *GDF Suez v Commission*, para. 387, and Case T-360/09 *E.ON Ruhrgas and Other v Commission*, para. 262, referring to Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627, para. 316.

44 Case COMP/39.462—*Freight forwarding*, summary decision, para. 17; Case COMP/39.452—*Mountings for windows and window-doors*, summary decision, para. 12 (although the wording is ambiguous); Case COMP/39.611—*Water management products*, para. 74. The entry fee imposed in *TV and computer monitor tubes* (n 2) is not publicly known yet.

45 2006 Guidelines (n 6), para. 28.

(such as retaliatory measures taken against other undertakings) may still be relevant.

(i) *Repeat infringement.* Paragraph 28 of the 2006 Guidelines provides that where an infringement continues, or an undertaking repeats ‘*the same or a similar infringement*’, after the Commission or a national competition authority has decided that the undertaking infringed Article 81 or 82 EC (now Articles 101 and 102 TFEU), the basic amount will be increased by ‘*up to 100 per cent for each such infringement established*’.

Probably for the first time in such clear terms, the Court stated in *UPM* and subsequently in *Shell Petroleum*, that a repeat infringement does not require the company concerned to have taken part directly in the previous infringement. It is deemed sufficient in this respect for the undertaking which that company is part of to have been involved in previous infringements, regardless of whether such infringements were implemented on the same market.⁴⁶ This remains true even if, in the previous decision, the Commission did not formally impute the first infringement to the parent company fined for the second infringement, or controlling the subsidiary fined for the second infringement. What matters is that the parent company could have been sanctioned because, as a matter of fact, it controlled the punished subsidiary. In the Court’s view this is justified by the Commission’s discretion not to impute an infringement to a parent company.⁴⁷ While this outcome may implicitly be supported by *ENI* and *Polimeri*,⁴⁸ it is contrary to a recent and probably firmer line of case law according to which a previous infringement cannot be taken into account if the parent company was not formally found liable in the previous decision and did not have a chance to exercise its rights of defence in relation to this finding.⁴⁹ It is to be hoped that the ECJ will soon clarify this issue.

(ii) *Refusal to cooperate with or obstruction of the Commission.* Article 23(1) of Regulation No 1/2003 allows the Commission to impose fines for various procedural infringements. Their amount may be up to 1 per cent of the total turnover of the undertaking in the preceding

business year. However, the Commission may also sanction such an infringement indirectly, that is, as an aggravating circumstance, as long as it is not sanctioned under both.⁵⁰

In *Koninklijke Wegenbouw Stevin*, the Court upheld a 10 per cent increase of the fine due to an obstruction that consisted in (i) refusing access to the premises before the arrival of the undertaking’s attorneys (which had triggered a 47-minute delay) and (ii) briefly refusing access to one of the company directors’ office (where, according to the undertaking, there were no documents concerning the relevant product). In the Court’s view, the presence of an outside counsel during an investigation is permitted but does not condition the validity of the investigation. In addition the delay that the Commission must grant to the undertaking to contact its attorneys depends on the specific circumstances of each case and, in any event, must remain extremely short and reduced to the strict minimum.⁵¹ Finally, the Commission had no obligation to establish that the refusal to cooperate or obstruction had had any effects on the preservation of the evidence.⁵² In other words, such effects are not required; they can only make things worse.

(iii) *Role of leader or instigator.* The third cause for an increase of fines provided by the 2006 Guidelines is the role of leader or instigator played by the undertaking sanctioned. In 2012 this aggravating circumstance was applied in *Koninklijke Wegenbouw Stevin* and *Shell Petroleum*,⁵³ where the Court took the opportunity to confirm and clarify the scope of these concepts: (i) to qualify as an instigator, an undertaking must have encouraged others to join or implement the cartel, even if this occurred on one single occasion,⁵⁴ whereas (ii) an undertaking can be considered as a leader if it can be established, with respect to the circumstances of the case, that said undertaking acted as a driving force or played a central part in the functioning of the cartel, for instance by attending meetings on behalf of another member of the cartel and sharing the information with that undertaking afterwards, or by organizing several of

46 Case T-53/06 *UPM Kymmene Oyj v Commission*, paras 129–133 (‘*the Commission is entitled to conclude that the same undertaking has previously been censured for an infringement of the same type when the perpetrators of repeated unlawful conduct are different subsidiaries forming part of a single economic entity*’); Case T-343/06 *Shell Petroleum v Commission*, para. 248 (‘*the Commission is entitled to find recidivism where one group company commits an infringement of the same type as that for which another was previously punished*’), relying on Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paras 284–285 (which is less clear than the Court suggests).

47 Case T-343/06 *Shell Petroleum v Commission*, para. 252.

48 Case T-39/07 *ENI v Commission*, not yet reported, paras 161–171; Case T-59/07 *Polimeri v Commission*, not yet reported, paras 297–303.

49 Joined Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07, and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others v Commission*, not yet reported, paras 302–323; Case T-206/06 *Total v Commission*, not yet reported, para. 213.

50 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, , paras 301–303; Case T-343/06 *Shell Petroleum v Commission*, paras 234–237.

51 *Ibid.*, para. 232.

52 *Ibid.*, para. 239.

53 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*; Case T-343/06 *Shell Petroleum v Commission*.

54 Case T-343/06 *Shell Petroleum v Commission*, para. 156.

the meetings or being in charge of collecting and sharing the information with the other cartel members. Actively ensuring compliance with the decisions of the cartel is a determining criterion in this respect. It is not sufficient to establish that an undertaking has put pressure on others or dictated their conduct. Finally, neither the market power nor the resources of an undertaking are relevant when determining whether an undertaking was a leader.⁵⁵

Based on these principles, the General Court found in *Shell Petroleum* that the Commission had failed to prove that the applicants were instigators or leaders, and decreased the fine accordingly.⁵⁶ By contrast, in *Koninklijke Wegenbouw Stevin*, the Commission had only failed to prove that the applicant was an instigator, and had made no mistake as to its leadership role. This half-victory did not result in a decrease of the fine, as the Court exercised its unlimited jurisdiction to find that in any event the applicant's role as a leader justified a 10 per cent increase.⁵⁷

2. Mitigating circumstances

The basic amount of a fine may be reduced where the Commission finds mitigating circumstances. A non-exhaustive list of mitigating circumstances is set out in paragraph 29 of the 2006 Guidelines.

(i) *Early termination of infringement.* Pursuant to paragraph 29, first indent, of the 2006 Guidelines, terminating an infringement as soon as the Commission intervenes does not amount to a mitigating circumstance in the case of secret agreements or practices and, in particular, cartels. This limit is now widely accepted. It raises very few issues and, in fact, there was no case law dealing with it in 2012.

(ii) *Limited involvement in the infringement.* Pursuant to paragraph 29, third indent, of the 2006 Guidelines, this mitigating circumstance applies when an undertaking provides evidence that its involvement in the infringement is substantially limited. The undertaking must demonstrate that, during the period it was a party to the illegal agreement, it actually avoided complying with it by adopting competitive conduct on the market.

As illustrated by the previous editions of this survey, the standard applied by the Commission is usually very

high. The EU Courts are also very demanding: as confirmed by several judgments of 2012, they interpret the scope of this mitigating circumstance (or its predecessors in the 1998 Guidelines, that is, 'an exclusively passive or "follow-my-leader" role' or 'non-implementation' of the infringement) strictly.⁵⁸

On a brighter side, the Court found in *Novácke chemické závody* that since the list in paragraph 29 of the 2006 Guidelines of mitigating circumstances is not exhaustive, the fact that (unlike the 1998 Guidelines) this list does not include the passive role of an undertaking does not preclude that aspect from being taken into consideration as a mitigating circumstance 'if it is capable of demonstrating that the relative gravity of that undertaking's participation in the infringement is less significant'.⁵⁹ This reasoning is in line with the *Gosselin* judgment of 2011,⁶⁰ and can be extended to a number of possible mitigating circumstances.

(iii) *Cooperation outside the scope of the Leniency Notice.* The case law on this mitigating circumstance is also very demanding. In *Ecka* for instance, the General Court refused to reduce the fine on the ground put forward by the applicant that it had not contested the facts.⁶¹ In doing so, the Court relied on the fact that this circumstance was not listed in the 2006 Guidelines and therefore held that the Commission was not required to grant a reduction on this basis.⁶² The Court read this provision restrictively by limiting its scope to the circumstances expressly listed and found that, in this case, the lack of contestation had not enabled the Commission to establish the existence of an infringement more easily.⁶³ In our view, this interpretation is objectionable as the Court itself stated that the list provided in paragraph 29 of the 2006 Guidelines is non-exhaustive (see paragraph (ii) immediately above).

The Court also refused to grant a reduction on the ground of cooperation in *ICI* and explained that it is not enough for an undertaking to provide incriminating evidence, as such evidence must prove useful to the Commission in consideration of the information already in its possession at the time. This is consistent with the assessment carried out within the framework of the Leniency Notice since '[e]ven inculpatory material may be of only limited use to the Commission, in particular by

55 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 265–273 and 283–287; Case T-343/06 *Shell Petroleum v Commission*, paras 151–182 and 196–237.

56 Case T-343/06 *Shell Petroleum v Commission*, paras 237 and 278.

57 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 302–303.

58 See eg, Case T-348/06 *Total Nederland v Commission*, para. 78; Case T-359/06 *Heijmans Infrastructuur v Commission*, para. 153 (both concerning the 1998 Guidelines).

59 Case T-352/09 *Novácke chemické závody v Commission*, para. 94.

60 Case T-209/08 *Gosselin v Commission* [2011] ECR II-3639, para. 183.

61 Case T-400/09 *Ecka v Commission*, paras 56–71 and 91.

62 *Ibid.*, paras 59 and 91.

63 *Ibid.*, paras 62–66.

reference to earlier submissions by other undertakings'. It is 'the usefulness of information which is the decisive factor in the assessment of the application for a reduction of the fine for cooperation with the Commission'.⁶⁴

(iv) *Authorisation or encouragement of the infringement by public authorities or by legislation.* This mitigating circumstance allows the Commission to grant a reduction of the fine when the anticompetitive conduct has been 'authorised or encouraged by public authorities or by legislation'.⁶⁵

The General Court refused to apply this mitigating circumstance in *GDF Suez*. The Court held that, as a public undertaking, GDF Suez could not rely on the fact that its behaviour was allegedly authorised or encouraged by a law that was contrary to a directive that France had failed to transpose into national law in good time.⁶⁶ In the Court's view, this does not seek to deprive GDF Suez, in its capacity as a public undertaking, of the possibility of relying on the mitigating circumstance in question, but rather demonstrates that, in that capacity, it could not adopt a course of conduct running counter to the objective of the directive, and that therefore the French legal framework neither authorised nor encouraged the conduct at issue in the present case. The Court added that the lack of certainty as to the applicable rules, due to the ongoing liberalization process, could not induce the belief that the anticompetitive conduct was authorised or encouraged by the public authorities or by legislation.⁶⁷

(v) *Reasonable doubt on the existence of the infringement.* Under the 1998 Guidelines the Commission could reduce the amount of the fine where there was a 'reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement'. While this mitigating circumstance is not mentioned in the 2006 Guidelines, it nonetheless remains relevant, as the list of mitigating circumstances in the Guidelines is not exhaustive.

In *Telefónica*, the Court considered that the Commission could discretionarily waive the fine on account of the novelty of the contested conduct, which would not prevent it from subsequently imposing a fine for said type of conduct.⁶⁸ However, in *AstraZeneca* the ECJ held that the novelty of an abuse ought not to be taken into account as a mitigating circumstance in the case where the abuse 'had the deliberate aim of keeping away compe-

titors from the market'. This meant that AstraZeneca 'was aware of the highly anti-competitive nature of its conduct and should have expected it to be incompatible with competition rules'. In addition, the General Court had rightly found that AstraZeneca's conduct 'was manifestly contrary to competition on the merits'.⁶⁹

3. Increase for deterrence

Pursuant to paragraph 30 of the 2006 Guidelines, the Commission may increase a fine to ensure that it has a deterrent effect, particularly where the infringement has an impact beyond the sale of goods or services to which it directly relates. The Commission may also take into account the need to increase the fine in order to outweigh the gains improperly obtained as a result of the infringement.

Cases in 2012 have allowed the Court to provide additional guidance on several points concerning the deterrent multiplier.

First, the General Court has confirmed that the Commission is entitled to rely on the worldwide turnover of the undertakings concerned, as this provides a good, albeit imperfect, indication of the size and market power of said undertakings.⁷⁰ In *UPM Kymmene*, the Court further held that the stronger market power and more prominent role of other members of the cartel, along with the fact that the cartel only represented a small part of the undertaking's turnover and the fact that the latter was only concerned through the actions of its subsidiary, were irrelevant for the purpose of applying the deterrent multiplier.⁷¹

Second, in *Novácke chemické závody*, the General Court held (under the 1998 Guidelines) that while an increase in the fine to be imposed on an undertaking which has a particularly large turnover beyond the sales of goods or services to which the infringement relates may prove necessary in order to ensure that that fine has a sufficiently deterrent effect, it does not follow conversely that a fine which does not represent a significant percentage of the worldwide turnover of the undertaking concerned will not have a sufficiently deterrent effect on that undertaking.⁷² In the Court's view this derives from the fact that a fine determined in accordance with the methodology set out in the 1998 Guidelines represents, in principle, a substantial percentage of the value of sales which the undertaking fined has achieved in the sector

64 Case T-214/06 *ICI v Commission*, paras 252–262.

65 2006 Guidelines (n 6), para. 29, fifth indent.

66 Case T-370/09 *GDF Suez v Commission*, para. 448.

67 Case T-370/09 *GDF Suez v Commission*, para. 451.

68 Case T-336/07 *Telefónica v Commission*, para. 357.

69 Case C-457/10 P *AstraZeneca v Commission*, para. 164.

70 See, in relation to the 1998 Guidelines, Order in Case C-421/11 P *Total v Commission*, para. 80; Case T-448/07 *YKK v Commission*, paras 202–204, and Case T-214/06 *ICI v Commission*, para. 146.

71 Case T-53/06 *UPM Kymmene Oyj v Commission*, paras 76–82 (concerning the 1998 Guidelines).

72 Case T-352/09 *Novácke chemické závody v Commission*, para. 62.

affected by the infringement. Thus, as a result of the fine, that undertaking will see its profits in that sector diminish significantly, and may even record losses. Therefore, even if such undertaking's turnover in that sector represents only a small fraction of its worldwide turnover, this does not necessarily mean that the decline in profits made in that sector, or even their transformation into losses, will not have a deterrent effect, since a commercial undertaking generally operates in a given sector in order to generate a profit.⁷³ As a result, the Commission has the power, but not the obligation, to increase the fine imposed on an undertaking which has a particularly large turnover beyond the sales of goods or services to which the infringement relates.⁷⁴ In our view these principles can be extended to the 2006 Guidelines.

4. Ten per cent ceiling

Pursuant to Article 23(2) of Regulation No 1/2003, the final amount of the fine shall not in any event exceed 10 per cent of the total turnover of the undertaking in the preceding business year. However, the *Britannia Alloys* line of case law has opened the possibility for the Commission in exceptional cases not to use the turnover of the undertaking in the preceding business year where (i) the Commission does not have such a figure at its disposal, or (ii) the last business year does not represent a full year of normal economic activity.⁷⁵

As regards the first exception, the General Court held in *Almamet* that, absent serious evidence casting doubts on the reliability of the relevant figures, the mere fact that accounts have not been audited does not preclude the Commission from using them for the purpose of calculating the 10 per cent increase.⁷⁶

As noted above, the second exception applies when the turnover of the last business year does not represent a full year of normal activity. In *Almamet* and *I. garantovaná*, the Court drew a distinction between two situations in which the turnover had drastically dropped in the preceding year: (i) if the drop can be attributed to the economic context or to a strike or an incident, such turnover is deemed to reflect the normal economic activity of the company and can be taken into account, as opposed to (ii) a drop due to the winding up of the

company or an attempt to divert the turnover of the company with a view to reducing the fine, which would allow the Commission to depart from the normal rule and use the turnover of the previous business year.⁷⁷ In *I. garantovaná*, the board of directors had been given a mandate to sell all or part of the applicant's assets as a first step to stopping its activities, which meant that the Commission was right not to take into account the applicant's turnover corresponding to the last business year before the decision.⁷⁸

Interestingly, in *Novácke chemické závody* the General Court also held that the 10 per cent ceiling is not always sufficient to prevent the fine imposed from being disproportionate. For instance, an undertaking trading in high value materials with a low margin may have a disproportionately high turnover in relation to its profits and assets, which alone will be used to pay the fine. This specific situation may therefore justify a departure from the 2006 Guidelines under paragraph 37 thereof, in particular if the undertaking has a 'relatively focused product portfolio' and does not belong to a large group (see Section V.B.7 below).⁷⁹

5. Application of the Leniency Notice

In 2012 all the cartel cases decided by the Commission were initiated by a leniency application. At the judicial level, in a number of cases, the Court confirmed the Commission's wide margin of discretion in setting the level of the leniency discounts and its reluctance to exercise its unlimited jurisdiction with respect to the level of such discounts (see Section IX.B and C below).

First, the General Court held in *FLSmidth* and *FLS Plast* that a parent company cannot benefit from an application for leniency filed by its subsidiary if they no longer belong to the same group at the time when such application is made.⁸⁰ This remains true even if the Commission has (wrongly) applied a different method to another undertaking that participated in the infringement, as 'a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party'.⁸¹ Importantly, the Court further suggested that such application by a subsidiary will not automatically benefit its current parent company, as the latter must either

73 Ibid., para. 63.

74 Ibid., para. 64.

75 Case T-410/09 *Almamet v Commission*, paras 213–215; more generally, see Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paras 25–30; Case T-33/02 *Britannia Alloys & Chemicals v Commission* [2005] ECR II-4973, paras 37 to 42, 48 to 51, and 74.

76 Case T-410/09 *Almamet v Commission*, paras 250–251.

77 Case T-392/09 *I. garantovaná v Commission*, paras 86–87; Case T-410/09, *Almamet v Commission*, para. 216.

78 Ibid., paras 90 *et seq.*

79 Case T-352/09 *Novácke chemické závody v Commission*, paras 138–140.

80 Case T-65/06 *FLSmidth v Commission*, para 89; Case T-64/06, *FLS Plast v Commission*, para. 169. This applies even if the applicant's inability to provide the Commission with any evidence was due to the fact that the business concerned by the infringement had been divested in the meantime and that the applicant had not kept archives (Case T-53/06, *UPM Kymmene Oyj v Commission*, para. 117).

81 Case T-65/06 *FLSmidth v Commission*, paras 93–96; Case T-64/06 *FLS Plast v Commission*, para. 173–176.

provide information directly or ‘*join in with the cooperation offered by its subsidiary*’. Granting a reduction on the sole basis that two companies are part of the same undertaking would, in the view of the Court, amount to confusing the imputability of the infringement with the imposition of the fine.⁸² In our view this is highly debatable: if, legally, the offender is supposedly the undertaking, why then should an application made by a part of such undertaking not benefit such undertaking, that is, the offender as a whole, in particular if the parent company was not directly involved in the infringement (but only held liable on account of the fact that it controlled its subsidiary)? In any event, this judgment confirms that parent companies would be well advised to always join the leniency applications made by the subsidiaries that they clearly control.

Second, the ECJ and the General Court confirmed that the conditions for ‘partial immunity’ (ie, the exemption applying to an undertaking that is the first to submit compelling evidence which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement) are strict. In *Kuwait Petroleum* the Court insisted on the fact that the leniency procedure ‘*constitutes an exception to the rule that an undertaking must be punished for any infringement of the rules of competition law*’, which means that the relevant rules must be interpreted strictly.⁸³ Their effectiveness must also be protected.⁸⁴ Therefore only ‘*new information relating to the gravity or the duration of the infringement*’—as opposed to mere corroborating evidence—is eligible to a partial immunity under the 2002 Leniency Notice,⁸⁵ which confirms the principle established in *Kone* in 2011.⁸⁶ Similarly, the ECJ found in *Otis* that the evidence must be ‘*sufficiently precise and substantiated to enable the Commission to use it, after verification, in its final decision*’.⁸⁷ The same solution will likely prevail under the 2006 Leniency Notice, as it requires ‘*compelling evidence . . . which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement*’, which means, if one refers to paragraph

25 of the Leniency Notice, evidence that does not need to be corroborated.⁸⁸

6. Ten per cent reduction in case of settlements

Pursuant to the Settlement Notice, where a company acknowledges its liability for the infringement, indicates its willingness to accept a maximum fine, and agrees to waive certain procedural rights (full access to the file and oral hearing), it is eligible to receive a 10 per cent reduction of its fine.⁸⁹ In 2012 the Commission adopted only one decision applying the settlement procedure (out of the four cartel decisions adopted that year),⁹⁰ against two and three decisions in 2010 and 2011 respectively. It is still too early to identify a trend.

7. Inability to pay and departure from the methodology of the 2006 Guidelines

It can now be considered as settled case law that the mere risk of an undertaking going into liquidation is not sufficient to justify a reduction of the fine on this ground.⁹¹ However, as suggested in *I. garantovaná*, the Commission may have to consider a decrease of the fine if the financial penalty risks leading to the disappearance of one or several companies and would affect the market structure.⁹² In this regard, paragraph 35 of the 2006 Guidelines provides that, in exceptional cases, the Commission may, upon request, take account of an undertaking’s inability to pay in specific social and economic circumstances. The Commission enjoys a very wide margin of appreciation to adapt fines on this basis.

In 2012 the Commission seems to have applied only two reductions on this basis, but very significant ones. The first consisted in a 45 per cent reduction to the benefit of one of the undertakings fined in the *Mounting for Windows* case, the second, according to press reports, was an 85 per cent reduction granted to Technicolor in the *TV and computer monitor tubes* case.⁹³ In absolute term, the reduction of the fine amounted to no less than €219 million, that is to say, probably the highest reduction on this account to date.

82 Case T-65/06 *FLSmidth v Commission*, para. 96; Case T-64/06 *FLS Plast v Commission*, para. 175.

83 Case T-370/06 *Kuwait Petroleum v Commission*, para. 34.

84 *Ibid.*, para. 35.

85 *Ibid.*, paras 33 and 37.

86 Case T-151/07 *Kone and Others v Commission*, not yet reported, para. 124.

87 Order of the Court of 15 June 2012 in Case C-494/11 P *Otis and Others v Commission*, para. 89.

88 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006, C 298, p. 17), paras 25 and 26.

89 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) 1/2003 in cartel cases (OJ 2008, C 167, p. 1).

90 Case COMP/39.611—*Water management products* (not taking into account the re-adoption of the *GIS* decision), paras 85–86.

91 Case T-400/09 *Ecka v Commission*, paras 50–51; Case T-352/09 *Novácke chemické závody v Commission*, paras 186–188, 201 and 209; Case T-392/09 *I. garantovaná v Commission*, paras 118–119. See also Case T-452/05 *Belgian Sewing Thread v Commission* [2010] ECR II-1373, paras 95 and 96.

92 Case T-392/09 *I. garantovaná v Commission*, paras 116 and 124 *et seq.*

93 Case COMP/39.452—*Mounting for windows*, summary decision, para. 20; ‘*Antitrust: Commission fines producers of TV and computer monitor tubes EUR 1.47 billion for two decade-long cartels*’, IP/12/1317, 5 December 2012. See GCR, 18 December 2012, ‘*CRT cartelists obtains record inability-to-pay fine cut*’.

At the judicial level, the Courts examined several cases in which applicants unsuccessfully put forward their inability to pay in order to obtain a reduction of their fine.

In *I.garantovaná*, the General Court held that an applicant was barred from relying on this ground when it had decided to terminate its activity and to sell its assets.⁹⁴ Furthermore, as noted above, the mere fact that the imposition of a fine might give rise to the bankruptcy of the undertaking concerned is not sufficient to apply paragraph 35 of the 2006 Guidelines. The undertaking must fulfil the cumulative conditions set out in this provision and establish: (i) that the fine would cause its assets to lose their value, that is, that a takeover by another undertaking is unlikely and that the assets would be unlikely to find a buyer should they be sold separately, and (ii) that this takes place in a special economic and social context, which could lead to an increase in unemployment or to a deterioration of the economic sectors upstream or downstream.⁹⁵

These are very demanding conditions. However, if they are fulfilled, despite its wide discretion with respect to setting the amount of the fine and the use of the conditional tense in paragraph 35 of the 2006 Guidelines, the Commission is bound to grant a reduction.⁹⁶ In addition, the General Court seems to have increased the Commission's duty to state reasons when an undertaking submits detailed information that specifically aims at proving that these conditions are met: in such a case, if the Commission intends to reach a different conclusion, it is required to provide at least a brief summary of the evidence and findings substantiating its conclusion, provided that the information submitted is sufficiently focused on the conditions of paragraph 35 (and in particular explains why a declaration of bankruptcy would jeopardise the undertaking's economic viability and would cause its assets to lose all their value).⁹⁷

On a related but different point, the Court also upheld the possibility for the Commission to tailor the fines to the individual circumstances of each undertaking through the use of paragraph 37 of the 2006 Guidelines, according to which '*the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from [the] methodology*'. This wording obviously leaves much discretion to the Com-

mission. However, in the Court's view, the openness of this safety net does not affect the legality of the 2006 Guidelines read in light of the principle of legality, as in any event a soft law instrument cannot deprive the Commission from the margin of discretion that has been conferred on it by statute: lack of flexibility could on the contrary result in disproportionate fines.⁹⁸

In fact, the *Calcium carbide* case shows that undertakings often benefit from this provision. In *Novácke chemické závody*, the Court noted that the Commission refused to apply paragraph 35 (on inability to pay) to Almamet, but agreed to decrease its fine by 20 per cent on the basis of paragraph 37, due to the fact that Almamet was a small independent trader that did not belong to a large group of companies, that it traded high value materials with a low margin and had a relatively focused product portfolio.⁹⁹ *Novácke chemické závody's* claim that it should have benefitted from the same reduction was dismissed, as Almamet had peculiar characteristics that created risks of a disproportionate fine in spite of the application of the 10 per cent ceiling, in particular a product portfolio that was focused on high value materials with a low margin.¹⁰⁰ Importantly, the summary of the *Mounting for windows* decision confirms that the Commission is now increasingly inclined to take into account the mono-product nature of certain companies to decrease the amount of the fine imposed on them, although at this stage the importance of the decrease granted in this case remains publicly unknown.¹⁰¹

8. Reduction due to the unreasonable length of the proceedings

When the Commission's proceedings are unreasonably long, it sometimes decides, on its own motion, to decrease the amount of the fine imposed.

In *Heineken and Bavaria*, the ECJ upheld the amounts of the fines as revised by the General Court to properly reflect the unreasonable length of the proceedings.¹⁰² It seems to us that the ECJ should have gone a little further. The ECJ upheld the ruling of the General Court insofar as it considered that the Commission was entitled to increase the amount of the fine in 2005 to reflect its deterrence policy. However, the only reason why the administrative proceedings were still ongoing

94 Case T-392/09 *I.garantovaná v Commission*, para. 144.

95 Case T-352/09 *Novácke chemické závody v Commission*, paras 189–193. See also Case T-400/09 *Ecka v Commission*, paras 50–51, 96–99, and 112–115.

96 Case T-400/09 *Ecka v Commission*, paras 48 and 100.

97 Case T-352/09 *Novácke chemické závody v Commission*, paras 205–210.

98 Case T-400/09 *Ecka v Commission*, para. 45.

99 Case T-352/09 *Novácke chemické závody v Commission*, paras 133–134.

100 *Ibid.*, paras 137–148.

101 Case COMP/39.452 — *Mounting for windows*, summary decision, para. 15. See also Press Release IP/12/313 of 28 March 2012 '*Antitrust: Commission fines nine producers of window mountings €86 million for price fixing cartel*'.

102 Case C-452/11 P *Heineken v Commission*, para. 100; Case C-445/11 P *Bavaria v Commission*, para. 80.

at the time was that it took the Commission an unreasonably long time to proceed. In other words, the Commission was able to increase the fine imposed on the applicants thanks to the violation it committed. This seems difficult to reconcile with the *nemo auditur* principle, which applies under EU law.¹⁰³ Furthermore, although in this case the Commission increased the fine but nevertheless applied the 1998 Guidelines (which would have applied absent the excessive duration of the proceedings), the ECJ seems to suggest that its reasoning would remain applicable even if the delay had resulted in the application of the 2006 Guidelines.¹⁰⁴

The question of unreasonably long proceedings was also addressed in *ICI*, where the General Court refused to decrease ICI's fine on this account.¹⁰⁵ As is well known, the reasonableness of the duration of the proceedings must be appraised in light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity, the conduct of the person concerned and that of the competent authorities. Based on this test, the General Court quite strikingly held against the applicant the fact that it had not explained the importance that the €91 million bore for it.¹⁰⁶ This begs the question of whether there actually are undertakings for which a fine of this magnitude is insignificant.

VI. Joint and several liability for the payment of fines

In *FLSmidth* and *FLS Plast* the General Court elaborated on the principle developed in 2011 that a company is only entitled to challenge the calculation of the fine imposed on another company if the contested step in the calculation has an impact on its own fine.¹⁰⁷ The rationale provided by the Court for this approach is that, in spite of the joint liability tying certain offenders together, the decisions of the Commission are bundles of individual decisions. This is consistent with the methodology applied by the Commission which, despite joint and several liability, allows for individualised fines

taking into account the duration of the participation of each company, the mitigating and aggravating circumstances that are either personal to said company or common to the jointly liable companies, as well as the level of cooperation of each company with the Commission. For the same reasons, the fine of a parent company held liable for an infringement committed by its subsidiary is not necessarily equal to the fine imposed on the subsidiary pro rata to the period of control.¹⁰⁸

In fact, the Court further confirmed that where a subsidiary has been controlled successively by several parent companies during the infringement, the combined amount of the fines imposed on the parent companies may exceed the amount of the fine imposed on the subsidiary. In the Court's view, this cannot be considered '*a priori inappropiate*', nor '*manifestly wrong*',¹⁰⁹ a finding that reflects a principle already established in 2010 in *Trioplast Industrier*.¹¹⁰ Another illustration of this principle is that the consequences drawn from the gravity of the infringement committed by a subsidiary must not be allocated to its two successive parent companies so that the total amount of the fine imposed on the two parent companies is not greater than the one that would have been imposed on a parent company that would have controlled the subsidiary for the whole duration of the infringement.¹¹¹ In other words, it does not matter that the sale of the subsidiary during the infringement had no impact on the gravity of the infringement, as the aggregate, total fine is increased because of the personal situation of each parent company.

Similarly, different deterrent multipliers can be applied to entities that are held jointly and severally liable.¹¹² However, the 10 per cent ceiling of the fine is calculated with respect to the total turnover of all the companies that are held jointly and severally liable for the payment of the fine on account of them forming a single undertaking.¹¹³ This substantially increases the maximum amount of the fine, although in the recent past the Commission has sometimes applied this rule flexibly.¹¹⁴

103 Case T-141/01 *Entorn and other v Commission* [2005] ECR II-121, para. 121.

104 Case C-452/11 P *Heineken v Commission*, paras 92–101; Case C-445/11 P *Bavaria v Commission*, paras 73–81.

105 Case T-214/06 *ICI v Commission*, paras 291–319.

106 Case T-214/06 *ICI v Commission*, para. 306.

107 Case T-65/06 *FLSmidth v Commission*, paras 42 and 54, and Case T-64/06 *FLS Plast v Commission*, para. 108. On the same issue, see also Case T-392/09 I. *garantovaná v Commission*, para. 122.

108 Case T-65/06 *FLSmidth v Commission*, para. 44.

109 Case T-64/06 *FLS Plast v Commission*, para. 99.

110 Case T-40/06 *Trioplast Industrier v Commission* [2010] ECR II-4893, para. 76.

111 Case T-214/06 *ICI v Commission*, paras 107–136.

112 Order in Case C-421/11 P *Total SA v Commission*, paras 82–83.

113 Case T-448/07 *YKK v Commission*, paras 192–193.

114 See in particular Case COMP/38.344 *Prestressing Steel*, paras 1072a–1072b, Commission Decision of 30 June 2010. The Commission '*took this decision because, in this specific case, the parent companies were liable for only a small proportion of the infringement and therefore of the fine, while the subsidiaries were solely liable for a much greater portion of the fine*' (J. Almunia, 'Recent developments and future priorities in EU competition policy, International Competition Law Forum', St Gallen, 8 April 2011).

VII. Calculation of fines imposed for other infringements

A. Obstruction

The Commission may impose a fine on a company for obstruction or consider the conduct as an aggravating circumstance, but not both at the same time.¹¹⁵ At this stage the leading case where obstruction was sanctioned as a standalone infringement remains *E.ON Energie*. In 2012 the ECJ upheld the judgment of the General Court and the fine imposed on E.ON Energie concerning the breaking of a seal affixed by Commission officials to secure documents collected in the course of an unannounced inspection. In particular, the ECJ confirmed that it is irrelevant to determine whether or not someone actually entered the room after breaking the seal, as the mere doubt cast on the integrity of the evidence in itself is sufficient to justify imposing a fine.¹¹⁶ The ECJ also found that the fine of €38 million, which represented 0.14 per cent of E.ON's annual turnover, 'could not be considered as excessive as regards the need to ensure its deterrent effect'.¹¹⁷ This shows that tampering with the Commission's investigation, be it by negligence, can trigger very harsh consequences.

This is also evidenced by the *EPH* decision, which concerned a case of tampering with e-mails during an inspection.¹¹⁸ In this case the Commission imposed a fine which, even though it was not huge in absolute terms (as it amounted to €2,500,000), was not insignificant in relative terms (as it corresponds to 0.25 per cent of the turnover of the undertaking concerned). *EPH*'s subsidiary had obstructed the inspection (i) by unblocking the e-mail account of one of the key persons targeted by the inspection, and (ii) by diverting the e-mails of at least one other key person. The Commission took this opportunity to reassert the necessary deterrent effect of procedural fines for obstruction. More specifically, the Commission insisted on the need to bear in mind the fine for breach of substantive law when setting the amount of the procedural fine so as 'to ensure that it does not pay off for companies to take the risk of a procedural fine in order to avoid a potentially high fine for breaches of substantive law'.¹¹⁹ With respect to gravity, the Commission stressed the special nature of electronic records on account of the higher risk of manipulation and deletion.¹²⁰ In addition, the Commission assessed the

gravity of an infringement objectively, that is, irrespective of whether it was committed negligently or intentionally.¹²¹

B. Non-compliance with a decision finding an infringement

Under Article 24 of Regulation No 1/2003, the Commission can impose periodic penalty payments on undertakings, not exceeding 5 per cent of the average daily turnover in the preceding business year, calculated from the date indicated in the decision, to compel them to, *inter alia*, comply with a decision. As a general comment, in *Microsoft*, the Court highlighted the similarities between fines and periodic penalties, insofar as they both relate to past conduct of an undertaking and call for deterrence of similar behaviour in the future. In light of these similarities, the imposition of a periodic penalty payment does not presuppose that the obligations of the person in question have to be specified more precisely than when the Commission considers imposing a fine.¹²²

In this case, the General Court nonetheless exercised its unlimited jurisdiction to decrease the amount of the periodic penalty imposed by the Commission—which incidentally was already lower than that laid down by the first decision imposing a penalty payment—so as to reflect the fact that the Commission had induced Microsoft into believing that it was entitled 'to implement, for a period of time, a practice liable to have anti-competitive effects that the 2004 decision was intended to put an end to'.¹²³

In *Mastercard*, the General Court upheld the penalty of 3.5 per cent of Mastercard's daily consolidated global turnover in case of non-compliance with any of the measures ordered in its decision, that is, 70 per cent of the maximum amount under article 24 of Regulation No 1/2003.¹²⁴ The General Court found that the Commission had given sufficient reasons for the potential imposition of the penalty payment, as it took into account the existence of a serious risk that MasterCard would continue to apply multilateral interchange fees or attempt to circumvent the remedy imposed. As to the amount of the periodic payment, the Court found that the Commission had given sufficient reasons when it referred to (i) the need to set periodic penalty payments at a level that makes it economically rational for the undertaking

115 Case T-384/06 *IBP v Commission*, para. 109.

116 Case C-89/11 P *E.ON Energie v Commission*, paras 128–133.

117 *Ibid.*, para. 133.

118 Case COMP/39.793, *EPH and others*, Decision of 28 March 2012.

119 *Ibid.*, para. 83.

120 *Ibid.*, paras 83 and 87.

121 *Ibid.*, para. 89.

122 Case T-167/08 *Microsoft v Commission*, para. 94.

123 *Ibid.*, para. 226.

124 Case T-111/08 *MasterCard and Others v Commission*, paras 316–318.

to comply with the decision rather than reap the benefits of non-compliance; (ii) the substantial size of the MasterCard payment organization, and (iii) what it saw as a past attempt to hamper the application of competition law through the IPO of MasterCard.

C. Gun jumping

The EU Merger Regulation prohibits implementation of concentrations with a Community dimension before the Commission has cleared them.¹²⁵ Article 14 of the Merger Regulation contributes to the effect of this rule by allowing the Commission to impose fines of up to 10 per cent of the aggregate turnover of the undertaking(s) acquiring control of another undertaking, without having received prior approval under the EU Merger Regulation. This practice is known as ‘gun jumping’.

As noted above, *Electrabel* is the first judgment reviewing a decision taken on these grounds.¹²⁶ In this case the Commission imposed a €20 million fine on Electrabel for acquiring control of *Compagnie Nationale du Rhône*, another electricity producer, without having received prior approval under the Merger Regulation.¹²⁷ In reviewing the amount of the fine, the Court insisted on the fact that the 2006 Guidelines are not applicable to merger control decisions: ‘[a]lthough parallels may no doubt be drawn with respect, in particular, to the application of the case-law on certain general principles in the field of competition law’, the Commission cannot be criticised for not having followed any particular method set out in the 2006 Guidelines.¹²⁸ The Court also confirmed the seriousness of the infringement in view of the fundamental importance of the standstill obligation in guaranteeing the effectiveness of the EU merger control system, irrespective of whether the infringement had been committed voluntarily or negligently, or the fact that the non-notified merger had no adverse effects on competition (even though the existence of such effects can be taken into account).¹²⁹ As an important aside, it added that ‘concealment would constitute an element of intent which could have justified an increase of the amount of the fine’.¹³⁰

Finally, the Court held that the fine was proportionate due to the seriousness and duration of the infringement, which was ‘far removed from excusable error and was inappropriate when the circumstances were taken into

account’. Taking into account the need to ensure that fines have a sufficient deterrent effect, the Court noted that the €20 million fine corresponded to only around 0.04 per cent of the Suez group’s turnover and therefore did ‘not seem disproportionate to the aim pursued, namely to protect the system of prior notification and approval of the putting into effect of a concentration of a Community dimension’, and was ‘proportionate to the infringement assessed as a whole’.¹³¹

VIII. Procedural issues concerning fines

With respect to the right to be heard, the case law seems to be increasingly strict towards applicants.

First, in *1. garantovaná*, the Court considered that an undertaking is deemed to have been given the opportunity to be heard on evidence it has itself submitted, regardless of the fact that at the time the undertaking was unaware of the way in which the Commission intended to use said information.¹³² This rule is excessively harsh, especially in light of the fact that, in this case, the Commission used the information to depart from the rule according to which the 10 per cent cap is calculated on the basis of the turnover of the preceding year. We find it problematic that in the Court’s view the Commission was not bound to warn *1. garantovaná* of its intention to exceptionally depart from this rule, based on the fact that ‘the legal consequences that the Commission is going to draw from an assessment of the relevant facts of a case form part of the final position that it intends to adopt, to which the right to be heard does not extend’.¹³³ Is this in line with a judgment like *ADM*, where in substance the ECJ underlined the need to allow an undertaking to understand at least the basic relevance that the Commission may give to certain factual elements used to increase the fine?¹³⁴

Second, in *Koninklijke Wegenbouw Stevin*, the mere assertion by the Commission in its statement of objections that it intended to take each undertaking’s individual role into account when fixing the amount of the fine and the fact that lack of cooperation with the Commission is listed in the 2006 Guidelines as an aggravating circumstance were deemed sufficient by the Court to consider that there had been no violation of the undertaking’s rights to be heard on this ground.¹³⁵ This appears like a regression

125 Regulation No 139/2004, cited above.

126 Case T-332/09 *Electrabel v Commission*.

127 Case COMP/M.4994, *Electrabel/Compagnie nationale du Rhône*, Commission Decision of 10 June 2009, paras 226–227.

128 Case T-332/09 *Electrabel v Commission*, paras 227–228 and 272.

129 *Ibid.*, paras 234–239 and 246–247.

130 *Ibid.*, para. 277.

131 *Ibid.*, paras 281–283.

132 Case T-392/09 *1. garantovaná v Commission*, para. 79.

133 *Ibid.*, para. 78.

134 Case C-511/06 P *ADM v Commission* [2009] ECR I-5843, paras 68–72, 79–96, and 133–137.

135 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 217–218.

compared to judgments like *Hoechst*, where the General Court (at that time the Court of First Instance) considered that the lack of precision in the statement of objections concerning the characterisation of Hoechst's role prevented that undertaking from adopting an effective defence on its alleged leadership in the infringement.¹³⁶ This may also be contrary to the ECJ judgment in *ADM*.¹³⁷

IX. Fines before the EU Courts

As in 2011, this year the most significant developments concerning fines before the EU Courts related to: (i) the strict application of the obligation to pay the fine while an appeal is pending; (ii) the control of legality and the limitation of the EU Courts' control of certain elements of the fine; and (iii) the EU Courts' unlimited jurisdiction.

A. Application of the obligation to pay the fine while an appeal is pending

Suspension of a decision imposing fines or other interim measures may be ordered by the President of the General Court if it is established that such an order is justified, *prima facie*, in fact and in law and that it is urgent, in order to avoid serious and irreparable harm to the applicant's interests.¹³⁸

Over the past years, the number of orders issued by the Presidents of the General Court and the ECJ on interim measures has varied quite significantly. In 2012, there was only one such order, in which the President of the ECJ reviewed the level of financial information required to prove that suspension was justified. According to the President, while the impossibility to obtain a bank guarantee may appear on the basis of the applicant's financial statements alone, the applicant is generally required to submit evidence that it sought assistance in facing the fine from financial institutions and that such assistance was denied. The President approved the General Court's case law according to which, when the applicant relies on banks' letters of refusal, the content of such letters of refusal must enable the judge hearing the application for interim measures 'to determine the seriousness of the corresponding requests for bank guaran-

tees and the context in which they were made'. As a rule, it is therefore for the applicant to provide, 'when lodging the application for interim measures', that is, at the very beginning of the proceedings, 'unequivocal and sufficiently complete information on the banks' letters of refusal upon which it relies in order to prove that it was objectively impossible for it to provide the requisite bank guarantee'.¹³⁹ This rule is of major importance, as applications for interim relief are commonly dismissed due to the lack of sufficient information in this regard.

B. Control of legality: Limitation of the EU Courts' control of certain elements of the fine

Despite being limited by the objective criteria set out in the 2006 Guidelines and its duty to justify any departure from the methodology set out therein,¹⁴⁰ the Commission's margin of appreciation in setting fines remains considerable.¹⁴¹ In 2012 the General Court has once again sent signals that it would limit its control of legality on certain elements of the calculation of the fine.

First, on several occasions, the General Court reasserted that the Commission had a 'wide margin of discretion when setting the amount of fines'¹⁴² and that its control of legality 'in areas where the Commission has maintained a discretion, for example as regards the starting amount of a fine or the uplift for duration', is limited to ascertaining that the Commission has not committed a manifest error.¹⁴³ In recent judgments this standard of review seems to be interpreted by the Court as: (i) ensuring that the considerations which the Commission relied on are 'coherent and objectively justified', which implies that 'the Courts must not immediately substitute their own assessment for that of the Commission';¹⁴⁴ or as controlling that the fine is proportionate to the gravity and duration of the infringement and weighing the gravity of the infringement and the circumstances invoked by the applicant.¹⁴⁵

As indicated in the previous edition of this survey, this approach is over-restrictive and open to criticism. If a certain margin of discretion can be required for the purpose of allowing the Commission to shape its competition policy, this ought in any case to be limited to the general level of its fines and to complex economic appraisals. And even if one agreed with the General

136 Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paras 420–439 and 607–610.

137 Case C-511/06 P *ADM v Commission* [2009] ECR I-5843, paras 68–72, 79–96, and 133–137.

138 Order of the President of the Court of 14 October 1996 in Case C-268/96 P@ *SCK and FNK v Commission* [1996] ECR I-4971, para. 30.

139 Order of the President of the Court of 20 April 2012 in Case C-507/11 P@ *Fapricela v Commission*, para. 36. See also paras 53, 55, and 67.

140 See, eg, Case T-410/09 *Almamet v Commission*, para. 187.

141 See, eg., Case T-392/09 *I. garantovaná v Commission*, para. 112.

142 See eg, Case T-336/07 *Telefónica v Commission*, paras 429–430.

143 See eg, Case T-439/07 *Coats Holdings v Commission*, para. 185.

144 Case T-76/08 *El du Pont de Nemours v Commission*, paras 124 and 127; Case T-77/08 *Dow Chemicals v Commission*, para. 142.

145 See eg, Case T-362/06 *Ballast v Commission*, paras 121; Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, para. 195.

Court that assessing the added value of the evidence provided by an undertaking in the context of a leniency programme triggers ‘complex assessments’ justifying a limited review,¹⁴⁶ it is doubtful that, for instance, granting a reduction of the fine to an undertaking which benefits from the leniency procedure by taking into consideration only the timing, as opposed to the usefulness and quality of the information, requires any complex assessments.¹⁴⁷

In fact in 2012 the General Court confirmed that the Commission benefits from a wide margin of appreciation which extends to almost every aspect of the calculation of the fine. As regards the basic amount of the fine, in *GDF Suez*, the General Court found that the Commission ‘did not err’—not that it did not make any manifest error of appreciation—when it set the gravity percentage at 15 per cent.¹⁴⁸ However, in *Dow Chemical*¹⁴⁹ and *EI du Pont de Nemours*,¹⁵⁰ the General Court carried out a limited review of the multiplier applied to reflect the duration of the infringement. According to the Court, when the Commission sets progressive thresholds which may have the effect of ignoring the differences which may exist between the exact durations during which the undertakings participated in the infringement, the Court’s ‘review of the lawfulness of the exercise of the Commission’s discretion in the matter must confine itself to checking that the thresholds set are coherent and objectively justified and the Courts must not immediately substitute their own assessment for that of the Commission’.¹⁵¹

Finally, with respect to the individualization of the fine, the Courts leave ample discretion to the Commission when it decides whether or not to take into account mitigating¹⁵² or aggravating circumstances.¹⁵³ Similarly, in *FLSmidth*, *EI du Pont de Nemours*, *YKK*, *FLS Plast*, *Dow Chemical*, *Nynäs*, and *Kuwait Petroleum*, the General Court carried out a limited review of the assessment made by the Commission of the cooperation

provided by undertakings in order to benefit from a reduction.¹⁵⁴

C. Exercise of unlimited jurisdiction

According to Article 31 of Regulation No 1/2003, the Courts have unlimited jurisdiction in actions brought against decisions whereby the Commission has imposed a fine. The EU Courts may therefore cancel, reduce, or increase the fine imposed. The EU Court’s unlimited jurisdiction is—as its name indicates—extremely broad. Pursuant to the ECJ in *Danone*, ‘the [EU] judiciary is empowered to exercise its unlimited jurisdiction where the question of the amount of the fine is before it’.¹⁵⁵ However, over the last 30 years, one of the main characteristics of the EU Courts’ unlimited jurisdiction has been the discrepancy between the judge’s ample powers and the very limited—and at times insufficient—use made of such powers. Such self-inflicted restraint is regrettable considering the importance of the Courts’ unlimited jurisdiction for the rights of the defence of applicants.¹⁵⁶

In 2011, this survey noted that the General Court seemed more eager than before to exercise its jurisdiction. 2012 conveys a completely different impression. As explained below, this is probably the result of the *KME* judgment of 8 December 2011.¹⁵⁷

1. Must the parties specifically ask the Court to exercise its unlimited jurisdiction?

In the past, the EU courts sometimes did not shy away from exercising their unlimited jurisdiction even in the absence of any arguments made to this effect by the applicant. This trend is clearly not dead, since this year the General Court reduced the amount of the periodic penalty payment imposed on Microsoft based on arguments which, apparently, the applicant had not formally raised.¹⁵⁸

Yet the signs of this proactive trend tend to be less frequent. On several occasions over the past year, the General Court restated the principle expressed in *KME*

146 Case T-76/08 *EI du Pont de Nemours v Commission*, para. 145; Case T-77/08 *Dow Chemicals v Commission*, para. 164.

147 Case T-76/08 *EI du Pont de Nemours v Commission*, paras 145–151; Case T-77/08 *Dow Chemicals v Commission*, paras 164–170.

148 Case T-370/09 *GDF Suez v Commission*, para. 422 (in the official language of the case: ‘c’est sans commettre d’erreur que la Commission a estimé’).

149 Case T-77/08 *Dow Chemicals v Commission*, para. 142.

150 Case T-76/08 *EI du Pont de Nemours v Commission*, paras 124 and 127.

151 Case T-76/08 *EI du Pont de Nemours v Commission*, para. 127, and Case T-77/08 *Dow Chemicals v Commission*, para. 142, referring, to that effect and by analogy, *Itochu v Commission*, [2009] ECR II-883, paras 73 and 74.

152 Case T-336/07 *Telefónica v Commission*, paras 455–456; Case T-332/09 *Electrabel v Commission*, para. 272; Case T-83/08 *Denki Kagathu v Commission*, para. 240.

153 Case T-448/07 *YKK v Commission*, para. 212 (for recidivism).

154 Case T-65/06 *FLSmidth v Commission*, para. 83; Case T-76/08 *EI du Pont de Nemours v Commission*, paras 138 and 145; Case T-448/07 *YKK v Commission*, paras 165 and 171; Case T-64/06 *FLS Plast v Commission*, para. 163; Case T-77/08 *Dow Chemicals v Commission*, para. 164; Case T-347/06 *Nynäs Petroleum and Other v Commission*, para. 62; Case T-370/06 *Kuwait Petroleum v Commission*, paras 39, 49, 63, 66, 67, and 69 (in the two last cases the Court nonetheless held that it ‘undertakes a comprehensive review concerning, in particular, the extent to which the undertakings’ rights of defence limit their obligation to reply to requests for information’, *Ibid.*, same paras).

155 Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, para. 62.

156 Case T-392/09 *I. garantovaná v Commission*, para. 69.

157 Case C-389/10 P *KME Germany and Others v Commission*, not yet published.

158 Case T-167/08 *Microsoft v Commission*, paras 222 *et seq.*

according to which the Court's unlimited jurisdiction does not imply a review of its own motion of the fines imposed, save with respect to public policy matters, such as the duty to state reasons.¹⁵⁹ The General Court now seems increasingly reluctant to correct fines in the absence of a specific request made by the parties. By way of example, in *Koninklijke*, the General Court suggested that where the applicant requests it to exercise its unlimited jurisdiction only to correct errors of law and fact made by the Commission, as opposed to substituting its appreciation for that of the Commission, the Court must only examine whether such errors can be found and, where appropriate, correct the fine. Interestingly, the General Court did not seem very confident on this point, as it added that, in any event, the arguments raised by the applicant did not justify an appreciation different from that of the Commission.¹⁶⁰

2. When must the parties make a request?

In *Ballast*, *Total*, and *Shell Petroleum*, the General Court held that, when exercising its unlimited jurisdiction, it may allow new pleas and arguments (ie, made in the reply or at the hearing) only on the twofold condition that those pleas and arguments are effective for the purpose of its unlimited jurisdiction, and that they are not based on grounds of illegality different from those raised in the application.¹⁶¹ In our view this approach is excessively restrictive and contradictory with previous case law.¹⁶² *Prima facie* it may also appear as contradictory with less restrictive judgments delivered in 2012, such as *ICI*, in which the Court examined the excessive length of the proceedings even though such plea was raised for the first time at the hearing, which could have given rise to a debate with respect to its admissibility.¹⁶³ However, the contradiction with this judgment is only apparent: since the plea criticised the overall duration of the proceedings in relation to the applicant, namely the combined duration of the administrative and judicial

proceedings, it could not have been raised in the application for annulment.¹⁶⁴

3. Is a finding of illegality necessary?

In our view the answer is clearly negative. This year for instance, the General Court exercised its unlimited jurisdiction to decrease the amount of the penalty payment imposed on Microsoft without having found an illegality.¹⁶⁵ Similarly, in certain sections of the *EI du Pont de Nemours*, *Dow Chemicals*, *Denki Kagatu*, *Total Nederland*, *Nynäs Petroleum*, *Novácke chemické závody*, and *GDF Suez* judgments, the General Court seemed prepared to exercise its unlimited jurisdiction irrespective of any illegality of the decision, although it declined to do so in these cases.¹⁶⁶

Yet in other cases—or other sections of the same judgments—the General Court took a more restrictive stance. For instance *EI Dupont de Nemours* and *Almamet* may be interpreted as meaning that, as a prerequisite of the exercise of its unlimited jurisdiction, the Court must have made a finding of illegality.¹⁶⁷ However these judgments remain ambiguous, and a restrictive approach would be at odds with some of the cases commented on in the previous edition of this survey, such as the rulings in *Bavaria*, *Heineken*, and *Arkema* which led the Court to reduce the fine without making any finding of illegality.¹⁶⁸

4. To what extent do the Courts substitute their appreciation for that of the Commission?

The General Court often exercises its unlimited jurisdiction, after rejecting a plea of illegality, to confirm its reasoning, that is, to concur with the Commission's appreciation.¹⁶⁹ By contrast there are fewer cases in which the Court exercises its unlimited jurisdiction to make findings contrary to those of the Commission or that depart from the general methodology followed in the decision challenged.

159 Case T-332/09 *Electrabel v Commission*, paras 221–222; Case T-410/09 *Almamet v Commission*, para. 270. See also Case T-360/09 *E.ON Ruhrgas v Commission*, para. 298. Case C-389/10 P *KME Germany and Others v Commission*, not yet published, para. 131.

160 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 169–170.

161 Case T-362/06 *Ballast v Commission*, paras 136–141; Case T-344/06 *Total v Commission*, paras 97–99; Case T-343/06 *Shell Petroleum v Commission*, paras 272–273.

162 See eg, Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para. 884.

163 Case T-214/06 *ICI v Commission*, paras 291–297.

164 *Ibid.*, para. 297.

165 Case T-167/08 *Microsoft v Commission*, paras 222 *et seq.*

166 Case T-76/08 *EI du Pont de Nemours v Commission*, para. 164; Case T-77/08 *Dow Chemicals v Commission*, para. 181; Case T-83/08 *Denki Kagatu v*

Commission, para. 264; Case T-348/06 *Total Nederland v Commission*, paras 124, Case T-347/06 *Nynäs Petroleum and Other v Commission*, para. 118, Case T-352/09 *Novácke chemické závody v Commission*, paras 212–214 and 229; Case T-370/09 *GDF Suez v Commission*, paras 405, 411, 424, and 433.

167 Case T-76/08 *EI du Pont de Nemours v Commission*, para. 133. See also, albeit in ambiguous terms, Case T-410/09 *Almamet v Commission*, para. 277.

168 Case T-240/07 *Heineken v Commission* [2011] ECR II-3355, paras 429–434; Case T-235/07 *Bavaria v Commission* [2011] ECR II-3329, paras 340–343; Case T-217/06 *Arkema v Commission* [2011] ECR II-2593, paras 247–280, and 339–353.

169 Case T-392/09 *I. garantovaná v Commission*, para. 149; Case T-400/09 *Ecka v Commission*, paras 91 and 119; Case T-352/09 *Novácke chemické závody v Commission*, para. 229; Case T-410/09 *Almamet v Commission*, paras 273–275.

This year the General Court noted in both *E.ON Ruhrgas* and *GDF Suez* that, when it exercises its unlimited jurisdiction, it ‘must make its own appraisal, taking account of all the circumstances of the case.’¹⁷⁰ Yet the EU Courts have also been quite reluctant to depart from the methodology set out in the 2006 Guidelines.

For instance in *Coppens*, the ECJ indicated that it may use the Guidelines as ‘guidance’ to calculate the fine where the Commission has applied them to other undertakings penalised by the decision which those Courts are asked to examine.¹⁷¹ In the ECJ’s view, this is justified by the fact that ‘the exercise of unlimited jurisdiction cannot result, when the amount of the fines to be imposed is determined, in discrimination between undertakings which have participated in an agreement or concerted practice.’¹⁷² Similarly, in *Ballast*, although the General Court insisted on the fact that the 1998 or the 2006 Guidelines are not binding on it, it held that it may have to rely on the methodology set forth therein, when reviewing the fine, in particular to avoid discrimination between the undertakings sanctioned.¹⁷³ This shows the strong paradox that characterizes the 2006 Guidelines: while they are just soft law, they may go as far as constraining the EU Courts’ unlimited jurisdiction.

Along the same lines, in *Koninklijke* the General Court referred to the previous decision-making practice of the Commission—not even the Guidelines—as useful guidance to determine whether a fine should be increased on the grounds of obstruction.¹⁷⁴

5. What control on appeal before the ECJ?

In *Heineken* and *E.ON Energie*, the ECJ reiterated that, when it rules on an appeal against a judgment of the General Court, it must not substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction on the amount of fines.¹⁷⁵ In the ECJ’s view, this meant, therefore, that ‘only inasmuch as [it] considers that the level of the penalty is not merely inappropriate, but also excessive

to the point of being disproportionate, would it have to find that the General Court erred in law, due to the inappropriateness of the amount of a fine.’¹⁷⁶ Such review is further limited by the fact that the ECJ is content with very succinct reasoning in certain cases,¹⁷⁷ and now increasingly rules on cases by way of order under article 181 of the Rules of Procedure.¹⁷⁸

6. The General Court’s readiness to increase fines

In certain cases the General Court seems prepared to exercise its unlimited jurisdiction to increase the fine imposed on the applicant, even in the absence of any request made by the Commission.

First, in *Koninklijke* the General Court compared the 10 per cent increase imposed on the applicant for obstruction of the Commission’s investigation with the previous decision-making practice of the Commission, and ruled that in view of the relatively limited length of the obstruction it had no reason to increase the fine.¹⁷⁹ This shows that, as a matter of principle, an increase was not excluded.

Second, in *Novácke chemické závody*, the Court recalled that where there has been an unequal treatment of a number of participants in an infringement owing to the fact that the gravity of the offending conduct of some participants was underestimated by comparison to that of others, the most appropriate way of restoring a fair balance would be to increase the amount of the fine imposed on the former.¹⁸⁰ This presupposes, however, that the participants in the infringement whose fines are to be increased have challenged their fines before the General Court and have been given the opportunity to comment on such increase. If those conditions are not fulfilled, the most appropriate means of remedying the unequal treatment is for the fine imposed on the other participants in the infringement to be reduced.¹⁸¹

Third, in *Shell Petroleum*, the General Court examined whether it should increase a fine due to the fact that the applicants submitted for the first time before the Court

170 Case T-360/09 *E.ON Ruhrgas v Commission*, para. 301; Case T-370/09 *GDF Suez v Commission*, para. 462.

171 Case C-441/11 P *Commission v Verhuizingen Coppens*, para. 80.

172 Case C-441/11 P *Commission v Verhuizingen Coppens*, para. 80, referring to Case C-291/98 P *Sarrió v Commission* [2000] ECR I-9991, paras 97 and 98, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para. 337.

173 Case T-362/06 *Ballast v Commission*, paras 143–145.

174 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 253–255.

175 Case C-452/11 P *Heineken Nederland v Commission*, para. 125, C-89/11 P *E.ON Energie v Commission*, paras 125.

176 *Ibid.*, para. 126.

177 Case C-181/11 P *Cetarsa v Commission*, para. 114.

178 See, Case C-654/11 P *Transcatlab v Commission*; Case C-495/11 P *Total and Other v Commission*; Case C-421/11 P *Total v Commission*; Case C-404/11 P *Elf Aquitaine v Commission*; Case C-494/11 P *Otis Luxembourg and Others v Commission*; Case C-493/11 P *UTC v Commission*; Case C-593/11 P *Alliance One International v Commission*. Pursuant to article 181 of the Rules of Procedure: ‘where the appeal or cross-appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal or cross-appeal in whole or in part.’

179 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 253–255.

180 Case T-352/09 *Novácke chemické závody v Commission*, para. 55, citing to this effect Joined Cases T-67/00, T-68/00, T-71/00, and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para. 576.

181 Case T-352/09 *Novácke chemické závody v Commission*, para. 56.

two documents which, in their view, established that the Commission ought not to have taken into account the turnover from Mexphalte C when determining Shell's turnover relating to road pavement bitumen in the Netherlands. The Court exercised its control of legality without taking those documents into account.¹⁸² On the other hand, it accepted a request to analyse said documents in the exercise of its unlimited jurisdiction. This may well have resulted in a pyrrhic victory: the Court added that in view of the undertaking's duty to cooperate actively when it is sent a request for information, in the exercise of its unlimited jurisdiction, the Court may take account, where relevant, of an undertaking's lack of cooperation and consequently increase the fine imposed on it, on condition that that undertaking has not been punished in respect of that same conduct by a specific fine.¹⁸³ In the Court's view, that could, for example, be the case where, in reply to a request to that effect from the Commission, an undertaking has failed to submit, intentionally or negligently, during the administrative procedure, decisive evidence for the setting of the amount of the fine and which was or might have been in its possession at the time of adoption of the contested decision. More specifically, *'an undertaking which relies on such evidence only at the judicial stage of the proceedings, thus prejudicing the purpose and the proper conduct of the administrative procedure, exposes itself to the risk that that factor will be taken into consideration when the Court determines the appropriate amount of the fine'*.¹⁸⁴ In the present case, the applicants had made it clear to the Commission that they were of the opinion that turnover for Mexphalte C ought not to be taken into account in the determination of their fine, and therefore they had not failed to fulfil their obligation of sincere cooperation during the administrative procedure by not providing the documents, although those documents could have been submitted during that procedure.¹⁸⁵

Finally, in several cases the General Court exercised its unlimited jurisdiction to—at least indirectly—increase the amount of the fine imposed on the undertaking.

In *GDF Suez and E.ON Ruhrgas*, the Commission had not established to the requisite legal standard that the infringement in question continued after 10 August 2004 and until 30 September 2005 insofar as it related to the French market for gas. The General Court therefore

decreased the fine, but not to the level that would have resulted from the application of the method chosen by the Commission, as this would have entailed a reduction of the applicant's fine *'greatly disproportionate to the relative importance of the error which has been found to exist'*: although the Commission's error related only to one of the two markets and only to 12.5 months of the 5.2 years initially established for the infringement committed on that market, the application of the Commission's method would have resulted in a reduction in the amount of the fine of more than 50 per cent (probably because, first, the Commission had calculated the amount of the fine on the basis of the average value of sales during the duration of the infringement and, second the sales of the period that were now to be excluded were very important, thereby causing the average to decrease dramatically). Accordingly, the General Court decreased the fines imposed on GDF Suez and E.ON from €553 million to €320 million instead of €267 million.¹⁸⁶

In both cases, before indirectly increasing the amount of the fine, the General Court was cautious to hear the parties at the hearing *'on the possible consequences of a partial annulment of the contested decision so far as concerns the determination of the amount of the fine in the light of the duration of the infringement on the French market'*.¹⁸⁷

Along the same lines, in *Koninklijke* the Court found that the Commission had wrongly qualified the applicant as both instigator and leader of the cartel, when it should have applied the sole qualification of leader. After examining the single increase in the fine applied for both qualifications, the Court considered it appropriate even if only one of the qualifications were to apply and therefore left the increase unchanged, which amounts to an indirect increase.¹⁸⁸

Of course the EU Courts are absolutely free to depart, in these cases and in others, from the method applied by the Commission. But there is something quite disturbing in the fact that, at least this year, they deemed it appropriate to exercise their powers to their full extent only to the detriment of offenders.

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182 Case T-343/06 *Shell Petroleum v Commission*, paras 104–105.

183 *Ibid.*, para. 118.

184 *Ibid.*, para. 119.

185 *Ibid.*, paras 125–126.

186 Case T-370/09 *GDF Suez v Commission*, paras 460–466; Case T-360/09 *E.ON Ruhrgas v Commission*, paras 299–305.

187 Case T-370/09 *GDF Suez v Commission*, para. 466; Case T-360/09 *E.ON Ruhrgas v Commission*, para. 305.

188 Case T-357/06 *Koninklijke Wegenbouw Stevin v Commission*, paras 301–303.