Developments under articles 101 and 102 TFEU in 2010

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Regulation 330/2010 Art.4(b)(iii).

downstream market where he sells the goods.

See Regulation 330/2010 Art.3. Previously, the buyer's share on the purchasing market was only relevant if the agreement provided for exclusivity in favor of the supplier.


Commission Notice, Guidelines on Vertical Restraints [2010] OJ C130/1. For a detailed discussion, see G. De Stefano, “The new EU ‘Vertical Restraints Regulation':

Regulation 330/2010 on the application of Art.101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

In 2010, the block exemptions for horizontal and vertical restraints. Fines assessed against participants in hardcore cartels totalled close to €3 billion, the second highest figure ever; this total includes the fines accepted by companies in the first two settlements of cartel cases. Joaquin Almunia, a Spanish top-level politician with a strong intellectual background in both economics and law, succeeded Neelie Kroes as Competition Commissioner. The European courts again handed down a number of important judgments, in particular with respect to TFEU Art.102. This article will concentrate on the most significant developments.

Legislation

The overhaul of existing block-exemption regulations and guidelines was completed during the course of the year. The reform of motor-vehicle distribution and the corresponding aftermarket regime as well as the new insurance block exemptions have been summarised in last year’s report. In 2010, the block exemptions for horizontal and vertical agreements were revised, including accompanying guidelines. These are described further below. Overall, the reform cycle of 2010 brought relatively marginal changes into the existing legislative framework, the major revolution having occurred 10 years earlier with the introduction and implementation of the more economic approach.

In addition, the Commission issued in preliminary form notices describing best practices of proceedings, the mandate of the hearing officer and the submission of economic evidence. These are covered in the section on procedure further below.

Reform of vertical agreements regime


Revised block exemption

The conditions for the block exemption have been tightened in two important respects:

The Regulation introduced a second market share threshold: for an agreement to benefit from the exemption, it is not sufficient any more that the supplier’s share does not exceed 30 per cent on the relevant market, the market share of the buyer on the relevant purchasing market may also not exceed 30 per cent.

The second change concerns selective distribution systems: restrictions on members of a selective distribution system to sell to unauthorised distributors outside the territory where the system is in effect now labelled as hardcore restrictions; previously, the operator of the selective system could prohibit sales to all unauthorised distributors.

Revised Vertical Guidelines

The revised Guidelines contain, for the first time, rules for online distribution: they qualify internet sales as typically passive, unless the distributor targets online customers in a certain territory, e.g. by using territory-based banner advertising or by paying a search engine to show ads to customers in a particular territory.

This means that restrictions on a distributor’s online sales

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are in principle restrictions to passive selling and thus prohibited hardcore restrictions under the block exemption—arguably too rigid an approach.\(^9\)

Another significant development relates to the treatment of resale price maintenance: while imposing minimum prices on resellers remains a hardcore restriction under the new block-exemption regulation,\(^9\) the Commission now recognises that setting of minimum prices can also generate efficiencies in certain circumstances, providing for a justification under TFEU Art.101(3).\(^10\) An example is that resale price maintenance can be necessary to preserve the margin of retailers who provide pre-sales services, especially in the marketing of complex products.

Finally, the revised Guidelines contain for the first time a formal acknowledgement by the Commission that hardcore restrictions listed in the Vertical Block Exemption Regulation may, under exceptional circumstances, nevertheless fall outside TFEU Art.101. In particular, the prohibition to restrict passive sales by distributors into territories exclusively reserved for other distributors,\(^11\) which is the core of the entire system, may now be lifted for a start-up period of up to two years if the exclusive distributor had to make substantial investments to launch the product.\(^12\)

Reform of horizontal co-operation regime

On December 14, 2010, the Commission issued revised rules on the assessment of co-operation agreements between competitors under TFEU Art.101. As in the past, the package includes: (i) two revised block-exemption regulations,\(^7\) which provide legislative “safe harbors” for research and development (“R&D”) and specialisation agreements that fulfil certain conditions; and (ii) new Horizontal Guidelines,\(^14\) which contain the general principles which the Commission will apply to co-operation between competitors, as well as specific guidance on the assessment of certain types of co-operation.

Revised R&D Block Exemption

The new R&D Block Exemption Regulation keeps market share threshold for the application of the block exemption—combined market share of not more than 25 per cent on the relevant product and technology markets. However, it tightens the conditions for the exemption of R&D agreements from TFEU Art.101(1) in three main respects:

1. First, to be fit for exemption the agreement must now foresee the disclosure of the know-how of one party pre-existing to the joint R&D, against a reasonable compensation, if the other party needs that know-how for the exploitation of the results of the joint R&D.
2. Secondly, the new Regulation clarifies that all co-operating parties have to have “full access” to the final results of the joint R&D, which includes any resulting intellectual property rights and know-how, for further R&D or exploitation.
3. Finally, the new Regulation excludes the possibility to allocate exploitation rights related to certain technical areas in R&D agreements between non-competitors.

Revised Block Exemption for specialisation agreements

As regards specialisation agreements, the most important feature of the new block exemption is the introduction of a second market-share threshold in certain cases: if the specialisation agreement relates to an intermediate product which at least one party uses also for the production of a downstream product, the co-operating parties’ market share may not exceed 20 per cent on both the market for the intermediate product and on the market for the downstream product.

Revised Horizontal Guidelines

The new Horizontal Guidelines contain for the first time guidance on the assessment of information exchanges between competitors. They introduce a distinction between exchanges that have the object of restricting competition—in particular, exchanges of information on future intentions regarding prices or quantity—and restrictions of competition by effect, in relation to which the Commission provides criteria as to when a restriction by effect is more—or less—likely (exchange of individualised rather than aggregate information; exchange of recent rather than historic data; frequent instead of sporadic exchanges, etc.). While these clarifications are welcome, the only parameter that these Guidelines use is the likely effect on competition; it is a fundamental defect that the Guidelines do not distinguish according to the purpose for which an information exchange is arranged, for instance, as part of a due diligence process in a merger and acquisition (“M&A”) transaction or when studying the feasibility of a co-operation.

The Guidelines also contain a revised and significantly expanded section on standardisation agreements between competitors, which provides inter alia the Commission’s

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\(^9\) Sellers may, however, require a distributor to have a certain number of brick and mortar shops, in addition to his online activities.

\(^7\) Regulation 330/2010 Art.4(a).

\(^10\) Guidelines on Vertical Restraints para.229.


\(^12\) Guidelines on Vertical Restraints para.61.

view on how fair, reasonable and non-discriminatory (FRAND) terms for access to intellectual-property rights involved in a standard must be determined.15

Article 101 TFEU—Commission practice

Hardcore cartels

During the year, seven proceedings relating to hardcore cartels were brought to a close and the Commission ended the year imposing the second highest total of fines in history.16

Commitment Decision regarding co-operation between British Airways, American Airlines and Iberia

In another decision concerning global airline alliances, the Commission gave the green light to the co-operation between British Airways, American Airlines and Iberia, members of the “Oneworld” alliance, on their transatlantic routes, against commitments by the carriers which the Commission declared binding under Regulation 1/2003 Art.9(1).18 The carriers are now free to jointly manage their flight schedules, capacity and pricing, and to share revenues on their routes between North America and Europe. Competition concerns related to routes between London and various US airports could be removed in particular by the parties’ commitment to make available to competitors a total of 49 slots per week for transatlantic flights at either London-Gatwick or London-Heathrow. Moreover, competing airlines will be allowed to make offers to their passengers combining their own flights with flights offered by the co-operating parties.

Article 102 TFEU—Commission decision: strategic underinvestment as an abuse

The Commission has long used commitments as a tool by which it can shape the European energy markets and thus achieve results that it could not otherwise achieve in light of the Council’s reluctance in recent years to enact any significant new legislation.17 In still another twist, the Commission in September 2010 declared binding commitments offered by the former Italian energy monopolist ENI, which included the divestiture of ENI’s stakes in long distance gas pipelines between Germany, Austria, Switzerland on the one hand and Italy on the other hand.19 The Commission had launched the procedure against ENI in 2006, based on the consideration that access to the pipelines is an indispensable requirement to allow other suppliers to effectively compete with ENI on the downstream markets for the supply of Italian customers with gas.

The Commission considered that ENI had violated TFEU Art.102 by engaging in: (i) capacity-hoarding, i.e. refusing to offer available and unused capacity to competitors and by failing to set up an efficient capacity management; (ii) capacity degradation, i.e. offering

Joint ventures

BHP Billiton/Rio Tinto—Production JV abandoned

The joint venture between Australia’s BHP Billiton and UK-based Rio Tinto would have combined the iron ore mining and production activities in Western Australia of two of the three largest producers of iron ore in the world. As each parent would have continued to market on its own the iron ore jointly produced, this was not a full-function joint venture and was investigated by the Commission pursuant to TFEU Art.101. The transaction was ultimately abandoned over regulatory opposition fuelled by major customers in South-East Asia.20

15 See in this regard also Commission Decision of December 9, 2009 (COMP/38.636—RAMBUS) [2010] OJ C30/17, where the Commission accepted commitments from a company owning patents that cover standard technologies for the production of DRAM chips.

16 Decision of May 19, 2010 (COMP/38.511—DRAMs); Commission press release IP/10/586 (€331.3 million); Decision of June 23, 2010 (COMP/39.092—Bathroom fittings & fixtures); Commission press release IP/10/790 (€622.3 million); Decision of June 30, 2010 (COMP/38.866—Animal Feed Phosphates); Commission press release IP/10/985 (€175.6 million); Decision of November 9, 2010 (COMP/39.258—Air Freight); Commission press release IP/10/1487 (€799.4 million); Decision of December 18, 2010 (COMP/39.309—LCD); Commission press release IP/10/1685 (€648.9 million).

17 Authorities in Germany, Austria and South-East Asia reviewed the transaction under their merger rules. The companies announced on October 18, 2010 that they had jointly decided not to proceed with the transaction.

18 Commission Decision of July 14, 2010 (COMP/39.596—British Airways/American Airlines/Iberia (BA/AA/IB)) [2010] OJ C278/14. Proceedings concerning airline alliances fall under the procedural rules of Regulation 1/2003 on the implementation of the rules on competition laid down in the Treaty Arts 81 and 82 [2003] OJ L1/1 governing antitrust procedure, because the underlying agreements do not qualify as a “concentration” under the EC Merger Control Regulation. In analysis and outcome, however, they rather resemble merger control proceedings. However, the Commission’s approval is limited to co-operation on the routes which are the subject of the proceeding.


available capacities to competitors only with delays and in an unco-ordinated manner; (iii) strategic limitation of investment, i.e. refusing to invest in the expansion of its pipelines in spite of significant and credible long term capacity demand by third-party shippers. With regard to the third allegation, according to the Commission, ENI made a deliberate decision to forego profits in its pipeline business, since the availability of increased capacity to competitors would have threatened ENI’s profits on the Italian downstream markets. The Commission thus appears to favour a very expansive interpretation of TFEU Art.102, according to which the obligations of an owner of essential facilities under certain circumstances are not limited to the granting of access to existing facilities but also require the dominant company to enlarge the essential infrastructure facilities.

Sanctions and procedure—Commission practice

Best practices package

In January 2010, both DG Competition and the hearing officer published papers summarising: (i) best practices for proceedings under arts 101 and 102 TFEU; (ii) guidance on the procedures of hearing offices in Arts 101 and 102 TFEU cases; and (iii) best practices for the submission of economic evidence (in Arts 101 and 102 proceedings as well as in merger control). The best practices on economic evidence have been previously discussed with economists; the two other procedural documents were not the subject of any sort of—formal or informal—consultation. All three documents have been posted as drafts for comments, with the Commission stating that it would provisionally put these practices into application.

The paper regarding best practices for Arts 101 and 102 TFEU proceedings describes for the most part the existing practice; however, it also contains a number of innovations. Particularly noteworthy are the following points (not all of which are new):

- It is now officially stated that English will be the standard language for requests for information, although addressees will be informed of their right to a translation.
- High-level executives of companies involved in proceedings will be offered the opportunity to discuss cases with the Director General or Deputy Director General or, where appropriate, the Competition Commissioner.

Inability to pay as a partial defence

According to para.35 of the 2006 Fining Guidelines, the Commission may in exceptional cases take account of a company’s inability to pay in a specific social and economic context provided that the fine would irretrievably jeopardise economic viability of the undertaking concerned and cause its assets to lose all their value. For several years, this provision has been neglected in practice. However, the economic crisis of 2008/2009 has generated a new practice of the Commission and a new approach. The Commission now regularly receives and reviews applications for reductions of the otherwise applicable fine because paying the fine would jeopardise the existence of the company; fines in many cases have been adjusted downward by as much as 75 per cent.

Judicial review

Article 101 TFEU

As regards Art.101, the Court of Justice considered again the question of the parent company’s liability for infringements of a wholly owned subsidiary (Knauf-Gips). More significant are the judgments rendered with respect to Art.102 TFEU and in the area of sanctions and procedure.

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21 See Commission press release IP/10/2 (January 6, 2011). According to the press release and the Commission’s website, these best practices are to be applied provisionally.
22 The three documents as found on the Commission’s website do not carry a date or any other document reference. This in itself appears to be a rather unusual way for a public authority to proceed.
23 This would be a major departure from current practice and draws upon the practice in the US.
24 The practice to date has been rather diverse and in the majority of cases the hearing officer refused to make available these replies, even when parties requested them for good reason, e.g. because the Commission referred to them in its final decision as evidence against other defendants.
26 See fn.17.
27 See Philip Kienapfel and Geert Wils, Inability to pay—First cases and practical experiences (Competition Policy Newsletter 2010-3).
Article 102

Overall, the European courts issued four judgments in 2010 applying Art.102. The judgment of the General Court in ICI v Commission, issued on June 25, covers much of the same ground as the December 2009 judgment in Solvay v Commission. The remaining three judgments, however, provide important guidance on the role of economic analysis in Commission decision-making, the use of “intent” evidence to show abuse, and the significance of Member State regulatory intervention role. These significant judgments are reported here in some detail:

AstraZeneca v Commission: Art.102 and IP rights

On July 1, 2010, the General Court issued its judgment on the application for annulment of the Commission’s 2005 AstraZeneca decision. The Court upheld the Commission’s conclusions regarding market definition and dominance. The Court also approved the Commission’s conclusions on abuse, but without endorsing some of the contentious assertions made in the Commission decision concerning the relationship between intellectual property (“IP”) rights and Art.102.

Market definition and dominance The Commission had determined that AstraZeneca was dominant in the market for proton pump inhibitors (“PPIs”) a product used to treat a range of gastrointestinal disorders (including ulcers and acid reflux) by blocking the production of stomach acid. The appellants argued that the Commission’s market definition was flawed because it failed to take account of competition from antihistamines that are also used to treat the same conditions. The Court examined the Commission’s factual findings in detail to find no manifest error of assessment in the determination that PPI’s, which are substantially superior in efficacy to antihistamines and therefore command a price premium, were a separate market. The Court also rejected the argument that AstraZeneca could not be dominant for purposes of Art.102 because the role of national authorities in the sale of prescription drugs in the EU meant that a pharmaceutical company did not have meaningful power over price. The Court observed that AstraZeneca’s ability to exclude rivals and therefore keep prices for PPI’s from going down while its IP rights remained in force, was indicative of dominance.

Abuse: Misleading national authorities The first abuse reviewed by the Court involved representations made by AstraZeneca in the context of applications for supplemental protection certificates. These certificates are rights granted by national authorities in the European Union that extend patent protection for medical products in order to compensate companies for the reduction in the period of effective patent protection attributable to the lengthy marketing authorisation process. The General Court upheld the Commission’s findings that AstraZeneca had mislead national authorities: the general view in the industry is that such extended patent protection should cover the authorisation process until the date when the technical authorisation has been granted; AstraZeneca on the other hand in its applications that used the (later) date on which the administrative authorisation had been completed, thereby causing patent protection to run longer. In its applications, AstraZeneca had not revealed the fact that it had made a choice that was not in conformity with industry practice. According to the Court, the submission of misleading information liable to lead the authorities into error and therefore to cause them to grant an exclusive right to which an undertaking is not entitled falls outside the scope of competition on the merits and therefore constitutes an abuse. Proof that the dominant firm had deliberately set out to deceive the national authorities is not necessary in order to classify such conduct as abusive; however, the existence of such evidence can be taken into account.

Abuse: Withdrawal of marketing authorisation The second abuse involved steps taken by AstraZeneca to protect its market position following the expiry of patent protection. The strategy developed by AstraZeneca included development of an improved patent-protected PPI and the replacement of the original capsule version of the product with a tablet formulation. The discontinuation of the capsule version made it possible for AstraZeneca to withdraw the marketing authorisations granted by various Member States for that product. As a consequence, under the legislation then in place, generics producers could not use the AstraZeneca authorisation as a basis for marketing their own capsule products, imposing both significant costs and a time delay on generic entrants.

The Court observed that the implementation of a strategy designed to minimise the erosion of sales and meet generics competition was legitimate and part of the normal competitive process, as long as it did not involve
practices outside the scope of competition on the merits.\textsuperscript{35} The Court noted that the introduction of the tablet form of the product was not in itself capable of raising regulatory barriers to new entry.\textsuperscript{36} The analysis of abuse therefore focused on the deregistration of the capsule marketing authorisations.

The Court ruled that a dominant firm:

\"[C\]annot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking involved in competition on the merits or in the absence of an objective justification.\textsuperscript{37}\"  

The Court accepted that the generation by AstraZeneca of the data underlying the marketing authorisations was a form of competition on the merits. The Court rejected the argument, however, that AstraZeneca had a legitimate interest in preventing rivals from benefitting from that data, since the relevant Directive\textsuperscript{38} contemplated that rivals could make use of the data once the exclusivity period had expired. On a similar basis, the Court rejected the argument that a requirement to maintain the registrations in place was equivalent to a mandatory licence, since the Directive expressly allows Member State authorities to rely on the data.

Implications of the judgment Contrary to some expectations, the AstraZeneca judgment does not provide the basis for a new assault on IP rights, particularly in the pharmaceutical sector. In considering the first abuse, the Court repeated three times the formula that the abuse involved obtaining IP rights to which the applicant either was not entitled or was not entitled for the period claimed. It is therefore difficult to extend the Court’s ruling to cases where an applicant for IP rights was entitled to those rights under the relevant national law. The Court also ignored the Commission’s invitation to read Tetra Pak I\textsuperscript{39} as a basis for treating valid applications for IP rights as a form of conduct subject to Art.102 on the same basis as any acquisition of property. The Court also made it clear that intent evidence only served to confirm objective evidence. Thus while the first abuse did involve applications for IP rights, the approach taken by the Court means that the case is not particularly significant for cases where the validity of an IP grant is not in doubt.

The second abuse is potentially more significant for application of Art.102 to IP rights. If it is abusive to use regulatory procedures to prevent or delay competition, could applications for IP rights be abusive as well? If patent applications are a form of regulatory procedure subject to this rule, then applications for patents on innovations that the applicant does not intend to use or license could be viewed as abusive, since they do not serve competition on the merits. The AstraZeneca judgment does not reach this question, since the marketing authorisation certificates do not constitute intellectual property.

Tomra Systems v Commission: Fidelity rebates

On September 9, the General Court issued its judgment\textsuperscript{40} affirming the Commission’s 2006 decision in Prokent-Tomra.\textsuperscript{41} The Commission decision had found that the Tomra group of companies held a dominant position in national markets for the sale of reverse vending machines (“RVMs”)—machines that consumers can use to return empty containers and collect the appropriate deposit. The customers for RVMs are primarily supermarkets and similar retail outlets. The Commission ruled that Tomra had abused its dominant position through a strategy of foreclosing rivals by concluding agreements with customers that included retroactive target rebates and volume purchase commitments that led to de facto near-exclusivity.

The Court rejected Tomra’s argument that the Commission had relied improperly on evidence of subjective intent to establish the existence of an anti-competitive scheme or plan. Although the Court did not cite its earlier judgment in AstraZeneca, it echoed the discussion of intent in that judgment, observing that evidence of intent was not sufficient to establish abuse but could be helpful by excluding alternative explanations for challenged conduct. The Court found that the Commission’s findings of abuse were based on examination of all evidence—not just internal intent. The Court also rejected the suggestion that the rebates in question constituted lawful volume discounts, indicating that negotiation of volume purchase commitments that approximated the requirements of the customer should be treated in the same way as a contractual exclusivity obligation.

The Commission staff touted the decision at the time it was adopted as an example of the new more “economics-based” approach to Art.102 set out in the 2005 Discussion Paper.\textsuperscript{42} The decision had included an extensive discussion of the economic impact of the practices, following the approach outlined in the Discussion Paper. Before the General Court, Tomra challenged important aspects of this economic analysis.

\textsuperscript{35} AstraZeneca v Commission [2010] 5 C.M.L.R. 28 at [804].
\textsuperscript{36} AstraZeneca v Commission [2010] 5 C.M.L.R. 28 at [809].
\textsuperscript{37} AstraZeneca v Commission [2010] 5 C.M.L.R. 28 at [672]. The Court related this obligation to the “special responsibility of a dominant firm”, at [671]. At a later point the Court observed that: “[T]he fact that an undertaking in a dominant position is under no obligation to protect the interests of competitors does not make practices outside the scope of competition on the merits.”
\textsuperscript{40} Tomra Systems v Commission of the European Communities (T-155/06) September 9, 2010. The unreported judgment has been appealed to the ECI.
\textsuperscript{42} DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) n.7.
The Court ruled that the extensive submissions made by Tomra regarding the alleged defects in the economic analysis provided in the decision were irrelevant to the application for annulment, because the Commission was not legally required to make this assessment. The Court ruled that the Decision’s key findings on abuse were consistent with the general case law established in cases like Hoffmann-La Roche, Michelin II or British Airways, which establish that target rebates are liable to affect competition.

Deutsche Telekom (October 14, 2010)

Court of Justice

On October 14, 2010, the Court of Justice issued its judgment in the Deutsche Telekom margin-squeeze case. The Court upheld the approach taken by the General Court to the role of national regulatory authorities in competition cases and approved the position taken by the General Court on the legal basis for the margin-squeeze test, including reliance on an “equally efficient competitor” test. In a passage that may be important for the ongoing debate on the need to show competitive harm under Art.102, the Court rejected the Commission’s argument that the margin squeeze was an abuse in itself, without regard for the competitive context.

Background

The Commission had found that Deutsche Telekom, as the operator of the German fixed telephone network, held a dominant position in the German market for wholesale access to the local loop. The Commission had also found that Deutsche Telekom held a dominant position in the German market for providing end-user access services to residential and commercial customers. The Commission determined that during the period between 1998 and 2003, the margin between the retail price charged by Deutsche Telekom and the wholesale price that it charged to its competitors was either negative (so that the retail price was lower than the wholesale price) or insufficient to cover Deutsche Telekom’s own product specific costs of providing the service. The Commission imposed a fine on Deutsche Telekom of €12.6 million. The principal issues in the case arose because Deutsche Telekom’s prices in both the wholesale and the retail market were approved by Germany’s independent telecoms regulatory authority, which had specifically considered and rejected the argument that these prices created a margin squeeze contrary to Art.102.

Limited scope of “state action” defence

The Court rejected the argument that approval by the regulatory authority of the prices at issue meant that Deutsche Telekom’s pricing conduct fell outside Art.102. The Court observed that, while Arts 101 and 102 are not applicable to conduct that is required by national law, conduct that is encouraged or facilitated by national law remains subject to the competition rules. Since the Commission and General Court had found that Deutsche Telekom had the ability to adjust its pricing in the retail market, if necessary by applying to the regulator for approval of a price increase, the Court concluded that Art.102 remained applicable.

The Court also noted that a decision by a national authority or court applying EU law cannot bind the Commission in its application of EU law to the same facts, rejecting the argument that approval by the telecoms regulator meant that Deutsche Telekom did not “intentionally or negligently” infringe Art.102 (as required by the relevant procedural regulation). According to the Court, this requirement was satisfied as long as Deutsche Telekom was aware of the impact that its pricing structure had on competition in the retail market. Thus, the Court in essence requires private companies to be smarter than national regulatory agencies.

Nature of the margin-squeeze test

The Court endorsed the approach taken by the General Court to the problem of the margin squeeze under Art.102. The Court ruled that the essence of the margin squeeze as an abuse was not the abusive level of the input price (which might be exploitative) or the abusive level of the retail price (which might be predatory), but rather the relationship between these two prices. In a situation where a firm dominated both the wholesale and retail market, a margin squeeze could allow the dominant firm to limit entry by equally efficient competitors in the downstream market and thereby protect its dominant position in that market. Since the system of undistorted competition protected by Art.102 requires that competitors of dominant firms enjoy “equality of opportunity”, a practice that restricts the ability of efficient rivals to enter a market controlled by the dominant firm could therefore be abusive under Art.102.

Anti-competitive effects

The Court rejected the Commission’s assertion that to establish an abusive margin-squeeze it was sufficient to show that the difference in prices did not allow an efficient competitor to be profitable, ruling that: “[I]n the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult.”

The Court ruled, however, that the General Court had properly found that Deutsche Telekom’s pricing practices had actually restricted competition in the retail market.
This aspect of the judgment may usefully be contrasted with the approach in other cases, such as *Michelin II*, *British Airways* or *Tomra*, where the courts have ruled that it is not necessary to show actual competitive harm to prove abuse. The Court here seems to suggest that while it is not necessary to show actual effects (in terms of higher prices or lower output), it is necessary to have a plausible theory supporting the conclusion that some negative effect on competition was likely in the context of the actual markets affected by the conduct.

**Sanctions and procedure**

**ECJ ruling in Akzo—Extent of legal professional privilege**

In the long-awaited judgment in *Akzo v Commission*, the ECJ refused to expand the scope of legal professional privilege under EU law.

In 2003, the Commission had adopted a decision ordering Akzo Nobel Chemicals and its subsidiary Akcros Chemicals to submit to an investigation aimed at seeking evidence of possible anti-competitive practices. The investigation was carried out by Commission officials assisted by representatives of the Office of Fair Trading at the company’s premises in the United Kingdom. During the examination of the documents seized, a dispute arose in relation to copies of two emails exchanged between Akcros’ general manager and Akzo’s co-ordinator for competition law, a lawyer member of the Netherlands Bar and, at the time, a member of Akzo’s legal department, employed by the company on a permanent basis. The Commission rejected the claim that the documents at issue should be covered by legal professional privilege. Akzo and its subsidiary appealed before the General Court and subsequently before the Court of Justice on the basis that the General Court wrongly refused to consider the two emails to be covered by the privilege.

While the ECJ in *AM&S* held that the legal professional privilege should be limited to “independent” lawyers, on appeal Akzo argued that it was an error to interpret this judgment in such a way as to equate an employment contract with a lack of independence on the part of the lawyer. The ECJ rejected this argument and held that an in-house lawyer, despite being enrolled with a bar or law society and subject to ethical obligations, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. According to the Court, the fact that an in-house lawyer is an employee, does, by its very nature, not allow him to ignore the commercial strategies pursued by his employer, affecting his ability to exercise professional independence.

The judgment brings about no significant changes to the status quo, but instead confirms the findings of the ECJ in *AM&S*, closing any possibility of addressing the weaknesses that arise from this judgment for the foreseeable future. The judgment leaves also open important questions relating to dual track investigations (by Commission and Member States, in particular, in jurisdictions such as the United Kingdom that do recognise the legal professional privilege). The judgment also fails to shed light on the extent to which communications between the company and its outside counsel are protected under the privilege.

**Rights of third parties and proportionality in commitment decisions—ECJ in Alrosa**

In the *Alrosa* judgment of June 19, 2010, the ECJ set aside the judgment by the General Court that had for the first time annulled a commitment decision adopted by the Commission under Regulation 1/2003 Art. 9. The Commission’s decision had concluded a proceeding based on TFEU Art.102 against the leading supplier of rough diamonds in the world, De Beers, related to a trading agreement concluded between De Beers and Alrosa, the number two in the worldwide market. It made binding commitments by Beers to stop trading with Alrosa from 2009. Following the decision, the Commission had discontinued, without adopting a decision, a second procedure against both De Beers and Alrosa under TFEU Art.101 relating to the same agreement. In this procedure, Alrosa and De Beers, had submitted joint commitments, which were superseded when De Beers offered unilateral commitments in the Art.102 procedure.

The General Court had considered that the Commission had: (i) disregarded the principle of proportionality, because it had not duly considered the joint commitments as less onerous alternatives to the cessation of all trading between De Beers and Alrosa; and (ii) violated Alrosa’s right to be heard, because it had not provided Alrosa with the unilateral commitments proposed by De Beers in due time.

The General Court’s view that Alrosa’s right to be heard had been infringed relied mainly on the finding that the two procedures had de facto been treated by the Commission as one, so that Alrosa had the procedural rights of an “undertaking concerned” in both procedures. On this point, the ECJ took a more formal view: It

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57 *European Commission v Alrosa Co Ltd* (C-441/07) [2010] 5 C.M.L.R. 11.
distinguished clearly between the two procedures and treated Alrosa merely as any interested third party in the Art.102 procedure. Therefore, Alrosa did not have a specific right to be provided with the unilateral commitments offered by De Beers.

Less related to the procedural particularities of the case and thus of comparatively broader significance is the rejection by the ECJ of the General Court’s view on the proportionality of decisions adopted under Regulation 1/2003 Art.9. The General Court had opined that the proportionality test under Art.9 does not substantially differ from the proportionality test applicable to infringement decisions under Art.7, and that the joint commitments offered by both De Beers and Alrosa had constituted a less onerous alternative to remedy the Commission’s competition concerns. Not surprisingly, the ECJ disagreed: the Commission does not have to subject commitments offered to any test of proportionality because they are offered on a voluntary basis. The Commission only has to “take into consideration” the interests of third parties, when declaring commitments binding. The Court also considered that the General Court had encroached on the Commission’s discretion when entering into its own assessment of whether the initial joint commitments had been equally suitable to remedy the competition concerns.

Repairers of luxury watches - General Court annuls Commission decision rejecting complaint

In the first annulment of a Commission decision rejecting a complaint in almost 10 years, 60 the General Court annulled a Commission decision 61 that had rejected a complaint brought by seven national associations of independent watch repairers about a refusal by several Swiss luxury watch-makers to supply them with spare parts.

The Commission’s rejection of the complaint was substantially based on a prima facie conclusion that there are no separate aftermarkets for: (i) the supply of spare parts for luxury watches; and (ii) the provision of repair and maintenance services for luxury watches. Rather, the Commission found that the respective markets were “closely linked” to the primary market for the supply of luxury watches.

The Court held that the Commission committed a manifest error of assessment as regards market definition: it held that the Commission did not establish that customers can easily switch to another luxury watch in case of a price increase for spare parts for the watch that they have previously purchased, 62 and that the same applies in case of a price increase for repair and maintenance services. 63 Because of the Commission’s erroneous market definition, its finding that the watch-makers did not hold a dominant position cannot be sustained. 64

The Court then considered that the Commission’s finding of insufficient Community interest in taking up the complaint was likewise flawed: the Commission had held that, in any event, the complaint concerned only a market of a limited size but had failed to substantiate that assessment with any market data. 65 The Court equally rejected the Commission’s argument that Member State authorities would be better placed to deal with the complaint, because the alleged anti-competitive behaviour existed—according to the complainants—in at least five Member States, and its alleged perpetrators, the makers of luxury watches, are largely domiciled in Switzerland and thus outside the European Union. 66

General Court judgment in E.ON Energie —confirmation of first fine for breach of a Commission seal

In E.ON Energie v Commission, 67 the General Court confirmed the first ever fine for breach of a seal, based on Art.23(1) lit.e of Regulation 1/2003. The Commission had imposed a fine of €38 million on E.ON Energie because a seal that Commission officials had affixed to a door during a dawn raid at E.ON Energie’s premises in May 2006 had been found slightly displaced on the following day and had shown markings of “Void”. 68

Before the Court, E.ON Energie vigorously contested—as it had done in the Commission proceeding—that the altered state of the seal found the following day was the result of intentional actions attributable to the company. Alternative explanations brought forward by E.ON and not properly investigated by the Commission included possible effects of a detergent used to clean the door on which the seal was affixed, vibrations of the office walls, and the overall assertion that the seal was technically not suitable for its purpose. All of these contentions had been supported by expert opinions of technical experts from German universities. The Court rejected these arguments without hearing the experts or taking other evidence; according to the Court, the Commission does not have to establish

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60 The last time the General Court annulled a decision rejecting a complaint alleging an infringement of the substantive EU competition rules appears to be in Métropole Télévision Sà r.v Commission of the European Communities (T-206/99) [2001] E.C.R. II-1057; [2001] 4 C.M.L.R. 39.
62 CEAHR v Commission Unreported December 15, 2010 at [102] and [107].
63 CEAHR v Commission Unreported December 15, 2010 at [118].
64 CEAHR v Commission Unreported December 15, 2010 at [152].
65 CEAHR v Commission Unreported December 15, 2010 at [61] and [164].
66 CEAHR v Commission Unreported December 15, 2010 at [176].
67 E.ON Energie AG v Commission of the European Communities (T-141/08) Unreported December 15, 2010. E.ON has appealed to the ECJ.
that a sealed door actually has been opened in order to establish a breach of seal in the sense of Art.23(1) lit.e of Regulation 1/2003.

As regards the amount of the fine, the Court did not take issue with the fact that the Commission had not established which natural person was effectively responsible for the displacement of the seal, holding that E.ON Energie was in any event responsible for taking measures to avoid any displacement of the seal, and had at least negligently failed to take such measures. The Court went on to reject E.ON Energie’s arguments that the Commission had set the amount of the fine arbitrarily, had not given adequate reasons, and that the amount was disproportionate. The General Court held that in the absence of guidelines for the setting of the fine, the Commission was merely obliged to clearly state in the decision the considerations which it took into account in setting the fine (which the Commission had done), and that the Commission did not need to disclose how it calculated the fine.

In addition, the Court found that the amount of fine was justified because a breach of seal is a “particularly severe infringement”. But the Court does not explain why a procedural infringement such as breaking a seal would in all cases be particularly severe, especially if it has not been established that the door to the sealed room has actually been opened. It may well be argued that the infringement would be particularly severe only if it could be established that the seal had been broken intentionally by a person acting on behalf of the company. Overall, the judgment appears to be a particularly egregious example of an extremely superficial review of a Commission fining decision engaged in by the Community courts.

Conclusion and outlook

European competition law at the end of the first decade—a well-watered plateau

After 50 years of Commission practice under the competition rules of the Treaty, both the competition policy of the Commission and the application of Arts 101 and 102 have reached a relatively mature stage. While individual aspects of the overall policy, the implementation of that policy in individual cases and the legality of individual decisions all are open to debate, the overall picture is of a well-developed competition-law regime applied by the Commission and Member States. The relatively minor and limited modifications of the rules for horizontal and vertical restrictions are evidence of this state of affairs and no revolutionary changes are expected in the near future in the area of the substantive law.

Rule of law and role of judicial review

The picture is more differentiated with respect to the role of judicial review and the level of scrutiny exercised by the European courts:

The European courts have, perhaps surprisingly, coped reasonably well with the challenge of reviewing Commission decisions based on TFEU Art.102. These cases usually involve complex considerations of an economic nature and nevertheless the Community courts have by-and-large engaged in a meaningful level of judicial review.

In contrast, as regards the level and amount of fines for infringements of the competition rules, the courts continue to accord an enormous amount of discretion to the European Commission; whether this unsatisfactory sort of “light touch” review will be able to survive in light of the applicability of the European Convention on Human Rights remains an open issue.

69 This finding is in much contrast with the law on state aid, which is far less advanced.