The Judicial Review of the European Union Industrial Cartels

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A. Introduction

The public enforcement of the European Union (EU) prohibition of hard-core cartels, in particular, price-fixing agreements, reflects the mission of the European Commission (EC) to detect and punish any professional or trade association of producers or

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manufacturers that pursue exclusively speculative commercial profits at the expense of consumer welfare. Secret cartels among competing producers or manufacturers stifle free competition on the basis of price or quantity.[1] Most cartels affect the welfare of intermediate consumers in a particular industry, thereby imposing significant restraints upon competition. A classical division operates between horizontal and vertical agreements. Horizontal agreements among producers or manufacturers that unlawfully intend to fix prices, divide markets, or restrict competition, reflect a major conspiracy in trade against the public interest. In contrast, vertical agreements among manufacturers and their distributors or retailers are often perceived as less harmful.[2]

Industrial organization has identified several types of harmful cartels on the basis of similar indicators, such as price, quotas, allocation of territories or customers, standardisation/specialisation, costs, and rebate cartels.[3] While it is widely accepted that the above cartels harm consumer welfare, the enforcement of Article 101 TFEU demonstrates a constant focus on major industrial cartels.[4] Suffice it to mention here that the EU Commission has imposed €1.68 billion in cartel fines in 2014, following two previous peak years of over €1.8 billion each. Since 1990 this new *Robin Hood* has taken an impressive €22,654 billion away from the richest industrial giants back to the benefit of his own citizens. It is a fact, not a praise, that the EU Commission's extremely effective and efficient public enforcement against harmful cartels has recently covered all the major sectors of the EU's *supra-national economy* from flat glass, car glass, air freight, cement, electric cables, industrial bags, road pavement bitumen, "bearings" for cars and trucks, calcium carbide and magnesium, installation and maintenance of elevators and escalators, high voltage power cables, candle waxes, paraffin and slack waxes, gas insulated switchgear, heat stabilisers, plastic industrial bags, zip fasteners, aluminium fluoride, carbonless paper, liquid crystal display panels for TVs,

1 See e.g. *Heimler*, Cartels in Public Procurement, J of Comp Law & Ec 8 (2012), p. 849; *Smuda*, Cartel Overcharges and the Deterrent Effect of EU Competition Law, J of Comp L & Ec 10 (2013), p. 65. On the economics of price-fixing, see seminal papers by *Kaplow*, Direct versus Communications-Based Prohibitions on Price Fixing, Harvard John M. Olin Discussion Paper Series no 703/2011; *Connor/Lande*, Cartels as Rational Business Strategy: Crime Pays, Cardozo L Rev 34 (2012), p. 427.

2 See *Gundlach/Cannon*, Resale Price Maintenance: A Review and Call for Research, American Antitrust Institute Working Paper No 14-03 (2014); *Asker/Bar-Isaac*, Raising Retailers Profits: On Vertical Practices and the Exclusion of Rivals, American Ec Rev 104 (2014), p. 672; *Sahuguet/Walckiers*, Hub-and-Spoke Conspiracies: the Vertical Expression of a Horizontal Desire?, J Eur Comp L & Practice 5 (2014), p. 11 et seqq.

3 See e.g. *Lipczynski/Wilson/Goddard*, Industrial Organization: Competition, Policy and Strategy, 4th ed. 2013; *Waldman/Jensen*, Industrial Organization: Theory and Practice, 4th ed. 2013, p. 288 et seqq.

4 See *Chirita*, A Focus on: Recent Developments in EU Cartels, Oxford Competition Law, 2014.

notebooks, and PC monitors, bleaching agents, butadiene rubber, bathroom fittings and fixtures, removals, to carbonless paper.[5]

In the banking sector, producers of smart card chips,[6] which are used in mobile telephone SIM cards, and bank and identity cards, were hit with a major €138 million fine. Furthermore, action regarding the interest rate derivatives cartels involving for-

5 ECJ, case C-580/12 P, *Guardian Industries and Guardian Europe v EC* (COMP/39165, *Flat glass*); GC, case T-68/09, *Soliver NV v EC* (COMP/39125, *Carglass*); GC, case T-534/11, *Schenker AG v EC*; GC, case T-292/11, *Cemex and others*: GC, case T-293/11, *Holcim (Deutschland) and Holcim*; GC, case T-296/11, *Cementos Portland Valderrivas*; GC, case T-297/11, *Buzzi Unicem*; GC, case T-302/11, *Heidelberg Cement*; GC, case T-305/11, *Italmobiliare*; GC, case T-306/11, *Schwenk Zement v Commission*; ECJ, case C-37/13 P, *Nexans SA, Nexans France SAS v EC*; GC, case T-135/09, *Nexans France and Nexans v EC*; ECJ, case C-243/12 P, *FLS Plast A/S v EC* (COMP 4634/2005, COMP/F/38354, *Industrial Bags*); ECJ, case C-36/12, *Armando Alvarez SA v EC* (COMP/F/38354, *Industrial bags*); ECJ, case C-35/12 P, *Plásticos Españoles SA (ASPLA) v EC* (COMP/F/38354, *Industrial Bags*); ECJ, case C-612/12 P, *Ballast Nedam NV v EC* (COMP/F/38456, *Bitumen (Netherlands)*); *Almunia*, Introductory Remarks on Bearings cartel, speech/14/233 of 19/3/2014; EC, press release IP/14/2002 of 20/11/2014; ECJ, case C-90/13 P, *1.garantovana s.a. v EC*; GC, case T-406/09, *Donau Chemie v EC* (COMP/39396, *Calcium carbide and magnesium based products*); ECJ, case C-501/11 P, *Schindler Holding Ltd and others v EC*; ECJ, case C-557/12, *Kone AG and Others v ÖBB-Infrastruktur AG* (COMP/E-1/38823, *Elevators and Escalators*); EC, press release IP/14/358 of 2/4/2014; GC, case T-540/08, *Esso Societé anonyme française, Esso Deutschland and others v EC* (COMP/39181, *Candle Waxes*); GC, case T-541/08, *Sasol and others v EC*; GC, case T-543/08, *RWE AG, RWE Dea AG v EC* (COMP/39181, *Candle Waxes*); ECJ, joined cases C-231/11 P to C-233/11 P, *EC v Siemens AG Österreich, VA Tech Transmission & Distribution and others*, *Nuova Magrini Galileo SpA*; ECJ, joined cases C-239/11 P, C-489/11 P, and C-498/11 P, *Siemens AG, Mitsubishi Electric Corp and Toshiba Corp. v EC* (COMP/F/38899, Gas *Insulated Switchgear*); GC, case T-30/10, *Regens SpA v EC* (COMP/38589, *Heat Stabilisers*); GC, case T-181/10, *Reagens SpA v EC*; ECJ, case C-238/12 P, *FLSmidth & Co A/S v EC*; GC, case T-65/06, *FLSmidth v EC* (COMP/F/38354, *Industrial bags*); opinion of AG *Wathelet*, ECJ, case C-408/12 P, *YKK Corp., YKK Holding Europe BV, YKK Stocko Fasteners GmbH v EC*; ECJ, case C-467/13 P, *Industrie Chimiques du Fluor SA (ICF) v EC* (COMP/39180, *Aluminium Fluoride*); ECJ, case C-414/12 P, *Bolloré v EC*; GC, case T-91/11, *InnoLux Corp v EC* (COMP/39309, *LCS – Liquid Crystal Displays*); ECJ, case C-446/11 P, *Commission v Edison SpA*; ECJ, case C-447/11 P, *Caffaro Srl v Commission*; ECJ, case C-448/11 P, *SNIA SpA v Commission*; ECJ, case C-449/11 P, *Solvay Solexis SpA v Commission*; ECJ, case C-455/11 P, *Solvay SA v Commission – bleaching agents* (COMP/F/38620, *Hydrogen Peroxide and Perborate*); ECJ, case C-499/11 P, *The Dow Chemical Company, Dow Deutschland Anlagengesellschaft mbH, Dow Europe GmbH v EC* (COMP/F/38638, *Butadiene Rubber and Emulsion Styrene Butadiene Rubber*); ECJ, case C-511/11 P, *Versalis SpA v EC*; GC, case T-378/10, *Masco Corp, Hansgrohe, Hüpe and others v EC* (COMP/39092, *Bathroom Fittings and Fixtures*); GC joined cases T-379/10 and T-381/10, *Keramag Keramische Werke AG, Koralle Sanitärprodukte GmbH, Koninklijke Sphinx BV, Allia SAS, Produit Céramique de Touraine SA, Pozzi Ginori SpA, Sanitec Europe Oy v EC* (*Bathroom Fittings and Fixtures*); opinion of AG *Kokott*, ECJ, case C-439/11 P, *Ziegler SA v EC*; GC, case T-372/10, *Bolloré v EC* (COMP/36212, *Carbonless paper*).

6 EC, Antitrust: Commission fines smart card chips producers €138 million for cartel, press release IP/14/960 of 3/9/2014.

ward rate agreements and credit default swaps,[7] especially the record €1.7 billion fine,[8] has consolidated the EC's excellent reputation when it comes to detecting and punishing banking cartels. Another €14.9 million fine was imposed on the UK based broker ICAP for having disseminated misleading information to certain JPY LIBOR panel banks with regard to future expectations of the prevailing LIBOR rates, as well as for attempting to influence LIBOR submissions. JP Morgan and Barclays were involved in the Swiss franc interest rate derivatives cartel,[9] having previously discussed forthcoming CHF LIBOR submissions and exchanged sensitive information concerning trading predictions and future prices by using online chats on the Bloomberg and/or Reuter's platforms. The Commission found that during May to September 2007 traders at Royal Bank of Scotland, UBS, JP Morgan, and Credit Suisse agreed to quote fixed bid-ask-spreads on Swiss over-the counter derivatives.[10] Such spreads represent the difference between the bidding and the asking price respectively at which a trader is willing to buy or sell a particular contract.

In sharp contrast, significantly fewer recent cartels, namely, bananas,[11] North Sea shrimps,[12] raw tobacco,[13] and canned mushrooms[14] stand out as isolated examples of EU cartels that harm the final consumer directly. Statistically, however, an overwhelming number of the cartels detected by the EC harm industrial, i.e., intermediate consumers, and only a negligible fraction harm the welfare of EU citizens. Recent examples of industrial cartels include bid-rigging and the exchange of commercially-sensitive information in *Nexans*[15] or the setting of price factors and trends in *Ba-*

7 See, EC, Antitrust: Commission sends Statement of Objections to ICAP for suspected participation in yen interest rate derivatives cartels, press release IP/14/656 of 10/6/2014; on RBS, UBS, JP Morgan and Credit Suisse agreeing the "bid-ask" spread, i.e. the difference between the price at which a bank is willing to sell and buy a given product, see e.g. European Commission, Statement by Vice President Joaquin Almunia on 2 cartel decisions concerning Swiss Franc Related Derivatives, Brussels of 21/10/2014.

8 COMP/39861, *Yen Interest Rate Derivatives (YIRD)*, decision of 4/2/2015 and COMP/39914, *Euro Interest Rate Derivatives*, decision of 4/12/2013; both decisions are not yet available as of 19/6/2015, thus reported in the Report on Competition Policy 2013, COM (2014) 249 final of 6/5/2014, p. 4. See also, European Commission, Antitrust: Commission sends Statement of Objections to Crédit Agricole, HSBC and JP Morgan for suspected participation in euro interest rate derivatives cartel, press release IP/14/572 of 20/5/2014; European Commission, Antitrust: Commission fines banks €1.71 billion for participating in cartels in the interest rate derivatives industry, press release IP/13/1208 of 4/12/2013. Comparatively on the US cartel, see *Connor*, Big Bad Banks: Bid Rigging and Multilateral Market Manipulation, American Antitrust Institute Working Paper no 14-04 (2014).

9 COMP, case AT-39924, *Swiss Franc Interest Rate Derivatives (CHF LIBOR)*, decision of 21/10/2014.

10 Ibid., para. 26.

11 GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130; COMP/39188, *Bananas*.

12 COMP/39633, *Shrimps*.

13 See ECJ, case C-578/11 P, *Deltafina SpA v EC*, ECLI:EU:C:2014:1742.

14 European Commission, Antitrust: Commission fines three producers of canned mushrooms €32 million in cartel settlement, press release IP/14/727 of 25/6/2014.

15 ECJ, case C-37/13 P, *Nexans SA and Nexans France SAS v EC*, ECLI:EU:C:2014:2030.

nanas.[16] The latest cartels have frequently embraced the unwritten form of oral gentlemen's agreements,[17] for example, in *Toshiba*, between European and Japanese producers of power transformers.[18]

B. A substantive review of the EU public enforcement against cartels

I. The purpose or intent of agreements: quo vadis effects?

Within the meaning of Article 101, to demonstrate the existence of an anti-competitive agreement, it is sufficient that cartelists express their intention to behave in the market in a certain way. In other words, there is a clear materialisation of their "concurrence of wills" so as to restrict competition.[19] In practice, because most cartels take place clandestinely, i.e. in secret meetings, the associated written documentation is reduced to a minimum.[20] For example, the "Crystal meetings" held in Taiwanese hotels, had the anti-competitive object of fixing minimum prices for LCD panels.[21] In *Car Glass*,[22] triangular club meetings were held in hotels in various towns, in the private homes of the employees of those undertakings, and at the premises of their European trade association, the aim being to monitor market shares, the allocation of supplies of car glass to manufacturers, the exchange of information on prices, and other sensitive information. Therefore, even undated or unsigned documents have a recognised probative value, especially where their origin, probable date, and content can be determined with sufficient certainty.[23] For example, in *Paraffin and Slack Waxes*,[24] the EC inferred from a manuscript note that an arrow preceding the price figure was probably part of an agreed future strategy of a price increase. In *Car Glass*,[25] a handwritten record of a telephone conversation between the cartelist's sales manager and the representative of its wholly-owned subsidiary was used as evidence of the cartelist's awareness of the cartel. Thus, in *Fittings*,[26] the EC lost its appeal before the European Court of Justice (ECJ) which disputed the General Court's (GC) inaccurate reasoning in arguing that one particular, isolated handwritten note was insufficient to prove participation in this cartel.

However, the mere participation in meetings remains insufficient to prove the existence of an unlawful cartel in the absence of any further evidence of the anti-com-

16 GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130, para. 256.
17 GC, case T-519/09, *Toshiba Corp. v EC*, ECLI:EU:T:2014:263.
18 Ibid., para. 8.
19 Ibid., para. 34.
20 Ibid., para. 93.
21 GC, case T-91/11, *InnoLux Corp v EC*, ECLI:EU:T:2014:92, para. 15.
22 GC, case T-68/09, *Soliver NV v EC*, ECLI:EU:T:2014:867.
23 GC, case T-91/11, *InnoLux Corp v EC*, ECLI:EU:T:2014:92, para. 94.
24 GC, case T-541/08, *Sasol et. al v EC*, ECLI:EU:T:2014:628, para. 300.
25 GC, case T-68/09, *Soliver NV v EC*, ECLI:EU:T:2014:867.
26 ECJ, case C-287/11 P, *EC v Aalberts Industries NV and others*, ECLI:EU:C:2013:445; GC, case T-385/06, *Aalberts Industries and others v EC*, ECLI:EU:T:2011:114; COMP/F1/38121, *Fittings*.

petitive nature of such meetings.[27] In *Car Glass*,[28] the cartelist pretended not to have properly understood the overall scope of the cartel due to its limited cooperation. Despite the existent identity of purpose between the cartel agreement in question and the overall cartel, the Court judged that the cartelist was thus not responsible for the overall cartel. The decisive criterion should be whether the participating undertaking

> "knew or should have known that in doing so it was joining the cartel as a whole, thereby expressing its accession to that cartel".

In endorsing this interpretation, the Court rejected the EC's previous, rather comfortable, categorisation of "single and continuous infringement"[29] as a means of imputing liability for the overall cartel, except where the undertaking itself had participated in meetings and engaged in certain forms of anti-competitive conduct.

Where an undertaking had simply attended such meetings, even if it had not participated actively, and later that undertaking had not distanced itself publicly from what was being said or agreed in the meeting, this factor counts as acquiescence of the respective cartel.[30] Furthermore, an undertaking that had participated in such meetings "without manifestly opposing to them" meets the EC's requisite standard to establish participation in the cartel.[31] For example, in *Candle Waxes*,[32] the cartelists argued that they had neither participated in technical meetings, nor ever been informed of the outcome, since their own representative had concealed the anti-competitive content of such meetings. Before the GC, this argument did not count as the undertaking "publicly distancing" itself from the cartel. There was evidence of emails seeking to arrange the next technical meeting with the representative. The GC recalled that even if the undertaking had not participated in certain meetings, a presumption operated that the undertaking took account of information already exchanged with its competitors.[33]

Once more, these recent developments demonstrate the harshness of the approach adopted by the EC when it comes to pernicious cartels, and it renders obsolete the running of professional or trade-association meetings in pursuit of common pricing, or even non-pricing, strategies. For example, the simple attendance of certain meetings was sufficient to prove the existence of the *Industrial Bags* cartel.[34] It is then for the undertaking concerned to prove that its participation in those meetings "was without

27 GC, case T-91/11, *InnoLux Corp v EC*, ECLI:EU:T:2014:92, para. 184.
28 GC, case T-68/09, *Soliver NV v EC*, ECLI:EU:T:2014:867.
29 Although the EC had failed to establish that the infringement was continuous, this did not impede its categorisation as "repeated", see GC, joined cases T-147 and 148/09, *Trelleborg Industrie SAS and Trelleborg AB v EC*, ECLI:EU:T:2013:259.
30 GC, case T-91/11, *InnoLux Corp v EC*, ECLI:EU:T:2014:92, para. 206.
31 GC, joined cases T-379/10 and T-381/10, *Keramag Keramische Werke and others v EC*, ECLI:EU:T:2013:457, para. 136.
32 GC, case T-540/08, *Esso Societé anonyme française, Esso Deutschland and others v EC*, ECLI:EU:T:2014:630.
33 Ibid.
34 ECJ, case C-35/12 P, *Plásticos Españoles SA (ASPLA) v EC*, ECLI:EU:C:2014:348, para. 16.

any anti-competitive intention".[35] This requires the undertaking to prove that it had indicated to its competitors that it was "participating in those meetings in a spirit that was different from theirs".[36] For example, in *Heat Stabilisers*, in an internal memorandum, an employee had already highlighted to his supervisors the need to mention that their undertaking no longer wished to participate in meetings where "red papers" detailed group decisions to raise prices.[37] However, in *Zip Fasteners*,[38] the GC warned that the concept of "publicly distancing oneself" from the cartel must be construed narrowly in order to establish liability for the cartel activity in question. Therefore, silence in a meeting could not be interpreted as an expression of "firm and unambiguous" disapproval.

The EC is under no obligation to consider mitigating circumstances, e.g. the non-implementation of the cartel, unless the undertaking concerned shows that it "clearly and substantially" opposed its implementation to the "point of disrupting the very functioning" of the cartel.[39] Again, such an interpretation constructs yet another major obstacle for any undertaking being caught in the very existence of the cartel up to the moment of instant realisation that, in recent practice, the only safe way out of it is to blow the whistle on the cartel.

One controversial issue is that where a cartel has the object of restricting competition, it is not deemed further necessary to prove its actual effects.[40] This can be traced back to the *KME* ruling,[41] where, relying on the old case-law of *Consten and Grunding*,[42] the ECJ advanced the following apodictic pronouncement, namely, that (i) "there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition", and (ii) price-fixing and market sharing are "obvious" restrictions of competition. Overall, the above pronouncement does not pursue an "effects-based approach" that could otherwise see the Courts shoulder a greater burden of proof when it comes to actual effects. Furthermore, the same explanation emerged in *Car Glass*,[43] where it was explicitly stated that there is no need to take account of the agreement's actual effects once it appears that its object is to prevent, restrict or distort competition. Following this reasoning, attending a cartel meeting but not increasing the prices, as discussed and agreed in that meeting, will still be captured as a "restriction of competition by object", even if the author's intention fails to materialise.

35 See also GC, case T-46/10, *Faci SpA v EC*, ECLI:EU:T:2014:138, para. 55; COMP/38589, *Heat Stabilisers*.
36 Ibid., para. 127, citing ECJ, case C-204/00 P, *Aalborg Portland v EC*, ECLI:EU:C:2004:6, para. 81; GC, case T-541/08, *Sasol and others v EC*, ECLI:EU:T:2014:628, para. 306.
37 Ibid., para. 160.
38 GC, case T-448/07, *YKK and others v EC*, ECLI:EU:T:2012:322, para. 116; COMP/39168, *PO/Hard Haberdashery: Fasteners*.
39 Ibid., para. 267.
40 Ibid., para. 227.
41 ECJ, case C-389/10 P, *KME and others v EC*, ECLI:EU:C:2011:816, para. 75.
42 ECJ, joined cases 56/64 and 58/64, *Consten and Grunding v EC*, ECLI:EU:C:1966:41.
43 GC, case T-68/09, *Soliver NV v EC*, ECLI:EU:T:2014:867.

In *Toshiba*, the Courts examined the object of preventing, restricting, or distorting competition by looking at the "content and economic context" of an anti-competitive agreement.[44] For example, even a gentlemen's agreement aimed at protecting EU domestic producers against actual or potential competition from Japanese producers was found to be capable of restricting competition within the EU internal market, since insurmountable barriers to entry into the internal market need to be overcome.[45] In the wake of a subsequent reference to inter-member states' trade and the "potential risk" of impeding the realisation of the single market, the ECJ projected the political goal of market integration to its outer boundaries in an international context.[46] The tone of this pronouncement becomes even more explicit where the Court refers to "any", i.e. cross-EU border, cartel that is "capable of constituting a threat" to the freedom of trade among member states, but in such a manner that it could simply "harm the attainment of the objectives of a single market".[47] The said market-partitioning agreement was, nevertheless, capable of adversely affecting the structure of the internal market.[48]

In conclusion, there is no traceable shift of the wider competition policy perspective when it comes to the overarching goal of the specific provision of Article 101, namely, to protect not the "immediate interests of individual competitors or consumers", but the structure of the market and thus competition as such.[49] Judging by the significant number of giant industrial cartels' pronouncements in the name of intermediate consumers, it seems that the political goal of market integration has reached an evolutionary stage by protecting certain market participants in the free game of competition that stand somewhere in the middle of this process of market consolidation. Certainly, sparse resources make it more difficult for the EC to detect more of the little, but ugly cartels that harm the welfare of final consumers because their perceived effect is less toxic and pervasive in the structure of the internal market itself; nonetheless, their effect is felt much more intensely in the EU citizens' pockets. Judging by the geographical reach of the EU cartels, it would be difficult to convince, say, EU citizens living in the North East of England of the importance of the elevators and escalators cartel, but the North Sea shrimps cartel was certainly a notable success. Thus, one would not argue much in favour of the popularity of a specific cartel in the eyes of the EU public recognising that, by having removed the national boundaries for the purpose of an integrated EU market, the EC has stretched itself quite far. So the price to pay for the consolidation of its internal market is that when it comes to EU cartel enforcement policy and prioritisation, the fantastic work done by the EC is never enough. Many of what I would call "little" cartels, at least at the EU supra-national

44 Ibid., para. 230, recalling ECJ, case C-209/07, *Beef Industry Development Society and Barry Brothers*, ECLI:EU:C:2008:643, para. 227. Generally on *Toshiba*, see *Monti*, Managing Decentralized Antitrust Enforcement: Toshiba, CML Rev 51 (2014), p. 261 et seqq.

45 Ibid.

46 GC, case T-68/09, *Soliver NV v EC*, ECLI:EU:T:2014:867, para. 239.

47 Ibid., para. 240.

48 Ibid., para. 241.

49 GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130, para. 545.

level, look inoffensive, as a narrow oligopoly is actually monopolistic in its pursuits at the Member State national level. Allowing it to escape twice, including due to the scarcity of resources at a national level, could jeopardise this achieved consolidation. In other words, we are grateful to the EC for fining not only giant but, particularly, such little EU cartels.

It is rather curious that the EU Courts have kept intact their well-established position that the parties' intention to engage in a concerted practice, for example, by means of anti-competitive pre-pricing communications, should not be taken as an "essential pre-condition" to the finding of an anti-competitive agreement.[50] Understandably, the anti-competitive "object" or purpose is based on the objective intent of the parties to reach an agreement, whereas its anti-competitive "effect" is to be ascertained in the situation where an oral arrangement is seen rather as a lack of final agreement. Following this logic, an individual victim of a cartel could rely on either the contractual or the tortious measure to claim damages. On the basis of the former measure, in order to prove an anti-competitive object, the victim needs to rely primarily on establishing the objective intent. On the basis of the tortious measure, the victim needs to infer abstention from an established anti-competitive effect. In other words, quasi-delictual inaction needs to be ascertained in situations where intention cannot be established easily, or with certainty, from the parties' actions, but can possibly still be inferred from the whole of the evidence being submitted. Even in this latter uncomfortable situation, one should acknowledge that, despite not being 100 % sure of the objective intention of the parties, their inaction, for example, being unconsciously trapped in dubious cartel meetings, could trigger a quasi-contractual, i.e. tortious, liability, as the anti-competitive effect could still be inferred from such inaction.

In *Dole* (*Bananas*),[51] the GC simply recalled that any coordination between undertakings that "knowingly" includes practical cooperation in the form of exchanges of information to eliminate the risk of competition is tantamount to collusion.[52] This explicit, i.e. intentional, conduct is therefore by its "very nature" injurious to the proper functioning of normal competition.[53] In contrast, even non-explicit manifestations of tacit collusion, where such intentional conduct is invisible for the purpose of proper detection, could still restrict competition through an inflicted harmful anti-competitive effect, which is, nevertheless, being created while undertakings tacitly abide by the rules of an established cartel whose existence is known to non-cartel members.

The Court went on to explicitly endorse a "systematic and consistent" interpretation of the EC's soft law Guidelines according to which price-fixing, market-sharing, and output-limitation agreements are

50 Ibid., para. 413.
51 GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130; COMP/39188, *Bananas*.
52 Ibid., para. 56.
53 Ibid., para. 69.

> "by their very nature among the most harmful restrictions of competition".[54]

For example, in *Versalis*,[55] the ECJ articulated once more that

> "horizontal price or market sharing agreements may be classified as very serious infringements solely on account of their nature, without the EC being required to demonstrate an actual impact of the infringement on the market".[56]

While this could be acceptable on the EC's part, it may be expected that the Courts will engage in a fuller analysis of such an impact. Thus, the illicit and immoral purpose of these agreements, as suggested by the explicit reference to their "very nature", does not push them straight into the corner of "the object box",[57] but their practical materialisation makes the actual difference in terms of negative outcomes. At the end of the day, a cartel initiator hits the object box, while its followers, even if not "friends" with the initiator, could tacitly touch on "the effect box" by consolidating the same very harmful cartel.

Pre-pricing communications were found to reduce the uncertainty regarding the pricing of bananas,[58] against the exercise of "free and undistorted competition", namely, the requirement that each producer determine autonomously its own pricing policy.[59] In practice, an autonomous setting of the price bans further contact among producers, of bananas or other goods, aimed at influencing the market strategy of other actual or potential competitors.[60] In *Bathroom Fittings and Fixtures*,[61] the price coordination among eight associations of manufacturers and three umbrella associations included the exchange of recent sales data and forecasts. In *Keramag*,[62] while the disclosure of sensitive information removed uncertainty regarding the future conduct of a competitor, it certainly did not

> "deprive operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors".[63]

54 Ibid., para. 655 et seq.
55 ECJ, case C-511/11 P, *Versalis SpA v EC*, ECLI:EU:C:2013:386; on appeal, GC, case T-59/07, *Polimeri v EC*, ECLI:EU:T:2011:361; COMP/F/38638, *Butadiene rubber and emulsion styrene-butadiene rubber*.
56 Ibid., para. 83. In the same vein, there is no need to demonstrate the actual effects of a concerted practice once "it is apparent" that its object is to prevent, restrict or distort competition, see ECJ, case C-8/08, *T-Mobile Netherlands and others*, ECLI:EU:C:2009:343, para. 29.
57 For the view that the "object box" does not include a fixed set of behavioural anti-competitive practices, see *van Cleynenbreugel*, Article 101 TFEU and the EU Courts: Adapting Legal Form to the Realities of Modernization?, CML Rev 51 (2014), p. 1409.
58 GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130, para. 63.
59 Ibid., para. 292.
60 Ibid., citing ECJ, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *"Suiker Unie" UA and others v EC*, ECLI:EU:C:1975:174, para. 56.
61 GC, case T-378/10, *Masco Corp, Hansgrohe, Hüpe and others v EC*, ECLI:EU:T:2013:469.
62 GC, joined cases T-379/10 and T-381/10, *Keramag Keramische Werke and others v EC*, ECLI:EU:T:2013:457.
63 Ibid., para. 56.

However, "any direct or indirect contact between them, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question"[64] is strictly precluded. What the EC wanted to say here is that exchanges of information of this kind are best avoided.

In contrast, in *Pierre Fabre*,[65] in the context of a selective distribution system, vertical price-fixing agreements that required distributors to sell cosmetics only in the presence of a pharmacist were found to operate as a ban on online sales, which had restricting competition as its "object" rather than its effect. Through the setting of an additional obstacle to cosmetics sales, while such mandatory marketing requirements may protect vulnerable consumers, the effect of the ban could still restrict competition. This is yet another example of unorthodoxy where the Court embraced instead the concept of a restriction by object, as it did in *Allianz Hungária*[66] and in *Groupement des Cartes Bancaires.*[67] In the latter case, the ECJ identified an error made by the GC when it took for granted that the object of the anti-competitive agreements in question was "obvious" from the actual formulas envisaged by a mechanism encouraging members to expand their activities by acquiring more bank cards in return for a membership fee. A supplementary fee applied to members tripling their acquiring transactions and a dormant fee applied to inactive members.[68] The effect of the above fees was to limit these members' activities and the competition among them. The GC had disregarded the degree of harm these fees caused. From the objective intention of certain group members, the Court inferred the anti-competitive "object" from the formulae used for setting the fees.[69] It rejected as an objective justification the prevention of free riding, as such fees would have restricted entry into the market.[70] In contrast, the ECJ accepted that free riding was a legitimate concern.[71] In his opinion, AG *Wahl*[72] clarified that proof of a restriction of competition by object is needed whenever

> "an analysis of the clauses of that agreement does not reveal the effect on competition to be sufficiently deleterious".

64 Ibid.
65 ECJ, case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*, ECLI:EU:C:2011:649.
66 See also ECJ, case C-32/11, *Allianz Hungária*, ECLI:EU:C:2013:160, para. 34: only where "the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition", the effects of the agreement should be considered more thoroughly. For the view that both the EC and the Courts have consistently expanded the "object" box beyond what one would consider as "hard core" restrictions, see e.g. *Völcker*, Ignotantia Legis Non *Excusat* and the Demise of National Procedural Autonomy in the Application of the EU Competition Rules, CML Rev 51 (2014), p. 1511.
67 ECJ, case C-67/13 P, *Groupement des cartes bancaires v EC*, ECLI:EU:C:2014:2204.
68 Ibid., para. 4.
69 Ibid., para. 20.
70 Ibid., para. 37.
71 Ibid., para. 75.
72 Opinion of AG *Wahl*, case C-67/13 P, *Groupement des cartes bancaires v EC*, ECLI:EU:C:2014:1958, para. 38.

In other words, only

> "conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object".

This means that "agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective"[73] do not restrict competition. This line of reasoning takes account of the dual-sided nature of the operating banking system. Traders would not agree to join this system if there were insufficient cardholders, as fewer consumers would join something that was not widely accepted by traders.[74] In *Gosselin*,[75] the ECJ agreed with the GC that the conduct of cover pricing and hidden commission payments qualifies as a restriction of competition by object.

Finally, unrelated to cartels but relevant for the general assessment of "effects", in *MasterCard*,[76] the ECJ agreed with the EC that in the absence of a multilateral interchange fee (MIF), the Mastercard system could remain economically viable and, therefore, the fee qualified as a restriction of competition by effect.[77] In particular, the fee could reduce the pressure that merchants can exert on acquiring banks when negotiating merchants' service charges and possibly lowering the service fees. The GC appeared to have previously disregarded the dual-sided nature of the market in question since the restrictive effects of the interchange fees should be objectively justified as an ancillary restriction.[78] However, the ECJ considered that a justified improvement under Article 101(3) cannot be identified

> "with all the advantages which the parties obtain from the agreement in their production or distribution activities".[79]

Following, again, in the well-worn footsteps of *Consten and Grunding*, the ECJ went on to say that, even if there were advantages derived from one market to another, such advantages alone could not compensate for the disadvantages stemming from the anti-competitive effects of the measure in question.[80] In other words, the beneficial effects of the MIF did not amount to "significant" objective advantages being required by Article 101(3).[81]

73 Ibid., para. 56.
74 Ibid., para. 73.
75 ECJ, case C-429/11 P, *Gosselin Group NV v EC*, ECLI:EU:C:2013:463.
76 ECJ, case C-382/12 P, *MasterCard Inc. and others v EC*, ECLI:EU:C:2014:2201.
77 Ibid., para. 143.
78 Ibid., para. 181 et seq.
79 Ibid., para. 234.
80 Ibid., para. 242.
81 Ibid.

II. From the public enforcement against EU cartels: an excursus into private enforcement

As a general rule, under EU competition law, any individual is entitled to claim compensation for any loss incurred where there is a causal relationship between that loss and an infringement of the competition rules.[82] The interplay between public and private enforcement in the area of cartels has, again, been in the spotlight in a reference for a preliminary ruling. The ECJ clarified that the interpretation of Article 101 precludes national legislation being able to categorically exclude any civil liability of undertakings belonging to a cartel for loss resulting from the fact that other tacitly colluding undertakings, even if not party to the original cartel, also raised their own prices.[83] Following this reasoning, participating undertakings could be held liable for collateral or incidental losses, i.e. unintended damage being incurred as a result of a third party's higher pricing. However, this kind of liability could be supported solely on the basis of the tortious measure, which is more generous than the standard contractual liability,[84] the latter covering for indirect losses that are not too remote. It could be presumed that, outside of the original cartel, non-participating third party undertakings were reasonably aware of implementing it *de facto*, namely, by pursuing the same pricing policy as the original cartel that they were probably silently observing. This "added" liability,[85] created by the ECJ, to shoulder cartel members differs greatly from, for example, having car insurance cover for injuries caused by a third party to one's car, where your own fault or negligence as this car's owner cannot be established. This is, first, because it was the cartel members' fault in maintaining the illegal cartel, and, second, because they could not have possibly been insured against third parties implementing this illegal cartel. The legal difficulty is that one could put forward a similar tortious claim based on a "duty of care" owed by non-cartelists, i.e. not to increase their pricing by taking advantage of the existence of a cartel to the point of actually implementing it. This could ultimately form the basis of an action in regress against so-called "umbrella pricing" by non-, but quasi, cartelists that acquired an

82 See ECJ, case C-453/99, *Courage and Crehan*, ECLI:EU:C:2001:465, para. 465; ECJ, joined cases C-295/04 to C-298/04, *Manfredi and others*, ECLI:EU:C:2006:461, para. 461; ECJ, case C-360/09, *Pfeiderer v Bundeskartellamt*, ECLI:EU:C:2011:389, para. 24; ECJ, case C-536/11, *Donau Chemie and others*, ECLI:EU:C:2013:366, para. 27; opinion of AG *Kokott*, case C-557/12, *Kone AG and others*, ECLI:EU:C:2014:45. For an excellent recent contribution on causation see, *Lianos*, Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe, in: Lianos/Davies/Nebbia (eds.), Damages Claims for the Infringement of Competition Law, forthcoming 2015.

83 ECJ, case C-557/12, *Kone AG and others*, ECLI:EU:C:2014:45; ECJ, case C-510/11 P, *Kone and others v EC*, ECLI:EU:C:2013:696.

84 Critically on the suitability of the tortious measure in the context of private competition law actions, see e.g. *Maier-Rigaud*, Umbrella effects and the ubiquity of damage resulting from competition law violations, J of Eur Comp L & Practice 5 (2014), p. 247 et seqq.

85 On the practical significance of *Kone*, see *Schreiber/Savov*, Kone v Commission: Umbrella Damages Claims, J of Eur Comp L & Practice 5 (2014), p. 548; for the view that undertakings cannot escape liability for consequences that they ought to have contemplated, see *Dunne*, It Never Rains But It Pours? Liability for 'umbrella effects' under EU Competition Law in Kone, CML Rev 51 (2014), p. 1826.

unlawful profit, too, so they should never be offered the chance of an unjustified enrichment either. Being a third party to a cartel, but ultimately having contributed to its tacit implementation, cannot be accepted as a just cause of lawful enrichment. The orthodoxy of the proper measure of damages, which should have been clarified by the ECJ, is that the victim can chose only one measure and cannot therefore claim (i) compensation on the basis of contractual liability from the members of the cartel and (ii) extra-contractual liability based on tortious inaction by third party undertakings. The abridged route, as has been proposed by the ECJ, is to recover such "indirect" losses caused by a third party's tortious inaction from the cartel members since the actual effects of this umbrella cartel were not clearly proven. This far-reaching interpretation, while certainly contrasting with a more "civilian" categorical exclusion of liability is thus no novelty under EU competition law, which has long given stricter interpretations to, for example, the concept of "joint" liability than to company law.[86] This comes with the realisation that categorical exemption of liability for a third party's action or inaction is designed (i) to protect an individual citizen (natural person) against a possible abuse of law, and (ii) to ease that same individual's burden of proof when seeking fair and just compensation for undertakings' illegal conduct, this time by not excluding the same type of liability applicable to them as legal persons.

III. Procedural principles in cartel infringements in light of Article 6(2) ECHR

One persistent bone of contention in appeals is the perceived strictness of the test applied as a legal presumption that the parent company is liable for the conduct of its subsidiary. In appeals, cartelists argued that being asked to effectively rebut this presumption of liability runs counter to the presumption of innocence laid down in Article 6(2) ECHR. The parent company is called upon to prove the negative, namely, that it gave no instructions to its subsidiary.[87] Other cartelists went even further to argue that, in practice, this presumption amounts to a *probation diabolica*. In turn, the ECJ unambiguously stated that the fact that it is difficult to adduce evidence to the contrary does not, in itself, mean that the presumption is irrefutable.[88] The ECJ had ruled that this presumption, i.e. that a company holding, directly or indirectly, all the capital of another company, exercises decisive influence over the latter, is "settled case-

86 See the argument put forward in ECJ, case C-501/11 P, *Schindler Holding Ltd and others v EC*, ECLI:EU:C:2013:522, namely that "allowing joint and several liability of the parent company for the infringements committed by its subsidiary breaches national company law regimes which, in principle, do not allow an extension of the liability of legally distinct legal persons and observe the principle of limited liability of shareholders for the debts of their company".

87 ECJ, C-243/12 P, *FLS Plast A/S v EC*, ECLI:EU:C:2014:2006, para. 17.

88 ECJ, joined cases C-247/11 P and C-253/11 P, *Gas Insulated Switchgear*, ECLI:EU:C:2014:257, para. 81.

law".[89] Therefore, it does not infringe any presumption of innocence.[90] In one of the *Industrial Bags* cartels,[91] the presumption had been applied to a parent company which exercised decisive influence over a subsidiary,[92] in which it owned all the shares, through its most senior managers, who had attended a number of cartel meetings. In *Gas Insulated Switchgear*, the ECJ reiterated that it is "settled case-law" that the conduct of the subsidiary may be imputed to the parent company,

> "where, although having separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities".[93]

In *Degussa*,[94] the existence of a compliance programme and general instructions given to a subsidiary not to engage in cartel activities could not rebut the above presumption of liability.

Another recurrent bone of contention is the protection of legitimate expectations and the principle of equal treatment.[95] The latter prohibits treating similar situations differently and different situations the same way.[96] For example, in *Industrial Bags*,[97] although both cartelists applied for a fine reduction, only one obtained it. Despite the argument that both were in the same situation, the ECJ ruled that the GC did not err in law by holding that the EC did not infringe the principle of equal treatment.[98] As a matter of principle, a person may not rely on an unlawful act committed in favour of a third party.[99] In other words, the principle of equal treatment has to be reconciled with the principle of legality.[100] Where an undertaking breaches Article 101 TFEU, it cannot escape being penalised on the grounds that other undertakings have not been fined.[101] In *Dow Chemicals*, the "differential treatment" was based on the "economic capacity" to cause damage to competition.[102] Since the actual effects could

89 ECJ, case C-179/12 P, *The Dow Chemical Company v EC*, ECLI:EU:C:2013:605; GC, case T-395/09, *Gigaset v EC*, ECLI:EU:T:2014:23; GC, case T-40/10, *Elf Aquitaine v EC*, ECLI:EU:T:2014:61.
90 Ibid., para. 27.
91 ECJ, case C-36/12, *Armando Alvarez SA v EC*, ECLI:EU:C:2014:349; COMP/F/38354, *Industrial bags*, paras. 13-25.
92 See also ECJ, case C-97/08 P, *Akzo Nobel v EC*, ECLI:EU:C:2009:536, para. 58; GC, case T-541/08, *Sasol and others v EC*, ECLI:EU:T:2014:628, para. 33.
93 ECJ, joined cases C-231/11 P to C-233/11 P, *EC v Siemens AG Österreich, VA Tech Transmission & Distribution and others, Nuova Magrini Galileo SpA*, ECLI:EU:C:2014:256, para. 46; also, see ECJ, case C-97/08 P, *Akzo Nobel v EC*, ECLI:EU:C:2009:536, para. 58.
94 GC, case T-391/09, *Evonik Degussa et AlzChem v EC*, ECLI:EU:T:2014:22.
95 GC, case T-448/07, *YKK and others v EC*, ECLI:EU:T:2012:322, para. 150.
96 ECJ, joined cases C-247/11 P and C-253/11 P, *Gas Insulated Switchgear*, ECLI:EU:C:2014:257, para. 125, citing GC, case T-279/02, *Degussa v EC*, ECLI:EU:T:2006:103, para. 131.
97 ECJ, case C-243/12 P, *Industrial Bags*, ECLI:EU:C:2014:2006, para. 59.
98 Ibid., paras. 59, 61 and 72-77.
99 Ibid., para. 82.
100 GC, case T-91/11, *InnoLux Corp v EC*, ECLI:EU:T:2014:92, para. 93.
101 See GC, case T-120/04, *Peróxidos Orgánicos v EC*, ECLI:EU:T:2006:350, para. 77.
102 ECJ, case C-499/11 P, *Dow Chemical and others v EC*, ECLI:EU:C:2013:482.

not be measured, the EC differentiated on the basis of sales figures, with the starting amount of the fines a reflection of the above capacity to cause damage to competition.[103] The ECJ made it clear that only an undertaking that had cooperated with the EC on the basis of the Leniency Notice could be granted a reduction of the fine.[104] Therefore, this benefit cannot be extended to another company, which, while it belonged to the company benefitting from the reduction during the infringement period, ceased to do so at the time when, under leniency, this company cooperated with the EC.[105] However, a "voluntary and unsolicited" disclosure by a cartelist of its cooperation with the EC during "on-site" inspections did not count as cartel discovery.[106]

Another controversial interpretation was raised in *Zip Fasteners*.[107] The cartelists claimed that, by having applied the previous 1996 Leniency Notice instead of the latest 2000 Notice, the GC misread the *lex mitior* principle recognised by Articles 7 ECHR and 49(1) EU Charter. According to this principle, the most lenient law applies retroactively. In particular, the cartelists argued that the evidence adduced provided significant added value to the EC's investigation. In contrast, AG *Wathelet* highlighted that the cartelists had already claimed an additional reduction in the amount of the fine, so they had already benefitted from partial immunity. As the basis for the imposition of the fine was Article 23(2) and (3) of the Regulation 1/2003, and since the application was introduced before the entry into force of the 2002 Leniency, *ratione temporis*, it was right to apply the previous 1996 Leniency Notice. In *Wathelet's* opinion, the advantage, which had already been gained, constituted an inversion of the principle *ne bis in indem*,[108] namely, a reduction in the fine for having provided "added value" and immunity for the facts which the cartelists revealed.[109] In other words, this would otherwise make it possible for an undertaking to be rewarded twice. Nonetheless, one could extract the proposition that even the general principle of non-retroactivity is being applied somewhat differently to such undertakings. This, again, was the case in *Paraffin and Slack Waxes*,[110] where the GC agreed with the EC that applying the 2006 soft law Guidelines, detailing the calculation of the fine provided for in Article 23(2) of the Regulation 1/2003, made perfect economic sense since the Regulation allows the EC to adjust the level of the fine imposed on a thirteen-year-old cartel.

103 Ibid.
104 ECJ, joined cases C-247/11 P and C-253/11 P, *Areva and others v EC*, ECLI:EU:C:2014:257.
105 Ibid., para. 85.
106 ECJ, case C-578/11 P, *Deltafina SpA v EC*, ECLI:EU:C:2014:1742, para. 48; COMP/38281, *Row tobacco Italy*.
107 See the opinion of AG *Wathelet*, case C-408/12 P, *YKK and others v EC*, ECLI:EU:C:2014:66, para. 60.
108 For the principle *ne bis in idem* applied to administrative sanctions, see e.g. *Andreangeli*, Ne Bis in Idem and Administrative Sanctions: Bonda, CML Rev 50 (2013), p. 1827 et seq.
109 See the opinion of AG *Wathelet*, ECJ, case C-408/12 P, *YKK and others v EC*, ECLI:EU:C:2014:66, para. 70.
110 GC, case T-541/08, *Sasol and others v EC*, ECLI:EU:T:2014:628, para. 214.

The next issue of discord concerns the principle of proportionality with regard to the determination of cartel fines.[111] The ECJ reiterated its previously held position when it ruled out joint or several liability (in order to guarantee that the parent company covers for its subsidiary) where the two companies form a single economic unit.[112] By contrast, the amount of the fine has to be determined by reference to the gravity of the infringement, for which the company concerned is considered individually responsible, and the duration of the infringement.[113] In *Gas Insulated Switchgear*, the ECJ held that, when ruling on points of law, the Court cannot substitute, on grounds of fairness, its own assessment for that of the GC by exercising "its unlimited jurisdiction" to rule on the amount of fines imposed on undertakings. The only exception applies where the level of the fine is not "merely inappropriate", but also "excessive" up to the point of being truly "disproportionate".[114] In *Candle Waxes*,[115] the GC reminded that the exercise of unlimited jurisdiction does not amount to a review undertaken by the Court's own motion and that the proceedings are *inter partes*.

However, the EC's power to impose penalties is limited to determining the amount of the fine, for the payment of which legal entities forming part of the same undertaking are held "jointly and severally liable"; it cannot decide on how the same fine is to be allocated internally.[116] In other words, the GC erred in law when it ruled in the absence of any prior finding by the EC that some of the companies had a greater share of responsibility.[117] In *Heat Stabilisers*, the GC maintained, again, its previous position that the method of calculation, as proposed in the soft law Guidelines on the calculation of fines,[118] allows for certain disparities to occur in the setting of the fines. Although this calculation is not based on the overall turnover of an undertaking, it is irrelevant for the purpose of establishing a possible breach of the principles of proportionality and of equal treatment.[119] The Guidelines mention that, in order to take into account the duration of the participation of each undertaking in the cartel, the amount, which is determined on the basis of the value of sales, will be

111 For a recent contribution challenging the EC's margin of discretion on the proportionality of the fine, see e.g. *Gilliams*, Proportionality of EU Competition Fines: Proposal for a Principled Discussion, World Comp L & Ec Rev 37 (2014), p. 456.
112 GC, case T-541/08, *Sasol and others v EC*, ECLI:EU:T:2014:628, para. 107.
113 Ibid., citing ECJ, joined cases C-247/11 P and C-253/11 P, *Areva and others v EC*, ECLI:EU:C:2014:257, para. 127.
114 ECJ, joined cases C-231/11 P to C-233/11 P, *EC v Siemens AG Österreich*, *VA Tech Transmission & Distribution and others, Nuova Magrini Galileo SpA*, ECLI:EU:C:2014:256, para. 111.
115 GC, case T-540/08, *Esso Societé anonyme française, Esso Deutschland and others v EC*, ECLI:EU:T:2014:630.
116 ECJ, joined cases C-247/11 P and C-253/11 P, *Gas Insulated Switchgear*, ECLI:EU:C:2014:257, paras. 151 and 157.
117 Ibid., para. 153.
118 See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ C 210 of 1/9/2006, p. 2.
119 GC, case T-181/10, *Reagens v EC*, ECLI:EU:T:2014:139, para. 196.

"multiplied by the number of years of participation".[120]

Several times, a wrong multiplier has been applied by the EC, leading to a fine reduction on appeal.[121] Previously, in *Dow Chemical*, an allegation that the applied multiplier for deterrence was excessive and discriminatory had failed,[122] since in the exercise of its power of "unlimited jurisdiction", the GC cannot make just a "mechanical recourse" to an arithmetical formula based only on the turnover of the undertaking concerned. On appeal, one undertaking asked the EC for a fine reduction due to inability to pay, which failed. Despite the undertaking's precarious financial situation,[123] this factor could not jeopardise its economic viability, even in the event of its bankruptcy.

IV. A quasi-criminal nature of cartel fines in light of Article 6(1) ECHR?

Another heated argument is whether the above penalties imposed in cartel proceedings, on the basis of Regulation 1/2003, could be considered as "criminal", or at least "quasi-criminal" in scope, since they do not apply to "natural" persons.[124] Obviously, it is the latter case, since undertakings enjoy a legal personality. Penalties have to meet the "Engel criteria",[125] as developed by the ECtHR,[126] to qualify for the "hard core" area of criminal law, in particular, where a penalty requires the deprivation of liberty. However, imprisonment is not decisive in excluding the inherently criminal character of an offence.[127] Despite the domestic classification of the fine as administrative, having

120 Guidelines, (fn. 118), para. 24.

121 See in the *Bathroom Fixtures and Fittings* cartel (case COMP/39092) on the Italian market for ceramics, where the undertakings participated in the cartel for a shorter period; GC, case T-380/10, *Wabco Europe and others v Commission*, ECLI:EU:T:2013:449.

122 ECJ, case C-499/11 P, *Dow Chemical and others v EC*, ECLI:EU:C:2013:482.

123 See GC, case T-406/09, *Donau Chemie v EC*, ECLI:EU:T:2014:254. *Reagens* (*Heat Stabilisers*) was refused access to documents relating to applications for inability to pay the fine, see GC, case T-181/10, *Reagens v EC*, ECLI:EU:T:2014:139.

124 See opinion of AG *Kokott*, case C-501/11 P, *Schindler Holding Ltd and others v EC*, ECLI:EU:C:2013:248, Installation and maintenance of elevators and escalators, para. 35.

125 See ECtHR, no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, *Engel and others v the Netherlands*, para. 82 et seq.

126 See generally ECtHR, Guide on Article 6: Right to a Fair Trial (criminal limb), 2014, para. 19 on the consideration of *Menarini Diagnostics S.r.l v Italy* under the criminal head of Article 6 ECHR.

127 See e.g. ECtHR, no. 8544/79, *Öztürk v Germany*, para. 53; ECtHR, no. 23470/05, *Nicoleta Gheorghe v Romania*, para. 26.

regard to its high level[128] and deterrent purpose,[129] the fine imposed on *Menarini*[130] was considered to be criminal under Article 6(1) ECHR, since the Engel criteria are not required cumulatively.[131] In *Schindler*,[132] the cartelists contested the GC's finding that the EC's decisions do not belong to the "hard core" area of criminal law, arguing that the Court wrongly transposed *Jussila*[133] to cartel proceedings by accepting that outside of the above area, the decision does not need to be adopted by a tribunal. They also contested the transposition of *Menarini* as the EC is not an "independent" administrative authority. The ECJ dismissed the above claims by saying that the EC's administrative decisions in imposing fines in competition matters are still compatible with Article 6 ECHR. For the ECJ, "entrusting" both the prosecution and the punishment of breaches of competition law to an administrative authority (in the first instance) does not make the current system incompatible as long as the decision can still be challenged before a tribunal.[134]

In light of *Menarini*, AG *Kokott* asserted that this recognition does not trigger a breach of Article 6 ECHR,[135] since *Menarini* had access to a domestic court, exercising full jurisdiction (i.e. the power to quash the decision on questions of fact and law),[136] which carried out a complete judicial review[137] of the administrative decision of the Italian competition authority, rather than a mere "formal" review of legality. The separate opinion of Judge *Albuquerque* warned of the emergence of a so-called "pseudo" criminal law with two speeds, where an overly powerful public administration imposes extremely severe financial penalties, but does so in the absence of the

128 On the maximum potential penalty see e.g. ECtHR, no. 7819/77 and 7878/77, *Campbell and Fell v the UK*, para. 72; ECtHR, no. 13157/87, *Demicoli v Malta*, para. 34.

129 On the punitive or deterrent purpose see e.g. ECtHR, no. 8544/79, *Öztürk v Germany*, para. 52; ECtHR, no. 12547/86, *Bendenoun v France*, para. 47; ECtHR, no. 9912/82, *Lutz v Germany*, para. 55.

130 ECtHR, no. 43509/08, *A. Menarini Diagnostics S.R.L. v Italy*. See also White & Case, Commission publishes new Best Practices for antitrust procedures and expands the role of Hearing Officer; and Strasbourg court stresses the importance of full merits judicial review of administrative authority decisions imposing competition fines, October 2011.

131 See ECtHR, no 43509/08, *A. Menarini Diagnostics S.R.L. v Italy*, para. 38: "*la qualification juridique de la mesure litigieuse en droit national, la nature même de celle-ci, et la nature et la degré de sévérité de la «sanction» (Engel, précité). Ces critères sont par ailleurs alternatifs et non cumulatifs: pour l'article 6 § 1 s'applique au titre des mots «accusation en matière pénale», il suffit que l'infraction en cause soit, par nature, «pénale» au regard de la Convention, ou ait exposé l'intéressé à une sanction qui, par sa nature es son degré de gravité, ressortit en général à la 'matière pénale'.*"

132 ECJ, case C-501/11 P, *Schindler Holding Ltd and others v EC*, ECLI:EU:C:2013:522.

133 ECtHR, no. 73053/01, *Jussila v Findland*, para. 31.

134 ECJ, case C-501/11 P, *Schindler Holding Ltd and others v EC*, ECLI:EU:C:2013:522, para. 34.

135 Ibid., para. 37.

136 See e.g. ECtHR, no. 15523/89, *Schmautzer v Austria*, para. 36; ECtHR, no. 15963/90, *Gradinger v Austria*, para. 44, ECtHR, no. 43509/08, *A. Menarini Diagnostics S.R.L. v Italy*, para. 59.

137 Ibid., paras. 63-67.

classical guarantees of criminal procedural law, which could ultimately "usurp" the judiciary.[138]

In light of the above, in *Paraffin and Slack Waxes*,[139] the GC made the following statement:

> "While competition law is indeed similar to criminal law, it is not at the 'heart' of criminal law".

This is tantamount to saying, "Here we have an apple" that is not really an apple. In reality, the Court was interested only in emphasising that the above criminal procedural safeguards, which Judge *Albuquerque* referred to as lacking, are inapplicable outside the "hard core of criminal law".[140] The Court went on to state that

> "unlike criminal law, both the benefits and the penalties for unlawful activities are purely pecuniary".[141]

In the eyes of the Court, if the fines were "more or less predictable, this would have highly damaging consequences for the European Union competition policy",[142] in particular, if the offenders could calculate in advance the cartel's benefits against an eventual fine.[143]

C. A critical review of the substantive rights of defence

Some of the undertakings' rights of defence are mirrored by the EU Charter of Fundamental Rights, others by Article 6 ECHR.[144] The right to good administration of justice finds recognition in Article 41 of the EU Charter. Accordingly, every person has the right to be handled "impartially, fairly and within a reasonable time". Under Article 44(1)(c) of the GC's Rules of Procedure, the summary of an application must be "sufficiently clear and precise" to enable the defendant to prepare its defence.[145] Therefore, a mere abstract statement of the grounds for appeal does not meet these requirements. On appeal, very many pleas were practically left unsubstantiated, al-

138 Ibid., *Opinion Separées*, para. 9: "*L'acceptation d'un «pseudo-droit pénal» ou d'un «droit pénal à deux vitesses», où l'administration exerce sur les administrés un pouvoir de punition, imposant parfois des sanctions pécuniaires extrêmement sévères, sans que s'appliquent les garanties classiques du droit et de la procédure pénale, aurait deux conséquences inévitable: l'usurpation par les autorités administratives de la prérogative juridictionnelle du pouvoir de punir et la capitulation des libertés individuelles devant une administration publique toute-puissante*".

139 GC, case T-541/08, *Sasol and others v EC*, ECLI:EU:T:2014:628, para. 206.

140 Ibid., citing ECtHR, no. 73053/01, *Jussila v Finland*, para. 43.

141 GC, case T-541/08, *Sasol and others v EC*, ECLI:EU:T:2014:628, para. 207.

142 Ibid.

143 Similarly see, GC, case T-279/02, *Degussa v EC*, ECLI:EU:T:2006:103, para. 83.

144 For a recent survey, see *Oliver/Bambois*, Competition and Fundamental Rights Survey, J of Eur Comp L & Practice 5 (2014), p. 498.

145 GC, case T-30/10, *Regens SpA v EC*, ECLI:EU:T:2014:253; COMP/38589, *Heat Stabilisers*, para. 67.

leging, *inter alia*, an infringement of the right to good administration in a superficial manner, which contributed to their rejection.

I. The right to a fair presentation of evidence: the statement of objection

In *Road Pavement Bitumen*,[146] the ECJ followed the GC's previous approach, which required the statement of objections (SO) to be sufficiently clear as to afford the undertakings concerned the opportunity to make known their views on the relevance of the alleged facts.[147] Although each group of undertakings constituted a single undertaking, the SO mentioned that the parent company was in a position to exercise decisive influence over the conduct of its subsidiaries. This statement had been made without any clarification of the nature of the relationship between the two, in particular, the participation of the subsidiaries' managing director. This is why the GC emphasised later that the SO's wording should have been clearer.[148] However, the ECJ found that the GC erred in law[149] when it considered that the failure to provide in the SO any additional evidence for the existence of a single economic unit made sufficiently clear the EC's intention to apply the presumption of decisive influence.[150] The SO was even more ambiguous since the subsidiary, participating through its managing director, received no such SO.[151] Furthermore, it was unclear from the parent company's reply to the SO whether this company actually understood its potential liability for its wholly-owned subsidiary. On this basis, the ECJ found that the parent company's rights of defence had, indeed, been infringed.[152]

II. The right to equality of arms

The principle of "*audi alteram partem*", i.e. "hear the other side, too", allows the accused party to present the case without being placed at a substantial disadvantage vis-à-vis its opponent. In *Guardian Industries*,[153] the principle of equality of arms was referred to as a "corollary of the very concept of a fair hearing", whose aim is to ensure a balance between the parties so that they have the opportunity to examine and challenge any document submitted to the court and so be afforded a reasonable opportunity to present the case. The issue in dispute was the receipt by Guardian of the copy of a letter only three days before the hearing. The ECJ dismissed it since *Guardian*

146 ECJ, case C-612/12 P, *Ballast Nedam NV v EC*, ECLI:EU:C:2014:193. See *Nikpay/Taylor*, The New UK Competition Regime: Radically Different or More of the Same?, J of Eur Comp L & Practice 5 (2014), p. 278.
147 ECJ, case C-612/12 P, *Ballast Nedam NV v EC*, ECLI:EU:C:2014:193, para. 13.
148 Ibid., para. 69.
149 Ibid., para. 26.
150 Ibid.
151 Ibid., para. 28.
152 Ibid., para. 30.
153 ECJ, case C-580/12 P, *Guardian Industries Corp., Guardian Europe Sarl v EC*, ECLI:EU:C:2014:2363; COMP/39165, *Flat glass*.

Industries had neither asked the GC to comment on that letter in writing, nor had Guardian requested that the hearing be postponed. Reference to the principle of equality of arms was previously made in *Bathroom Fittings and Fixtures*,[154] where it was alleged that the EC used documents to which the cartelists themselves did not have access. Since the documents in question were not to be found in the EC's investigation file either, the rights of defence would have been jeopardised only if the cartelists had expressly asked to have access to them.[155] In this case, while they had indeed asked for access to the documents, the appeal was dismissed because they had failed to also seek an extension for responding to them.

III. The right to have access to file

As a matter of principle, no judge can rely on evidence presented by a party that has not been shown to the other party and on which the latter has been unable to present an observation. The ECJ held that, as a rule, before being heard, the parties have a right to inspect and comment on the existing evidence and to submit observations to the court.[156] It then falls on the courts to balance the protection of confidentiality whenever access to the file is required against the need to allow the parties to participate usefully in the proceedings.[157]

In principle, access to the file attempts to reconcile an institutional interest in the smooth running of inspections, investigations, audit, or court proceedings with the undertakings' interest in protecting against disclosure their own commercial interests or other sensitive business information. In *Heat Stabilisers*,[158] one of the grounds for annulment of the EC's decision was that the EC had denied cartelists access to all of the requested documents on its file, including partial access to non-confidential versions of such documents. The GC reiterated that it is "settled case law" that Article 4 of the Transparency Regulation 1049/2001 constitutes an exception to the general principle of public access to such documents.[159] Therefore, it must be interpreted and applied restrictively. However, whenever such a request is received, the institution in question is required to carry out "a concrete, individual assessment" of the content of such documents.[160] Unfortunately, the EC failed to do so, though it could have provided access to a non-confidential version of the undertakings' requests and to the first questionnaire. The EC wrongly refused such access in order to protect the undertak-

154 GC, joined cases T-379/10 and T-381/10, *Keramag Keramische Werke AG v EC*, ECLI:EU:T:2013:457, para. 265.
155 This follows a previous line adopted in GC, joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line and others v EC*, ECLI:EU:T:2003:245, para. 340; GC, case T-376/10, *Mamoli Robinetteria SpA v EC*, ECLI:EU:T:2013:442.
156 ECJ, case C-89/08 P, *EC v Ireland and others*, ECLI:EU:C:2009:742, para. 52.
157 See e.g. *Fountoukakos/Puech-Baron*, What happens in Luxembourg stays in Luxembourg: confidentiality issues in competition law proceedings before the EU Courts, J of Eur Comp L & Practice 5 (2014), p. 331.
158 GC, case T-181/10, *Reagens SpA v EC*, ECLI:EU:T:2014:139, para. 51.
159 Ibid., para. 60.
160 Ibid., para. 61.

ings' commercial interests.[161] Furthermore, in order for the above refusal to be justified, the EC should have provided

> "explanations as to how access to that document could specifically and actually undermine the interest protected by an exception to disclosure".[162]

To date, the Court has made use of general presumptions in four cases concerning documents on administrative files relating to a procedure for reviewing State aid; documents exchanged between the EC and notifying or third parties in merger control proceedings; the plea lodged by one of the EU institutions in court proceedings; and documents concerning an infringement procedure during the pre-litigation stage.[163] The ECJ held that it is sufficient for an undertaking being refused access to either incriminatory or exculpatory documents to prove that it would have been able to use any such exculpatory documents for its defence.[164] Under the ECHR, the Court will not review whether a refusal of disclosure was justified, but whether the decision-making procedure complied with the other procedural guarantees, such as an adversarial hearing or equality of arms.[165]

An overriding public interest in disclosure must be "objective and general in nature" and must be "distinguishable" from individual or private interests.[166] The Court clarified that the beneficiaries of the right of access under the Transparency Regulation 1049/2001 are

> "any natural or legal person residing or having its registered office in a Member State".[167]

Disclosure should undermine (i) the protection of commercial interests of a specific natural or legal person or the purpose of investigations, inspections, and audits,[168] or (ii) the institution's decision-making process, in particular, where the document contains opinions for internal use only as part of deliberations and primary consultations within the institution concerned.

The above exceptions have to take into account the specific rules governing access under Regulations 1/2003 and 773/2004,[169] which pursue different objectives. None of them expressly gives one regulation primacy over the other, which creates a conflict of norms.[170] The Court simply stated that if third parties, who have no right to access the file under the specialist regulations, were to obtain access on the basis of the more favourable Transparency Regulation, then the former could clearly be under-

161 Ibid., para. 100.
162 ECJ, case C-356/12 P, *EC v EnBW Energie Baden-Württemberg AG and others*, ECLI:EU:C:2014:350, para. 64.
163 Ibid., para. 66.
164 ECJ, case C-407/08 P, *Knauf Gips KG v EC*, ECLI:EU:C:2010:389, para. 23.
165 See ECtHR, (fn. 126), para. 105.
166 Ibid., para. 142.
167 Ibid., para. 143.
168 ECJ, case C-356/12 P, *EC v EnBW Energie Baden-Württemberg AG and others*, ECLI:EU:C:2014:350, para. 62; COMP/F/38899, *Gas insulated switchgear*.
169 Ibid., para. 83.
170 Ibid., para. 84.

mined.[171] It follows that it is preferable to apply the continental principle, i.e. the special precedes the general norm (*specialia generalibus derogant*), than the principle of *lex melior*, i.e. the more favourable regulation granting third parties access to the file. The ECJ found that the GC had previously erred in law by finding that an eventual disclosure of the documents requested was unlikely to undermine the protection of the EC's investigations.[172] In *Airfreight*,[173] the GC explained that the above interpretation that restricts third parties' access to the file is really needed; otherwise, disclosure could discourage potential whistleblowers from making corporate statements.

The GC clarified in *Aluminium Fluoride*[174] that where access has been refused, the undertaking has to show that the document in question would have been useful in its defence. In other words, it is not necessary for it to have influenced the course of the proceedings, the content of the EC's decision or, indeed, the outcome of the administrative procedure. In this case, the Court held that the EC was wrong to refuse access to a non-confidential version of a part of the decision whose confidentiality had previously not been raised as being an issue.

The most significant ruling on access is *MasterCard*,[175] where the GC found that the EC wrongly denied access to an internal study of the costs and benefits to merchants accepting different methods of payment. When an institution is asked to disclose a document on the basis of the exceptions foreseen by Regulation 1049/2001, that institution must also assess whether the document falls within any of its exceptions, in particular, access that might undermine the institution's decision-making process, such as

> "attempts to influence and exert external pressure or curtail its independence".[176]

This is something the EC failed to prove.[177] It was not enough that an internal study, reflecting preliminary results, concerned a protected interest. Rather, the institution was required to assess whether disclosure could specifically and actually undermine the protected interest.[178] For example, one cannot regard all information concerning a company and its business relations as commercially sensitive,[179] except for sale figures, market shares, or customer relations.[180] In addition, the risk of that interest being

171 Ibid., para. 88.
172 Ibid., para. 98.
173 GC, case T-534/11, *Schenker AG v EC*, ECLI:EU:T:2014:854.
174 GC, case T-404/08, *Fluorsid SpA, Minmet financing Co v EC*, ECLI:EU:T:2013:321, citing ECJ, case C-110/10 P, *Solvay v EC*, ECLI:EU:C:2011:687, para. 57; ECJ, case C-204/00 P, *Aalborg Portland v EC*, ECLI:EU:C:2004:6, para. 71; ECJ, case C-407/08 P, *Knauf Gips v EC*, ECLI:EU:C:2010:389, para. 110; ECJ, joined cases C-238/244/245/247/250 to C-252/99 P and C-254/99 P, *Limburgse Vinyl v EC*, ECLI:EU:C:2002:582, para. 108.
175 GC, case T-516/11, *MasterCard Inc., MasterCard International Inc., MasterCard Europe v EC*, ECLI:EU:T:2014:759; COMP/34579, *MasterCard*; COMP/36518, *EuroCommerce*; COMP/38580, *Commercial Cards*.
176 Ibid., para. 48.
177 Ibid., para. 61.
178 Ibid., para. 50.
179 Ibid., para. 81.
180 Ibid., para. 83.

undermined should be reasonably foreseeable, and not purely hypothetical.[181] In fact, the preliminary nature of the study and the fact that it was still being commented upon by the EC did not establish that its decision-making process could be seriously undermined.[182]

Therefore, the reality of external pressures should have been established with certainty, by adducing evidence to show that there was indeed such a risk of being undermined.[183] The EC did not adduce any such evidence.[184]

IV. The right to be heard before an independent and impartial tribunal

The argument that the EC is not a "tribunal" within the meaning of Articles 6 ECHR or 47 EU Charter has recently been raised in the *Removals* cartel.[185] It consists of two major requirements. On the one hand, subjective impartiality requires that no competition official shows "bias or personal prejudice in any way", and on the other, objective impartiality is required. The latter requirement demands that sufficient guarantees exist to exclude any legitimate doubt as to bias on the part of the competition agency.[186] In view of the cartelists, the fact that the EC, acting as any State authority, brings proceedings against them and later also fines them for the existence of the cartel, misses the "objective impartiality" target.[187] What matters is that all the necessary precautions are taken in order to avoid

> "any semblance of bias in the eyes of the persons concerned".[188]

AG *Kokott* suggested that, as an administrative authority, the EC does not need to satisfy the "same strict requirements" as an independent tribunal within the meaning of Article 47 EU Charter as long as the EC's administrative decisions are subject to independent judicial review by the EU Courts.[189] However, a pertinent argument raised by AG *Kokott* in *Schindler*[190] is that the right to an impartial tribunal under Article 47 could not be relied upon to demand a "fundamental modification of the distribution of competences" between the EC, acting as an administrative competition authority, and the EU Courts. This is a lucid observation since the ECHR does not create rights where such rights are not afforded protection by domestic, i.e. EU law.

181 Ibid.
182 Ibid., para. 67.
183 Ibid., para. 71.
184 Ibid., para. 89.
185 ECJ, case C-439/11 P, *Ziegler SA v EC*, ECLI:EU:C:2013:513, para. 140.
186 Ibid., para. 141. For the view that there is a "confirmation" bias within the DG COMP since the same individuals draft both the SO and the final decision, see e.g. *Lang*, The Duty of Cooperation of National Courts in EU Competition Law, Irish J of Eur L 17 (2014), p. 31.
187 ECJ, case C-439/11 P, *Ziegler SA v EC*, ECLI:EU:C:2013:513, para. 144.
188 Ibid.
189 Ibid., para. 151.
190 Opinion of AG *Kokott*, ECJ, case C-501/11 P, *Schindler Holding Ltd and others v EC*, ECLI:EU:C:2013:248, para. 41.

Therefore, the only way to sort out any perceived lack of independence and impartiality is by undergoing an institutional reform, no matter how difficult to achieve this could be.

Another rather amusing argument raised before the GC, but ultimately rejected, was that the above requirement of being heard before an independent tribunal was not met where the cartelists had not been heard by "judges", as none of the members of the College of Commissioners had attended the undertakings' hearing.[191]

V. The right to a reasoned decision

In recent times, the right to a reasoned decision is one of the most common grounds heard on appeal. The failure to state reasons concerns a matter of public policy which the Courts are required to raise on their own motion.[192] Therefore, the EC must give reasons for its ultimate decision based on the results of its entire investigation.[193] For example, in *Liquid Crystals*, the GC relied on an appeal in the area of merger proceedings (*Bertelsmann and Sony v Impala*) in order to clarify that the EC is not obliged to explain any differences between its final and provisional assessments.[194]

In *Nexans*,[195] the cartelists submitted that the GC had failed to state reasons. According to Article 36 of the Statute of the ECJ and Article 81 of the Rules of Procedure of the GC, the GC did not "explain adequately" how it had reached the conclusion that the alleged infringement "probably" had a "global reach".[196] The inspection decision also lacked precision on the same geographic scope. The cartelists went on to argue that, since the conduct affected markets outside the EU, it was unclear how this could have affected the internal market. Rather, the lack of precision of the said decision affected their rights of defence, thereby preventing them from "understanding the exact scope of their obligation to cooperate".[197] The ECJ recognised the brevity of the decision.[198] It stated that, while the EC cannot carry out an inspection if the suspected cartel does not affect the internal market, it may still examine documents relating to outside markets in order to detect whether such conduct could potentially affect the internal market.[199] The Court found that the GC had properly explained why it held that the EC had described in sufficient detail the scope of the suspected cartel.[200] The same approach had previously been proposed by AG *Kokott*, namely,

191 GC, case T-372/10, *Bolloré v EC*, ECLI:EU:T:2012:325, para. 53.
192 GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130, para. 241.
193 GC, case T-91/11, *InnoLux Corp v EC*, ECLI:EU:T:2014:92, para. 96.
194 Ibid.
195 ECJ, case C-37/13 P, *Nexans SA and Nexans France SAS v EC*, ECLI:EU:C:2014:2030.
196 Ibid., para. 17.
197 Ibid., para. 19.
198 Ibid., para. 24.
199 Ibid., para. 27.
200 Ibid., para. 28.

that it is unnecessary that the relevant market is precisely defined in the inspection decision.[201]

The ECJ had previously explained, notably in *Solvay*,[202] what can reasonably be expected of a statement of reasons, specifically, to be appropriate to the measure at issue and to disclose the reasoning in a clear and unequivocal fashion.[203] The latter requirement has to enable the court to exercise its power of review.[204] The Court recognised with almost precedential value, i.e. "as settled case-law", that the above requirements need to be analysed by reference to the circumstances of the case, in particular, the content of the measure and its addresses. It is unnecessary to refer to all the relevant facts and points of law.

As has been unambiguously stated in *Solvay*, it is not only the wording of the statement of reasons, but also "the context and all the rules governing the matter" which need to be carefully examined before reaching the conclusion of an inadequate statement of reasons.[205] For example, in *Bananas*,[206] the GC dismissed the appeal on the grounds of the EC's failure to identify clearly and unequivocally the various types of information exchanged that it regarded as unlawful, in particular, the price-setting factors. In yet another recent appeal,[207] the Court considered that the statement of reasons was adequate, in particular, since the EC had stressed the importance of imposing a fine with a deterrent effect and emphasised the special nature of electronic records. For the latter, there is, indeed, a greater risk of manipulation and concealment than for paper records. The undertaking did so in order to avoid a higher fine. Although in one instance, the undertaking had acted only negligently, while the incoming e-mails were being diverted to its own server, this infringement continued for a significant period of time during the EC's inspection.

In *Gascone*, the ECJ ruled that the GC was not obliged to provide in the statement of reason an 'account that follows exhaustively and one by one all the arguments' put forward by the parties.[208] However, in *Removals*,[209] AG *Kokott* clarified that it is both in the spirit and purpose of the obligation to state reasons; thus, the explanations to be given by the EC

> "must be more detailed the greater the extent to which the penalty imposed exceeds the minimum requirements laid down in the guidelines on fines".

201 Opinion of AG *Kokott*, case C-37/13 P, *Nexans SA and Nexans France SAS v EC*, ECLI:EU:C:2014:223, para. 49.
202 ECJ, case C-455/11 P, *Solvay v EC*, ECLI:EU:C:2013:796, para. 90.
203 Ibid., para. 31.
204 See also GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130, para. 125.
205 Ibid., para. 33.
206 Ibid., para. 264.
207 GC, case T-272/12, *Energeticky a prumyslovy holding a.s., EP Investment Advisors s.r.o. v EC*, ECLI:EU:T:2014:995; COMP/39793, *EPH and others*.
208 ECJ, case C-36/12 P, *Armando Alvarez v EC*, ECLI:EU:C:2014:349, para. 31, citing ECJ, C-58/12 P, *Groupe Gascone v EC*, ECLI:EU:C:2013:770, para. 37; see previously ECJ, case C-499/11 P, *Dow Chemical and others v EC*, ECLI:EU:C:2013:482.
209 See opinion of AG *Kokott*, case C-439/11 P, *Ziegler SA v EC*, ECLI:EU:C:2012:800, para. 105.

This statement creates legitimate expectations that the higher the fine being contemplated, the lengthier the ruling will be, though this does not necessarily make it clearer.

According to Article 20(4) Regulation 1/2003, an inspection decision must indicate both the subject matter and the purpose of the inspection. Both requirements are essential to ensure that the undertakings concerned understand the scope of their duty to cooperate and that their rights of defence are being duly observed.[210] Thus, there is no obligation to communicate to the addresses all the information that the EC has at its disposal or to make a "precise" legal analysis of the alleged infringements, e.g. to define exactly the relevant market.[211]

In *Industrial Bags*,[212] the cartelists submitted that the EC explained only at the hearing before the GC that it had relied on the presumption of decisive influence of the parent company over its subsidiary where it held a 100 % shareholding. During the written procedure, they complained that the decision was vitiated by a defective statement of reasons since the EC insisted that the presumption of liability had not been rebutted.[213] The obligation to state reasons was regarded as a "corollary" of the principle of respect for the rights of defence.[214] First, this obligation must provide sufficient information to make it possible to ascertain whether the administrative act is vitiated by a defect, and to enable it to be reviewed by the judicature.[215]

In *Bananas*,[216] the Court considered that the EC fulfilled its obligation to state reasons where it had indicated the factors that enabled it to measure the gravity and the duration of the infringement. A more detailed account or figures relating to the method used to calculate the fine was, therefore, unnecessary.[217]

As a general rule, a statement of reasons, which is sent to a parent company held responsible for the unlawful conduct of its subsidiary, must be capable of justifying the attribution to the parent company of liability for that infringement.[218] However, the ECJ held that the GC was right not to take issue with the EC for failing to give specific reasons concerning the imposition of a fine to be paid jointly and severally by those companies, which no longer formed a single undertaking.[219] This approach is seemingly inconsistent with previous rulings.

210 ECJ, case C-37/13 P, *Nexans SA and Nexans France SAS v EC*, ECLI:EU:C:2014:2030, para. 34.
211 Ibid., para. 35 et seq.
212 ECJ, case C-243/12 P, *FLS Plast A/S v EC*, ECLI:EU:C:2014:2006; GC, case T-64/06, *FLS Plast v EC*, ECLI:EU:T:2012:102; COMP 4634/2005; COMP/F/38354, *Industrial Bags*.
213 Ibid., para. 42.
214 Ibid., para. 49.
215 Ibid.
216 GC, case T-588/08, *Dole Food Company, Inc., Dole Germany OHG v EC*, ECLI:EU:T:2013:130, para. 647.
217 Citing ECJ, case C-279/98 P, *Cascades v Commission*, ECLI:EU:C:2000:626, paras. 38-47; and GC, joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line and others v Commission*, ECLI:EU:T:2003:245, para. 1532.
218 ECJ, joined cases C-247/11 P and C-253/11 P, *Areva SA, Alstom SA, T & D Holding SA, Alstom Grid SAS, Alstom Grid SA v EC*, ECLI:EU:C:2014:257, para. 34; GC, joined cases T-117/07 and T-121/07, *Areva and others v EC*, ECLI:EU:T:2011:69; COMP/F/38899, *Gas Insulated Switchgear*.
219 Ibid., para. 51.

VI. The right to decide within a reasonable time

A recurrent basis for appeal put forward by cartelists is, on the basis of Article 47 EU Charter and Article 6(1) ECHR, the right to receive a ruling within a "reasonable" time in respect of the enshrined principle of effective judicial protection.[220] For example, in *Heat Stabilisers*,[221] the GC recalled that almost a precedential value was being attached to compliance with the procedural requirement of reasonable time. Both institutions could be reproached for the misfortunate time lag, namely, the EC's administrative procedure, on the one hand, and the judicial review of the ECJ, on the other. For example, in *Industrial Bags*, six years passed between the initiation of proceedings and the delivery of the judgement under appeal.[222] The GC remained inactive for most of this period, namely, for the four years and four months between the end of the written procedure and the date of the hearing. The ECJ recalled the ECtHR's ruling in *Kudla v Poland*,[223] where such a procedural irregularity gave the party concerned the right to an effective remedy. In *Aluminium Fluoride*,[224] a procedural delay of four years and nine months until the hearing, with a period of three years of inactivity, was dismissed on appeal.

Nevertheless, the ECJ cannot allow the cartelists to re-open the question on the amount of the fine solely on the basis of a failure to adjudicate within a reasonable time.[225] The Court considered that such a failure could only be remedied in a subsequent action for damages brought before the GC.[226] For example, in *Gascogne Sack*,[227] the Court held that a failure to decide within a reasonable time could be remedied solely by granting appropriate relief of this kind. It then falls to the same Court, "sitting in a different composition" from that which heard the appeal,[228] to assess the relationship between the harm caused and the excessive length of the legal proceedings.[229] Again, it falls to the GC to ascertain whether, apart from any material loss, any other type of harm could be compensated for due to excessive delay.[230] In particular, *Gascogne* evidenced having paid interest on the amount of the fine and having provided a bank guarantee.

220 ECJ, case C-385/07 P, *Der Grüne Punkt – Duales System Deutschland v EC*, ECLI:EU:C:2009:456, para. 179.
221 GC, case T-46/10, *Faci SpA v EC*, ECLI:EU:T:2014:138, para. 173.
222 Ibid., para. 121.
223 ECtHR, no 30210/96, *Kudla v Poland*, para. 156 et seq.
224 ECJ, case C-467/13 P, *Industrie Chimiques du Fluor SA (ICF) v EC*, ECLI:EU:C:2014:2274.
225 ECJ, case C-243/12 P, *Industrial bags*, ECLI:EU:C:2014:2006, para. 134.
226 See ECJ, case C-578/11 P, *Deltafina SpA v EC*, ECLI:EU:C:2014:1742, para. 86.
227 *ECJ*, case C-40/12 P, *Gascogne Sack*, ECLI:EU:C:2013:768, para. 80; ECJ, case C-50/12 P, *Kendrion v EC*, ECLI:EU:C:2013:771; GC, case T-54/06, *Kendrion NV v EC*, ECLI:EU:T:2011:667; COMP/38354, *Industrial bags*, OJ L 282 of 26/10/2007; ECJ, case C-578/11 P, *Deltafina SpA v EC*, ECLI:EU:C:2014:1742, para. 80.
228 Ibid., para. 136.
229 Ibid., paras. 88 and 90.
230 Ibid.

The ECJ was bold to acknowledge that the GC's failure to adjudicate within a reasonable time was a sufficiently serious breach of the rule of law, which was intended to confer rights on individuals.[231] Yet, in *Industrial Bags*,[232] the cartelist submitted that, by not adjudicating within a reasonable time, the GC infringed both Articles 47 EU Charter and 6(1) ECHR. In particular, the duration of the judicial review by the GC exceeded six years, with extensive periods of inactivity on its part. It took four years and four months between the closing of the written procedure and the oral hearing. The ECJ reiterated the same reasoning, including *Kudla v Poland* and the right to an effective remedy, which dates back to *Kendrion*,[233] where the ECJ acknowledged that the length of the proceedings before the GC of five years and nine months could not be justified by the particular circumstances of the case.

What can one take from all of the above arguments? There is no better evidence elsewhere of a real need to set up an EU Competition Tribunal. As advanced elsewhere, in 2013, the average duration of a competition case was forty-six months,[234] which was more than twice the average duration in other areas. Even the suggestion that the above failures to adjudicate be reviewed by the same court, albeit in a different composition, is very unlikely to eliminate the GC's own caseload and to address the need for a specialised court that performs a full judicial review.

When delivering her opinion on the raw tobacco cartel (*Deltafina*),[235] AG *Sharpston* critically considered as 'excessively lengthy' the proceedings' duration of five years and eight months compared to *Baustahlgewebe*.[236] In this latter case, the Court held that five years and six months was "an excessive delay".[237] Furthermore, forty-three months elapsed between the end of the written procedure and the decision to open the oral phase. Thus, such a procedural failure would have no negative effect on the outcome itself; annulling the judgement could not have effectively remedied the breach of the principle of effective judicial protection.[238] In other words, the Court should not re-open the question of the validity or amount of the fine.[239] However, in *Deltafina*,[240] the ECJ held that the length of these proceedings "cannot be justified either by the certain degree of difficulty of the case" or by *Deltafina's* application seeking

231 ECJ, case C-243/12 P, *Industrial bags*, ECLI:EU:C:2014:2006, para. 142, citing ECJ, case C-352/98 P, *Bergaderm and Goupil v EC*, ECLI:EU:C:2000:361, para. 42; GC, case T-46/10, *Heat Stabilisers*, ECLI:EU:T:2014:138, para. 174, citing ECJ, case C-185/95 P, *Baustahlgewebe v EC*, ECLI:EU:C:1998:608, para. 49.
232 ECJ, case C-238/12 P, *FLSmidth & Co A/S v EC*, ECLI:EU:C:2014:284, para. 17.
233 ECJ, case C-50/12 P, *Kendrion NV v EC*, ECLI:EU:C:2013:771; COMP/F/38354, *Industrial bags*.
234 See *Jenkins/Bushell*, Justice Denied or Simply Delayed? Consequences of Excessive Delay at the EU's General Court, J of Eur Comp L & Practice 5 (2014), p. 12.
235 Opinion of AG *Sharpston*, case C-578/11 P, *Deltafina SpA v EC*, ECLI:EU:C:2014:199.
236 ECJ, case C-185/95 P, *Baustahlgewebe v EC*, ECLI:EU:C:1998:608.
237 Opinion of AG *Sharpston*, case C-578/11 P, *Deltafina SpA v EC*, ECLI:EU:C:2014:199, para. 36.
238 Ibid., para. 39; followed by the ECJ, case C-578/11 P, *Deltafina SpA v EC*, ECLI:EU:C:2014:1742, para. 84.
239 Ibid., para. 41.
240 Ibid., para. 91.

access to a document held by the EC. In *Guardian Industries*, the ECJ only acknowledged that a period of four years and seven months could not be justified by any particular circumstances.[241]

Similarly, in *Heat Stabilisers*,[242] the ECJ found no legal basis for the annulment of the EC's decision on grounds of excessively long proceedings where the ability of the undertakings concerned to defend themselves had not been adversely affected and where there was no indication that such an excessive duration could have affected the content of the EC's decision.[243] In this particular case, the applicant argued that, as a result of the excessive duration of the administrative proceedings, the fine imposed in 2009 was higher than it would have been in 2004 when its turnover was much lower.[244] Obviously, the ECJ rejected this point as

> "extremely generic and entirely unsupported by detailed evidence".[245]

If this were the case, namely, that the EC had intentionally waited for the cartelists' turnover to increase, before imposing the fine, then the EU public administration deserves some praise for bringing in more money to the EU budget, albeit based on purely unjustified enrichment. At the end of the day, no problem would emerge for taxpayers unless the fine on this cartel was too low.

Even more dubious was the enormous time lag between the sending of a first statement of objections, namely, four years and ten months after the end of the infringement and three years and six months after the beginning of the investigation.[246] The prohibition decision had been adopted one year and five months after the first statement of objections, which was not considered to be within the framework of a reasonable time. However, excessive proceedings of this kind could not lead to an annulment of the administrative decision insofar as the decision did not "adversely" affect the rights of defence of the cartelist.

On a comparative basis, in the UK, the former OFT (now Competition and Markets Authority) had also been heavily criticised;[247] first, for under-enforcing competition laws and, second, for taking an excessively long time to complete its administrative investigations, i.e. on average, thirty-three months for cartels.[248] In particular, the OFT took a record length of thirty-eight months to conclude a leniency-based inves-

241 See ECJ, case C-580/12 P, *Guardian Industries Corp., Guardian Europe Sarl v EC*, ECLI:EU:C:2014:2363.
242 GC, case T-46/10, *Heat Stabilisers*, ECLI:EU:T:2014:138, para. 80.
243 Citing ECJ, case C-185/95 P, *Baustahlgewebe v EC*, ECLI:EU:C:1998:608, para. 49; GC, case T-276/04, *Compagnie maritime belge v EC*, ECLI:EU:T:2008:237, para. 45.
244 Ibid., para. 83.
245 Ibid., para. 88.
246 GC, case T-372/10, *Bolloré v EC*, ECLI:EU:T:2012:325, para. 108.
247 Questioning the criminalization of cartels, see *Ost*, From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence, J of Eur Comp L & Practice 5 (2014), p. 125; *Jones/Williams*, The UK response to the global effort against cartels: is criminalization really the solution?, J of Antitrust Enforcement 2014, p. 100.
248 See *Veljanovski*, A Statistical Analysis of U.K. Antitrust Enforcement, J of Comp Law & Ec 2014, p. 17.

tigation, and twenty-nine months in the absence of leniency. However, overall, the current situation is, perhaps, not too bad if one considers that, under the ECHR, the reasonable time has frequently been in excess of what could amount to a "reasonable" time,[249] with excessive delays ranging from thirteen years and four months[250] to five years and five months.[251]

VII. The EU judicial review of cartel infringements: a call for an EU Competition Tribunal?

Despite the lack of an EU Competition Tribunal, the ECJ has to exercise its powers of judicial review, including complex economic assessments, not only of the legality of the EC's administrative decision or of the judgement of the GC. As recently pronounced in *Chalkor*[252] and *Toshiba*,[253] while the EC enjoys a margin of discretion with regard to economic matters, this cannot be interpreted in the sense that the EU Courts must refrain from reviewing such administrative decisions.[254] Obviously, this margin of appreciation did not vitiate the EC's administrative decision. Thus, although the EC carries out both investigating and prosecutorial administrative functions, this does not represent a breach of the requirement of impartiality.[255] Nonetheless, the cartelists put forward various other interesting arguments aimed at proving the lack of subjective impartiality since the Commissioner for Competition expressed publically his views on the outcome of the administrative proceedings by saying that

> "the undertakings could therefore be certain that they would not escape, on procedural grounds, the fines imposed in the cartel cases".[256]

If this message were to have come from a judge, before deciding on the case, that judge would have been removed from the case for subjective bias and lack of impartiality.[257] This has happened where public expressions have implied that the judge had

249 For a recent contribution asking what is a reasonable time by looking at the complexity of the case, conduct of the parties and the GC's workload, see *Jenkins/Bushell*, (fn. 234), p. 12; also, see *Scheidtmann*, Haste Makes Waste(?) – Some Reflections on the European Court of Justice's Approach to Remedying Infringements of the General Court regarding the Right to be Heard Within a Reasonable Time, Comp Policy Int 2014, p. 3.

250 See ECtHR, no. 10256/83, *Baggetta v Italy*, paras. 20-25.

251 See e.g. ECtHR, no. 11968/86, *B v Austria*, paras. 48-55; for nine years and seven months, see e.g. ECtHR, no. 10527/83, *Milasi v Italy*, paras. 14-20; for five years and eleven months, see ECtHR, no. 50268/99, *Rouille v France*, para. 29; for twelve years and seven months, see ECtHR, no. 46098/99, *Clinique Mozart SARL v France*, paras. 34-36.

252 ECJ, case C-386/10 P, *Chalkor v EC*, ECLI:EU:C:2011:815, para. 54.

253 GC, case T-519/09, *Toshiba Corp. v EC*, ECLI:EU:T:2014:263, para. 41.

254 See previously ECJ, case C-389/10 P, *KME and Others v EC*, ECLI:EU:C:2011:816, para. 121.

255 ECJ, case C-414/12 P, *Bolloré v EC*, ECLI:EU:C:2014:301, para. 66.

256 Ibid., para. 70.

257 See the ECtHR, (fn. 126), para. 66 et seq. The personal impartiality of a judge is presumed until proof to the contrary.

already formed an unfavourable view of the applicant's case.[258] However, as it comes from a politician, at the same time a member of the EC's College of Commissioners, representing the executive of the EU "Government", and not the judiciary, it did not. The GC considered that such public statements were not a pure "manifestation of bias",[259] but

> "merely the assertion of a clear intention, wholly consistent with the task entrusted to the EC […] in order not to undermine the effectiveness of EU competition law".

VIII. The right not to incriminate oneself (self-incrimination)

The EC can compel undertakings to provide all the necessary information regarding the existence of a cartel and to disclose to the EC any "incriminating" documents. An equivalent "human" right not to give evidence against oneself, as applied in *Orkem v EC*,[260] would otherwise make it impossible for the EC to oblige these undertaking to offer answers, some of which might even admit the existence of an illegal cartel.[261] This ECHR's principle has also been weighted by AG *Mazák*, in his opinion in *Pfleiderer*, where the Advocate-General advanced that with the exception of self-incriminating corporate statements cartel victims should have access to documents submitted under leniency, insofar this could help them to seek compensation.[262]

D. Conclusions

A first preliminary finding is that the goal of market integration has reached an evolutionary stage by protecting, foremost, intermediary market participants affected by pernicious cartels. Therefore, the corollary finding is that at a supra-national level, the vast majority of prohibited cartels cause harm to intermediate industrial consumers, and despite fantastic efforts invested in the detection of EU cartels, more needs to be done to combat the little but ugly cartels that directly harm the welfare of the final consumer. At present, the Directorate-General for Competition operates on the assumption that giant cartels also cause harm to the final consumer, albeit indirectly.

A second preliminary finding is that, from a substantive point of review, the prohibition enshrined in Article 101 has been inconsistently applied in practice, as the Courts have insisted that intention is not of crucial relevance and have often affixed the label of a "restriction of competition by object" where, in fact, it was a restriction by effect. From a procedural point of view, another preliminary finding is that super-

258 See ECtHR, no. 29569/95, *Buscemi v Italy*, para. 67; ECtHR, no. 58442/00, *Lavents v Latvia*, para. 118.

259 In contrast, the requirement of impartiality before the ECtHR demands that there is no prejudice or bias, see e.g. ECtHR, no. 73797/01, *Kyprianou v Cyprus*, para. 118; ECtHR, no. 17056/06, *Micallef v Malta*, para. 93.

260 ECJ, case 374/87, *Orkem v EC*, ECLI:EU:C:1989:387, para. 34 et seq.; also, see ECtHR, no. 10828/84, *Funke v France*, para. 44; ECtHR, no. 19187/91, *Saunders v the UK*, para. 69.

261 GC, case T-91/11, *Inno Lux Corp v EC*, ECLI:EU:T:2014:92, para. 167.

262 Opinion of AG *Mazák*, case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2010:782.

ficial and not properly substantiated arguments touching upon the respect of the procedural rights afforded by the EU Charter of Fundamental Rights have been rather unhelpful in securing success on appeals.

A third preliminary finding is that, while being a settled case-law with utmost precedential value, the presumption of parent company liability for the actions of its subsidiary remains one issue of discord from the perspective of company law and the undertakings concerned. More needs to be done to enhance the procedural guarantees available to such undertakings and to alleviate further concerns regarding the severity of fines, in particular, merely unfounded claims alleging the "criminal nature" of the fines.

A fourth preliminary finding, which one could easily extract from the critical review of the undertakings' rights of defence, is that it would seem a lot easier to acquire access to file on the basis of the Transparency Regulation 1049/2001. However, doing so could risk undermining the specific objectives of Regulations 1/2003 and 773/2004. The EU Courts have been particularly mindful of the latter.

Possibly, the recognition of the excessive length of competition proceedings could serve as a helpful step in articulating the particular need for an EU Competition Tribunal. Otherwise, a referral back to the same overloaded instance that was instrumental in causing this procedural breach would not resolve the problem, and could not offer the Courts the necessary time to reflect on the subtle details, both civil and economic, of a given case. The latter are quite important as they could ease the individuals' burden of proof in seeking damages against illegal cartels and securing just and fair compensation. By treating in passing any such aspects due to the pressures of time and procedural economy, the Courts could obfuscate access to justice in the long run and, as a result, this could lead to under-enforcement of private litigation. At the same time, by not performing a timely review, the Courts risk raising the expectations in terms of burden of proof and substantive analysis to burden the EC even more, while the Court would appear to indulge in more self-sufficiency.

Apart from the perceived technical formalism advanced by the Courts, the downside of their performance and conservative stance gives the impression of a cosmetic review. Although the Courts seem to be better at calculating the "right" multiplier of the fine, in reality, these reductions of fines come at the expense of the EU taxpayer, thereby reducing the EC's discretion over its deterrence policy against illegal cartels.

As far as this author has been able to detect, arguments construed against the perceived lack of impartiality of the College of Commissioners, in particular that of the Commissioner responsible for Competition Policy, could be further considered with the view of establishing an independent European Competition Authority. This should help to alleviate previous stakeholders' and undertakings' concerns.

On the whole, there seems to be no massive shift of perspective on the part of the Courts. As expounded earlier, the revolutionary "more-effects" based approach, which was expected to better expose the actual harm caused to consumers, was probably too ambitious in scope. Finally, the area under review being that of European Union industrial cartels, where both the public and the academic opinion converge on their outright negative effects, one could argue that proof of anti-competitive effects has for long been settled by their very anti-competitive object.