

Appealing EU Cartel Decisions before the European Courts: Winning (and Losing) Arguments

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Introduction

For some time now, cartel enforcement has been a high priority for the European Commission (the ‘Commission’), and this is reflected in the amount of fines imposed over the years. Although the number of infringement decisions and total amount of fines vary from year to year, the trend over the past ten years (and indeed since the mid-1990s) is upward. In the period from 2005 to February 2017, the number of undertakings subject to a Commission cartel decision practically doubled compared to 1995–2004.¹ Fines increased from an aggregate of €3.76bn in the period 1995–2004 to €18.50bn over the past decade.² In 2016 alone the average fine imposed amounted to €266.2m per undertaking.³ Addressees of a Commission decision have an incentive to appeal their cartel decision in order to try and reduce the fine amount before

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- 1 This includes entities that were not fined, such as immunity applicants. If more than one legal entity of the same group were subject to the decision, they are counted as one; see <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.
- 2 These figures represent the amounts as imposed by the Commission (including corrections following amendment decisions), not corrected for changes following judgments of the EU courts, and only considering cartel infringements under Art 101 TFEU; see <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>, excluding 2016.
- 3 This high figure results from the record fines in Case AT.39824 – Trucks. In its decision of 19 July 2016, the Commission imposed a total fine of €2,926,499,000 on four truck producers. Moreover, one of the cartel participants received a fine of €1,008,766,000, which amounts to the highest fine ever imposed on an undertaking; see <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> for an overview of the ten highest cartel fines per undertaking since 1969.

the General Court⁴ since it has unlimited jurisdiction to impose fines⁵ and can, in addition to upholding or overturning a decision, decide to adjust the fine itself, either downward or, exceptionally, upward.⁶

The chances of success of an appeal before the European courts make obtaining a fine reduction far from a shoo-in. Still, about one-third of applicants before the General Court achieve some reduction of the amount of the fine imposed by the Commission – be it by obtaining a partial or complete annulment and/or a reduction of the fine. No doubt many decision addressees conclude that with such odds, an appeal is worth trying as they believe their infringement decision is wrong on the merits and that, besides other benefits that might result from an appeal (eg, slowing down or discouraging private damages claims), the potential fine reduction could far outweigh the (budgeted) legal fees and risks associated with an appeal (whereas these added costs are often small, relative to the total fine amount). The number of appeals lodged relative to the number of infringement decisions would seem to bear out the perception of an incentive to appeal. In the period from January 2005 to February 2017, the Commission found that 434 undertakings had committed a cartel infringement⁷ in the context of a total of 74 cartel cases.⁸ Against the infringement decisions in those 74 cases, 300 appeals⁹ were lodged before the General Court.

At the same time, the General Court has found fault with the Commission's cartel decision and reduced the fine in a significant portion of the cartel appeals that have come before it. In the 2005 to February 2017 period, the General Court handed down judgments (including orders) on 339 appeals.¹⁰ More than one in three of these appeals resulted in the General Court reducing the amount of the fine.¹¹ However, the odds of achieving a substantial reduction

4 Throughout the article, appeals before the General Court include appeals before the Court of First Instance.

5 Article 261 TFEU *juncto* Art 31 of Regulation No 1/2003.

6 In the past decade, the General Court only increased the fine once. See Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* ECLI:EU:T:2007:380. The (former) Court of First Instance increased the amount of the fine imposed on BASF from €34.97m to €35.02m. Since the Commission had erroneously characterised the global and European cartel as a single and continuous infringement, BASF lost the benefit of leniency for cooperation over the global cartel.

7 See n 1 above.

8 A cartel case concerns a single proceeding against multiple undertakings, and may involve more than one infringement. Hence, this number also includes cartel settlement decisions; see n1 above.

9 Where different appeals covered the same subject-matter and were therefore joined by the President of the General Court in accordance with Art 50(1) of the General Court's Rules of Procedure, they are counted as one. Moreover, this number does not include appeals that were removed from the General Court's register.

10 *Ibid.*

11 This includes the appeals that resulted in the Commission's decision being annulled in its entirety (these amount to about 12 per cent of total appeals).

are in reality not that high. The General Court reduced the fine by over €3m in only 84 out of the 339 appeals (approximately 25 per cent).¹² Thus, the odds of actually recouping very substantially more than the costs of an appeal by obtaining a fine reduction greater than that amount are rather low.

To maximise the chances of achieving success on appeal, by (a) raising any argument that might carry favour with the European courts, and generally (b) casting doubt on the solidity of the infringement decision as a whole, applicants tend to raise as many arguments as possible in their application to the European courts. Whether a particular argument is likely to succeed on appeal is of course highly dependent on the facts of the case: each individual case is different, and arguments that are baseless in many appeals might exceptionally fit the particular circumstances of that one instance in which it provides the key to a positive outcome. The chances of success will also be influenced by the credibility of the Commission's theory of harm and the imperviousness of the Commission's decision as a whole. Moreover, views of the European courts on a particular issue may change over time and affect the chances of success of arguments related to that issue.

Nonetheless, when reviewing the case law over the past decade, it is possible to draw some appropriately caveated conclusions about the relative success of some of the main arguments that applicants have raised in appeals to the European courts over the years. These conclusions may help inform companies considering an appeal, in the broader context of the facts and circumstances of their particular case, whether to invest in raising a particular argument or not. This article considers some of the more common appeal arguments and assesses the extent to which they have been invoked successfully over the past decade (2005 to February 2017), both before the General Court, and in relation to further appeals before the European Court of Justice (ECJ).¹³

12 *Ibid.*

13 The most successful appeal arguments were identified as such by assessing how many times they were accepted by the General Court or the ECJ as compared to the other successful appeal arguments. Thus, the most successful arguments were not determined by examining the number of times they were raised successfully as compared to the number of times they were raised as a whole; the latter method would possibly lead to misleading conclusions, since an appeal argument raised only once in the past decade would be considered as one of the most successful arguments when raised successfully that one time. The reader should note that the compilation of the figures included in this article to some extent relied on subjective assessments, given that some arguments can be categorised under multiple different appeal grounds. Rather than reflecting a report of a scientific statistical analysis, for which our sample size defined by cartel judgments in the past decade is likely in any event to be too small, the percentages in this article are mainly included for illustrative purposes. It would be misguided to draw too far-reaching conclusions regarding the relative merits of success of arguments from differences of one or two percentage points.

Successful appeal arguments

By virtue of Article 263 of the Treaty on the Functioning of the European Union (TFEU) an act addressed to alleged cartel participants may be annulled on grounds of:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaties or any rule of law relating to their application;
- or
- misuse of powers.¹⁴

Nevertheless, the four most successful appeal arguments before the General Court are all related to infringements of the Treaties or any rule of law relating to their application. These arguments concern either Commission decisions that are based on a misapplication of Guidelines or Notices,¹⁵ or the Commission's failure to comply with its obligation to state reasons under Article 296 TFEU. Similarly, before the ECJ, one of the most successful appeal arguments is based on infringements of Article 296 TFEU. The strongest ground of appeal before the ECJ, however, concerns violations of the essential procedural requirements of the TFEU.

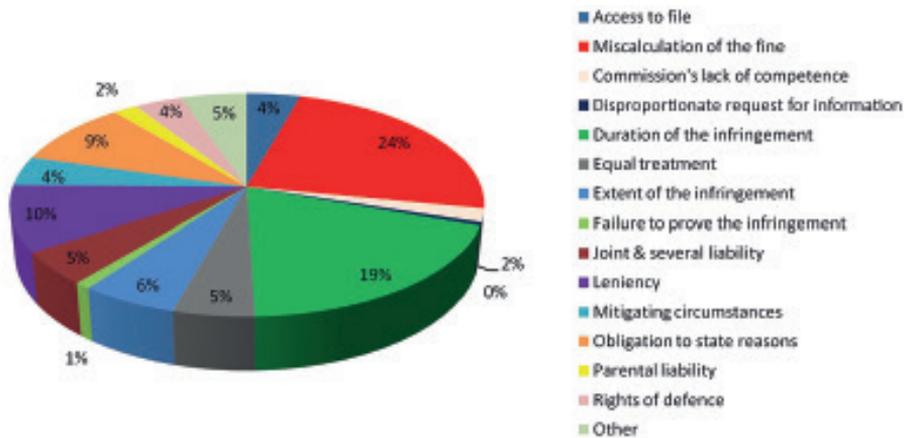
General Court

As demonstrated in Figure 1, four of the most successful appeal arguments before the General Court in recent years are miscalculation of the fine, mischaracterisation of the infringement as concerns duration, misapplication of the applicable Leniency Notice and failure to state reasons.

14 Article 263(2) and (4) TFEU.

15 Although Notices and Guidelines are acts of soft law and therefore do not have any impact on the scope of the obligations deriving from the TFEU (Case T-187/99 *Agrana Zucker und Stärke AG v Commission* ECLI:EU:T:2001:149, para 56), the General Court and ECJ may examine those acts if the Commission's decision is logically based on them.

Figure 1: Successful appeal arguments before the General Court



CALCULATION OF THE FINE

One of the most commonly raised appeal arguments is the claim that the Commission miscalculated the amount of the fine. It is also the ground that has been raised with the greatest success over the past ten years: roughly a quarter of all successful grounds of appeal alleged a miscalculation of the fine. However, this ground is often intertwined with other successful appeal arguments. For example, when the Commission makes an error in its assessment of the duration or the extent of the infringement, or neglects to recognise certain mitigating circumstances, this will often result in a miscalculation of the fine. It may lead the Commission to make mistakes in its determination of the value of sales or to apply the wrong multiplier in setting the basic amount of the fine.

Where the miscalculation of the fine is the result of an erroneous application by the Commission of its fining guidelines, appellants typically raise one of three broad types of calculation errors. The first and most successful group concerns instances in which the Commission erred in setting the basic amount of the fine. The 2006 Guidelines on the method of setting fines ('2006 Fining Guidelines'),¹⁶ which contain the current guidance on the Commission's fining policy, provide that the Commission determines the basic amount of the fine by taking 'the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA'.¹⁷ The basic amount will then be

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

17 *Ibid* point 13.

related to a proportion of the value of sales to which the infringement directly or indirectly relates, depending on the degree of gravity of the infringement, and multiplied by the number of years of the infringement.¹⁸ Under the previous version of the fining guidelines ('1998 Fining Guidelines'),¹⁹ the Commission also used the turnover of the alleged infringer to determine the basic amount of the fine, which was then further specified according to the duration and gravity of the infringement. Thus, in most of these appeals, the General Court reduced the fine because the Commission took the wrong value of sales or turnover into account when setting the fine's starting point.²⁰ The Commission has also been held to have erred in calculating the basic amount of the fine by mistakenly treating some cartelists differently from others and therefore breaching the principle of equal treatment.²¹ For example, in two appeals concerning the gas insulated switchgear cartel, the General Court held that by choosing a different reference year for Japanese and European producers when determining the value of worldwide sales in order to calculate the basic amount of the fine, the Commission had breached the principle of equal treatment, as there was no objective justification for this difference in treatment.²²

The second most commonly recognised group of calculation errors includes instances in which the Commission erroneously increased the basic amount of the fine as a result of alleged aggravating circumstances. Under both the 1998 and the 2006 Fining Guidelines, the Commission is entitled to increase the basic amount where it finds that there are aggravating circumstances, such as recidivism, refusal to cooperate with or obstruction

18 *Ibid.*

19 European Commission, Guidelines on the method of setting fines pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 009, 14 January 1998.

20 See, for example, Joined Cases T-389/10 and T-419/10 *SLM v Commission* ECLI:EU:T:2015:513; T-82/13 *Panasonic Corp and MT Picture Display Co Ltd v Commission* ECLI:EU:T:2015:612; Case T-418/10 *voestalpine and voestalpine Wire rod Austria v Commission* ECLI:EU:T:2015:516; Case T-422/10 *Trafilerie Meridionali v Commission* ECLI:EU:T:2015:512; Case T-91/11 *Chimei Innolux v Commission* ECLI:EU:T:2014:92; Case T-128/11 *LG Display and LG Display Taiwan v Commission* ECLI:EU:T:2014:88; Case T-360/09 *E.ON Ruhrgas and E.ON v Commission* ECLI:EU:T:2012:332; Case T-322/01 *Roquette Frères v Commission* ECLI:EU:T:2006:267.

21 Case T-113/07 *Toshiba v Commission* ECLI:EU:T:2011:343; Case T-133/07 *Mitsubishi Electric v Commission* ECLI:EU:T:2011:345; Case T-11/06 *Romana Tabacchi v Commission* ECLI:EU:T:2011:560; Case T-21/05 *Chalkor v Commission* ECLI:EU:T:2010:205.

22 Case T-113/07 *Toshiba v Commission* ECLI:EU:T:2011:343, paras 280–297; Case T-133/07 *Mitsubishi Electric v Commission* ECLI:EU:T:2011:345, paras 264–282.

of the Commission's investigation, or where a cartel takes on the role of leader or instigator of the infringement.²³

In that regard, the General Court on more than one occasion reduced the amount of the fine on account of the Commission wrongfully attributing to the appellants the role of leader and/or instigator of the infringement.²⁴ For example, in *Shell Petroleum and Others*, the applicants successfully contested the Commission's classification of Shell Nederland Verkoopmaatschappij BV (SNV) as instigator and leader of the Dutch road pavement bitumen cartel. First, as regards the role of instigator, the Commission claimed that SNV (1) had played a role in the setting-up of the cartel by proposing to grant a special rebate to large road builders; and (2) had tried to persuade ExxonMobil to join the cartel. However, in order to classify an undertaking as the instigator of a cartel, the Commission must adduce sufficient evidence to establish that the undertaking concerned persuaded or encouraged other undertakings to establish the cartel or to join it, for example, by suggesting an opportunity for collusion.²⁵ In this regard, the General Court held that the Commission had not adduced sufficient evidence to conclude with certainty that SNV was at the origin of the establishment of the cartel.²⁶ Secondly, as concerns the role of leader, the Commission relied on five types of conduct by SNV in order to classify it as a leader of the cartel, including SNV's role as spokesperson for bitumen suppliers during bitumen consultation meetings and SNV's involvement in monitoring the implementation of the cartel. Yet, in order for an undertaking to be classified as a leader, it must be demonstrated adequately in light of the overall context of the case that such undertaking has been a significant driving force for the cartel and has borne individual and specific liability for the its operation.²⁷ The General Court held that this is the case 'where it is shown that that undertaking played a central role in the actual operation of the cartel, for example by organising various meetings,

23 2006 Fining Guidelines, n 16 above, point 28; 1998 Fining Guidelines, n 19 above, point 2.

24 Case T-146/09 *Parker ITR and Parker Hannifin v Commission* ECLI:EU:T:2013:258; Case T-343/06 *Shell Petroleum and Others v Commission* ECLI:EU:T:2012:478; Joined Cases T-117/07 and T-121/07 *Areva and Others v Commission* ECLI:EU:T:2011:69; Case T-29/05 *Deltafina v Commission* ECLI:EU:T:2010:355; Case T-410/03 *Hoechst v Commission* ECLI:EU:T:2008:211; Case T-15/02 *BASF v Commission* ECLI:EU:T:2006:74; Case T-38/02 *Groupe Danone v Commission* ECLI:EU:T:2005:367; Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission* ECLI:EU:T:2005:220.

25 Case T-15/02 *BASF v Commission* ECLI:EU:T:2006:74, para 321.

26 Case T-343/06 *Shell Petroleum and Others v Commission* ECLI:EU:T:2012:478, paras 141–183.

27 Case T-15/02 *BASF v Commission* ECLI:EU:T:2006:74, paras 299, 300, 373 and 374; Case T-410/03 *Hoechst v Commission* ECLI:EU:T:2008:211, para 423.

collecting and distributing information within the cartel, and by most often suggesting proposals relating to the operation of the cartel'.²⁸ In the end, however, the General Court concluded that although SNV had a particular role during the first two years of operation of the cartel, the Commission had insufficiently substantiated that SNV played the role of leader.²⁹

The General Court has also reduced the Commission's fines because the Commission improperly established the aggravating circumstance of repeated infringement.³⁰ In order for the Commission to penalise a parent company as a repeat offender – on the basis of past cartel behaviour of its subsidiary – it must demonstrate that, at the time of the first infringement, the subsidiary formed a single economic entity with the parent company involved in the second infringement.

For example, in *Saint-Gobain Glass France and Others*, the General Court reduced the percentage increase of the fine for repeated infringement from 60 per cent to 30 per cent, as the Commission had mistakenly taken into account the previous infringement of a wholly-owned subsidiary for the purpose of establishing recidivism vis-à-vis the appellants. The General Court considered that because the appellants were not penalised by a Commission decision in respect of the first infringement and they were not addressees of the statement of objections in that case, they were never given the opportunity to rebut the presumption that they formed a single economic entity with the subsidiary to which the previous decision was addressed. As a result, the Commission could not rely on the previous cartel decision to establish a repeat infringement on the part of the appellants. However, another subsidiary of the appellants had also previously participated in a cartel, but this time the Commission's decision was addressed to the appellants. Since the Commission had not erred in finding that the subsidiary and the appellants belonged to the same economic unit at the time of the first infringement, the General Court held that the Commission was entitled to conclude that the appellants had already been penalised for a previous identical or similar infringement.³¹

28 Case T-343/06 *Shell Petroleum and Others v Commission* ECLI:EU:T:2012:478, para 199.

29 *Ibid*, paras 184–237.

30 Joined Cases T-56/09 and T-73/09 *Saint-Gobain Glass France and Others v Commission* ECLI:EU:T:2014:160; Case T-558/08 *Eni v Commission* ECLI:EU:T:2014:1080; Case T-103/08 *Versalis and Eni v Commission* ECLI:EU:T:2012:686; Joined Cases T-144/07, T-147/07 to T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others v Commission* ECLI:EU:T:2011:364; Case T-39/07 *ENI v Commission* ECLI:EU:T:2011:356; Case T-59/07 *Polimeri Europa v Commission* ECLI:EU:T:2011:361.

31 Joined Cases T-56/09 and T-73/09 *Saint-Gobain Glass France and Others v Commission* ECLI:EU:T:2014:160, paras 304–337.

Similarly, in *ThyssenKrupp Liften Ascenseurs and Others*, the General Court found that the Commission had erred in increasing the basic amount of the fine imposed on ThyssenKrupp AG, ThyssenKrupp Elevator AG and the ThyssenKrupp subsidiaries by 50 per cent on account of repeated infringement.³² The Commission mistakenly referred to a previous decision in which it had fined ThyssenKrupp Stainless GmbH and Acciai Speciali Terni SpA for their involvement in the alloy surcharge cartel. However, in the alloy surcharge case, the Commission did not find that the parent companies of Krupp Hoesch Stahl AG, Thyssen Stahl AG, ThyssenKrupp Stainless GmbH and Acciai Speciali Terni SpA, of which ThyssenKrupp AG is the economic and legal successor, formed an economic unit with those undertakings for the purposes of applying Articles 101 and 102 TFEU, and therefore did not claim that those undertakings could not decide independently upon their own conduct in the market. Hence, the General Court held that:

‘it cannot be accepted that the Commission is entitled to decide, when making a determination as to the aggravating circumstance of repeated infringement, that an undertaking should be held liable for a previous infringement in relation to which it was not penalised by a Commission decision and in the establishment of which it was not the addressee of a statement of objections, with the result that such an undertaking was not given an opportunity, in the procedure leading to the adoption of the decision establishing the previous infringement, to make representations with a view to disputing that it formed an economic unit with certain other undertakings.’³³

Consequently, the General Court concluded that the infringements in the elevators and escalators cartel could not be regarded as repetitions on the part of the same undertakings as were held liable for the cartel behaviour in the alloy surcharge decision.

Finally, the Commission has also been found mistakenly to have relied on the need to ensure that fines have a sufficient deterrent effect. For purposes of deterrence, the Commission may increase the fine to be imposed on undertakings that have a particularly large turnover beyond the sales of goods or services to which the infringement relates. In the same context, the Commission can also increase the fine in order to make sure it exceeds the amount of gains improperly made under the infringement.³⁴ However, although less frequently successfully raised, the General Court

32 Joined Cases T-144/07, T-147/07 to T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others v Commission* ECLI:EU:T:2011:364, paras 298–323.

33 *Ibid*, para 319.

34 2006 Fining Guidelines, n 17 above, points 30–31; 1998 Fining Guidelines, n 20 above, point 1A, para 4 and point 2.

has reduced the fine either because the Commission was not entitled to increase the fine for deterrence,³⁵ or because it erred in the determination of the increase for that purpose.³⁶ For example, in *Pegler v Commission*, the General Court held that the Commission had wrongfully increased the fine imposed on the appellant, as the Commission had calculated the increase for deterrence by reference to the size of a separate undertaking that had no connection to the appellant's economic or financial situation.³⁷ In *Degussa v Commission*, the General Court reduced the amount of the fine, since the Commission took the wrong turnover figure into account when determining the appropriate level of increase for deterrence.³⁸

DURATION OF THE INFRINGEMENT/SINGLE AND CONTINUOUS INFRINGEMENT

Another fairly successful ground of appeal before the General Court is the claim that the Commission incorrectly assessed the duration of the infringement. About 19 per cent of all successful grounds of appeal allege such an erroneous analysis by the Commission, and the argument has led to the (partial) annulment of the Commission's decision and/or fine reductions in approximately 10.5 per cent of all appeals.

Since under both the 1998 and the 2006 Fining Guidelines the duration of infringement plays a significant role in determining the basic amount of the fine, it is imperative that the Commission conducts a correct assessment of the time period during which cartel participants were allegedly involved in collusive behaviour. The General Court has repeatedly faulted the Commission for failing to properly assess that the appellants had stopped or interrupted their participation, or for overestimating or miscalculating the duration of their involvement.³⁹ Closely related are the instances in which the Commission erroneously

35 Case T-217/06 *Arkema France and Others v Commission* ECLI:EU:T:2011:251; Case T-386/06 *Pegler v Commission* ECLI:EU:T:2011:115.

36 Case T-103/08 *Versalis and Eni v Commission* ECLI:EU:T:2012:686; Case T-279/02 *Degussa v Commission* ECLI:EU:T:2006:103.

37 Case T-386/06 *Pegler v Commission* ECLI:EU:T:2011:115, paras 119–134.

38 Case T-279/02 *Degussa v Commission* ECLI:EU:T:2006:103, paras 296–310.

39 Joined Cases T-389/10 and T-419/10 *SLM v Commission* ECLI:EU:T:2015:513; Case T-540/08 *Esso and Others v Commission* ECLI:EU:T:2014:630; Case T-395/09 *Arques Industries v Commission* ECLI:EU:T:2014:23; Case T-566/08 *Total Raffinage Marketing v Commission* ECLI:EU:T:2013:423; Case T-380/10 *Wabco Europe and Others v Commission* ECLI:EU:T:2013:449; Case T-11/06 *Romana Tabacchi v Commission* ECLI:EU:T:2011:560; Case T-42/07 *Dow Chemical and Others v Commission* ECLI:EU:T:2011:357; Joined Cases T-208/08 and T-209/08 *Gosselin Group and Stichting Administratiekantoor* ECLI:EU:T:2011:287; Case T-379/06 *Kainer and Others v Commission* ECLI:EU:T:2011:110; Case T-36/05 *Coats Holdings and Coats v Commission* ECLI:EU:T:2007:268.

found that the appellant was involved in an infringement during a certain period of time, where it actually was not.⁴⁰ For example, *Parker ITR and Parker Hannifin v Commission* concerned a cartel in the marine hose sector that went on from 1 April 1986 until 2 May 2007. The cartel originally involved, among others, ITR and its parent company, Saiag. Yet, the rubber hose business of ITR was transferred to its wholly-owned subsidiary ITR Rubber, a transfer that took effect as of 1 January 2002. Subsequently, ITR sold all the shares in ITR Rubber to Parker-Hannifin by an agreement executed on 31 January 2002. However, the Commission had erroneously attributed liability to ITR Rubber (later named Parker ITR) for the period prior to 1 January 2002. The General Court held that, although a subsidiary may be penalised instead of its parent undertaking, it is required that the subsidiary itself participated in the infringement, which precludes the Commission from retroactively holding a subsidiary responsible for an infringement committed by its parent company before it was formed. Thus, since ITR Rubber only personally committed the infringement from 1 January 2002 to 31 January 2002 and no evidence was put forward by the Commission of ITR Rubber's involvement in the cartel during the period prior to 1 January 2002, Parker ITR could not be found liable for the infringement prior to 1 January 2002.⁴¹

However, the most commonly identified Commission mistake in relation to determining duration is the mischaracterisation of the participation in the cartel as a single (complex) and continuous infringement. Under this concept, an undertaking can be held responsible for a cartel, even though it may not have been involved in every aspect of its decision-making (eg, the undertaking did not attend every meeting, the undertaking interrupted its participation for a while but subsequently re-entered, etc).⁴² In order to establish that an undertaking has participated in a so-called 'single overall agreement', three conditions must be met, namely:

(1) the existence of an overall plan pursuing a common objective;

40 Case T-68/09 *Soliver NV v Commission* ECLI:EU:T:2014:867; Case T-146/09 *Parker ITR and Parker Hannifin v Commission* ECLI:EU:T:2013:258; Joined Cases T-373/10, T-374/10, T-382/10 and T-402/10 *Villeroy & Boch and Others v Commission* ECLI:EU:T:2013:455; Case T-360/09 *E.ON Ruhrgas and E.ON v Commission* ECLI:EU:T:2012:332; Case T-370/09 *GDF Suez v Commission* ECLI:EU:T:2012:333; Joined Cases T-122/07 to T-124/07 *Siemens Österreich and VA TECH Transmission & Distribution v Commission* ECLI:EU:T:2011:70; Case T-382/06 *Tomkins v Commission* ECLI:EU:T:2011:112; Case T-58/01 *Solvay v Commission* ECLI:EU:T:2009:520.

41 Case T-146/09 *Parker ITR and Parker Hannifin v Commission* ECLI:EU:T:2013:258, paras 83–130.

42 Richard Wish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015), 107.

- (2) the intentional contribution of the undertaking to that plan; and
- (3) the undertaking's awareness (proved or presumed) of the offending conduct of the other participants.⁴³

Indeed, in *Commission v Verhuizingen Coppens*, the ECJ set forth that:

'if an undertaking has directly taken part in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk.'⁴⁴

However, in multiple appeals, the General Court found that the Commission failed to establish to the requisite legal standard that the appellant had participated in a single and continuous infringement within a particular timeframe.⁴⁵ The Commission most often failed to demonstrate that the alleged cartel member was aware or should have been

43 Case T-211/08 *Putters International v Commission* ECLI:EU:T:2011:289, para 35; see also Case T-204/08 *Team Relocations and Others v Commission* ECLI:EU:T:2011:286.

44 Case C-441/11 P *Commission v Verhuizingen Coppens* ECLI:EU:C:2012:778.

45 Case T-104/13 *Toshiba v Commission* ECLI:EU:T:2015:610; Case T-398/10 *Fapricela v Commission* ECLI:EU:T:2015:498; Case T-422/10 *Trafilerie Meridionali v Commission* ECLI:EU:T:2015:512; Case T-655/11 *FSL and Others v Commission* ECLI:EU:T:2015:383; Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie and Trelleborg v Commission* ECLI:EU:T:2013:259; Case T-53/06 *UPM-Kymmene (UPM) v Commission* ECLI:EU:T:2012:101; Case T-348/08 *Aragonesas Industrias y Energía v Commission* ECLI:EU:T:2011:621; Case T-59/06 *Low & Bonar (LB) and Bonar Technical Fabrics (BTF) v Commission* ECLI:EU:T:2011:669; Case T-208/06 *Quinn Barlo and Others v Commission* ECLI:EU:T:2011:701; Case T-44/07 *Kaucuk v Commission* ECLI:EU:T:2011:358; Case T-234/07 *Koninklijke Grolsch v Commission* ECLI:EU:T:2011:476; Case T-210/08 *Verhuizingen Coppens v Commission* ECLI:EU:T:2011:288; Case T-385/06 *Aalberts Industries v Commission* ECLI:EU:T:2011:114; Case T-18/05 *IMI and Others v Commission* ECLI:EU:T:2010:202; Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* ECLI:EU:T:2007:380; Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others v Commission* ECLI:EU:T:2007:115.

aware of the anti-competitive conduct.⁴⁶ In *Toshiba v Commission*, for example, the General Court held that the Commission was not entitled to hold the appellant liable for a single and continuous infringement, as it failed to specify the evidence on which it had relied to conclude that, by participating in four meetings, the appellant (1) was aware of the planned unlawful conduct or could have reasonably foreseen it; and (2) intended to contribute to the common objective pursued by the cartel participants through these meetings.⁴⁷ Similarly, in *Fapricela v Commission*, the General Court concluded that the Commission had erred in concluding that the appellant committed a single and continuous infringement, since it had not established to the requisite legal standard that the appellant, by participating in a meeting with competitors, was aware of the pan-European dimension of the cartel during the infringement period.⁴⁸

MISAPPLICATION OF THE 1996, 2002 OR 2006 LENIENCY NOTICE

Before the General Court, close to nine out of ten cartel investigations, which led to successfully appealed Commission decisions, involved leniency applications under the 1996, 2002 or 2006 versions of the Leniency Notice.⁴⁹ Therefore, it should be no surprise that about one in ten successful appeals raised the argument that the Commission had misapplied its leniency policy. The 1996, 2002 and 2006 Leniency Notices provide (d) the Commission with the possibility to grant immunity from the fine or to reduce the fine imposed on cartel participants in exchange for different types of cooperation with the Commission.

Under the 2006 version of the Leniency Notice, undertakings participating in a secret cartel are granted immunity from a fine when they are the first to submit information and evidence, which, in the Commission's view, will enable it to carry out a targeted inspection or to find an infringement of

46 As regards whether this failure should lead to the annulment of the decision (and fine) in its entirety, or only in respect of the conduct of which the cartel participant was unaware, there are conflicting ECJ judgments, notably *Coppens* (see n 46 above) and *Aalberts* (Case C-287/11 P *Commission v Aalberts Industries and Others* ECLI:EU:C:2013:445). See further, Petre Biolan, 'Limited Awareness of Cartel Participants: Any Consequence for the Single Infringement in EU Competition Law?' (2015) 6(6) *Journal of European Competition Law and Practice* 383.

47 Case T-104/13 *Toshiba v Commission* ECLI:EU:T:2015:610, paras 80–87.

48 Case T-398/10 *Fapricela v Commission* ECLI:EU:T:2015:498, paras 95–142.

49 Similarly, about 77 per cent of the Commission's investigations into cartels, in relation to which grounds of appeal were successfully put forward before the ECJ, were mainly initiated through, or supported by, leniency applications under the 1996, 2002 or 2006 Leniency Notice.

Article 101 TFEU.⁵⁰ If undertakings do not qualify for immunity, they may still be eligible for a reduction in the fine, but only if they provide the Commission with evidence of the alleged infringement that represents ‘significant added value’ with respect to the evidence already in the Commission’s possession.⁵¹ However, at the time of writing, only one appeal successfully addressed a misapplication of the current 2006 version of the Leniency Notice, in part because fewer cases involving this more recent version of the notice have reached a judgment stage compared to earlier versions, and in part perhaps because it clarifies (and toughens) the requirements for obtaining leniency, leaving less room for judicial clarification.

In *MRI v Commission* – the one successful appeal to date – the Commission was found to have underestimated the added value of the evidence submitted by the appellant. Under point 26 of the 2006 Leniency Notice, the Commission determines the level of reduction according to three different bands, namely a reduction of:

- (i) 30–50 per cent for the first undertaking to provide significant added value;
- (ii) 20–30 per cent for the second undertaking to do so; and
- (iii) up to 20 per cent for subsequent undertakings that provide such information or evidence.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence was submitted and the extent to which it represents added value. It is in relation to the latter that the Commission was found to have erred, as the General Court concluded that the actual added value represented by the evidence was not properly reflected in the rate of the reduction of the fine.⁵² In that regard, point 25 of the 2006 Leniency Notice provides that ‘the concept of “added value” refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission’s ability to prove the alleged cartel’ and that ‘the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested’. Since the documentary evidence provided by Manuli Rubber Industries (MRI) increased the Commission’s ability to demonstrate the existence of

50 European Commission, Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8 December 2006, paras 8(a) and (b).

51 *Ibid* paras 23–24.

52 Case T-154/09 *Manuli Rubber Industries (MRI) v Commission* ECLI:EU:T:2013:260, paras 318–339.

the cartel and enabled it to support its argument that the infringement was continuous from April 1986 until May 2007, in spite of a crisis experienced by the cartel during a period of two years, the Commission had failed properly to rely on the intrinsic value of the documents supplied by MRI when setting the rate of reduction of the fine.

Appeals involving earlier versions of the notice focused on the Commission's assessment of the extent to which the leniency applicant provided evidence of significant added value,⁵³ whether the Commission had awarded the appropriate reduction under the applicable notice,⁵⁴ whether the Commission had appropriately assessed the nature of the leniency applicant's role in the cartel and whether the Commission had breached the principle of equal treatment.

Multiple successful appeal arguments were based on the claim that the Commission underestimated the cooperation of the appellant(s) involved⁵⁵ or refused to grant a reduction despite non-contestation of the facts.⁵⁶ For instance, in *Hoechst v Commission*, the General Court concluded that the appellant was wrongfully denied a reduction in its fine for not contesting the facts, as the Commission had erred in deciding that the reply of the appellant to the statement of objections, in which it had put forward that 'Hoechst wishes to make clear that it does not substantially contest the facts established by the Commission in the statement of objections. Hoechst will however demonstrate that those facts are not sufficient in law to substantiate some of the Commission's legal conclusions. The points that Hoechst will subsequently raise relate therefore solely to the legal assessment of the facts of this case', could not be considered to be express, clear, unequivocal and capable of constituting genuine cooperation by the appellant. Therefore, the General Court considered it appropriate to reduce the amount of the fine by ten per cent.⁵⁷ The 2002 and 2006 versions of the Leniency Notice no longer provide for the possibility of a reduction in the fine on the ground

53 See, for example, Case T-406/09 *Donau Chemie AG v Commission* ECLI:EU:T:2014:254; Case T-391/09 *Evonik Degussa and AlzChem Hart v Commission* ECLI:EU:T:2014:22; and Case T-186/06 *Solvay v Commission* ECLI:EU:T:2011:276.

54 See, for example, Case T-412/10 *Roca (France) v Commission* ECLI:EU:T:2013:444; and Case T-132/07 *Fuji Electric v Commission* ECLI:EU:T:2011:344.

55 Case T-38/05 *Agroexpansión v Commission* ECLI:EU:T:2011:585; Case T-452/05 *Belgian Sewing Thread v Commission* ECLI:EU:T:2010:167; Case T-53/03 *BPB SA v Commission* ECLI:EU:T:2008:254; Case T-26/02 *Daichi Pharmaceutical v Commission* ECLI:EU:T:2006:75.

56 Case T-37/05 *WWTE v Commission* ECLI:EU:T:2011:76; Case T-33/05 *Cetarsa v Commission* ECLI:EU:T:2011:24; Case T-161/05 *Hoechst v Commission* ECLI:EU:T:2009:366; Case T-30/05 *Prym and Prym Consumer v Commission* ECLI:EU:T:2007:267.

57 Case T-161/05 *Hoechst v Commission* ECLI:EU:T:2009:366, paras 81–101.

of non-contestation of the facts. Nonetheless, the Commission is still able to grant a reduction of the fine for such type of cooperation, albeit outside the applicable Leniency Notice. The General Court has, however, become less inclined to support the grant of a considerable reduction for non-contestation of the facts. Indeed, in more recent appeals, the General Court dismissed pleas that criticised the Commission for not granting a reduction of more than one per cent in view of the same type of non-contestation as in *Hoechst*. For example, in the appeals concerning the elevators and escalators cartel, none of the applicants succeeded in their efforts to obtain a greater reduction of the fine. The applicants all claimed that the Commission's previous decisional practice, pursuant to which an undertaking that did not substantially contest the facts contained in the statement of objections would be granted a ten per cent reduction in its fine, in accordance with the second indent of Section D of the 1996 Leniency Notice, created legitimate expectations. Yet, the General Court dismissed this argument because (1) the Commission's practice in previous decisions cannot in itself serve as a legal framework for the imposition of fines in competition matters, and (2) only the 2002 Leniency Notice applied to the applicants' leniency applications, as a result of which the Commission's decisional practice in relation to the application of the 1996 Leniency Notice could not create legitimate expectations concerning the rate by which the fines would be reduced.⁵⁸

In *BASF and UCB v Commission*, the General Court found that the Commission had erred in characterising the successive global and European cartel arrangements⁵⁹ as a single and continuous infringement. Yet, if the Commission had correctly considered the global cartel arrangements to be a distinct infringement from the European arrangements, both infringements would have been considered separately and the global infringement would have been time-barred. As a result, UCB would have been entitled to a considerable reduction of the fine under the Leniency Notice, as it was the first to report on the European cartel. Therefore, the General Court decided that UCB was entitled to a reduction of 90 per cent.⁶⁰

58 Case T-138/07 *Schindler Holding and Others v Commission* ECLI:EU:T:2011:362, paras 350–361; Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others v Commission* ECLI:EU:T:2011:363, paras 355–379; Case T-151/07 *Kone and Others v Commission* ECLI:EU:T:2011:365, paras 199–213; Joined Cases T-144/07, T-147/07 to T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others v Commission* ECLI:EU:T:2011:364, paras 417–438.

59 The choline chloride cartel operated at two different but closely-related levels: the global level and the European level. At the global level, the applicants participated in the anti-competitive activities between June 1992 and April 1994. The cartel at the European level continued from March 1994 until October 1998.

60 Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* ECLI:EU:T:2007:380, paras 235–241.

In the decision leading to *Deltafina v Commission*, the Commission had found that the appellant had acted as leader and instigator of the cartel – a characterisation that, in accordance with Section B(e) of the 1996 Leniency Notice, automatically ruled out the benefit of a substantial reduction in the fine. Point 13 of the 2006 Leniency Notice still provides for the same exclusion by stating that ‘an undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines’. However, in *Deltafina*, the General Court disagreed with the Commission’s characterisation and therefore further reduced the fine imposed, as the appellant had neither represented a significant driving force in the cartel nor had it borne individual and specific liability for the operation of the cartel.⁶¹

Finally, the Commission has on occasion been found to have breached the principle of equal treatment, because, despite the fact that the appellant had provided cooperation of the same kind, the Commission had granted a smaller reduction to the appellant as compared to the reduction granted to other cartel participants.⁶²

OBLIGATION TO STATE REASONS

Article 296 TFEU imposes an obligation on EU institutions to state reasons whenever they adopt a certain measure. The statement of reasons must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution that adopted it; this will enable the persons concerned to ascertain the reasons for the measure and allow the competent court to review its legality. Whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.⁶³ The General Court has repeatedly annulled cartel decisions on the basis that the Commission failed to adhere to the obligation to state reasons in relation to different issues, such as the

61 Case T-29/05 *Deltafina v Commission* ECLI:EU:T:2010:355, paras 331–336; see also Case T-15/02 *BASF v Commission* ECLI:EU:T:2006:74.

62 Case T-410/03 *Hoechst v Commission* ECLI:EU:T:2008:211; Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others v Commission* ECLI:EU:T:2007:115.

63 Case C-367/95 P *Commission v Sytraval and Brink’s France* ECLI:EU:C:1998:154, para 63; Case C-37/13 P *Nexans and Nexans France v Commission* ECLI:EU:C:2014:2030, paras 31–32 and case law cited.

impact of the infringement,⁶⁴ parental liability,⁶⁵ the calculation of the fine⁶⁶ or the alleged participation in the infringement.⁶⁷

For example, the appellants in 13 appeals concerning the air freight cartel successfully argued that the grounds and the operative part of the Commission's decision were contradictory. The grounds of the decision described a single cartel constituting a single and continuous infringement in relation to all of the routes covered by the cartel and in which all of the appellants at issue participated. In that regard, the introduction of the decision put forward that the case:

'relates to a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), Article 53 of the Agreement on the European Economic Area ("the EEA Agreement") and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport ("the Swiss Agreement"), covering the EEA territory and Switzerland by which the addressees coordinated their pricing behaviour in the provision of airfreight services with respect to various surcharges and the payment of commission payable on surcharges.'⁶⁸

Yet, articles one to four of the operative part of the decision seemed to refer to four separate single and continuous infringements, based on different periods and different categories of routes, and committed by different appellants. Therefore, the operative part did not support the finding of a single and continuous infringement covering all routes and all the appellants. Instead, it could be interpreted as either finding four separate single and continuous infringements or just one single and continuous infringement (liability for which was attributed only to the appellants who participated directly in the unlawful conduct on the routes specifically mentioned in the different articles of the operative part or who were aware of the collusion on those routes). Therefore, the General Court held that the internal inconsistencies in the Commission's decision were liable to infringe the appellants' rights of defence, as they did not allow the appellants to understand the nature and scope of the infringement or infringements found, and prevented the court from exercising its power of review. Consequently, the General Court annulled

64 Case T-30/05 *Prym and Prym Consumer v Commission* ECLI:EU:T:2007:267.

65 Case T-517/09 *Alstom v Commission* ECLI:EU:T:2014:999; Case T-185/06 *Air Liquide v Commission* ECLI:EU:T:2011:275; Case T-196/06 *Edison v Commission* ECLI:EU:T:2011:281.

66 Case T-95/15 *Printeos and Others v Commission* ECLI:EU:T:2016:722; Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission* ECLI:EU:T:2006:391.

67 Case T-234/07 *Koninklijke Grolsch v Commission* ECLI:EU:T:2011:476.

68 Commission Decision of 9 November 2010 in case COMP/39258 – Airfreight, recital 1.

the Commission's decision and the fines imposed on the 11 airlines totalling €799m, without it being necessary to consider any other grounds of appeal raised by the appellants.⁶⁹

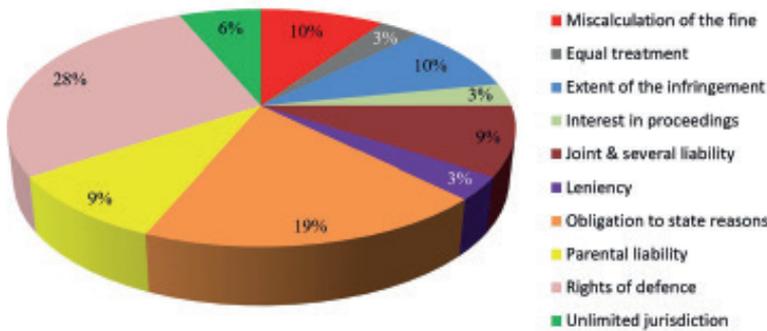
European Court of Justice

Although over 40 per cent of appeals before the General Court succeed (by obtaining a partial or complete annulment and/or reduction of the fine), most still fail, and a good number of applicants who do not get the relief they had hoped for from the General Court appeal to the ECJ (between 25 and 50 per cent).⁷⁰ In accordance with the second subparagraph of Article 256(1) TFEU, appeals before the ECJ, contrary to the General Court, are limited to points of law. Moreover, if the outcomes of appeals over the past decade can serve as a guide, the chances of success before the ECJ are, if anything, more limited than before the General Court, with fewer than two out of ten appeals avoiding dismissal in their entirety.⁷¹

69 Case T-28/11 *Koninklijke Luchtvaart Maatschappij v Commission* ECLI:EU:T:2015:995; Case T-36/11 *Japan Airlines v Commission* ECLI:EU:T:2015:992; Case T-38/11 *Cathay Pacific Airways v Commission* ECLI:EU:T:2015:985; T-39/11 *Cargolux Airlines v Commission* ECLI:EU:T:2015:991; T-40/11 *Latam Airlines Group and Lan Cargo v Commission* ECLI:EU:T:2015:986; T-43/11 *Singapore Airlines and Singapore Airlines Cargo PTE v Commission* ECLI:EU:T:2015:989; Case T-48/11 *British Airways v Commission* ECLI:EU:T:2015:988; Case T-56/11 *SAS Cargo Group and Others v Commission* ECLI:EU:T:2015:990; Case T-62/11 *Air France-KLM v Commission* ECLI:EU:T:2015:996; Case T-63/11 *Air France v Commission* ECLI:EU:T:2015:993; Case T-67/11 *Martinair Holland v Commission* ECLI:EU:T:2015:984; Case T-9/11 *Air Canada v Commission* ECLI:EU:T:2015:994.

70 However, a Maltese judge at the General Court, Eugène Buttigieg, recently put forward that the rising use of the cartel settlement procedure has led to a steady decline in appeals at the General Court. So far, only two undertakings have appealed before the General Court after reaching a settlement.

71 This figure does not cover the appeals of the Commission before the ECJ, as the number of appeals in which the Commission succeeded in its efforts is rather negligible. However, it is interesting to note that in nine of the 22 appeals (including cross-appeals) lodged by the Commission, the ECJ accepted one or more ground(s) of appeal (amounting to a success rate of about 41 per cent).

Figure 2: Successful appeal arguments before the ECJ

In those rare appeals that have succeeded⁷² (in the past ten years, only 24 out of 153 appeals in which the ECJ handed down a judgment), the two arguments that stand out the most are (in order of rate of success) (1) a breach of the rights of defence; and (2) a failure sufficiently to state reasons. As can be seen in Figure 2, other types of argument have also been successfully raised, albeit less frequently. These included, among others, misapplication of the rules on joint and several liability,⁷³ errors in the assessment of the extent of the infringement,⁷⁴ miscalculation of the fine⁷⁵ and unjustified refusal to reduce the amount of the fine under the applicable Leniency Notice.⁷⁶ However, given the small number of successful cartel appeals before the ECJ over the past decade, it would be imprudent to attach too much importance to the relative success rates of the above-mentioned arguments, but it is nonetheless instructive to assess which types of appeal arguments carried the day in these appeals.

⁷² That is, at least one ground of appeal was accepted.

⁷³ Joined Cases C-231/11 P to C-233/11 P *Commission v Siemens Österreich and Others and Siemens Transmission & Distribution and Others v Commission* ECLI:EU:C:2014:256; Joined Cases C-247/11 P and C-253/11 P *Areva and Others v Commission* ECLI:EU:C:2014:257.

⁷⁴ See, for example, Case C-67/13 P *Groupement des Cartes Bancaires v Commission* ECLI:EU:C:2014:2204.

⁷⁵ Case 637/13 P *Laufen Austria v Commission* ECLI:EU:C:2017:51; Case C-408/12 P *YKK Corp, YKK Holding Europe BV, YKK Stocko Fasteners GmbH v Commission* ECLI:EU:C:2014:2153.

⁷⁶ See, for example, Case C-511/06 P *Archer Daniels Midland v Commission* ECLI:EU:C:2009:433.

RIGHTS OF DEFENCE: STATEMENT OF OBJECTIONS, STANDARD OF PROOF, RIGHT TO BE HEARD, RIGHT TO JUDICIAL PROTECTION AND EXCESSIVE DURATION OF THE ADMINISTRATIVE PROCEDURE

Contrary to the General Court, which has been rather unsusceptible to rights of defence arguments, the ECJ has accepted such arguments most frequently. It is settled case law that in all proceedings in which fines may be imposed, including administrative proceedings, the rights of defence of the undertakings involved must be observed. This is a fundamental principle of EU law.⁷⁷ Looking at successful appeals to the ECJ over the past ten years, five broad categories of rights of defence arguments can be distinguished.

First, the ECJ has been willing to accept the argument that the General Court's failure to annul the Commission's decision infringed the appellants' rights of defence because of a deficient statement of objections. Since the statement of objections constitutes an essential procedural safeguard for the right to be heard, as it informs the undertakings of the objections relied on by the Commission, it is imperative that the statement of objections provides all the information the undertakings need to defend themselves effectively and to comment on the allegations made against them.⁷⁸ Therefore, it should contain all the essential elements used against the undertakings concerned, such as the facts, the characterisation of the facts and the evidence on which the Commission relies.⁷⁹ In addition, it must specify unequivocally the legal person on whom the fines may be imposed and be addressed to that entity.⁸⁰

By way of example, in *Ballast Nedam v Commission*, the ECJ found that the statement of objections did not enable the appellant to ascertain the facts and circumstances relied on by the Commission in support of its findings, or to discover an objection against it, or unequivocally to identify which legal persons could expect to be fined. The ECJ held that because of the ambiguity in the wording of the statement of objections and the fact that no statement of objections was sent to the subsidiary for the conduct of which the appellant was being held jointly and severally liable in its capacity as parent company, it could not be concluded that the appellant had understood,

77 Case C-85/76 *Hoffman-La Roche v Commission* ECLI:EU:C:1979:76, para 9; Case C-176/99 P *ARBED v Commission* ECLI:EU:C:2003:524, para 19.

78 European Commission, Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, point 82.

79 Case C-41/69 *ACF Chemiefarma v Commission* ECLI:EU:C:1970:71, para 26; Case C-62/86 *AKZO v Commission* ECLI:EU:C:1991:286, para 29; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* ECLI:EU:C:1993:120, para 135; Case C-176/99 P *ARBED v Commission* (2003), para 20.

80 Case C-395/96 P *Compagnie Maritime Belge Transports and Others v Commission* (2000), paras 143 and 146; Case C-176/99 P *ARBED v Commission* ECLI:EU:C:2003:524, para 21.

from reading the statement of objections, that it would be the addressee of a final Commission decision.⁸¹

In another case, *Archer Daniel Midland*, the ECJ upheld an appeal alleging that merely annexing to the statement of objections, documents of evidence and facts used to classify the appellant as leader of the cartel without referring to those facts expressly in the wording of the statement itself, did not afford the appellant the opportunity to exercise its rights of defence.⁸²

Secondly, to comply with the rights of defence, the Commission must afford the undertaking under investigation the opportunity to make known its views on the truth and relevance of the facts alleged and on the documents the Commission used to support its claim that there was an infringement.⁸³ In that regard, the imposition by the General Court of a standard of proof that was impossible to satisfy was considered in *Solvay v Commission* to be a breach of the appellant's procedural rights. The ECJ held that the General Court had erred in requiring that the appellant show that documents, lost by the Commission, would have been useful to its defence and in holding that the lack of access to all the documents in the investigation file had not prevented it from defending itself.⁸⁴

Thirdly, also in *Solvay v Commission*, the ECJ concluded that the General Court had erred in law in holding that the Commission had not infringed the appellant's right to be heard. The ECJ found fault in the Commission failing to hear the appellant before the adoption of the contested decision, even though it was the same as the decision that had been annulled previously owing to a lack of proper authentication by the College of Commissioners. The ECJ put forward that, although the General Court rightly pointed out that 'where, following the annulment of a decision penalising undertakings which have infringed Article [101(1) TFEU] because of a procedural defect concerning exclusively the procedures governing its final adoption by the College of Commissioners, the Commission is to adopt a fresh decision, with substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned',⁸⁵ the question of hearing the appellant could not be separated from the issue of

81 Case C-612/12 P *Ballast Nedam v Commission* ECLI:EU:C:2014:193, paras 22–31; see also Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission* ECLI:EU:C:2009:500.

82 Case C-511/06 *Archer Daniels Midland v Commission* ECLI:EU:C:2009:433.

83 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* ECLI:EU:C:2004:6, para 66; see also Art 41 (2) (a) and (b) of the Charter of Fundamental Rights of the European Union.

84 Case C-110/10 P *Solvay v Commission* ECLI:EU:C:2011:687, paras 46–62.

85 Case C-238/99 P *Limburgse Vinyl Maatschappij and Others v Commission* ECLI:EU:C:2002:582, paras 83–111.

access to file, as the first decision was not only annulled by the General Court because of a procedural irregularity at the final stage of the procedure, but also because the Commission had not granted the appellant access to all the documents in the its file, in particular, the exculpatory documents. As a result, the Commission should have opened a new administrative proceeding in order to hear the appellant after having granted access to the file.⁸⁶

Fourthly, in *Knauf Gips v Commission*, the ECJ set forth that the General Court had erred in its finding that, because the appellant had not raised any issues during the administrative procedure on its role as the company responsible for the actions of other undertakings in the same group, it had lost the right to demonstrate that, despite the factors relied upon by Commission, it could not be held jointly and severally liable. The ECJ stated that there is no obligation under EU law that the addressee of a statement of objections must challenge the various matters of fact or law during the administrative procedure, if it is not barred from doing so later at the stage of judicial proceedings. Moreover, the ECJ put forward that, although an undertaking's express or implicit acknowledgment of matters of fact or of law during the administrative proceedings before the Commission may constitute additional evidence when determining whether an action is well-founded, it would run against the rights to an effective remedy and of access to an impartial tribunal, enshrined in Article 47 of the Charter of Fundamental Rights of the EU, if this would restrict the actual exercise of the right to bring proceedings before the General Court under Article 263 TFEU.⁸⁷

Finally, two more appeals concerned an alleged breach by the Commission of the 'reasonable time' principle. This general principle of EU law requires the Commission to adopt decisions following administrative procedures within a reasonable time.⁸⁸ In these cases, the ECJ held that the General Court erred in failing to ascertain whether the excessive duration of the entire administrative procedure, including the phase preceding the notification of the statement of objections, was capable of affecting the appellants' future possibilities to defend their interests.⁸⁹ In cartel proceedings, undertakings are only able to defend themselves against the Commission's allegations after notification of the statement of objections, at which point undertakings have the opportunity to access the file and to express their views on the

86 Case C-110/10 P *Solvay v Commission* ECLI:EU:C:2011:687, paras 63–68.

87 Case C-407/08 *Knauf Gips v Commission* ECLI:EU:C:2010:389, paras 88–92.

88 Case C-282/95 P *Guérin automobiles v Commission* ECLI:EU:C:1997:159, paras 36 and 37; Case C-238/99 P *Limburgse Vinyl Maatschappij and Others v Commission* ECLI:EU:C:2002:582, paras 167–171.

89 Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (FEG) v Commission* ECLI:EU:C:2006:592; Case C-113/04 P *Technische Unie v Commission* ECLI:EU:C:2006:593.

Commission's statement of objections. However, the fact that the rights of defence take effect only after notification of the statement of objections, does not mean that that preceding stage of the administrative procedure does not affect the ability of undertakings to defend themselves. Indeed, as Advocate-General Kokott observed in her opinion in *Technische Unie v Commission*, 'the longer the period between the first investigative measures and notification of the statement of objections, the more likely it is that any exculpatory evidence against the allegations raised in the statement of objections will henceforth be difficult to obtain'.⁹⁰ However, even though the ECJ partially set aside the General Court's judgment insofar as it determined that the prolongation of the first phase of the administrative procedure was not in itself capable of adversely affecting the appellants' rights of defence, it held that the alleged breach of the 'reasonable time' principle was not supported by convincing evidence.

OBLIGATION TO STATE REASONS

Finally, the ECJ has been receptive to arguments on appeal that the General Court failed to state reasons in rejecting an appeal. As explained in more detail above, Article 296 TFEU imposes an obligation on the EU institutions to state reasons whenever they adopt a certain measure.

In a case concerning an alleged cartel in the cement industry, the General Court did not honour this obligation and, therefore, the ECJ set aside the General Court's judgment and annulled the Commission's decision containing a formal request for information under Article 18(3) of Regulation 1/2003. In its decision, the Commission required the addressees to provide large quantities of economic data within a short period of time. The formal request for information, which included a questionnaire of 67 pages, created an extremely onerous workload for the undertakings concerned by requiring them, *inter alia*, to:

- (1) submit an extraordinary volume of data, covering nearly all economic activities of the undertakings in 12 Member States during a period of more than a decade;
- (2) verify, one by one, thousands of financial documents, as well as data on older transactions not included in the undertakings' databases;
- (3) reformat information already covered by previous burdensome requests for information following a strict and complex format; and
- (4) provide information that was in the public domain.

90 AG Kokott, Case C-113/04 P *Technische Unie v Commission* ECLI:EU:C:2005:752, para 123.

However, the statement of reasons enclosed in the Commission's decision did not sufficiently explain why the particularly burdensome request for information was necessary to further the Commission's investigation. In particular, the ECJ found that the brevity and the vague and generic nature of the contested request's statement of reasons as regards the description of the alleged infringement, the products to which the investigation related, and the geographical scope of the alleged infringement, meant that it was impossible for the undertakings in question to verify whether the requested information was necessary for the purposes of the investigation. Therefore, the General Court had erred in upholding the Commission's decision, by noting that it is for the Commission to determine what information it considers necessary to request from companies when investigating potentially anti-competitive practices, as long as it can reasonably expect that information to be of help in determining whether the alleged infringement took place.⁹¹

In *Acerinox v Commission*, the ECJ partially set aside the General Court's judgment because it contained an incorrect statement of reasons, which was based on a distortion of evidence concerning the appellant's alleged participation in a certain aspect of the cartel. The General Court had treated a fax, in which the appellant allegedly made an announcement on future surcharges, as a decisive piece of evidence as to the fact that the appellant had participated in a cartel on the Spanish market. However, the appellant had contested the truth of the statements attributed to it in that fax. Yet, the General Court incorrectly presented the appellant's point of view by concluding that the appellant had not contested the truth of those statements. Therefore, the ECJ held that by relying on the fax as evidence without explaining why the appellant's objections to that fax had to be rejected, the General Court failed to fulfil its obligation to state reasons.⁹²

Finally, in *Elf Aquitaine v Commission*, the ECJ set aside the General Court's judgment, since it contained a misconception of the obligation to state reasons by not finding fault with an inadequate statement of reasons vitiating the Commission's decision. In holding the appellant jointly and severally liable for infringements of its subsidiary, the Commission had not adequately explained the reasons why the elements of fact and of law put forward by the appellant did not suffice to rebut the presumption of decisive influence. Instead, it had put forward 'repetitive and by no means detailed series of

91 Case C-247/14 P *HeidelbergCement v Commission* ECLI:EU:C:2016:149; Case C-248/14 P *Schwenk Zement v Commission* ECLI:EU:C:2016:150; Case C-267/14 P *Buzzi Unicem v Commission* ECLI:EU:C:2016:151; Case C-268/14 P *Italmobiliare v Commission* ECLI:EU:C:2016:152.

92 Case C-57/02 P *Acerinox v Commission* ECLI:EU:C:2005:453, paras 33–37.

bald assertions and denials',⁹³ which, in the absence of further information, did not enable the appellant to ascertain the reasons for the measure or the competent court to exercise its power of review. Nevertheless, the General Court erroneously held that the Commission stated to the requisite legal standard the reasons for the Commission's position on several detailed arguments put forward by the appellant.⁹⁴

Unsuccessful appeal arguments

In addition to the arguments that have found favour with the General Court and the ECJ, there are arguments that appellants regularly raise that have not been greeted with much success. Before the General Court, these include grounds of appeal relating to parental liability, mitigating circumstances, inability to pay, legitimate expectations and legal certainty, gravity of the infringement, *ne bis in idem* (double jeopardy), the Commission's definition of the market or procedural issues such as the lapse of the limitation period and fairness of proceedings. Before the ECJ, no pleas other than those concerning a breach of the rights of defence and a failure to comply with the obligation to state reasons have been shown to have had a significant chance of success. Moreover, certain pleas have never gained traction before the ECJ, such as the General Court's alleged failure properly to assess the duration of the infringement or the existence of mitigating circumstances, and the claim that the excessive length of the judicial proceedings before the General Court breached the 'reasonable time' principle.

The fact that the above-mentioned appeal arguments have never, or almost never, succeeded before the General Court does not mean that these arguments are necessarily bound to fail, but the judgments over the past decade suggest that the General Court will only follow them in very compelling circumstances. For example, by virtue of both the 1998 and the 2006 Fining Guidelines, the Commission may⁹⁵ reduce the fine where it finds that mitigating factors exist, such as, inter alia, effective cooperation outside the scope of the applicable Leniency Notice, negligence or limited

93 Case C-521/09 P *Elf Aquitaine v Commission* ECLI:EU:C:2005:453, para 168.

94 Case C-521/09 P *Elf Aquitaine v Commission* ECLI:EU:C:2011:620, paras 144–171.

95 Since the Fining Guidelines are not a binding legal instrument, the Commission has a broad discretion in setting the amount of the fine. However, the Fining Guidelines do create (legitimate) expectations as regards the Commission's fining practice and thus have some degree of authority. Indeed, if the Commission wishes to depart from the Fining Guidelines, it runs the risk of treating like cases differently and therefore breaching the principle of equal treatment enshrined in EU law.

involvement in the infringement.⁹⁶ Despite being among the appeal arguments that have been raised the most in the past decade, the Commission has rarely accepted them and the European courts tend to uphold the Commission's reasoning on these pleas. Indeed, before the General Court this argument was raised in 99 appeals over the past decade, of which 90 were unsuccessful.

However, exceptionally, this plea has been successfully raised before the General Court, even where the appellant had already been granted a reduction of the fine under the applicable Leniency Notice.⁹⁷ For example, in *Fresh Del Monte Produce v Commission*, the General Court increased the reduction of the fine granted by the Commission because the Commission had failed to take account of the appellant's cooperation during the administrative procedure and failed to recognise its lesser involvement in the alleged infringement. The General Court held that although a passive or minor role in a cartel (demonstrated by significantly sporadic participation at cartel meetings and late entry to the market that was the subject of the infringement) does not amount to a mitigating circumstance as described in the 2006 Fining Guidelines, it could give rise to a reduction in the fine. Therefore, the General Court increased the reduction applied to the basic amount by 20 per cent, so as to take account of the relative gravity of the appellant's participation in the overall cartel.⁹⁸ Similarly, in *Coats Holding and Coats v Commission*, the General Court reduced the amount of the fine because the appellant's role in the cartel was more akin to that of a mediator than that of a full member of the cartel.⁹⁹ Furthermore, in *Ferriere Nord v Commission*, the General Court held that the Commission had erred in setting the basic amount of the fine, as it had failed to consider the applicant's lack of participation in parts of the cartel for a period of more than three years.¹⁰⁰ Finally, in *FNCBV and Others*, the General Court ruled that the Commission should have granted a greater reduction to the fines under section 5(b) of the 1998 Fining Guidelines, in respect of the serious crisis in the beef sector following the outbreak of BSE, also known as 'mad cow disease'.¹⁰¹

Similarly, raising the argument that the alleged infringement of the appellant is time-barred as the limitation period has lapsed is unlikely to achieve success before the General Court. One of the rare exceptions was the 2011 judgment in the *Stempher* case, in which the General Court found

96 2006 Fining Guidelines, n 18 above, point 29; 1998 Fining Guidelines, n 21 above, point 3.

97 See, for example, Case -90/10 *Ferriere Nord SpA v Commission* ECLI:EU:T:2014:1035.

98 Case T-587/08 *Fresh Del Monte Produce v Commission* ECLI:EU:T:2013:129, paras 797–817.

99 Case T-36/05 *Coats Holdings and Coats v Commission* ECLI:EU:T:2007:268, paras 207–215.

100 Case T-90/10 *Ferriere Nord SpA v Commission* ECLI:EU:T:2014:1035, paras 317–325.

101 Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission* ECLI:EU:T:2006:391.

that the Commission was precluded from fining the appellants, as it was not able to precisely and coherently prove that the appellants had continued to participate in the infringement after 20 June 1997. Since the first act that could have interrupted the limitation period was the Commission's inspection of 26 June 2002, the General Court held that the five-year limitation period of Article 25 of Regulation No 1/2003 had elapsed and that therefore the Commission was time-barred from imposing a fine on the appellants. Consequently, the General Court annulled the Commission's decision insofar as it related to the appellants.¹⁰²

Finally, another ground of appeal that so far has had limited chances of success is the allegation that the Commission has misapplied the rules on parental liability – the legal concept under which the conduct of a subsidiary can be imputed to a parent company. The Commission has nevertheless been found to have erred, in particular regarding the presence of decisive influence. Where a parent company exercises decisive influence over the conduct of its subsidiary, preventing it from deciding independently upon its own behaviour on the market, they form a single economic entity.¹⁰³ As a result, the Commission is able to address a fining decision to the parent company, without having to establish the personal involvement of the latter in the infringement.¹⁰⁴ Moreover, where a parent company has a 100 per cent shareholding in a subsidiary, there is a rebuttable presumption that the parent company exercises decisive influence. This rebuttable presumption also applies where a holding company holds 100 per cent of the capital of an interposed undertaking, which, in turn, holds the entire capital of a subsidiary of its group that has committed an infringement of EU competition law; in this case, the holding company is presumed to exercise decisive influence over the conduct of the interposed undertaking and also indirectly, via that undertaking, over the conduct of that subsidiary.¹⁰⁵ In *FLS Plast v Commission* and *FLSmidth v Commission*, two related and rare successful appeals, it was undisputed that the applicant¹⁰⁶ had held a 100 per cent shareholding in its subsidiary, Trioplast Wittenheim, from 1992

102 Case T-68/06 *Stempher and Koninklijke Verpakkingsindustrie Stempher v Commission* ECLI:EU:T:2011:670, paras 19–42.

103 Case C-73/95 P *Viho v Commission* ECLI:EU:C:1996:405, para 51; Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011), OJ C 11/1, para 11.

104 Case C-97/08 P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536, paras 58 and 59.

105 Case T-65/06 *FLSmidth v Commission* ECLI:EU:T:2012:103, paras 22–24; see also Case C-90/09 P *General Química and Others v Commission* ECLI:EU:C:2011:21, paras 86–88.

106 At the time of the judgments, FLSmidth & Co A/S was the parent company of a group of companies (ie, the holding company). One of those companies was FLS Plast A/S, which itself was the former parent company of Trioplast Wittenheim SA, a participant in the industrial bags cartel.

until the beginning of 1999. However, in 1991, it had only held 60 per cent of the equity. Yet, the Commission seemed to have relied on the principle of the rebuttable presumption for both periods. In *FLS Plast*, the General Court reiterated that in order to determine whether, in the absence of a 100 per cent shareholding, a subsidiary decides independently upon its conduct on the market, ‘it is not appropriate merely to take account of the fact that the parent company influences pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing. Account must also be taken of all relevant factors relating to the economic, organisational and legal links between the subsidiary and the parent company, which may vary from case to case and cannot, therefore, be exhaustively listed’.¹⁰⁷ In that regard, the General Court concluded that the Commission had not established to the required legal standard that the applicant had exercised actual control over Trioplast Wittenheim throughout the year 1991, and that therefore the infringement could not be imputed to the applicant for that period.¹⁰⁸

Conclusion

A review of the case law of the General Court and the ECJ over the past decade suggests that running some appeal arguments is more likely to lead to success than others, and that applicants who otherwise try to throw the proverbial kitchen sink of arguments at the European courts might be well-advised to consider focusing their time, money and efforts on those arguments that have proven to be the most likely to succeed. Given the limits on the lengths of briefs imposed by the European courts, it is not inconceivable that an over-inclusive approach to appeal arguments ultimately hurts an applicant’s case as it might render the most compelling arguments underdeveloped. That being said, applicants will always have to consider the specific circumstances of their case, which might represent that exceptional instance in which the European courts see merit in an otherwise unpopular argument. There are no bright lines to be drawn between successful and unsuccessful appeal arguments, and the fact that lawyers (1) often have invested themselves in and passionately believe in the arguments supporting their case, (2) are worried about leaving out any arguments that could even theoretically turn around a case, and (3) sometimes miss the courage or perspective to be selective in which arguments they bring forward, probably means that many applications to the European courts will continue to be over-inclusive, and perhaps not as focused as they could or should be, in terms of the arguments they present.

107 Case T-64/06 *FLS PLast v Commission* ECLI:EU:T:2012:102, paragraph 31; *See also* Case C-97/08 P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536, para 74.

108 Case T-64/06 *FLS PLast v Commission* ECLI:EU:T:2012:102, paras 25–46.