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REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

## Raising the EU evidentiary bar for the “single and continuous infringement” doctrine

Article | Concurrences N° 4-2016  
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## ABSTRACT

Viewed against the backdrop of the European Commission's withdrawal of a number of EU antitrust investigations for alleged collusive practices, the authors analyze the overhaul of the "single and continuous infringement" doctrine which has been progressively subjected to increasing evidentiary rigor by the jurisprudence of the European Courts. The more traditional precedents from the European Courts were in general very relaxed about the application of that doctrine by the Commission as the basis upon which liability could be established under Article 101 TFEU for alleged multi-party collusive practices. However, both the General Court and the CJEU have taken significant steps over the past 12 years to develop more coherent evidentiary standards to establish a company's liability for its participation in a "single and continuous infringement". Those steps have culminated in the Cases of Aalberts (2013), Soliver (2014) and Toshiba (2015), as a result of which there is now no doubt that the Commission cannot construct a case alleging collusion on the basis of circumstantial, indirect or incomplete evidence to prove a company's liability for its participation in a broader continuous infringement.

*Dans le contexte de la clôture d'un certain nombre d'enquêtes de droit de la concurrence de l'UE concernant de prétendues pratiques collusoires, les auteurs analysent la refonte de la doctrine d'«infraction unique et continue» qui ressort de la jurisprudence récente des Cours européennes. La jurisprudence traditionnelle des tribunaux de l'UE était jusqu'à présent très souple quant à l'application de cette doctrine par la Commission, sur la base de laquelle une responsabilité dans le chef de l'Article 101 TFUE pour pratiques collusives multipartites pouvait être établie. Toutefois, le Tribunal de l'UE ainsi que la CJUE ont pris d'importantes mesures les 12 dernières années pour développer de manière plus détaillée la jurisprudence relative au standard de la preuve requis pour établir la responsabilité des entreprises pour une «infraction unique et continue». Ces mesures ont culminé dans les affaires Aalberts (2013), Soliver (2014) et Toshiba (2015), et ont démontré que la Commission ne peut se baser uniquement sur des preuves circonstancielles, indirectes ou incomplètes pour en déduire la responsabilité d'une entreprise pour une infraction globale et continue.*

\*The authors acted as defence counsel to UBS AG in Case COMP/39.745 – CDS Information market.

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## I. Introduction

1. In the course of the year 2015, the current European Commission's Competition Commissioner, Margrethe Vestager, closed a number of antitrust investigations into alleged violations of EU competition laws that had been opened by her predecessor, Joaquín Almunia. The case that arguably generated the most controversy in EU antitrust circles was the *CDS* investigation.<sup>1</sup>

2. This case had been pursued by the Commission against 13 banks and two financial organisations on the allegation that the defendant banks had colluded, under the auspices of Markit (a financial information and services company) and the International Swaps and Derivatives Association (“ISDA,” a trade association), in order to protect their position as traders of credit default swaps (“CDS”). Based on the Commission's understanding of the parties' role in bespoke over-the-counter (“OTC”) CDS trading and the ways in which the various parties interacted in relation to the licensing procedures adopted for the provision of CDS exchange trading services, the Commission issued a Statement of Objections

<sup>1</sup> See Case COMP/39.745 – *CDS Information market*.

in the summer of 2013 against the 13 banks, Markit and ISDA for allegedly coordinating their behaviour over the period 2006 to 2009 by jointly preventing CDS from being traded on exchanges.<sup>2</sup>

3. After having heard the parties' defences at an oral hearing and having conducted a series of additional fact-finding inspections,<sup>3</sup> the Commission ultimately withdrew its case against the 13 defendant banks on 4 December 2015, concluding that "[t]he evidence was not sufficiently conclusive to confirm the Commission's concerns with regards to the 13 investment banks."<sup>4</sup> While the Commission did not close its case at that juncture against Markit and ISDA, a settlement has now been brokered between the Commission and those organisations under an "Article 9" commitments procedure.<sup>5</sup>

4. The CDS Case was characterised by numerous flaws, including the lack of actual evidence that defendants had been parties to any agreement, or that any such agreement was indeed anti-competitive, either "by object" or by reference to its alleged "effects" on the market. Among these flaws, the Commission's inability to establish liability on the defendants for a "single and continuous infringement" undoubtedly played an important role in the Commission's decision to abandon its charges against all 13 banks.

5. Indeed, in order to understand why the Commission would close a case for lack of evidence against such a large number of defendants after investigating the matter for over 5 years, issued numerous requests for information to the defendants, drafted a Statement of Objections in excess of 350 pages, and having conducted multiple sets of on-site document reviews, one needs to understand how the parallel development of the jurisprudence of the European Courts over the life of the Commission's investigation influenced the final outcome of that investigation. It is contended that the momentum built up in the respective judgments delivered in *Aalberts* (2013), *Soliver* (2014) and *Toshiba* (2015)<sup>6</sup> raised insurmountable evidentiary barriers to the Commission proving that the defendant banks had engaged in a "single and continuous" infringement of Article 101(1) TFEU over the period 2006–2009.

6. To this end, the case-law needs to be appraised in its entirety in order to better understand how judicial momentum transformed the doctrine of a "single and continuous infringement," which had hitherto provided the Commission with a wide margin of discretion as to how broadly its collusion allegations could be framed, into one where the evidentiary standard in EU cases now arguably provides more safeguards than U.S. litigation standards of proof.<sup>7</sup> Before doing so, however, it is worthwhile reviewing the state of the law as it stood until recently.

## II. The development of the "single and continuous infringement" doctrine

7. The doctrine of "single and continuous infringement" has its origin in a widely held concept found in the legal orders of the EU Member States concerning the attribution of liability for infringements committed by several perpetrators according to their participation in an infringement as a whole.<sup>8</sup> In effect, the doctrine performs the role of a legal presumption through which the Commission can establish the existence of a unitary competition law infringement over a defined period of time and with regard to a specific number of companies, "not only from an isolated act but also from a series of acts or from continuous conduct."<sup>9</sup> Put another way by Advocate General Cosmas in the *Anic Partecipazioni* Case, the doctrine applies to "the interrelationship between several acts each of which, viewed in isolation, in itself constitutes an infringement."<sup>10</sup> Accordingly, the establishment of a company's participation in and liability for a "single and continuous infringement" covers all anti-competitive conduct carried out by all parties involved in the single infringement, and imputes liability to all companies to an equal extent.<sup>11</sup>

2 See Statement on CDS (credit default swaps) investigation, Vice President of the European Commission responsible for Competition Policy Joaquín Almunia, 1 July 2013, available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-593\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-593_en.htm).

3 See Goldman, BofA Among Banks Said to Face Fresh Swaps Scrutiny, *Bloomberg*, 11 September 2015, available at: <http://www.bloomberg.com/news/articles/2015-05-13/swaps-probe-reviewed-as-eu-said-to-weigh-new-antitrust-complaint>.

4 See Antitrust: Commission closes proceedings against 13 investment banks in credit default swaps case, European Commission, 4 December 2015, available at: [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39745/39745\\_13719\\_14.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39745/39745_13719_14.pdf).

5 See Antitrust: Commission seeks feedback on commitments by ISDA and Markit on credit default swaps, European Commission, 28 April 2016, available at: [http://europa.eu/rapid/press-release\\_IP-16-1610\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1610_en.htm), which refers to the adoption of a decision pursuant to Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1–25. See further, EU accepts Markit, ISDA concessions in credit default swaps probe, *Reuters*, 20 July 2016, available at: <http://www.reuters.com/article/eu-markit-isd-antitrust-idUSB5N19N008>.

6 See Case C-287/11 P *Commission v. Aalberts* ECLI:EU:C:2013:445; Case T-68/09 *Soliver v. Commission* ECLI:EU:T:2014:867; and Case T-104/13 *Toshiba Corp. v. Commission* ECLI:EU:T:2015:610.

7 U.S. antitrust law requires that each purported conspirator must be shown to have a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 810 [1946]: "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design or understanding (...) the conclusion that a conspiracy is established is justified"). The extent to which this standard protects against overly broad claims of single and continuous conspiracy is addressed below.

8 See Case C-49/92 P *Commission v. Anic Partecipazioni* [1999] ECR I-4125, at § 84.

9 See *Anic Partecipazioni*, *op. cit.*, at § 81.

10 See Advocate General Cosmas in Case C-49/92 P *Commission v. Anic Partecipazioni* ECLI:EU:C:1997:357, at §§ 80–81.

11 See Case C-441/11 P *Commission v. Verhuizingen Coppens* [2012] ECR I-0000, at §§ 43 to 45; Case C-444/11 P *Team Relocations NV v. Commission* ECLI:EU:C:2013:464, at § 55.

8. The analytically separate questions of whether there exists a “single and continuous infringement,” on the one hand, and the parties’ participation in it, on the other, are interrelated. Indeed, the European Courts have referred to such an infringement as “*different actions [which] form part of an overall plan because their identical object distorts competition within the common market*,”<sup>12</sup> a definition which relies on the interaction and participation of the different infringing parties (the “actions”) and their understanding of why these actions occurred (the “identical object”). In these circumstances, “*the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole*.”<sup>13</sup> Thus, where it can be proven that the parties against whom proceedings have been initiated have participated in such an infringement to the requisite level (e.g., with an identical object, contributing to an overall plan; see discussion in section III below), a “single and continuous infringement” can be established, with liability for the totality of the infringement being imputed to the various participating entities.

9. The first time the Commission resorted to the “single and continuous infringement” doctrine was in its *Polypropylene* Decision,<sup>14</sup> adopted further to a Commission investigation into the petrochemicals sector. The Commission’s approach in this investigation was endorsed by the General Court and the Court of Justice of the EU (“CJEU”) in a series of appeals.<sup>15</sup> Thereafter, the Commission had recourse to the “single and continuous infringement” doctrine on a regular basis, in the context of horizontal cartels<sup>16</sup> and vertical agreements,<sup>17</sup> and has even applied the doctrine in relation to unilateral conduct (in the form of a “single and continuous abuse” or “strategy” by a dominant entity).<sup>18</sup> In the majority of these cases, the European Courts supported the Commission’s expansive view of the doctrine.

10. Without doubt, the Commission’s application of the “single and continuous infringement” doctrine facilitates its role as an enforcement agency in the application of Article 101(1) TFEU, especially in relation to allegations of multi-party collusion. In such circumstances, the understanding that an infringement constituted by a pattern of behaviour is “single” and has been “ongoing” over a period of time resolves a number of

thorny practical issues that may arise in any complex allegation of collusion as regards the application of a statute of limitations and, indeed, in effect lowers the burden of proof needed to satisfy a review court that collusive conduct was ongoing over the entirety of the investigation period. Moreover, the application of the doctrine magnifies the risks faced by defendants in terms of their exposure to administrative fines (and potential liability in private enforcement actions before EU national courts). As a number of noted commentators agreed back in 2012, the use of the “single and continuous infringement” doctrine “*significantly reduces the burden that the Commission would otherwise face in establishing the fact of collusion, particularly where a cartel persisted for a long period, during which the nature of the collusion may have varied as between different parties or at different times*.”<sup>19</sup>

11. Over the years, it became increasingly clear to the EU antitrust defence Bar that the doctrine was being applied by the Commission in an over-inclusive manner. In doing so, cases emerged where liability was being established for the entirety of an infringement on specific companies whose participation may not have been as comprehensive or as well informed as the Commission’s allegations suggested. With the passage of time, practitioners became increasingly concerned that the expansive use of the doctrine raised a number of fundamental questions about whether it could be reconciled with the fundamental right under EU law relating to the presumption of innocence<sup>20</sup> and the principle of personal responsibility for infringements of EU competition law.<sup>21</sup> The European Court of Human Rights (“ECtHR”) case-law, even in the wake of the *Menarini* Judgment,<sup>22</sup> also limited the use of factual presumptions in criminal proceedings to those which are “reasonable” and capable of being rebutted so that the legal presumption of innocence would not be “render[ed] void” through their use.<sup>23</sup>

12. Notwithstanding the temptation experienced by the Commission to take advantage of the “single and continuous infringement” doctrine as an enforcement

<sup>12</sup> See *Anic Partecipazioni*, *op. cit.*, § 81; *Verhuizingen Coppens*, *op. cit.*, at § 41.

<sup>13</sup> *Ibid.*

<sup>14</sup> See Case IV/31.149 – *Polypropylene*, OJ L 230, 18.8.1986, pp. 1–66.

<sup>15</sup> See Case T-1/89 *Rhone-Poulenc v. Commission* [1991] ECR I-867; Case T-6/89 *Enichem Anic v. Commission* [1991] ECR II-1623; and, ultimately, Case C-49/92 P *Commission v. Anic Partecipazioni* [1999] ECR I-4125.

<sup>16</sup> See, for example, Case T-25/95 *et al. Cimenteries et al. v. Commission* [2000] ECR II-491; Cases T-101/05 and T-111/05 *BASF and UCB v. Commission* [2007] ECR II-4949.

<sup>17</sup> See Case COMP/35.587 – *PO Video Games*; Case COMP/35.706 – *PO Nintendo Distribution*; Case COMP/36.321 – *Omega – Nintendo*; and Case COMP/37.980 – *Souris/Topps*, at §§ 122–128.

<sup>18</sup> See Case COMP/37.507 – *AstraZeneca* (upheld on appeal in Case T-321/05 *AstraZeneca v. Commission* [2010] ECR II-2805 and Case C-457/10 P *AstraZeneca v. Commission* ECLI:EU:C:2012:770); and Case COMP/37.990 – *Intel* (upheld on appeal in Case T-286/09 *Intel v. Commission*).

<sup>19</sup> See M. Siragusa and C. Rizza (eds.), *EU Competition law. Volume III. Cartels & Collusive Behaviour. Restrictive Agreements and Practices Between Competitors*, Claeys & Casteels, 2012, at § 1.7. See further, I. Simonsson, *Legitimacy in EU Cartel Control*, Hart Publishing, Modern Studies in European Law, 2010, at § 135.

<sup>20</sup> See Article 48(1) of the Charter of Fundamental Rights of the EU, OJ C364, 18.12.2000, pp. 1–22; and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the “ECHR”). See also Case C-199/92 P *Hüls v. Commission* [1999] ECR I-4287, at §§ 149 and 150; Case C-235/92 P *Montecatini v. Commission* [1999] ECR I-4539, at §§ 175 and 176; and Case T-36/05 *Coats Holdings and Coats v. Commission* [2007] ECR II-110, at § 70.

<sup>21</sup> See *Anic Partecipazioni*, *op. cit.*, at §§ 83–85 and 203.

<sup>22</sup> See ECtHR of 27 September 2011 *A. Menarini Diagnostics S.R.L. v. Italy*, at §§ 38 to 44. According to the *Menarini* doctrine, despite antitrust fines being of a criminal nature, the investigation and imposition of fines can be carried out by (the same) administrative body, provided that any such infringement and fining decisions are subject to full judicial review.

<sup>23</sup> See further ECtHR of 30 March 2004 *Radio – France v. France*, at §§ 24 *et seq.* and ECtHR of 5 September 2001 *Philips v. United Kingdom*, at §§ 40 *et seq.* In the words of the ECtHR, “Article 6 § 2 [ECHR] does not (...) regard presumptions of fact or of law provided for in (...) criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of defence,” see ECtHR *Salabiaku v. France*, A 141 A (1988), 13 EHRR 379, at § 28, and ECtHR of 30 June 2011 *Klouvi c. France*, at §§ 39–40.



short-cut through which to impute liability on a defendant engaged in an alleged act of multi-party collusion, it did not take long for the European Courts to respond to the clear shortcomings in the standard of proof being used to establish such offences.

13. By the year 2000, the European Courts began to establish certain conditions for, and limits on, the use of the doctrine. This, in turn, led to the development of a standard of proof which the Commission needed to satisfy before it could proceed to fine companies for their participation in a collusive practice.

### III. Setting the conditions and limits for the doctrine's application

14. As indicated above, a “single and continuous infringement” can be established where “*different actions form part of an overall plan because their identical object distorts competition within the common market.*”<sup>24</sup> Thus, the existence of such an infringement is based on the assessment of the participation of the different parties (the “actions”), and on whether they meet all the conditions necessary for the conduct in question to be considered liable for their participation in a “single and continuous infringement” and be sanctioned on that basis. A review of the case-law suggests that the European Courts have established that a number of conditions need to be satisfied in order that a company's liability for a “single and continuous infringement” be established:<sup>25</sup>

- First, it must be demonstrated that what might otherwise appear to be different conduct has an “*identical*” purpose or object to the anti-competitive aims allegedly being pursued, so that the various concerted practices and agreements detected in the investigation can be considered to have been “*part of a series of efforts made by the undertakings in question in pursuit of a single economic aim.*”<sup>26</sup>

- Second, it is necessary to establish evidence for “*each undertaking to have contributed, at its own level, to the pursuit of the common objective.*”<sup>27</sup> Thus, the “single and continuous infringement” doctrine applies to companies who, through their conduct, contribute to an anti-competitive “*identical purpose*” or “*single economic aim,*” which can be characterised as their “*common objective.*”
- Third, it must be shown that each undertaking in question “*was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk.*”<sup>28</sup> In this regard, the General Court has further clarified that the undertaking concerned must be aware of the general scope and the essential characteristics of an alleged cartel as a whole.<sup>29</sup>

15. The judgments of the European Courts from which these conditions can be distilled have to a large degree supported the Commission's use in individual cases of the “single and continuous infringement” doctrine as an integral part of its investigatory and enforcement powers. Nevertheless, there have been isolated instances where the Commission was considered to have over-reached its application of the doctrine in the establishment of a company's participation and liability for such infringement, based on the tests set forth above. Although these rulings of the European Courts only related to the liability of individual companies, their rationale could have equally applied to other addressees of the relevant Commission decisions placed in an equivalent position,<sup>30</sup> to the point of challenging the finding of a “single and continuous infringement” as a whole.<sup>31</sup> However, these Judgments did not overrule the Commission's findings in each case that a “single and continuous infringement” had been established with respect to the other relevant cartel participants, who were therefore held liable for those infringements.

<sup>24</sup> See *Anic Partecipazioni*, *op. cit.*, § 81; *Verhuizingen Coppens*, *op. cit.*, at § 41.

<sup>25</sup> See, e.g., *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* [2004] ECR I-123, at §§ 83, 258, 260 and 286; *Verhuizingen Coppens*, *op. cit.*, at §§ 41 and 42; *Case C-444/11 P Team Relocations NV v. Commission* [2013] ECR NYR at §§ 49–50. The CJEU and the General Court have also referred to this requirement as the establishment of “*the same object of distorting competition*” or “*the pursuit of a common objective*” (see *BASF and UCB*, *op. cit.*, at § 161; and *Anic Partecipazioni*, *op. cit.*, at § 87): “*Likewise, the fact that different undertakings played different roles in the pursuit of a common objective does not mean that there was no identity of anti-competitive object and, accordingly, of infringement, provided that each undertaking contributed, at its own level, to the pursuit of the common objective.*”

<sup>26</sup> See *Anic Partecipazioni*, *op. cit.*, at § 197.

<sup>27</sup> See *Anic Partecipazioni*, *op. cit.*, at § 206. See further *Case T- 53/03 BPB*, *op. cit.*, at § 257 and *Case T-21/99 Dansk Rorindustri*, *op. cit.*, at § 67. See *Case T-36/05 Coats Holdings and Coats*, *op. cit.*, at § 119.

<sup>28</sup> See *Anic Partecipazioni*, *op. cit.*, at § 203.

<sup>29</sup> See *Joined-Cases T-259/02 to T-264/02 and T-271/02 Raiffeisen Zentralbank Österreich v. Commission* [2006] ECR II-5169, at §§ 191 and 193; and *Case T-385/06 Aalberts Industries v. Commission* [2011] ECR II-1223, at §§ 111–119; and *Case T-68/09 Soliver NV v. Commission* ECLI:EU:T:2014:867 at § 64.

<sup>30</sup> However, this approach might not apply in all cases. For example, in *Case T-23/99 LR af 1998 v. Commission*, ECLI:EU:T:2002:75, an appeal by company LR af 1998 against the Commission decision in the *Pre-Insulated Pipes* investigation, the applicant was found to have been active throughout the different levels of the infringement, ranging from its commencement in Denmark to its termination as an EEA-wide cartel. Therefore, the liability of this company for the overall single and continuous infringement was confirmed by the General Court (see §§ 98 ff.).

<sup>31</sup> See, e.g., *BASF and UCB*, where the Commission's finding of an overall single and continuous infringement which covered two separate infringements was subject to criticism by the General Court in a manner that could have compromised the establishment of an infringement regarding all investigated parties.

# 1. Knowledge or awareness of the unlawful conduct

16. One can go back to the early 2000s to find the first precedent where the General Court struck down a Commission decision on the basis of lack of knowledge or awareness.

17. In the *Pre-Insulated Pipes* investigation, the Commission had found the existence of an EEA-wide “single and continuous infringement” in the pre-insulated pipes sector, which operated through meetings at a national level. Accordingly, the Commission proceeded to fine a large number of companies for their participation in a cartel that covered the entire territory of the EEA.<sup>32</sup> On appeal, Sigma Tecnologie, an alleged member of the identified conspiracy, argued that the evidence on the file did not demonstrate its awareness of a cartel operating at a European level: unlike other cartel participants, Sigma Tecnologie pointed out that it had not been represented in EEA-wide meetings, but was only active in the national market, it had only been invited to some meetings and it had not participated in some of the more important meetings. Consequently, in its *Sigma Tecnologie* Judgment, the General Court upheld these arguments, concluding that, by participating in the agreement on a national market (i.e., Italy), the company was not aware of the anti-competitive conduct at European level of the other undertakings, nor could it have reasonably foreseen such conduct taking place.<sup>33</sup> The Commission did not appeal the General Court’s ruling.

18. In the *Quinn Barlo* Case,<sup>34</sup> the General Court further emphasised the need for the Commission to be able to prove that any given defendant had sufficient subjective knowledge or awareness of the overall anti-competitive plan. The Judgment was delivered in an appeal against the Commission decision in the *Methacrylates* investigation,<sup>35</sup> where the liability of Quinn Barlo was established for a “single and continuous infringement” covering PMMA solid sheet, PMMA sanitary ware and PMMA moulding compounds. The Commission had determined the liability of Quinn Barlo for its participation in this all-embracing infringement even though it could only establish that company’s participation in an infringement with respect to PMMA solid sheet products. On appeal, the General Court overturned the Commission’s conclusions, and in the process of doing so criticised the approach pursued by the Commission. In the view of the Court, such an approach “would allow an undertaking to be held liable for a single infringement solely because of objective links between that infringement and the agreement in which that undertaking participated, such as belonging to the same economic sector, even though it had

*not been established that it was aware of the existence of such a single infringement or that it could reasonably have foreseen it and was prepared to take that risk.”*<sup>36</sup>

19. In the *International Removal Services* investigation,<sup>37</sup> Verhuizingen Coppens NV also succeeded in having the Commission’s decision against it overturned by the General Court (ruling confirmed on appeal before the CJEU) concerning its alleged participation in a cartel. In this case, the Commission had argued that, by participating in a specific aspect of a broader cartel (an agreement on quotes submitted to customers), Verhuizingen Coppens NV had participated in a “single and continuous infringement” which included another constituent element (agreements on commissions) of the more broadly framed offence. In the *Verhuizingen Coppens* Judgments, both the General Court and the CJEU (in separate review proceedings) concluded that the Commission had not discharged the burden of proof correctly; even if Verhuizingen Coppens NV had not denied that it was aware of the other agreements making up the broader cartel allegation, such a finding had not been adequately established by the Commission during the investigation.<sup>38</sup> Accordingly, the Commission was held to have erred in its establishment of liability on the part of Verhuizingen Coppens NV.

## 2. The identical common objective behind the different types of conduct

20. The *BASF and UCB* Case constituted the first occasion in which the General Court limited the undue application of the “single and continuous infringement” doctrine with regard to the “identical purpose” element of that doctrine. In the *Choline chloride* investigation, the Commission had conflated two consecutive cartels (of global and European scope, respectively) into a “single complex and continuous infringement,” for which the participating companies had been fined for the entirety of its overall duration.<sup>39</sup>

21. On appeal, the General Court identified the various differences between both “autonomous” cartels, and rebutted the Commission’s conclusions as to their complementarity, which had relied on a single overall aim of distorting competition in the choline chloride market. As the General Court indicated: “the concept of single objective cannot be determined by a general reference to

32 See Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel*.

33 See Case T-28/99 *Sigma Tecnologie v. Commission* [2002] ECR II-1845, at §§ 44 ff.

34 See Case T-208/06 *Quinn Barlo v. Commission* [2011] ECR II-7953.

35 See Case COMP/F/38.645 – *Methacrylates*.

36 See *Quinn Barlo*, op. cit., at § 150.

37 See Case COMP/38.543 – *International Removal Services*.

38 See Case T-210/08 *Verhuizingen Coppens NV v. Commission* [2011] ECR II-3713, at §§ 31 and 32; and *Verhuizingen Coppens*, op. cit., at §§ 66 and 67.

39 See Case COMP/E-2/37.533 – *Choline chloride*. The Commission argued that a first global choline chloride global cartel between the North American and European producers had morphed into a second arrangement between the European producers after the first arrangement dissolved. In this way, under Article 25(2) of Regulation No 1/2003 (“in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases”), the Commission avoided the application of the five-year limitation period to the first global cartel.

*the distortion of competition in [a] market, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a substantial element of any conduct covered by Article [101](1) [TFEU].*<sup>40</sup> In other words, the Commission had to point to more than a mere “distortion of competition” as a common element in order to bring individual elements of anti-competitive conduct under the “single and continuous infringement” umbrella.

22. Accordingly, the General Court repealed the Commission decision as it had concluded that BASF and UCB had engaged in the more broadly framed offence. Unsurprisingly, given the robustness with which the General Court expressed its views, the Commission did not contest its ruling before the CJEU.

## IV. Emerging legal standards of proof

23. Having spent a number of years clarifying the point that the Commission needed to respect some basic standards of evidentiary proof when relying on the “single and continuous infringement” doctrine, the European Courts have recently decided to develop further momentum, establishing more robust benchmarks for what they expected from the Commission in terms of the burden of proof and the standard of proof when it sought to prosecute multi-party collusion cases. In doing so, they have gone well beyond confirming the legal standards of proof established in the respective *Sigma Technologie* and *Verhuizingen Coppens* Judgments.

### 1. *Aalberts Industries* (2013) – Liability cannot be established for the (local) continuation of a cartel post-inspection

24. In the first instalment of this new wave of case-law, the General Court and the CJEU on appeal were asked to assess the appropriateness of the Commission’s attribution of liability to Aalberts Industries NV in its *Fittings* investigation.<sup>41</sup> In March 2001, as part of that investigation, a series of on-site inspections were conducted on the premises of suspected members of a pan-European cartel. Although the inspections brought an end to the investigation of the key cartel meetings, the Commission took the view that the cartel had continued from March 2001 until April 2004 through cartel members’ recourse to: (i) bilateral contacts; (ii) contacts at a trade fair; and (iii) contacts in the context of the meetings of the French sectoral trade association (“FNAS”).

<sup>40</sup> See *BASF and UCB*, *op. cit.*, at § 180.

<sup>41</sup> See Case COMP/F-1/38.121 – *Fittings*.

25. In the Commission’s decision, the liability of Aalberts Industries for the activity of the cartel after March 2001 had been established solely on the basis that the company had participated in the FNAS meetings. On appeal, the General Court found that the FNAS meetings attended by Aalberts after March 2001 only related to the French market (and not to the national geographic markets of Spain, Italy, the United Kingdom, Germany and a possibly wider European market). It therefore went on to overturn the Commission’s findings, concluding that Aalberts Industries “*was [not] aware of the anti-competitive activities of the other undertakings when it took part in the FNAS meetings [and] that it could [not] reasonably have foreseen those activities, and therefore that its conduct was part of an overall plan including all the constituent elements of the cartel.*”<sup>42</sup> In the eyes of the General Court, the knowledge or awareness of the overall infringement by Aalberts Industries from 1991 to March 2001 could not be relied upon as evidence with which one could presume its full knowledge of the cartel as it continued post-March 2001.<sup>43</sup>

26. On further appeal, the CJEU confirmed the findings of the General Court, holding that the Commission had failed to establish that Aalberts Industries “*intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the conduct planned or put into effect by other undertakings in pursuit of those same objectives, or that it could reasonably have foreseen it, and that it was prepared to take the risk.*”<sup>44</sup> Moreover, since the Commission had not identified that the FNAS meetings led to an anti-competitive agreement which constituted a separate infringement of Article 101(1) *TFEU* in and of itself, the Commission could not successfully defend its finding of an infringement against Aalberts Industries in relation to the FNAS meetings alone.<sup>45</sup>

### 2. *Soliver* (2014) – Setting a high benchmark for “knowledge or awareness”

27. Until 2014, all cases where the EU Courts had overturned the Commission’s application of the “single and continuous infringement” doctrine concerned investigations where conclusive evidence had clearly not been adduced regarding: (i) the existence of a common economic aim<sup>46</sup> (the *BASF and UCB* Case); or (ii) the knowledge or awareness by a company of the overall

<sup>42</sup> See Case T-385/06 *Aalberts Industries NV v. Commission* [2011] ECR II-1223, at §§ 107 ff. The participation of Aalberts Industries in the cartel had been found through the participation in the meetings of Aalberts’ subsidiary, Aquatis.

<sup>43</sup> See *Aalberts Industries NV v. Commission*, *op. cit.*, at § 112.

<sup>44</sup> See Case C-287/11 P *Commission v. Aalberts Industries* ECLI:EU:C:2013:445, at § 63.

<sup>45</sup> See *Commission v. Aalberts Industries*, *op. cit.*, at §§ 64–66.

<sup>46</sup> See *BASF and UCB*, *op. cit.*



scope of the cartel.<sup>47</sup> The factual background in the *Soliver* Case would test the resilience of the General Court's traditional approach.

28. In its *Carglass* Decision adopted in 2009,<sup>48</sup> the Commission found that Soliver NV (together with other car glass manufacturers) was liable for a "single and continuous infringement" in the sector. Despite the fact that Soliver NV was not a member of the core group of cartel members (the so-called "club," which included Pilkington, Saint-Gobain and AGC/Splintex), the Commission established its liability for a "single and continuous infringement" based on its bilateral anti-competitive contacts with AGC/Splintex and with Saint-Gobain in the period between November 2001 and March 2003.

29. On appeal, and further to a thorough analysis of the evidence relied upon by the Commission, the General Court struck down on a number of grounds the Commission's decision insofar as Soliver NV's liability was concerned:

- First, the General Court noted that Soliver NV had not participated in either of the two most important meetings of the cartel, held in 2001 and 2012 respectively, during which the participants carried out an overall assessment of the operation of the cartel and the changes necessary to pursue their collusion effectively as regards their maintenance of market share levels.<sup>49</sup>
- Second, during these meetings, Soliver NV had not been included among those companies whose market shares had been forecasted, and which had been set forth as one of the objectives of the cartel.<sup>50</sup>
- Third, the General Court did not consider the hand-written notes taken by Soliver NV's representative during its meetings with AGC/Splintex and with Saint-Gobain to reflect Soliver NV's knowledge of the overall cartel. In the words of the General Court, "[t]he references [in the notes] to 'discussions' or to a 'cooperation' [between different individual members of a cartel] do not provide any indication of the nature and scope of the cartel between the big three carglass producers."<sup>51</sup>

- Fourth, the General Court found that other third-party and extemporaneous documents and statements (including those submitted by the leniency applicant in the *Carglass* investigation) did not prove Soliver's knowledge or awareness of the overall cartel.<sup>52</sup>

30. Importantly, the General Court dismissed as irrelevant the Commission's position that Soliver NV could only exculpate itself by publicly distancing itself from the content of the meetings of club members in order to avoid liability by virtue of the single and continuous infringement committed by those members. In the words of the General Court, "[s]uch a finding would be relevant only if the Commission had discharged the burden of proof on it, which it has not done in the present case."<sup>53</sup>

31. In the *Soliver* Case, the General Court dismissed the Commission's findings regarding Soliver NV's liability for a "single and continuous infringement."<sup>54</sup> In doing so, the General Court carried out a substantive analysis of the different factual elements that had been relied upon by the Commission to support Soliver NV's liability. Irrespective of how persuasive it may have been superficially, the General Court concluded that the evidence cited by the Commission, whether analysed individually or taken as a whole, did not meet the strict standard set for the establishment of Soliver NV's liability for a "single and continuous infringement."

### 3. *Toshiba* (2015) – Confirming the judgments in *Quinn Barlo* and *Verhuizingen Coppens*

32. In its most recent ruling scrutinising the "single and continuous infringement" doctrine, the General Court again struck down a Commission decision against a defendant which had participated in a number of anti-competitive meetings.

33. As occurred in the *Fittings and International Removal Services* investigations, the *TV and Computer Monitor Tubes* Case concerned several complex and distinct meetings of market operators (in this case, cathode ray-tube producers). In this investigation, the Commission considered that the different meetings and agreements constituted parts of several single and continuous infringements relating to: (i) the CDT (colour display tubes) cartel; and (ii) the CPT (colour picture tubes) cartel.<sup>55</sup>

47 See the *Sigma Technologie* and *Aalberts* cases, *op. cit.*, regarding the geographic scope of the agreements in which the companies at issue were involved; *Quinn Barlo*, *op. cit.*, regarding the type of product in which the company was involved; and *Verhuizingen Coppens*, *op. cit.*, regarding the type of agreement in which the company was involved.

48 See Case COMP/39.125 – *Carglass*.

49 See Case T-68/09 *Soliver NV v. Commission* ECLI:EU:T:2014:867, at §§ 85 and 86.

50 See *Soliver NV*, *op. cit.*, at § 86.

51 See *Soliver NV*, *op. cit.*, at § 87–91.

52 See *Soliver NV*, *op. cit.*, at §§ 92–98.

53 See *Soliver NV*, *op. cit.*, at § 105.

54 The test had been used in the past by reference to the existence of an anti-competitive agreement and its duration. See Cases 29/83 and 30/83 *Compagnie Royale asturienne des mines and Rheinzink v. Commission* [1984] ECR 1679, at § 20; Case T-68/89 *Società Italiana Vetro v. Commission* [1992] ECR II-1403, at § 95. With regard to the "single and continuous infringement" doctrine, the test was expressed by the General Court in *Quinn Barlo*, *op. cit.*, at § 43, and *Soliver*, *op. cit.*, at § 104.

55 See Case COMP/39.437 – *TV and Computer Monitor Tubes*.



34. As regards Toshiba's alleged involvement in the CPT cartel, a number of conclusions were drawn by the Commission. First, it was concluded that Toshiba had participated directly in that cartel by maintaining bilateral contacts between 16 May 2000 and 11 April 2002 with the majority of the undertakings involved in the core aspects of the cartel (in which the same types of discussions took place as in certain anti-competitive meetings, known by the participants as "glass meetings"). Second, it was concluded that, from 12 April 2002, Toshiba also participated directly in a number of the glass meetings. Third, the Commission observed that, from 1 April 2003, the company MTPD, over which Toshiba exercised decisive influence, continued its uninterrupted participation in the CPT cartel, both by exchanging sensitive commercial information concerning bilateral contacts with the undertakings participating in the European glass meetings and by attending two types of meetings (the SML meetings, between Samsung, MTPD and LGE; and the ASEAN meetings, covering Southeast Asia), both of which were global in their impact, and which had been conducted in Asia.<sup>56</sup> On the basis of this evidence, the Commission concluded that Toshiba had participated in a "single and continuous infringement" concerning the CPT market.

35. On appeal, Toshiba argued that the Commission had wrongly conflated four different types of meetings (the SML meetings, the ASEAN meetings, the Asian "glass meetings" and the European "glass meetings") as forming part of a single cartel.<sup>57</sup> Toshiba claimed that the Commission had failed to prove that these meetings were in pursuance of a single economic aim, nor had it proved that they were sufficiently complementary and connected. It also contended that it could not be held liable for the more broadly framed anti-competitive agreement, of whose existence it had no knowledge.

36. In the *Toshiba* Judgment, the General Court upheld the last of Toshiba's arguments, which challenged the misapplication of the "single and continuous infringement" doctrine (namely, that Toshiba had no knowledge of a broader anti-competitive arrangement). After having analysed the minutes of the SML meetings (in which Toshiba had participated), the General Court concluded that, although those meetings defined the object and worldwide scope of the meetings and had also confirmed the determination of its members to continue their cooperation at the worldwide level, this did not constitute evidence of Toshiba's knowledge or awareness of the overall cartel and all its constituent elements.<sup>58</sup> The fact that Toshiba had also maintained bilateral contacts with some of the participants in the CPT cartel did not undermine this conclusion.

<sup>56</sup> See Case T-104/13 *Toshiba Corp. v. Commission* ECLI:EU:T:2015:610, at § 18.

<sup>57</sup> See *Toshiba Corp., op. cit.*, at § 82.

<sup>58</sup> See *Toshiba Corp., op. cit.*, at § 86.

37. In the words of the Court, "*the Commission ha[d] not specified in the contested decision the evidence on which it relied in order to find that the applicant was aware of the unlawful conduct planned or put into effect by the participants in the CPT cartel and that it intended by its own conduct to contribute to the common objectives pursued by those participants.*"<sup>59</sup>

## V. Conclusions

38. The legal position for several decades has been that the EU Courts require the Commission to adduce sufficiently cogent evidence to support a finding that alleged infringement of competition law has taken place.<sup>60</sup> However, it has only been over the past few years that the rulings of the CJEU and the General Court in the respective *Aalberts*, *Soliver* and *Toshiba* Judgments have sought to introduce a level of precision and consistency in the application of the evidentiary burden to which the Commission is subject when it applies the "single and continuous infringement" doctrine to establish the liability of a given undertaking.

39. In the *Soliver* Case, in particular, the General Court meticulously dissected every element and statement which the Commission had relied upon, arriving at a diametrically opposite conclusion to the antitrust enforcer, namely: that the meetings and written notes of the parties, and the written notes and statements of third parties, did not prove *Soliver NV's* knowledge or awareness of the entire cartel, including all its constituent elements. The liability of *Soliver NV* could not, in the eyes of the Court, be drawn from a detailed analysis of the evidence on the record.

40. Therefore, a company which might have been in contact with a member of the core cartelists and which might be aware of some further contacts with other competitors, but which does not have *knowledge or awareness of all the constituent elements of the unlawful conduct*, cannot be considered to have been "tainted" with liability for the "single and continuous infringement."<sup>61</sup> This analytical rule holds true even if those contacts took place in the context of meetings of trade associations, as was the case in *Aalberts* and *Toshiba*—because the Commission must prove specifically and precisely the fulfilment of all three conditions to establish a company's liability for a "single and continuous infringement," in doing so it

<sup>59</sup> See *Toshiba Corp., op. cit.*, at § 84.

<sup>60</sup> See, to that effect, Joined-Cases 29/83 and 30/83 *CRAM and Rheinzink v. Commission* [1984] ECR 1679, at §§ 20; 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* [1993] ECR I-1307 (aka. *Woodpulp II*), at §§ 127; Joined-Cases T-68/89, T-77/89 and T-78/89 *SIV et al. v. Commission* [1992] ECR II-1403, at §§ 193 to 195, 198 to 202, 205 to 210, 220 to 232, 249, 250 and 322 to 328; Case T-62/98 *Volkswagen v. Commission* [2000] ECR II-2707, at §§ 43 and 72; Case T-68/89 *Società Italiana Vetro v. Commission* [1992] ECR II-1403, at § 95: the General Court will "*check meticulously the nature and import of the evidence taken into consideration by the Commission.*"

<sup>61</sup> This is without prejudice to the possibility that the Commission does identify each individual agreement or conduct as constituting an infringement in itself of Article 101(1) TFEU. See *Verhuizingen Coppens, op. cit.*, at §§ 33 ff.; *Soliver, op. cit.*, at §§ 107 ff.

cannot resort to evidentiary short cuts that in practice enshrine a principle of “guilt by association.”<sup>62</sup> The new case-law of the European Courts raises the evidentiary bar considerably for the Commission, both in terms of the amount and the quality of the evidence required to attribute liability to a company for its participation in a complex “single and continuous infringement.”<sup>63</sup>

41. The *Soliver* Judgment is also important given that, as part of its analytical framework, the General Court acknowledged the fact that anti-competitive practices and agreements are, in general, conducted “in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum.”<sup>64</sup> The clandestine nature of cartels means that the Commission may in all likelihood discover evidence in a fragmented manner, and that it will be often necessary to reconstruct certain details by deduction alone.<sup>65</sup> Notwithstanding this, the General Court did not consider that any evidentiary inferences could flow from the “secret” or “clandestine” nature of anti-competitive agreements so as to indirectly support the Commission’s allegations (e.g., by compensating for the absence of evidence proving a company’s “knowledge or awareness” of all the constituent elements of a “single and continuous infringement,” from which liability could be derived).

42. The approach of the General Court in *Soliver* is also consistent with the long-standing fundamental rights relating to the presumption of innocence, the principle of personal liability and the other rights and principles contained in Articles 6 and 7 of the ECHR and Articles 47 to 49 of the Charter of Fundamental Rights of the EU. The General Court correctly founded its conclusion as to the “knowledge or awareness” of *Soliver* NV on the basis of a detailed assessment of the evidence on the file. Had the General Court accorded greater weight to the secret or clandestine nature of cartels, the attribution of liability to companies for an entire “single and continuous

infringement,” irrespective of their actual knowledge or awareness, would have been disproportionately simple for the Commission to establish.

43. The judgments of the EU Courts in the *Aalberts*, *Soliver* and *Toshiba* proceedings reflect a comparable parallel trend found in the U.S. in requiring greater rigour in the analysis of wide-ranging conspiracy allegations. At one time, while some U.S. Courts required “only slight evidence” to connect an individual participant to a larger conspiracy,<sup>66</sup> there has been a clear effort by the higher courts over the years to hold accountable only those defendants who are knowingly connected with the conspiracy.

44. The U.S. Supreme Court itself has held that when “a single conspiracy [i]s alleged,” liability can “only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged.”<sup>67</sup> As explained in an influential Second Circuit Judgment, “[t]here has been a tendency (...) ‘to deal with the crime of conspiracy as though it were a group [of men] rather than an act’ of agreement. Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant.”<sup>68</sup> The U.S. Department of Justice has itself argued that plaintiffs cannot seize on “evidence of concerted action in one area, hypothesize the existence of a broader conspiracy of which that concerted action may be a part, and then use that evidence as direct proof of the hypothetical broader conspiracy.”<sup>69</sup>

45. However, a wide discretion still remains in the hands of the lower U.S. courts as regards the standard of proof that they require. Thus, irrespective of the concern that it is precisely in those cases where the conspiracy is broadly framed that the possibilities of injustice vis-à-vis a particular defendant tend to be greatest (and in contrast to the standard applied by the EU Courts in *Anic Partecipazioni* and later case-law), lower courts in the U.S. continue to permit mega-conspiracy claims against groups of disparately situated defendants tied

62 In this regard, the case-law of the European Courts in *Aalberts*, *Soliver*, and *Toshiba* is consistent with the more recent case-law also adopted by these Courts in other questions of EU competition law, such as the finding of an “agreement” or “concerted practice.” See, in particular, Case T-442/08 *CISAC v. Commission*, ECLI:EU:T:2013:188, at § 107: “[T]he mere fact that collecting societies met in the context of the activities managed by the applicant and that there is a certain amount of cooperation between them does not constitute, as such, evidence of prohibited concertation.”

63 This trend has been and is also currently observed in the analysis of other elements of Article 101 TFEU. For example, the requirement that an “agreement” be proven, even in the form of an action to which the other party acquiesces (Cases C-2/01 P and C-3/01 P *BAI and Commission v. Bayer* [2004] ECR I-23); the requirement that allegations regarding a “concerted practice” should be supported by parallel conduct being the only “plausible explanation” (Cases C-89/85 *Ahlström Osakeyhtiö v. Commission* [1993] ECR I-1307, at §§ 61–72); the limits established by the CJEU to the excessive recourse of the Commission to qualify actions as restrictions “by object” (Case C-67/13 P *Groupement des cartes bancaires v. Commission* ECLI:EU:C:2014:2204).

64 See *Soliver*, *op. cit.*, at § 59.

65 In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of parallel acts and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. See 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* [2004] ECR I-123, at §§ 55 to 57; and Joined-Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v. Commission* [2007] ECR I-729, at § 51.

66 Compare *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 119 (7th Cir. 1978) (applying “slight evidence” rule in antitrust conspiracy case) with *United States v. Martinez de Ortiz*, 883 F.2d 515, 523–25 (7th Cir. 1989) (Easterbrook, J., concurring) (“‘Conspiracy’ is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh. (...) Prosecutors have many legitimate advantages in the criminal process. Defendants’ great counterweight is the requirement that the prosecution establish guilt beyond a reasonable doubt. References to ‘slight evidence’ and ‘slight connection’ reduce the power of that requirement.”).

67 See *United States v. United States Gypsum*, 438 U.S. 422, 463 (1978).

68 See *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964) (citation omitted). “If, in Judge Learned Hand’s well-known phrase, in order for a man to be held for joining others in a conspiracy, he ‘must in some sense promote their venture himself, make it his own,’ (...) it becomes essential to determine just what he is promoting and making ‘his own.’” Id. at 385 (citation omitted).

69 Brief for United States as Amicus Curiae Supporting Petitioners, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

together on tenuous grounds.<sup>70</sup> Particularly in view of treble damages and the exposure to joint-and-several civil liability, this has led to great—often crushing—pressure on individual defendants to settle antitrust cases alleging broad overarching conspiracy claims.

**46.** At least with respect to those investigations whose scope extends beyond the territory of the EU, it is ironic that the diligence of the European Courts in raising the evidentiary bar may nevertheless be undermined by the more relaxed standards used by many lower U.S.

courts. When one considers that antitrust investigations may be conducted over very different timeframes, this asymmetry in approach runs the risk that a successful defence (and complete exoneration from the allegations) in the EU might not produce the same results in the U.S. In such cases, despite the fact that defence strategies will need to be adapted to the specificities of each jurisdiction, defendants might be frustrated by the fact that success in EU proceedings does not offset completely the tendency for capricious results being achieved before lower U.S. courts. ■

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<sup>70</sup> See, e.g., *In re High-Tech Employee Antitrust Litigation*, 856 F.Supp. 2d 1103, 1119-20 (N.D. Cal. Apr. 18, 2012); *In re Polyurethane Foam Antitrust Litigation*, No. 1:10 MD 2196, 2015 WL 520930 (N.D. Ohio Feb. 9, 2015); *In re Magnesium Oxide Antitrust Litigation*, No. CIV. 10-5943 DRD, 2011 WL 5008090 (D.N.J. Oct. 20, 2011).

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