

## Major Events and Policy Issues in EC Competition Law, 2002–03 (Part 1)

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The object of this paper is to outline the major events and policy issues related to Articles 81, 82 and 86 EC in the last year.<sup>1</sup>

The paper is divided into three sections:

- (1) a *general overview* of major events (legislation and notices, European Court cases, and European Commission decisions);
- (2) an outline of *current policy issues*, including competition and the liberal professions, review of the liner conference block exemption, and modernisation of Art.82 EC; and
- (3) areas of specific interest, meaning this year competition and gas supply, telecoms, sport, and media.

In the first part, EC legislation and notices and European Court cases are covered. The Commission's decisions are outlined, together with current policy issues and areas of specific interest, in next month's I.C.C.L.R.

In the author's view, the main themes of 2003 are as follows:

*Table 1: Major Themes in 2003*

- Enforcement through "object", "hardcore" and "per se" rules?
  - the *Michelin Case*, cartels, the draft Notice on effect on trade;
  - unfair (given the huge fines)? Too formalistic for "modern" law?
  - or a necessary enforcement rule (backed by the courts)?
- Preparing for May 2004:
  - Reg.1/2003;
  - the "decentralisation package" of regulation and notices;
  - a new approach for practitioners?
- State action:
  - the *Italian Matches Case*, *French Beef* and *Seamless Steel Tubes*;
- TTBE reform and IP Guidelines:
  - major changes: simplified BE, but now above the thresholds?
- Arts 81(3) and 82 EC = clearance for the dominant unless an abuse?
  - *Interbrew* and more.

First, the author has been impressed, reading through this year's material, by the way that a great deal of competition enforcement by administrations relies on anti-competitive inferences *from the nature of the conduct in question*. Practices are considered to have the *object* of restricting competition and therefore are unlawful, *even though their actual harmful effects may not be proven*. This is the case, for example, with "per se" abusive fidelity rebates by a dominant company, "hardcore" infringements, such as price-fixing cartels, or restrictions on trade between EU Member States, such as export bans. The issue is also highlighted this year by the Commission's draft Notice on "effect of trade", where there is extensive discussion of restrictions "inherently capable" of restricting competition.

A major theme this year is whether this is right, especially when the fines now can be huge (*e.g.* one company in a cartel was fined €249 million this year). Given also the "modernisation" of EC competition law to emphasise effect more than form, and the way that enforcement will now be decentralised, the issue is whether this should change. From cases such as *Michelin*, it appears that the European Court of First Instance may think that some classic infringements should remain "per se" rules. At least in other cases there appears to be more focus on effect.

Secondly, a great deal of material this year relates to preparing for the new, decentralised EC competition enforcement model: Regulation 1/2003 and, more recently, a whole new package of related draft legislation and notices. Interestingly, this may involve key changes to the way practitioners advise. The question is no longer: would *DG Competition* be likely to accept this? Although the Commission will remain central, the question for practitioners, after decentralisation, is more: would *any EU national competition authority or national court* be likely to accept this? Perhaps at times forcing a slightly more conservative view.

Thirdly, the different ways that State action is treated are illustrated this year. In cases described in the paper:

- the Italian competition authority was found to be entitled to disallow a national law contrary to EC competition law, but not to fine companies which abided by such a national context (*Italian Matches*);
- the Commission still fined a French slaughterhouse association despite great governmental pressure to enter into an unlawful

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1. The reference period is from November 2002 until October 2003. This is a slightly revised version of a paper given at the IBC Advanced EC Competition Law conference in Brussels, November 2003.

agreement with French farmers, in the depths of the beef crisis (*French Beef*); and

- in another case, the Commission imposed no fine on companies involved in a cartel for a period when an EU–Japan voluntary restraint agreement applied (*Seamless Steel Tubes*).

It appears that state action to restrict competition, whether formal or informal, is still very topical at the moment.

Fourthly, there is much discussion about reform of the transfer of technology block exemption and what to do above the proposed market-share ceilings therein. This is still being debated on recently published drafts.

However, one interesting point in the IP Guidelines (and also the Commission’s proposed Notice on Art.81(3) EC) is the way that the Commission is envisaging Art.81(3) EC clearance for a practice, even by a dominant company, provided that this does not result in an abuse. The Commission refers to *Tetra Pak I*, a case in which the issue was whether a dominant company could buy another company which held an exclusive patent licence for a rival technology.<sup>2</sup> The Court found that:

“The mere fact that an undertaking in a dominant position acquires an exclusive patent licence does not *per se* constitute abuse within the meaning of [what was then] Article 86 of the Treaty. For the purpose of applying Article 86, the circumstances surrounding the acquisition, and in particular *its effects on the structure of competition in the relevant market*, must be taken into account” (emphasis added).

Finally, a related theme is a similar trend to allow justified agreements involving dominant companies in the Commission’s decisions. Thus, in *Interbrew*, discussed below, the Commission allowed this leading Belgian brewery, with some 56 per cent market share, still to have “50% of total beer” requirements contracts.

All very interesting and encouraging for the dominant, even if this may need some further work before it is clear what is likely to be allowed.

## Overview of major events

### Legislative developments (adopted and proposed)

*Table 2: New Legislation/Notices (Adopted)*

- Reg.1/2003:
  - no surprises, but a huge change coming in May 2004 (with Enlargement by 10);
  - an “ECN” of 26 with the Commission at the centre;
  - no notifications and decentralised Art.81(3) EC;
- insurance block exemption;
- EU–Japan co-operation agreement (joining US/Canadian equivalents).

2. Case T-51/89, [1990] E.C.R. 11 309.

## Adopted

### *Regulation 1/2003*

In December 2002, the Council adopted the new “Regulation 17” (Reg.1/2003), setting up the new decentralised enforcement system for EC competition law, to come into force on May 1, 2004.<sup>3</sup> It may be useful to outline the key features of this huge change once again.

First, the Commission will no longer be the only authority able to rule that the conditions of Art.81(3) EC are satisfied. Both national competition authorities (“NCAs”) and national courts may do so also. The burden of proof of the infringement is on the party or authority alleging it; the burden of claiming the benefit of Art.81(3) EC is on the company claiming that it applies (*Arts 1 and 2*).

Secondly, European competition law enforcement will now be shared fully with the national competition authorities of the Member States. The Commission will carry out enforcement within the procedural framework set out in Reg.1/2003. The NCAs will operate on the basis of Reg.1, related EC case law and their own national procedural systems.

Thirdly, if Member States apply national competition laws to cases involving an effect on trade between Member States, they must *also* apply EC competition law. If Art.81(1) EC is concerned, the parallel application may not lead to divergent outcomes. If Art.82 EC is concerned, a Member State *can* apply stricter national competition rules (*Art.3*).

Fourthly, the notification system is abolished, with all pending case procedures on May 1, 2004 “lapsing”. At the end of 2002, the Commission’s antitrust “backlog” was 805, after 321 new antitrust cases and 363 cases closed.<sup>4</sup> As a result, from May 2004, more than before, companies will have to review for themselves whether their agreements and practices may infringe the EC competition rules.

However, it will be a slightly different type of assessment, *concerned more with whether any relevant competition authority or court* which may have to deal with a case *would be likely to find an infringement* and, if so, what consequences could follow, and less with what the Commission’s current approach is (although that clearly will also remain relevant).

Fifthly, there are structures for co-ordination between the Commission and the NCAs, including the transfer of cases and related files, and the exchange of confidential information (Arts 11–14). The enforcement concept is one of a “European Competition Network” (“ECN”) with the Commission at the centre, but also with possibilities

3. [2003] O.J. L1/1; Council Regulation (EC) No.1/2003 of December 16, 2002.

4. 2002 EC Commission Report on Competition Policy: Introduction, paras 5–7, and ID statistics tables at pp.46–47.

for cases to move from one national competition authority to another.

Importantly, national competition authorities will be able to use confidential information obtained in Commission investigations in their own national competition law procedures, where these are in parallel to application of the EC rules.

Key also is the right of the Commission in *Art. 11(6)* to initiate proceedings, thereby pulling a case to Brussels even if an NCA has already started acting on it. Only the Commission can take declaratory decisions on its own initiative, ruling that Arts 81 or 82 EC do not apply to an agreement or practice (*Art. 10*).

Sixthly, there are parallel but different co-ordination procedures as between the Commission, NCAs and the national courts (*Art. 15*). Essentially, Member States are to send national judgments on EC rules to the Commission. NCAs may offer written observations to the national courts of their Member State and make oral observations, if the Court so allows. The Commission may also do so, where the coherent application of Arts 81 and 82 EC so requires. The Commission will also provide information to national courts or its opinion on questions concerning the application of the EC rules, if the national court asks.

Seventhly, giving effect to *Masterfoods I*,<sup>5</sup> both NCAs and national courts must not take decisions which “run counter” to a Commission decision concerning the same agreements or practices, or a decision in proceedings initiated by the Commission (*Art. 16*).

Eighthly, Reg. 1 also modifies the Commission’s enforcement powers in important ways:

- *The Commission will have the power to interview a person or company, with their consent (Art. 19);*
- *the Commission will have the power to inspect premises other than a company’s, including the homes of company directors and staff, if there is a reasonable suspicion that evidence is being kept there and prior authorisation has been obtained from a national judicial authority of the Member State concerned (Art. 21);*
- *the Commission may “seal” business premises and books or records if necessary for an inspection (and can ask for explanations of facts or documents related to an inspection) (Art. 20.2(d), (e)).*

Ninthly, *the Commission is to have the right to take “structural remedies”, if required, in defined circumstances. Notably, such remedies have to be: (i) proportionate to the infringement; (ii) necessary to bring the infringement effectively to an end; and (iii) there must be no equally effective behavioural*

5. Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, Judgment of December 14, 2000; [2000] E.C.R. I-11369.

remedy, or that behavioural remedy would be more burdensome for the company concerned than the structural remedy (*Art. 7*).

*Fines and penalties have also significantly increased (Arts 23–24)*. A “procedural” infringement (such as providing misleading information) may lead to a fine *not exceeding 1 per cent* of the total turnover of a company in the business year preceding the Commission’s decision. A “full” infringement (of Arts 81 or 82 EC, of an interim measures decision, or of a decision making a commitment given by a company binding) may lead to a fine of 10 per cent of such turnover. Periodic penalty payments for non-compliance with a procedural or full infringement may be set *at not more than 5 per cent of the average daily turnover* of a company in question in the year preceding the Commission’s decision.

Tenthly, the Commission’s powers to take various measures are confirmed, notably:

- *Interim measures (Art. 8);*
- *sectoral reviews* “where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted” (*Art. 17*); and
- *withdrawal of block exemptions* where, in particular cases, it finds certain effects incomparable with *Art. 81(3) EC* (NCAs have a similar right if such effects occur in a distinct geographic market in their territory) (*Art. 29*).

Finally, we will all have to get used to new numbers. An “Article 11 letter” will be an “*Article 18 letter*”; a “dawn raid” will be based on *Art. 20*, not *Art. 14*. An “Article 19(3) Notice” should not occur in the same way because notification will have gone. However, the negative decisions envisaged in *Art. 10* will still be preceded by a notice seeking third-party comments, based now on “*Art. 27(4)*”.

A whole series of related notices have now been published for comment and are discussed below under proposed legislation.

#### *Insurance block exemption*

In February 2003, the Commission adopted and published the *revised insurance block exemption*.<sup>6</sup> This was discussed last year in detail as a draft.<sup>7</sup>

#### *EU–Japan co-operation agreement*

In July 2003, the European Union signed a co-operation agreement with Japan on competition matters, similar to those entered into with the United States and Canada.<sup>8</sup>

6. [2003] O.J. L53/8.

7. [2003] I.C.C.L.R. 45–46. See also Charro, “New block exemption for the insurance sector” (2003) *Competition Law Insight* 5 at p.17; Ryan, *EC Commission Competition Policy Newsletter, No.2—Summer 2003* at pp.51–52.

8. IP/03/995, July 10, 2003; [2003] O.J. L183/12.

## Proposed

Table 3: New Legislation/Notices (Proposed/Coming)

- A revised TTBE:
  - NB market-share ceilings: 20 per cent combined (competitor); 30 per cent individually (non-competitor);
  - only two party agreements;
  - distribution parallels;
  - copyright software licensing included;
- Proposed IP Guidelines:
  - no exemption if abuse? Clearance if dominant?
  - technology pools;
- The decentralisation package:
  - guidance on “novel” issues;
  - “NAAT” presumptions: less than 5 per cent market share and less than €40 million EU turnover = not EC law; agreement “inherently” capable of affecting trade greater than €40 million = EC law;
  - Art.81(3) EC and efficiencies: economics and proof; encouragement for dominant companies.

### A revised transfer of technology block exemption

On October 1, 2003, the Commission published the draft successor to the Transfer of Technology Block Exemption, Reg.240/96 (“the TTBE”), together with draft Guidelines on the application of Art.81 EC to technology transfer agreements (“the IP Guidelines”).<sup>9</sup> The main points in the draft Regulation are as follows.

First, the Commission has hugely simplified the TTBE, applying a “black-listed” (prohibited) clause approach, but abandoning the “white and grey” lists of clauses permitted or “permitted under certain conditions”.

The *black-list for agreements between competitors* covers: (i) pricing restrictions; (ii) output restrictions (except in a non-reciprocal licence); (iii) the allocation of markets or customers (except for field of use or product market restrictions in a non-reciprocal licence and “own use” requirements on licensees); and (iv) (non-compete) restrictions on a licensee exploiting its own technology, or the parties’ ability to carry out R&D “unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties” (Art.4.1).

In the case of non-competitors, the *black-list* covers: (i) pricing restrictions (although maximum prices may be set or recommendations given); and (ii) restrictions on territories or customers which may be supplied (although the licensor’s territory/customer group can be protected, and active sales into another licensee’s territory/customer group can be restricted, as well as licensee “own use” requirements). Restrictions on wholesalers supplying end-users and selective distributors supplying

unauthorised distributors are also allowed (Art.4.2).

If *black-listed clauses* are included in an agreement, it is not covered by the draft TTBE.

Other *specific obligations* are not exempted by the block exemption:

- Compulsory grant-back clauses for a licensee’s own severable improvements or new applications of licensed technology;
- compulsory assignment clauses for improvements or new applications of the licensed technology; and
- no-challenge clauses as regards the validity/secrecy or substantiality of IP rights.

Output restrictions in non-reciprocal agreements between competitors or non-compete provisions in agreements between non-competitors (unless indispensable to protect the disclosure of the licensed know-how to third parties) are also not block exempt (Art.5).

Secondly, the draft Regulation covers *copyright software licensing*, and extends to the *provision of goods or services as well as licensed manufacturing*. Perhaps because of this the draft TTBE has far more of a sense of vertical distribution issues than its predecessor and also deals with selective distribution through licensees.

Thirdly, as expected, the Commission does not block exempt multiparty technology pools, but rather reserves block exemption for *two-party agreements* (Art.2). Technology pools are, however, extensively discussed in the IP Guidelines.<sup>10</sup> It was understood this might happen because the Commission needs the new TTBE in force for May 1, 2004, or at the least to have resolved issues formerly tending to opposition procedure applications or full notification. The Commission has also published on its website a major study on technology pools, prepared by Charles River Associates.<sup>11</sup>

Fourthly, as noted above, the Commission has pursued the approach of varying what is black-listed and the conditions for block exemption according to whether licences are *between competitors or not*. “Actual competitors” are companies that license competing technologies or are both active on the relevant product/geographic market. “Potential competitors” would, “on realistic grounds”, undertake the necessary investments or incur the necessary switching costs to enter the relevant product/geographical market, in the event of a small and permanent increase in relative prices.

Fifthly, the Commission has continued with its “economic approach”, limiting the possibility for block exemption to agreements between parties

9. Draft Commission Regulation on the application of Art.81(3) of the Treaty, [2003] O.J. C-235/10 (proposed TTBE), and p.17 (proposed IP Guidelines). IP/03/1341, October 3, 2003.

10. Paras 202–228.

11. *Antitrust: Report by Charles River Associates on Multiparty Licensing*, April 22, 2003.

having only defined levels of market share. This was also expected, but is controversial, a similar approach having been ultimately dropped for Reg.240/96. This time the Commission does not fear a mass of notifications, since the system will be abolished as the new TTBE comes into force.

The “ceiling” for the benefit of the new TTBE will be 20 per cent for agreements between competitors, meaning that the *combined* share of the parties on the relevant technology or product market must not exceed this level (Art.3.1).

In the case of agreements between non-competitors, the ceiling is significantly higher, 30 per cent, meaning that the *individual* share of each party on the relevant markets must not exceed that level (Art.3.2).

In contrast to the Commission’s fairly positive position as regards agreements above the Vertical Restraints Block Exemption (“the VRBE”) ceiling, the Commission emphasises that there “can be no presumption” that technology transfer agreements above these thresholds which fall within Art.81(1) EC will “usually give rise to the objective advantages” to outweigh any disadvantages which they create for competition.<sup>12</sup>

Sixthly, the Commission has pursued the model of the VRBE, as regards the “modified” exclusivity system for licensees in the draft TTBE. The *licensor* continues to have absolute territorial protection, presumably on the basis that without that, he would not license for fear of establishing companies to compete against himself. Licensees, however, only have protection against active sales efforts into their territories. There is no “phased release” system over time as in Reg.240/96, whereby licensees have full territorial protection for a period and “modified exclusivity”, with protection against active sales efforts later.

Finally, one may note that the draft TTBE reflects the VRBE concept of withdrawal of the block exemption by the Commission and NCAs (e.g. “where the incentives to innovate are reduced or where access to the markets is hindered”,<sup>13</sup> and, interestingly, also where parallel networks of licences may have restrictive effects<sup>14</sup>).

#### *Proposed IP Guidelines*<sup>15</sup>

The *proposed Commission Guidelines* contain (on almost 40 pages):

- Detailed explanations on the provisions of the proposed TTBE;
- principles for the treatment under Art.81 EC of technology licensing agreements not

covered by the TTBE, including discussion of royalty obligations, exclusive licensing, sales restrictions, output restrictions, field of use restrictions, captive use restrictions, tying and non-compete obligations; and

- criteria for assessing technology pools, settlement agreements and non-assertion agreements, which, by definition, fall outside the TTBE.

#### **General principles for the application of Article 81 EC to technology licensing agreements not covered by the proposed TTBE**

If a technology licensing agreement is not covered by the proposed TTBE, an individual assessment in light of the market circumstances will establish whether the agreement restricts competition and is, therefore, caught by Art.81(1) EC. The only exceptions are hardcore provisions, which are considered to restrict competition by their very nature. Negative market effects may be on price, output, innovation, or the variety or quality of goods and services.

The proposed Guidelines focus on three types of possible restriction:

- (1) *Inter-technology restrictions*, i.e. restrictions on actual or potential competition that would have existed had no licence been granted (including the facilitation of explicit or tacit collusion). Normally, these will be caught by Art.81(1) EC.
- (2) *Intra-technology restrictions*, i.e. restrictions on competition that would have existed if the licence had been granted without the allegedly restrictive provision. These are also normally caught by Art.81(1) EC, unless the provision is objectively necessary for the conclusion of the agreement. For example, territorial restraints between non-competitors may fall outside Art.81(1) EC if they are objectively necessary in order to penetrate a new market.
- (3) *Foreclosure of competitors* can arise by raising their costs, restricting their access to essential inputs or otherwise raising barriers to entry.

Factors that the Commission will take into account when assessing restrictive effects include the nature of the agreement, the market position of the parties as well as of competitors and buyers of the licensed products, entry barriers, and the maturity of the market.

If an agreement restricts competition, it is still legal (under the new Reg.1/2003) if justified by its positive market effects under Art.81(3) EC.

In practice, exemption will often turn on whether parties with high market shares meet the fourth condition under Art.81(3) EC, i.e. they must not have the potential to eliminate competition.

12. Recital 12.

13. Recital 16.

14. Recitals 17 and 18.

15. With thanks to Axel Gutermuth for his assistance with this section.

Interestingly, the Commission states (as in the draft Guidelines on Art.81(3) EC discussed below) that a bar to clearance under Art.81(3) EC only exists if the agreement amounts to an abuse of a dominant position under Art.82 EC.<sup>16</sup> The key point is that dominance alone is not to preclude such clearance.

This appears to widen the commercial possibilities for dominant companies and therefore should be welcome to many. However, the proposal may still leave companies and their advisers in some doubt about what they can do!<sup>17</sup>

**Specific licensing provisions in agreements that fall outside the proposed TTBE** For technology licensing agreements that fall outside the scope of the proposed TTBE, the proposed Guidelines discuss how the following commonly found licensing provisions should be assessed:

- Royalty payment obligation on the licensee;
- exclusive licensing, *i.e.* an obligation on the licensor not to give other licenses;
- sales restrictions on the licensee or licensor;
- output restrictions;
- field of use restrictions on the licensee;
- captive use restrictions on the licensee;
- tying obligations on the licensee; and
- non-compete obligations on the licensee.

The assessment of these provisions under the proposed Guidelines depends on whether or not the parties are competitors and, if they are, whether or not the restriction or obligation is reciprocal. Additional factual distinctions are made with regard to some of the provisions.

The proposed Guidelines are too detailed to summarise usefully here. The following general remarks can be made.

*As a general rule, these restrictions and obligations are least problematic if entered into by non-competitors, more problematic if entered into by competitors, and most problematic if entered into by competitors in reciprocal licensing agreements.* In addition, restrictions in agreements between non-competitors preventing the licensee from using the licensed technology to compete against the licensor are generally looked upon favourably, on the premise that a technology owner would be likely to refrain from licensing if he cannot prevent such competition to his own technology.

Finally, the proposed Guidelines state that the following licensing provisions will not be considered to be restrictive of competition

16. Para.142, citing Case T-51/89, *Tetra Pak I* [1990] E.C.R. II-309.

17. The draft Commission Guidelines on the application of Art.81(3), which have been published as part of the Commission's draft "modernization package" and are set to come into force on May 1, 2004 also, do not provide in their current form significant additional guidance on the issue.

regardless of market circumstances: confidentiality obligations; obligations on the licensee not to sub-license; obligations not to use the licensed technology after the expiry of the agreement, provided that the licensed IP remains valid and in force; obligations to assist the licensor in enforcing the licensed intellectual property rights; obligations to pay minimum royalties or to produce a minimum quantity of products incorporating the licensed technology; and obligations on the licensee to use the licensor's trade mark or indicate the name of the licensor on the product.

**Assessment of technology pools** Long-awaited by many industries, the proposed Guidelines provide guidance on the assessment of technology pools. Technology pools are arrangements, regardless of their form, whereby two or more parties assemble a package of technology that is licensed not only to members of the pool, but also to third parties.

Technology pools may set an industry standard, but can also support competing standards. Licences granted by a pool to third parties fall within the scope of the proposed TTBE, but the pooling agreements themselves do not.

Technology pools are assessed according to the following principles:

- Pools combining *essential technologies* will normally fall outside Art.81(1) EC. A technology is essential if there are no substitutes inside or outside the pool and the technology constitutes a necessary part of the package of pooled technologies.
- Pool agreements encompassing *complementary technologies*, where there are substitutes outside the pool for the included technologies, are likely to be caught by Art.81(1) EC if the pool has a significant market position on any relevant market.
- Relevant for the Commission's assessment are, notably, whether there are any pro-competitive reasons for including the technology in the pool, whether the licensors remain free to license their technologies independently, and whether licensees can limit the license to certain parts of the package and obtain a corresponding reduction of royalties.
- Technologies are complements rather than substitutes (the Guidelines recognise that the distinction is not always clear cut) when they are required from a technological point of view to produce the product or carry out the process to which the technologies relate.
- Pooling of *substitute technologies* will generally be considered to violate Art.81 EC.

The Guidelines also discuss additional considerations that are relevant in the assessment of

technology pools. Companies should be aware of the following principles, in particular:

- Pools that hold a strong position on the market should be open and non-discriminatory;
- pools should not unduly foreclose third-party technologies or limit the creation of alternative pools;
- the risk of a pool violating Art.81 EC can be further reduced if participation in the process of setting up the pool is open to all interested parties, independent experts are involved in the creation and operation of the pool, the exchange of sensitive information among the parties is limited, and a dispute resolution mechanism exists.

**Non-assertion and settlement agreements** Non-assertion and settlement agreements normally fall outside of Art.81(1) EC, but their terms and conditions may restrict competition. The Guidelines express caution towards restrictions on the use of the technology and towards royalty payments other than by a one-way lump sum payment.

#### *The decentralisation package*<sup>18</sup>

In October 2003, the Commission entered the next phase of consultation on its modernisation and decentralisation proposals, with the publication of a draft Regulation on Commission proceedings under Arts 81 and 82 EC, and a number of draft guidance Notices designed to assist NCAs and courts in the application of the competition rules.

These measures fill out the new decentralised competition system which is set to be fully operational when Council Reg.1/2003 comes into effect on May 1, 2004 (with the next Enlargement) and replaces Reg.17/62. The Commission has invited all interested parties to provide comments on the draft procedural Regulation and the package of draft Notices by December 5.

The package contains:

- A draft Regulation on Commission proceedings under Arts 81 and 82 EC;
- a draft Notice on co-operation within the European network of NCAs (the ECN);
- a draft Notice on co-operation between the Commission and national courts;
- a draft Notice on the handling of complaints by the Commission under Arts 81 and 82 EC;
- a draft Notice on “novel questions” of Arts 81 and 82 EC that arise in individual cases;
- draft Guidelines on the concept of “effect on trade” (the dividing line between the application of EC or national competition law); and

- draft Guidelines on the application of Art.81(3) EC.

Each of these measures is examined below. The Notice on “novel questions”, the Notice on “effect on trade” and the Guidelines on Art.81(3) EC involve important new material.

#### **Draft Commission Regulation on proceedings**

*General.* The draft Regulation deals with a broad range of topics, such as the initiation of proceedings by the Commission, time limits, investigations by the Commission, handling of complaints, the right to be heard and access to the file. The Regulation is partly based on Reg.2842/98 on the hearing of parties in Arts 81 and 82 EC cases, and also, to some extent, on the Commission’s Notice on access to the file from 1997.<sup>19</sup>

The main new points are as follows.

*Interviews by the Commission.* Art.2 of the draft Regulation sets out the formalities which are to be respected where the Commission conducts interviews and takes statements (Art.19 of Reg.1/2003), or where Commission representatives ask oral questions during inspections (Art.20(2)(e) of Reg.1/2003). Basically, the rule is that the Commission may record the statements or declarations made, but it *must always* provide a copy of any such recording to the interviewee, or investigated undertaking, and allow this person to communicate rectifications on this recording within a certain deadline.

*Complaints.* Art.7(2) now explicitly provides that, where the Commission has informed a complainant of its reasons for rejecting a complaint *and the party in question has not reacted within the set deadline* (in principle at least four weeks), the Commission shall reject the complaint by decision. Furthermore, if the Commission rejects a complaint because another authority is dealing with the case, the Commission shall communicate to the complainant which NCA will deal with the case.

*Access to the file.* The draft Regulation itself sets out basic rights and principles regarding access, which is new, since previously this was only in a Notice.

#### **Draft Notice on co-operation within the network of competition authorities**

*General.* This draft Notice deals with the division of work between the different NCAs and the Commission, the consistent application of EC competition rules, and the functioning of the Advisory Committee. The Notice is to replace the 1997 Notice on co-operation between the NCAs and the

18. With thanks to Lorelien Hoet and Deirdre Waters for their assistance with this section.

19. *Commission Notice on the internal rules of procedure for processing requests for access to the file in cases under Arts 85 and 86 of the EC Treaty, Arts 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No.4064/89*, [1997] O.J. C-23/3.

Commission.<sup>20</sup> Much of this is new. Material closely overlapping with Reg.1 is not described here.

*Principles on work-sharing.* Under the new framework, cases can be dealt with by a single NCA, several NCAs (possibly with one NCA taking lead) or the Commission. In most cases, the NCA receiving a complaint or leniency application will deal with it. Where necessary, however, a case may be “reallocated” within the ECN on the basis of discussions between the authorities.

There is much controversy as to whether this will constitute an appealable act, with concern on the one hand that procedural differences of enforcement may be material, and on the other that procedural appeals, which can take years, would delay substantive enforcement. In some cases, there may be clear advantages to cases being dealt with at national level (e.g. where the NCA has already done a lot of factual work in the area), while in others there may be disadvantages, as where positions seem entrenched and not sufficiently to reflect the broader interests of EU competition.

Cases of reallocation should normally be resolved within *two months* from the moment when the NCAs inform the Commission under Art.11(3) of Reg.1/2003.<sup>21</sup> The Advisory Committee can also function as a forum for the discussion of case allocation.

*Criteria for work-sharing.* An NCA is considered to be “well-placed” to deal with a case if there is a “material link” with the NCA’s territory; competition there is substantially affected by an infringement; the NCA is able to effectively bring to an end the infringement; and the NCA can gather the necessary evidence/proof.<sup>22</sup>

The Commission is considered particularly “well-placed” to deal with a case if agreements/practices have effects in three or more countries, or if its involvement is required for development of EC competition policy, effective enforcement, or appropriate because of a close link with other EC provisions belonging to Commission competence.<sup>23</sup>

An NCA is in principle well-placed to deal with cases that have a major effect on the territory of its Member State. Where a practice has its main effects in the territory of two or three Member States, it is suggested that these NCAs should consider working together on a case.

Importantly, the Regulation provides that the allocation of cases does not create individual rights for undertakings to have a case dealt with by a particular authority.<sup>24</sup>

*Exchange of information.* In general, the possibilities to exchange (confidential) information among the different NCAs and the Commission

20. Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Arts 85 and 86 of the EC Treaty, [1997] O.J. C-313/3.

21. Para.18.

22. Para.8.

23. Paras 14–15.

24. Para.31.

are very extensive, and may be expected to give rise to discussions as to the rights of defence.

Regulation 1/2003 contains limits which may be important for companies and individuals,<sup>25</sup> notably:

- Information exchanged cannot be used to impose sanctions on individuals (as opposed to sanctions on undertakings/companies), unless the transmitting authority is able to impose similar sanctions on individuals, or, in the opposite case, if the receiving authority maintains the same level of protection for individuals as the transmitting authority in the case at hand. This is particularly relevant where national procedural law provides for criminal sanctions on individuals, as now in the United Kingdom.
- Information exchanged within the ECN can only be used for the purpose of the application of EC and, where applicable, national competition law (applied in parallel and only if leading to the same outcome), and for the “subject-matter for which it was collected”.

An application for leniency to a given authority is not to be considered as an application for leniency to any other authority.<sup>26</sup> As a result, in particular because of the importance of timing in such applications, it may be in the interest of undertakings therefore to apply for leniency to *all NCAs* which may be considered “well-placed” to act.

The draft Notice also specifies that:

- Information forwarded to the ECN by the authority that has received a leniency application will not be used by the other members as a basis for starting an investigation, but they may do so on the basis of information from other sources.<sup>27</sup>
- Information voluntarily submitted by a leniency applicant, or information obtained through an inspection which resulted from the leniency application, will only be transmitted with the consent of the applicant, unless the receiving NCA has also received a leniency application, or the receiving NCA has committed itself in writing not to use the information to impose sanctions on the leniency applicant, its employees or any other person covered by such application.<sup>28</sup>

The Commission has also made it clear that it would like all Member States to adopt appropriate (at best comparable) leniency programmes. Not all have explicit rules to this effect yet. Practitioners would agree that there may be an artificial tendency to go to Brussels first, rather than rely on less explicit rules at national level, even though the centre of gravity of a case is clearly national.

25. Para.28.

26. Para.38.

27. Para.39.

28. Para.40.

**Draft Notice on co-operation between the Commission and the national courts** *General*. The draft Notice elaborates on the co-operation principles and mechanisms provided for by the case law of the European Courts and Reg.1/2003. The Notice is to replace the 1993 Notice on co-operation between national courts and the Commission.<sup>29</sup> Some of this is new, some just a summary of existing law.

The main points are as follows:

- Where a national court applies *national* competition law to practices falling under Arts 81 or 82 EC, it must *also* apply Arts 81 or 82 EC to these practices (Art.3(1) of Reg.1/2003).
- Practices that are in accordance with Art.81 EC *may not be prohibited* under national competition law (Art.3(2) of Reg.1/2003).
- Practices that are not in accordance with Art.81 EC *cannot be allowed* under national competition law (*Walt Wilhelm*).<sup>30</sup>
- The general principle of primacy of Community law requires national courts to dis-apply provisions of national law that conflict with EC law rules (*Simmmenthal/Conorzio Industrie Fiammiferi*).<sup>31</sup>
- National courts cannot adopt decisions that conflict with prior Commission decisions (Art.16(1) of Reg.1/2003).<sup>32</sup> The only way for national courts to escape the binding effect of a Commission decision is through a request for a preliminary ruling (or by distinguishing on the facts).
- National courts must also avoid adopting decisions that conflict with decisions *contemplated* by the Commission (Art.16(1) of Reg.1/2003). National courts may for this reason decide to stay proceedings (*Delimitis*),<sup>33</sup> *Masterfoods*<sup>34</sup>).

*Procedural aspects of the national courts' application of EC competition law*. National courts are to apply their own procedural laws in the absence of Community procedural law. The draft Notice recalls, however, the case law of the European courts requiring that:

- Sanctions for infringement of EC law be effective, proportionate and dissuasive (*Commission v Greece*)<sup>35</sup>;

- infringements of EC law causing harm must give rise to damages (*Crehan, etc.*)<sup>36</sup>;
- national procedural law applied to enforce EC law must not make such enforcement excessively difficult (*Rewe/Comet*)<sup>37</sup> and must not be less favourable than rules applied to enforce national law (*Rewe, etc.*).

This is likely to be a developing area in national court cases, as plaintiffs seek to benefit from any higher standards of procedural law which are relevant (at least pending any possible harmonisation of procedural law).

*Co-operation between Commission and national courts—Commission as “amicus curiae”*. The Commission's assistance to national courts may take different forms<sup>38</sup>:

- The Commission has the duty to *transmit information* to national courts that seek it, e.g. documents held by Commission, information on whether Commission is dealing/has dealt with a case, and information on the timing of a decision (see Art.15(1) of Reg.1/2003). To some extent, this has been done in the past, but with mixed results. This may well increase in the future.
- The national court may ask the *Commission's opinion* on economic, factual and legal matters (Art.15(1) of Reg.1/2003). However, the Commission will not consider the merits of the case.<sup>39</sup> Again, this has been done in the past, sometimes even by arbitrators. This also may increase in the future.
- The Commission may submit *written observations* to the national court with regard to particular cases, where the coherent application of Arts 81–82 EC so requires (Art.15(3)).<sup>40</sup> This is an important possibility, to be used on points of law, which may perhaps allow for more realistic decisions in terms of time than the wholly unacceptable 12-year saga of *Masterfoods II*.<sup>41</sup> *Observations may also be oral* if the court agrees.

Pursuant to Art.287 EC, the Commission may only transmit information covered by professional secrecy if the court can guarantee protection of

29. *Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty*, [1993] O.J. C-39/6.

30. Case 14/68, *Walt Wilhelm* [1969] E.C.R. 1; Joined Cases 253/78 and 1 to 3/79, *Giry and Guerlain* [1980] E.C.R. 2327.

31. Case 106/77, *Simmmenthal* [1978] E.C.R. 629; Case C-198/01, *Conorzio Industrie Fiammiferi* [2003] E.C.R. 49.

32. Art.16(2) provides a similar rule for NCAs.

33. Case C-234/89, *Delimitis* [1991] E.C.R. I-935.

34. Case C-344/98, *Masterfoods* [2000] E.C.R. I-11369.

35. Case 68/88, *Commission v Greece* [1989] E.C.R. 2965.

36. e.g. Case C-453/99, *Courage and Crehan* [2001] E.C.R. 6297; Joined Cases C-6/90 and C-9/90, *Francovich* [1991] E.C.R. I-5357; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] E.C.R. I-1029.

37. e.g. Case 33/76, *Rewe* [1976] E.C.R. 1989; Case 45/76, *Comet* [1967] E.C.R. 2043.

38. Paras 21–35.

39. Para.29.

40. The NCAs can also do so without the requirement that this is “necessary for the coherent application” of the law.

41. The Commission itself sees it as more of an exceptional measure than a systematic practice, the whole idea being to *decentralise* enforcement, leaving matters to others to decide.

confidential business secrets. It is an open question how this will work.

The assistance offered by the Commission does not bind the national court. It is hoped that the Commission will treat this more openly than in the past, providing comments as it does in Art.234 (formerly Art.177) EC submissions to the European Court of Justice (“ECJ”). In the end, the *court* decides, and, if uncertain, can still refer to the ECJ.

For reasons of objectivity, the Commission will not hear any of the parties about its assistance to the national courts. If it has had contacts with any of the parties, it will simply inform the court thereof.

Otherwise, the draft notes that the Commission must be provided with copies of all judgments of national courts applying Arts 81–82 EC (Art.15(2) of Reg.1/2003).

**Draft Notice on the handling of complaints under Articles 81 and 82 EC** *General.* This Notice gives indications when to complain to the Commission or an NCA or to bring a case before a national court, and sets out the procedure for treatment of complaints by the Commission. Most of this is not new. However, it is useful to see the proposed “route map”.

The following are the main points:

- *As between the national courts and the competition authorities, the Commission emphasises that:*
  - The competition authorities act *in the general interest* and must thus set priorities in the treatment of cases;
  - national courts are *to safeguard rights of individuals* and are bound to rule on a certain case.
- *As between the Commission and an NCA:*
  - The Commission invites complainants to target the appropriate authority in order to reduce the potential need for reallocation within the ECN. Presumably, over time, we will know when to go where—it is not that clear now, partly because of the built-in flexibility of the system as proposed.
- The Commission notes that persons/undertakings can choose between:
  - Lodging a *formal complaint*; or
  - providing “*market information*” to the Commission which can be the starting point for an investigation by the Commission. Apparently, the idea is that this can be done on the Commission’s special website,<sup>42</sup> even on an anonymous basis!

*Requirement of legitimate interest.* A legitimate interest may be claimed by undertakings,

associations of undertakings entitled to represent their interests, consumer organisations and public authorities, for example in their capacity as buyers/users of goods/services. A legitimate interest is assumed for undertakings or associations which are operating in the relevant market concerned or whose interests are capable of being directly and adversely affected by the conduct complained of. The Commission may verify whether this requirement is fulfilled “at any stage of the investigation”.

*Assessment of a complaint—assessment of “Community interest”.* The Commission notes that it is entitled to reject a complaint for lack of Community interest (Automec II). Otherwise, one may think that the criterion as to whether the complainant can assert his right before the national courts is likely to have an increased importance under the new system.

The draft Notice also emphasises that the procedural rights of complainants are less far-reaching than those of the undertakings concerned.<sup>43</sup> Importantly, the Commission also notes that where it rejects a complaint, its assessment does not definitively rule on whether Arts 81 or 82 EC are infringed, and does not prevent NCAs or national courts applying Arts 81 or 82 EC to such practices.

**Draft Notice on guidance letters for novel questions** *General.* The abolition of the notification system for the application of Art.81 EC and its replacement with the new, decentralised “directly applicable system” clearly affects legal certainty. Up to now, companies could notify in the case of new business practices, or issues which could only be assessed on the basis of analogous principles or which overtly sought to test the limits of the apparently applicable existing rules.

Now, companies will have to self-assess in such cases and, in the case of Art.81(3) EC, they will have to consider *not just whether the Commission will clear the practice, but also whether the NCAs or national courts which may be involved will clear it.* The Commission will, however, remain central, above all because of the confirmation of its special role in *Masterfoods I*.

The draft Notice on guidance letters confirms that the Commission may provide informal guidance in a written statement (“guidance letters”) with regard to *novel* questions where it considers this appropriate and subject to its enforcement priorities.

Recently, there have been suggestions that the Commission now envisages a more extensive role for guidance letters than before. Previously, the Commission was concerned not to have continued notification and comfort letters “by the back door”. Perhaps the thought now is that this may be an

42. See <http://europa.eu.int/dgcomp/info-on-anti-competitive-practices>.

43. Joined Cases 142 and 156/84, *British American Tobacco and RJ Reynolds Industries v Commission* [1987] E.C.R. 249.

important avenue for the Commission to stay in touch with market development and, where appropriate, to start cases for Art.10 decisions on “findings of inapplicability”.

On the face of the text, the issuing of guidance letters will be reserved to cases presenting a “*genuinely unresolved question*”, and it is finally for the Commission to decide whether to process a request for guidance. There is no positive commitment or obligation to do so.

*Prerequisites for the issuance of guidance letters.* The Commission will consider requests for informal guidance only where:

- A case presents a question for which there is no clarification (in the EC legal framework, in publicly available general guidance, in case law/decision-making practice or in previous guidance letters);
- the clarification of the novel question seems *prima facie* useful, taking into account the economic importance for the consumers, the potential widespread character of the practice, the scope of investments and the possible effects on structural operations;
- the issuing of the guidance letter does not require further fact-finding.

The Commission will not consider a request for informal guidance where:

- Identical or similar questions are pending before the European Courts;
- the practice at stake is the subject of proceedings before the Commission, national courts or NCAs.

*Effects of the guidance letters.* A guidance letter will not bind EC Courts, national courts or NCAs. The Commission does not consider itself bound by guidance letters, in that it can always take a different approach in its assessment on the basis of a complaint. However, the Commission will “normally” take a previous guidance letter into account when dealing with the same facts and where there are no new developments in the case law of the European Courts.

It remains to be seen whether guidance letters will be appealable acts.

**Draft Guidelines on “effect of trade”** *General.* The purpose of the Guidelines is to assist NCAs and national courts in their determination as to whether an agreement or practice “*may affect trade between Member States*” and thus be subject to Art.81 EC or Art.82 EC. The draft Guidelines summarise the principles developed over the years to provide a methodology for NCAs and national courts to use in their examinations. (These are not repeated here.) However, the Guidelines also go further and establish a rule (the so-called “no

*appreciable affectation of trade (NAAT) rule*”) indicating when agreements are unlikely to be capable of affecting trade between Member States.

This is new. In practice, to work out if a restriction is caught by EC law, the draft Guidelines also need to be read with the parallel Notice on what is an appreciable *restriction* on competition.<sup>44</sup>

Interestingly, given current debates, there is much material on how restrictions “*inherently*” or “*by their very nature*” affect competition.

First, the Commission emphasises that the *notion of “may affect” trade* does not require an *actual* effect on trade: it is sufficient if an agreement/practice is *capable* of having such an effect. Thus, there is no need to calculate the actual volume of trade that is affected.

Community law considers certain types of agreement to be *by their nature* capable of having an effect on trade, such as cross-border cartels and agreements relating to imports/exports. In other cases, the *nature of the product* can be relevant. For example, agreements/practices concerning products that are easily traded across borders or that are important for entry into a market are more readily capable of affecting trade than others.

Once an *effect* on cross-border trade is established, the *nature* of that effect is considered *irrelevant*. Thus, jurisdiction is established even if the agreement/practice causes an *increase* in trade. Similarly, it does not matter whether the effect on cross-border trade is *direct* (generally for products covered by the agreement/practice) or *indirect* (generally for products *related* to those covered by the agreement/practice, or where the agreement/practice does not directly regulate the sale of the covered product).

Finally, even if the agreement/practice is not capable of affecting trade when it is implemented, Arts 81 and 82 EC will still be applicable *if effects may occur in the future* with a sufficient degree of probability. This will be the case when the current market/legal conditions would not allow an effect on trade but are likely to change in the foreseeable future.

Secondly, the draft Guidelines also state that Arts 81 and 82 EC apply only where the agreement/practice is capable of having effects of a “*certain magnitude*”. On the case law, sales amounting to *about 5 percent of the market* can be sufficient for this purpose. For vertical agreements, the cumulative effects of parallel networks of similar agreements are also relevant. Agreements between small and medium enterprises, on the other hand, are presumed not to be capable of affecting trade between Member States.

The most significant aspect of the draft Guidelines is the formulation of a *general presumption, applicable to all types of agreements, defining*

44. *Commission Notice on agreement of minor importance* [2001] O.J. C-368/13.

when there will be no appreciable effect on trade between Member States (the “NAAT” rule).<sup>45</sup>

To invoke the presumption, two conditions must be met:

- (1) The parties must have an aggregate market share on any affected market of *not more than 5 per cent*; and
- (2) either *the parties* (in the case of horizontal agreements) or *the supplier* (in the case of vertical agreements) must have an aggregate annual Community turnover in the products concerned of *not more than €40 million*.

While the NAAT rule creates a presumption that the agreement does *not* affect trade between Member States, the Guidelines also outline an (opposing) presumption in *cases of agreements/practices that, by their nature, are capable of affecting trade*. For such agreements, where the turnover exceeds the €40 million threshold for the NAAT rule, there is a presumption that the effects on trade are appreciable. For other agreements, exceeding the thresholds would not give rise to such a presumption.

*Application to various agreement.* Having set out the principles relevant to the assessment of effect on trade, the draft Guidelines then apply them to various types of agreement. Significant points in this respect are as follows:

- Foreclosure effects (such as from exclusive purchasing obligations) in relation to vertical agreements may limit trade between Member States.
- When assessing the appreciability of an effect on trade caused by either exploitative or exclusionary abuses under Art.82 EC, the very existence of the dominant position implies that competition is already weakened and the ability of conduct that further weakens competition to affect trade is normally appreciable.
- Sector-wide standardisation or certification regimes that are more difficult for competitors in other Member States to fulfil normally have an effect on trade.
- Where a regional market only is affected, the volume of sales affected must be significant in comparison to the overall volume of sales in the Member State. Agreements that cover areas with a high concentration of demand are therefore more likely to have an effect on trade between Member States than those in other areas.
- Trade is also capable of being affected when infrastructures such as airports and ports (important for providing cross-border services) are affected.

45. Paras 50–57.

**Draft Guidelines on the application of Article 81(3) EC General.** The aim of the draft Guidelines is to build on and provide more detailed guidance than that contained in the current Guidelines on vertical restraints and horizontal agreements in order for companies to “self-assess” agreements, and NCAs and national courts to apply Art.81(3) EC. This is new, important and explicitly economic.

*Basic principles of Art.81(1) EC.* Before the Guidelines examine the criteria for the application of Art.81(3) EC, they set out briefly the principles of Art.81(1) EC.

Agreements/practices which have the object of restricting competition, such as price-fixing or market-sharing (for horizontal agreements) and resale price maintenance or absolute territorial protection (for vertical agreements), are *presumed* to have negative effects on competition and come within the scope of Art.81(1) EC without the need to demonstrate actual effects on the market. For other agreements/practices, sufficient negative effects on competition must be shown. Such effects are likely to occur when at least one of the parties obtains some degree of market power, albeit of a lower level than would be necessary for the application of Art.82 EC.

To assess whether an agreement is restrictive of competition because of its effects on the market, the Guidelines propose two questions<sup>46</sup>:

- (1) Does the agreement restrict the competition (actual or potential) that would have existed “*in the absence of the agreement*”?
- (2) Does the agreement restrict the competition (actual or potential) that would have existed “*in the absence of the alleged restriction of competition*”?

According to the Guidelines, the second question relates to the issue of whether the restriction is *objectively necessary* for the conclusion of the agreement.

The Commission also provides guidance on the treatment of *ancillary restraints* (alleged restrictions of competition which are *directly related and necessary* to the implementation of a non-restrictive transaction and are proportionate to it). The Commission specifically points out that the application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects, such balancing being reserved for Art.81(3) EC.

This discussion is interesting, but not entirely clear, as we consider when restrictions are *outside* Art.81(1) EC or capable of being cleared under Art.81(3) EC (which may be significant for the burden of proof). It should be noted, however, that the Court’s case law and previous Commission practice is also perhaps not that clear. Recently, in *Metropole* and *Masterfoods II*, the European Court

46. Para.24.

has emphasised that economic assessments are in Art.81(3) EC *only*.

*Basic principles of Art.81(3) EC.* A number of general principles are relevant to Art.81(3) EC as a whole:

- The Guidelines stress that Art.81(3) EC applies to any and all agreements that come within the scope of Art.81(1) EC, even those involving so-called “hardcore” restrictions (price-fixing, output limitation, market-sharing, etc.).
- Art.81(3) EC can be applied individually or through the block exemptions (which remain in force under the new regime).
- The four conditions of Art.81(3) EC are exhaustive.
- As a general matter, restrictions in one market or area cannot be offset by efficiencies and consumer benefits in another. However, such benefits will be relevant in relation to closely interrelated markets.
- The benefit of Art.81(3) EC lasts only as long as the conditions are met. If the facts relied on change materially, the exception under Art.81(3) EC no longer applies. (Another controversial change with the new system, since before, when exemption was granted it was for a defined period, for which there was greater certainty as to competition compliance.)
- However, the Commission states that where the agreement is an irreversible event, such as the withdrawal from a research project, Art.81(3) EC remains applicable even if future events change the market conditions.

The draft Guidelines examine each condition of Art.81(3) EC individually, although not in the order in which they appear. Each of the four conditions must be met in order for Art.81(3) EC to save a restriction.

*First condition—efficiency gains.* Objective efficiencies only can be taken into account, meaning that cost savings arising from the exercise of market power will not be relevant. The efficiencies must result from the economic activity which forms the object of the agreement, and they must be substantiated.

To substantiate efficiencies, companies must provide verifiable data on the nature of the efficiencies, the link to the agreement, the likelihood and magnitude of the efficiencies, how and when they will be achieved, and the *cost* of any efficiencies. The latter is relevant because Art.81(3) EC counts only *net* efficiencies.

The Guidelines provide a number of examples of efficiencies (which are not intended to be exhaustive).<sup>47</sup> In general, these examples are not controversial. They include:

- cost efficiencies from the development of new technologies or production methods;

- synergies from the integration of existing assets;
- economies of scale, such as combination of logistics operations;
- economies of scope, such as distribution of similar products together; and
- efficiencies from better planning, inventory reduction and increased capacity utilisation.

However, some efficiencies listed by the Guidelines may prove harder to substantiate, namely “learning efficiencies” arising from expertise gained by focusing on a particular process or task. The Guidelines also refer to efficiencies in the form of technical and technological advances through joint research and development or joint production and improvements in product quality and service levels, such as those arising from specialised distribution.

There is no discussion of environmental gains, which one might have expected after the recent changes to the EC Treaty and recent Commission practice.<sup>48</sup> One senses that such considerations are to be dealt with mainly in the application of Art.81(1) EC, and that the Commission (and the Court) would prefer Art.81(3) EC to remain essentially economic.

*Third condition—indispensability of the restrictions.* This condition has two parts.

*First, there must be no other practicable and less restrictive means to achieve the claimed efficiencies.* For example, companies claiming economies of scale or scope will have to substantiate why internal growth and price competition would not have achieved the same result. A key factor for companies will be to determine the minimum efficient scale on the market, *i.e.* the level of output necessary to minimise average cost and exhaust economies of scale. The larger the minimum efficient scale, the more likely that efficiencies will be specific to the agreement. Certain types of efficiencies, namely synergies through the combination of complementary assets/capabilities, are presumed to be specific to the agreement.

*Secondly, it must be shown that the efficiencies would be eliminated or significantly reduced without the restrictions.* The greater the restriction, the stricter the test. On the other hand, where the success of a product is uncertain, greater restrictions may be necessary to ensure that the efficiencies will materialise. Similarly, substantial sunk investments are more likely to justify strict restrictions. If a restriction is indispensable only for a certain period, the exception in Art.81(3) EC will apply only for that period.

*Second condition—fair share for consumers.* The draft Guidelines specify that this implies that the *pass-on of benefits* at least compensates for

47. Paras 51–63.

48. *e.g.* the recent *CECED* line of cases.

the actual or likely negative consequences of the agreement, so that the net effect of the overall agreement is neutral from a consumer viewpoint.

The draft Guidelines highlight a number of factors that could have a negative effect on any *pass-on* of benefits in an elaborate and newly explicit way:

- A time lag between implementation of the agreement and materialisation of the efficiencies will reduce the value of the efficiencies for consumers. The draft Guidelines therefore state that the value of future gains must be “discounted” by applying an appropriate discount rate. (However, they do not provide any guidance on what such a rate could be in any given situation.)
- Where an agreement gives companies the ability to achieve efficiencies early (“lead time”), the draft Guidelines state that any likely negative impact on consumers following this lead time has to be taken into account. The concern of the Guidelines is that the agreement could lead to a strong market position and thus the ability to charge a higher price, and that the efficiencies would not fully compensate.
- In a similar vein, the draft Guidelines highlight that competition is an important long-term driver of efficiency and that the impact of the agreement on such competition must be weighed against the efficiencies created by the agreement. Interestingly, the draft Guidelines here refer to dominant firms as firms that may have less incentive to maintain or build on efficiencies because of a lack of competitive restraint.<sup>49</sup>
- The fact that efficiency gains may not affect the entire cost structure of the company must be taken into account. Thus, a 6 per cent reduction in production costs will count as only a 2 per cent benefit to consumers if production costs make up one-third of the costs on which prices are determined.

In assessing the *pass-on* of benefits to consumers, the draft Guidelines highlight that *pass-on* is likely to occur where cost efficiencies allow companies to expand output and increase profit. Where capacity constraints exist, *pass-on* is likely to take longer. Markets subject to tacit collusion are also likely to experience slower *pass-on*, although in some cases the efficiencies may be enough to turn a smaller player into a “maverick” to challenge the oligopoly.

The key element in reviewing the likelihood of consumer *pass-on* is that the pricing decisions of companies are determined by variable, as opposed to fixed, costs. Therefore, consumer *pass-on* is more likely when the cost efficiencies allow reductions

in *variable costs*. Once it is determined that consumer *pass-on* is likely, the rate of such *pass-on* will depend on the *price elasticity of demand* (the extent to which demand is responsive to a decrease in price). The higher the price elasticity of demand, the greater the *pass-on* rate.

The draft Guidelines recognise that *non-cost efficiencies* (for example, efficiencies resulting in new and improved products) are harder to assess quantitatively and require a certain value judgment. According to the Guidelines, once the value stemming from any improvements to consumers outweighs any harm from an increase in prices stemming from the agreement, then the test will be fulfilled.

*Fourth condition—no elimination of competition.* The draft Guidelines reiterate that competition is an essential driver of economic efficiency. Therefore, the ultimate aim of Art.81 EC is to protect the competitive process in the long term as well as the short term. *To this end, protection of the long-term competitive structure is to be given priority over potentially pro-competitive efficiency gains that could result in the short term.*<sup>50</sup> The draft Guidelines do not give an indication of what period would be sufficient to qualify as “long term”.

*Interestingly, the Commission states that Art.81(3) EC has to be interpreted consistently with Art.82 EC, so that it would prevent the exemption of a restrictive agreement that constitutes an abuse of a dominant position (but not just the creation of a dominant position).*<sup>51</sup> However, the Commission emphasises that not all restrictive agreements concluded by dominant companies amount to an abuse. An individual examination may therefore be necessary to determine if such agreements could be objectively justified.

The factors in any examination under the fourth condition are the degree of competition prior to the agreement and the impact of the agreement on that competition. Both actual and potential competition are relevant. For *actual competition*, market share, capacity restraints and costs of production will have to be assessed, as will evidence of past competitive interaction. The assessment of *potential competition* requires entry barriers to be assessed. This requires an evaluation of regulatory barriers, sunk costs of entry, the minimum efficient scale of the industry and the likely response of current players, among other factors.

This is interesting material. One may think that encouraging specialised national courts to deal with such issues is essential, if they are to be dealt with effectively! It may also be encouraging for dominant companies.

49. Para.80.

50. Para.93.

51. Para.95.

*Other*

On September 30, 2003, the Commission also published a *draft amendment to the Liner Consortia Block Exemption Reg.823/2000*<sup>52</sup> (“the LCBE”). This is only intended to apply from May 1, 2004 until April 25, 2005, when the LCBE is due for renewal in any event. What the proposed amendment does is to align the LCBE with Reg.1/2003, by:

- (1) abolishing the “opposition procedure”, whereby a consortium with market share between 30–35 per cent (depending on the circumstances) and 50 per cent could be notified to the Commission and come within the LCBE, if not opposed by the Commission within six months; and
- (2) abolishing the ability for a consortium with market share above 50 per cent to be notified to the Commission for individual exemption after May 1, 2004.

Instead, Reg.823/2000 will provide that consortia, claiming the benefit of the LCBE Regulation, must be able, on not less than one month’s notice, to demonstrate to the Commission or NCA that the relevant conditions for exemption in the LCBE are met, and submit the consortium agreement in question. The Commission also indicates that the Commission or the NCAs can withdraw the benefit of the LCBE, in line with Reg.1/2003.

In February 2003, the Commission adopted a *Proposal for a Council Regulation amending existing regulations in the air transport sector* in order to give the Commission clearer statutory enforcement powers for air transport between the European Union and third countries, and the related right to grant block exemptions if appropriate.<sup>53</sup> In recent years, the main transatlantic alliance cases have been handled without such a procedural power basis, in co-operation with Member States directly concerned. The Commission’s idea is that its powers in this field should be covered by Reg.1/2003. This is not new and still highly controversial.<sup>54</sup>

In February and July 2003, the Commission also adopted *recommendations in relation to the Framework Directive for electronic communications networks and services on product and service markets susceptible to ex ante regulation* and notifications, time limits, and consultations provided for in that Directive.

52. C-233/8, September 30, 2003.

53. IP/03/284, February 26, 2003; COM (2003) 91 final, February 24, 2003.

54. [2003] O.J. L114/45 and [2003] O.J. L190/13.

## European Court cases (ECJ and CFI)

Table 4: Main European Court Cases:

- *Michelin*:
  - fidelity rebates law reaffirmed;
  - “object and effect” intertwined in Art.82 EC?
  - transparency not key;
  - reinforcing “spontaneous demand” through a rebate unlawful;
- *The Italian Matches Case*:
  - NCAs can disapply national laws contrary to Arts 10 and 81 EC;
  - but no fine ... unless future conduct;
- *Lysine appeals*:
  - confirmation of wide Commission discretion. Is deterrence really fair?
- *Masterfoods*:
  - Commission foreclosure approach to freezer exclusivity upheld;
  - no rule of reason in Art.81(1) EC;
  - standard practice not enough.

**Michelin**

On September 30, 2003, in *Michelin v Commission*,<sup>55</sup> the European Court of First Instance (“CFI”) gave its judgment in the appeal against the Commission’s decision imposing on Michelin a €19.76 million fine for having applied fidelity rebates to its dealers in truck and heavy vehicle new-replacement tyres and retreads.<sup>56</sup> Michelin’s arguments were rejected and the Commission’s decision upheld.

In the process, the Court made a number of important clarifications to the existing case law on fidelity rebates.

First, and in general, the Court applied what it repeatedly emphasised was “settled case law” on fidelity rebates under Art.82 EC, based on the first *Michelin* judgment,<sup>57</sup> the *Hoffmann-La Roche* judgment<sup>58</sup> and other similar cases.<sup>59</sup> This case law establishes the unlawfulness of rebate systems practised by dominant companies which put great pressure on resellers not to buy from other suppliers and which cannot be shown to be strictly cost-justified.

Specifically, the Court had to consider the Michelin rebate systems, where the rebates increased according to the reseller’s sales turnover, in a scale with many steps (some 47 to 54 steps in one form, and 18 in another). One scale concerned sales turnover in *all types of tyre* (save for two), and two scales dealt with these excepted types. The scales had a reference period of *one year*. The Court held that these rebate systems constituted fidelity rebates because they applied to the reseller’s entire sales

55. Case T-203/01, *Manufacture Française des Pneumatiques Michelin v Commission*, September 30, 2003.

56. [2002] O.J. L143/1.

57. Case 322/81, *NV Nederlandse Banden-Industrie Michelin v Commission* [1983] E.C.R. 3461.

58. Case 85/76, [1979] E.C.R. 461.

59. Paras 54–60.

turnover with Michelin and had this length of reference period.

As regards the *length of the reference period* of the rebate, the Court confirmed that, contrary to the position taken by the Commission in its decision, the European Courts had never ruled that the reference period could not be more than three months. However, the Court emphasised that the loyalty-inducing character of a system based on total turnover achieved increased in proportion to the length of reference period.<sup>60</sup>

As regards the *loyalty effect of a total turnover system*, the Court compared the small gain to the reseller if an additional rebate were only applied on the amount of sales turnover above a threshold in order to move a single step to the next threshold in the scale, with the much higher gain to the reseller if the additional rebate were applied to the reseller's total sales turnover.<sup>61</sup>

The Court noted that if these quantity rebates were based on a clear economic return, then they could be objectively justified and lawful. However, the Court emphasised that *specific proven economies* (such as of scale) were required. Since Michelin had only provided general statements to this effect, these were not established.

Importantly, the Court also made it clear that a system of fidelity rebates is contrary to Art.82 EC "whether or not it is transparent".<sup>62</sup> Many had argued since the first Michelin case that the transparency of the mechanism of the rebates applied by a dominant firm was key to its justification under Art.82 EC. The Court found on the facts that the Michelin system "was complex" and "made it impossible for the resellers to assess the true price of the tyres at the moment of purchase".

Secondly, the Court considered whether Michelin's "service rebate" was lawful and found that it was not. This was a system giving points to resellers if they carried out various tasks. If enough points were achieved, a rebate was granted. Broadly, the Commission objected to the system, on the basis that it involved *subjective* elements and left a margin of discretion to Michelin as to whether it would award points and therefore rebates. For example, points were awarded if a reseller contributed "positively" to the launch of new Michelin products. The Court agreed with the Commission that this was too vague and therefore unfair and abusive: rebates by dominant companies had to be based on an *objective* economic justification.

Thirdly, the Court considered whether the so-called "friends of Michelin" co-operation club with large distributors was abusive, and found that it was. The Commission's objection to this club was

that it was used by Michelin to crystallise or improve its market share, giving Michelin exceptional insight into the activities of its members and requiring members to use Michelin for the first retread of Michelin tyres.

The Court agreed, noting that access to the club was conditional on an obligation to achieve a market share or "temperature" with Michelin (share of sales in Michelin products). Members of the club were further required to hold a sufficient stock of Michelin products to meet demand immediately.

Obligations to "put forward" the Michelin brand and not to turn "spontaneous demand" for Michelin products to other products also served to crystallise, if not improve, Michelin's market position. This is another controversial finding, since many companies think it fair to say to a customer: "Do not turn customers to other products if they ask for mine." The Commission's view, confirmed by the Court, is that a dominant company cannot *pay* rebates to induce distributors to respect such "fair play".

The Court also found that the information which the resellers had to give Michelin went too far, allowing Michelin too much control over its distribution. Indeed, the Court noted that the information requirements made it impossible for the club's members to increase their business with Michelin's competitors without Michelin knowing about it.

Finally, the Court held that the obligation on resellers to give Michelin the first retread business on their tyres abusively barred access to the retread market.

Interestingly, Michelin also argued that the Commission was obliged to show *concrete* effects flowing from the practices in question for there to be an abuse. The Court disagreed. Abusive conduct had only to *tend* to restrict competition or, in other words, the conduct had to be *of a nature or capable* of having such an effect.<sup>63</sup> If the *object* of restricting competition were shown, the conduct is considered capable of having such an effect, and that is enough. The Court also noted that, in the *AKZO* predatory pricing case, no proof of concrete effects had been required. Pricing below average variable cost was considered *per se* abusive.

On the whole, the judgment is an orthodox application of settled case law.<sup>64</sup> However, it is a source of much controversy already, since it brings disappointment for practitioners, economists and dominant companies who continue to find it difficult that dominant companies are prevented from competing, as they see it, "normally" with their smaller rivals, with the *same type* of rebates that they use

60. Para.85.

61. Paras 87–88.

62. Para.111.

63. Para.239.

64. With thanks to Frédéric Louis and Anne Vallery for their assistance with this section.

(while accepting that their pricing must be above average total costs).

This is particularly so in view of the fact that rebates normally do *not* just follow a strict cost-related structure. They usually reflect also history and competition. Forcing dominant firms to find only strict cost justifications for their rebates, involving minute and complex appreciations and resulting in rebates which are less attractive than non cost-justified competing offers by the non-dominant, is therefore not popular with the dominant.

It also remains an open question how strict the economic justification must be, if all the obvious “red flags” as to prohibited forms of rebate in the Court’s case law are observed. The Court appears to underline that the cost justification should be clear. In practice, the Commission has brought relatively few cases, usually where there were many clear aspects to the abuse.

On the other hand, many will be pleased to see that the “three-month reference period rule” is *just* the Commission’s proposed safe harbour, and not accepted as such by the Court as an obvious “red flag”. Longer reference periods may be allowed depending on the circumstances.

The statement that there is no need to demonstrate anti-competitive *effect* for a finding of abuse when there is an anti-competitive *object* is highly topical, given new debate on the reform of Art.82 EC. The Court actually says that the demonstration of the “object and anti-competitive effect” are mixed together in the context of Art.82 EC.<sup>65</sup>

Again, many will be disappointed, arguing that if, for example, a dominant company were losing market share, the *per se* rule is wrong, and just condemns the “dominant” to an unfairly high standard for rebates, until they are no longer dominant. Equally, that an unlawful and unproven exclusionary object should not be inferred from a normal and legitimate desire to sell more and, in that sense, induce loyalty.

The question as to how to reward services also remains a difficult issue. A checklist of simple things done, meriting a rebate, appears a lawful approach, but services are often assessed more in terms of *quality*, and this is not so easy to judge. *Qualitative* assessments are high risk, because they are likely to be considered subjective.

In general, the *Michelin* judgment requires careful evaluation. One can argue, as happened with *Michelin I*, that the circumstances were exceptional and therefore try to distance the ruling from other cases. One would note here, for example, the way that the Court wraps up its ruling on reseller pressure in all the elements of the case as if to say that the overall equity in this case was against the Michelin system. Another element which may have weighed

with the Court was that, apparently, Michelin list prices were so high that dealers were forced to sell their tyres at a loss, until account was taken of the rebates they were entitled to under the Michelin scheme.

However, one can also argue that the Court *has* chosen to favour a broad *per se* rule approach, focusing on preserving residual competition in a market weakened by a dominant participant, and preferring a “bright line” rule over more complex, effect-based rules.

This is all highly topical and controversial. It will be interesting to see what happens next with *Coca-Cola’s* proceedings in the Commission, possible Art.82 EC Commission Guidelines as it considers modernisation in this field,<sup>66</sup> and *Virgin/British Airways*,<sup>67</sup> another case on fidelity rebates at the European Court.

### **The Italian Matches Case**

In September 2003, the ECJ gave an important judgment on state action and EC competition law in the context of the supply of matches in Italy.<sup>68</sup>

The case arose on a reference from the Regional Administrative Court, Lazio. The Italian Competition Authority (“ICA”) had taken a decision against a form of commercial monopoly which had been conferred by the Italian state on a consortium of Italian match manufacturers (“CIF”). The monopoly was long-standing, dating from 1923, and had been amended through a judgment of the Italian Constitutional Court and subsequent decrees in 1983, 1992 and 1993. The ICA had concerns about:

- (1) Whether the CIF, as amended, infringed competition law;
- (2) agreements between the CIF and an organisation called the “Conaedi”, which represented wholesalers of monopoly goods; and
- (3) an agreement between Swedish Match and the CIF.

Interestingly, in doing so the ICA was applying (what was then) *Art.81(1) EC*, rather than Italian competition law.

*In what appears to have been a ground-breaking initiative*, the ICA found in 2000 that:

- (1) to the extent that Italian law had *required* participation in the CIF, it had provided a

66. See also the papers by Luc Gyselen, “Rebates: competition on the merits or exclusionary practice?”, published on the European Commission website; the other papers at the proceedings of the European University Institute, Florence, 2003, *What is an Abuse of Dominant Position* (Ehlermann and Atanasiu eds); and “Roundtable on loyalty or fidelity discounts and rebates” (OECD, May 2002).

67. [2000] O.J. L30/1.

68. Case C-198/01, *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato*, Judgment of September 9, 2003.

65. Para.241.

“legal shield” to conduct which would otherwise have been prohibited (this concerned the monopoly until 1993);

- (2) the legislative framework had to be *dis-applied* by any court or public administration, such as the ICA, since it was contrary to Arts 3(i)(g), 10 and 81(1) EC; and
- (3) disapplication would imply removal of the legal shield.

Furthermore, some of the activities of the CIF were not required by the legal framework of the Italian law, notably the allocation of production quotas in a related committee, the majority of which was constituted by producers.

The ICA noted that since 1994, participation in the CIF had no longer been compulsory for the production and marketing of matches in Italy, and that membership of the CIF had become voluntary. As a result, the conduct of the member companies had to be regarded, from 1994 onwards, as the result of autonomous economic decisions, for which they were responsible.

Finally, the two agreements, with the wholesalers and with Swedish Match, were also contrary to Art.81(1) EC. The former gave the CIF exclusive control of the commercial channel of wholesale distribution. The latter, whereby the CIF bought a certain amount of matches from its principal European competitor, prevented Swedish Match from selling directly in Italy.

On appeal to the Lazio Court, the main issue was whether the ICA was competent to disapply Italian law in this way. The Italian Court was also not sure whether there was room for significant competition between the members of CIF, prices for matches still being set by the state. In such a system, did quota allocation matter? Was autonomous conduct which restricted competition precluded? The Court referred these issues to the ECJ.

*In an equally ground-breaking judgment, the ECJ upheld the ICA's position.* A national competition authority could not effectively ensure that Art.81 EC is observed, if such an authority could not declare a national measure contrary to Arts 10 and 81 EC and, as a result, be able to disapply it.<sup>69</sup>

*However, in such a case the undertakings concerned were still entitled to plead the national law as a defence against any penalties,* whether criminal or administrative, in respect of past conduct required by the law concerned. The decision to disapply the law concerned did “not alter the fact that the law set the framework for the undertakings' past conduct”. It was still a legal “shield” for public authorities and other economic operators. Going forward, however, once the law was disapplied, the undertakings concerned could be penalised for their future conduct.<sup>70</sup>

69. Paras 50–51.

70. Paras 52–55.

If national law merely encouraged or made it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings could still be penalised for infringements before the law was disapplied. In the present context, however, the national legal framework could be a mitigating factor.

As regards the question whether competition could be distorted in the circumstances, the ECJ left that to the national court to determine, while making it clear that, in principle, the residual competition possible, other than on price, could be appreciable, and therefore a restriction of such competition could be caught by Art.81(1) EC.

The Commission has already picked up on the case, as a new facet to its campaign for competition in services (where professional rules may be set in laws).

### Lysine appeals<sup>71</sup>

In July 2003, the CFI ruled on four appeals, brought by Archer Daniels Midland (“ADM”), Kyowa Hakko Kogyo, Daesang-Sewon and Cheil Jedang, against the Commission's lysine (amino acids) cartel decision<sup>72</sup> in which the Commission had fined the four companies a total of €81.6 million.<sup>73</sup> The CFI reduced the fines to a total of €74.3 million.

It may be recalled that lysine is an amino acid and is used in animal feed. Nutritionists add synthetic lysine to feedstuff like cereals or soybeans in order to formulate protein-based diets for animals.

The case started when the American authorities discovered in 1995 that ADM, Kyowa, Sewon Corp, Cheil Corp and Ajinomoto Co Inc had formed a cartel to fix lysine prices and to allocate sales of lysine. In the US, the companies were fined and three executives of ADM were sentenced to prison.

In July 1996, Ajinomoto came to the Commission on the basis of the 1996 Leniency Notice,<sup>74</sup> offering to co-operate in proving the existence of a cartel in the lysine market and its effects in the European Economic Area (“EEA”). In June 1997, the Commission “dawn-raided” the European premises of ADM and Kyowa Europe, and in June 2001, the Commission issued a decision charging the companies with fixing lysine prices and sales quotas in the EEA and with exchanging information on their sales volumes.

In the decision, the Commission used the 1998 Fining Guidelines<sup>75</sup> and the 1996 Leniency Notice

71. With thanks to Natalie McNelis for her assistance with this section.

72. Case T-220/00, *Cheil Jedang Corp v Commission* (“Cheil”); Case T-223/00, *Kyowa Hakko Kogyo Co Ltd GmbH v Commission*; Case T-224/00, *Archer Daniels Midland Co Ltd v Commission*; Case T-230/00, *Daesang Corp and Sewon Europe GmbH v Commission*, Judgments of July 9, 2003.

73. [2001] O.J. L152/24.

74. [1996] O.J. C207/p.4.

75. *Guidelines for calculating fines imposed pursuant to Art.15(2) of Regulation 17 and Art.65(5) of the ECSC Treaty*, O.J. 1998 C9, p.3.

to calculate the fines. The applicants appealed the decision in August 2000, raising various pleas for its full-scale annulment or, at least, a reduction of the fine.

It may be useful to focus on certain facets of the judgments dealing with the Commission's calculation of the fines.

First, the applicants argued that, recently, the Commission has been imposing fines at a level that a few years ago no one would have thought possible. Notably, the applicants argued that the Commission should not have used the 1998 Fining Guidelines in this case because the cartel was brought to an end before the Guidelines were published. The applicants relied on principles such as breach of legitimate expectations, legal certainty, non-retroactive application of penalties and equal treatment.<sup>76</sup> The Court rejected them all, saying that use of the Guidelines amounted to a mere change in the administrative practice of the Commission which did not amount to an alteration of the existing legal framework for determining fines (set out in Art.15 of Reg.17).<sup>77</sup>

Secondly, the applicants argued the “*non bis in idem*” principle, that a second penalty may not be imposed on the same person for the same offence. As mentioned above, the US (and the Canadian authorities) had already imposed fines on the same companies for the same cartel. One of the issues before the CFI was whether, when calculating the fine in worldwide cartels, the Commission has to take into account fines previously imposed in non-EEA jurisdictions.

The answer was “no”. The CFI ruled that the Commission has no obligation to take into account fines imposed in non-EEA countries. According to the Court, an undertaking may be penalised in more than one jurisdiction for the same infringement when the penalties pursue different objectives. Here the Commission fines aim to preserve competition in the European Union, while those of the other jurisdictions aim to preserve competition in their respective markets. Thus, there was no breach of the *non bis in idem* principle.<sup>78</sup>

Thirdly, the Court stressed in this case that if the Commission proposes to impose a fine, then it *has* to assess the *gravity* of the infringement, and in doing so the Commission is *required to assess the actual impact of the cartel* “in cases where it appears that this can be measured”.<sup>79</sup> According to the Court, the Commission's point of reference is the competition that would normally have existed if there had been no infringement.<sup>80</sup>

76. All four judgments are similar, though not identical. All references here are to the *ADM* case, unless otherwise indicated. Para.23 *et seq.*

77. Paras 39–75.

78. Paras 85–104.

79. Para.143.

80. That is, “prices would not have developed in the same way as the prices which were actually charged”: para.152.

Fourthly, the Court held that the Commission should have looked at the turnover in the market affected by the infringement, the *EEA lysine* market, rather than worldwide turnover, *as a measure of the scale of the infringement* committed by each company.<sup>81</sup> Citing *Parker Pen*,<sup>82</sup> ADM had argued that its fine—which exceeded its turnover in the EEA lysine market in the last year of the infringement—was disproportionate.<sup>83</sup>

In spite of this, the Court did not consider that the fine was overall unreasonable.<sup>84</sup> In coming to that conclusion, the Court seems to have been influenced by the fact that ADM's EEA sales of lysine were a significant proportion of its worldwide turnover.<sup>85</sup>

*The Court said that total turnover can still come into play with regard to deterrence.* There, the Court said that the Commission *is* entitled to take *total worldwide* turnover into account, because that figure gives an indication of the overall size of the undertaking and its economic power. This is considered relevant to determining the amount of the fine that will deter it from infringing in the future.<sup>86</sup>

As in the *Pre-insulated Pipe Cases*, this must now be *very disturbing* for large multinationals. Is it really fair? Above all, why should multinational conglomerates be fined more *just because they are built that way*? One may well argue that fine levels should be adjusted in relation to *involvement* in infringements and markets affected, not just because companies are big or small. If groups are penalised twice, they can still be sanctioned more for recidivism, but *huge fines for deterrence* are a concern.

Finally, the Court was generally demanding in reviewing the equal treatment of those fined and the related reasoning. For example, in the *Cheil* case, the Court did not accept that the Commission increased the fine on certain companies *something less than 10 per cent per year of duration*, while it increased *Cheil's* fine *something more than 10 per cent per year*. The Court consequently reduced *Cheil's* fine.<sup>87</sup>

### **Masterfoods<sup>88</sup>**

In October 2003, the CFI upheld the Commission's decision in the Irish ice-cream case known as “*Masterfoods*”.<sup>89</sup> The Commission had found that

81. Paras 193–197.

82. Case T-77/92, *Parker Pen v Commission* [1994] E.C.R. II-549.

83. Paras 173–176.

84. Para.200. The Court noted that the “10% of worldwide turnover” ceiling of Art.15(2) Reg.17 is the ultimate measure for the proportionality of the fine.

85. Para.205.

86. See also, generally, *Cheil*, paras 76–103.

87. *Cheil*, para.139.

88. With thanks to Anne Vallery and Naboth Van den Broeck for their assistance with this section.

89. Case T-65/98, *Van den Bergh Foods v Commission*, Judgment of October 23, 2003; Court Press Release 93/03.

Van den Bergh (a Unilever subsidiary) infringed Arts 81 and 82 EC by supplying freezer cabinets for impulse ice-cream with the condition that they were not to be used for competing ice-cream products.

It may be recalled that Van den Bergh (formerly HB Ice Cream Ltd, “HB”) is the leading manufacturer of impulse ice-cream products (“single-wrapped ice-creams for immediate consumption”) in Ireland. For some time, retailers had been supplied with freezer cabinets, in which HB retained ownership, for no direct charge, provided that they were used exclusively for stocking and displaying HB ice-cream products. In a sense, HB had created the ice-cream market in this way, by providing storage opportunities for its products, and it had been very successful.

In 1989, Masterfoods Ltd (a subsidiary of Mars Inc, “Mars”) entered the Irish ice-cream market. Some Irish retailers started to place Masterfoods’ products in their HB freezers, which led HB to enforce the exclusivity provision in its distribution agreements. Masterfoods then brought an action in the Irish High Court, claiming that the HB exclusivity clause infringed (what were then) Arts 85 and 86 EC. In May 1992, the Irish High Court found *for HB*, and, in September 1992, Mars appealed against this judgment to the Irish Supreme Court.

Masterfoods also lodged a parallel complaint with the European Commission, as did Valley Ice Cream Ltd. In 1998, after a first set of negotiations and a settlement, the Commission pursued its proceedings again and decided that HB’s distribution arrangements infringed Arts 85 and 86 EC. The Commission also required HB to lift the freezer exclusivity imposed on the retailers for outlets where owning a freezer or taking a second freezer from a competitor was not an option.<sup>90</sup>

HB appealed (and obtained suspension of the Commission’s decision). This judgment relates to that appeal.

As a result of the Commission’s decision, the Irish Supreme Court decided to stay proceedings and to refer questions to the ECJ, resulting in the landmark *Masterfoods I* ruling. The ECJ held there that where a national court is considering issues that are already subject to a Commission decision, the Court may not reach a judgment which conflicts with that decision, irrespective of the fact that the Commission decision in question had been appealed to the CFI.

In HB’s appeal before the CFI, the *main issue* was *foreclosure under Art.81(1) EC*.

*HB argued that the Commission had over-estimated the degree of foreclosure on the relevant market resulting from its distribution agreements with retailers.* Notably, HB pointed out that its

distribution agreements did not involve *outlet exclusivity*; they merely prevented retailers from using the *freezer cabinets* provided to them by HB “free of charge” for competing ice-cream products. Retailers were free to install another freezer, paid for by them or supplied by another ice-cream supplier.

The Court accepted this to some extent, noting that the freezer exclusivity clause did not entail, “in formal terms, an exclusive purchasing obligation whose object is to restrict competition”.<sup>91</sup> However, the Court went on to look at the overall circumstances to see if, in fact, the freezer exclusivity resulted in outlet exclusivity and, if so, whether the Commission had correctly quantified the degree of foreclosure brought about by these clauses. Thus, the Court took into consideration all the similar agreements entered into by Van den Bergh and its competitors, as well as the economic and legal context on the market.

On this approach, the Court essentially confirmed the Commission’s decision. In other words, the Court considered points such as: the fact that HB had held a dominant position on the market for impulse ice-cream in Ireland for a long time; the high degree of recognition of the HB brand; HB’s product range in Ireland; and the fact that freezers were provided without charge. The Court found that retailers were generally space-constrained, and that the outlets which are the most important for the sale of impulse ice-cream are generally small in surface and have little available space for an additional freezer.

The Court also noted that retailers had only rarely opted to replace freezer cabinets supplied by HB (even though the agreements could be terminated at any time with two months’ notice). In practice, it appeared that such agreements lasted a long time, on average eight years.

The Court also found that there was customer demand for competing ice-cream brands. This was evidenced by the way that Masterfoods had achieved a numeric distribution of some 42 per cent before HB reacted to enforce its freezer exclusivity clause, resulting in a fall to 20 per cent. Other competitors had also obtained a high share in supermarket sales in Ireland, while only achieving a low figure in retailers.<sup>92</sup>

The Court concluded that the Commission had rightly found foreclosure in all the circumstances. HB’s system was found to have had a considerable dissuasive effect on retailers with regard to the installation of their own freezer cabinet or that of another manufacturer, and this had “tied” some 40 per cent of sales outlets.<sup>93</sup>

*HB also argued that there was a (balancing) “rule of reason” in Art.81 EC which applied here: the*

91. Para.80.

92. Paras 93 and 95.

93. Para.98.

90. [1998] O.J. L-246/1.

economic benefits of its system of freely providing freezer cabinets outweighed any possible negative effects that the (*de facto*) outlet exclusivity would have on competition. The Court disagreed, stating that the existence of such a rule in Community competition law was not accepted:

“It is only within the specific framework of Article 85(3) that the pro and anti-competitive aspects of a restriction may be weighed. Article 85(3) would lose much of its effectiveness if such an examination had already to be carried out under Article 85(1) ...”<sup>94</sup>

The Court also considered that the economic advantages of the supply of freezer cabinets to retailers were negated by the related exclusivity clause<sup>95</sup> and therefore agreed with the Commission that the first condition of Art.85(3) EC (economic progress) was not met.<sup>96</sup>

As regards the finding of an infringement of the former Art.86 EC, the Court agreed with the Commission that HB was an unavoidable partner for many ice-cream retailers in Ireland and that it had a dominant position on that market.

As regards whether there was an *abuse*, the Court accepted HB’s argument that the provision of freezer cabinets on a condition of exclusivity was a standard practice on the relevant market. However, importantly, the Court found that whereas in a normal competitive market those agreements would have been concluded in the interest of the two parties and could not be prohibited as a matter of principle, those considerations could not be accepted without reservation on a market where, because of the dominant position held by a trader, competition is already restricted.<sup>97</sup>

For a dominant company to restrict 40 per cent of outlets in this way was an abuse.<sup>98</sup>

As a result, the Court found that HB had effectively foreclosed competing ice-cream suppliers from entering the market, contrary to both Arts 81 and 82 EC.

Finally, the Court found that the exercise of HB’s property rights could be restricted in the circumstances, and considered that the Commission did not infringe the principle of subsidiarity by bringing the case, in spite of the Irish proceedings, since there were parallel issues in various other Member States.<sup>99</sup>

A few initial comments may be made.

First, it is interesting to see this result through *foreclosure*. One might have expected the Commission to bring a case like this through essential facility doctrine (*i.e.* arguing that the “freezers” were essential in that sense). However, instead, the case is brought on a narrow market definition

resulting in a finding of foreclosure. There is no discussion of “essential facility”, and it appears that the Commission deliberately avoided it, probably because it involves such a high standard of proof now. In any event, a similar substantive result appears to have been achieved.

Secondly, this is complex litigation, since the market information required for a good assessment is extensive. Notably, there were three major reports focusing on distribution and foreclosure, and, as is well known now, the case has taken (too) many years. The decision turned on many key facts, for example that access to the rest of the market beyond the 40 per cent “tied” share was also restricted. One would think that in other cases, an exclusivity of supply of 40 per cent might be accepted, if justified for particular supply or production reasons. As already noted, market definition was central. If the market had been for ice-cream as a whole, super-market access (which competitors had) would have undermined the whole case.

Thirdly, one may question the result that HB will not be allowed to offer free ice-cream freezer cabinets to retailers in exchange for exclusivity, while its smaller rivals may be allowed to do so (not that small really, given that some may include Mars and Nestlé). The judgment does not appear entirely clear on this. On the one hand, it appears that parallel exclusive systems *were* considered to contribute to the overall foreclosure effect.<sup>1</sup> On the other, the Court appears to have found that the other freezer exclusivity systems did not contribute significantly to foreclosure of the relevant market.<sup>2</sup>

In any event, this underlines the difficult position for dominant companies, which apparently cannot rely on being able to use “standard” practices, even though they may be “normal” competition, if the effect is considered abusive. The Court’s view is that ordinary business practices may not be “competition on the merits” for the dominant—hard where the dominance in question was apparently built up through the very creation of the market.

### TACA<sup>3</sup>

In September 2003, the CFI rendered its judgment in the *Atlantic Liner Conference Case*,<sup>4</sup> annulling fines of €273 million which the Commission had imposed against the members of the Trans-Atlantic Conference Agreement (“TACA”) under Art.82 EC. The TACA members operated shipping liner services between northern Europe and the US, and had filed the agreement setting up the conference for individual exemption with the Commission.

94. Paras 106–107.

95. Para.115.

96. Para.144.

97. Para.159.

98. Para.160.

99. Para.198.

1. Paras 110–111.

2. Para.172.

3. With thanks to Axel Gutermuth for his assistance with this section.

4. Joined cases T-191/98 and others, *Atlantic Container Line AB v Commission*, Judgment of September 30, 2003; Court Press Release 78/03.

The Commission refused to grant an exemption under Art.81(3) EC, but could not impose fines for violating Art.81 EC, because Art.19(4) of the maritime transport Reg.4056/86 excludes such fines when an agreement was filed for exemption. However, the Commission found that the TACA members also abused their *collective dominant position*, and therefore fined them.

The CFI upheld the Commission's decision, finding that the TACA infringed the competition rules and the Commission's refusal to grant an exemption under Art.81(3) EC. The Court also upheld the Commission's finding that the restrictions in relation to service contracts constituted an abuse, but set aside a second finding concerning measures inducing competitors to join the conference for lack of evidence and infringement of the rights of the defence.

However, the fines were set aside essentially because of the notification and mitigating circumstances, including the co-operation of the companies and legal uncertainty over the finding of abuse and the potential penalties.

Details of the (extensive) judgment are important for the maritime transport industry, as it clarifies various points of the application of EC competition law in this area.

Three points are of more general importance.

First, the judgment holds the Commission to a high standard of proof. In the CFI's view, the Commission had not proved "to the requisite legal standard" that two shipping companies previously competing with TACA joined the conference because they were induced to do so by the existing TACA members. The Commission had found such inducement to have taken place and qualified it as an "abusive alteration of the competitive structure of the market" by the collectively dominant TACA members. The CFI found, however, that the evidence did not exclude that the two companies joined for commercial considerations and their own interest. In doing so, the CFI effectively reconsidered the evidence in full.<sup>5</sup>

Secondly, the CFI confirms its strict stance against violations of the right of defence. The CFI found that the Commission had never informed the defendants, in the Statement of Objections or otherwise, that it intended to use certain documents to prove a *violation of Art.82 EC*. Existing case law prohibits the use of evidence under such circumstances unless the defendant could reasonably have inferred what negative conclusions the Commission intended to draw from the evidence. Here, the defendants themselves had submitted the documents in question in response to Commission requests for information which sought to determine the applicability of *Art.81(3) EC*. The CFI held that this was not sufficient to warn the defendants that

the documents could be used to prove violations of Art.82 EC and therefore excluded the use of these documents.<sup>6</sup>

Thirdly, the judgment holds that under the maritime transport Regulation, the application for individual exemption under Art.81 EC shields the applicant also from fines under Art.82 EC. This conclusion was highly disputed before. The ruling will, however, lose its significance with the abolition of the notification system, where immunity from fines can no longer occur.<sup>7</sup>

### Other

For reasons of space, given the amount of legislation this year, the author has had to be more selective on cases. The other main judgments this year were as follows:

- In March 2003, the CFI gave its ruling in the *FENIN* case.<sup>8</sup> The Court found that an association of undertakings which markets medical goods and equipment for use in Spanish hospitals did not act as an economic "undertaking" (and therefore was not found to have abused a dominant position by taking a long time to pay its debts to its members—apparently some 300 days).
- In March 2003, the CFI annulled the fines which the Commission had imposed in the *FETTCSA* (Far East Trade Tariff Charges and Surcharges Agreement) case, on the basis that they were time-barred.<sup>9</sup>
- In June 2003, the CFI ruled on the *Coe Clerici Logistics* case.<sup>10</sup> This concerns an appeal against a decision by the Commission rejecting a complaint by a ship transporter of coal for ENEL. The transporter had applied for the right to perform self-handling on a particular quay in the port of Ancona linked to an ENEL depot. Another company had been given a concession over that quay. The case involved an alleged infringement of Arts 82 and 86 EC. The CFI dismissed the application.
- In September 2003, the ECJ upheld the CFI's judgment in the *Volkswagen* (parallel imports) case.<sup>11</sup>
- In October 2003, the ECJ generally upheld the CFI's judgment on the Commission's *Steel Beams* decision, imposing €104 million in fines on various steel-makers. However, the CFI annulled the judgment as regards Arbed

6. Paras 159–188.

7. Paras 1440–1474.

8. Case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission*, Judgment of March 4, 2003.

9. Case T-213/00, *CMA CGM*, Judgment of March 19, 2003.

10. Case T-52/00, *Coe Clerici Logistics SpA v Commission*, Judgment of June 17, 2003.

11. Case C-338/00P, *Volkswagen AG v Commission*, Judgment of September 18, 2003.

5. Paras 1268–1326.

SA and the Commission's decision in so far as it concerns that undertaking. The ECJ also partially annulled the judgment against Siderúrgica Aristrain Madrid, and referred the matter back to the CFI to determine the amount of the fine that Aristrain is still required to pay.<sup>12</sup>

- In October 2003, the CFI essentially upheld the Commission's decision in the *Opel* (parallel imports) case, although it reduced the fine from €43 million to €35.5 million.<sup>13</sup>

12. Case C-176/99P and others, *Arbed SA v Commission*, Judgments of October 2, 2003; Court Press Release 82/03.

13. Case T-368/00, Judgment of October 21, 2003; Court Press Release 91/03.

**In the second half of this article, John Ratliff surveys:**

- Commission cases on cartels, horizontal co-operation, distribution and Articles 82/86 EC (including the *Vitamins* and *Nintendo* decisions published this year).
- The current policy focus on opening up the liberal professions to more competition and the Commission's consultation to see if reform of the Council liner conference block exemption may be justified.
- Areas of specific interest, notably several Commission cases aiming to foster competition in gas supply in various parts of Europe.