Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 1)

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Competition law; EC law

This article is designed to offer an overview of the major events and policy issues related to arts 81, 82 and 86 EC from November 2008 until the end of October 2009.[1] The article is divided into an overview of:

- legislative developments;
- European Court judgments;
- European Commission decisions;
- the Commission's current sectoral review and
- current policy issues.

Legislative developments and European Court judgments are included in Part 1. The other sections will be included in Part 2 which will be published in the next issue of I.C.C.L.R.

The main themes of the year are shown in Box 1.These are discussed in the appropriate sections below and in Part 2.

Box 1

- **Major themes/issues in 2009**
  - — Article 82 EC ''Guidance Note''
  - — Important judgments on ''restriction by object''
    - Irish Beef, T-Mobile, GlaxoSmithKline (Spain)
  - — Structural remedies, e.g.
    - Through commitments in E.ON electricity and RWE Gas
    - Through decisions in Greek Lignite
  - — Cartel judgments on recurrent issues
    - What has to be in a statement of objections?
    - Parent/subsidiary liability (Akzo Nobel)
    - Additional fining for actual impact
  - — Fines in billions (Intel, E.ON/GdF (Megal))
  - — Review of Regulation 1/2003
  - — Competition and the internet
    - In the new Proposed Vertical Guidelines and Vertical Restraints Block Exemption
    - In the Online Commerce Roundtable

Legislative developments

Box 2

- **Legislation/Notices (Adopted)**
  - — Article 82 EC Guidance Notice
    - Not binding law, but likely to be highly persuasive
    - Foreclosure assessment, with focus on circumstances and whether an ''as efficient'' competitor could compete with the dominant company
    - Sales below long run average incremental cost (LRAIC) as a key benchmark
    - Still need to consider case law
  - — New Commission Regulation on liner shipping consortia

Adopted

Article 82 EC Guidance Note

In February 2009 the European Commission published a ''Guidance Note'' on its enforcement priorities in applying art.82 EC to abusive exclusionary conduct.[2]

This was the result of a long debate over some years about how art.82 EC should be enforced, with many arguing for a more effects-based system, while others defended a presumptive ''per

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1. The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the Commission's website are to DG Competition's specific competition page: *http://ec.europa.eu/comm/competition/index_en.html* [Accessed December 8, 2009].

2. [2009] OJ C45/7; the draft was put on to the Commission's website in December 2008.

se'' approach given the abuse concept, which applies where the structure of competition has already been weakened by the existence of a dominant market participant.

In the end, interestingly, the Commission decided to produce a ''Guidance Note'', not a set of ''Guidelines''. It is thought that this is partly to give the Commission more scope to state its perception of how it wishes to enforce now (even though that may be different to the existing EC case law).

Nevertheless, in practice, one would expect both the Guidance Note (and the DG COMP Staff Discussion Paper[3] which preceded it) to be highly relevant sources for giving advice in this area, although patently neither is binding law. It is also still necessary in giving advice to consider the established principles in the EC case law (which the European Courts have confirmed frequently in recent years).

It appears that the Commission's enforcement is now more focused on the more relevant economic questions, so this move towards a more ''modern'' economic approach to art.82 EC is generally welcome. However, that said, we are now also seeing a degree of backlash from in-house and external counsel, arguing that competition law in this area (and others) has become too complex to apply quickly and cost-effectively. In short, the underlying debate of recent years continues.

The Guidance Note follows the structure of the DG COMP Staff Discussion Paper, explaining the Commission's general approach to exclusionary conduct and then focussing on certain specific forms of abuse: exclusive dealing; tying and bundling; predation; and refusals to supply and margin squeezing.

General approach

The Commission starts by emphasising that this ''document'' is not intended to constitute a statement of the law[4] (even though, in practice, it may be expected to have considerable persuasive effect before the Commission, national competition authorities (NCAs) and national courts). The Commission emphasises also that its enforcement is focussed on protecting ''competition on the merits'' and an ''effective competitive process'' (rather than competitors). This may well mean that ''competitors who deliver less in terms of price, choice, quality and innovation will leave the market''.[5]

In outlining its general approach to exclusionary conduct, the Commission notes that dominance essentially relates to the degree of competitive constraint on the company in question. The Commission recalls the case law that a company may be found dominant, even if some actual or potential competition remains[6] (which is often controversial in practice), the key issue being whether a company can profitably increase prices above the competitive level for a significant period of time (normally two years).[7]

Market shares continue to be considered a ''useful first indication'' of market power, although the Commission is clearly emphasising that a more detailed assessment of competitive structure (and actual and potential competitive constraints) is necessary. For example, the Commission suggests that usually there will *not* be dominance if an undertaking's market share is below 40 per cent, but the Commission might look at such a case if there were evidence of competitors facing serious capacity limitation.[8]

Importantly, the Commission notes that it will take into account potential competition if expansion or entry is ''likely, timely and sufficient''. ''Likely'' here means that it must be sufficiently profitable for the competitor or entrant, taking into account barriers to expansion or entry, the likely reactions of the allegedly dominant company and the risks and costs of failure.[9] ''Timely'' means that competitive reaction must be sufficiently swift to deter or defeat the exercise of substantial market power. ''Sufficient'' means that expansion or entry should be of such a scale as to be able to deter any attempt to raise prices by the allegedly dominant company. Barriers to expansion or entry may be legal (i.e. tariffs or quotas), but may also be advantages specifically enjoyed by the dominant undertaking (such as economies of scale).[10]

Buyer power will also be considered as a constraint, but not if it only ensures that ''a particular or limited segment of customers is shielded'' from the dominant company's market power.[11]

In assessing what is anti-competitive foreclosure the Commission notes that its aim is to assess whether, as a result of foreclosing practices, the dominant company is ''likely'' to be in a position to profitably increase prices.[12] In doing so the Commission will consider various aspects: the position of the dominant company and its competitors (including whether these are the closest competitors to the dominant undertaking or systematic price cutters); the conditions in the market; and whether competitors may have

3. Made available on the Commission's website in December 2005; see also Ratliff ''Major Events and Policy Issues in EC Competition Law 2005–2006'' [2007] I.C.C.L.R. 93.
4. Article 82 EC Guidance Note, para.3.
5. Article 82 EC Guidance Note, para.6.
6. Article 82 EC Guidance Note, para. 10.
7. Article 82 EC Guidance Note, para.11 and fn.6.
8. Article 82 EC Guidance Note, para.14.
9. Article 82 EC Guidance Note, para.16.
10. Article 82 EC Guidance Note, para.17.
11. Article 82 EC Guidance Note, para.18.
12. Article 82 EC Guidance Note, para.19.

''realistic, effective and timely counter-strategies'' to the dominant company.[13]

Importantly, the Commission also states that it may ''include the consideration of the *possible selectivity* of the conduct in question'' (emphasis added); and consider internal documents which contain direct evidence of a strategy to exclude competitors (both often controversial issues, as dominant companies argue selective action and aggressive comments in documents are just evidence of normal competition).

The Commission says usually it will consider the situation with the conduct in question in place and ''the counterfactual'' without it (an increasing trend among competition authorities recently).

However, in some circumstances, the Commission states that it may *not* carry out a detailed assessment. Notably, if it appears that the conduct can only raise obstacles to competition and creates no efficiencies (such as paying a distributor or customer to delay the introduction of a competitor's product).[14] In short, the ''restriction by object'' or ''presumptive per se'' concept remains for some types of conduct.

Then, in an important section, the Commission states that it will normally only intervene as regards price-based exclusionary conduct ''where the conduct concerned has already been, or is capable of, harming competition from competitors *which are considered to be 'as efficient' as the dominant undertaking*''.

However, in certain circumstances the Commission states that it may also intervene to protect a ''less efficient'' competitor (i.e. where, in the absence of the abusive practice, the competitor may enhance its efficiency through network and learning effects, so a more dynamic view should be taken).[15]

The Commission states that it will look at the economic data relating to costs and sales prices and, in particular, whether the dominant company is engaging in below cost pricing.[16]

Where available the Commission will use information on the costs of the dominant company itself. The Commission states that it will likely use two cost benchmarks: average avoidable cost (AAC) the (usually variable) costs that the company would have avoided if it had not produced the amount of product allegedly the subject of the abuse; and long-run average incremental cost (LRAIC), the average of all the variable and fixed costs that a company incurs to produce a particular product.

Failure to recover AAC is considered to show that the dominant company is sacrificing profits in the short term and that an equally efficient competitor cannot supply the targeted customers without loss. Failure to recover LRAIC is considered to show that the dominant company is not recovering all the (attributable) fixed costs of producing the goods in question and that an equally efficient competitor could be foreclosed. (LRAIC is usually above AAC.)

If, on this basis, an as efficient competitor is found able to compete effectively with the dominant company, the Commission will, in principle, not take the case further. However, if an as efficient competitor cannot do so, the Commission says it will look at the wider circumstances going to an assessment of anti-competitive foreclosure.

The Commission also states here (and in its treatment of specific abuses) that it will consider claims by a dominant company that its conduct is objectively necessary, or gives substantial efficiencies which outweigh any anti-competitive effects on consumers.[17] However, the latter has to be shown in a similar way to art.81(3) EC, so is still a high threshold for dominant companies (particularly insofar as residual competition has to be shown).

Specific forms of abuse

As regards exclusive dealing, the Commission says that it will focus its attention on cases where there are many customers and the exclusive purchasing obligations of the dominant company, taken together, have the effect of preventing entry or expansion of competitors.[18]

The Commission makes a distinction between competitors who can compete for the full supply of customers and those who cannot. In the former case, the Commission considers exclusive purchasing may not be a concern, unless switching of supplier is difficult because of obligations of long duration. In the latter case, the Commission states that there may be foreclosure, even with obligations of short duration.[19]

As regards conditional rebates, again the Commission makes the distinction as to whether a competitor can supply a customer's full demand or not, noting that a dominant company may foreclose by linking the contestable and non-contestable portions of the customer's demand.

Retroactive rebates (on all of a customer's purchases) generally are considered foreclosing. The Commission notes that it will look at the rebate system, rather than the possible foreclosing effect on the last purchased unit before a rebate threshold.[20]

13. Article 82 EC Guidance Note, para.20.
14. Article 82 EC Guidance Note, para.22.
15. Article 82 EC Guidance Note, para.24.
16. i.e. Article 82 EC Guidance Note paras 23–27.
17. Article 82 EC Guidance Note, para.28.
18. Article 82 EC Guidance Note, para.34.
19. Article 82 EC Guidance Note, para.36.
20. Article 82 EC Guidance Note, para.40.

Again, the Commission states that it will look at whether the rebates will foreclose as efficient competitors, focusing on the effective price the competitor would have to offer a customer to match the loss of a conditional rebate offered by a dominant company, if a customer would switch some of its demand (called ''the relevant range'') to the competitor. The ''relevant range'' for rebates only on purchases over a certain threshold (incremental rebates) is those incremental purchases; the ''relevant range'' for retroactive rebates may be wider, focusing on what a customer may realistically switch to a competitor.[21]

Importantly, the Commission states that as long as the effective price over the relevant range which the competitor has to match remains consistently above the LRAIC of the dominant company, that will normally allow an as efficient competitor to compete profitably and the rebate may not be considered anti-competitive.[22] If the effective price is below the AAC of the dominant company the Commission will generally consider the rebate scheme anti-competitive. If the effective price is between the LRAIC and the AAC the Commission will investigate further, notably looking at possible counter-strategies of competitors.

The Commission will also look at whether the rebate threshold is individualised or standardised.

In the section on tying and bundling there is discussion about multi-product rebates, suggesting that if the price offered by the dominant company for the individual products in the bundle remains above LRAIC, the Commission normally will not intervene. Further, that the Commission will look at ''bundled competition'' by competitors (i.e. where competition is at that level by groups of products) where applicable.[23]

Finally, the Commission outlines its position on predation and refusals to supply/margin squeezing. In other words, as regards predation the Commission states it will generally intervene where there is evidence of a dominant company deliberately incurring losses, or foregoing profits, in the short term so as to foreclose actual or potential competitors, with a view to strengthening or maintaining its market power, thereby causing consumer harm.[24]

As regards refusals to supply the Commission will consider intervention if: (1) the refusal relates to a product or service that is objectively necessary to compete effectively on a downstream market; (2) the refusal is likely to eliminate competition on the downstream market; and (3) refusal is likely to lead to consumer harm.[25] This may include action concerning secondary markets on which a dominant company is *not* dominant.[26]

We shall have to see how these rules are applied in practice. As noted above, the general impression is that more precise economic assessments will be made to have a better understanding of likely effects and, in some cases, a close review of costs, prices and profit will be required. It will be apparent that there may be significant scope for discussion but that, under the Guidance Note at least, dominant companies should have more flexibility.

However, it will also be apparent that we will still have to consider the European Court's case law, for example, on the dominant company's right to defend itself (which is not specifically dealt in the Guidance Note); and insofar as some case law principles are not discussed here (e.g. the principle that discounts of a dominant company have to be cost-justified).

Interestingly, it looks like the Commission may also do cases twice now in its decisions, once on the case law rules and again on the more ''effects-based'' approach, where that appears appropriate.

Revision of the Liner Shipping Consortia Block Exemption

In September 2009, the Commission adopted a new Regulation to replace the liner shipping consortia block exemption (BE), Regulation 823/2000. The new BE, Commission Regulation 906/2009, will enter into force in April 2010 and expire in 2015.[27]

It may be recalled that the Commission published a draft regulation and a technical paper in October 2008, asking interested parties for comments. The review process had two main objectives: to take account of the repealed Regulation 4056/86 on liner conferences and to move towards applying the same competition rules to the transport sector as apply to other sectors.

In March 2009, the EU Council had also adopted a codified version of the enabling regulation for Commission block exemptions for liner shipping consortia, Council Regulation 246/2009.[28]

The main changes in the new Commission Regulation are the following:

- First, the Regulation will apply to *all* liner shipping services, containerised or not.
- Secondly, the list of exemptions has been revised, deleting all activities related to

21. Article 82 EC Guidance Note, paras 41–42.
22. Article 82 EC Guidance Note, para 43.
23. Article 82 EC Guidance Note, paras 59–61.
24. Article 82 EC Guidance Note, para.63.
25. Article 82 EC Guidance Note, para.81. On margin squeezing see para.80.
26. Article 82 EC Guidance Note, para.63 and fn.2.
27. [2009] OJ L256/31; IP/09/1367 and MEMO/09/420, September 28, 2009.
28. [2009] OJ L79/1.

conferences, but keeping exemptions for capacity adjustments as long as they are indispensible to respond to fluctuations in supply and demand.

- Thirdly, the Commission has reduced the market share threshold for application of the BE from 35 per cent to 30 per cent in the relevant market in which the consortium operates.
- Fourthly, the new Regulation prolongs the exit-clauses and lock-in periods in case a member wishes to withdraw from a consortium. The Commission considers this better reflects current market practices (including the high investments undertaken) while allowing carrier flexibility.[29]
- Finally, the new Regulation notes that the Commission may withdraw the benefits of the block exemption, where the Commission finds that a consortium has negative effects on competition. It appears here that the Commission has noted that there are many links between consortia and/or their members operating in the same market and wanted to make it clear that it might withdraw the block exemption if there were concerns about them.[30]

Proposed

Box 3

- **Legislation/Notices (proposed/under review)**
  - — Commission proposals on new Vertical Restraints Block Exemption and new Vertical Guidelines
    - Focus on internet rules (new hard core restrictions)
    - Suggested new sections on upfront access payments and category management
    - N.B. References to "facilitating collusion" and "softening competition"
  - — Commission proposals on motor vehicle block exemption
    - Extend for three years, then include cars in the general vertical restraints block exemption
    - With specific rules on the after market and "price discipline"?
  - — Commission considering new insurance block exemption
    - Narrower focus on information exchange and insurance pools (not standard conditions and rules on security devices)

Vertical Restraints Guidelines Review

In July 2009, the Commission issued drafts of a revised Vertical Restraints Block Exemption (the Proposed VRBE) and Guidelines on Vertical Restraints (the Proposed Guidelines).[31] It may be recalled that the existing BE, adopted after much debate in December 1999, will expire in May 2010. Comments were sought by the end of September 2009 (and it is understood many have been supplied).

Both documents follow the same pattern as before, i.e. taking a far more economic approach than that before 1999, seeking a single, general BE (save for motor vehicle distribution, but see below) and then setting out the Commission's views as to the issues and methodologies involved. In general therefore, the Commission's approach remains welcome.

The Proposed VRBE would apply until May 2020. In the Proposed VRBE, it is stated that the BE should only be available where both the supplier and the buyer have less than 30 per cent of the relevant markets on which they operate.[32] Previously, to see if the BE applied, generally you looked only at the supplier's market share (the exception being in case of exclusive supply, where a supplier only supplied one buyer in the EU). In each case, the sales market of the supplier and buyer is intended (not the purchasing market).[33]

In the Proposed Guidelines, various changes are suggested. For example, as regards agency agreements, the Commission indicates that, if an agent has to take on other activities than the sale of the goods concerned, such as after-sales or repair services, or activities in other product markets (but not as an agent) and these activities are indispensable to the supply of the goods, then this may be a form of risk taking by the agent, which makes him "independent", not merely auxiliary to the principal.[34]

As regards the definition of vertical agreements, the Commission takes a controversially broad view, for example, suggesting that an agreement may be found from the "unilateral policy of one party" which "receives the acquiescence of the

29. Commission Regulation 906/2009 art.6 and Recital 11.
30. Commission Regulation 906/2009 Recital 12.
31. IP/09/1197, July 28, 2009; the texts are available on the Commission's website.
32. Proposed VRBE Recital 8 and art.3; and Proposed Guidelines, paras 23 and 83.
33. Proposed Guidelines, para.83.
34. Proposed Guidelines, paras 14–16, referring, among other things, to *DaimlerChrysler* (T-325/01) [2005] E.C.R. II-3319 at [113].

other party''[35], and that tacit acquiescence may be inferred from a supplier's system of monitoring and penalties.

It also appears that, while in principle against resale price maintenance (rpm), the Commission wants to show more open-mindedness, in particular after the American *Leegin* case,[36] ruling that rpm was not per se illegal in US law. Thus the Commission suggests on the one hand that rpm is generally a ''hard core'', severe restriction of competition, which is deemed within art.81(1) EC and unlikely to qualify for art.81(3) EC clearance.[37] Later, the Commission also outlines six reasons why rpm is harmful. On the other hand, the Commission accepts that rpm might be considered positive in some situations, e.g. as part of a new brand launch or product market entry, or in the case of short-term low price campaigns, or to avoid that a large distributor uses a particular brand as a loss leader.[38]

In announcing the proposed rules, the Commission emphasised that increased internet sales were one of the main changes in the last 10 years. Here the Commission deals with a number of important and controversial points.[39] For example:

- The Commission maintains its view that general internet advertising, which could reach customers in other territories, but which is a reasonable way of reaching customers inside a territory is considered passive. This would be where it is attractive to undertake the investments, even if the advertising did not reach outside the territory.
- Controversially, the Commission suggests that the language options in the website play no role, i.e. that is still not considered active selling.
- The Commission also states that requiring distributors to re-route customers from another territory who access their sites, or to terminate transactions in the event of credit card details showing foreign addresses are hard core restrictions.
- Limiting the proportion of overall sales made by a distributor on the internet is also a hard core restriction (although a distributor could be required to sell a certain amount of products offline to ensure an efficient operation of its physical ''bricks and mortar'' shop).
- Requiring a distributor to pay a higher price for products intended to be resold by the distributor online, than for products intended to be sold offline is also a hard core restriction (although a fixed fee buyer support for offline or online sales efforts would be accepted).
- Recognising the ''free rider'' problem in distribution, the Commission also confirms that in selective distribution, distributors can be required to have a ''bricks and mortar'' shop before engaging in online distribution and suggests that in certain cases an outright ban on internet sales may be necessary, although a supplier cannot reserve to itself sales on the internet.
- The Commission also states that criteria for online sales should be ''equivalent'' to those for offline sales, although accepting that they may be different. They should ''pursue the same objectives and achieve comparable results'' and differences between the two should be justified.

Much of this is controversial with, at the two extremes, some wanting everything available for sale on the internet and others wanting the clear right for a producer (e.g. of luxury goods) not to sell its goods, or allow its goods to be sold online at all.

In between, many suppliers are simply trying to balance their objective to be present in both offline and online channels, while recognising the different sales services provided. In that context much of the detail is being challenged, for example, why buyer support has to be a ''fixed fee'' when remuneration for sales services normally is through discounts (for ordinary operational reasons, rather than some anti-competitive purpose).

The Commission also notes a ''launch exception'', another version of which was set out last time.[40] The Commission states that when a distributor is selling a new brand, or is the first to sell an existing product in a new market, it may have to make investments justifying a ban on active and passive sales into the territory for the first two years of such sales.[41]

There are various references in the Proposed Guidelines to concerns about arrangements which could ''facilitate collusion'' and the ''softening of competition'' among suppliers or among buyers. Some of that was there before, but the impression given is that this has been increased in the text.[42] This is also controversial. On the one hand, it may be said that the long discussion-based style of the Vertical Guidelines is very useful. However, on the other hand, one may argue that the Guidelines

35. Proposed Guidelines, para.25, referring to *Volkswagen* (C-74/04 P) [2006] E.C.R. I-6585 and *Bayer* (T-41/96) [2000] E.C.R. II-3383 (and later, [109] where the Commission states: ''The existence of implicit restraints may be derived from the way in which the agreement is implemented by the parties and the incentives that they face'').

36. *Leegin Creative Leather Products v PSKS* 1275 CT 2705 (2007).

37. Proposed Guidelines, paras 47–48.

38. Proposed Guidelines, paras 219–221.

39. Proposed Guidelines, paras 51–54 and 57.

40. See Guidelines on Vertical Restraints, OJ C291/1, October 13, 2000, point 119(10).

41. Proposed Guidelines, para.56.

42. e.g. Proposed Guidelines, para.96.

are designed to help in ''hard law'' review of agreements for compliance, not raise possible fears about all sorts of possible vertical/horizontal issues.

Interestingly, the Commission also notes the importance of in-house production and supply, in competition assessment, in particular noting that if a producer of goods also sells products of others as distributor, these should also be included in the market share assessments.[43]

There is also new and controversial discussion in the Proposed Guidelines about ''upfront access payments'' by suppliers to retailers (payments for first listing of products on shelves) and ''category management'' agreements[44] (agreements where a supplier advises a retailer on how best to organise a product category on its shelves). These are topics which have been debated for many years, but usually in buyer power studies or in relation to oligopoly issues.

As regards upfront access payments the Commission's position is that these should be block-exempted when both supplier's and buyer's market shares on their respective downstream markets do not exceed 30 per cent. However, above that, the Commission refers to its exclusive supply discussion, the idea being that if a supplier has paid such fees, it will be more likely to concentrate its supplies on the distributors concerned and not supply others. The Commission states that it is also concerned about such payments raising barriers to entry for smaller entrants; and (again) ''facilitating collusion'' between suppliers, because they will raise prices to recover the fees paid.[45]

As regards category management, again the Commission says they should be block-exempted up to the new proposed supplier and buyer 30 per cent market share ceiling. However above that, again the Commission expresses concern that, for example, the category manager advising the distributor may limit or disadvantage the supplies of competitors; and that the distributor may have incentives to exclude some suppliers, if it also supplies private label products itself. Again, the Commission talks of such practices ''facilitating collusion'' between distributors (if they have the same category manager) and among suppliers (if they exchange commercially sensitive information).[46]

It should also be borne in mind that this is in a context where the Commission has had a Task Force on the Food Supply Chain[47] and NCAs have been bringing many cases at national level on food retail issues and ''hub and spoke'' style collusion in general.

Overall, one may question whether these sections really belong in the Proposed Vertical Guidelines, which were intended to focus on distribution agreements, rather than ''just any vertical restraint issue''.

More specifically, upfront access fees have been accepted by competition authorities as reasonable, given the risks of launching new products for distributors. Moreover, it has been noted by the Commission itself in *Procter & Gamble/Gillette*[48] that category management leads to better distribution.[49]

There may be *more specific* anti-competitive practices in these contexts (e.g. abuse of dominant position, or horizontal collusion), but those do not make either practice in itself wrong. Moreover, given the seriousness of such issues (and the fact that category advisers may be leading suppliers with significant market share), there is already significant compliance work in this area.

In short, it is far from clear that block exemption up to 30 per cent, with otherwise a fairly negative list of concerns is very helpful. At least, if these sections are retained, one would hope for more recognition of the positive aspects of the practices concerned and more distinction between what appears lawful and what may not be.[50]

Review of Motor Vehicle Block Exemption Regulation

In July 2009, the Commission issued a Communication[51] outlining the future policy options for the motor vehicle sector, after the expiry of the current block exemption (MVBE), Regulation 1400/2002, in May 2010.[52] The Communication, together with an impact assessment report, is available on the Commission's website. Comments were requested by September 25, 2009.

The Commission started the review process of the current MVBE in 2007 with a market survey, followed by an evaluation report published in May 2008 and an industry ''roundtable'' in February 2009.[53]

In the Communication the Commission draws a basic distinction between the primary market for the sale of new motor vehicles and the market for after-sales services and repairs, the so-called ''after-market''.

43. Proposed Guidelines, para.91.
44. Proposed Guidelines, paras 199–209.
45. Proposed Guidelines, paras 199–204.
46. Proposed Guidelines, paras 205–209.
47. Commission's 2008 Annual Report, July 23, 2009, COM(2009)374 final, para.102.
48. Case COMP/M.3732, decision of July 15, 2005.
49. Proposed Guidelines, paras 141–151.
50. John Ratliff ''Buyer-related EC Vertical Restraints in EC Competition Law'', paper at the FEB IEJE Conference, September 30, 2009.
51. IP/09/1168 and MEMO/09/348, July 22, 2009. With thanks to Katrin Guéna for her assistance with this section.
52. [2002] OJ L203/30.
53. MEMO/09/57, February 9, 2009.

The Commission considers that no significant competition problems exist in the primary market (where there is currently structural overcapacity and falling prices), which could therefore be dealt with under the general rules on vertical restraints. However, the Commission proposes to issue guidelines against possible closing off of new entrants, ''price discipline'' imposed by manufacturers and market segmentation through territorial protection, or impediments to cross-border sales. The Commission also states that, in order to have a smooth transition to a framework without a block exemption for the primary market, especially in the current economic crisis, it proposes to extend the existing MVBE until 2013.

In the after-market, on the contrary, the Commission considers that competition is less intense owing to its brand-specific nature. The Commission suggests in the future to apply general competition rules to the after-market, combined with a focused sectoral block exemption and/or specific guidelines, which would address issues such as independent operators' access to technical information, access to spare parts and the network of authorised repairers and the misuse of warranties aimed at excluding independent repairers.

Interestingly, the Commission also no longer appears to be pushing for multi-brand showrooms, accepting that this may dilute brand image and cause manufacturers to take steps to preserve such image by raising dealer standards. The Commission now suggests that the risk of market foreclosure could be addressed by the possibility to withdraw the block exemption if entry to the EU or a national market is problematic.

Review of Insurance Block Exemption[54]

In October 2009, the Commission issued a draft insurance block exemption (IBE) regulation to amend Regulation 358/2003,[55] which will expire in March 2010. The Commission was requesting comments from interested parties by the end of November 2009.[56]

The draft regulation follows a consultation process, which started in 2007 with a consultation paper issued by DG COMP, in which the Commission raised various questions as to whether the IBE promotes or inhibits competition and to what extend the IBE is actually used. The consultation paper was followed in March 2009 by a report prepared by DG COMP containing the preliminary findings of the consultation procedure and an accompanying working document.[57] In June 2009 there was also a public event to obtain comments on the preliminary findings and the proposed amendments.

The draft IBE proposes to reduce the number of categories of agreements to be exempted from the application of art.81 EC from four to two. The IBE would continue to exempt information exchange (e.g. insurers sharing information in order to calculate the average cost of covering a specified risk) and insurance pools, i.e. the common coverage of certain types of risk, since the Commission considers those categories to be specific to the insurance sector:

- As regards information exchange, the Commission proposes (1) to amend the term ''joint compilations, tables and studies''; (2) to exempt information exchange only where it is necessary; and (3) to permit access to data shared for interested third parties, e.g. consumer organisations;
- as regards pools, the Commission suggests (1) to amend the definition of ''new risks''; (2) to modify the calculation of market shares to bring the IBE in line with other competition rules; and (3) to raise the flexibility percentage for the thresholds of market shares to 3 per cent.

The Commission also states that agreements on standard policy conditions and models, which are exempted by the current IBE, also exist in other sectors, for example in the banking sector, without the need to have a block exemption. Further, that agreements on security devices and safety equipment, also exempted by the current IBE, fall into the general domain of standard-setting, which are covered by EC Guidelines on Horizontal Cooperation Agreements.

Other

Two other issues should be noted. First, the Commission has started work reviewing its Guidelines on Horizontal Cooperation Agreements.[58] Secondly, after Commission action, the Slovak Competition Act was amended so that the competition rules there also applied to the regulated sectors of electronic communications, energy and post (which was not previously the case).[59]

The Commission's review of Regulation 1/2003 is outlined under ''Policy'' in Part 2, to be published in the next journal.

54. With thanks to Katrin Guéna for her assistance with this section.
55. [2003] OJ L53/8
56. IP/09/1413, October 5, 2009.
57. IP/09/470 and MEMO/09/128, March 24, 2009.
58. OJ C3/2, January 6, 2001.
59. IP/09/1182, July 23, 2009.

European Court judgments

General/Article 81 EC

Box 4

- **Main European Court cases**
  - — *Irish Beef*
    - A ''restriction by object'' is a question of the nature of an agreement in its legal and economic context
    - Only look at anti-competitive effect, if serious anti-competitive object is not clear
  - — *T-Mobile*
    - National court obliged to apply an EU presumption of causal connection
    - No need to show ultimate consumer impact
    - A single meeting, plus conduct can be a concerted practice
  - — *GlaxoSmithKline (Spain)*
    - CFI wrong to require an effect on consumers for an infringement of art. 81(1) EC
    - A restriction on parallel trade is a restriction by object, even in the ''pharma'' context
    - But the Commission should have dealt more with possible art.81(3) EC arguments raised

Irish Beef—restriction by object[60]

In November 2008, the European Court of Justice (ECJ) gave its judgment in a reference from the Irish Supreme Court concerning industrial restructuring. It is now the leading judgment on restriction by object although, as we shall see, there are various other cases on this issue this year.

The context was that there were Irish Government/meat processing industry studies showing significant overcapacity. It was therefore suggested in an open initiative (and apparently endorsed officially, although not ordered) that there should be a reduction of processing capacity by 25 per cent to improve capacity utilisation. It was notably argued that prices would *not* rise as a result because economies of scale would improve and because of the buyer power of retailers in Ireland.

A scheme was devised among the 10 main meat processors in Ireland whereby the ''stayers'' were to pay the ''goers'': to close their businesses; not return to the market for two years; to decommission their plants; and not allow the land to be used for beef processing for five years.

However, the Irish Competition Authority sought an injunction on the basis that these arrangements were contrary to art.81(1) EC.

Before the courts the issue was whether these arguments were restrictive by object, so no effect had to be shown to prove the infringement.

The ECJ held that the concept of the arrangements ''patently'' conflicted with art.81(1) EC. Each economic operator had to determine independently its own market policy and, without the arrangements, the companies concerned would have had to intensify their commercial rivalry or resort to concentrations.[61]

The ECJ also held that the specifics of the arrangements constituted restrictions by object. In particular, the way that the scheme provided that the companies participating paid one level of fee for slaughtering within their ''traditional kill'' in the last three years, but a higher level of fee if they exceeded that ''kill''; the restrictions on disposal and use of processing plants; and the non-competition clause on the ''goers''.[62]

There was also an important opinion by Advocate General Trstenjak in this case.[63] She emphasised that the issue was whether the restrictions concerned were caught by art.81(1) EC, *not* whether the arrangements could be cleared under art.81(3) EC and that any efficiencies in production were to be taken into account under art.81(3) EC.[64]

She clarified that, in her view, a ''restriction ''by object'' is not just limited to agreements which ''obviously restrict'' competition: The key question is the content of the agreement and its legal and economic context.

She also indicated the three situations where she considered that a restriction of competition may be rejected or queried on the basis of the factual or legal context:

- If limiting freedom of companies to determine policy independently has no effects on competition (e.g. no competition to be restricted).
- If an agreement is ''ambivalent in terms of competition'' (e.g. if the object of an agreement is to open up a market and the issue is a ''necessary'' restriction to that objective which should therefore be accepted).

60. *Competition Authority v Beef Industry Development Society* (C-209/07), judgment of November 20, 2008.

61. *Competition Authority v Beef Industry Development Society* at [34]–[35].

62. *Competition Authority v Beef Industry Development Society* at [36]–[39].

63. Opinion of September 4, 2008.

64. *Competition Authority v Beef Industry Development Society* at [47]–[58].

- Where restrictions are part of ancillary arrangements necessary for a primary objective which is accepted, because it is neutral to competition or promotes competition.

T-Mobile—evidentiary presumptions and national law[65]

In this case, representatives of five mobile telecoms operators in the Netherlands met once in June 2001. They discussed proposed reductions of standard dealer remunerations for post-paid subscriptions at the beginning of September 2001 (including timing, extent and details).

The Dutch Competition Authority (NMa) later found that the operators had entered into a concerted practice and fined them.

On appeal, the College van Beroep vor het Bedrijfsleven queried:

- Whether such an exchange of information could be a restriction by object, so that the NMa did not have to show the effects of the concerted practice.
- Notably, insofar as consumer prices were not concerned.

The College also stated that in its view, for a restriction by object, competition had to be ''always, or almost always'' restricted, with detrimental effects which were ''unmistakable'' and would occur irrespective of the characteristic features of the relevant market. The College therefore considered that it was ''always necessary'' to examine the effects of a concerted practice to check that conduct is not regarded as pursuing a restrictive object when it does not have any restrictive effects.[66]

The College also queried whether the Community law presumption had to be applied, whereby undertakings in a concerted practice, which remain active on the market, are presumed to take account of information exchanged, or whether different provisions in national law on evidence could apply.[67] Further, the College queried whether such a presumption could apply to a concerted practice based around a single meeting.

In an important judgment, in June 2009, the ECJ recalled first what it had recently stated in the *Irish Beef* case: whether a concerted practice is anti-competitive involves an assessment of its objectives and its economic and legal context. Anti-competitive object and anti-competitive effects are alternative conditions. If the terms of the concerted practice do not appear ''sufficiently deleterious to competition'', the consequences have to be considered and whether there is an appreciable impact on competition, but only then. As a result, there is no need to look at actual effects, once it is apparent that the object of a concerted practice is to restrict competition.[68] It is sufficient if the concerted practice is capable in an individual case of restricting competition.[69]

Secondly, the court found that restricting dealer remunerations through an exchange of information between competitors could be a restriction by object on an oligopolistic market (as found here).[70] A detailed exchange of information as here was capable of removing uncertainties between those concerned and had therefore an anti-competitive object.[71]

Thirdly, the court found that there was no need for an impact on consumer prices. Remuneration paid to dealers could be decisive in fixing the price to be paid by the end-user. Article 81 EC is designed to protect not only individual competitors or consumers, but also the structure of the market and thus competition as such.[72]

Fourthly, the national court *was* required to apply the presumption of a causal connection between the concerted practice and market behaviour, if the companies remain active on the market. The court held that this presumption ''stems from'' art.81(1) EC, as interpreted by the European Court, and forms an ''integral part'' of applicable Community law, which is binding on the national courts.[73]

It may be interesting to note here that Advocate General Kokott in her Opinion arrived at the same conclusion, but by a different route.[74] She noted that under Regulation 1/2003, the burden of proof remains with the party alleging the infringement, whereas the standard of proof was a question of national rules.[75] She considered the presumption here as going to the standard of proof and therefore within the domain of national law.

However, she also considered that to have different national rules in different EU Member States on this issue would undermine the effective enforcement of Community law, so that the national rules had to give way to the Community standard.[76]

In practice therefore, the causal link between a possible exchange of information and subsequent

65. *T-Mobile* (C-8/08), Judgment of June 4, 2009. With thanks to Cormac O'Daly for his assistance with this section.
66. *T-Mobile* at [20].
67. *T-Mobile* at [21], referring to *Anic Partecipazioni* (C-49/92 P) [1999] E.C.R. I-4125 and *Hüls* (C-199/92 P) [1999] E.C.R. I-4287.
68. *T-Mobile* at [27]–[30].
69. *T-Mobile* at [31].
70. *T-Mobile* at [33]–[35].
71. *T-Mobile* at [41]–[43].
72. *T-Mobile* at [36]–[39].
73. *T-Mobile* at [44]–[53].
74. Opinion of February 16, 2009 at [77]–[94].
75. Regulation 1/2003 art.2 and Recital 5.
76. *T-Mobile* at [82] et seq.

market conduct *was* to be inferred, although it could still be rebutted, as appropriate.

Fifthly, the court held that a single meeting could be a sufficient basis for concertation of market conduct, depending on the circumstances. The issue was not the number of meetings, but whether the meeting or meetings offered the companies concerned the opportunity to take account of competitors' information and co-ordinate their conduct on the market.[77]

Clearly, this is a very important ruling, if it means that Community presumptions on evidence such as this may be considered binding on national courts (which appears to be the case at least for the presumption considered here).

GlaxoSmithKline (Spain)—pharmaceutical pricing[78]

In October 2009, the ECJ gave its ruling on whether the CFI had been correct (1) in upholding the Commission's finding that GlaxoSmithKline's (GSK) agreements with Spanish wholesalers on differential pricing as between domestic or export supply were contrary to art.81(1) EC and (2) in finding that the Commission had not adequately reviewed whether these agreements qualified for art.81(3) EC clearance.[79]

The ECJ upheld the CFI's ruling on art.81(1) EC, but varied the grounds. Notably, the ECJ found that the CFI had been wrong to hold that, in the circumstances of parallel exports of pharmaceutical products, such agreements were *not* restrictive by object, because it was not clear that they harmed the interests of final consumers. Rather, the ECJ recalled that restrictions on parallel trade are restrictive by object and, as it held in *T-Mobile Netherlands*, there is no need to show possible effect on consumers, an effect on the structure of competition is enough.[80]

Again, this is clearly an important ruling because the ECJ is not allowing the general prohibition of art.81(1) EC in cases of ''restriction by object'' to be narrowed in a particular industry context, even though that restriction is, on the case law, to be assessed in the legal and economic context.

The ECJ also upheld the CFI's review of the Commission's decision as regards art.81(3) EC, in which the CFI found, among other things, that the Commission had not adequately considered the specific structural features of the pharmaceutical sector in question and whether the agreements concerned gave rise to economic benefit through innovation.[81]

The ECJ held that the CFI's approach had been correct, even though the CFI had essentially said that the Commission had made a ''manifest error'' in not considering GSK's arguments for art.81(3) EC clearance seriously enough. The court also rejected the Commission's claim that this amounted to reversing the burden of proof, insofar as it was for the party seeking to rely on art.81(3) EC to prove that it should apply.

Essentially the ECJ explained that, if facts are made out by one party (here GSK), the other party (here the Commission) may be obliged to provide an explanation or justifications to the contrary.[82]

Otherwise, the Commission complained that the CFI had created a new category of reviewable error ''lack of serious examination''.[83] The ECJ disagreed, noting rather that the CFI had merely found that the Commission had not taken into account all of GSK's factual arguments and relevant evidence; and that the CFI had not substituted its own economic reasoning for that of the Commission.[84]

Cartel appeals

Box 5

- **Cartel appeals**
  - — *Parent/subsidiary liability*
    - *Akzo Nobel—Choline Chloride*: EC Competition law liability is based on the principle of the ''personal responsibility of the economic entity'' (not an individual company)
    - Various group structures/situations considered, but in each case the presumption of liability was held not to be rebutted (e.g. *General Quimica/Repsol*)
  - — *What has to be set out in the Statement of Objections*?
    - Not enough just to annex evidence to the SO, the Commission has to set out the facts on which its allegations are based in the SO itself (*Archer Daniels Midland/Citric Acid*)

77. *T-Mobile* at [59]–[61].
78. With thanks to Lisa Arsenidou for her assistance with this section.
79. *GlaxoSmithKline* (Joined Cases C-501/06P and Others), Judgment of October 6, 2009; the CFI's judgment was Case (T-168/01) [2006] E.C.R. II-2969. See Ratliff ''Major Events and Policy Issues in EC Competition Law 2005–2006'' [2007] I.C.C.L.R. 38.
80. In particular, *GlaxoSmithKline* at [62]–[63].
81. *GlaxoSmithKline* at [102]–[104], [118]–[119] and [128]–[129].
82. Quoting *Aalborg Portland* (Joined Cases C-204/00 P) [2004] E.C.R. I-123.
83. *GlaxoSmithKline* at [141].
84. *GlaxoSmithKline* at [147]–[149].

- BUT the Commission does not have to set out its legal conclusions in the SO, that would be premature
- The capacity in which a company is held responsible is also key (*Bolloré/Carbonless Paper*)

— *Fines*

- When fining an association, the Commission can consider its members' turnover, if its members had an active role in the infringement (*French Beef*)
- When setting fines the Commission does not have to focus on the size of the precise market concerned, the sector/ broad ''market'' is enough (*Copper Industrial Tubes* and others)
- The Commission is not bound by a limitation period in finding recidivism (*Hoechst/MCAA*)
- If the Commission increases a fine for actual impact, it must show concrete effects—mere implementation of the cartel agreement is not enough (*Prym/ Needles*)
- The Commission could fine ''lead banks'' in the *Austrian Banks* case by adding the market share of the smaller banks in the grouping/''branch'' concerned.

General Química/Repsol

In December 2008, the European Court of First Instance (CFI) ruled on Repsol's appeal against the fine imposed on its subsidiary General Química (GQ), its ''chemical parent'', Repsol Quimica and the ''ultimate group parent'', Repsol YPF for participation by General Química in a cartel in the supply of certain products used in the treatment of rubber.[85] It may be recalled that the Repsol Group had been fined some €3.4 million and this had been a high amount including a 2.5 multiplier because GQ belonged to Repsol.

During the procedure before the Commission and before the CFI, Repsol argued strongly that, both in principle and in the circumstances, the Commission should not have fined the Repsol parents. Notably, Repsol argued that the parent companies had not been involved in the infringement and only had an ownership/financial role as regards GQ, because Repsol Química owned 100 per cent of GQ and Repsol YPF owned 100 per cent of Repsol Quimica.

Further, they noted that this was a small business, which they had acquired in a broader transaction and had been seeking to sell.[86]

The Commission had relied on the case law establishing the parent/subsidiary presumption of responsibility in the event of 100 per cent ownership and considered that the arguments and facts put forward to rebut that presumption had not done so: the Repsol Group had not shown that GQ was operating independently. In particular, the Commission noted that there was a single board member of GQ who had also been on the board of Repsol Quimica and could therefore be a conduit for information between the two, allowing for parental influence and control of the subsidiary. The Commission also noted that the Repsol Group had defended itself as one in the administrative procedure.

On appeal the CFI upheld the Commission's position on the law and the facts.[87] The court emphasised that the Repsol Group was a single economic unit and that there was a parent/subsidiary presumption of responsibility, simply by virtue of the 100 per cent ownership stakes of the parents (the Commission not being required to show more than that to raise the presumption).

As the Commission had found, the court also noted that the Repsol Group had not shown that GQ acted independently on the market, or that the three companies to which the decision was addressed did not form a single economic unit.

The court noted, in particular, that Repsol Quimica had proved to the Commission that it had ordered GQ to cease any infringement of the competition rules after an inspection on GQ in 2002, which showed that GQ was under the influence of Repsol Quimica.[88] The court also focused on minutes of the Repsol Quimica board in which the financial results of GQ were reported, as well as on a discussion on the sale of GQ's shareholding in a company and the sale of real property of GQ. The CFI said that this showed that Repsol Quimica exercised a decisive influence on the behaviour of GQ.[89] The court also noted the overlapping single board member between parent and subsidiary referred to by the Commission.

Repsol YPF was also considered responsible simply because it was deemed, on the parent/subsidiary presumption, to be responsible for the infringement (even if it only had indirect control of GQ).

Even though the court noted that the Commission was bound by the principle of proportionality not to impose fines disproportionate to the object of enforcing the competition rules, the court also

85. *General Química v Commission* (T-85/06), Judgment of December 18, 2008.

86. *General Química* at [50].
87. *General Química* at [58]–[76].
88. *General Química* at [68]–[69].
89. *General Química* at [72].

upheld the Commission's decision to consider the Repsol parents in setting the fine to ensure its deterrent effect.[90]

Again an important ruling, given that the parent/subsidiary liability presumption is a major source of controversy now.

French Beef

In December 2008, the ECJ upheld the CFI's judgment in the *French Beef* cartel case.[91] It will be recalled that this case arose in the context of the "mad cow" disease crisis. Faced with severely depressed prices and French ministerial intervention to try and stop civil unrest, an agreement was entered into between the main French farming federations in the beef sector, including both farmers and slaughterhouses. This was designed to set minimum purchase prices for certain categories of beef and to suspend beef imports into France.

The Commission fined the federations concerned for infringement of art.81 EC, basing its fines on the federations on their members' sales figures. Otherwise, unusually the Commission increased some of the fines concerned because of the violence used to compel the slaughterhouse federation to agree. However, the Commission also reduced the fines on the slaughterhouse federation because of the French Minister's intervention and the illegal blockades its members faced. The fines were also reduced by 60 per cent because of the crisis context.

The CFI upheld the Commission's decision, but increased the reduction for the crisis context by a further 10 per cent in its unlimited jurisdiction.

On further appeal, the ECJ rejected various arguments against the CFI judgment as either inadmissible or unfounded. The following are the main points of interest:

First, the appellants argued that the Commission had infringed their rights of defence by making no reference in the Statement of Objections to the allegedly new method which the Commission intended to use in calculating the 10 per cent maximum level of fines (i.e. based on member revenues, rather than on the federations' own revenues), thus giving them no opportunity to express their views. The ECJ noted that the practice of calculating fines based on an aggregate turnover, including the turnovers of the federations' members was not new, so there was no change in method requiring a particular statement in that regard in the Statement of Objections.[92]

Secondly, the ECJ found that the CFI had not contradicted itself in upholding the Commission's finding of agreement, while at the same time accepting that the slaughterhouses had been subject to pressure to enter into agreements and reducing the fines on the slaughterhouses accordingly. The CFI *could* find an agreement in such circumstances, yet still vary the fines on the farmers and the slaughterhouses for, respectively, aggravating and mitigating circumstances.[93]

Thirdly, the ECJ confirmed that, when fining associations, the Commission is entitled to calculate the 10 per cent maximum turnover fining limit based on the aggregate turnover of an association's members, where an association engages directly in anti-competitive practices and its members had an active role in the infringement, as here. The Commission's ability to take this approach was not just limited to cases where an association has formal powers to bind its members, or fines would not be set at a sufficient level to have a deterrent effect.[94]

Fourthly, interestingly, one federation claimed a breach of the 1998 Fining Guidelines insofar as neither the Commission nor the CFI had shown that it was impossible to fine members individually, it being argued that this was a prerequisite under s.5(c) of the Guidelines to calculate fines on federations based on their members' turnovers. However, the ECJ rejected this as a new plea in law and thus inadmissible, as it was raised for the first time on further appeal to the ECJ.[95]

Fifthly, the ECJ confirmed that imposing separate fines on several federations, some of which were also part of an overall federation which was fined, and on several federations which had common members, did not amount to a breach of the principles of *non bis in idem* and proportionality. The necessary condition of "the unity of offenders" for a breach of the *non bis in idem* principle was not met, given that the federations each had separate legal personality, separate budgets and objectives. No breach of the proportionality principle was found either, since the court noted that the individual farmers (the federations' indirect members) were not themselves sanctioned. As a result, the court found that no member was fined twice for one and the same infringement[96] (a rather technical ruling, since one would think that, in practice, indirectly the members were responsible for each federation's fines).

90. *General Química* at [108]–[109] and [127].
91. *Coop de France bétail et viande, FNSEA, FNB, FNPL, and JA* (Joined Cases C-101/07 P and C-110/07 P), Judgment of December 18, 2008. The Commission decision and the CFI judgment were summarised in previous reviews; see Ratliff "Major Events and Policy Issues in EC Competition Law 2002–2003" [2004] I.C.C.L.R. 57–58 and Ratliff "Major Events and Policy Issues in EC Competition Law 2006–2007" [2008] I.C.C.L.R. 49–50.
92. *French Beef* at [50]–[51].
93. *French Beef* at [67]–[69].
94. *French Beef* at [93]–[98].
95. *French Beef* at [109]–[110].
96. *French Beef* at [127]–[130].

Akzo Nobel—Choline Chloride

It may be recalled that the Commission imposed a fine of some €20.99 million on Akzo Nobel and five of its subsidiaries for participation in the global choline chloride cartel. On appeal, Akzo Nobel argued no parental knowledge of the subsidiaries' infringement, while the Commission emphasised the chain of authority from the parent to its subsidiaries and that Akzo was a single economic unit''. The CFI dismissed the appeal.[97]

On further appeal, the ECJ supported the CFI's findings, i.e. it found that the parent company held 100 per cent of the capital of its subsidiary and exercised ''decisive influence'' over its commercial policy. The ECJ also supported the CFI findings by which it rejected the *Stora*-based argument that for the parent company to be liable, one needs additional circumstances indicating that the parent company had influence on the subsidiary, as well as 100 per cent ownership.[98]

Finally, the ECJ noted that Community competition law is based on ''the principle of personal responsibility of the economic entity'' which has committed the infringement, not the personal responsibility of the company concerned.[99]

Archer Daniels Midland—Sodium Gluconate[100]

This was a further appeal from the CFI's judgment dismissing Archer Daniels Midland's (ADM) appeal against the Commission's decision by which ADM had been fined €10.13 million.

The main issues raised were: whether ADM had shown in a 1994 meeting that it ''publicly distanced itself'' from the cartel, so that the duration of its infringement would be reduced; and whether the CFI had correctly upheld the Commission's view that ADM should not have a fine reduction because it had ended its unlawful conduct as soon as the US authorities intervened concerning US aspects of the infringement.

The ECJ rejected these claims. The court agreed with the CFI and the Commission's approach that:

> ''. . . [T]he relevant test of a public dissociation from a cartel is *whether the members of the cartel understood* the conduct of the undertaking as terminating its participation in such an agreement, and the burden of showing that was on ADM'' (emphasis added).[101]

The CFI was therefore entitled to hold that just leaving the meeting was not enough in itself.

The ECJ then reviewed the CFI's appraisal of the evidence to see if there was any distortion of that evidence (as it is required to do). The ECJ noted that there were other pieces of evidence considered by the CFI, suggesting that the cartel had continued after 1994 and that ADM in fact had sought a reallocation of sales quota at the meeting.[102]

The ECJ found that the CFI *had* distorted one piece of evidence in its review, concerning a report of a meeting in 1995, suggesting that the note concerned was written by another firm, Roquette, *at* the meeting concerned, when it was accepted by the Commission that the note was only supplied by Roquette and written *after* the meeting. However the ECJ found that such distortion was not material (i.e. did not invalidate the CFI's judgment).[103]

As regards whether ADM's end to its unlawful activities amounted to attenuating circumstances, the ECJ then repeated the (now standard) position that, although the 1998 Fining Guidelines provide for a fine reduction in such a case, that is not automatic where an undertaking is party to a manifestly unlawful infringement.[104]

Copper Industrial Tubes

In May 2009 there were three judgments, relating to appeals by KME, Wieland-Werke and Outokumpu against the Commission's 2003 decision in this case. It may be recalled that there was found to have been a cartel around a trade association called ''Cupraclima'' involving air conditioning and refrigeration tubes. KME was fined some €39 million, Wieland-Werke some €20 million and Outokumpu some €18 million.

Outokumpu[105]

There were two main issues in this case:

- First, what is the reference base for the fining amount? Just the value which was the subject of unlawful co-operation, or the value of the ultimate product sold, including the underlying metal concerned?
- Secondly, what is recidivism? A further infringement of the same norm/treaty? A repeat infringement with price-fixing, market-sharing etc. irrespective of huge differences in the nature and circumstances of such arrangements? Or a ''propensity'' to continue infringing when already told not to?

On the first metal issue, the case was unusual insofar as (1) the industrial tube producers agreed

97. *Akzo Nobel v Commission* (T-112/05) [2007] E.C.R. II-5049; see Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R. 72.
98. *Akzo Nobel v Commission* (C-97/08 P), judgment of September 10, 2009 at [62]. With thanks to Sungjin Kang for his assistance with this section.
99. *Akzo Nobel v Commission* (C-97/08 P), judgment of September 10, 2009 at [56] and [77].
100. *Archer Daniels Midland Co v Commission* (C-510/06 P), Judgment of March 19, 2009.
101. *ADM* at [110] and [120].
102. *ADM* at [125]–[131].
103. *ADM* at [132]–[136].
104. *ADM* at [146]–[150].
105. *Outokumpu v Commission* (T-122/04), judgment of May 6, 2009.

the metal price with the customer and then processed the metal into the desired tubes; and (2) the metal price is set on the London Metal Exchange. All three companies argued therefore that to fine them by reference to an infringement affecting the industrial tubes market as a whole (worth some €288 million) was wrong, when some two-thirds of that was copper, whose price was set otherwise other than under their control. So the precise market concerned was much less: just the so-called, ‘‘processing’’ or ‘‘conversion’’ margin.

The court did not accept this. On the 1996 Fining Guidelines, the Commission was not required to look at the size of the market to set the fine. However, since in fact the Commission had done so and might have set the fine lower, if it had only focused on the value of the metal processing market,[106] the CFI reviewed the fines.

Nevertheless, the court still upheld the Commission’s approach. The court found that the Commission could not be expected to distinguish between production costs, which the parties control and those which they do not[107] (i.e. here the copper metal price, but also other key inputs, e.g. electricity and water) in setting fines.

This remains controversial, because the fine is not linked to the precise activity included in the unlawful co-operation, it is just set on the ‘‘flat rate logic’’ of Commission fines, focused on turnover in the ‘‘sector’’ concerned and once again the great breadth of the Commission’s discretion to set fines is confirmed.

As regards recidivism, this was also an unusual case because the earlier Outokumpu infringement, the *Stainless Steel Sendzimir* case, was very different: It related to steel. It was a decision under the ECSC Treaty. It related to a trade dispute leading to a series of bilateral self-restraint limitations on exports to the EU as a result of Commission/Governmental trade pressure.[108] Moreover, this had been recognised by the Commission which had taken a decision finding a cartel infringement, but imposed no fines on Outokumpu in the circumstances.

Was a later cartel therefore a repeat infringement of the ‘‘same type’’ as this earlier, very special case? The court found that it was. The court held that the ECSC and EC Treaties were both part of the same Community legal order.[109] Further, even if the context of the infringements was different, the court found that the key point was that Outokumpu had been warned not to engage in cartel-type conduct by the first decision and in fact had continued to do so.[110]

Outokumpu has not appealed further, having now sold its copper tube business and given the passage of time (the CFI judgment was some five years after the appeal was filed).

KME, Wieland-Werke[111]

As regards the KME and Wieland-Werke appeals, they had overlapping claims with Outokumpu on the metal issue, i.e. argued that the real economic weight of the unlawful co-operation was limited to the processing margin (approx. one-third of final price of the industrial tube).

They received the same rejections as in the *Outokumpu* case,[112] although in *KME*, the court notes that the flat rate logic of the 1996 Fining Guidelines may not be the best (while accepting that what criterion to use for fining was a question for the Commission to decide, subject to the limits which flow from the equal treatment principle and (what was then) Regulation 17. The court said that it is:

> ‘‘. . . undeniable that, as a factor for assessing the seriousness of the infringement, the turnover of an undertaking in a market is necessarily vague and imperfect. However, despite its approximate nature, turnover is currently considered . . . an adequate criterion . . . for assessing the size and economic power of the undertakings concerned’’.[113]

Otherwise, Wieland argued, among other things, that as a smaller undertaking it should have been fined less, which was also rejected because the final amounts of fines do not have to reflect any distinction between companies in terms of their overall turnover, or their relevant turnover.[114]

Inspecteur voor de Belassingsdienst v JC BV[115]

In June 2009, the ECJ ruled on an interesting question from the Gerechtshof of Amsterdam. That court asked the ECJ whether the Commission was entitled to offer written observations on its own initiative in proceedings before that court, on whether a company could deduct from its taxes part of a Commission fine (from the Plasterboard cartel case). It appears that the issue was that fines imposed as punishment are not deductible in Dutch tax law, but fines which aim to capture some of the profits concerned are. The Commission, it appears, wished to say that its fines were based on punishment and should not be deductible.

The ECJ found that art.15(3) of Regulation 1/2003 provided that the Commission could offer

106. *Outokumpu* at [77]–[79].
107. *Outokumpu* at [82].
108. *Outokumpu* at [41]–[42].
109. *Outokumpu* at [55]–[56].
110. *Outokumpu* at [59]–[64].
111. *KME-Germany v Commission* (T-127/04) and *Wieland-Werke v Commission* (T-116/04), judgments of May 6, 2009.
112. *KME* at [91], *Wieland* at [69].
113. *Wieland* at [93].
114. *Wieland* at [86].
115. *Inspecteur voor de Belassingsdienst v JC BV* (C-429/07), judgment of June 11, 2009.

such observations, where the coherent application of arts 81 or 82 EC required, even if the proceedings concerned related to other issues (i.e. here tax law), rather than the application of arts 81 or 82 EC themselves.

The ECJ also noted that whether a fine or penalty was deductible was an issue going to the effectiveness of the prohibitions in those articles and their coherent application.[116]

Archer Daniels Midland—Citric Acid[117]

This was a further appeal from the CFI judgment in this case.[118] The main issue was whether ADM should have had its fine increased for being leader of the cartel.

ADM objected, in particular (1) that the Commission had not said it would be treated as leader of the cartel in the Statement of Objections; and (2) that the Commission had just annexed to the Statement of Objections an FBI report of an ADM representative's statements to the US authorities and a competitor's statement, although in its decision, the Commission had referred to facts in these statements, together with certain bilateral meetings, as evidence that ADM was a leader of the cartel.[119]

As a result, ADM claimed that its rights of defence had been infringed, that its fine had been unlawfully increased by 35 per cent and that it had been unlawfully denied a leniency reduction.

The CFI had held that the Commission did not have to state in the Statement of Objections that it considered ADM to be a leader of the cartel and that such annexing of documents was enough to give ADM the principal elements of evidence on which the Commission would rely to find ADM leader of the cartel.

The ECJ agreed with the CFI that the Commission was not required to state in the Statement of Objections that it might classify ADM as a leader of the cartel. That would be premature, although the court still noted that the Commission had to set out in the Statement of Objections the evidence which it considered relevant to enable an undertaking which might be classified as leader to respond to such an objection.[120]

However, the ECJ held that it was not enough just to annex the evidence in this way, without stating the relevant facts in the Statement of Objections, noting that it was an issue with important consequences.[121] The ECJ also noted that other evidence in the case suggestive of a leadership role for ADM (certain bilateral meetings) could not be treated as conclusive of that role.

As a result the court considered whether Cerestar or ADM had been the first to offer decisive evidence of the infringement (qualifying for a 50 per cent reduction under the 1996 Leniency Notice). However, the court upheld the Commission's view that Cerestar had been the first to offer such decisive evidence.[122]

As a result, overall the court upheld ADM's pleas on leadership and reduced ADM's fine from €39.69 million to €29.4 million.[123]

MCAA

In September 2009, the CFI gave four judgments on appeals against the Commission's MCAA (monochloroacetic acid) decision from 2005.[124] In general, the CFI upheld the Commission's decision, save that, as regards Hoechst, the court reduced the fine imposed by 10 per cent (from €74 million to €66 million). Particular points from the *Hoechst*, *Arkema* and *Akzo Nobel* judgments are noted here. (Various issues in *Elf Aquitaine* also overlap with the *Arkema* judgment.)

Hoechst

As regards Hoechst, there was a very specific situation in issue. Hoechst was found to have infringed for a number of years, then sold its MCAA business to Clariant, which was found to have continued the infringement, but then later approached the Commission seeking (and obtaining) immunity from fines. In such circumstances Hoechst argued, among other things, that it should not be fined because responsibility for the infringement passed to the company acquiring the business and continuing the infringement. Moreover, Hoechst argued that the responsibility had been transferred by contract when it transferred the MCAA business into a subsidiary company, which was then sold to Clariant.

The CFI rejected these arguments.

First, the court held that responsibility for an infringement falls on the legal person managing the undertaking when the infringement was committed, save exceptionally, where the new company involved in the cartel may be regarded as the successor to the original company infringing. Notably, this "economic continuity" test might apply where the originally infringing company had ceased to exist in law after the infringement

116. *JC BV* at [28]–[30] and [36]–[39].

117. *Archer Daniel Midlands Co v Commission* (C-511/06 P), judgment of July 9, 2009. With thanks to Sungjin Kang for his assistance with this section.

118. *ADM v Commission* (T-59/02) [2006] E.C.R. II-3627; see Ratliff "Major Events and Policy Issues in EC Competition Law 2005–2006" [2007] I.C.C.L.R. 47–48.

119. ADM (C-511/06 P) at [63]–[64].

120. ADM (C-511/06 P) at [71]–[72].

121. ADM (C-511/06 P) at [80]–[95].

122. ADM (C-511/06 P) at [150[–[163].

123. ADM (C-511/06 P) at [164].

124. *Hoechst* (T-161/05), *Arkema* (T-168/05), *Elf Aquitaine* (T-174/05) and *Akzo Nobel* (T-175/05), judgments of September 30, 2009.

has been committed. However, since here Hoechst had manufactured MCAA through its chemical division and therefore continued to exist, this exception did not apply.[125]

Nor could Hoechst argue that it should benefit from the other exception on the case law, allowing liability to pass if there is an internal restructuring and there remain structural links between the original and successor infringing companies. There were no such links between Hoechst and Clariant.[126]

Nor could the transfer of liability by Hoechst to its own subsidiary, or Clariant affect Hoechst's responsibility as against the Commission for the infringement.[127]

Secondly, the CFI held that Hoechst could also not claim to be covered by Clariant's immunity application, because it was a separate undertaking.

Thirdly, the CFI noted that the Commission had not reduced Hoechst's fine for not contesting the facts in the Statement of Objections, although Hoechst considered that it had stated this.

The issue was, it appears, that Hoechst had added that since Hoechst had sold the MCAA business it had no information from which to comment on the facts concerned. Further, Hoechst had stated that it would ''demonstrate that those facts are not sufficient in law to substantiate some of the Commission's legal conclusions''.[128] The Commission had regarded this as an equivocal response, not amounting to genuine cooperation and justifying a reduction.

The CFI disagreed. It found that Hoechst had stated it was not contesting the facts, while disputing the Commission's interpretation of them and legal conclusions. The court held: ''An objection to the Commission's legal assessment of certain facts cannot . . . be treated in the same way as a challenge to the very existence of those facts.''[129] Further, such a factual confirmation ''could not but facilitate'' the Commission's task of enforcing the competition rules in the case.[130] As a result the court reduced Hoechst's fine, in its unlimited jurisdiction by 10 per cent.

Fourthly, Hoechst complained that the Commission had set the fining scale too high for the value of the market concerned (some €106 million). The court rejected this, noting that the legal framework here did not require the Commission to take account of the size of the market for the purpose of setting the starting amount of the fine. The Commission could do so, but did not have to do so.[131] (The starting amount for Hoechst had been set at €21 million for Hoechst and Clariant, with €30 million on Akzo Nobel as the largest producer.)

Fifthly, there is extensive discussion about recidivism, with Hoechst arguing that it should not have its fine increased for infringements going as far back as the *Dyestuffs* case (1969) and the *PVC II* cases (1994). Further, that in practice, it should be relevant here that completely different businesses and people are involved.

Hoechst also argued that it was wrong to increase its fine for recidivism, taking into account these earlier decisions in the *Sorbates* decision in 2003 and then doing that again here in the MCAA decision only two years later. Hoechst argued that amounted to fining Hoechst twice for the same recidivism contrary to the *ne bis in idem* principle.

The CFI disagreed, taking the broad view that the Commission was entitled to take into account any indicia of a company's tendency to carry out infringements of the same type again. Specifically, the CFI held that the Commission ''cannot be bound by any limitation period when making such a finding'' (of recidivism).[132] The lapse of time since the *Dyestuffs* decision in 1969 did not matter, since it was the same (economic) ''undertaking'' which was censured for the repeat infringement. The fact that different subsidiaries or markets were involved also made no difference. The CFI also found no infringement of *ne bis in idem*, because the cartels concerned had different objects, relating to different product markets.[133]

This is highly controversial. Many argue that this is simply not fair on the larger conglomerate companies. It may be argued that fines have to be larger on them than smaller companies, so they have a real impact (i.e. the deterrence fining principle). However, to link very different businesses, over long periods, through a common parent and add the recidivism fining principle is something many still feel goes too far (despite the case law to the contrary). Especially since large conglomerates also have a high risk exposure with so many businesses, even with the (now frequent) compliance programmes.

Arkema/Akzo Nobel

In *Arkema*,[134] four particular points may be mentioned: first, the fact that a parent company and a subsidiary were not advised and defended by the same lawyer, as was the case for Elf Aquitaine and Arkema, was held not to demonstrate the autonomy of the latter. Referring

125. *Hoechst* at [50]–[53] and [61]–[62].
126. *Hoechst* at [52] and [63].
127. *Hoechst* at [65].
128. *Hoechst* at [92].
129. *Hoechst* at [95].
130. *Hoechst* at [96[–[100].
131. *Hoechst* at [104] and [109]–[110].
132. *Hoechst* at [141].
133. *Hoechst* at [140]–[151].
134. *Arkema* (T-168/05), judgment of September 30, 2009. With thanks to Stéphanie Strievi for her assistance with this section.

again to the *Stora* case,[135] where common representation of the parent company and its subsidiary during the administrative procedure had been noted, the court emphasised that this was not a factor going to the parent/subsidiary presumption, which was simply established by 100 per cent ownership of the subsidiary by the parent. So, absence of that element did not show independence for purposes of the presumption.[136]

Secondly, the court held that the Commission had been entitled, in order to prove the existence of the actual impact of the cartel as part of its fine assessment, to take into account the fact that the cartel had been implemented for more than 15 years and that the members of the cartel controlled almost the entirety of the EEA market.[137]

Thirdly, the court held that the fact that a multiplying factor for deterrence had already been used in a previous case involving Arkema did not prevent the Commission from applying it again to another case concerning the same period of time.[138]

Finally, the court held that a very strict compliance policy might be a valid argument in order to obtain a decrease in the fine (as an attenuating circumstance), but was not a ground against a deterrent increase.[139]

In *Akzo Nobel*,[140] much of the case is again devoted to the issues of parent/subsidiary liability, this time in the context of a business unit/business division. The CFI found parental liability on the facts.[141]

However, two other points may be noted: first, in its pleadings it appears that the Commission argued that a parent should be considered to have decisive influence over a subsidiary because they made a joint reply to the Statement of Objections and a joint application to the court. This was rejected by the court.[142]

Secondly, interestingly Akzo Nobel argued that classification of the cartel members for fines should have been assessed as an average of the market shares over the period of infringement, not the last year of the infringement. While recognising that this could be a valid approach if Akzo Nobel had shown that using the last year gave a distorted picture and that this gave a better comparison with the other undertakings, the court held, on the facts, that Akzo Nobel had not offered evidence to show that.[143]

135. *Stora v Commission* (C-286/98 P) [2000] E.C.R. I-9925.
136. *Arkema* at [68].
137. *Arkema* at [161]–[165].
138. *Arkema* at [179].
139. *Arkema* at [181].
140. *Akzo Nobel* (Case T-175/05), judgment of September 30, 2009.
141. *Akzo Nobel* at [104]–[107].
142. *Akzo Nobel* at [111].
143. *Akzo Nobel* at [142]–[145].

Prym/Needles

In September 2009, the ECJ gave judgment in the Haberdashery Needles cartel case, upholding the CFI's ruling as regards William Prym, which also had upheld the Commission's decision.[144]

There are several interesting points:

First, Prym claimed that the Commission should have been required to explain further in the Statement of Objections in the Needles case why it had split the Haberdashery case into two, Needles and Fasteners. The ECJ rejected this, noting that the Statement of Objections was designed to focus on the matters related to an alleged infringement, not why the Commission did not propose to act in another infringement.[145]

Secondly, Prym claimed that the two cases should be treated as one and that it had been denied justice because it had been unable to address that issue in the Needles case. Again, the ECJ rejected this. The court found that the CFI had been correct to say that the issue as to whether there was one or two infringements could not be judged until the second investigation and decision had been concluded and taken, because what the Commission might find in the second case was not yet clear. It was open to Prym, in appealing that second decision, to argue that there was only one infringement.[146]

Thirdly, Prym argued that the CFI, having found that the Commission had failed to ascertain the size of the markets concerned, should have applied that to the assessment of the gravity of the infringement for fining purposes. The CFI had held that this failure could lead to partial annulment of the Commission's decision, unless the effective economic capacity of the undertakings concerned to cause damage could be based on other grounds (and then found that the Commission had found such grounds).[147] Prym argued that was incorrect.

The ECJ rejected this. The court held that, in order to determine an undertaking's effective economic capacity to cause significant damage, the Commission did not have to define the market and assess its size, taking into account the volume of that undertaking's turnover. Moreover, the Commission could not be obliged to do so in a case where the infringement has an anti-competitive object. The CFI could therefore accept as lawful, an assessment of economic capacity to cause significant damage by the Commission, which was simply based on a finding that Prym was the market leader (and did not have to partially annul the Commission's decision because it had not ascertained the market size).[148]

144. *William Prym v Commission*, (C-534/07 P), judgment of September 3, 2009.
145. *William Prym* at [33].
146. *William Prym* at [42].
147. *William Prym* at [48].
148. *William Prym* at [63]–[65].

Fourthly, Prym also argued that the CFI's acceptance of the Commission's €20 million starting amount for the fine was wrong, given the CFI's finding as to the inadequacy of the Commission's decision. The CFI had held that the classification of the infringement as "very serious" was well founded and noted that the Commission had only applied the minimum starting amount for a very serious infringement (or the maximum amount for a serious infringement). Interestingly, the Commission also asked the ECJ to amend the CFI's grounds here, insofar as the Commission argued that it could rely on proof of implementation to show market effect for fining purposes.

The ECJ disagreed with both Prym and the Commission and upheld the CFI's judgment. The court noted that on the 1998 Fining Guidelines the Commission could classify an infringement as very serious without showing actual impact on the market; (that was the case here, because the object of the cartel was market-sharing). Further, actual impact of the infringement is just one of several factors which, if it can be measured, the Commission may use to increase the starting amount of the fine.

The court then rejected the Commission's view that, in order to establish actual impact, it was enough for the Commission to show implementation of the cartel: "Such a reference, without any additional evidence, amounts in effect to a presumption that the implementation of the cartel has created an effect on the market."[149] That was wrong. If the Commission wished to increase the fine for "the optional element" of actual impact, it could not just put forward a mere presumption, but had to provide "specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition on that market".[150] The Commission could not simply infer actual effect from implementation, so the CFI's reasoning on the issue had been correct.

This is an important ruling on a point which has come up frequently in recent cases (and is discussed in other cases such as *Austrian Banks* below).

Koehler Bolloré Divipa—Carbonless Paper

In September 2009, the ECJ gave judgment in the further appeal by three companies found by the Commission to have participated in the Carbonless Paper cartel.[151]

The main interest in the judgment concerns Bolloré. It may be recalled that Bolloré had been fined €22.68 million. Bolloré had been an addressee of the Statement of Objections, in its capacity as parent of another company, Copigraph. However, later, when the Commission took its decision, Bolloré was held to have directly participated in the infringement.

On appeal to the CFI, Bolloré claimed that this infringed its rights of defence. The CFI agreed, finding that the Statement of Objections had not allowed Bolloré to address the allegation of its direct involvement, nor had Bolloré even been made aware of the facts established by the Commission in support of that allegation. However, the CFI then found that this defect in the decision did not entail annulment of the decision as regard Bolloré, because Bolloré could still be liable for the participation of its subsidiary Copigraph (as its parents).[152] This was clearly controversial.

On further appeal to the ECJ, the court upheld Bolloré's claim and annulled the Commission's decision. The court recalled that a Statement of Objections sent to an undertaking in which the Commission envisages imposing a penalty has to contain "the essential elements used against it, such as the facts, the characterization of these facts and the evidence on which the Commission relies", so that the undertaking may submit its arguments effectively.[153]

It followed from this that a competition decision in which the Commission imposes a fine on an undertaking without first having informed it of the objections relied on against the undertaking cannot be held to be lawful: "Given its importance, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person". Further the court held that it is "also necessary that the statement of objections indicate *in which capacity* an undertaking is called upon to answer the allegations" (emphasis added).[154]

The Commission's decision could therefore not stand as regards Bolloré, because it could possibly have been based on conduct in respect of which Bolloré was not able to defend itself.[155]

Austrian Banks[156]

In September 2009, the ECJ dismissed an appeal by eight Austrian banks against a CFI judgment in 2006 in the so-called "Lombard Club" case.[157] The

149. *William Prym* at [80].
150. *William Prym* at [82].
151. *Papierfabrik August Koehler and Others* (Joined Cases C-322/07 P and Others), Judgment of September 3, 2009.

152. *Bolloré and Others* (Joined Cases T-109/02 and Others) [2007] E.C.R. II-947. See Ratliff "Major Events and Policy Issues in EC Competition Law 2006–2007" [2008] I.C.C.L.R. 53–54.
153. *Papierfabrik* at [36].
154. *Papierfabrik* at [38]–[39].
155. *Papierfabrik* at [40]–[48].
156. With thanks to Stéphanie Strievi for her assistance with this section.
157. *Erste Groupe Bank AG and Others* (Joined Cases C-125/07 P and Others), judgment of September 24, 2009.

CFI had upheld the Commission's 2002 decision, finding that these banks had participated in a price-fixing cartel covering the Austrian territory, but reduced the fine imposed on one of the banks.[158]

This judgment of the ECJ is of particular interest with regard to two points relating to the setting of fines: (1) the concrete impact of the infringement; and (2) the effective capacity of infringers to distort competition.

Regarding the first point, the ECJ was called upon to state what standard of proof is required in order to determine ''the concrete impact of the infringement'' used in the determination of the basic amount of fines. The parties, supported by Advocate General Bot,[159] claimed that the CFI erred in law when it found that the Commission could legitimately rely on the implementation of the cartel in order to show an actual impact on the market. Rather impact had to be demonstrated.

The court agreed on the principle, finding that if the Commission increased a fine for actual impact, it had to show that impact and mere implementation was not enough. However, the ECJ then found that in fact the CFI's assessment was not merely based on the implementation, but also on the existence of concrete effects of the cartel on the market.[160]

The second point concerns the market shares taken into account in order to determine the effective capacity of the infringer to distort competition, when the infringer is the ''lead bank'' of a grouping or ''branch'' of small banks (not in the same economic group). Here, controversially the Commission had assessed the lead banks' fines based also on the market shares of the smaller banks which they ''lead'' and the CFI had agreed.

The ECJ upheld the CFI's approach. The links existing between the lead banks and the grouping or ''branch'' of small banks had an influence on the impact of the behaviour of the lead bank on the market, which was greater than the impact of the lead bank by itself.[161] For this reason, the market shares of the small banks could lawfully be taken into account in assessing the lead banks' fines. Further, the court found that not to do so would undermine the deterrent effect sought by the Fining Guidelines.[162]

This remains controversial, insofar as it is argued that the correct solution would rather have been to fine the smaller banks individually and, at most, to have increased the fine on a ''lead bank'' for its role, but not to have attributed the smaller banks' market shares to the lead bank.

Thyssenkrupp—Alloy Surcharge

In July 2009, the CFI upheld the Commission's re-adopted ECSC decision in the Alloy Surcharge cartel case, fining ThyssenKrupp Stainless AG (TKS) €3.168 million for the infringement of Thyssen Stahl AG (Thyssen).[163]

It may be recalled that in 1998 the Commission had fined TKS €3.56 million for Thyssen's conduct in this cartel, TKS having confirmed in July 1997 to the Commission that it assumed responsibility for the acts of Thyssen.[164] However, on appeal in 2001 the CFI annulled this part of the Commission's decision, because the Commission was found not to have given TKS the opportunity to comment on Thyssen's behaviour in the administrative procedure.[165] As a result the CFI reduced the fine imposed on TKS by the amount that had been imposed in relation to Thyssen's infringement. In 2005, the ECJ upheld the CFI's judgment.

In 2006, the Commission then issued a new Statement of Objections to TKS and re-adopted its decision, imposing the same fine for Thyssen's infringement as before, save that the Commission reduced it by 20 per cent to reflect the CFI's judgment on other issues. In doing so, the Commission also specifically referred to TKS' statement accepting liability for Thyssen's acts.

TKS again appealed, claiming to have revoked its statement accepting liability from 1997 and arguing that the decision was unlawful on a number of grounds. The CFI rejected TKS' claims.

The main points of interest are the following:

First, TKS argued that the Commission had breached the principle of *nulla poena sine lege* insofar as it had adopted the 2006 decision under the substantive rule in art.65 ECSC, with the procedural framework in Regulation 1/2003, without having the power to do so. TKS claimed that, in 2006, following the expiry of the ECSC Treaty in 2002, art.65 ECSC was unenforceable and its retroactive application was prohibited, in the absence of an explicit transitory provision in the ECSC Treaty. Regulation 1/2003 was also not applicable, since it did not explicitly grant

158. *Raiffeisen Zentralbank Österreich and Others* (Joined Cases T-259/02 and Others) [2006] E.C.R. II-5169); see Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R. 50–51.
159. The Advocate General noted that the case law is divided on the point: one line of decisions required only the implementation of the agreement, while another line found that implementation was not sufficient and that a higher standard of proof was required. *Erste Groupe*, Opinion of March 26, 2009 at [279]–[300] and [303].
160. *Erste Groupe* at [116]–[118].
161. *Erste Groupe* at [175].
162. *Erste Groupe* at [176].

163. *ThyssenKrupp Stainless AG v Commission* (T-24/07), judgment of July 1, 2009.
164. *TKS* at [17] and [22].
165. *TKS* at [25].

enforcement powers to the Commission in relation to art.65 ECSC.[166]

The CFI rejected TKS's arguments. The court found that Regulation 1/2003, specifically arts 7(1) and 23(2), which concern the Commission's ability to find infringements and impose fines, is to be interpreted as covering ECSC cartels, even in the absence of an express reference to art.65 ECSC, in order to ensure the continuity of the Community legal order.[167] The court stated that the ECSC and the EC Treaties form part of the same legal order, the ECSC Treaty being a *lex specialis* derogating the *lex generalis* of the EC Treaty; and both share the same objective, to pursue undistorted competition.

At the time of the ECSC Treaty's expiry, in 2002, the general scheme in the EC Treaty extended to sectors previously governed under the ECSC Treaty. Thus Regulation 1/2003 was the procedural framework for ECSC cartels as well. Further, the court found that the Commission had correctly applied art.65 ECSC, as this was the substantive rule applicable at the time of Thyssen's infringement. Since Thyssen's conduct took place in 1993–1994, well before the ECSC Treaty's expiry, the CFI rejected the claim that the Commission had retroactively applied art.65 ECSC.[168]

Secondly, TKS argued that the Commission had breached the principle of *res judicata* in fining TKS, when the ECJ had ruled that TKS was not liable for Thyssen's conduct. The CFI again rejected this, viewing TKS's claim as a misinterpretation of the ECJ's ruling, which had accepted the validity of TKS's statement in July 1997 confirming that TKS assumed liability in relation to Thyssen's conduct and on which the Commission had relied.[169] The court held that this issue, the acceptance of liability in this way, had been definitely settled by the courts as res judicata.

Thirdly, as concerns TKS's claims of breaches of the rights of defence, the CFI rejected TKS's argument that the new Statement of Objections sent to TKS as regards Thyssen's conduct was inadequate, just a ''patchwork'' of various documents, because it attached the previous Statement of Objections and a list of other documents.[170] The CFI stated that this was enough in the circumstances to allow TKS to answer the allegations of fact and law in issue concerning its liability for Thyssen.[171]

166. *TKS* at [44]–[56].
167. *TKS* at [70]–[71], [74]–[90].
168. *TKS* at [86]–[90].
169. *TKS* at [114] and [139]–[147].
170. *TKS* at [228].
171. *TKS* at [233], [237] and [243].

Box 6

- **Distribution/Article 82 EC cases**

— *Distribution*
- A bonus on only national sales is a restriction by object
- If a fine is increased for actual impact, the Commission should consider the way price differentials change and may affect trade flows (Peugeot)
- A manufacturer has a duty to display ''special vigilance'' as regards the compliance of its distribution system (Nintendo)
- A €4.5 million fine for an activity which is 0.004% of group turnover is not disproportionate (!) (Itochu)

— *Article 82 EC*
- *Clearstream*:

A dominant company has a duty to organise third party access allowing competition in a non-discriminatory way
No ''quid pro quo'' defence (French access for German access)

Distribution

Peugeot[172]

This was an appeal against the Commission's decision in 2005, in which it had fined Peugeot €49.5 million essentially for (1) operating a bonus for sales by dealers in the Netherlands, which was found not to be applicable to export sales; and (2) for exerting pressure on Dutch dealers not to export.

The main issue was whether these practices had an anti-competitive object, so that the Commission did not have to prove effect. Peugeot argued that its objective was not to prevent exports, but to motivate sales in the Netherlands, which was entirely legitimate.

On the law, the CFI quoting the *Irish Beef* case laid out the general system in art.81(1) EC: i.e. that first one looks at whether the agreements concerned involve clauses with such a degree of harm for competition that they are considered restrictive by object. That involves an appreciation of the contents of the agreement (the nature of the restriction) in its economic context. If that object is not clear, for the clauses to be unlawful, it is necessary to show appreciably anti-competitive effect.[173]

172. *Peugeot v Commission* (T-450/05), judgment of July 9, 2009.
173. *Peugeot* at [43]–[45].

The court also stressed that the issue was not whether the parties had intended to restrict competition. An agreement could also be restrictive by object, if it had both legitimate objectives and anti-competitive ones.[174]

The court noted that a distribution agreement had a restrictive object if it involved the treatment of export sales less favourably than national sales and thus led to a partitioning of the relevant market.[175] The court then reviewed in considerable detail whether (1) the bonus system in question, *and* (2) the alleged pressure on dealers not to export had been shown to meet this test (and found that to be the case).

The court also considered whether there had been "agreement" between Peugeot and its dealers, focusing on whether unilateral acts of Peugeot in its relations with its dealers had been at least tacitly agreed (acquiesced in by dealers) and again found that to be the case.[176]

Peugeot also argued that the Commission had set the fine too high in part because it had held that, in addition to an anti-competitive object, the agreement and practices concerned had a material effect on parallel exports.

The court agreed that the Commission had considered the actual effect in setting the fine (although the Commission did not have to do so, where there is a finding of an infringement by anti-competitive object). The court therefore reviewed whether the Commission had an adequate basis to do so. In general, the court found for the Commission, save in one respect. Notably, the Commission had tended to downplay the way in which price differentials between countries had changed and the extent to which that, rather than the unlawful bonus system, had affected the amount of parallel exports.

In its unlimited jurisdiction the court therefore reduced the fine on Peugeot by 10 per cent on this account, i.e. to €44.55 million.[177]

Nintendo[178]

In April 2009, the CFI ruled on three appeals related to the Commission's 2002 Nintendo decision, by Nintendo, Itochu and CD-Contact Data.

It may be recalled that this was a 2002 parallel imports case concerning Nintendo games consoles and related games cartridges.[179] The decision was interesting partly because high fines were imposed on Nintendo and its European distributors, based on the 1998 Fining Guidelines (e.g. Nintendo €149 million; John Menzies (the UK distributor) €8.6 million; Itochu (the Greek distributor) and its parent €4.5 million; and CD-Contact Data (the Belgian/Luxembourg distributor), €1 million.

It was also interesting because there appeared to be vertical and horizontal aspects, but the Commission ultimately treated the case as an essentially vertical one. In practice that meant that there were fine reductions for co-operation for some, but the 1996 Leniency Notice was not applied (on the basis that it only concerned cartels).

On appeal Nintendo's fine was reduced to €119 million, CD-Contact Data's fine was reduced to €500,000 and Itochu's appeal was dismissed.

Nintendo[180]

This was an appeal against a fine of €149 million for the vertical infringement of restricting parallel exports in Europe for almost seven years, an unprecedentedly high fine for a vertical infringement.

The key features of the fine were as follows:

- Nintendo was given top weighting (being placed in the first group).
- A multiplier of 3 was applied, given the size of Nintendo's sales in Europe and that Nintendo was the manufacturer of products concerned.
- The basic amount of Nintendo's fine was increased by 50 per cent on the basis that Nintendo was the leader and instigator of the infringement.
- The basic amount of Nintendo's fine was also increased by 25 per cent on the basis that Nintendo had continued the infringement for two years after the Commission sent requests for information concerning videogames supply.
- Nintendo was given a 25 per cent fine reduction for co-operation based on the 1998 Fining Guidelines (but not 50 per cent reduction under 1996 Leniency Notice), while John Menzies obtained a 40 per cent reduction for co-operation.
- Nintendo's fine was also reduced by €300,000 for compensation paid to third parties.

There are several important issues in the CFI's judgment:

First, the Commission assessed the gravity of the infringement based on Nintendo's share in the volume of sales of the games consoles and cartridges concerned in EEA. This was accepted

174. *Peugeot* at [55]–[56].
175. *Peugeot* at [46]. Referring to *General Motors* (C-551/03 P) [2006] E.C.R. I-3173 and *Volkswagen* (C-338/00 P) [2003] E.C.R. I-9189.
176. *Peugeot* at [174].
177. *Peugeot* at [302]–[305] and [328]–[329].
178. With thanks to Roberto Grasso for his assistance with this section.
179. See Ratliff, "Major Events and Policy Issues in EC Competition Law 2001–2002" [2003] I.C.C.L.R. 97.
180. *Nintendo v Commission* (T-13/03), judgment of April 30, 2009.

by the CFI as representative of ''the specific weight of each undertaking in the [Nintendo] distribution system in question''.[181]

Secondly, Nintendo argued that being the manufacturer was no reason to increase its fine for deterrence.

The CFI disagreed with both points. The court found that the Commission was entitled to take into account that a manufacturer has a unique position in its distribution system.[182] Given a manufacturer's central position in its distribution system, the court held that it is obliged to ''display special vigilance'' to comply.[183] The Commission could also increase Nintendo's fine for supervising the restriction of parallel trade, even though that role might be considered to merge with its role as manufacturer.[184]

Thirdly, the CFI also found that the fact that the Commission did not mention the possibility of applying a deterrence multiplier in its Statement of Objections was not an infringement of the rights of the defence (even though doing so in a vertical case was new). The court held that deterrent effect is one of the factors going to gravity in the 1998 Fining Guidelines and that was enough to make Nintendo aware that it faced the issue.[185]

Fourthly, the court held that the Commission was not required to vary the rate of increase for duration according to the variable intensity of infringement, despite previous decisions in which it had done so. The Commission could take that aspect into account just in the starting amount for gravity.[186] (This is a point which has come up in several judgments this year.)

Fifthly, the court found that the 25 per cent increase for continuing the infringement after the Commission started to investigate videogames supply was justified in the circumstances.[187]

Sixthly, the court found that the Commission had been correct not to apply the 1996 Leniency Notice which, on its face, is applicable only to horizontal cases such as cartels.[188]

Finally, the court held that the Commission had made a mistake in distinguishing between John Menzies and Nintendo in according them fine reductions under the 1998 Fining Guidelines for their cooperation. The court found that both had made qualitatively comparable contributions at the same stage of the proceedings.[189] Accordingly, Nintendo's fine reduction for co-operation was increased from 25 per cent to 40 per cent (some €29.8 million).

Itochu[190]

The main issue in this appeal was that the Commission sent the Statement of Objections to Itochu Hellas' ultimate group parent and set the fine taking into account its considerable group size (many times larger than Nintendo). The Commission therefore applied a deterrence multiplier of 3, giving an overall fine of €4.5 million. The main points of interest are as follows:

First, Itochu argued this was disproportionate and unfair. In practice, distribution for Nintendo in Greece was very small business for the group (some 0.004 per cent of consolidated turnover in 1997!).[191] Itochu also argued that the ultimate group parent was not involved. So Itochu submitted that its fine should have been much smaller, in line with its Greek business and the smaller fines on the other distributors.

The court said ''no'', applying (again) the classic rules about parent/group responsibility. Here, Itochu owned 100 per cent of its Greek subsidiary directly and indirectly through group companies and was found not to have rebutted the presumption that Itochu Hellas was controlled by its parent.[192]

Secondly, Itochu argued that its role had been merely passive, with Nintendo the main party responsible. The court disagreed, noting that Itochu had signed the distribution agreement in question and had spontaneously informed Nintendo of parallel imports into Greece.[193]

Thirdly, Itochu also argued that it should not be fined for the full duration of its distribution agreement with Nintendo, stating that its unlawful activities were only some of that time. The court disagreed, stating that the Commission was entitled to rely on the existence of the distribution agreement with an anti-competitive object (i.e. containing unlawful restrictions on parallel trade and unlawful, related monitoring provisions, even if these were not implemented).[194]

Fourthly, Itochu argued that, in applying differential treatment for fining purposes, the Commission should not have had one ''third'' category for those with small sales in the Nintendo products concerned. There should have been a ''fourth'' category.[195] However, the court accepted the Commission's approach, which was based more on the nature of the infringement than differences in market shares in assessing gravity, noting that the Commission had some discretion to establish categories for fining purposes.[196]

181. *Nintendo* at [50].
182. *Nintendo* at [80].
183. *Nintendo* at [79].
184. *Nintendo* at [128]–[131].
185. *Nintendo* at [75] and [87].
186. *Nintendo* at [110]–[117].
187. *Nintendo* at [144].
188. *Nintendo* at [157]–[158].
189. *Nintendo* at [176]–[189].
190. *Itochu Corp v Commission* (T-12/03), judgment of April 30, 2009.
191. *Itochu* at [34].
192. *Itochu* at [51] and [56]–[58].
193. *Itochu* at [137]–[138].
194. *Itochu* at [109]–[113].
195. *Itochu* at [67].
196. *Itochu* at [73]–[81].

So a *Stora*-based[197] interpretation of parent/subsidiary liability (arguing that the Commission has to show more than a 100 per cent ownership relationship between parent and subsidiary to hold the parent responsible) was rejected again; and the message was reinforced again that small businesses in big groups have to be very carefully checked for compliance.

CD Contact-Data[198]

The focus in this case was on the situation of a distributor of Nintendo products in Belgium and Luxembourg which was found to have participated in the parallel trade infringement for some two months. The Commission included CD Contact-Data in the third category of fine weighting and imposed a fine of €1 million.

CD Contact-Data appealed, challenging the finding that it had infringed at all, arguing that the relevant correspondence relied on by the Commission did not show that. CD Contact-Data also raised various arguments suggesting that such a fine was disproportionate or contrary to the principle of equal treatment.

The court upheld the Commission's finding that CD Contact-Data had infringed art.81(1) EC by agreeing to monitor parallel exports. On the facts CD Contact-Data argued that it had contacted Nintendo in order to make sure its supply price was not too high, not to seek action on parallel imports. However, the CFI found that the relevant fax ''dealt with the issue of the price of products in a more or less direct connection with the presence of parallel imports'' and, importantly, was went to Nintendo France (from where the parallel export came), not the Nintendo company which set CD Contact-Data's supply price.[199]

The court also confirmed that the Commission has some considerable discretion to group together companies for weighting purposes and had not acted incorrectly in including CD Contact-Data in the third group in this case (even if there were differences between the companies in that group).[200] However, the court reduced CD Contact-Data's fine by 50 per cent on the basis that CD Contact-Data's situation was similar to that of the distributor for Portugal, which only had a €500,000 fine.[201]

Pedro IV/Total—Fuel supply and block exemptions

In April 2009, the ECJ gave a ruling on a reference from the Audiencia Provincial de Barcelona concerning another petrol station dispute in Spain.[202]

The context was a rather complex property and contract situation in which (1) Total had been given the right to build and own a fuel station on land owned by Pedro IV Servicios (Pedro IV) for 20 years; (2) Total leased the fuel station back to Pedro IV; (3) with a long ''tie'' exclusive supply obligation for 20 years, so that Pedro IV could only sell Total fuel.[203]

It may be recalled that, in principle, such long ties may be block exempt under both Regulation 1984/83 on exclusive purchasing and its successor Regulation 2790/1999, although there are differences in the specific wording under each block exemption. Notably, under art.12 of Regulation 1984/83, the block exemption allows for a tie, for the whole period that premises are let, if the station is let by the fuel supplier to the reseller, or the supplier allows the reseller to occupy ''on some other basis'', whereas under art.3 of Regulation 2790/99, for such a long tie to be block exempt, the fuel supplier must own both the station and the land from which the reseller sells fuel. The latter was a consciously more restrictive rule introduced to avoid avoidance of the normal rule that exclusive supply should only be for five years' duration.

In a situation where the legality of the tie was in issue the national court therefore first sought clarification as to whether the two block exemptions applied to this set of arrangements.

The ECJ held that the differences in wording between the two block exemptions mattered (despite contrary argument of the Commission): The long tie arrangements here could benefit from Regulation 1984/83, but might not from the stricter Regulation 2790/99, from when it was in force. Otherwise it was for the referring court to rule on the facts, notably whether Total had more than 30 per cent market share or had in fact acquired ''land rights'' through the right to build the station in Spanish law.[204]

However, the ECJ also noted that the national court had to ascertain whether the agreement had as its object or effect perceptibly to restrict competition and was capable of appreciably affecting trade between Member States.[205]

A second issue was whether the pricing provisions in the fuel supply agreement amounted to unlawful vertical price fixing/resale price maintenance in the circumstances so that, on that account, the two block exemptions might not apply.[206] The provision concerned required Total

197. *Stora* [2000] E.C.R. I-9925.
198. *CD Contract Data v Commission* (T-18/3), judgment of April 30, 2009.
199. *CD Contract Data* at [65]–[68].
200. *CD Contract Data* at [104]–[111].
201. *CD Contract Data* at [119]–[121].
202. *Pedro IV Servicios SL v Total España SA* (C-260/07), judgment of April 2, 2009.
203. *Pedro IV* at [15]–[18].
204. *Pedro IV* at [44], [60] and [66].
205. *Pedro IV* at [68].
206. *Pedro IV* at [75].

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to supply Pedro IV on the most advantageous terms agreed by Total with other stations in Barcelona and its supply price had never to be higher than the average of the prices fixed by other suppliers with a significant presence on the market, who operate in Barcelona. Total also undertook to inform Pedro IV of recommended retail prices and to ensure Pedro IV's competitivity against prices offered in good faith by other competitors in the area.[207]

The ECJ held that provisions concerning supply prices did not amount to unlawful price fixing or resale price maintenance. As regards Pedro IV's retail price, the court noted that the prices were recommended prices. It was, however, for the national court to ascertain whether, in the context, the recommended retail price constituted in reality a fixed or minimum sales price.[208] If so, the exclusive supply agreement would be ineligible for either block exemption. However, again the fixing of the retail price would only be caught by art.81(1) EC if the object or effect of the agreement was to perceptibly restrict competition and was capable of appreciably affecting trade between Member States.[209]

Article 82 EC

Der Grüne Punkt/DSD—Environmental collection systems

In July 2009 the ECJ ruled on the further appeal by the German packaging recovery system Duales System Deutschland (DSD) against the CFI's judgment in May 2007, which upheld the Commission's decision in 2001, in which the Commission found that DSD had infringed art.82 EC and imposed remedies.[210]

It may be recalled that the case related to a trade mark agreement between DSD and manufacturers and distributors, which participated in its packaging recovery system, authorising them, for a fee, to put DSD's ''Der Grüne Punkt'' logo on packaging included in the DSD system.[211]

In a complex decision, the Commission had found that the requirement that those manufacturers and distributors pay such a fee even where they might ''self-manage'' their packaging recovery, or that recovery might be undertaken by other suppliers of such services was contrary to art.82 EC, as an unfair charge and one which prevented competition.[212] The Commission had also found that it was not economically realistic for manufacturers and distributors to organise their packaging so that only packaging recovered by DSD carried the DSD logo,[213] so had required DSD to accept that other logos/labels could also be put on the packaging and that it would not receive the fee where there was proof of recovery other than through the DSD system.[214]

The CFI had upheld this decision, ruling that such a remedy was necessary to prevent abusive foreclosure and unfair pricing by DSD. The court found that this did not adversely affect the ''essential function'' of DSD's trade mark rights, because in effect the DSD logo was an indication that a product could be recovered under the DSD system, not necessarily that it had to be. DSD could not therefore ask for a full fee for every product to which its logo was attached, but it could seek that fee where it carried out the recovery and, where it did not, could obtain some ''adequate'' fee, just for the attachment of its logo.[215]

On further appeal to the ECJ, DSD argued, among other things, that it was being obliged to give a compulsory licence of its trade mark rights and that its logo would lose its distinctive character which relates exclusively to its system and services.[216]

The ECJ disagreed, noting that DSD was not being obliged to offer its services (and to license its logo) to all. DSD was merely required to allow its contractual partners not to pay for packaging recovery services which they did not use. DSD could still bring proceedings against a third party which used its logo without its permission.[217]

Otherwise the ECJ upheld the CFI's judgment, save in one respect. The ECJ found that the CFI had taken too long to deal with the case (some five years and 10 months).[218] However, DSD had argued that such a procedural irregularity should result in the CFI judgment being set aside, which went too far for the ECJ.[219] (It may be noted that there was no compromise position here, in a case where the Commission had imposed a remedy, not a fine which could have been partially reduced, as has occurred in other cases.)

The case is a controversial one because DSD at least still appears to think that it is being required to license to mixed packaging recovery users

207. *Pedro IV* at [76].
208. *Pedro IV* at [79]–[80].
209. *Pedro IV* at [81]–[82].
210. *Der Grüne Punkt—Duales System Deutschland GmbH v Commission* (C-385/07 P), judgment of July 16, 2009.
211. *Der Grüne Punkt* at [8] and [12].
212. *Der Grüne Punkt* at [30] and [32]. See Ratliff ''Major Events and Policy Issues in EC Competition Law 2000–2001'' [2002] I.C.C.L.R. 65–66.
213. *Der Grüne Punkt* at [31].
214. *Der Grüne Punkt* at [37].
215. *Der Grüne Punkt* at [51]–[58]. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R. 40–42.
216. *Der Grüne Punkt* at [126], [136]–137].
217. *Der Grüne Punkt* at [129]–[133] and [143]–[146].
218. *Der Grüne Punkt* at [183] and [188].
219. *Der Grüne Punkt* at [196].

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when that was not its business model, whereas it appears that the Commission and the Community Courts just consider that the DSD logo trade mark agreement has to be interpreted more narrowly or there will be abusive results.

France Telecom/Wanadoo—Predatory pricing[220]

In April 2009, the ECJ gave judgment in this further appeal concerning the Wanadoo predatory pricing case. It may be recalled that in 2003 the Commission had found that Wanadoo had charged predatory prices for ADSL services in France: below variable costs until August 2001; and below total costs from August 2001 to October 2002, as part of a plan to ''pre-empt'' the market in high-speed internet access as it developed. The Commission imposed a fine of €10.35 million.

In 2007 the CFI upheld Commission's approach and the fine.[221]

On further appeal to the ECJ, the main substantive points of interest are as follows:

First, the ECJ confirms that a dominant company has no absolute right to align its prices on those of its competitors, notably if those prices would then be below cost and therefore considered abusive.[222]

Secondly, the ECJ confirms that for abusive predatory pricing, it is not necessary to show that the dominant company could later recoup its losses (following *Tetra Pak*).[223] Such proof is not required where the eliminatory intent of the dominant company can be presumed, because it applied prices below average variable costs.[224]

Thirdly, the court went on to say that this did not prevent the Commission from finding such a possibility of recoupment of losses to be relevant to whether a practice is abusive.[225]

Fourthly, the lack of possibility of recoupment of losses also did not prevent reinforcement of a dominant position, because the reduction in competition and the reduction in choice for customers if competitors withdrew might be enough to constitute an abuse.[226]

Clearstream—Access to securities services[227]

In September 2009, the CFI confirmed the Commission's decision in 2004, in which the Commission found that Clearstream had abused its dominant position in the provision of ''primary'' clearing and settlement services for securities deposited in Germany.[228]

It may be recalled that clearing and settlement are steps for securities trading, which relate to the transfer of title and payment. There are national depositories of shares (called CSDs) and other service providers seeking to organise such services internationally (ICSDs).

The core of the dispute and case here was allegations by Euroclear, seeking to operate as an ISCD, that Clearstream, acting as CSD in Germany and with some 90 per cent of German shares deposited with it, was blocking Euroclear from obtaining access to Clearstream's services on the same terms as those offered to Clearstream's own ISCD, Clearstream Banking Luxembourg.

A first main issue was market definition, since the Commission found that the ''primary'' service level was distinct from the secondary level (and indispensable to offering services at the secondary level). Here the CFI upheld the Commission's decision. Interestingly, the court noted that it could only carry out a limited review of complex economic assessments by the Commission, but still formulated that review test in a broad way (after *Microsoft*),[229] i.e. the court had to check whether the Commission's assessment was based on ''accurate, reliable and coherent'' evidence, including ''all relevant data'' and was capable of substantiating the Commission's conclusions.[230] This is not new, but in the more ''modern'' economics-based competition world, it is interesting to see how demanding this review standard is.

In the case the CFI found no manifest error in the Commission's assessment.

A second main issue was whether Clearstream had acted abusively in denying Euroclear access to its services for some two years, although it only took some four months to organise access for its own related ISCD company Clearstream Banking Luxembourg (and was also quick in relation to other CSDs). Much of the debate was about whether Euroclear's demand had been an unusual mix of automatic (computer) access for

220. *France Télécom SA v Commission* (C-202/07 P), judgment of April 2, 2009.
221. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R. 36–37.
222. *France Télécom* at [45]–[49].
223. *Tetra Pak International SA v Commission* (C-333/94) [1996] E.C.R. I-5951.
224. *France Télécom* at [35]–[39] and [110]–[113].
225. *France Télécom* at [111].
226. *France Télécom* at [112].

227. With thanks to Eleonora Wäktare for her assistance with this section.
228. *Clearstream v Commission* (T-301/04), judgment of September 9, 2009. The Commission's decision was summarised in Ratliff ''Major Events and Policy Issues in EC Competition Law 2003–2004'' [2005] I.C.C.L.R. 120.
229. *Microsoft v Commission* (T-201/04) [2007] E.C.R. II-3601 at [482].
230. *Clearstream* at [47].

some shares and manual access for others. The CFI upheld the Commission's view, again on a limited review assessment insofar as technical issues were concerned.[231]

Interestingly, the court emphasised that in the negotiations it would have been reasonable to expect Clearstream to indicate if such a combination of access was a problem for it, or even to propose an alternative solution. Equally, even if there were technical changes to be made to computer systems and other tests, this could not reasonably justify a two-year wait for an access link which was part of Clearstream's everyday business and which it usually granted within a few months.[232]

The third main issue was whether Clearstream could link access to its system for Euroclear to Clearstream's access to Euroclear's system in France. The CFI said ''no'', not if that impaired genuine competition on the relevant market. A dominant company's right to defend its own commercial interests did not go so far.[233]

The fourth main issue was whether the refusal to supply constituted by such delay was abusive, notably did it involve a risk of elimination of all effective competition (as required on the case law). The CFI held that this had been adequately shown, because the delay was capable of causing Euroclear a competitive disadvantage on the market.[234]

Finally, the CFI upheld the Commission's finding of price discrimination. Euroclear was offered €1 per transaction more than Clearstream Banking Luxembourg, with a €125,000 annual charge. That was considered to distort Euroclear's competitive relationship vis-à-vis its competitors.[235]

Other

In April 2009, the ECJ confirmed the CFI's dismissal of an application to annul the Commission's rejection of a complaint by a Greek collective IP management society, AEPI, concerning an infringement of arts 81/82 EC by three Greek bodies which collectively manage related rights to copyright.[236]

In Part 2, to be published in the next issue, John Ratliff will outline:

- the European Commission's cartel decisions (e.g. on Marine Hoses and Bananas);
- the Commission's other horizontal decisions and settlements (e.g. on collecting societies; ship classification and the Mastercard MIF system);
- the Commission's art.82 EC cases, including structural remedies in the energy sector involving E.ON and RWE and a €1 billion fine on Intel;
- the Commission's report on the first years of Regulation 1/2003 (and the related ECN and national court co-operation);
- the Commission's ''Online Commerce Roundtable''.

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231. *Clearstream* at [93]–[95].
232. *Clearstream* at [103] and [106].
233. *Clearstream* at [131]–[136].
234. *Clearstream* at [144]–[151].
235. *Clearstream* at [192]–[194].
236. *AEPI v Commission* (C-425/07 P), judgment of April 23, 2009.

Major Events and Policy Issues in EC Competition Law, 2008–2009 (Part 2)

JOHN RATLIFF[1]

Cartels; Competition law; EC law; Fines

This is the second and final part of the overview of ‘‘Major Events and Policy Issues in EC Competition Law in 2008–2009’’, following on from Part 1 published in last month’s journal.[2]

The main part of the article is devoted to the European Commission’s recent decisions on cartels; other European Commission decisions and settlements on horizontal co-operation (e.g. on collecting societies; ship classification and the Mastercard MIF system); and the Commission’s art.82 EC cases, including structural remedies in the energy sector involving E.ON and RWE and a €1 billion fine on Intel.

This is followed by a summary of the Commission’s report on the pharmaceutical sectoral review, and then an outline of three areas of important policy discussion: The Commission’s report on the first years of Regulation 1/2003 (and the related ECN and national court co-operation); developments in private actions for damages for competition infringements and the Commission’s ‘‘Online Commerce Roundtable’’.

1. Wilmer Cutler Pickering Hale and Dorr LLP, Brussels. With many thanks to Ingrid Cloosterin, Katrin Guéna, Jane Hollands and Rachel Norris for their general help in the production of this article.

2. The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the Commission’s website are to DG Competition’s specific competition page: *http://ec.europa.eu/comm/competition/index_en.html* [Accessed January 13, 2010]. For present purposes the terminology prior to the Lisbon Treaty is retained, since that treaty entered into force after this article was written.

European Commission Decisions

Cartels—new

Box 1

New cartel fines (November 2008–October 2009)*

Total fines		**Highest company fines(s)**	
Car Glass	€1.3 billion	*Saint Gobain*	€896 million
Marine Hoses	€131 million	*Bridgestone*	€58.5 million
E.ON/GdF	€1.106 billion	*E.ON and GdF (each)*	€553 million
Calcium Carbide and Magnesium Reagents	€61 million	*Novácke chemické závody and I. garantovaná*	€19 million
Concrete Reinforcing Bars (re-adopted)	€83 million	*Riva Fire*	€26.9 million
Power Transformers	€67.6 million	*ABB*	€33.75 million
TOTAL	**€2.767 billion**		

Box 2

- **Main issues**
  - — Fines going off the traditional scale with big markets, some duration and recidivism
    - 2 (total infringement) fines in billions of Euros
    - Saint Gobain €896 million in *Car Glass*!
  - — Big reduction (60%) for regulatory context and fact that co-ordination on quotation (not actual) prices in *Bananas*
  - — One company in *Bananas* had a 10% reduction because no evidence that knew of other bilateral exchanges in the case
  - — New experience with the 2006 Fining Guidelines
    - Focus on where sales occur

Box 2: Continued

- Focus on evidence of sales (''calibrated'' approach in *Car Glass* on direct evidence)
- Commission flexible on use of last full business year, if circumstances justify a wider average (*Car Glass, Candle Wax, Marine Hoses*)

— Several cases where multiple infringements were treated as a single continuous infringement (e.g. *Candle Wax, Calcium Carbide/Magnesium*); inspections on home premises: *Marine Hoses*
— No fine where infringer dealt with by criminal sanction: *Marine Hoses*

Car Glass

In November 2008, the Commission imposed huge fines, totalling €1.3 billion on four glass producers for operating a cartel in the car glass market related to light vehicles (passenger cars and light commercial vehicles).[3] The Commission found that, from 1998 until 2003, Asahi/Glaverbel, Pilkington, Saint Gobain and Soliver shared markets, discussed prices and exchanged commercially sensitive information.

More specifically, the Commission states that the infringement consisted in ''concerted allocation of contracts concerning the supply of car glass for all major car manufacturers in the EEA'' through pricing and supply strategies, together with related monitoring and ''correcting measures'', as appropriate.[4]

It appears that the Commission conducted two rounds of inspections at the premises of the companies concerned in Belgium, France, Germany, the United Kingdom and Italy. After the first inspection, Asahi and Glaverbel applied for immunity, which was rejected. However, Asahi/Glaverbel were given a 50 per cent fine reduction for co-operation.

The car glass concerned is made from float glass and is used in the automotive industry for the manufacture of windscreens, sidelights and sunroofs. The Commission noted that, during the infringement period, the parties controlled about 90 per cent of the car glass used in the EEA, a market worth an estimated €2.2 billion in the last full year of the infringement.

Fines were assessed under the 2006 Fining Guidelines.[5]

Interestingly the Commission appears to have taken a specific approach to assess the value of each undertaking's sales[6] to which the infringement relates. Thus:

- First, the Commission notes that there was a sort of ''roll-out'' phase for the first two and a half years of the cartel, in which the Commission had direct evidence of cartel activity only for part of all European car manufacturers. As a result, the Commission has assessed fines based on relevant sales only where it has direct evidence that they were subject to the cartel arrangements.
- Secondly, the Commission notes that, at the end of the infringement, there was a phase when the cartel activity slowed down (it appears Pilkington exited). For that period, some six to seven months, again the Commission only considered as relevant those sales for which it had direct evidence that they were subject to the cartel arrangements.
- Thirdly, for the intervening period, the Commission states that the car manufacturers discussed accounted for some 90 per cent of the EEA sales of each car glass supplier and that the Commission therefore presumes that the whole market was affected.
- The Commission also averaged sales in the infringement period, in view of the particularities of the case.

The Commission increased the fine of Saint Gobain by 60 per cent to €896 million for recidivism. Saint Gobain had been fined already for cartel activities in previous Commission decisions in 1988 for Flat Glass Benelux and 1984 for Flat Glass Italy. This is the highest individual cartel fine to date.

The Commission set the proportion of sales (the so-called ''variable amount'') for its fine assessment at 16 per cent, with the additional amount (the so-called ''entry fee'' for being involved in the cartel) at 16 per cent. The fine on Soliver, considered a much smaller regional supplier, was capped by the 10 per cent of turnover ceiling in art.23(2) of Regulation 1/2003.

Pilkington was fined €370 million, Asahi's fine was reduced by 50 per cent to €113.5 million and Soliver was fined €4.4 million.

As may be apparent the scale of these fines appears due to the size of the market, the five year duration of the infringement and recidivist fine increases for these (now rather old) previous infringements under the new 2006 Fining Guidelines.

3. IP/08/1685, November 12, 2008.
4. Commission Summary [2009] OJ C173/13 at [10].
5. [2006] OJ C210/2.
6. [2009] OJ C173/13 at [16]–[19].

The Commission also notes that Saint Gobain was fined in 2007 for its role in the *Flat Glass* cartel but, because the investigation overlapped in time with the *Car Glass* investigation, the Commission did not consider it in this decision to increase the company's fine.

Marine Hoses[7]

In January 2009, the Commission adopted its decision in the Marine Hoses cartel case. The Commission found that Bridgestone, The Yokohama Rubber Company, Dunlop Oil & Marine, Trelleborg Industrie, Parker ITR and Munuli Rubber Industries had participated for varying periods, from April 1986 until May 2007, in a worldwide cartel which involved allocation of tenders, price-fixing, market sharing and the exchange of ''sensitive'' information.[8]

Bridgestone was fined €58.5 million, Parker ITR €25.6 million, Trelleborg €24.5 million, Dunlop Oil & Marine €18 million and Manuli Rubber €4.9 million (with more specific findings of liability on various group companies, reflecting corporate changes over the years). Yokohama Rubber was not fined, as the immunity applicant. Manuli Rubber's fine was reduced by 30 per cent for leniency co-operation, while claims for leniency reductions by Parker ITR and Bridgestone were rejected as not justified because their submissions had not added value to the Commission's case. Fines were assessed under the 2006 Fining Guidelines.

It appears that the main products concerned are wide (4-24 inch) multi-layered elastomer, strengthened by steel and textile or wire. They are typically used offshore in the context of oil transportation from places not linked to pipelines. They may be floating or submarine and be up to 40 feet long.

The case is interesting for many reasons. Notably:

First, as is perhaps well known, this is a case involving both international cartel enforcement (among the EU, US and Japanese competition enforcement agencies) and criminal prosecution of individuals (notably with a UK citizen who acted as a cartel co-ordinator going to prison in the United Kingdom).[9]

Secondly, the Commission's investigations included an inspection at that cartel coordinator's home.[10]

Thirdly, although the cartel co-ordinator concerned had a company offering ''consultancy services'' to some of the cartel members, the Commission did not follow *AC Treuhand*[11] and fine him or his company separately, apparently on the basis that he had already been sanctioned enough through the individual criminal process. To the extent that he offered services to a cartel member, he was however considered to have acted on behalf of that cartel member, which was held liable accordingly.[12]

Fourthly, the core arrangements appear to have involved different things at different times, ranging from several meetings to bilateral contacts, including via cartel co-ordinators and faxes, emails etc.. The Commission found that there was essentially a Japanese co-ordinator and a European co-ordinator, although there are variations of this over time.

Fifthly, an interesting (and no doubt still controversial[13]) aspect of the case is the way that the Commission deals with an apparent break in the cartel for some two years (even with a price war at that time). The Commission's approach is multi-layered, considering on the one hand that the cartel may not have completely ended in that period, but on the other hand, that even if it did, the Commission could consider that this was a ''repeated'' infringement because the nature of the cartel before and after the break expressed continuity rather than two different cartels.[14] The Commission notes also that the cartel members themselves talked about ''restarting'' the ''old club''.[15] However, the Commission does not fine the cartel members concerned for the break period (i.e. in the duration increase).

Sixthly, two companies, Parker ITR and Parker Hannifin, argued strongly that they had not participated in the cartel because, on the contrary, an ex-employee of the relevant business had fraudulently concealed the cartel from senior management and steered payments into consultancy companies in which he was a shareholder.[16] The Commission rejected such arguments, concluding that the Parker group still had ''control'' of the business concerned and the group had benefited from the employee's participation in the cartel[17] so even if, to use the English expression, the employee was on a ''frolic of his own'', the group was responsible. This is also no doubt controversial.

Seventhly, to assess the fines in a situation where the non-European cartel members had little or no relevant sales in the EEA, the Commission

7. IP/09/137, January 28, 2009; Commission Summary [2009] OJ C168/6; the non-confidential version of the decision is available on the Commission's website.
8. *Marine Hoses* non-confidential decision at [70].
9. e.g. *Marine Hoses* at [67], [139] and [250].
10. *Marine Hoses* at [76].
11. *AC Treuhand* (T-99/04), judgment of July 8, 2008 [2008] E.C.R. II-1501.
12. *Marine Hoses* at [171] and [337]–[338].
13. *Marine Hoses* at [413].
14. See, e.g., *Marine Hoses* at [283] and [294]–[307].
15. *Marine Hoses* at [304].
16. *Marine Hoses* at [369].
17. *Marine Hoses* at [374]–[389].

said that it applied the principles set out in para.18 of the 2006 Fining Guidelines, whereby it calculated the average European sales of the cartel and weighted that by reference to the cartel members' worldwide sales.[18]

Eighthly, in assessing the fines, the Commission assessed sales on the basis of products sold/invoiced to customers in the EEA (even if used elsewhere).[19]

Ninthly, the Commission assessed the proportion of sales factor for this cartel infringement high, at 25 per cent, with duration multipliers ranging from 19 to 2.5 according to the company concerned, and the additional amount (''entry fee'') at 25 per cent. Parker ITR and Bridgestone's fines were increased by 30 per cent for their co-ordinating leadership roles.

Tenthly, part of the alleged infringement appears to have been treated as time-barred for Manuli Rubber, where the break in the infringement was four years.[20]

Finally, the Commission looked at an average of sales over three years to assess the relevant sales, noting the volatility of annual sales so that, to look at a single year, could otherwise give a distorted picture.[21]

E.ON/GdF

In July 2009 the Commission imposed fines totalling €1.106 million on E.ON and GdF for market-sharing in relation to the supply of Russian gas in Germany and France.[22] Each was fined €553 million.

It appears that in 1975, when Ruhrgas (now E.ON) and GdF (now GdF Suez) decided jointly to build the MEGAL pipeline (MEGAL) to take Russian gas into Germany and France they agreed in two side-letters that GdF would not supply customers in Germany with gas transported through MEGAL and Ruhrgas would not transport gas in the pipeline to France.

At the time neither market was liberalised, but the German market was liberalised in 1980 and the French market in 2000.

Although it appears that in 2004 the two companies signed an agreement confirming that the side-letters were no longer valid, the Commission found that the market-sharing arrangement between them continued to exist and produce effects from January 1980 (as regards Germany) and August 2000 (as regards France) until at least September 30, 2005, when the two companies started to take gas off the pipeline to sell in each other's home markets and entered into new agreements about MEGAL.[23] The arrangement was treated as a restriction of competition by object.

The Commission carried out dawn raids in 2006.

The Commission assessed fines under the 2006 Fining Guidelines. The Commission based its fine on:

- affected sales of gas by E.ON and GdF in Germany over the MEGAL pipeline (except sales of gas under E.ON's Gas Release Programme and to eligible customers in France); and
- the average of MEGAL gas supplies in France during the infringement, rather than the last full year of infringement, as generally provided for in the Fining Guidelines, on the basis that the number and type of eligible customers increased significantly during the infringement.[24]

The Commission applied a multiplier of 7.5 for the German sales and 5.5 for the French sales and set the starting percentage based on proportion of sales as 15 per cent of these affected sales. To this the Commission added a further 15 per cent additional amount (entry fee).

However, the Commission did not impose any increase for specific deterrence, noting that ''the fine in this case is in itself sufficiently deterrent (and that these were the first Commission fines for an anti-trust infringement in the energy sector).[25]

Interestingly, the Commission did not individualise the fines, but decided that each company should have an identical fine. This was on the basis that the infringement concerned gas through a pipeline which the companies jointly owned and operated and that the different degree of implementation of liberalisation in Germany and France should not influence the determination of the fine.[26]

Calcium Carbide and Magnesium Based Reagents

In July 2009 the Commission announced that it had taken a decision imposing fines of some €61.12 million on nine companies in relation to these products.[27] It appears that between 2004 and 2007 some seven companies operated a market sharing and price fixing cartel across most of the EEA, excluding Spain and Portugal and the

18. *Marine Hoses* at [429]–[436].
19. *Marine Hoses* at [427].
20. *Marine Hoses* at [412].
21. *Marine Hoses* at [422].
22. IP/09/1099, July 8, 2009; Commission Summary [2009] OJ C248/5; the non-confidential version of the Commission's decision is available in French on the Commission's website.
23. [2009] OJ C248/5 at [4].
24. [2009] OJ C248/5 at [8].
25. [2009] OJ C248/5 at [10].
26. [2009] OJ C248/5 at [11].
27. IP/09/1169, July 22, 2009; and a Commission Summary available on the Commission's website.

United Kingdom and Ireland in relation to calcium carbide powder. This also included customer allocation and information exchanges. The cartel was found to have involved at least 12 meetings. Four companies, which produced calcium carbide granulates, also used these meetings to co-ordinate their behaviour and exchange information. The Commission states that, as a result of the collusion on calcium carbide powder, three companies also colluded on magnesium granulates which are possible substitutes for that powder. They organised separate meetings, usually after the calcium carbide powder meetings.

Calcium carbide powder and magnesium granulates are used in steel production to remove oxygen and sulphur impurities from molten steel and improve the final product. Calcium carbide granulates are used to produce acetylene welding gas, when mixed with water.

The Commission appears to have treated all three aspects as part of one single and continuous infringement, valuing the combined market for the producers as some €175 million.

It appears that Akzo Nobel revealed the cartel to the Commission and obtained immunity. If not, the Commission states that it would have been fined some €17.4 million (including a 100 per cent increase for recidivism based on four previous infringements).

The highest fine was on Novácke chemické zàvody and its parent I. garantovanà, €19.6 million. SKW Stahl Metallurgie and ARQUES Industries were fined €13.3 million. Two companies received fine reductions for cooperation (Donau Chemie 35 per cent; Evonik Degussa 20 per cent), although Evonik Degussa's fine was also increased 50 per cent for recidivism. Two other leniency applications were rejected as not adding significant value to the Commission's case.

It appears one company, Holding Slovenske elektrame was fined as the parent of another, TDR Metalurgija which had gone into liquidation before the decision was adopted.[28]

Fines were assessed under the 2006 Fining Guidelines. The proportion of sales/variable amount taken was set at 17 per cent, with an additional amount/entry fee at the same level.

Although several companies claimed on inability to pay, it appears those claims were rejected. However, one company Almamet received a 20 per cent fine reduction based on its special circumstances, financial position and deterrent effect.

Concrete Reinforcing Bars

In September 2009 the Commission announced that it had re-adopted its decision on an Italian cartel in concrete reinforcing bars, imposing fines totalling some €83 million.[29]

It may be recalled that the Commission first took its decision in this case in December 2002, adopting its decision on the basis of art.65 of the ECSC Treaty. However, in 2007 the CFI overturned that decision considering that, since the ECSC Treaty had expired at the time of the decision, the Commission should have based its decision on the EC procedural regulation, then Council Regulation 17/62, now Council Regulation 1/2003.[30] This decision is therefore stated to be based on arts 7 and 23 of Council Regulation 1/2003.

It appears that the concrete reinforcing bars are used to strengthen columns and other concrete structures in buildings. The infringement concerns only Italy and the period of December 1989 to May 2000.

The Commission states that the fines, still based on the 1998 Fining Guidelines, are almost the same as before, i.e. on the same eight undertakings, ranging from €26.9 million on Riva Fire to €1.08 million on Leali. However, the fine on one company, Lucchini, has been reduced from €16.14 million to €14.35 million ''because its relative size to the third largest addressee'' has decreased.

Power Transformers

In October 2009 the Commission announced that it had imposed fines of some €67.64 million on seven companies for a market sharing agreement in relation to power transformers between 1999 and 2003.[31]

Power transformers are electrical components used by electricity suppliers in their electricity grids for the transmission and distribution of electric power to the customer.

It appears that the companies concerned had an oral agreement, called a ''Gentlemen's agreement'' with meetings once or twice a year, whereby the European producers would not sell power transformers in Japan and the Japanese producers would not sell them in Europe. The Commission estimated annual sales in the EEA to be some €100 million.

Fines were assessed under the 2006 Fining Guidelines. The largest fine was on ABB, €33.75 million including a 50 per cent fine increase for recidivism. The Commission noted that it would have fined Siemens €33.36 million, but did not because Siemens had revealed the cartel and therefore obtained immunity.

Three other companies obtained reductions for co-operation outside the Leniency Notice (Fuji

28. Commission Summary at [9].

29. IP/09/1389, September 30, 2009.

30. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R 56–57.

31. IP/09/1432, October 7, 2009.

Electric 40 per cent; Areva 18 per cent; Hitachi 18 per cent). Areva was therefore fined €16.5 million, Toshiba €13.2 million, Hitachi €2.46 million and Fuji Electric €1.73 million.

Cartels—old

Bananas

In the course of the year the Commission has published the non-confidential version of its decision in October 2008 in the bananas cartel case, together with a summary of its decision.[32]

It may be recalled that the case relates to the supply of fresh bananas in northern Europe (eight EU Member States).[33] The Commission found that Chiquita, Dole and Weichert engaged in bilateral pre-pricing communications, during which they discussed factors going to the setting of prices of bananas. More specifically, information related to the setting of quotation prices for the following week. The Commission found that such communications occurred before the companies concerned set their quotation prices. These were found to follow a consistent pattern even if they did not occur every week. Further, after quotation prices were set on Thursday mornings the parties bilaterally exchanged their prices or ''at least had a mechanism in place'' to do so. This was considered a form of monitoring of the prices after the pre-pricing communications rather than as a separate infringement.[34]

The Commission concluded that the object of the pre-pricing communications was to reduce uncertainty as to the conduct of the parties. They amounted to a ''concerted practice which concerned the fixing of prices''.[35] The infringement period was essentially three years, 2000–2002.

Del Monte was found (jointly and severally) liable for Weichert's infringement insofar as Del Monte exercised decisive influence over Weichert.

Chiquita was not fined, since it had sought and obtained immunity by revealing the communications to the Commission. Dole was fined €45.6 million and Del Monte/Weichert €14.7 million.

There are a number of points of interest in the case, not the least because most of the companies fined contested the Commission's position in multiple ways:

First, there was discussion about the scope of the infringement, it being argued that not all fresh bananas were concerned, only certain green and/or branded bananas, and/or only Latin/American imports. The Commission rejected this on the basis that the pre-pricing communications affected quotation prices which, as market signals, impacted the prices of other bananas, so that ''all fresh bananas'' should be taken as a whole.[36]

Secondly, there was discussion about whether the pre-pricing communications were restrictive by object, or rather should have been treated like an information exchange which only comes within art.81(1) EC when the market is concentrated (i.e. applying the *UK Tractor Exchange* case.[37] Here the Commission distinguished the *UK Tractor Exchange* case as only relating to ex-*post* communication of volumes sold, as opposed to here pre-pricing communications and found a restriction by object.[38]

Thirdly, there was discussion about whether such pre-pricing communications really influenced prices and/or were capable of materially affecting competition. The companies argued, notably, that in the regulated banana sector (in which there are licences and quotas etc.), there was considerable transparency on many issues (called ''radio banana'').[39] The Commission found that the pre-pricing communications affected price competition, but ultimately decided to reduce the basic amount of the fines imposed by 60 per cent because of the specific regulatory context and because the co-ordination was concerned with quotation prices, not on actual prices.[40]

Fourthly, there was particular discussion about the position of Weichert, insofar as it appears that the communications were bilateral (Dole/Chiquita and Dole/Weichert) and the Commission accepted that it did not have evidence that Weichert knew of, or ought reasonably to have foreseen, the Dole/Chiquita communications. As a result the basic amount of Weichert's fine was reduced by 10 per cent.[41]

Fifthly, there was particular discussion about the liability of Del Monte, insofar as Del Monte was in a form of partnership with Weichert (with an 80 per cent stake) and also Weichert's banana supplier. The parent/subsidiary liability presumption did not apply therefore and the Commission found decisive influence based on the structure and circumstances concerned[42]

Sixthly, on fines the Commission set the proportion of sales percentage of the value of sales at 15 per cent, the multiple for duration at 3 and

32. Commission Summary [2009] OJ C189/12. The non-confidential version of the decision is available on the Commission's website.
33. See Ratliff ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 117.
34. *Bananas* at [51]–53], 198 and [247]–[258].
35. Commission Summary at [7]–[8].
36. *Bananas* at [34] and [287].
37. e.g. *John Deere* (C-7/95) [1998] E.C.R. I-3111.
38. *Bananas* at [311] and [315].
39. *Bananas* at [325].
40. *Bananas* at [456] and [467].
41. *Bananas* at [255] and [476].
42. *Bananas* at [20], [384] and [404].

the additional amount (entry fee) at 15 per cent. The Commission also made no specific increase for deterrence.

Finally, although there is discussion about how to assess the size of the market concerned, the Commission estimates the combined market share of the cartel members in 2002 at 40 to 45 per cent.[43]

Candle Waxes[44]

In October 2008, the Commission adopted a decision in the Candle Waxes cartel case.[45] In the course of the year, the Commission has put the non-confidential version on its website.

In its decision, the Commission imposed a total fine of some €676 million on nine groups, ENI, ExxonMobil, Hansen & Rosenthal, Tudapetrol, MOL, Repsol, Sasol, RWE and Total, for participating in a complex of agreements and/or concerted practices in the paraffin waxes and slack wax industry.

The Commission's investigation was prompted by an immunity application by Shell. The fine for Sasol was increased by 50 per cent because it was found to be the leader of the cartel, while the fine for ENI and Shell was increased by 60 per cent for previous infringements (repeat infringements). Since Shell was the first company to provide the Commission with information about the cartel, it received full immunity from fines. Sasol, Repsol and ExxonMobil were granted reductions of their fines of 50 per cent, 25 per cent and 7 per cent respectively, for their co-operation with the investigation.

Although these undertakings were found to have committed a single and continuous infringement, the Commission acknowledged that some of them were not involved in some practices concerning paraffin waxes, while others were involved in other conduct relating to slack wax. In particular, the Commission found that nine companies were involved in fixing the price of paraffin wax in the EEA between 1992 and 2005 (with related information exchanges).[46] Further, six of the companies were engaged in customer and/or market sharing in Germany. The Commission also found that four of the companies were also involved in agreements and concerted practices related to slack wax in Germany from October 1997 until May 2004.[47]

Paraffin waxes are a key input for the production of a wide range of products such as candles, waxed paper, paper cups and plates, the wax coating on cheese, chemicals, tyres and car components, but also in the rubber, packaging, adhesive and chewing gum industries.

Slack wax is the raw material used to produce paraffin wax. It represents a by-product in the manufacture of base oils from crude oil. In addition to being sold to paraffin waxes producers, it is sold to manufacturers of particle board.

The overall market was estimated to be worth some €500 million.

Several further points may be noted:

First, MOL, one of the cartel participants, claimed that the Commission had not properly established its jurisdiction for its conduct prior to May 2004. The company argued this since, prior to 2004, it was present only in Hungary, and the latter was not yet part of the EU. Further, that the Commission had not established jurisdiction on, for example the "single entity doctrine",[48] the "implementation" doctrine[49] or the "effects" doctrine.[50]. Moreover, MOL argued that the Commission did not satisfy the *Woodpulp* "effect" test and did not demonstrate that MOL's conduct prior to 2004 had effects in the common market. MOL stressed that the Commission had to prove the effects (and affected trade) within the Community if an undertaking has no presence in the Community.

The Commission rejected MOL's view. It recalled that art.81 EC applies irrespective of where an undertaking is located. Further, it stated that, under the *Woodpulp* doctrine, the fact that MOL (and the other participants in the cartel) had sales into the Community was enough to prove effects within the Community, since "[w]hen agreements and practices produce effects within the Community, they may well affect trade within the Community".[51] The Commission also considered the agreements to be partially implemented, or as having effects in the EU.

Secondly, the Commission held the paraffin waxes and slack wax makers responsible for a single and continuous infringement.[52] The Commission considered that the price-fixing and information exchange occurred at the same meetings, by the same persons and concerned the same products, which were economically linked (insofar as slack wax is a raw material for the production of paraffin waxes).[53]

This was contested by the companies, noting that some participants did not produce one of the

43. *Bananas* at [25]–[31].
44. With thanks to Roberto Grasso for his assistance.
45. See Ratliff "Major Events and Policy Issues in EC Competition Law 2007–2008" [2009] I.C.C.L.R 116–117.
46. *Candle Waxes* at [328].
47. *Candle Waxes* at [210] and [328].
48. *Imperial Chemical Industries Ltd* (48/69) [1972] E.C.R. 619.
49. *Ahlstrom* (Joined Cases 89/85, 104/85, 116/85, 117/85 and 125/85 to 129/85) [1988] E.C.R. 5193.
50. *Gencor Ltd* (T-102/96) [1999] ECR II-753.
51. *Candle Waxes* at [187]–[191], non-confidential version available on the Commission's website at the time of writing.
52. *Candle Waxes* at [267] and [273].
53. *Candle Waxes* at [273] and [278].

two products concerned and that, for example, slack wax and paraffin wax are distinct markets.

Thirdly, the Commission considered in detail issues of the liability of parent companies for their subsidiaries, and the issue of the liability of the parent companies of a joint venture for an infringement by the JV.

As regards the parent subsidiary issue, the Commission simply recalled the presumption of decisive influence from near 100 per cent ownership.[54] The Commission added that further additional circumstances can be used to corroborate such a presumption, but they are not necessary to establish liability.[55]

As regards the issue of the joint and several liability of the parent companies of a JV, the Commission relied on the ECJ's judgment in *Avebe*,[56] stating that "the joint management power and the fact that the parent companies each held a 50% stake in the joint venture" meant that there was control over the JV. Thereafter, each parent company owning 50 per cent of the JV with decisive influence was considered to be in a position similar to that of a single parent company holding 100 per cent of its subsidiary.[57]

Fourthly, the Commission gave a flexible interpretation of para.13 of the 2006 Fining Guidelines, which states that the Commission will "normally" base its assessment of the fine on a company's sales during its last full business year of the infringement.

The Commission noted that, in exceptional circumstances, the last full business year of participation in an infringement may not be the best proxy in calculating the value of sales for the purpose of determining the basic amount of the fine.

Here, one of the paraffin wax makers argued that its sales in the countries which joined the EU in 2004 should not be considered for the calculation of the value of sales, because the illegal conduct took place "almost entirely" before the accession of these countries to the EU.[58] The Commission agreed, acknowledging that "the year 2004 was an exceptional year", due to the enlargement of the European Union in May, and considered it appropriate to use the last three business years of the involvement in the infringement as a basis for the calculation of the fine.[59]

Fifthly, one of the participants in the cartel argued that, in calculating the value of sales, the Commission should not include sales made "within legitimate cross-supply relationships between the undertakings involved".[60] The Commission rejected this view because the undertaking had not "put forward any evidence showing that the cartel did not relate to such sales".[61]

Sixthly, some argued that the credibility of statements by other companies should be questioned, particularly if given in pursuit of leniency fine reductions. The Commission appears to reject this as a general principle, although noting that the quality of such evidence still has to be evaluated (together with corroboration and other types of evidence).[62]

Finally, fines ranged from €318 million on Gasol to €12 million on Tudepetrol.

Fittings

During the course of the year, the Commission published the non-confidential version of its 2006 decision in the copper fittings cartel case, in which it imposed fines of some €314 million on 11 groups.

It may be recalled that the products concerned are copper alloy fittings used to transport water, air, gas, etc., for plumbing, heating, sanitation and other purposes. The Commission found that the companies concerned had agreed prices and implementation mechanisms, allocated markets and customers and exchanged confidential information.[63] The case was summarised in a previous review, based on the Commission's summary.[64]

The following are the main points of interest on the non-confidential version of the decision:

First, the Commission found that the cartel cooperation had continued between some members after the on-site inspections in March 2001 until April 2004.[65] The Commission relied on evidence including telephone bills, showing that several bilateral and multilateral contacts had taken place in the period in question, together with submissions by two companies.[66]

Secondly, the Commission treated the cartel activities in this period as part of an overall anti-competitive scheme, so part of a single and continuous infringement.[67]

Thirdly, the Commission found evidence indirectly implicating a French trade association (FNAS) in the cartel activities. However, the Commission considered that, while the evidence clearly showed the manufacturers' anti-competitive agreement, it did not also prove that FNAS had "actively accepted the tasks entrusted

54. *Candle Waxes* at [332], [333].
55. *Candle Waxes* at [332], [333].
56. *Avebe* (T-314/01) [2006] E.C.R. II-3085.
57. *Candle Waxes* at [334].
58. *Candle Waxes* at [633].
59. *Candle Waxes* at [634].
60. *Candle Waxes* at [638].
61. *Candle Waxes* at [638].
62. *Candle Waxes* at [216]–[217].
63. *Fittings* at [546].
64. See Ratliff "Major Events and Policy Issues in EC Competition Law 2006–2007" [2008] I.C.C.L.R 85–86.
65. *Fittings* at [564]–[567] and [590].
66. *Fittings* at [143]–[144].
67. *Fittings* at [590]–[591].

to it by the manufacturers'', or that it had ''facilitated the implementation of the cartel''. As a result, the Commission concluded that FNAS was not a party to the agreement and, thus, was not an addressee of the decision.[68]

Fourthly, as regards fines, the Commission fixed the starting amount for gravity at €60 million on the leading producers (Aalberts and Viega) based on the total value of the fittings market. However, the Commission then appears to have created several categories to differentiate the starting amount for the various cartel participants, taking into account that some companies were small and produced only certain types of fittings.[69]

Fifthly, the Commission found two aggravating circumstances for certain companies:

- The Commission imposed a very high 60 per cent increase on several companies for continuing the infringement after the inspections in 2001 (but not the company, which had first disclosed this to the Commission).[70]
- The Commission also imposed a 50 per cent increase on one company for providing misleading information to the Commission during the administrative procedure.[71] Essentially, it appears that the company had made a statement, annexed to its Reply to the Statement of Objections, asserting that there has been no contacts in 2001–2005; whereas the Commission had evidence from telephone records showing calls between the companies concerned in the relevant period.

Sixthly, interestingly the Commission applied the 10 per cent of turnover maximum fine ceiling for six companies, showing how hard these fines can be also on smaller companies.[72]

Summaries of old decisions

Fasteners

In February 2009, the Commission published a summary of its 2007 decision in PO/Hard Haberdashery Fasteners.[73]

This appears to be a complex decision. The Commission indicates that it found four separate infringements:

- one cartel with five groups/companies, assisted by a trade association, from 1991 to 2001, involving price-fixing with respect to ''other'' (metal and plastic) fasteners and their attaching machines;
- another cartel with two groups, from 1999 to 2003, fixing prices and allocating customers as regards these ''other'' (metal and plastic) fasteners and their attaching machines;
- another cartel with three groups from 1998 to 1999 involving price co-ordination on zip fasteners in Europe;
- another cartel between two groups for some 15 years from 1977 to 1998, involving market sharing of the supply of zip fasteners and ''other'' (metal and plastic) fasteners. The arrangement was to prevent one group from entering the ''other'' fasteners markets.

The Commission sets out how it has assessed the fines separately for each cartel under the 1996 Fining Guidelines. It also appears that the Commission assessed leniency co-operation differently so that, in two cartels this was under the 1998 Leniency Notice and in the other two under the 2002 Leniency Notice.[74] The trade association was given a symbolic fine of €1,000 for its role as a secretariat to a cartel and ''facilitator'' of the related price arrangement.[75] It appears that since the 1996 Leniency Notice did not provide for cooperation outside its ordinary scope (e.g. additional evidence on gravity or duration) the Commission has dealt with that under attenuating circumstances.

There were various reductions for fines (ranging from 75 to 20 per cent) based on co-operation, including immunity in one case for disclosure of one of the cartels.

The geographic scope of the cartel was Europe although one of the groups concerned was YKK based in Japan. Since YKK was significantly larger than others, a deterrence increase was applied.

Some fines were large. Notably Coats was fined €110 million in one long lasting cartel (zip fasteners and ''other'' fasteners). YKK was fined €62.5 million, €49 million and €19.5 million on three other cartels. Overall the fines amounted to some €328.64 million[76]

Synthetic Rubber

In April 2009, the Commission published a short summary of its 2008 decision in the Nitrile Butadiene Rubber case.[77] This was summarised last year.[78]

68. *Fittings* at [604]–[607].
69. *Fittings* at [765].
70. *Fittings* at [779]–[785]. In *Nintendo*, discussed [2010] I.C.C.L.R. 122, the increase was only 25%.
71. *Fittings* at [786] et seq.
72. *Fittings* at [830]–[831].
73. [2009] OJ C47/8.
74. Commission Summary [2009] OJ C47/8 at [21]–[22].
75. Commission Summary [2009] OJ C47/8 at [10].
76. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R 84–85.
77. [2009] OJ C86/7.
78. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 115–116.

Sodium Chlorate

In June 2009, the Commission published a short summary of its 2008 decision in the Sodium Chlorate case.[79]

Needles

In June 2009, the Commission published a summary of its 2004 decision in PO/Needles.[80] This case was summarised previously[81] (and see now the *Prym* ECJ judgment summarised in Part 1 in last month's journal).

International Removal Services

In August 2009, the Commission published a summary of its 2008 decision in international removal services to and from Belgium.[82]

Other horizontal decisions/settlements

Box 3

- **Article 81 EC—other horizontal issues**
  - — *Collecting societies*
    - Systematic territorial delineation arising from reciprocal representation agreements found contrary to art.81 EC (preventing author choice and multi repertoire/multi-territory activity)
  - — *ICAS/Ship classification*
    - Article 9 settlement, whereby ICAS undertakes to apply qualitative membership criteria, with independent review and to provide for participation/access to its activities/ resolutions for third parties
  - — *Morgan Stanley/VISA*
    - Decision imposing fine of €10.2 million for not admitting Morgan Stanley to VISA
  - — *Mastercard MIF ''Settlement''*
    - Revised MIF system based on avoided costs of using cards over cash
    - No EC action on possible non-compliance
    - Transparency on rates charged for cards
    - (Appeal pending)

Collecting societies

In December 2008, the Commission published a summary of its decision in the *CISAC* case.[83]

It may be recalled that this concerns certain aspects of reciprocal representation agreements between collecting societies in Europe. The reciprocation representation agreements as such are not challenged. These are designed to allow each collecting society to collect royalties due for the exploitation of the rights which it represents in countries where they are not present.

What the Commission is objecting to is certain clauses based on a CISAC model contract and a concerted practice which it finds leads to strict domestic territorial segmentation of licensing areas.[84] One clause, the ''membership clause'', is found to restrict the ability of an author to choose which collecting society to join or to be a member of several (single membership based on nationality). Another, the ''exclusivity clause'' requires a collecting society only to appoint one collecting society per territory for its repertoire of rights, which the Commission found restricted competition between collecting societies on the market for the provision of public performance rights to commercial users.[85]

The Commission also found a concerted practice among collecting societies amounting to strict domestic territorial delineation, insofar as all the representation agreements give the licence to collect royalties on repertoire to the local collecting society, even though that may not be necessary. In other words, insofar as local monitoring is no longer required to monitor the use of the licence for internet, satellite and cable broadcast. The idea is that this prevents the issue of multi-repertoire, multi-territorial licences to commercial users.

The collecting societies were given 120 days to bring an end to the concerted practice. Although the case is still known as *CISAC*, it may also be noted that the association itself was not an addressee of the final decision.

It will be interesting to see what happens. From a competition law perspective the main point is that the Commission has focused on the old

79. [2009] OJ C137/6; see also Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 116.
80. [2009] OJ C147/23.
81. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2004–2005'' [2006] I.C.C.L.R 58–59. The non-confidential version of the Commission's decision is also on the Commission's website.
82. [2009] OJ C188/16. See Ratliff ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 116. The non-confidential version is also now available on the Commission's website in French.
83. [2008] OJ C323/12, and the non-confidential version of its decision is now also available on the Commission's website; see also Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R 86–87 and Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 121–122. See also the article by Andries and Julien-Malvy, ''The CISAC decision—creating competition between collecting societies for music rights'' in the *EC Competition Policy Newsletter*, 2008 No.3, available on the Commission's website.
84. Commission Summary [2008] OJ C323/12 at [2].
85. [2008] OJ C323/12 at [7].

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ECJ *Tournier* and *Lucazeau* judgments,[86] which already dealt with reciprocal representation agreements, but in the context of performance rights for physical premises (such as discos), whereas here the Commission is focusing on copyright licensing of music rights for satellite, cable broadcasting and internet exploitation.[87]

Ship classification[88]

During the year, after inspections in January 2008, the Commission has pursued proceedings involving a possible infringement of art.81 EC and art.53 EEA by the International Association of Classification Societies (IACS), an association established in the United Kingdom with 10 of the world's ship classification societies as members (and one associate member).[89]

It appears that classification societies establish, apply and certify compliance with rules and standards concerning the design, construction, maintenance and survey of the world's cargo carrying ships. More than 90 per cent of the world's cargo carrying tonnage is covered by the IACS classification rules and procedures.

The Commission's concern is that IACS may have reduced the level of competition in the worldwide market for such ship classification services:

- By preventing other classification societies from joining it.
- By not allowing other classification societies to participate in IACS's technical working groups.
- By not giving other classification societies access to IACS's resolutions and related technical background documents.

The Commission provisionally considers that membership of IACS and/or the ability to offer compliance with its rules and standards are important competitive advantages.[90] For example:

- Many (shipping) Flag States do not allow classification societies, which are not IACS members, to perform statutory surveys on their behalf.
- Many ports do not permit entry of ships which are classified with a non-IACS member.
- Some international associations of shipowners require that their members have their ships classified by IACS members as a membership condition.
- Ships classified by an IACS member (or associate member) benefit from standard insurance and marine rates for the cargo they carry. Many Protection and Indemnity Clubs are also hesitant to insure ships not classified by an IACS member and, either they do not normally accept such ships, or they require special conditions of entry.

The Commission provisionally considered that admission, suspension and withdrawal of IACS membership was not governed by objective and sufficiently determinate requirements, applied in a non-discriminatory way, with an independent appeal/review mechanism.

Further, that IACS members alone decided upon the adoption of the IACS rules and procedures, which are, in practice, de facto industry standards.

Non-IACS classification societies were also excluded from participation in the elaboration of IACS's technical standards (i.e. IACS's resolutions).

Further, IACS did not give non-IACS classification societies access to the technical background information relating to these standards.[91]

The Commission therefore provisionally considers that these aspects of IACS's rules could raise concerns under art.81(1) EC and art.53(1) EEA. Further, that they may not fulfil the requirements for clearance under art.81(3) EC and art.53(3) EEA.

Without admission of any infringement, IACS has proposed commitments to address the Commission's concerns, which would be legally binding for five years after they enter into force. These were market tested in June 2009 through an art.27(4) Notice, seeking third-party comments.[92]

The key elements of the proposed commitments were as follows:

- As regards membership: IACS undertakes to establish a single class of membership of IACS and adopt objective, transparent, non-discriminatory qualitative membership criteria, which will be applied uniformly to applications for membership and renewal of membership; together with related procedures with specified deadlines for consideration of such issues.

86. *Tournier* (395/87) [1989] E.C.R. 2521; and *Lucazeau* (Joined Cases 110/88 and others) [1989] E.C.R. 2811.
87. [2008] OJ C323/12 at [77]–[80].
88. With thanks to Sungjin Kang for his assistance.
89. The non-confidential version of the Commission's decision is available on the Commission's website.
90. *Ship classification* at [12].
91. *Ship classification* at [13]–[14].
92. [2009] OJ C131/20; and IP/09/898, June 10. 2009. The non-confidential text of the commitments was made available on the Commission's website.

- As regards participation by non-members of IACS in IACS's technical work: IACS will set up and maintain a subscription-based, online Technical Contributions Forum on IACS' website, providing interested classification societies with a platform for comment and discussion relating to IACS's technical work programmes. Any classification society which is not a member of IACS, but registered on the IACS Technical Contributions Forum can participate in IACS working groups.
- As regards access by non-members of IACS to IACS resolutions and related technical background information: IACS will place in the public domain, all current and future versions of IACS resolutions, as well as a historical file containing the main points of discussion and any technical background documents. IACS will also place no restriction on the individual freedom of its members to enter into any agreement with any classification society on the provision of further information or assistance on the application of IACS' resolutions.
- IACS will also establish an Independent Appeal Board to settle possible disputes on these issues.

In October 2009, the Commission adopted a decision finding that these commitments were sufficient and necessary to address its concerns, without being disproportionate and making the commitments binding for five years.[93]

Morgan Stanley/VISA

In August 2009 the Commission published a summary of its decision in this case.[94] It may be recalled that in October 2007 the Commission adopted a decision imposing a fine of €10.2 million on VISA for refusing to admit Morgan Stanley to VISA Europe, which was found to prevent Morgan Stanley from issuing VISA cards and offering services to merchants who demand coverage of both VISA and MasterCard transactions as a package.[95]

It appears that Morgan Stanley had filed a complaint and sued for damages in the English High Court, but VISA had settled before the Commission's decision and admitted Morgan Stanley to its network.

There appear to have been three main issues:

First, VISA denied Morgan Stanley entry to its system on the basis that it operated a competing payment card system, ''Discover''. There was, in fact, a specific rule against competitors becoming members of VISA. However, the Commission noted that the risk of Morgan Stanley bringing ''Discover'' to Europe was very low in the circumstances (there were ''no realistic'' possibilities of doing so).[96] Further, that the owners or shareholders of other payment networks had been admitted to VISA.

Secondly, VISA appears to have argued that the ''no competitor'' rule fell outside art.81(1) EC and art.53(1) EEA on the basis that it was ''directly related and necessary (proportionate and non-discriminatory)'' for the proper functioning of VISA's payment card network. This was the case here because its card network would be threatened if Morgan Stanley could free-ride on confidential information to the benefit of its ''Discover'' network.[97]

The Commission rejected this. In addition to the points noted above on consistency and whether ''Discover'' could be expanded to Europe, the Commission noted that the information concerned could be available to Morgan Stanley through other means (a so-called ''fronting'' arrangement acceptable to VISA). Further, the Commission noted that less restrictive measures could have been used (confidential undertakings) and, in fact, apparently such issues had been overcome in admitting Morgan Stanley in the settlement.

Thirdly, the Commission appears to have looked closely at whether Morgan Stanley was, in fact, a viable entrant to the card market concerned (the UK merchant acquiring market) and able to be an ''efficient acquirer''. It found that Morgan Stanley was, despite high barriers to entry, so admitting it to such activities could be expected to promote ''efficient competition'' in a highly concentrated market.[98]

Groupement des Cartes Bancaires

The Commission's intervention in this case, from October 2007, was summarised in previous years.[99] The non-confidential version of the decision was made available last year. The Commission has now published a short summary of its decision in the case.[100]

Multilateral Interchange Fees (MIFs)

In April 2009 the Commission announced that it was ''not planning to take further action'' as regards Mastercard's MIF system.[101]

93. IP/09/1513, October 14, 2009.
94. [2009] OJ C183/6; the non-confidential version is also available on the Commission's website.
95. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R 87.
96. Commission Summary [2009] OJ C183/6 at [16].
97. [2009] OJ C183/6 at [17].
98. [2009] OJ C183/6 at [14]–[15].
99. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2006–2007'' [2008] I.C.C.L.R 87–88.
100. [2009] OJ C183/12.
101. IP/09/515 and MEMO/09/143, April 1, 2009.

It may be recalled that in 2007 the Commission took a decision ruling that Mastercard's MIF system for cross-border payment card transactions violated art.81 EC. Mastercard was given until June 2008 to remove the MIF or face daily penalty payments. Mastercard then appealed to the CFI but, in June 2008, announced that it would temporarily repeal its MIF to avoid such sanctions.[102]

Since then it appears that, in October 2008, Mastercard revised its merchant acquirer pricing structure in the EEA, which meant increasing certain existing acquirer fees, introducing a new fee on acquirers and repealing certain acquirer fee waivers. As the Commission put it:

> ''This raised the question of whether Mastercard has effectively been circumventing the prohibition in the Decision to apply its MIF and put in place measures having the same or equivalent object or effect''.[103]

On the other hand, as Mastercard said it would, it appears that Mastercard has been working on, trying to negotiate a solution to the Commission's concerns about whether its system met the criteria of art.81(3) EC, at least pending the CFI's ruling. To that end, it appears that Mastercard has now agreed to introduce a new methodology for the calculation of its MIFs, which will effectively reduce their cost. This is based on the ''avoided cost'' of accepting payments by card, as compared to cash. (Apparently it is also known as the ''tourist test''.) Further, it appears that Mastercard has agreed to change rules providing for ''unblended'' rates for use of cards, instead invoicing distinct rates according to the type of card used.

The Commission is therefore now saying that, in the current circumstances, it will take no further action on the issue of possible non-compliance with its 2007 decision, or for any possible infringement in the October 2008 changes, taking note of (1) Mastercard's introduction of a temporary MIF based on the ''tourist test'' methodology; (2) its repeal of the charges introduced in October 2008; and (3) the new transparency measures.[104]

This remains a complex situation insofar as there are also parallel proceedings against VISA's cross-border MIF system[105] and proceedings in several EU Member States on domestic MIFs.

102. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 121.
103. MEMO/09/143, p.2.
104. See, further MEMO/09/143 at pp.3–4.
105. MEMO/09/151, April 6, 2009.

Articles 82/86 EC

Box 4

- **Articles 82/86 EC**
  - — *The growing use of structural remedies*
    - *Greek Lignite* last year (now followed up with agreed commitments on deposits and tenders for deposits)
    - Energy unbundling (*E.ON Electricity* and *RWE Gas*)
    - Building a transmission line? (*Swedish Interconnecters*)
  - — *Huge fines on €1 billion*
  - — *As ''efficient competitor'' assessments in rebates—Intel*
  - — *A Microsoft browser settlement:*
    - Allowing for a ''ballot box'' choice on screen for Internet Explorer?
  - — *Rambus proposed commitments to ''patent ambush'' claim*

Intel[106]

In May 2009, the European Commission (the Commission) imposed a fine of €1.06 billion on Intel Corp (Intel) for abuse of dominant position under art.82 EC and art.54 EEA.[107]

The investigation stemmed from a complaint by Advanced Micro Devices (AMD) in October 2000, further developed in 2006 and involved several inspections at Intel sites in the United Kingdom, Germany, Italy and Spain, as well as at several Intel customers and European PC retailers.

The Commission issued a first Statement of Objections (SO) in July 2007 concerning Intel's conduct vis-à-vis five original equipment manufacturers (OEMs)[108] and a supplementary Statement of Objections (SSO) in July 2008 concerning Intel's conduct vis-à-vis a retailer.[109]

According to the Commission, Intel engaged in a single, continuous strategy aimed at foreclosing AMD from the x86 CPU market. In particular, Intel committed two separate types of exclusionary abuse, the effects of which reinforced each other, by:

- Giving wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, their x86

106. With thanks to Gabriele Accardo for his assistance with this section.
107. IP/09/745 and MEMO/09/235, May 13, 2009; see the Commission Summary published in [2009] OJ C277/13. The non-confidential version of the decision (518 pages long) is available on the Commission's website.
108. MEMO/07/314, July 27, 2007.
109. MEMO/08/517, July 17, 2008.

central processing units (CPUs) from Intel. Intel was also found to have made direct payments to a major retailer on condition that it stock only computers with Intel x86 CPUs (conditional rebates).

- Making direct payments to computer manufacturers to halt or delay the launch of specific products containing a competitor's x86 CPUs and to limit the sales channels available to these products (so-called "naked restrictions").[110]

Intel contested these allegations, arguing that the case law requires the Commission to demonstrate not only the exclusivity or quasi-exclusivity condition of the discounts, but also "whether the scheme in question did in fact affect the situation of competitors (i.e. whether they did actually or likely foreclose competitors)".[111] Moreover, Intel argued that the Commission had adopted a per se approach, which was at odds with both the case law and the Commission's own Guidance Note on art.82 EC.[112]

The Commission rejected these arguments and held that the EC case law only requires a finding that rebates/payments are granted on condition of exclusivity/quasi-exclusivity (which the Commission considered it had demonstrated), but does not require evidence of actual market foreclosure.

In any event, the Commission noted that a breach of art.82 EC can also result from the anti-competitive object pursued by a dominant undertaking (such as the so-called "naked restrictions" which the Commission found Intel had imposed). The Commission also rejected the view that its approach was contrary to its own Guidance Note on art.82 EC.

Further, the Commission found that, in the absence of any objective justification, Intel's abuse of dominance was sufficiently demonstrated by various findings[113]:

- The level of rebates granted to four OEMs was de facto conditional upon those OEMs purchasing all or nearly all of their x86 CPUs from Intel.
- Payments granted to a retailer were conditional upon selling only PCs based on Intel x86 CPUs.
- Payments to three OEMs were linked to or conditioned on these OEMs halting or postponing the launch of AMD-based products.

110. *Intel* at [917]; see in particular, s.4.2 for "conditional rebates and payments" and s.4.3 for "naked restrictions".
111. *Intel* at [922].
112. *Intel* at [918].
113. *Intel* at [924]–[925].

The Commission also noted the growing threat that AMD's products represented to Intel and that Intel's customers were actively considering switching part of their x86 CPU supplies to AMD.

Interestingly, the Commission also carried out a so-called "as efficient competitor" analysis to demonstrate that the conditional rebates that Intel granted to some customers and the conditional payments granted to a retailer were capable of causing, or likely to cause, anti-competitive foreclosure.[114]

The Commission noted that the "as efficient competitor" analysis is not indispensable for a finding of infringement under art.82 EC, but it is one possible way to consider whether Intel's rebates and payments were capable of causing or likely to cause anti-competitive foreclosure.

In particular, the "as efficient competitor" analysis is an exercise which establishes what effective price a competitor which is "as efficient" as Intel (in terms of producing x86 CPUs and in terms of delivering x86 CPUs that provide the same value to customers as Intel), but which would not have as broad a sales base as Intel, would have to offer x86 CPUs in order to compensate an OEM for the loss of Intel rebates. If this price is below Intel's own cost, then a hypothetical "as efficient" competitor would be foreclosed from the market through Intel's rebates. Accordingly, this type of economic analysis was, in principle, independent of whether or not AMD was actually able to enter.

The decision discusses at length three factors on which the "as efficient" competitor analysis is based:

- The contestable share, i.e. the amount of a customer's purchase requirements that can realistically be switched to a new competitor in any given period.
- The relevant time horizon, which in the specific circumstances the Commission considered to be at most one year, given the speed of innovation characterising the industry.
- The relevant measure of cost, where the Commission ultimately used average avoidable costs (AAC) similar in most cases to average variable cost (AVC) as a benchmark, although it noted that other benchmarks, which also take into account fixed costs elements, could be more appropriate for the x86 CPU industry which is characterised by high fixed costs.

In this respect, a critical (and controversial) issue was actually to determine which of Intel's costs and what percentage of such costs, could be considered as avoidable for the purpose of

114. This analysis was done by reference to several OEMs (pp.302–432) and a retailer (pp.433–453).

the ''as efficient'' competitor analysis.[115] Intel strongly contested the Commission's approach and submitted two economic studies in this respect.[116]

The Commission then calculated the ''required share'' which a competitor would have to sell both (1) to compensate OEMs for lost rebates and (2) to be able to generate sufficient revenues so that sales would be above cost.

The minimum required share is a function of the level of rebates that would be lost if an OEM switched away from Intel in its purchasing and the relationship between Intel's AAC and its average selling price. The Commission noted that, if the required share is higher than the contestable share, then an OEM could not profitably begin to source from a competitor under realistic penetration scenarios. A larger required share implied that an ''as efficient'' competitor would have to take a higher share of business from Intel than what is actually contestable to compensate for the effect of the loss of rebates.

The Commission ultimately found that Intel's rebates were capable of having or likely to have anti-competitive foreclosure effects, since even an ''as efficient'' competitor would have been prevented from supplying a particular OEM's x86 CPU requirements. This conclusion was also based on the presence of reinforcing factors (e.g. Intel would have switched rebates from the OEM; no longer buying exclusively from it, to competitors of that OEM which remained loyal).

The Commission conducted the same kind of economic analysis for the Intel payments to a retailer.[117] However the economic analysis of the capability of these payments to foreclose an ''as efficient'' competitor also took account of the fact that Intel's payments were made at another level of the supply chain, and that their effect was additional to that of conditional rebates to OEMs.

As to Intel's ''naked restrictions'' (i.e. payments awarded to major OEMs conditioned on these OEMs postponing or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of AMD-based products), the Commission found that they were shorter in duration and focused on a specific product or line of products or specific sales channels, whereas rebate arrangements were longer in term and covered entire business segments.[118]

However, the two types of conduct were found to complement each other and were found to be part of a single strategy to foreclose AMD from the x86 CPU market. Within that single strategy, ''naked restrictions'' were considered to be tactical moves to foreclose AMD from well-identified specific products or sales channels of an OEM, while conditional rebates were found to be more strategic devices to foreclose AMD from entire segments of OEMs' demand. Intel's ''naked restrictions'' were considered an abuse of a dominant position by object rather than by effect.

The Commission concluded that Intel's conduct harmed competition by depriving consumers of the choice of AMD-based products at various quality levels and price points.

The Commission also rejected Intel's claim that no fine should be imposed as in the *Clearstream* case, discussed above. In particular, the Commission held that the economic activity of Intel did not raise any controversial issue similar to that in *Clearstream* and that no novel or specific circumstance was present that would justify the non-imposition of fines, as in *Clearstream*.

The Commission imposed a fine of €1.06 billion, based on the 2006 Fining Guidelines.[119] In order to determine the basic amount of the fine, the Commission took into account a number of factors, such as the nature of the infringement, the market share of the undertaking and the geographic scope of the infringement.[120]

In particular, the Commission considered the specific features of the x86 CPUs industry, notably high fixed investments and the fact that there are only two meaningful participants (Intel and AMD) on the market for x86 CPU production, which was considered a market of great economic importance. Therefore, according to the Commission any anti-competitive behaviour on that market had a considerable impact.[121] The Commission also considered that Intel's exclusionary strategy against AMD was worldwide in scope and therefore covered the whole EEA.[122]

In the specific circumstances, the Commission also states that it took into account additional factors to determine the gravity of the infringement, namely that while Intel's conduct vis-à-vis individual OEMs constituted separate abuses, the Commission found that Intel had engaged in a single infringement. However, the intensity of that single infringement differed across the years, while some of the ''individual abuses'' had a short duration.[123]

Interestingly the Commission clarified that it took into account figures relating to the invoice location of the x86 CPUs in the EEA. According to the Commission, such figures were more favourable to Intel because they underestimated the value of Intel sales of x86 CPUs, directly or indirectly related to the infringement in the EEA.

115. *Intel* at [1036]–[1153].
116. *Intel* at [1040] and [1044].
117. *Intel* at [1509]–[1573].
118. *Intel* at [1641]–[1681].
119. [2006] OJ C210/2.
120. *Intel* at [1780], [1783], [1784] respectively.
121. *Intel* at [1780]–[1781].
122. *Intel* at [1784].
123. *Intel* at [1785].

This is because most of the world's computers are assembled in Asia or in the United States, even if they are eventually sold in the EEA to EEA customers. Computers incorporating x86 CPUs which are manufactured or assembled outside the EEA, but sold into the EEA are therefore not accounted for.

Finally, according to the Commission no mitigating circumstances were present.[124]

Intel has appealed the Commission decision to the CFI.[125]

Energy cases

E.ON—German electricity commitments

In February 2009, the Commission published a short summary of its decision in the E.ON German electricity case (after the art.27(4) Notice in June 2008).[126]

It may be recalled that the decision relates to two cases, one on the German wholesale electricity market, the other on the German balancing market.

As regards the German wholesale electricity market, the Commission's concern was that E.ON ''may have designed a strategy to withdraw available generation capacity (limiting the supply of electricity from certain plants on the short-term market, to the power exchange EEX), with a view to raising electricity prices'' (which would be an infringement of art.82 EC).[127] Further, that this ''may have been complemented by a medium and long-term strategy'' of deterring competitors from investments to enter the generation market (long-term electricity supply contracts and offering new competitors a participation in an E.ON power plant), thereby limiting the market volume in electricity generation.[128]

As regards the German electricity balancing market, the Commission's concern was that E.ON may have abused its dominant position on the market for ''secondary balancing services'' in the E.ON network area, increasing its own costs by favouring its own production affiliate for supplies even though it was more expensive. (Balancing services being the additional supply brought into an electricity network to deal with shortfalls in supply at certain times.) This also denied power producers from other EC Member States the opportunity to export ''balancing energy'' into the E.ON (area) balancing market.[129]

It may also be recalled that, without admitting any infringement, E.ON has offered (what are perceived to be) very significant commitments to deal with these concerns:

- the divestiture of some 5,000 MW of E.ON's generation capacity; and
- the divestiture of E.ON's transmission system business, the system operation of the E.ON control area and related activities. This ''unbundles'' the vertically integrated structure of E.ON, with E.ON staying in production and supply.[130]

The Commission considers the proportionality of the remedies in its decision.[131] The Commission considers the divestment of generation capacity to address its concern because it ''removes the incentive to withdraw generation capacity profitably''. The network divestment meets its concern because it severs the links between E.ON as an electricity producer and its position as a network owner responsible for transmission, including balancing services.[132] Otherwise, the Commission reasons that in each case behavioural remedies would not have been equally effective. The Commission also notes that the remedies are voluntary.[133]

RWE—German gas commitments

In March 2009, the Commission announced that it had adopted a decision accepting commitments from RWE to divest its gas transmission network in North-Rhine Westphalia after the Commission had taken proceedings alleging that RWE had abused its dominant position there.[134]

Again, this was quite an event, since the result is again unbundling, other than through the negotiated regulatory process.

RWE was found to hold a dominant position on the German gas transmission market in the area where it operates a network, North-Rhine Westphalia. RWE was also a supplier of gas in that area.

It appears that the Commission alleges that RWE ''may have'' infringed art.82 EC in two ways:

124. *Intel* at [1791].
125. See [2009] OJ C220/41.
126. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 125–126; [2009] OJ C36/8. The Commission has also made available a non-confidential version of its decision (and the related commitments) on its website. See also, the article published by Chauve, Godfried, Kovacs, Langus, Nagy, Siebert in the *EC Competition Policy Newsletter*, 2009, No.1, ''The E.ON electricity cases: an antitrust decision with structural remedies'' currently available on the Commission's website.
127. Commission Summary [2009] OJ C36/8 at [2] and *E.ON* decision at [26]–[40].
128. Commission Summary [2009] OJ C36/8 at [2] and *E.ON* decision at [41]–[44].
129. Commission Summary [2009] OJ C36/8 at [3] and *E.ON* decision at [50]–[55].
130. *E.ON* at [57]–[75].
131. *E.ON* at [77]–[88].
132. *E.ON* at [80] and [88].
133. *E.ON* at [79].
134. IP/09/410, March 18, 2009; Commission Summary [2009] OJ C133/10; the non-confidential version of the decision is available on the Commission's website, as are the proposed commitments which were summarised with an art.27(4) Notice seeking comments in December 2008: [2008] OJ C310/23.

First, insofar as RWE did not develop a congestion management system to allow third parties to obtain access to its gas network, the capacity of which was mainly committed to its own gas supply through a long-term intra-group gas supply agreement in any event. This was treated as a refusal to supply.

Secondly, insofar as RWE may have operated a high priced tariff for use of its gas network, incurring significant losses in its downstream gas supply[135] (even with favourable rebate terms for the long-term arrangement) so that third parties were unable to compete at the downstream level (i.e. were ‘‘margin squeezed’’).

There is *no* finding of infringement, but it appears that, like E.ON, RWE has thought it best as a solution, simply to take itself out of the upstream management role, while keeping the supply position.

There are a number of interesting points here:

First, the Commission states in its decision that the long-term capacity bookings by RWE were not part of the Commission's concerns identified in the Preliminary Assessment that are addressed by the commitments.[136]

Secondly, the first allegation was one of not managing an essential facility in such a way as to allow downstream competition. The Commission states:

> ‘‘. . . [A] dominant essential facility holder is under the obligation to take all possible measures to remove the constraints imposed by the lack of capacity and to organise its business in a manner that makes the maximum capacities of the essential facility available.’’[137]

It appears that the Commission was critical that numerous third-party requests for access had been rejected; that RWE operated a network with nine market areas until August 2006 making long distance transport complicated and costly; that RWE may have understated the capacity available to customers; and that RWE may have not used all available means to make capacities available to customers.[138]

Thirdly, as regards the allegation of margin squeezing, the Commission also states that RWE may have benefited from certain asymmetric costs which did not apply to third parties.[139] Notably, RWE had granted significant rebates for transmission contracts with a long duration, favouring its own downstream business and for which other users could not qualify. Further, RWE's downstream business was exempted from paying balancing fees, whereas other transport customers had to pay high penalty fees for balancing services in RWE's network. Again this was made more difficult by RWE's ‘‘fragmented’’ balancing zones.

Fourthly, the Commission relies on *Ambulanz Glöckner*[140] to find that the Bundesland of North-Rhine Westphalia, Germany's most populated *Land* is a substantial part of the common market, noting also the large number of customers in the area.

Fifthly, the Commission emphasises that it considers this structural remedy as necessary to deal with RWE's conflict of interest as TSO operator and network user, stating that behavioural remedies would not have been equally effective in dealing with the Commission's concerns.[141] The Commission also considers that the remedy is proportionate given the large number of customers (potentially) affected.[142] Clearly this remains controversial, but again one can only note that RWE, at least, appears to have decided that the best solution was to hold on to its downstream position.

GdF Suez—French gas foreclosure

In July 2009, the Commission issued an art.27(4) Notice in relation to proposed commitments offered by GdF Suez, concerning alleged infringements of art.82 EC foreclosing the French gas market.[143]

It appears that the Commission has concerns that GdF Suez might be closing off competitors from access to gas import capacity into France though (1) long-term reservations of that capacity; (2) procedures for allocating import capacity in an LNG terminal; and (3) ‘‘strategic limitation of investments’’ in capacity in another terminal.[144] Without admitting an infringement, GdF Suez is undertaking to release a large share of its long-term reservations of gas import capacity into France immediately and then to continue to reduce its share of these reservations to below 50 per cent.

The Commission considers these commitments should have a major structural impact on competition on the French market.

Comments were requested by third parties within two months.

Greek lignite[145]

In August 2009, the Commission accepted commitments by the Hellenic Republic further to the Commission's art.86(3) EC decision in 2008,

135. *RWE* at [31].
136. *RWE* at [21], fn.23.
137. *RWE* at [23], fn.25.
138. *RWE* at [24]–[27].
139. *RWE* at [29]–[35].
140. *Ambulanz Glöckner* (C-475/99) [2001] E.C.R. I-8089.
141. *RWE* at [50].
142. *RWE* at [51].
143. IP/09/1097, July 8, 2009; [2009] OJ C156/25; the proposed commitments are available on the Commission's website.
144. Commission Notice [2009] OJ C156/25 at para.3.
145. *With thanks to Lisa Arsenidou for her assistance.*

finding that it had infringed arts.86(1) and 82 EC by maintaining certain measures giving the state-owned electricity incumbent Public Power Corporation (PPC) privileged access to lignite.[146]

It may be recalled that the measures in question concerned exclusive rights granted by Greece to PPC for the extraction of lignite, which accounts for most of the electricity produced there. In 2004, three years after the formal opening of the Greek electricity market to competition, the Commission reached the preliminary conclusion that these rights violated EU law.

In its decision in 2008[147] the Commission found that the measures in favour of PPC created an inequality of opportunity between economic operators as regards access to lignite, the primary fuel for electricity production in Greece. PPC was found to have a quasi-monopoly in the exploitation of lignite, while lignite-fuelled electricity generation represented more than 60 per cent of total generation. As a result, PPC had gained a low cost advantage enabling it to maintain or reinforce its dominant position on the Greek wholesale electricity market (PPC had some 85 per cent of that market).

The Commission considered that competitors needed lignite-fired generation to compete and therefore sufficient access to lignite in order to have some baseload capacity in their generation portfolio and in order to be able to exercise competitive pressure on PPC during off-peak periods.

The Commission found that 40 per cent of lignite reserves represented at a minimum one third of baseload production in Greece and thus concluded that the necessary minimum remedy was to allow access to 40 per cent of the Greek lignite reserves, on the one hand, to ensure competition on PPC during off-peak periods and, on the other, to allow competitors a sufficient baseload production to build balanced generation portfolios.

In line with the Commission's approach in its decision, the Hellenic Republic, through a series of letters in May, June, August, October and December 2008, communicated a list of measures which it intended to adopt to ensure access to lignite and lignite-fired generation to PPC's competitors in the Greek electricity market. In particular, the Hellenic Republic has proposed:

- to grant exploitation rights on four lignite deposits (Drama, Elassona, Vegora and Vevi) to entities other than PPC through tender procedures;
- to prohibit the future right holders of Drama, Elassona and Vegora to sell the extracted lignite to PPC, for as long as it owns exploitation rights on more than 60 per cent of all lignite reserves licensed for exploitation in Greece, unless there is no other reliable offer to purchase this lignite;
- to carry out a new allocation procedure for the deposit in Vevi, if the ongoing procedure is cancelled and not to take account of any potential bid by PPC in that procedure, unless no other reliable offer is made. Also, to prohibit the future right holder of Vevi to sell the extracted lignite to PPC, for as long as it owns exploitation rights on more than 60 per cent of all lignite reserves licensed for exploitation in Greece, unless there is no other reliable offer to purchase this lignite.

Also, during the procedure before the Commission, Greece abolished the legislative provision which allowed the state to grant PPC exclusive exploitation rights.

The Commission indicates that it considers these measures necessary and proportional to remove the effects of the infringement and has made them binding by decision in August 2009. The timeframe for their implementation is six months from notification of the August decision for the launching of the tenders and 12 months for the allocation of the exploitation rights. The Hellenic Republic may request an extension in case of unforeseen circumstances beyond its control.

It may be interesting to note that PPC was also given the opportunity to comment on the suggested remedies. PPC raised its objections as to the necessity and the scope of the remedies, putting forward arguments based mainly on developments in lignite trade and the Greek electricity market. In particular, PPC mentioned a number of projects for several gas-fired plants and a lignite-fired power plant by competitors, claiming with respect to the former that there were plans to operate it by imported lignite.

However, the Commission did not consider these to be substantial new facts which would justify a reconsideration of its art.86(3) EC decision. Specifically, with respect to access to lignite from neighbouring countries, the Commission stressed that such access would need to occur under conditions which would allow other players to effectively exercise competitive pressure on PPC.[148]

Moreover, to be able to substitute for exploitation rights for lignite deposits located in Greece, such imports would need to be of sufficient quality and quantity, at competitive prices and providing adequate security of supply (in terms of contract duration) so as to allow electricity operators to

146. IP/09/1226, August 6, 2009; Commission Summary [2009] OJ C243/5; the non-confidential decision is available on the Commission's website.

147. IP/08/386, March 5, 2008; Commission Summary [2008] OJ C93/3; the non-confidential decision is available on the Commission's website: see Ratliff, "Major Events and Policy Issues in EC Competition Law 2007–2008" [2009] I.C.C.L.R 124–125.

148. [2009] OJ C243/5 at [16].

compete with PPC on an "equal footing" on the wholesale market.[149] To reduce the share of total exploitable reserves in Greece, the Commission stated that it would need specific information on these issues, which the Commission considered that PPC had not submitted.[150]

Swedish interconnectors

In October 2009, the Commission published an art.27(4) Notice concerning commitments offered by Svenska Kraftnät (SVK), the Swedish national grid operator.[151]

It appears that the Commission considers SVK to be a dominant undertaking on the Swedish electricity transmission market. Further, that SVK may have abused that position when it anticipated internal congestion within the Swedish transmission system and reduced export interconnection capacity for trade between Sweden and its EU/EEA neighbours, thereby discriminating between domestic and export electricity transmission services, without objective justifications.

Without admitting an infringement, SVK has offered commitments to deal with these concerns. It appears that SVK will divide the Swedish transmission system into two or more bidding zones and operate them on that basis from July 1, 2011.

Thereafter, in general SVK will manage the Swedish system without limiting trading capacity on interconnectors. It is argued that this will create flexibility to allow suitable adaptation to changes in future electricity flow patterns in the Swedish transmission system.

However, an exception is made as regards the so-called "West Coast corridor" of Sweden. Here SVK has argued that congestion cannot be managed efficiently through bidding zones and market splitting, because the area does not contain sufficient generation resources to be able to set a market price by itself. However, SVK is proposing to undertake to alleviate the situation by building and operating a new transmission line in the corridor (between Stenkuller and Strömna-Lindome) by November 2011.

In the meantime, SVK commits to manage any congestion, save in the West Coast corridor, through countertrade, taking into account suitable "regulatory resources" (i.e. sources of electricity which can increase or decrease production or consumption of electricity at short notice). It appears that SVK will first look at resources in Sweden, sourcing from the cheapest first and only then turn to interconnector trading capacities. Thereafter, SVK is to look at any available regulating source to address congestion to guarantee the interconnector trading capacities it will have given to the market.

Comments were invited within one month of publication.

"High Tech" cases

Microsoft[152]

In the course of the year there have been two main issues in relation to Microsoft:

First, in March 2009 the Commission decided that it no longer needed a full-time trustee to monitor Microsoft's compliance of its 2004 decision.[153]

Secondly, a new issue is Microsoft's alleged tying of its web browser Internet Explorer with its dominant PC operating system Windows.[154] In January 2009, the Commission sent a Statement of Objections to Microsoft, alleging that Microsoft's tying of its Internet Explorer with its dominant PC operating system Windows, which makes Internet Explorer available on 90 per cent of the world's PCs, distorts competition on the merits between competing web browsers, insofar as it provides Internet Explorer with an artificial distribution advantage which other web browsers are unable to match, and therefore could amount to an abuse of a dominant position.

In particular, as a result of its tying conduct, the Commission alleged Microsoft would be able to shield Internet Explorer from head to head competition with other browsers and the ubiquity of Internet Explorer creates artificial incentives for content providers and software developers to design websites or software primarily for Internet Explorer, which risks undermining competition and innovation in the provision of services to consumers.

According to the Commission, Microsoft's practice would lead to significant consumer harm, in the light of the fact that the development of new online services makes web browsers an increasingly important tool for businesses and consumers, and a lack of real consumer choice on this market would undermine innovation.

Microsoft replied to the Statement of Objections in April 2009 and in June 2009, Microsoft announced that it was prepared to separate Internet Explorer from Windows to address the Commission's concerns.[155] In particular, Microsoft stated that it would supply retail consumers with a version of Windows without a web browser at all, and computer manufacturers (OEMs) would be able to choose to install Internet Explorer, another browser or multiple browsers in the computers they sell.

149. [2009] OJ C243/5 at [22].
150. [2009] OJ C243/5 at [22]–[23] and [27].
151. [2009] OJ C239/9; and IP/09/1425 of October 6, 2009.
152. With thanks to Gabriele Accardo for his assistance.
153. IP/09/349, March 4, 2009.
154. MEMO/09/15, January 17, 2009.
155. MEMO/09/272, June 12, 2009.

The Commission's first reaction to Microsoft proposal was not positive. It appears that in the Statement of Objections the Commission had suggested that a potential remedy should provide consumers with a genuine choice of browsers presented to them through a ''ballot screen'' in Windows.

In July 2009, Microsoft offered a new set of commitments to meet the concerns expressed by the Commission, including the ballot screen solution suggested by the Commission.

In October 2009, the Commission published an art.27(4) Notice with a summary of the proposed commitments and called for comments from interested third parties, with the aim of making those commitments binding on Microsoft.[156]

The commitments offered by Microsoft intend to allow for an unbiased choice for both OEMs and end users between Microsoft's browser and competing browsers. The key elements of the commitments are:

- OEMs and computer users within the EEA will have the possibility to turn Internet Explorer on and off via a control panel feature and, when Internet Explorer is off, the browser frame window and menus will not be accessible to the user or anybody else in any way.
- OEMs will be free to pre-install any web browser(s) of their choice on PCs they ship and set it as default web browser. Microsoft will not circumvent the commitments and will not retaliate against OEMs for installing competing web browsers or by other means.
- A ''ballot screen'' will give users within the EEA the opportunity to choose whether and which competing web browser(s) to install. The ballot screen will display in an unbiased way icons of and basic identifying information on the most widely used web browsers.

Comments were requested within one month.

Otherwise, in July 2009 the Commission published a summary of its 2008 decision imposing a €899 million period penalty payment on Microsoft for its failure to provide interoperability information on reasonable and non-discriminatory terms, as required by the 2004 decision.[157]

Rambus[158]

In June 2009, the Commission published an art.27(4) Notice, seeking third-party comments on commitments offered by Rambus to address Commission concerns in relation to a so-called ''patent ambush'' by Rambus.[159]

It is alleged that Rambus abused a dominant position in the market for dynamic random access memory chips (DRAMs), a type of electronic memory primarily used in computer systems for the temporary storage of data.

It appears that DRAMs have been standardised by JEDEC, a US based standard-setting organisation. Rambus owns and is asserting patents which it claims cover the technology included in these JEDEC standards. Therefore, manufacturers wishing to produce JEDEC-compliant DRAM chips or chipsets must either acquire a licence from Rambus or litigate its asserted patent rights.

The Commission has alleged that Rambus engaged in:

> ''. . . intentional deceptive conduct in the context of the standard-setting process, for example by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted standard''.[160]

The Commission therefore provisionally considers that Rambus is abusing its dominant position by claiming unreasonable royalties for the use of its patents from the JEDEC-compliant DRAMS manufacturers, at a level which Rambus would have not been able to charge without this conduct. The Commission's view is that the reasonableness of the royalty must be assessed in light of the previous conduct of ''an intentional deceptive capture of a standard incorporating technologies protected by those patents''.[161]

The Commission further noted that behaviour such as that carried out by Rambus undermines confidence in the standard-setting process, whereas an effective standard-setting process is a precondition to technical development and the development of the market in general to the benefit of consumers.

Rambus has offered, without admission of any infringement, two bundled five-year worldwide licence grants for future DRAM products, for all of its patents. In the case of the licence offered for chips, there is no charge in relation to two DRAMS, otherwise Rambus sets royalties at a maximum rate of 1.5 per cent. In the case of the licence offered for memory controllers, Rambus sets royalties at maximum rates ranging from 1.5 to 2.65 per cent until April 2010, falling thereafter to 1 and 2 per cent respectively. The licences are forward-looking only (i.e. do not concern liability for past royalties, if any). Moreover, there will be a ''most

156. MEMO/09/439, October 7, 2009; [2009] OJ C242/20. The full version of the commitments is available on the Commission's website.
157. [2009] OJ C166/20; see Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 123–124.
158. With thanks to Gabriele Accardo for his assistance.
159. [2009] OJ C133/16; see also MEMO/09/273. The full version of the commitments is available on the Commission's website.
160. Notice [2009] OJ C133/16, para.5.
161. Notice [2009] OJ C133/16, para.7.

favoured licensee'' clause, under which any future rate reductions offered would be applied to all.

Inkjet cartridges

In May 2009, the Commission rejected a complaint by EFIM alleging that Hewlett Packard, Lexmark, Epson and Canon infringed arts.81 and 82 EC by excluding inkjet cartridge manufacturers such as Pelikan through patenting strategies, the use of microchips and recollection programmes from the inkjet cartridge aftermarket.

The allegations were based essentially on art.82 EC. The Commission rejected the complaint not on the substantive issues, but on the basis of its *Automec* discretion[162] not to pursue cases where the Commission does not consider it in the Community interest (i.e. here where the investigation appeared too onerous, with limited likelihood of proving an infringement of art.82 EC).[163]

Slovak hybrid mail services

In December 2008, the Commission published a summary of its decision in relation to the Slovak Republic's legislation, which reserved hybrid mail services to the Slovak Post Office.[164]

The basis for the decision is art.86(3) EC, together with arts 86(1) and 82 EC. It appears that in February 2008, the Slovak Republic adopted a law, which extended the postal monopoly of the Slovak Post Office to hybrid mail services, despite the fact that previously these services had been liberalised and open to competition. Apparently, the Slovak Republic considered that this is necessary for the provision of its postal universal service. However, the Commission does not accept that position in its decision.

It may be recalled that hybrid mail services are those where mail is electronically transferred to a postal service operator, which then prints, envelopes, sorts and delivers the postal items.

The Slovak Post Office is a public undertaking owned by the Slovak State, with exclusive rights for certain categories of mail.

Other

In July 2009 the Commission published a summary of its 2004 decision in *Clearstream*.[165]

Sectoral reviews

Pharmaceutical sector report[166]

In November 2008 the Commission issued a preliminary report on its inquiry into the pharmaceutical sector.[167] Then, in July 2009 the Commission issued its final report. [168] It may be recalled that the central issues were (1) whether there was anti-competitive behaviour, which was delaying the entry of generic medicines to the market, and (2) a perceived decline in the number of novel medicines reaching the market. The investigation also started controversially with dawn raids.[169]

The Commission states that its sector inquiry was based on review of the behaviour of 43 so-called ''originator companies'' (companies which develop and patent original patents for the mediaries concerned) and of 27 ''generic companies'' (companies which produce medicines when ''off patent'') and concerned only prescription medicines for human use.

The Commission's final report is in form of Communication, (a long) staff working paper, and some ''fact sheets''. These are all available on the Commission's website. The following is an outline of the main findings based on the Communication:

Market structure: the Commission considers the pharmaceutical sector to be highly regulated and R & D driven. The Commission notes that, on average, it takes seven months for generics to enter the market, which it considers to be long and important because prices for generics are at least 25 per cent lower than the prices for original products.

Main findings: first, the Commission found that originator companies contribute to the delayed entry of generics to the market through their behaviour. Notably, such companies were found to use various instruments to increase the life-cycle of their products (referred to by the Commission in its hearing on the preliminary report as a ''tool box'' of devices to delay market entry), including patent filing strategies, patent litigation and intervention in administrative procedures.

Thus the Commission found that originator companies file many patent notifications for the same product (''patent clusters'' or ''patent thickets''). Further, the Commission noted that litigation between originator companies and

162. *Automec* (T-24/90) [1992] E.C.R. II-2223.
163. Rejection Decision at [10]. The Decision is available on the Commission's website.
164. [2008] OJ C322/10. The Commission has also made a non-confidential version of its decision available on the Commission's website.
165. [2009] OJ C165/7; the decision was summarised previously.
166. With thanks to Katrin Guéna for her assistance.
167. IP/08/1829 and MEMO/08/746, November 28, 2008. The text of the preliminary report is available on the Commission's website.
168. IP/09/1098 and MEMO/09/321, July 8, 2009. The text of the final report is available on the Commission's website.
169. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 127–128.

generic companies increased by a factor of four between 2000 and 2007. It is also suggested that the success rate of that litigation is low (just under 40 per cent), implying (it appears) that some litigation may not have been well founded. Further, that originator companies had entered into some 200 settlements with generics to end litigation or disputes, some 50 per cent of which restricted generic entry and that, in more than half of these, there was a ''value transfer'' to the generic company (some being direct payments). (Again, with the apparent implication that some of this may be anti-competitive.)

The Commission also noted that, in many cases, originator companies intervene in administrative procedures for marketing authorisations by generics and that delay through such procedures can delay the entry on the market of generics.

Secondly, the Commission found that many originator companies have potentially overlapping patents, medicines and R & D programmes with other originator companies, which can have negative effects on innovation. Originator companies often also have defensive patent strategies to exclude competitors without any innovative effort.

Thirdly, the Commission noted apparent general agreement that a Community patent is urgently needed, as well as a Community patent litigation system. The Commission announced in its report that it will further support the rapid adoption of legislation to establish such instruments.

The Commission stressed the need for full implementation of the existing regulatory framework on marketing authorisations and invited Member States to improve their pricing and reimbursement provisions, in particular regarding generic products. Also, the Commission announced that it may revise existing Community rules on pricing and reimbursement.

Investigations regarding particular companies: the report abstains from conclusions on the compatibility with the EC Competition rules of particular pharmaceutical companies' behaviour described in the report. Also, the report does not identify individual pharmaceutical companies infringing competition law.

However, the Commission announced on the same date that the report was issued that it had opened proceedings against *Les Laboratoires Servier* and several generic companies for abuse of dominant position and the infringement of the EC Competition rules.[170] Those formal proceedings followed unannounced inspections by the Commission three days before the preliminary report was issued in November 2008.[171]

170. MEMO/09/322, July 8, 2009.
171. MEMO/08/734, November 25, 2008.

In October 2009,[172] the Commission also confirmed that it had carried out further inspections of pharmaceutical companies allegedly abusing their dominant position and/or infringing the EC Competition rules.

Although clearly controversial it appears that this may be the start of many cases!

Policy

Box 5

- **Other policy issues**
  - Detailed review of Regulation 1/2003, focusing on Commission's new powers and ECN/national court co-operation
  - ECN: ''A common space to think''
  - Progress towards a Directive on private actions/damages actions (but it appears not in this Commission?)
  - Online Commerce Roundtable, focus now on copyright issues restricting online distribution and efficiencies

In view of their importance, the author proposes to focus on three issues here: The Commission's review of Regulation 1/2003; possible developments in relation to damages actions; and the Commission's ''Online Commerce Roundtable''.

Review of Regulation 1/2003

In April 2009, five years after the entry into force of Regulation 1/2003, the Commission published its Report to the European Parliament and the Council on the Regulation's functioning.[173]

It may be recalled that the Commission launched a public consultation in preparation of this report in July 2008.[174] The Commission received 45 submissions from businesses, lawyers and academics. National competition authorities (NCAs) also provided input and were involved with the preparation of the report. The review is provided for in Regulation 1/2003.

The result was a 10-page report, called a ''Communication'', accompanied by a very useful, lengthier Commission Staff Working Paper,[175] which is of particular interest to practitioners. It is proposed to summarise both here.

172. MEMO/09/435, October 6, 2009.
173. IP/09/683, April 30, 2009, COM(2009) 206 final, available on the Commission's website.
174. IP/08/1203, July 24, 2008. The related Commission questionnaire is on its website.
175. SEC(2009) 574, also available on the Commission's website.

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The Commission's Communication[176]

The Communication is divided into an introduction and six main sections:

- The first deals with the system change from notification to direct application of art.81(3) EC;
- the second reports on the application of the effective enforcement tools provided by the Regulation;
- the third examines the application of EC Competition law in accordance with art.3, regulating the relationship between arts 81/82 and national competition laws;
- the fourth looks into EC Competition law enforcement by NCAs and cooperation in the ECN;
- the fifth addresses the Commission's interaction with national courts; and
- the sixth raises certain aspects of the interface with third country enforcement.

Regarding the direct application of art.81(3) EC, the Commission states that it has been ''widely welcomed by stakeholders'' and that no major difficulties were reported. The Commission notes that the change has freed up resources, enabling the Commission to focus on sector inquiries and general guidance, while there was an increase in the number of decisions adopted, compared with earlier periods. With respect to individual guidance, the Commission states that it is committed to providing guidance to companies which encounter novel or unresolved questions, but it appears that there were very few approaches during the reporting period.

Regarding the application of new enforcement tools, the Commission states that it has used its new powers actively and overall successfully. The Commission considers that sector inquiries, one of its key investigative tools now, have enabled the Commission to identify shortcomings in several sectors (gas and electricity, retail banking, business insurance and pharmaceuticals) providing factual material which has supported the Commission's enforcement in individual cases.

The Commission also suggests that further reflection may be appropriate on two points:

- First, the Commission notes that when interviewing legal and natural persons, the absence of penalties for misleading or false replies may be a disincentive to provide correct and complete statements.
- Secondly, the Commission has rarely used the power to request NCAs to carry out inspections on its behalf.

As to the new types of decisions, during the reported period, the Commission has adopted 13 art.9 commitment decisions. So far, it has not imposed structural remedies, but has accepted structural changes as commitments in two cases.

The Commission states that the power to seal and ask questions about facts or documents during inspections has been regularly employed. Further that inspections in non-business premises have occurred twice[177] (The Commission refers to the *Marine Hoses* cartel case described above.) The Commission also notes the *E.ON* breach of seals case (where a fine of €38 million was imposed).[178]

Regarding complaints, while the Commission states that it encourages complainants to provide ''substantiated input'', it should further examine how to streamline the handling of complaints which do not give rise to priority cases.

Regarding its fining policy, the Commission considers that the Community Courts have largely endorsed its approach.

Finally, based on its experience with the imposition of periodic penalty payments under art.24 in the *Microsoft* case, the Commission states that it believes there is room for improvement in what can prove a relatively ''lengthy and cumbersome'' procedure.[179]

Regarding the relationship between arts 81/82 EC and national competition laws, the Commission states that the obligation of NCAs to apply the EC Competition rules to agreements/conduct capable of affecting trade between EU Member States has led to a very significant increase in the application of arts 81 and 82 EC.

In this context, the Commission notes that the business and legal communities have criticised the divergence of standards regarding unilateral conduct where EU Member States remain free to enact stricter national competition laws than art.82 EC. Diverging standards fragmented business strategies that were typically formulated on a pan-European or global basis. The Commission states that it should further examine this matter to assess the need for action at European level.

It appears the Commission has several issues in mind. Notably laws on abuse of economic dependence, ''superior bargaining power'' or ''significant influence'', laws on resale below cost or at a loss, different standards for dominance and stricter standards on the conduct of dominant undertakings.

Regarding EC Competition law enforcement by NCAs and co-operation in the ECN, the Commission states that enforcement of the EC Competition rules has ''vastly'' increased, with

176. With thanks to Lisa Arsenidou for her assistance.

177. Communication, para.12.

178. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 119–121.

179. Communication, para.18.

more than 1000 cases having been pursued by NCAs by the end of March 2009. Also, work sharing between the enforcers in the network was generally unproblematic.

The Commission states that the power of NCAs to carry out inspections or other fact-finding measures on behalf of another NCA has met limitations due to the diversity of national procedures, but has been used in appropriate cases.

In this context there is some discussion as to whether the ban on the use of information by a NCA for the imposition of custodial sanctions, where the NCA has received the information from a jurisdiction which does not have such sanctions is too far-reaching and an obstacle to efficient enforcement. The Commission states that it may examine whether other options are available and that these considerations could also be relevant for future discussions concerning international co-operation agreements with selected jurisdictions with criminal enforcement systems.

By the end of the reporting period, while having been informed of more than 300 envisaged decisions by NCAs, the Commission did not initiate proceedings to take a case from an NCA for reasons of coherent application under art.11(6). Instead the Commission explains that the Commission and the NCAs have developed the practice of informally discussing the NCA's proposed course of action under art.11(4) and the Commission reports that ''stakeholders'' were largely satisfied with the results of the application of the EC Competition rules within the ECN.

Also, the Commission notes that work within the ECN has encouraged Member States to introduce their own leniency policies. Today, only two Member States do not have any kind of leniency policy in place.[180]

Overall, the Commission finds that an aspect which may merit further examination is the fact that the Member States' enforcement systems diverge on important aspects such as fines, criminal sanctions, liability in groups of undertakings, liability of associations of undertakings, succession of undertakings, prescription periods and the standard of proof, the power to impose structural remedies, as well as the ability of EU Member State competition authorities formally to set enforcement priorities.[181] There has been much voluntary convergence, but significant differences remain here.

Regarding the Commission's interaction with national courts, which have the power to apply both arts.81 and 82 EC in full since the entry into application of Regulation 1/2003, during the reporting period, the Commission has issued opinions to national courts on 18 occasions and it decided to submit amicus curiae observations on two occasions, where it considered that there was an imminent threat to the coherent application of the EC Competition rules. In this context the Commission says ''stakeholders pointed to uneven enforcement by national courts and called on the Commission to have greater recourse to the instrument of *amicus curiae* observations''. It appears that NCAs have acted as amicus curiae more frequently.

Otherwise, the Commission noted that the EU Member States had not been very consistent in forwarding to the Commission a copy of written judgments deciding on the application of arts.81 or 82 EC. The Commission is considering options for ensuring efficient and effective access to national court judgments.

Finally, *regarding the interface with third-country enforcement*, during the reported period, the Commission noted that there were issues of disclosure of information from the Commission's files in the context of private litigation and, on a more limited scale, with respect to the exchange of information with third country public authorities.

The Commission states that, while being a strong proponent of civil damages, disclosure of information from its files may undermine the effectiveness of antitrust enforcement. Therefore, the Commission has intervened through amicus curiae briefs before US courts against the discoverability of information prepared solely for the purpose of its investigation. Also, DG Comp made a submission to the US Antitrust Modernisation Commission to this effect. The Commission therefore suggests that the legal framework could be clarified and reinforced to further enhance existing levels of protection against disclosure.

The Commission concludes that the Regulation has significantly improved its enforcement of arts.81 and 82 EC. As already mentioned, the report highlights aspects which merit further evaluation, but leaves open the question of any amendment to the existing rules or practice.

The Commission's Staff Working Paper

There are a number of interesting precisions in the Staff Working Paper, which is 89 pages long, in particular on ECN co-operation and co-operation with national courts. Following broadly the same scheme of sections as above, the following additional points may be of interest:

180. European Competition Network report on leniency convergence and MEMO/09/456, October 15, 2009; the report is available on the Commission's website.
181. Communication, para.33.

The system change[182]

The Commission notes a steep increase in the amount of time spent on inspections (773.5 ''man days'' in 2008, as compared with 213 in 2005).[183] The Commission also notes that it took more decisions in the last five years than in earlier enforcement periods (34 cartel cases with fines, 27 substantive final decisions on arts 81 and 82 EC).[184]

At the time of the report, most (''more than 20'') Member States did not require notifications, but some still do.[185]

Commission enforcement/procedures

It appears that various parties in the consultation for the report have argued for strengthening of the role of the Hearing Officer.[186] The Commission notes that it frequently uses seals during inspections, in part because ''[f]orensic IT is used which often requires overnight scanning of IT files''.[187] The Commission also highlights the use of factual questions during inspections to obtain access to relevant information.[188]

It appears that the Commission asked NCAs to carry out inspections in France and Germany in the one cartel case. However, there are issues in doing so in some cases because of differences in national procedures which can complicate matters, if imported into the overall case.[189]

The Commission is considering using art.18(3) decisions more to obtain information, since voluntary requests are not always answered properly, especially in sector inquiries: ''In the context of certain sector inquiries especially this was a mass phenomenon''.[190]

The Commission also notes the complexity which can occur if NCAs have parallel proceedings to a Commission procedure resulting in an art.9 settlement, referring to the parallel Spanish and Greek proceedings in relation to Coca-Cola.[191]

The Commission states that since the 2006 Leniency Notice the Commission has received an average of two applications for immunity per month.[192]

Interestingly, the Commission notes that in the *E.ON* breach of seals case, the Commission considered that such breaches should, as a matter of principle, be serious infringements and that would have had a sufficiently deterrent effect for E.ON, which is a large subsidiary of a major energy company.[193] (A key point being that the Commission did not go *higher* in the corporate structure to assess deterrence. This is what many argue should happen in other cases, e.g. including cartels.)

In *MasterCard*, it appears the Commission announced its intention to impose a periodic penalty payment already in its art.7 decision, rather than leaving that to a second decision, as it had done in *Microsoft*.[194]

The relationship of EC and national competition laws

According to the Commission, after May 1, 2004, NCAs ''massively migrated'' to the application of the EC competition rules where trade may be affected.[195]

Interestingly, some of the divergent stricter national laws which the Commission is concerned about (listed above) were adopted after 2004, a key issue being it appears, competitive issues in the retail sector.[196] The Commission discusses the issues in detail and appears to question whether some of them are really competition ones.[197] This appears a complex area with various policy factors in play.

ECN/NCA enforcement

The Commission notes that various NCAs have also carried out sectoral inquiries.[198]

The Commission states that some 90 cartel decisions were taken by ECN members since May 2004, 33 Commission decisions and more than 50 national cases (mainly by the French, German, Dutch, Italian and Greek authorities).[199]

In general, insofar as procedural divergence exists in NCA enforcement, the Commission notes that much is changing through convergence and soft harmonisation (e.g. on leniency and principles of fining), but raises the possibility of minimum standards through binding rules.[200]

The Commission notes its ability to work on cases in parallel to NCAs as appropriate, referring to the *France Telecom* judgment in 2007.[201]

The Commission notes that it has ''declined to pursue cases in favour of NCAs doing so'' (e.g. in relation to joint sales of media rights in football) stressing that this is not, however, a ''transfer'' of a decision.[202]

182. No Commission notifications; decentralised art. 81(3) EC assessment.
183. Staff Working Paper, paras 19–20.
184. Staff Working Paper, paras 19–20.
185. Staff Working Paper, para.36.
186. Staff Working Paper, para.57.
187. Staff Working Paper, para.72
188. Staff Working Paper, para.73.
189. Staff Working Paper, para.80.
190. Staff Working Paper, para.82.
191. Staff Working Paper, paras 106–108.
192. Staff Working Paper, para.130.
193. Staff Working Paper, para.135.
194. Staff Working Paper, paras 137–138.
195. Staff Working Paper, para.147.
196. Staff Working Paper, para.163.
197. Staff Working Paper, paras 160–181.
198. Staff Working Paper, para.185.
199. Staff Working Paper, para.188.
200. Staff Working Paper, paras 206–207.
201. Staff Working Paper, paras 208–213 ; *France Telecom* (T-339/04 and T-340/04) [2007] E.C.R. II-521.
202. Staff Working Paper, paras 219–221.

Interestingly, it appears that there has also been a case of parallel enforcement by NCAs in relation to a single infringement (Germany and Belgium re Benzyl-Buthyl-Phtalat).[203]

The Commission stresses also that it considers art.12 allows competition authorities to exchange information as "intelligence", irrespective of the criminal or administrative nature of the underlying proceedings, although the use of such information as *evidence* may be restricted.[204]

As regards the ban on the use of information for custodial sanctions where the transmitting authority does not foresee such sanctions referred to above, the Commission notes that a "double barrier" approach has been proposed. The idea is that the transmitting and receiving authorities would each have to verify that the information can be used in conformity with their respective rules. It appears the Commission may also be interested to use this idea internationally.[205]

The ECN as a policy co-ordinator

In a key passage, the report is very positive concerning the way the ECN has proved to be "a successful forum to discuss general policy issues",[206] talking about how it has created a "common space to think", many layers of ECN Working Group and has led to pro-active exchanges among case-handlers of different authorities.[207]

The Commission notes, however, that its discussions with and writings to NCAs on cases are on various issues, but do not contain new evidence which would be "exculpatory or incriminating".[208]

This remains controversial, since, while one can understand the ECN's desire to keep its co-operation informal and private, companies and their counsel continue to be concerned that their cases are affected by an input they cannot directly address (save before the NCA). In this context, interestingly the Commission notes that a Swedish court in 2006 upheld a Swedish Competition Authority decision denying access to DG Comp observations on a case in the art.11(4) procedure.[209]

Interaction with national courts

The Commission gives further details of its 18 opinions to national courts and notes that it has also published examples on its website.[210] It also describes its amicus curiae interventions in the French *Garage Gremeau* case and the Dutch fine tax deductibility case.[211]

Interface with third-country enforcement

Finally, the Commission stresses that it does not want public disclosure of co-operate leniency statements under discovery rules, but does not see itself as having an interest in generally protecting pre-existing documents from discovery.[212] This remains controversial.

Private damages actions

During the year the Commission has also been working on the follow-up to its White and Green papers on damage claims.[213] It appears that the Commission is considering a proposal for a Directive to harmonise and otherwise provide for a structure for such claims throughout the EU, but this has not yet been adopted. It appears that that the draft addresses single damages claims, a passing-on defence and "opt-in" class actions.

The Commission is also understood to be working on a non-binding notice, which is designed to offer guidance to national courts and private parties on how damages should be assessed.

This remains a complex area, given possible use of econometrics and differing approaches to the degree of precision required in such claims (e.g. can a court provide an "equitable" assessment of damages, or is it up to the plaintiff to prove his damage sufficiently precisely for the court to award it?).

It is also apparent that more claims are being brought, notably in the United Kingdom using Regulation 44/2001[214] and the case law allowing claims to be centred in the United Kingdom, if that is the domestic jurisdiction of one of the defendants.

The "Online Commerce" Roundtable[215]

It may be recalled that in September 2008, the Commission organised a first "Roundtable

203. Staff Working Paper, para.223.
204. Staff Working Paper, para. 239.
205. Staff Working Paper, paras 245 and 308.
206. Staff Working Paper, paras 248–249, 267.
207. Staff Working Paper, para.114.
208. Staff Working Paper, para.257.
209. Staff Working Paper, para.267, fn.318.
210. Staff Working Paper, paras 277–282.
211. Staff Working Paper, paras 283–289. See the summary in the European Court cases section [2010] I.C.C.L.R. 109.
212. Staff Working Paper, paras 299–300.
213. See Ratliff, "Major Events and Policy Issues in EC Competition Law 2007–2008" [2009] I.C.C.L.R 128–130.
214. Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
215. With thanks to Gabriele Accardo for his assistance with this section.

on Online Commerce''.[216] During the year the Commission has received some 35 sets of comments from industry and gone on with the ''Roundtable'' discussions.[217]

There were two different areas of debate, copyrighted material and non-copyrighted material.

As regards copyright, it appears that some debate has focused on promoting competition among right managers, the development of possible centralised copyright data holders and the development of pan-European copyright.

A general theme is the difficulties for online delivery of copyright material (music downloads) given the complex nature of copyright ownership, national limitations, the number of different rights and the national collecting society monopolies. On the other hand, there are also various contributions emphasising the need to protect right holders' exclusive rights and copyright territoriality to allow business decisions to phase release and ensure returns to compensate for high-risk and capital intensive activity.

In October 2009, the participants of the fourth Roundtable on the online distribution of music, chaired by the Commission, issued a joint statement setting out general principles that (in their view) should underpin the online distribution of music in the future.[218] In particular, in their joint statement the roundtable participants agreed to explore:

- the development of efficient licensing platforms including several collective rights managers offering multi-territorial licences for their repertoires. Such platforms would manage and, where possible, license the ''online rights'' (performing and mechanical rights) of all right holders willing to entrust them;
- the potential for the creation of licensing platforms which would manage the substantial bodies of repertoire and deliver pan-European/multi-repertoire licences to commercial users. Such platforms should be non-exclusive and non-mandatory.

The Roundtable participants (Amazon, BEUC, EMI, iTunes, Nokia, PRS for Music, SACEM, STIM and Universal) announced that they would be forming a Working Group with the aim of developing a common framework for rights ownership information. The Working Group should also aim to take due account of market developments and consider the increasing dissemination of online means of music.

As regards online retailing of non-copyright material, the discussion has moved into that about the Proposed EC Vertical Guidelines, set out above. In other words, how to treat online sales, given the existing rules on the existing formats: Should everything be sold online? Is selective distribution denying that? Should there be careful distinctions between online and offline sales to preventing the former free-riding on the latter?

In this area, unsurprisingly, there appears to be a polarisation of positions between those who wish to exclude ''pure'' internet retailers from their distribution systems; and those who think any restrictions on online sales should be treated as ''hard core'' restrictions in the EC rules.

Otherwise there is generalised concern about piracy and counterfeit goods.

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216. See Ratliff, ''Major Events and Policy Issues in EC Competition Law 2007–2008'' [2009] I.C.C.L.R 130.
217. Various materials from these discussions are available on the Commission's website.
218. IP/09/1548, October 20, 2009. The joint statement is available on the Commission's website.