Major Events and Policy Issues in EC Competition Law, 2005–2006 (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 2005 until the end of October 2006. The article is divided into five sections, giving an overview of:

- — Legislative developments;
- — European Court judgments;
- — European Commission decisions;
- — The Commission's sectoral reviews;
- — Current policy issues.

Legislative developments and European 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 as follows:

Box 1

- **Major themes/issues in 2006**
  - — Many cartel appeal judgments
  - — When is a restriction caught by Art.81(1) EC?
    - * In general and in the pharma sector, in *O2 Germany* and *GlaxoSmithKline*
  - — Fines
    - * A series of *high fines* by the Commission
    - * Followed by new EC Fining Guidelines, which radically raise the stakes for recidivists and infringements of long duration
  - — Ongoing leniency "harmonisation"
    - * Limited EC marker proposed
    - * ECN Model Leniency programme
  - — Sectoral inquiry into energy
  - — Microsoft Phase 2: €280.5 million fine for non-compliance
  - — Article 82 EC enforcement (in the Commission's paper on the topic and A.G. Kokott's Opinion in *BA/Virgin*)

These are discussed in the appropriate sections below.

Legislative developments

Adopted

Box 2

- **Legislation/Notices**
  - — IATA block exemption
    - * Interlining conferences re the EU to end
  - — End of liner conference block exemption
    - * Focus now on what information exchange may occur
  - — Access to file notice
    - * Information > 5 years old usually not confidential
    - * Internal documents not accessible
  - — EC and ECN Leniency Programmes
    - * Summary applications
    - * Authorisation to "continue" while Commission prepares investigation
  - — EC Fining Guidelines
    - * Duration increase: 100% per year
    - * Recidivism increase: Up to 100% for each infringement
    - * Basic amount: 10–30% of sales in last year of infringement
    - * "Entry fee": 15–25% of sales

Revision of IATA passenger tariff conferences block exemption

In November 2005, the Commission proposed that the block exemption for IATA passenger tariff conferences be discontinued for routes within the European Union as of January 1, 2007, with a transitional period before then to allow IATA to work on alternative arrangements.[1]

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1. Commission Press Release IP/05/1432, November 16, 2005. With thanks to David Reingewirtz for his assistance.

Since the previous block exemption, Regulation 1617/93, expired on June 30, 2005, this proposal in fact involved a retroactive exemption. The Commission proposed that the block exemption should continue longer for tariff conferences *between the EU and non-EU countries*, where interlining may still be needed, on the condition that the airlines concerned provide the Commission with data to review the situation. The Commission also proposed that the block exemption be discontinued as regards slots and scheduling conferences.

This is a debate that has been going on for some years now (as noted in previous annual reviews).[2] The Commission argues that such multilateral interlining is no longer required because of other interlining options (global airline alliances, code sharing, bilateral interlining) and notes that less than three per cent of all interlining is based on the IATA conferences. The Commission also suggests that such interlining involves higher prices and is high risk in competition terms because competitors exchange commercial sensitive information to agree prices for interlined tickets.

In September 2006, the Commission adopted the block exemption so that[3]:

- For routes within the European Union, tariff conferences will no longer be exempted after December 31, 2006.
- For routes between the European Union and the United States or Australia, tariff conferences will no longer be exempted as of June 30, 2007.
- For routes between EU and other non-EU countries, tariff conferences will no longer be exempted as of October 31, 2007.

These arrangements are subject to certain conditions. Notably:

- The Commission sets out rules on access to slots and reserves the right to send observers to any multilateral meetings for advance consultation on slot allocation and airport scheduling.
- The Commission sets out conditions for consultations on passenger tariffs which, among other things, may not extend to the capacity for which such tariffs are available and again the Commission reserves the right to send observers to related consultations.

The revised Regulation also ends the block exemption for IATA slots and scheduling conferences. Airlines benefiting from the block exemption on routes between EU and non-EU countries must provide the Commission with data on interlining to allow the Commission to consider whether the exemption for those routes should be extended beyond those dates.

Repeal of liner conferences exemption

In December 2005, the Commission proposed a Council Regulation to repeal the liner shipping block exemption in Council Regulation 4056/86 and extended the scope of Regulation 1/2003 so as to cover so-called tramp and cabotage services.[4]

The Commission also indicated that it was in discussions with the shipping industry on a proposal of the European Liner Affairs Association (ELAA) to establish a form of information exchange instead. The Commission indicated that if the block exemption were to be repealed, the Commission would envisage publishing guidelines on how the competition rules apply to all forms of co-operation in the sector. The Commission's proposal was that the block exemption should be allowed to continue for a further two years to allow for proper transitional arrangements both for the companies concerned and Member States which have entered into related international agreements.

In September 2006, the EU Council of Ministers adopted Council Regulation 1419/2006 repealing Council Regulation 4056/86, and amending Regulation 1/2003 to extend its scope to include cabotage and international tramp services. The repeal will enter into effect in October 2008.

The current block exemption, established by Council Regulation 4056/86, allows carriers to fix prices and regulate capacity jointly. Liner shipping (i.e. the provision of regular, scheduled maritime freight transport, chiefly by container) has been organised in the form of liner conferences[5] since the 1870s, although the EU law protecting such practices was put in place in 1986. The exemption was originally granted on the assumption that it was needed to ensure reliable services.

It will be recalled that this is the result of a long campaign and investigation by the Commission, which considers that the block exemption is

2. See e.g. [2006] I.C.C.L.R. 39 at p.40.
3. Commission Regulation 1459/2006 of September 28, 2006 on the application of Article 81(3) of the EC Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports [2006] O.J. L272/3; IP/06/1294, October 2, 2006.

4. IP/05/1586 and MEMO/05/480, December 14, 2005. Tramp services are non-regular, maritime transport of bulk cargo, which is not containerised. They may apply to the transport of oil, agricultural and chemical products. The cabotage concerned relates to the transport of cargo between ports in Member States, which was not previously covered by Regulation 1/2003.
5. Liner conferences are agreements between liner shipping companies on prices and other conditions of carriage.

unduly generous in scope and unduly broad, given that it has no fixed duration or market share ceilings and is not justified.[6] In the Commission's view, now apparently accepted by the EU Council of Ministers, the conditions of Art.81(3) EC clearance are not met.[7]

It appears that modernisation of these arrangements is also considered to be a Lisbon Agenda/European competitiveness issue, because so much European trade (some 40 per cent by value of EU external trade) is affected. The change does not affect the Consortia block exemption, Regulation 823/2000.

Repeal of the block exemption will also mean that technical agreements in the context of liner conferences will not be block exempt, to the extent that they may be caught by Art.81(1) EC.

The focus of debate has now moved to the question as to whether the ELAA's proposed information exchange will be accepted by the Commission. In that context, on September 29, 2006, the Commission published what it calls a ''Staff Issues Paper'' on the market impact of the industry's proposal for a new information exchange system,[8] inviting comments by October 31, 2006.

It is an interesting document, even if not involved in the shipping sector, because it shows the way that the Commission assesses whether each aspect of the proposed exchange may lead to collusion in the market conditions and in the light of the *Tractor Exchange* and *Thyssen Stahl* cases.[9] For example, the Commission considers:

- The structural characteristics of the market and market concentration HHIs for the ''trade lanes''/markets concerned.
- The history of collusion, transparency, buyer power and the risk of signalling of market behaviour.
- The fact that the industry proposes to exchange forecasts of capacity utilisation.
- The way that the proposed exchange involves the disclosure of information after only one or two months.
- The Commission also looks at the extent of aggregation (and the risk of ''disaggregation'' by industry players to reveal more).

The overall conclusion appears to be that the proposed exchange will substantially increase market transparency and includes a number of elements on which the Commission expresses concern about infringing Art.81(1) EC, notably, forward-looking capacity forecasts, the joint coordination of currency surcharges and carrier-only discussions on market developments.

Access to file

In December 2005, the Commission adopted a new Notice on Access to File.[10] The new Notice is intended to update and replace the previous 1997 Notice[11] and offers some useful clarifications of recent Commission practice and procedure.

The main points are as follows:

- The Commission continues with the (controversial) position that access to file is only *required* from the issue of the Statement of Objections (SO) in antitrust cases.[12]
- Access will not be given to the replies of other parties to the Commission's objections.[13]
- The Commission notes that a complainant can obtain access to the documents on which the Commission based its assessment in the event of proposed rejection of a complaint.[14]
- The Commission suggests that generally it will treat information which is more than five years old as non-confidential.[15]
- The Commission gives examples of business secrets[16] and emphasises that in addition to business secrets, there is a category of ''other confidential information'' which it will protect. This includes the identity of persons who have given information in some cases (e.g. customers in an Art.82 EC case, who may be subject to retaliatory measures), where disclosure could significantly harm the person or undertaking which gave the information.[17]
- The Commission emphasises that access to file in competition cases is separate from applications under the EC Transparency Regulation, 1049/2001.
- The Commission states that internal documents of the Commission cannot be disclosed, because they lack evidential value.[18]
- The Commission also states that ''internal documents'' include its communications with other competition and public

6. See e.g. [2005] I.C.C.L.R. 47 at p.55.
7. The various studies concerned are available on the Commission's website.
8. IP/06/1283, September 29, 2006.
9. See the Issues Paper, p.4.
10. Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 139/2004 [2005] O.J. C325/7; IP/05/1581, December 13, 2005.
11. [1997] O.J. C23/3.
12. Above fn.10, para.3.
13. Above fn.10, para.27.
14. Above fn.10, para.31.
15. Above fn.10, para.23.
16. Above fn.10, para.18, e.g. market shares, costs and price structure.
17. Above fn.10, para.19.
18. Above fn.10, para.12.

authorities (including both European Competition Network (ECN) co-operation and third countries),[19] the Commission's own minutes of a meeting (unless agreed with those concerned)[20] and communications in relation to third-party studies which it may commission (although those studies should be accessible).[21]

- The Commission recalls that access relates not only to inculpatory documents, but also exculpatory documents.[22]
- Finally, the Commission maintains the controversial proposition that if information is disclosed other than for the Commission's procedures, it many report a company's counsel, if involved, with a view to disciplinary action (when one would have thought a sanction *on the party concerned* should be the issue).

New EC fining guidelines

For some time now the Commission has been reviewing its 1998 Fining Guidelines. In June 2006 the Commission adopted the result, new Guidelines which are much tougher, at least on long duration cartels and recidivists.

The 2006 Guidelines were published in the EC Official Journal in September 2006[23] and the Commission has indicated that it will apply them to all cases in which an SO is issued after that date. They apply also to abuses of dominant position, but appear strongly influenced by cartel considerations.[24]

Interestingly, it appears that the ECN has also been discussing fines and other national competition authority guidelines are also coming at national level. The German competition authority has already published new guidelines, which are similar, but not identical to the Commission's approach.[25]

The main changes to the EC Fining Guidelines

First, the Commission has stopped using the opening ''tariff'' classification of infringements into ''very serious'', ''serious'' and ''minor'' with corresponding base fine amounts. Instead the opening ''basic amount'' is based on 10–30 per cent of the value of the infringing company's sales, to which the infringement directly or indirectly relates in the EEA.[26] This appears welcome, because it should make the opening amount more predictable and proportionate to infringement. Somewhat daunting for cartel infringers is, however, the Commission's indication that in such cases it will fine at the ''higher end of the scale'', leading to speculation as to whether that starts at 15 per cent or the Commission means 25 per cent!

Secondly, the Commission has made the increase in the fine for *duration* much tougher, changing it from 10 per cent per year to *100 per cent per year*.[27] It appears that the Commission considered that a 10 per cent increase understated the benefit of the cartel to the participants.

Thirdly, the Commission has made the increase in the fine for recidivism/repeated offences much tougher, with now the right to increase *up to 100% for each infringement*.[28] Up to now the Commission generally has applied an increase of 50 per cent (or less) for recidivism, with no apparent multiplier or other increase for multiple recidivism. That now may change. (This may have something to do with a number of multiple recidivist cases recently.)

Fourthly, the Commission will take into account for recidivist assessments not only its decisions, but also those of national competition authorities applying Arts 81 or 82 EC.

Fifthly, the Commission has introduced a new so-called ''entry fee'' which it *will* apply in cartel cases and *may* apply in others, which can be between 15 per cent and 25 per cent.[29] This is designed to punish hard *any* cartel participation. It may be tough on minor infringements, because automatically there will be at least a 15 per cent of turnover fine. Some argue that it is not necessary in the case of long infringements, because the duration increases already punish hard enough. It appears that the Commission preferred not to have debate about whether the fee should only be applied for one- or two-year infringements and therefore has not limited it to the shorter infringements.

Sixthly, the Commission indicates that the basic amount normally will be assessed on the turnover in the *last full business year of infringement*, rather than the last year before the decision is taken (although that remains relevant to ensure that the overall fine has not exceeded the ''10 per cent of turnover'' ceiling for fines in, now, Regulation 1/2003 Art.23(2)).

Finally, one should also note that the Commission still reserves the right to increase fines on companies with a large turnover beyond relevant sales (e.g. multi-product firms, so-called ''specific deterrence'')[30] although in many cases this will

19. Above fn.10, para.15.
20. Above fn.10, para.13.
21. Above fn.10, para.11.
22. Above fn.10, para.24.
23. [2006] O.J. C210/2.
24. IP/06/857 and MEMO/06/256, June 28, 2006. See WilmerHale Antitrust and EU Competition Briefing Series, July 2006, available at *www.wilmerhale.com*.
25. Available at *www.bundeskartellamt.de*.
26. Above fn.23, paras 21–23.
27. Above fn.23, para.24.
28. Above fn.23, para.28.
29. Above fn.23, para.25.
30. Above fn.23, para.30.

be unnecessary because the company may already have reached the ''10 per cent of turnover'' fine ceiling. The Commission also reserves the right to increase fines so that they exceed the amount of the improper gain, where that can be estimated.[31]

First reactions

The result of this appears to be that *long, big infringements will be fined at the 10 per cent of sales maximum regularly*. Some short, small infringements may be fined less, but others may be fined more, because of the new entry fee and/or where a company is a repeat offender.

There is much speculation as to what the Commission will do. Under the 2006 Guidelines the Commission has *many discretions* (up to 30 per cent—basic amount; 15 to 25 per cent—entry fee; up to 100 per cent per infringement—recidivism). To decide the proportion of sales to be considered in a given case for the basic amount or the entry fee, the Commission also says that it will look at a number of factors (nature of the infringement, combined market share, geographical scope, implementation).[32]

The Commission has said that the 2006 Guidelines should not be applied like arithmetic formula, so one can still expect a case-by-case assessment. Nevertheless, even taking a broad approach, one would think that, unless the Commission chooses to exercise restraint, the fines could be consistently huge.

One would also think that the Commission will *recalibrate* elements of its fining, e.g. instead of a single 50 per cent increase for recidivism, that we may see 25 per cent per repeated offence or variations thereof, rather than just apply multiples to the currently frequent 50 per cent. The point is that *many variables* in the overall formula change, so one would think that ''recalibration'' or reassessment of each element will be necessary.

There has also been much speculation about the Commission's concept in the revision of the Guidelines. To some extent the changes may be seen as just fixing perceived weaknesses in the 1998 Guidelines: from the defence side, what many considered the ''black box'' as to what the opening amount would be (e.g. assessment of turnover in the sector, etc.) and over-fining issues for small markets (e.g. the *Greek Ferries* case, etc.), and from the Commission's side, perceived under-fining for duration and recidivism.

There have also been various recent studies on cartel fines and perceived overcharging by companies. Notably, there has been much discussion of papers by Professors Connor and Bolotova, surveying various cartels from the 18th century to recent times and concluding that international cartels may have had an overcharge of some 29 per cent, with national cartels on 15 per cent.[33] These authors have not disclosed their data, which appears wide-ranging, but their papers appear to be influential.

Similarly, the OECD carried out a study in 2002 which, among other things, underscored the idea that fines should be three times the improper gain, because of the probability of not being caught.[34] This may also be influential.

Comparisons to US fining (where a 10 per cent overcharge was assumed and doubled to set the base fine) are more complex, because the US sanctions system is a mixture of corporate and individual executive fines and imprisonment, with treble damage private actions also part of overall deterrence.

Whatever the origin of the scaling up of EC fines, the conclusion is clear: these fines will more than ever require boardroom attention.

It may also be useful to note some of the residual practical concerns which companies and their advisers have. For example, there is continued concern about the use of turnover as a ''proxy'' for any improper gains made to set the fines. Some also argue that since fines are related to *last year's turnover* this can be a tough punishment if the cartel was, as so often, in fact a defensive act in a high fixed-capacity cost industry because of losses incurred over time. Fines are also based on turnover, but paid out of profit.

Corporate groups are also focused on what reasonably they can do to ensure compliance. The problem here is that a group may have a very tough compliance programme, yet a small unit under pressure to achieve profits may still infringe. On the case law, the group is responsible if it 100 per cent owns the unit or subsidiary, which leads then to recidivist and deterrence fine increases, even though the group was doing all it reasonably could to comply. There are already several appeals on the parent–subsidiary presumption. We may expect more, together with more claims that the ''cartel group'' was on a ''frolic of its own''. Practically, one may hope that the Commission in its discretion will fine *less* for group *negligence*[35] and *more* where the Commission has *proof of actual knowledge or participation* by group management.[36]

Finally, as private actions increase in Europe, one would think that there is a case for *reducing* fines where compensation is paid. There is no reference to this in the 2006 Guidelines, but it has been done in previous EC cases and one would

31. Above fn.23, para.31.
32. Above fn.23, paras 22 and 25.
33. Available at *www.agecon.purdue.edu*.
34. Available at *www.oecd.org*.
35. As it can under para.29, above fn.23.
36. See the new German Fining Guidelines, above fn.25.

hope that the Commission should continue to do so, if a reasonable basis for compensation can be worked out.[37]

Other

In August 2006, the Council adopted a newly codified regulation for competition and agriculture, replacing Regulation 26/62, *Council Regulation 1184/2006*.[38] This does not involve substantive change.

Proposed EC and ECN leniency programmes

During the year the Commission appears to have been working on two main developments to its 2002 Leniency Programme:

- — Revising the Commission's own programme to confirm the Commission's existing practice in taking oral ''corporate statements'' and to align the Commission's practice with that of the Member States.
- — Developing an ECN Model Leniency programme.

Taken together there are, as a result, quite a few changes adopted and proposed.

In September 2006, the Commission therefore announced two initiatives at the same time: Draft Amendments to its 2002 Leniency Notice and an ECN Model Leniency Programme, which is intended to lead to soft harmonisation of the EU Member States' national leniency programmes and/or encourage introduction of programmes where there are none at present.[39]

There are a number of key points to note on the Commission's proposal, as shown below.

First, the Commission is proposing to accept ''markers'' for the first time, *but not generally*, only in specific cases where it considers that a company may justifiably need more time to prepare its immunity application.[40] The Commission's example is where a company acquires another and discovers a cartel infringement. So, at present, it appears that the Commission is not thinking of allowing a marker, just because a company is anxious to contact the Commission quickly when a compliance review has revealed an infringement. In such cases, the time pressure remains, while any investigation is carried out.

Markers are also provided for in the ECN Model Leniency programme where, however, on current practice, they may be more general (e.g. as in the United Kingdom).[41]

Secondly, the Commission confirms that, taking into account discovery concerns, companies may offer corporate statements *in oral form*, provided that the company or its representatives approve the accuracy of the recording and/or transcript.[42] The idea is that the Commission retains the material with access only on Commission premises. Provision is also made for addressees of the SO to access such statements, again at the Commission's premises, provided no copies are made. Clearly, such arrangements are far from ideal, but in the absence of some statute-based privilege or other solution, they are welcome to accommodate the relevant treble damage claim concerns.

Interestingly, the ECN Model Leniency programme also provides for oral procedures, with the qualifying comment that their use must be ''justified and proportionate''.[43] This appears to focus on the point that US treble damage suits are more likely if international cartels are in issue and these are more likely to be cases with which the Commission will deal. Unfortunately, however, this is not always the case, with such suits being initiated also for purely European or even EU national infringements. It may well be that such oral procedures will also be necessary at national level, again unless and until a more robust and satisfactory solution can be worked out.

Thirdly, the Commission and the ECN have stated more clearly what they require for an Art.''8(a)'' immunity application (information leading to a ''dawn raid'').[44] The Commission notes the very practical information it needs (names and addresses of alleged co-conspirators) and that companies have actually to describe their own infringement, not just generally what was going on. The Commission emphasises that often such an application is more of a process, where the initial file has to be supplemented, but clearly wants to streamline this now to be more efficient. Commission officials have also been saying that applications are not factual enough, with too much tentative drafting, so this appears designed to rectify that.

Fourthly, the Commission has usefully clarified that *applicants will still be able to qualify for immunity,* even though they may have to attend the next trade association/cartel meeting so as not to jeopardise the Commission's ability to carry out

37. See e.g. *Pre-insulated pipe cartel* [1999] O.J. L24/1.
38. [2006] O.J. L214/7.
39. IP/06/1288 and MEMO/06/357, September 29, 2006, with the two documents available on the Commission's website.
40. Proposed Notice, above fn.39, paras 14–15.
41. ECN Programme, above fn.39, paras 16–18 and the ECN Explanatory Notes, para.35.
42. Proposed Notice, above fn.39, paras 31–35.
43. ECN Programme, above fn.39, paras 28–30 and ECN Explanatory Notes, para.48.
44. Proposed Notice, above fn.39, para.9; ECN Programme, para.13.

an effective ''dawn raid''. The Commission now states that for immunity an application must end its involvement in the alleged cartel ''immediately following its application, except for what would be reasonably necessary in the Commission's view to preserve the integrity of the inspections''.[45]

This has been a difficult issue for some time since, on the 2002 Leniency Notice, no flexibility on termination is apparent and other (e.g. US) authorities may be demanding that applicants go (''wired'') to obtain evidence at the next meeting. The development also bridges differences in ECN members' laws (e.g. the United Kingdom followed the US model of allowing the Office of Fair Trading to authorise an applicant to attend a possible cartel meeting if required). These will remain delicate issues, but the Commission and ECN Model Programme proposals may help to reduce current tension.

Fifthly, the Commission is building up the concept of co-operation required from both immunity and fine reduction applicants. The Commission emphasises the need for ''genuine'' co-operation, which is not compatible with any concealment of relevant information or evidence or telling others of the application.[46]

Sixthly, interestingly the Commission has offered some *clarification on evidence*. For example, the Commission notes that evidence requiring little corroboration is clearly more ''compelling'' than that which needs it and therefore such ''compelling evidence'' may be considered to add more ''added value'' to an application.[47]

The qualification that evidence has to be ''compelling'' is also added to the possibility of obtaining fine reductions for showing additional facts going to the gravity and duration of an infringement.[48] (However, this may just be a confirmation, since even under the current wording, clear *evidence* is required to earn the additional fine reduction.)

The Commission also emphasises that it needs ''contemporaneous incriminating evidence, in addition to a corporate statement for an Art.''8(b)'' application (evidence proving an infringement).[49] Importantly, the Commission still is saying that it will use a corporate statement as evidence, not just a ''route map'' to finding evidence, albeit that the Commission will rely less on the statement, if it has hard evidence, proving the same points.[50]

Finally, the Commission states that disclosure of a corporate statement ''at any time'' would undermine its inspections and investigations for the purposes of the EC Transparency Regulation. Again, from the position of would-be applicants a very welcome statement.

As regards the ECN Model Leniency programme, which is largely similar to the Commission's proposed programme, apart from points already noted, an interesting development is the concept of a ''summary application''.[51]

The idea is that where companies make applications at national level, as well as in Brussels, for precautionary reasons and/or to protect executives from individual sanctions, they may do so in a standardised summary form and then focus on Brussels, save to the extent that a national competition authority (NCA) has specific questions. A company may have to provide a full submission if the NCA then decides to take up the case. Importantly, summary applications are to count for purposes of the timing of applications.

In terms of *statistics*, it appears that between February 2002 and the end of 2005 the Commission received 167 applications under the 2002 Leniency Notice, 87 requests for immunity and 80 fine reduction applications. This appears to relate to 10 different cartel investigations. Importantly, in some 23 cases the Commission rejected or decided not to deal with applications, showing that these procedures are still far from straight forward.

Many of these issues are also described in a useful article by Messrs Van Barlingen and Barennes in the EC Commission Competition Newsletter of Autumn 2005, which summarises much Commission practice in recent years.[52]

European Court judgments[53]

Box 3

- **Main European Court cases—general**
  - — *O2 Germany*: When is an agreement caught by Art.81 EC?
    - * Restatement
    - * National roaming does not restrict competition ''by definition''

45. Proposed Notice, above fn.39, para.12(b); ECN Model Leniency Programme, above fn.39, para.13 and the ECN Explanatory Notes, para.29, cartel appeal.
46. Proposed Notice, above fn.39, para.12. See also the *SGL Carbon* judgment in the *Graphite Electrodes* cartel appeal, below fn.153, summarised in the accompanying text.
47. Proposed Notice, above fn.39, para.25.
48. Proposed Notice, above fn.39, para.26
49. Proposed Notice, above fn.39, para.11.
50. See also the *BASF* judgment in the *Vitamins* cartel appeal, below fn.116 and accompanying text.
51. Above fn.39, paras 22–25.
52. At pp.6–16.
53. With thanks to Lisa Arsenidou, Helena Dolezalova, Cormac O'Daly and David Reingewirtz for their considerable assistance with this section.

- * Careful appreciability assessment required (*Delimitis*)
- * What would competition be without the agreement? (*Société Technique Minière*)

— *GlaxoSmithKline*
- * A restriction by object in the pharmaceutical sector? Still necessary to look at the full context
- * Need for ability to alter competition/affect end consumers

— *Manfredi*
- * Italian damages case
- * The principles of equivalence and effectiveness and national limitation rules (etc.)

— *British Airways*: Advocate General Kokott's restatement of Art.82 EC and rebates and bonuses
- * Is there an objective economic justification?
- * The protective function of Art.82 EC

General

Advocate General Kokott's Opinion—British Airways

On February 23, 2006, Advocate General Kokott delivered an Opinion recommending dismissal of British Airways' (BA's) appeal of the CFI's judgment[54] which upheld the Commission's decision in *BA/Virgin*.[55] The decision and the subsequent appeal were outlined in previous annual reviews.

The Advocate General's Opinion is an important document since she makes a number of general statements on Art.82 EC.

First, the Advocate General suggests that the particular responsibility on a dominant company applies ''whatever the causes of its dominant position.[56] (This appears to be a suggestion that the Art.82 EC duty on a dominant company does not vary according to whether the dominant company earned its position, or inherited it as a former state monopoly.)

Secondly, she aims to offer some restatement of the law in order to clarify it, while accepting that in individual cases it may be difficult to draw the line between legitimate conduct and prohibited abuse. Interestingly, here the Advocate General's general approach is to regard the need to look at all the individual circumstances in a given case as a *positive,* rather than *negative* aspect. In other words, such an assessment may lead to the conclusion that a practice is *outside* or *inside* Art.82 EC.[57] She also emphasises that the fact that a practice may involve a foreclosure effect does not mean it is automatically an abuse, because there may still be an *objective economic justification* for the practice[58] (albeit that any efficiency advantages demonstrably will have to benefit (i.e. be passed on to) consumers).

Thirdly, she also states that since the objective of Art.82 EC is *to protect* the existing competition in a market weakened by the presence of the dominant undertaking (a recurrent theme in her Opinion), *the application of Art.82 EC extends much further in the context of rebates and bonuses than to situations where the bonus recipient has no choice*, e.g. because dealing with unavoidable trading partner or predatory pricing.[59] The application of Art.82 EC is ''in no way'' deferred until there is practically no effective competition left in the market. Nor are the categories of abuse (here abusive rebates and bonuses) closed.

In the context of rebates and bonuses the Advocate General also states that individually defined sales targets, on the whole volume of turnover of a business partner with a dominant undertaking, are normally factors which may lead to a foreclosure effect. Further, that it is particularly difficult for smaller competitors to outbid such rebates or bonuses.

> ''Because of its much higher market share, a dominant undertaking is normally, so far as the other market participants are concerned, an unavoidable trading partner.''[60]

Fourthly, repeatedly told that the Commission was reviewing its current Art.82 EC enforcement policy, the Advocate General noted that, whatever reorientation that might lead to in the future, the Commission's administrative practice would still have to act within the framework prescribed for it by Art.82 EC as interpreted by the European Court.[61] (A reality many practitioners have been emphasising also, even if greater clarification of Art.82 EC would be most welcome.)

Fifthly, it is sufficient to show that a practice *tends to restrict* competition,[62] i.e. is *capable* of having anti-competitive effects. It is not necessary

54. Case T–219/99 *British Airways Plc v Commission* [2003] E.C.R. II–5917; Case C-95/04 P *British Airways Plc v Commission*.
55. [2000] O.J. L30/1.
56. Above fn.54, [23].
57. Above fn.54, e.g. [40], [45], [57], [59], [72]–[73], [95]–[97].
58. Above fn.54, [42].
59. Above fn.54, [44].
60. Above fn.54, [47]–[52].
61. Above fn.54, [28].
62. Above fn.54, [76].

to show *actual* effects, because that may be too late (and the damage to the market is done).[63]

Sixthly (and logically given her whole emphasis), the Advocate General notes that Art.82 EC has a protective purpose:

> ''Article 82 EC . . . is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market and thus competition as such (as an institution*), which has already been weakened by the presence of the dominant undertaking on the market. In this way consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared''[64] (emphasis added in the original text).

Finally, the Advocate General takes the view that the second limb of Art.82(c) is not merely of declaratory effect, but should be shown. In other words that discrimination must be shown *which places trading partners of the dominant company which are competitors at a disadvantage*. This has been the subject of debate for some time. The Advocate General considers that the case law is not clear and therefore the Court of First Instance (CFI) could be forgiven for not examining the issue in detail, but clearly she feels that in future the second limb should be taken seriously.[65]

When is a restriction outside Art.81(1) EC? O2 (Germany)

In May 2006, the CFI issued its judgment in *O2,* partially annulling the Commission's decision regarding the *German Network Sharing Agreement between O2 and T-Mobile*.[66]

It may be recalled that in July 2003, the Commission cleared the framework agreement between O2 (Germany) and T-Mobile concerning infrastructure sharing and national roaming for third-generation GSM mobile telecommunications on the German market.[67] In its decision, the Commission concluded that site sharing was not caught by Art.81(1) EC. However, the Commission took the view that *national roaming* between network operators restricted competition between those operators ''by definition''.[68] The Commission then declared Art.81(1) EC inapplicable to the national roaming provisions of the framework agreement and granted an Art.81(3) EC exemption.

In September 2003, O2 lodged an application to the CFI asking for partial annulment of the Commission's decision. O2 submitted that the Commission did not analyse the actual effects of the agreement as it should have done, since it had accepted that the agreement did not have as its object a restriction of competition. O2 contended that the Commission worked from the assumption that national roaming in itself restricted competition and did not examine the competitive situation in the absence of the agreement. In its defence, the Commission submitted that O2's criticism amounted to asking it to apply a rule of reason to Art.81(1) EC, contrary to established case law.

The CFI agreed with O2. The court found that the decision contained no objective analysis of the specific situation in the absence of the agreement and that it did not demonstrate in concrete terms and in the context of the relevant emerging market that the agreement's provisions were restrictive.

In particular, the court repeated its established case law regarding the assessment of agreements under Art.81(1) EC:

- In cases where the agreement did not have *as its object* a restriction of competition, its effects should be considered in the economic and legal context taking into account, in particular the structure of the market concerned and the actual conditions in which the agreement functions.
- That method of analysis is of general application and is not confined to a category of agreements.[69]
- For the agreement to be caught by the prohibition of Art.81(1) EC, it is necessary to find that competition has in fact been prevented or restricted or distorted to an appreciable extent.
- The competition in question must be understood within the actual context in the absence of the agreement in dispute. An interference with competition was, in particular, to be doubted if the agreement appeared really necessary for the penetration of a new area by an undertaking.

The court stated that such an assessment did not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason. The examination required under Art.81(1) EC consisted in:

- first, taking into account the impact of the agreement on existing and potential competition; and
- secondly, taking into account the competitive situation in the absence of the agreement.[70]

In this context, the court observed that the examination of competition in the absence of an

63. Above fn.54, [69]–[71].
64. Above fn.54, [68].
65. Above fn.54, [120]–[131].
66. Case T–328/03, judgment of May 2, 2006.
67. [2004] O.J. L75/32; [2004] I.C.C.L.R. 61.
68. Above fn.66, [19].
69. Above fn.66, [65]–[73].
70. Above fn.66, [71]–[73].

agreement appeared to be particularly necessary as regards markets undergoing liberalisation or emerging markets, such as the 3G mobile communications market at issue in the case. In those markets effective competition may be problematic, for example owing to the presence of a dominant operator, the concentrated nature of the market or the existence of significant barriers to entry.

The court then noted that the Commission's entire assessment of effects was based on *the assumption* that O2 would have been present on the German 3G market, irrespective of the agreement with T-Mobile and was therefore not objective. The Commission had not considered the extent to which the agreement was necessary for O2 to penetrate the 3G mobile communications market.[71]

The Commission had some *general considerations* about the nature of national roaming agreements, but had not looked at the *specific evidence* to see if they were correct for the O2/T-Mobile agreement.[72]

Moreover, the court observed that several considerations set out in the decision relating to Art.81(3) EC suggested uncertainty concerning the competitive situation and O2's position in Germany in the absence of the agreement. In the court's view, such considerations should have been looked at in the Commission's assessment of the effects analysis *under Art.81(1) EC*, prior to its analysis under Art.81(3) EC.[73]

The court also found that the Commission had not substantiated its general assessment in the light of the agreement's duration. Notably, the Commission did not take into account the parties' timetable for phasing out roaming in the assessment under Art.81(1) EC, only in the examination under Art.81(3) EC.

According to the CFI, the Commission's findings under Art.81(3) EC that O2's competitive situation on the 3G market would probably not have been secure without the agreement also confirmed that the Commission's *presuppositions* in its examination under Art.81(1) EC had not been established.[74]

The court also stated that the Commission should take a new decision on the notified agreement by reference to the date of notification and Regulation 17.[75]

This is clearly an important restatement of the law, which we may expect to be much quoted in the future.

Italian damages actions—Manfredi

In July 2006, the European Court of Justice (ECJ) ruled on requests for a preliminary ruling from the Guidice di Pace di Bitonto (Italy).[76] The questions in this case concerned the interpretation of Art.81 EC and were raised in several actions for damages against three insurance companies in Italy.

The defendants, Lloyd Adriatico Assicurazioni SpA, Fondiaria Sai SpA and Assitalia SpA, along with other insurance companies, had been found to have entered into an anti-competitive agreement which was declared unlawful by the Italian Competition Authority in 2000. The Italian Competition Authority found that, as a result of the insurance companies' anti-competitive behaviour, there was a 20 per cent increase in the insurance premiums for compulsory civil liability insurance relating to accidents caused by motor vehicles, vessels and mopeds for a period of five years. Four individuals, Messrs Manfredi, Cannito, Tricarico and Murgulo, brought actions for damages before the Guidice di Pace di Bitonto seeking to obtain an order against the three insurance companies for repayment of the increase in the premiums cost.

The first question raised was whether the agreement, which was found to infringe *Italian* competition law, also infringed Art.81(1) EC because, among its parties, were also insurance companies from other Member States.

The ECJ held that the mere fact that parties to a national agreement also included undertakings from other Member States was not, of itself, decisive so as to conclude that the criterion of effect on trade between Member States had been satisfied.[77]

However, an agreement extending over the whole of the territory of a Member State had, by its very nature, the effect of reinforcing the partitioning of markets on a national basis. It was therefore for the national court to determine whether there was a sufficient degree of probability that the agreement at issue might have a significant influence, direct or indirect, actual or potential, on the sale of civil liability auto insurance policies in Italy by operators from other Member States, notably whether the cartel was capable of having a deterrent effect on insurance companies from other Member States without activities in Italy, for example by setting the relevant premiums at a level which would make it unprofitable for those companies to provide them.[78]

The other questions concerned several practical issues of private enforcement, i.e. which court

71. Above fn.66, [77].
72. Above fn.66, [86].
73. Above fn.66, [78]–[79].
74. Above fn.66, [114].
75. Above fn.66, [48].

76. Joined Cases C 295–298/04 *Manfredi and Others*, judgment of July 13, 2006.
77. Above fn.76, [44].
78. Above fn.76, [47]–[52].

had jurisdiction, whether Art.81 EC entitled third parties to claim damages, whether time began to run for limitation purposes from the moment the agreement started or only when it ended, and finally what type of damages could be recovered.

With respect to whether Art.81 EC entitled third parties to claim damages, the court confirmed its established principles of liability, based on *Courage and Crehan*, provided that there was a causal link between the harm and the behaviour prohibited under Art.81(1) EC.[79]

With respect to court jurisdiction, limitation and the award of damages, the court reiterated classic principles: jurisdiction and procedural rules governing actions for rights which individuals derived from Community law fell to be determined by the domestic legal system, but had to respect the *principle of equivalence* (i.e. not be less favourable than those governing similar domestic actions) and the *principle of effectiveness* (i.e. not render practically impossible or excessively difficult the exercise of rights conferred by Community law).[80]

As regards court jurisdiction, under Italian law, plaintiffs had to bring their actions for damages for infringement of national competition rules before the Corte d'appello having territorial jurisdiction. The plaintiffs claimed that, if applied here, this would involve a considerable increase in costs and time. It was noted that the claims of the size here normally would come before other courts then the Corte d'appello. The Italian court therefore asked whether Art.81 EC must be interpreted as precluding the specific national jurisdictional provision here (i.e. as against the principle of effectiveness). The ECJ did not decide the issue, but repeated the principles just noted.

As regards the limitation period for damages actions, the court went a little further. The court noted that the national rule providing for time to run from the moment that unlawful behaviour was adopted could make it practically impossible to exercise the right to seek compensation, particularly if that rule also imposed a short limitation period which was not capable of being suspended. Moreover, in cases of continuous or repeated infringements it was possible that the limitation period would expire even before the infringement was brought to an end, making it thus impossible for an individual to bring any damages actions.[81]

The ECJ left it to the national court to determine whether such was the case with regard to the national rule at issue, but with a clear suggestion that the principle of effectiveness might not be satisfied. This is a potentially important ruling because it could imply a change in Italian law and similar issues arise in other jurisdictions.

As regards the amount of damages, the Italian court asked whether it should grant on its own motion punitive damages on the basis of Art.81 EC, where the damages that can be awarded on the basis of national law were lower than the economic advantage gained by the infringing party, thereby deterring the adoption of behaviour prohibited under that article.[82] The court's answer was that on the basis of the principle of equivalence, the court must be able to award "particular damages" such as exemplary or punitive damages, if such damage may be awarded pursuant to similar actions founded on domestic law (apparently this was not the case). However, national courts could ensure that the protection of the rights deriving from Community law did not entail unjust enrichment of those who enjoy them.

On the basis of the principle of effectiveness, the injured party must be able to seek compensation, not only for *actual loss* but also for *loss of profit, plus interest*.[83]

It will be interesting to see what happens. This is the sort of action expected after *Courage/Crehan*, in the event that there are procedural issues in bringing damages actions.

"Agreement" redefined again—Volkswagen

In July 2006, the ECJ upheld the CFI's judgment annulling the Commission's decision that Volkswagen's price-fixing practices towards its German dealers did not amount to an "agreement" under Art.81(1) EC.[84] The court found that the CFI had erred in law, but not materially.

It will be recalled that in July 2001 the Commission decided that Volkswagen had restricted the resale prices of its new Passat model, by agreeing with German dealers in its distribution network to strict price discipline for sales of the cars. The Commission relied on three circulars and five letters sent by Volkswagen to its German dealers "calling for strict price discipline" in terms of granting discounts to customers. The Commission considered that the dealers tacitly had agreed to follow Volkswagen's instructions when they signed their dealer agreements and that *no further proof* of acquiescence or agreement was required. The Commission imposed a fine of €30.96 million on Volkswagen.

In December 2003, the CFI annulled the Commission's decision. The court concluded that the Commission had not demonstrated that there had been an agreement between Volkswagen and its dealers within the meaning of Art.81(1) EC.

79. Above fn.76, [57]–[61].
80. See above fn.76, e.g. at [62].
81. Above fn.76, [78]–[79].
82. Above fn.76, [83].
83. Above fn.76, [92]–[97].
84. Case C–74/04 P, *Commission v Volkswagen*, judgment of July 13, 2006.

Notably, it could not be inferred that the dealers had accepted an *unlawful* variation of the dealer agreement when signing that agreement. That could not be foreseen when the dealers signed and generally agreed to follow Volkswagen's distribution policy. The CFI therefore considered Volkswagen's letters to be unilateral acts not caught by Art.81(1) EC.

On appeal the Commission maintained its position from its decision and argued that future measures of a supplier did not have to be foreseen by the dealership agreement, nor did they have to comply with the law to constitute an agreement within Art.81(1) EC.

The ECJ upheld the CFI's judgment, but found that the CFI had erred in law as regards what constitutes an ''agreement'' under Art.81 EC. Notably, the ECJ stated that a call by a supplier which is contrary to the competition rules might be authorised by seemingly neutral clauses of a dealership agreement. As a result, the CFI should have considered whether the clauses of the agreement in question provided for or authorised such unlawful calls, taking into account all other relevant factors, such as the aims of the agreement in the light of the economic and legal context in which the agreement was signed.[85]

Here, the court noted that the agreement provided for dealers generally to follow Volkswagen's instructions, *but also stated that Volkswagen issued non-binding price recommendations*. The court therefore concluded that, despite its misinterpretation of the law, the CFI had not erred in regarding the calls at issue as not constituting an agreement caught by Art.81(1) EC.

Pharmaceutical dual pricing—GlaxoSmithKline

In September 2006, the CFI partially annulled the Commission's 2001 decision finding that GlaxoSmithKline's (GSK's) dual pricing system for pharmaceutical products in Spain infringed Art.81 EC.[86]

It may be recalled that GSK (at that time Glaxo Wellcome) notified its ''General Sales Conditions'' to the Commission in 1998. The Commission also received a number of complaints regarding cl.4 of these conditions, which stipulated that wholesalers had to pay a higher price for products exported to other Member States than for those sold in Spain.

The General Sales Conditions applied to some 82 medicines, eight of which according to GSK were ''prime candidates for parallel trade'', principally between Spain and the United Kingdom. The price to be paid for export was said to reflect the price GSK sought for its products from the Spanish health authorities (which then reduced it for Spain).

The court's approach was detailed and demanding. The following are the most interesting points.

First, the CFI rejected the Commission's position that GSK's dual pricing had, as its *object,* the prevention, restriction or distortion of competition. The Commission had reasoned that the European courts had always qualified agreements containing export bans, dual-pricing systems or other limitations of parallel trade, as restricting competition by ''object''. The court did not accept this approach and considered that the Commission had to look at the legal and economic context in each case, both when considering the effect of an agreement *and its object*.[87]

The court said:

> ''the characterisation of a restriction of competition within the meaning of Article 81(1) EC must take account of the actual framework and, therefore, of the legal and economic context in which the agreement to which that restriction is imputed is deployed. *Such an obligation is imposed for the purpose of ascertaining both the object and effect of the agreement* . . .
>
> Thus, when examination of the clauses of an agreement, carried out in their legal and economic context, *reveals in itself the existence of an alteration of competition*, it may be presumed that that agreement has as its object the prevention, restriction or distortion of competition . . . so that there is no need to examine its effect''[88] (emphasis added).

Secondly, the court stated that cases like *Consten and Grundig* only showed that agreements which aim to restrict parallel trade were *in principle* to be regarded as having a restrictive object, not that, *by their nature*, they were restrictive of competition.[89] The court held that the Commission could not infer here that differential pricing designed to *limit parallel trade* had as its object the *restriction of competition*. The Commission had to show that the practice denied consumers the advantages of effective competition in terms of supply or price.[90] The court also emphasised that the relevant consumer was the *final consumer* of the product in question.[91] The Commission could make an abridged assessment where clauses of an agreement indicated in themselves an alteration of competition, but had to do a more detailed assessment in other cases.[92]

The court found that this was not the case here, given the legal and economic context. Notably, that the prices of the products in question, subject

85. Above fn.84, [45] and [48].
86. Case T–168/01, judgment of September 27, 2006.
87. Above fn.86, [93]–[94] and [138].
88. Above fn.86, [110]–[111].
89. Above fn.86, [115]–[116] and [120].
90. Above fn.86, [118]–[121].
91. Above fn.86, [118].
92. Above fn.86, [119].

to control by the Member States which fix them directly or indirectly, are determined at structurally different levels in the Community and are, in any event, to a significant extent shielded from the free play of supply and demand.[93] In such a ''largely unprecedented'' situation, a restrictive object to the agreement could not be inferred and the Commission had to show anti-competitive effect.

Thirdly, the CFI agreed with the Commission's alternative finding that GSK had infringed Art.81(1) EC because of the *effects* of dual pricing. Notably, the CFI found various examples in which both patients and national insurance schemes, which were final consumers for the products concerned, were prevented ''from taking advantage, in the form of a reduction in prices and costs, of the participation by Spanish wholesalers in intra-brand competition on the markets of destination of the parallel trade originating in Spain''.[94] In short, preventing parallel trade restricted competition in fact and there was an infringement of Art.81(1) EC.

Fourthly, the CFI ruled that the Commission had not carried out a proper examination of GSK's application for an exemption under Art.81(3) EC. GSK had argued that parallel trade *reduced* its ability to innovate because it denied GSK the ability to maximise profits through differential pricing, leading to a loss in interbrand competition. GSK also argued that the dual pricing scheme in cl.4 *increased* its capacity to innovate. A significant and repeated theme was also that, in effect, GSK was being forced to sell in the United Kingdom at prices dictated by the Spanish authorities.

The Commission's approach was to find that GSK had not shown that the dual pricing led to economic benefits, notably because these could not be constituted just by more profits for GSK, some of which might be applied to more research and development. The Commission looked at the ''loss of efficiency'' argument in detail, but little at the ''gain in efficiency'' argument, or at the other arguments GSK put forward under Art.81(3) EC.

The CFI held that this was not enough.[95] While not saying that GSK's arguments were well founded, or that they offered a complete and definitive picture of the impact of parallel trade on innovation, the Commission was found not to have examined the facts adequately. Nor had the Commission looked properly at the possible gains in efficiency arising from cl.4, or carried out a proper balancing exercise of the loss of *intra*brand competition, as against gains in *inter*brand competition.[96] The Commission had not sufficiently examined GSK's extensive evidence on the nature of its investments in research and development, the financing of this research and development, or on the impact of parallel trade in these circumstances.

The CFI therefore annulled the Commission's decision.

Finally, as in *O2 (Germany)*, the CFI stated that the Commission should re-examine GSK's application for an exemption under Art.81(3) EC, despite the fact that notification had been abolished by Regulation 1/2003, if the request for exemption still remained before it.[97]

This judgment is clearly very important for the pharmaceutical sector and less clearly for other cases, given the unusual circumstances. Nevertheless both *O2 Germany* and *GlaxoSmithKline* underline that infringements generally cannot be assumed from the nature of an agreement. It will be interesting to see whether the Commission appeals. The judgment also confirms the trend to tolerance of parallel trade restrictions in the pharmaceutical sector in EC law, which started with Advocate General Jacobs's Opinion in *Syfait* and has continued recently with the related Hellenic Competition Commission's ruling.[98]

It is the notification that counts—JCB

In September 2006, the ECJ generally upheld the CFI's judgment concerning JCB's distribution agreements for construction and earthmoving machinery, rejecting appeals by JCB, but allowed a cross-appeal by the Commission.[99]

It may be recalled that long before the Commission opened its investigation against JCB, in 1973, JCB had notified to the Commission its distribution agreements. However, subsequently they were changed and no new notification was submitted. After more than four years of investigation, in December 2000 the Commission took a decision declaring JCB's distribution agreements in the United Kingdom and France contrary to Art.81(1) EC, because they led to a partitioning of national markets. The Commission stated that its decision was based on facts not covered by the earlier notification and imposed a fine on JCB of €39.6 million.

JCB appealed the Commission decision to the CFI, which partially annulled it and reduced the fine to €30 million.

JCB then appealed the CFI judgment to the ECJ arguing, among other things, that the CFI should have found that the excessive duration of the Commission procedures (for the notification and the infringement) infringed JCB's right to a defence. The ECJ rejected this and other claims.

The Commission also made a cross-appeal against the CFI decision. It submitted that the

93. Above fn.86, [133], [141], [147].
94. Above fn.86, [182]–[194].
95. Above fn.86, [262].
96. Above fn.86, [265], [294], [296], [301], [303], [307].
97. Above fn.86, [320].
98. See Arsenidou, ''Parallel Trade in Drugs'', *Competition Law Insight*, November 7, 2006.
99. Case C–167/04 P, judgment of September 21, 2006.

CFI had incorrectly failed to take account of an aggravating circumstance (retaliatory measures against a distributor) in setting the fine. The CFI found that the Commission could not take this into account as an aggravating circumstance, since the clause under which the penalty against the distributor was applied enjoyed immunity from fines, being in a notified agreement.

The ECJ found that the CFI erred in law because JCB had stated *in the Form A/B* that no sanctions could be imposed against the distributor in the given case. In such circumstances, the ECJ held that the unlawful sanctions could not enjoy benefit from fine immunity. As a result the ECJ raised the fine again by €864,000 to take account of the aggravating circumstance, resulting in a total fine imposed of €30,864,000.[100]

Adapting to the new MVBE may justify reorganisation of the network—Audi/Skandinavisk Motor

In September 2006, the ECJ gave a preliminary ruling in a dispute pending before the Danish court (Oste Landsret) concerning termination of an agreement for distribution of Audi vehicles in Denmark.[101] Skandinavisk Motor (SMC) terminated a distribution agreement with a dealer using a one-year notice of termination, on the ground that, owing to the new EC block exemption for vertical agreements in the motor vehicle sector (Regulation 1400/2000), the dealers' network in Denmark had to be restructured.

The Danish court asked the ECJ for guidance as to the supplier's right under Art.5(3) of Regulation 1475/95 to terminate a distribution agreement by giving one year's notice, where it is necessary to reorganise the distribution network. It asked in particular:

- Whether the termination notice must state reasons for termination which go beyond the reference to Art.5(3).
- What are the requirements for reorganisation of the network and when and how must the dealer be informed of it?
- Who bears the burden of proof that the conditions for termination of a distribution contract under Art.5(3) are satisfied?
- Could Art.5(3) be satisfied, simply on the ground that Regulation 1400/2002 was implemented?

As regards the need to state reasons for termination, the ECJ held that Art.5(3) does not require a formal statement of reasons for termination as regards the form and substance of reorganisation. That is a question for national law.

As regards the conditions for application of Art.5(3), in particular the meaning of "reorganisation" of a network, the court ruled that, in order to exercise the right to terminate under this provision, the supplier has to *convincingly* justify the need for reorganisation (and termination) on the grounds of:

> "economic effectiveness based on objective circumstances internal or external to the supplier's undertaking which, failing a swift reorganisation of the distribution network, would be liable, having regard to the competitive environment in which the supplier carries on business, to prejudice the effectiveness of the existing structures of the network".[102]

The national courts have to check whether the need for reorganisation is *objectively* justified. It is not a decision simply within the supplier's discretion.

As regards the burden of proof, the ECJ ruled that it is clearly in the hands of the one who seeks to benefit from the block exemption, i.e. the supplier.

As regards the issue as to the entry into force of Regulation 1400/2002, the ECJ held that the entry into force of that Regulation did not make the reorganisation *necessary* for the purposes of Art.5(3). However, owing to substantial amendments to the scheme of the exemption brought about by this Regulation, some suppliers' distribution networks may have required changes that were so significant that they could constitute a reorganisation for the purposes of Art.5(3).[103] It is, however, for the national courts or arbitrators to determine whether this is the case on the basis of the evidence in a particular case before them.

IOC Anti-doping rules could restrict competition

In July 2006, the ECJ delivered its judgment on the appeal in the *Meca-Medina/Majcen International Olympic Committee* case.[104] The court set aside the CFI's ruling that the International Olympic Committee's (IOC's) anti-doping regulations were not subject to EC competition law, being purely sporting rules which do not pursue any economic objective. However, the court then rejected the appeal after examining the case on the substance.

The CFI had observed that the fact that purely sporting rules, such as regulations on doping, may have nothing to do with economic activity, with the result that they do not fall within the scope of Arts 39 and 49 EC, meant that they also had nothing to do with the economic relationships of competition, with the result that they do not fall under Arts 81 and 82 EC.

100. Above fn.99, [235]–[243].
101. Case C–125/05, judgment of September 7, 2006.
102. Above fn.101, [37].
103. Above fn.101, [58]–[62].
104. Case C–519/04 P, judgment of July 18. 2006.

The ECJ disagreed. The court held that the CFI had erred in law by holding that doping rules could be excluded straightaway from the scope of EC competition law, solely on the ground that they were regarded as purely sporting with regard to the application of Arts 39 and 49 of the Treaty.[105]

The court then reviewed the anti-doping rules and found that they did not constitute a restriction of competition, because they were justified by a legitimate objective. The limitation they imposed was inherent in the organisation and proper conduct of competitive sport and its purpose was to ensure healthy rivalry between athletes.

However, the restrictions imposed by those rules had to be limited to what was necessary to ensure the proper conduct of competitive sport. Anti-doping rules could prove excessive if *the conditions* laid down for establishing the dividing line between circumstances which amount to doping and those which do not and/or if the *severity of the penalties* went too far.[106]

On the facts the court held that the restrictions in issue did not go beyond what was necessary in order to ensure that sporting events take place and function properly.

Other

In February 2006, the ECJ upheld the decision of the CFI to reject Laurent Piau's complaint against the Commission's settlement of the FIFA players' agents case.[107]

In April 2006, the ECJ upheld the CFI's judgment on General Motors/Opel Nederland's restrictive bonus policies in the Netherlands.[108] The ECJ found that the CFI had not distorted the evidence showing that there was a restriction on exports and noted that indirect measures could affect exports. Direct restrictions on exports were not required for a finding of infringement.

In July 2006, the ECJ upheld the CFI's ruling in *FENIN*[109] that the bodies managing the Spanish national health system were not undertakings.

After the CFI judgment in *Irish Sugar*, the Commission refunded Greencore (Irish Sugar's parent company) almost €1 million of its fine but without interest. In an action in 2005, Greencore claimed interest. The CFI held that Greencore was entitled to it.[110]

In September 2006 the ECJ rejected Unilever's appeal of the CFI's judgment in *Van den Bergh Foods v Commission*.[111]

Box 4

- **Main European Court cases—cartel appeals**

  - *Zinc Phosphate*—The 10% maximum fine rule and the last year of ''normal economic activity''
  - *Vitamins*
    * An instigator establishes or enlarges a cartel, a leader operates it as a ''significant driving force''
    * Review in ''unlimited jurisdiction''
    * Decisive evidence is more than a route map, it is principal evidence which can be used directly
    * Oral statements should be recorded or noted
  - *Graphite Electrodes*
    * Documents showing an infringement have to be provided; answers admitting an infringement do not
    * Leniency and a ''genuine spirit of co-operation''
  - *Austrian Banks*
    * Publication of the ''main content'' of a decision
    * The Commission can describe the background and does not *have* to put in the minimum
    * Customers are entitled to complain (and obtain a non-confidential version of the SO)
  - *Electrotechnical fittings*
    * Excessive duration of the *whole* procedure can violate the rights of defence, but need to show practically how
  - *Citric Acid*
    * Termination of an infringement is usually not an attenuating circumstance, unless by a company's own initiative
    * If termination is after a competition authority's intervention, to be an attenuating circumstance termination should be helpful to establish the infringement or otherwise in ending it (at least)
    * Fines are about punishment, not just capturing improper gains
    * Compensation paid may be a factor but does not have to be

105. Above fn.104, [31]–[33].
106. Above fn.104, [47]–[48] and [54].
107. Case C–171/05 P, judgment of February 23, 2006.
108. Case C–551/03 P, judgment of April 6, 2006.
109. Case C–205/03 P, judgment of July 11, 2006.
110. Case T–135/02, *Greencore v Commission*, judgment of December 14, 2005.
111. Case C–552/03 P, *Unilever Bestfoods (Ireland)*, judgment of September 28, 2006.

— *Sodium Gluconate*
  * Avebe claim that not responsible for joint venture rejected on the facts
  * Comparisons to other cases *may* be admitted, but are often difficult to make

Cartel appeals

Zinc Phosphate

In November 2005, the CFI dismissed four appeals concerning the Commission's 2001 *Zinc Phosphate* cartel decision.[112]

The *Britannia Alloys* appeal is of particular interest. Britannia had been involved in a cartel concerning the production and sale of zinc from 1993 until March 1997, when it sold its zinc business to Trident in a management buyout. Britannia continued to exist as a subsidiary of the MIM group, but carried on only residual zinc trading activities for a while, before ceasing its commercial activities entirely. Trident continued to participate in the infringement until May 1998. In its decision, the Commission fined Britannia €3.37 million for its participation between 1993 and 1997 and Trident €1.98 million for involvement thereafter.

In doing so the Commission based its assessment of the maximum level of fine for Britannia on the year ending *June 1996*, which was considered to be Britannia's last full year of normal economic activity.

On appeal, Britannia argued that because the Commission adopted its decision in December 2001, the correct ''preceding business year'' should have been the year ending June 30, 2001, as Art.15(2) of Regulation 17/62 stated. As Britannia had nil turnover during that period, the Commission could have imposed only the maximum allowed under Regulation 17/62, i.e. €1 million. The Commission argued that to do so would give a totally distorted picture of the size of the undertaking concerned and that a broader interpretation of Art.15(2) should be taken.

The CFI agreed with the Commission. The court held that, while in principle the ''preceding business year'' for Art.15(2) referred to the last full business year before the adoption of a decision, the function of this assessment was to check the proportionality of the fine to the size of undertaking and its ability to pay, i.e. in order to check its (financial) ''standing''.

Application of the 10 per cent maximum fine in Art.15(2) rule presupposed that the Commission had available turnover for the last business year before its decision and that such data represented a full year of normal economic activity over 12 months. If the last year's accounts were not available or, because of a reorganisation, the last accounts were not for 12 months, then the Commission was entitled to look at an earlier complete year because, if not, the Commission could not assess a company's standing.

The position was the same where the last year's economic activity was not a normal one. In this respect the figures for Britannia's economic activity between 2001 and 1996[113] were not normal.

Moreover, the court noted that Britannia had realised the value of its commercial activity by selling its zinc business to Trident and had not pleaded inability to pay the fine. Therefore the CFI concluded that it was not disproportionate to determine the upper limit of the fine by reference to Britannia's situation before the transfer of its commercial operations.[114]

The court also accepted that a company might have a lower turnover in the year preceding the decision to fine than in the last year of the infringement. However, that was not considered grounds for infringement of the principle of equal treatment. The Commission had to take a company as it stood when checking against the 10 per cent rule in Art.15(2).

Provided that there was no indication that a company had not ceased its commercial activities or diverted turnover *in order to reduce its fine*, the court considered that the Commission was obliged to fix the maximum limit of fine by reference to the most recent turnover corresponding to a complete year of economic activity. In this case that was 1996, the last full year before the end of the infringement.[115]

Otherwise the *SNCZ* and *Hans Heubach* judgments are of interest in so far as both companies argued that their fines were disproportionate for a small company. Their claims were dismissed. However, they illustrate that it is not just the large conglomerates that find the Commission's fines tough. A big fine on a company that has only one product activity can be very tough also, since the fine will be on its *only* turnover and profit.

Vitamins

In March 2006, the CFI delivered its judgments in BASF's and Daiichi's appeals of the fines imposed in the Commission's 2001 decision on

112. Cases T–33/02, T–52/02, T–62/02 and T–64/02, *Britannia Alloys, SNCZ, Union Pigments and Hans Heubach GmbH & Co KG*, judgments of November 29, 2005.

113. Above fn.112, [35]–[42].
114. Above fn.112, [43].
115. Above fn.112, [47]–[50].

the vitamins cartels.[116] The judgments rejected the majority of the applicants' arguments, but both companies obtained significant reductions in their fines.

As regards *BASF*, the CFI held that the Commission had not adequately demonstrated its role as *instigator or leader* in four of the cartels. As a result, the CFI annulled the 35 per cent increase of the basic amount of fine imposed for these infringements.

Given that BASF was not an instigator or leader in these cartels, the CFI also considered that BASF was not, in principle, prevented from obtaining a reduction under ss.B and C of the 1996 Leniency Notice. The CFI concluded that it should do so for two cartels, where it was the first company to provide decisive evidence of the existence of the cartels, but not for the others. In the case of beta-carotenes and carotinoids, the CFI therefore increased the fine reductions for co-operation from 50 per cent to 75 per cent. Overall the CFI therefore reduced BASF's total fine from €296 million to €236 million.[117]

As regards *Daiichi*, the CFI held that the Commission incorrectly had not allowed it the benefit of s.D of the 1996 Leniency Notice, which provides for increased reduction after receiving an SO where an undertaking informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

The CFI appears to have been persuaded that the Commission had undervalued Daiichi's voluntary, extensive and detailed documentation, some of which the Commission had apparently used in its drafting.[118] The CFI therefore increased the reduction under s.D from 35 per cent to the 50 per cent. Overall, the CFI reduced Daiichi's fine from €23.4 million to €18 million.

The main points of general interest which are in the *BASF* judgment are as follows:

First, the CFI differentiated between *instigation*, which ''is concerned with the establishment or enlargement of a cartel'', and *leadership*, which ''is concerned with its operation''.[119] These were two separate assessments. The CFI stated that to be an instigator meant to have encouraged or persuaded others to join a cartel. It was not sufficient simply to have been a founding member of the cartel.[120]

Secondly, the CFI stated that to be *a leader* a company had to be a ''significant driving force'' in a cartel. In BASF's case, developing and suggesting anti-competitive conduct constituted leadership.[121] It did not have to be shown that BASF had exerted pressure on other cartel members or had been able to impose certain conduct on them. Hosting meetings, when other companies also hosted other meetings, did not, however, on its own, constitute leadership.[122]

Thirdly, the CFI makes clear that the alignment of the interests, objectives and positions adopted by participants in a cartel does not necessarily mean that they are joint leaders, or that such classification should be extended from one of them to all the others.[123]

In deciding that Roche, not BASF, was the leader of the vitamin C cartel, the CFI emphasised that Roche had:

— Organised a number of meetings.
— Separately met individual cartel members.
— Represented other members that were unable to attend meetings.
— Collated sales figures.
— Most often made proposals for the cartel's operation.[124]

Fourthly, the CFI distinguishes between companies which take the initiative to determine and notify price increases[125] and where the participants in a cartel agree in advance on price increases and on which company will make the first move. In the latter case, being the first company to announce does not constitute leadership, but is ''merely a step performed strictly in accordance with an agreed predefined plan and not a voluntary initiative propelling the cartel''.[126]

Fifthly, in a long-term infringement, the members of a cartel may, at various times, take turns in exercising leadership, so that it cannot be ruled out that each may have the aggravating circumstance of leader applied to them.[127]

Sixthly, it may be useful to recall the court's general (and repeated) approach here. First, the CFI considered whether the *Commission* had found correctly that BASF instigated or led the cartel in its decision, so that there was an aggravating circumstance. If not, the court then went on, in its ''unlimited jurisdiction'' to review what the fine should have been in all the circumstances, including new arguments raised on appeal.[128]

Seventhly, the court clarified that to qualify for s.B of the 1996 Leniency Notice a company had to provide *decisive evidence*. That did not mean

116. Cases T–15/02 *BASF v Commission*; and T–26/02 *Daiichi v Commission*, judgments of March 15, 2006.
117. *BASF*, above fn.116, [612]–[613].
118. *Daiichi*, above fn.116, [182].
119. *BASF*, above fn.116, [316].
120. *BASF*, above fn.116, [321], [456].
121. *BASF*, above fn.116, [374].
122. *BASF*, above fn.116, [387].
123. *BASF*, above fn.116, [402].
124. *BASF*, above fn.116, [404].
125. *BASF*, above fn.116, [370]–[374].
126. *BASF*, above fn.116, [427].
127. *BASF*, above fn.116, [460].
128. *BASF*, above fn.116, e.g., [338] and [582].

evidence *sufficient* to prove on infringement, but evidence that was ''decisive to that purpose''. It could not be simply an indication as to the direction the Commission's investigation should take, but must be material which may be used directly as the principal evidence supporting a decision finding an infringement.[129] Such evidence could also be provided orally, although principles of sound administration require that minutes should be drawn up or a sound recording made.[130]

Methionine

In April 2006, the CFI ruled on Degussa's appeal in the *Methionine* cartel case.[131] It may be recalled that methionine is one of the most important amino acids, which cannot be naturally produced by the animals' organisms and therefore needs to be added in food products. At the time of the cartel, there were three main world producers of methionine: Rhône-Poulenc (now Aventis SA), Degussa and Novus. In July 2002, the Commission fined Degussa €118 million and Nippon Soda €9 million for a series of agreements and practices in breach of Art.81 EC, while Aventis was granted amnesty.

The following are the main aspects of the *Degussa* judgment.

First, there is extensive discussion about what constitutes participation in a cartel. The Commission found that the methionine cartel lasted from 1986 to 1999, whereas Degussa argued that, from 1988 and 1992, it did not participate. The court agreed with the Commission, finding that the disputes between some participants could not be interpreted as an interruption of the cartel because meetings among them did not stop during that period, with the clear intention to collude on prices and adopt new policies further to changes in the market.[132]

Secondly, Degussa argued that methionine prices had decreased from 1992 to 1997 and that the Commission had not taken into account the (negative) impact of the cartel on the methionine market for the whole duration of the cartel (1986–1999).

Acknowledging that prices decreased during the period 1992/1993 to 1997, the court ruled that the Commission did not have to demonstrate that prices *increased* because of the cartel, but rather that, in the absence of the cartel, methionine prices would have *further decreased*. However, the court found that the Commission had only partially demonstrated the concrete impact of the cartel on the methionine market and decided to reduce the fine of Degussa from €35 million to €30 million.[133]

Thirdly, Degussa also argued that as its size was about half of the size of Aventis, it was contrary to the principle of equal treatment to impose on Degussa and Aventis the same amount of increase for deterrence in the basic amount of the fine (i.e. 100 per cent).[134]

The court agreed. Finding that Degussa's turnover was some 25 to 33 per cent less than Aventis, the court reduced the percentage of increase of the fine for deterrence for Degussa from 100 per cent to 80 per cent.[135]

Overall, this meant that Degussa's fine was reduced from €118 million to €91 million.

Lysine

In May 2006, the ECJ ruled on Archer Daniels Midland's appeal from the CFI's judgment in the *Lysine* cartel case and upheld this judgment.[136]

The main interest is that the court confirmed two points that have been coming up repeatedly in recent cartel appeals.

First, that the application of the 1998 Fining Guidelines to infringements committed before the Guidelines were adopted was not contrary to the principle of non-retroactivity. The court states that the Commission may at any time adjust the level of fines to the needs of that policy and that the new Guidelines were reasonably foreseeable for the appellants at the time that the infringements concerned were committed.[137]

Secondly, the appellants invoked a ''corollary to the *non bis in idem* principle'', i.e. that concurrent penalties concerning the same facts had to be taken into account in the Commission's fines. However, the court rejected this, noting that where the sanction imposed in a non-Member country covers only the applications or effects of the cartel on the market of that state and the Community sanction covers only the applications or effects of the cartel on the Community market, the facts are not the same.[138] As a result, the Commission was not required to take account of third-country sanctions.

Austrian banks

In May 2006, the CFI ruled on an application by Bank Austria Creditanstalt contesting the publication of a non-confidential version of the Commission's *Austrian Banks* decision in the version proposed by the Commission.[139] In

129. *BASF*, above fn.116, e.g., [492]–[493].
130. *BASF*, above fn.116, e.g., [496]–[502] and [506].
131. Case T–279/02, judgment of April 5, 2006.
132. Above fn.131, [137] and [154].
133. Above fn.131, [241]–[243], [245]–[248] and [254].
134. Above fn.131, [318]–[319].
135. Above fn.131, [323] and [342].
136. Case C–397/03 P, judgment of May 18, 2006.
137. Above fn.136, [21] and [25].
138. Above fn.136, [69].
139. Case T–198/03, judgment of May 30, 2006.

particular, Bank Austria contested the inclusion of an account of the facts related to the year 1994 (since the Commission did not find an infringement then) and proposed a shorter factual summary. Bank Austria argued that the Commission's obligation (in Art.21(2) of Regulation 17/62) to publish the ''main content'' of its decision, having regard to the legitimate interest of the undertakings in the protection of their business secrets, entitled it to less disclosure than the Commission proposed. Bank Austria's case was therefore an appeal of the hearing officer's decision.

The application to suspend publication of the Commission's decision was not allowed by the President of the CFI,[140] so these matters were ruled on *after* publication had occurred.

The main points are as follows.

First, the CFI confirmed that the hearing officer's decision under Art.9 of Decision 2001/462 (establishing the terms of reference of the hearing officer) was a decision capable of judicial review, because it created binding legal effects. The court recalled that the hearing officer had to check that the version of a decision intended for publication contained no business secrets or other information enjoying similar protection and no other information which could not be disclosed to the public (on the basis of rules affording information special protection or because the information was covered by the obligation of professional secrecy). The hearing officer's decision produced legal effects inasmuch as it determined whether a text for publication contains such information.[141]

Secondly, the CFI rejected the Commission's arguments that Bank Austria had no interest in bringing the application, because the two SOs in the case already had been published. The court noted that a ''Statement of Objections'' is different from a decision, because:

> ''it seeks to provide the interested parties with an opportunity to make their point of view known on the Commission's provisional findings against them'',

whereas ''the decision imposing fines contains a description of the facts which the Commission considers to be established''.[142]

Otherwise, the court held that the legal interest of the addressee of a decision in challenging that decision could not be denied on the ground that it had been implemented, since annulment per se of such a decision may have legal consequences.

Thirdly, the CFI rejected Bank Austria's argument that the Commission could *only* publish *the main content* of its decision under Art.21(2) of Regulation 17/62 and that any other publication was unlawful.

The CFI took a much broader approach. The court noted the various EC Treaty provisions reflecting the principle that decisions should be taken as openly as possible.[143] The court also noted that Art.20 of Regulation 17 prohibits the disclosure of business secrets, in particular information covered by the exceptions to the right of public access (e.g. in Regulation 1049/2001).

However, this was not a bar to the Commission publishing *other* information. The Commission could publish the full text of the decision if it considered it appropriate to do so, provided that its obligations of professional secrecy were respected. Notably, if it had the resources to do so, the obligation to publish the ''main content'' of the decision did not prevent the Commission from publishing other information which, even though not confidential, is not part of the ''main content'' of a decision, either in the Official Journal or on the Commission's website.[144]

Fourthly, the CFI rejected Bank Austria's argument that the Commission was not entitled to publish information for 1994, on the basis that this was a period when the Commission had no power over any infringement in Austria and the Commission therefore had taken no decision concerning its conduct in that period.

The court held that the:

> ''inclusion . . . of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement. It is legitimate for the Commission, in a decision finding an infringement and imposing a penalty, to describe the factual and historical context of the conduct in issue. The same is true for the publication of that description, given that publication may be of use in allowing persons interested to understand fully the reasoning behind such a decision''.[145]

The issue comes up frequently in practice and remains controversial, especially where the Commission includes accounts of apparently alleged unlawful practices, but then says it does not have the evidence to prove them.[146]

Then, again in the context of the *Austrian Banks* case, in June 2006, the CFI ruled on the participation of complainants in competition procedures.[147] This time, the Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft contested the capacity of the Austrian political

140. Case T–198/03 R [2003] E.C.R. II–4879.
141. See, especially, [34], above fn.140.
142. Above fn.140, [43].
143. Above fn.140, [69].
144. Above fn.140, [75]–[79].
145. Above fn.140, [89]–[91].
146. In the proposed EC Leniency Programme, the Commission states that in future it will not investigate periods that are prescribed; see para.36 of the Proposed Notice, above fn.39.
147. Cases T–213/01 and T–214/01, judgment of June 7, 2006.

party the FPÖ to act as a complainant in a competition procedure within the meaning of Regulation 17/1962 and its right to receive a non-confidential version of the SOs in the case. Apparently the FPÖ had received them but then disclosed their content to the press.

The main points are as follows:

First, the CFI rejected the Commission's arguments that the Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft had no legal interest in bringing their action because the two respective SOs had already been communicated to the FPÖ. The court held that the communication of the SO to the FPÖ could not frustrate their legal interests since the possible annulment of the decision to do so could have legal consequences for them, e.g. by making illegal the use of the SO which would have been illegally communicated.[148]

Secondly, again the CFI found that the hearing officer's decision under Art.9 of Decision 2001/462, which rejected the request not to communicate the SO to the FPÖ, was a decision capable of judicial review. Although intermediate measures, whose purpose is only to prepare a final decision, are not subject to judicial review, the court found that the preparatory acts which constitute the last step of a distinct procedure from the one enabling the Commission to take a decision on the substance of a case and that create binding legal effects, are capable of judicial review.[149]

Thirdly, the court rejected the appellants' argument that the FPÖ could not be a complainant within the meaning of Regulations 17/62 and 2842/98 because the Commission started its investigation before the FPÖ filed its complaint. The court found that it was not necessary to be at the origin of the Commission's investigation to be granted the capacity of a complainant to a competition procedure, no matter how the Commission's investigation was started, whether at its own initiative or at the request of a third party.[150]

Fourthly, the court rejected the appellants' argument that the FPÖ did not have a legitimate interest to be a complainant within the meaning of Regulation 17/1962. The court found that *a final consumer*, such as the FPÖ, *who justified that it was financially harmed* (or could be harmed) by the anti-competitive practices of the Austrian banks *because it was a bank customer, met the requirement of a legitimate interest* within the meaning of Art.3 of Regulation 17/1962.[151]

Finally, the court rejected the argument that the right of the FPÖ to receive the SO was time-barred since the SO already had been sent to the parties concerned, the hearings had already taken place and the procedure was close to an end. The court found that, as long as the Advisory Committee on Restrictive Practices and Monopolies had not been consulted pursuant to Art.10(3) of Regulation 17/62, the rights of a complainant to receive the SO and to be heard were not time-barred.[152]

148. Above fn.147, [55].
149. Above fn.147, [64]–[66].
150. Above fn.147, [90]–[91].
151. Above fn.147, [114]–[119].

Graphite electrodes

In June 2006, the ECJ gave judgment in appeals by the Commission, SGL Carbon and Showa Denko against the CFI's judgment in the *Graphite Electrodes* case.[153] It may be recalled that the CFI had reduced the fines on SGL Carbon from €80 million to €69 million and on Showa Denko from €17 million to €10 million. The ECJ granted the Commission's appeal and reincreased the fine on SGL Carbon to €75.7 million. Otherwise, the ECJ rejected the companies' appeals.

The author would note three points:

First, the ECJ ruled that a company faced with a Commission formal request for documents is required to produce them to the Commission, even where those documents could be used to establish an infringement by the company concerned.

As a result the provision of such documents was not a ground for a reduction in fines for co-operation with the Commission. It may be recalled that the CFI had stated that a company did not have to reveal documents in such circumstances and had therefore reduced the fine on SGL Carbon. The ECJ considered such disclosure completely different to where the Commission seeks *answers* from a company which would lead to an admission of an infringement.[154]

Secondly, the ECJ ruled that to qualify for leniency a company must act in a ''genuine spirit of co-operation''. Where a company fails to reveal that it has warned another company of the Commission's investigation, that may be considered as *not* reflecting that spirit (even though disclosing that information might lead the Commission to a higher fine) and the Commission was entitled not to grant a fine reduction for leniency accordingly. On the facts, SGL Carbon had told the Commission that it had warned two other cartel participants, but had not mentioned another which it had warned.[155] The Commission had treated the warning as an aggravating circumstance justifying a fine increase of 25 per cent. The ECJ therefore upheld the CFI's ruling confirming this part of the fine.

152. Above fn.147, [149].
153. Case C–301/04/P *Commission v SGL Carbon;* Case C–308/4 P *SGL Carbon v Commission*; Case C–289/04 P *Showa Denko v Commission*, judgments of June 29, 2006.
154. Case C–301/04 P, above fn.153, [39], [48].
155. Case C–301/04 P, above fn.153, [68]–[70].

Thirdly, the ECJ held that, although fines which a company had to pay in non-EEA jurisdictions with respect to the worldwide graphite cartel, did not *have* to be taken into account by the Commission in setting its fines, they *could* be taken into account in the Commission's discretion.[156]

Electrotechnical fittings

In September 2006, the ECJ decided on the appeals of Technische Unie and the Dutch Electrotechnical Fittings Association against the CFI's judgment which upheld the Commission's 1999 decision imposing total fines of €6.55 million.[157]

The ECJ set aside the CFI judgment on the basis that the CFI had not examined what was the impact of the excessive duration of the entire administrative procedure on the rights of the defence. Notably the ECJ considered that the CFI should have considered the impact of the long investigative phase of the procedure *before the SO*, on the ability of a defendant to defend itself *after the SO* was issued.[158] (The investigative procedure in this case had lasted from 1991 until 1996, while the Commission's decision was adopted in 1999.)

However, on the facts, the ECJ rejected the applicants claims', noting that the harm alleged was abstract and imprecise. The applicants had failed to refer to specific witnesses who were no longer reachable or evidence which those witnesses might have provided.

Citric Acid cartel

In September 2006, the CFI delivered its judgments in Archer Daniels Midlands' (ADM) and Jungbunzlauer's (JBL) appeals of the fines imposed on them in the Commission's 2001 decision on the C*itric Acid* cartel.[159] In both cases, the CFI upheld the Commission's fines.

It may be recalled that the Commission had found that five companies, including the two appellants, had set and adhered to quotas, fixed targeted and floor prices, not competed on discounts and exchanged information on customers, fining them some €135.22 million.

In the *ADM* case the CFI found that the Commission had not set out two allegations of infringement (that ADM had agreed to restrict capacity in the market and to designate a producer who was to lead a price increase in each national market) in its SO, which it had subsequently found in its decision. The court therefore annulled the Commission's decision on this point, but considered that these omissions were not sufficient to modify the amount of the fine that had been imposed. However, the CFI ruled that the Commission should pay one-tenth of ADM's costs of appeal as a result.

The following are the most interesting points, focusing on the *ADM* case.

First, ADM argued that the Commission had infringed the principles of non-retroactivity, legal certainty and equal treatment, by applying the 1988 Guidelines so that the fine it had received was between 10 and 34 times what it would have been fined under the Commission's previous approach.

Although covered in other judgments it may be useful to note the court's approach in rejecting these claims, in part because of the new EC Fining Guidelines. The court agreed that the principle of non-retroactivity of criminal laws in Art.7 of the European Convention of Human Rights was a general principle of Community law, which must be observed when fines are imposed for competition infringements, and it applied to the Commission's Fining Guidelines.

However, the court noted that, on the related case law, if it was reasonably foreseeable in the circumstances that the Commission might increase its fines as it did at the moment when the offence was committed, then the principle of non-retroactivity is not infringed. Moreover, ''foreseeability'' depended on the circumstances and could be satisfied even if a person had to take appropriate legal advice to assess it. This was particularly so of those in a professional activity who might be expected to exercise a high degree of caution. Given cases like *Musique diffusion française* in 1983, confirming that the Commission had a wide discretion to increase the level of fines to meet its policy objectives, that was the case here, even if the change was through new rules of general application.[160]

In part, ADM's argument was that others had been fined less in other cases, for infringing activities that occurred at the same time, because the Commission's decision here was taken later. This was rejected as an infringement of the principle of equal treatment.[161]

Secondly, considering *ne bis in idem* arguments, the court stated that, if the non-EU countries *had* also punished conduct in the Community, the principle of fairness could, in certain specific circumstances, compel the Commission to take account of such sanctions, but this was not proved here (e.g. by a reference in the US plea

156. Case C–289/04 P, above fn.153, [68].
157. Cases C–113/04 P *Technische Unie v European Commission*; and C–105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, judgments of September 21, 2006.
158. Above fn.157, [45]–[52].
159. Cases T–59/02 *Archer Daniels Midland Co*; and T–43/02 *Jungbunzlauer*, judgments of September 27, 2006.
160. *ADM* case, above fn.159, [41]–[53].
161. *ADM* case, above fn.159, [53].

agreement to the fact that the agreement was in the United States ''and elsewhere'').[162]

Thirdly, ADM argued that the deterrent multiplier was disproportionate, given that ADM had already paid some US$32 million in US and Canadian fines and some US$83 million in compensation to shareholders.[163] ADM's argument was essentially that fines had already exceeded any profit from the infringement.

The CFI stated that the Commission's fines were not about negating profit; they were about *punishment* of the actual infringement committed and deterrence of future conduct. As a result the court rejected any claim of lack of proportionality.[164] Again, this is interesting, given debates about the levels of the new EC Fining Guidelines and as compared to the new German Fining Guidelines which have *two* financial sanctions: one for punishment and another to ''skim off any profits made''.

The court took a similar position as regards the fact that ADM had paid damages, including for EU purchases. ADM estimated that it had paid US$15.7 million in damages to non-US buyers, of which US$ 6.8–11.7 million were accounted for by purchases in the European Union.[165] The court held that the Commission's fine was a sanction for an EU/EEA infringement. The damages were compensation, ''insufficiently related to facts of which the Commission should take account''.[166]

ADM also argued that the Commission *had* taken account of damages paid in the *Pre-insulated pipe* cartel. However, the court considered that one case did not establish a Commission practice, that the comparison was not clear enough and, in any event, recalled that the Commission was not *obliged* to follow the same approach in subsequent decisions.[167]

Fourthly, in the *ADM* case the Commission had relied on a statement made to the FBI during the US authorities' investigation of the same cartel, which another company had given the Commission. ADM objected that use of this statement violated the principle that an undertaking should not be compelled to admit an infringement. The CFI held that the Commission was entitled to rely on the statement, but that it was also bound to ensure that ADM's rights were protected.[168] This it had done by attaching the document to the SO giving ADM an opportunity to object to its use, which ADM had not done.[169]

Fifthly, at points in its judgment, the CFI opens the door to comparisons with other Commission decisions on fines, for the purpose of checking compliance with the principle of equal treatment. However, it is a narrow opening because such decisions are only relevant where it is demonstrated that the facts of the other cases ''such as markets, products, the countries, the undertakings and the periods concerned'' are comparable to those in the case here.[170]

Finally, in a complicated passage, the court noted that the 1998 Fining Guidelines could give the impression that termination of an infringement constituted an attenuating circumstance *in all cases*, whereas there was case law stating that termination of an infringement was only an attenuating circumstance in certain situations. Notably, termination after the Commission had intervened should *not* be rewarded in the same way as an independent initiative by the offending company.[171] Moreover, it was relevant whether the termination would make it easier for the Commission to establish an infringement or put an end to it. Such a finding was therefore *not automatic*, but depended on the *particular circumstances*.

Nor did it matter that the intervention which had put an end to the infringement here had been by the *US authorities*, not the Commission. That did not make ADM's termination more ''intentional'' (i.e. more an independent, private termination). The court found no attenuating circumstances.

Sodium gluconate

It may be recalled that in October 2001 the Commission adopted a decision concerning a worldwide price fixing and market sharing cartel for sodium gluconate. Sodium gluconate is a so-called ''chelating agent'', which inactivates metal ions in industrial processes, such as industrial cleaning, surface treatment and water treatment. It appears that the cartel had been disclosed in US proceedings and acknowledged by five companies, but that none sought leniency from the Commission until *after* Commission requests for information. The infringement had been terminated in 1994 after US intervention. The Commission imposed on these companies fines amounting to €57.53 million.

In September 2006, the CFI ruled on four appeals.[172]

The cases mostly centred on the Commission's application of its 1998 Fining Guidelines, findings of the length of the infringement and reduction of

162. *ADM* case, above fn.159, [66]–[67].
163. *ADM* case, above fn.159, [122].
164. *ADM* case, above fn.159, [130].
165. *ADM* case, above fn.159, [347].
166. *ADM* case, above fn.159, [352].
167. *ADM* case, above fn.159, [354].
168. *ADM* case, above fn.159, [264]–[265].
169. *ADM* case, above fn.159, [268]–[269].
170. *ADM* case, above fn.159, [316]–[317].
171. *ADM* case, above fn.159, [336]–[344].
172. Case T–314/01 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA*; Case T–322/01 *Roquette Frères*; Case T–329/01 *Archer Daniels Midland*; Case T–330/01 *Akzo Nobel*, all judgments of September 27, 2006.

fines. Various statements echo judgments in other cases, notably the *Citric Acid* judgments given the same day. Thus, in the *ADM* case, the court dealt with, among other things: whether the fines had been set in a way which infringed the principle of non-retroactivity[173]; whether fines were to be set as a punishment or only to capture improper gains[174]; and when termination of an infringement may be an attenuating circumstance.[175]

In *Roquette Frères*, the CFI reduced the fine imposed by the Commission from €10.8 million to €8.1 million owing to the fact that the Commission included sales generated by a product that was not covered by the cartel agreement in Roquette's turnover.[176] However, in its powers of unlimited jurisdiction the court increased the fine by €5,000 on the basis that Roquette Frères had been seriously negligent in the information which it had provided to the Commission, leading to the error.[177] The other three appeals were dismissed in full.

The *Avebe* case is interesting because there the CFI had to consider whether one of the parent companies in a joint venture could be held liable for the joint venture's participation in a cartel, prior to that parent taking control of the management of the joint venture.

The joint venture in this case was between Avebe and Akzo and called Glucona. It had no legal personality of its own. Avebe stated that its representative was responsible for production, while Akzo's representative, some 200 kilometres away sitting in Akzo's premises, was responsible for sales. Avebe therefore argued that it should not be held responsible for the activities of Glucona until August 1993 when it took over full management of the joint venture. Avebe relied on the CFI's judgment in *Mayr-Melnhof*,[178] where the CFI ruled that a company may be held liable for the conduct of one of its subsidiaries only from the date it had taken control over the subsidiary, which Avebe claimed to have done only in August 1993.

The CFI rejected these arguments. The court noted that in the case of a 100 per cent subsidiary, it is *presumed* that the parent company exerts a decisive influence over its subsidiary's conduct, although this presumption is rebuttable. Here, the CFI found on the facts that Glucona was in a position comparable to that of a 100 per cent subsidiary to its *two* parent companies which were therefore jointly responsible for its conduct.[179]

The court noted that the joint venture agreement required representatives of the two parents to act jointly and in close collaboration. Minutes of Glucona's activities had also shown that the representatives discussed the entire range of Glucona's activities. Each parent also had a 50 per cent stake in the joint venture and controlled all of its shares jointly. As a result, the joint venture was *not* independent of its parents. On the contrary, there were close economic and legal links to the parents, which formed an economic unit with Glucona.

Much of the *ADM* judgment is concerned with arguments raised by ADM, because it considered that the fine of €16.8 million before leniency was too high, given ADM's EEA sales. Notably, ADM pointed out that its total EEA sodium gluconate sales for the *whole* alleged cartel period (four years) were €7.83 million.[180]

None of ADM's arguments was accepted but some are of interest, again because they come up frequently in practice.

First, the court accepted that the Commission could take the market share of undertakings on the *worldwide* market to assess weightings for fines, because the undertakings operated at worldwide level and the cartel involved price-fixing and market sharing by allocating sales quotas. Thus the *worldwide* market was relevant, even though the Commission's sanction is only for the EU/EEA infringement.[181]

Secondly, again the court was willing to consider comparisons to other cases, here the *Zinc Phosphate* decision, to which *ADM* referred, among other things, because it was partly contemporaneous and also concerned a small market.[182] However, the court distinguished *Zinc Phosphate* on the facts and, in any event, considered that the basic amount taken by the Commission was appropriate in all the circumstances.

Thirdly, there was discussion as to what "actual impact" of the cartel the Commission had to show, when it relied on impact in assessing the gravity of the infringement.[183] ADM argued that the Commission had just inferred impact from implementation and had to prove the *actual* impact. The court disagreed and held that, for these purposes, the Commission only had to provide "specific and credible evidence indicating with sufficient probability that the cartel had an impact on the market"[184] (which it found the Commission had done).

Fourthly, ADM also complained that it had not received a request for information from

173. *ADM* case, above fn.172, [35]–[50].
174. *ADM* case, above fn.172, [140]–[146].
175. *ADM* case, above fn.172, [272]–[286].
176. *Roquette Frères,* above fn.172, [39]–[55] and [293]–[300].
177. *Roquette Frères,* above fn.172, [313]–[316].
178. Case T–347/94 [1998] E.C.R. II–1751.
179. *Avebe*, above fn.172, [89]–[97] and [135]–[141].
180. *ADM* case, above fn.172, [68].
181. *ADM* case, above fn.172, [59], [77], [87].
182. *ADM* case, above fn.172, [111]–[114].
183. *ADM* case, above fn.172, [174]–[185].
184. *ADM* case, above fn.172, [177]–[178].

the Commission at the same time as other cartel participants and therefore necessarily had come to the Commission later and obtained less leniency fine reduction (relying on the 2001 *Krupp* judgment).

The court confirmed that, while the Commission has a wide discretion to organise its procedure, it could not act ''arbitrarily''. However, that was not the case here. Since ADM had not been identified as one of the largest sodium gluconate producers when the US authorities had informed the Commission of the cartel, the Commission had first sought such information from Akzo and Avebe (Glucona).[185] As a result there was a reasonable explanation for the Commission's approach and ADM had not been discriminated against in terms of opportunity to seek leniency.

Other

In November 2005, the ECJ rejected Minoan Lines' appeal against the CFI judgment upholding the Commission's *Greek Ferries* cartel decision.[186]

In December 2005, the CFI dismissed Brouwerij Haacht's appeal in relation to the *private label beer* part of the Belgian beer cartel case.[187]

In July 2006, the CFI dismissed an appeal by Hoek Loos NV against the Commission's decision in the *Dutch industrial and medical gases* cartel case.[188]

In September 2006, the CFI rejected the Commission's application to set aside judgments by default in the *German Banks* case, on the ground that the Commission had not proved to the requisite legal standard that there was an agreement on charges for exchanging euro-zone currencies.[189]

In its judgment, the court found the Commission's application admissible, but held, on the merits, that the existence of the alleged agreement had not been proved by the Commission to the requisite legal standard. In particular the Commission had erred in finding that the banks concluded a prohibited agreement or concerted practice in a meeting concerning exchange fees for foreign currencies in cash. The CFI stressed that the banks' meeting was primarily motivated by existing legal uncertainty over the issue as to whether fees could be charged for such operations and that the Commission had not taken this into account and provided sufficient direct evidence from which it could be concluded, without any doubt, that the banks entered into an agreement.[190]

In September 2006, the CFI dismissed the application by Haladjian Frères against the Commission decision rejecting its complaint concerning the distribution system of *Caterpillar*, as regards restrictions on distribution of spare parts.[191]

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

- The Commission's recent decisions on cartels, horizontal cooperation, vertical restraints and Art.82 EC.
- The Commission's sectoral reviews in energy and financial services (payment cards, retail banking and business insurance).
- Current policy issues, notably plea bargaining/direct settlements in cartel cases, the Commission's Green Paper for damages actions in competition infringement cases and the Commission Staff Discussion Paper on Art.82 EC enforcement.

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185. *ADM* case, above fn.172, [342]–[345].
186. Case C–121/04 P *Minoan Lines v Commission*, judgment of November 17, 2005.
187. Case T–48/02 *Brouwerij Haacht NV v Commission*, judgment of December 6, 2005.
188. Case T–304/02, judgment of July 4, 2006.
189. Joined Cases T–44/02 *Dresdner Bank*; T–54/02 *Vereins-und Westbank*; T–56/02 *Bayerische Hypo-und Vereinsbank*; T–60/02 *Deutsche Verkehrsbank*; and T–61/02 *Commerzbank*, judgment of September 27, 2006.
190. *German Banks*, [144] and [145].
191. Case T–204/03, judgment of September 27, 2006.

Major Events and Policy Issues in EC Competition Law, 2005–2006 (Part 2)

JOHN RATLIFF*

Competition law; EC law

This article is the second and final part of the overview of "Major Events and Policy Issues in EC Competition Law in 2005–2006", following on from last month's journal.[1] This part of the article is divided into three sections:

- The Commission's recent decisions on cartels, horizontal co-operation, vertical restraints and Art.82 EC.
- The Commission's sector reviews in energy and financial services (payment cards, retail banking and business insurance).
- Current policy issues, including plea bargaining/direct settlements in cartel cases, the Commission's "Green Paper" for damages actions in competition infringement cases and the Commission's "Staff Discussion Paper" on Art.82 EC enforcement.

European Commission decisions

Cartels

This year has seen some heavy Commission fines with six new decisions. The Commission has also started to emphasise actions for damages in its press releases on cartels. We are told that there are now some 60 people in the Cartels Directorate.

Industrial bags

In November 2005, the Commission announced that it had imposed fines of some €290.71 million on 16 companies for operating a cartel in the plastic industrial bags market in Germany, the Benelux countries, France and Spain.[2] Plastic industrial bags are used as a packaging material for raw materials, fertiliser, agricultural and horizontal products, animal feed and building materials. The Commission's decision relates to the period 1996–2001, although the Commission states that for some, the secret contacts may date back some 20 years.

It appears that the cartel took place under the cover of an official professional organisation for one type of bag ("valve bags") called "Valve-Plast", with five regional level sub-groups.

The companies involved in the cartel were found to have: fixed prices and price calculation models; allocated sales quotas by geographical areas; allocated customers and orders; established lists of main customers with designated companies responsible for co-ordinating offers to them; had multilateral and bilateral contacts on specific contracts and collusive bidding for certain invitations to tender; and regularly to have exchanged sensitive market information.

The Commission considered that the companies committed a "very serious" infringement. The Commission estimated that the value of the market concerned by the cartel was, in 2001, some €265 million. In 1996 the value was about €220 million.

For the purpose of determining the fine the Commission divided the companies into six categories based on their relative market shares in 1996. The fine applied to UPM-Kymmene was multiplied by two for deterrence, given the economic strength of the company. In addition, in UPM-Kymmene's case the Commission increased the fine by 50 per cent for recidivism (a violation in the 1994 *Cartonboard* case).

The fine imposed on Bischof and Klein was increased by 10 per cent because it appears that during the inspections, one of the company's employees destroyed documents selected by the Commission agents.

One company, Stempher, was given a 25 per cent reduction on the basis that it had only participated in a sub-group in the Netherlands and from time to time in Belgium, and its participation in the wider overall co-operation had not been shown.

The ultimate individual fines ranged from €0.35 million (Cofira-Sac) to €56.55 million imposed on UPM-Kymmene, apparently in several cases reaching the "10% of turnover" fining ceiling in Regulations 17/62 and Regulation 1/2003.

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With many thanks to Ingrid Cloosterin and Lisa Arsenidou for their general help in the production of this article.

1. [2007] I.C.C.L.R. 27.

2. IP/05/1508, November 30, 2005. See also, Jung and Krauss (Spring 2006) *EC Commission Competition Newsletter* 61. With thanks to Helena Dolezalova for her assistance.

Box 1

- **New cartel fines (November 2005–October 2006)****

	Total fines	**Highest company fines(s)**	
Industrial Bags:	€290.71	UPM-Kymmene	€56.55
Rubber Chemicals:	€75.86	Bayer	€58.88
Hydrogen Peroxide:	€388.13	Solvay	€167.06
Acrylic Glass:	€344.56	Atochem/Arkema	€219.13
Road Bitumen:	€266.72	Shell	€108.00
Copper Fittings:	€314.78	Aalberts	€100.80
TOTAL	**€1,680.76**		

**All figures are € million

Box 2

- **Cartel decision themes/issues**

— High fines, with several multiple recidivism cases
— 10 per cent fine increases for obstruction of investigations (document destruction/refusal of access) (*Industrial Bags, Dutch Road Bitumen*)
— 60 per cent fine increases for continuing infringement (*Copper Fittings*)
— 50 per cent fine increase for misleading information (*Copper Fittings*)
— Repsol's attempt to rebut the parent-subsidiary responsibility resumption (*Rubber Chemicals*)
— Continuing after seeking immunity issue (*Rubber Chemicals*)
— The way Degussa cleared out liabilities of some €394 million in two immunity applications

British Polythene Industries, which had approached the Commission with information on the cartel, received full immunity from fines. Five other companies obtained reductions for co-operation (ranging from 10 to 30 per cent). Ten companies had no leniency reduction.

Rubber chemicals decision

In December 2005, the Commission announced that it had imposed fines of some €75.86 million on three undertakings for operating a cartel in the EEA and worldwide rubber chemicals market.[3] A fourth company obtained immunity for disclosing the cartel to the Commission.

Rubber chemicals are synthetic or organic chemicals (so-called ''anti-oxidants'', ''anti-zonants'' and ''primary accelerators'')[4] which improve the production and the characteristics of rubber products. They are used in a wide range of applications, mainly in tyres for cars and other vehicles.

The Commission found that between 1996 and 2001 Flexys, Bayer and Crompton/Uniroyal (now Chemtura) agreed to exchange information on prices and price increases of certain rubber chemicals. General Quimica participated in these agreements in 1999 and 2000.

The companies were found to have reached agreements on price increases at least in 1996, 1998, 1999, 2000 and 2001. During an initial phase, the parties agreed the amount of suggested price increase, the products and the territory covered, as well as the leader and timing of the announcements. The subsequent phase involved exchange of information on negotiations with customers, with follow-up contacts involving exchange of information on contracted volumes and prices with specific customers.

The Commission regarded this arrangement as a ''very serious'' infringement. In 2001, the EEA market value was estimated at some €200 million and the worldwide market as €1.5 billion. The Commission took as a reference for setting the fines the worldwide market shares in 2001, the last full year of the infringement. The companies were

3. IP/05/1656, December 21, 2005. A non-confidential version of the Commission's decision is now available on the Commission's website at *http://ec.europa.eu*. See also Askola (Spring 2006) *EC Commission Competition Newsletter* 66.

4. Anti-zonants and anti-oxidants are what are called ''anti-degradants'', which protect finished products from damage caused by oxidation. Accelerators speed up what is called the ''vulcanisation'' of raw rubber into its final state.

divided into four groups according to their relative importance in the global market and taking into account Bayer and General Quimica's size and resources (General Quimica is a 100 per cent subsidiary of Repsol).

The Commission did not find any aggravating circumstances in this case. It found an attenuating circumstance in that General Quimica had had a passive and minor role in the infringement, which the Commission considered warranted a 50 per cent reduction of fine. The ultimate individual fines were: Bayer €58.88 million, Crompton/Uniroyal €13.6 million and General Quimica €3.38 million.

Flexys was granted full immunity from fines, with reductions for leniency co-operation of 50 per cent for Crompton/Uniroyal, 20 per cent for Bayer and 10 per cent for General Quimica. The immunity finding was contested by Crompton/Uniroyal, which appears to have claimed that Flexys coerced other parties and continued the infringement after its leniency application. The Commission rejected these claims.

The Commission published a non-confidential version of its decision straight away. It is interesting on a number of issues.

First, there is much discussion as to whether an attempted price increase in 1996 was separate from or part of an infringement relating to price increases from 1998. Notably, Bayer argued that the infringement was only continuing from 1998 to 2001 and that in 1997 there was no activity.

As a result there is discussion as to what a company has to do to leave a cartel and whether a ''price war'' or ''silent period'' in a series of cartel events is consistent with such an infringement. The Commission concludes that such activities could still be linked together in an overall anti-competitive scheme, if afterwards the parties returned to the table rather than continuing the break (and considering that some contacts continued in any event).[5]

Secondly, in addition to price increases, the Commission notes that Flexys, Crompton/Uniroyal and Bayer agreed to make their agreements with tyre customers for a uniform maximum duration of six months.[6]

Thirdly, various price increases appear to have failed. Some increases were discussed, but not even implemented. It is also alleged that there was a fair amount of strategic behaviour around the cartel (e.g. attempts to gain share through non-implementation). As a result, there is discussion about how the infringement involved an agreement or at least a concerted practice.[7] The Commission found evidence of a number of multilateral and bilateral contacts, customer-specific discussions, implementation through announcements and impact on prices.

Fourthly (and interestingly), there appears to have been a determined effort by Repsol to rebut the *parent–subsidiary responsibility presumption* as regards General Quimica.[8] This presumption is a frequent issue at present, with many arguing that the burden to disprove it goes too far. Especially since recidivist fines will be even tougher now, so that findings of *group responsibility* (as opposed to a particular subsidiary) are even more important.

Here Repsol attempted to show that the Repsol board had no involvement in the day-to-day business of General Quimica. For example, Repsol showed that General Quimica's annual business plan and sales objectives were not subject to approval by Repsol and that there were no overlaps in the management boards of Repsol and General Quimica during the period of the infringement. Repsol also gave plausible explanations as to why General Quimica was left to act independently, i.e. that Rubber Chemicals was a non-core business, which Repsol was trying to sell.[9]

The Commission rejected these claims, partly considering that there was an information channel to Repsol through a ''single administrator'', partly stating that the subsidiary's accounts were consolidated in the group and that General Quimica and Repsol had jointly replied to the Statement of Objections (SO).[10] At first sight these appear to be rather formalistic and unconvincing grounds.

The Commission's position on this may be contrasted with the position of Flexys, a full-function joint venture of Akzo Nobel and Monsanto, then reorganised as Solutia Inc. Here the Commission accepted the presumption the other way, that Flexys was a stand-alone business and not an integral part of its parents.[11]

Fifthly, Crompton/Uniroyal attempted to argue that Flexys should not have received full immunity, mainly because of an internal note of Crompton's, recording a conversation with Flexys after Flexys had disclosed the cartel to the Commission.[12] In other words, Crompton argued that Flexys had not terminated the infringement as it went into the Commission, breaching one of the conditions for immunity. Crompton then hoped to obtain full immunity as the ''first in''. The Commission rejected this, although only after noting that immunity was not to be withdrawn lightly and that Flexys' duty to terminate the infringement when it sought immunity also had to be reconciled with Flexys' obligation not to take action to

5. Above fn.3, e.g. paras 207, 212, 214, 218–219.
6. Above fn.3, paras 65 and 103.
7. Above fn.3, paras 187–194.
8. Above fn.3, paras 254–262.
9. Above fn.3, para.258.
10. See above fn.3, para.262.
11. Above fn.3, para.263.
12. See above fn.3, paras 352–363.

jeopardise the Commission's investigation.[13] (This is exactly why the proposed change in the EC leniency programme on this issue is welcome.) In any event, the Commission stressed that Crompton would not have gained immunity, since its co-operation with the Commission had been *after* the Commission's dawn raids.[14]

Finally, at least Flexys and Crompton made *oral applications* for immunity, with access to file to "oral statements and documents relating thereto" being at the Commission's premises.[15]

Hydrogen peroxide and perborate

In May 2006, the Commission announced that it had imposed fines of some €388 million on seven companies (Akzo Nobel, Edison, FMC/Foret, Kemira, Snia, Solvay and Total/Elf Acquitaine/Arkema) for participating in a cartel in the markets for hydrogen peroxide and perborate.[16] Two other companies were also found to have participated in the cartel (Degussa and L'Air Liquide).

Hydrogen peroxide is an oxidising agent used in the pulp and paper manufacturing industries for bleaching textiles, disinfection and environmental applications such as sewage treatment. It is also a raw material for the production of peroxygen products, such as persalts, which include perborate. Perborate is mainly used as an active substance in synthetic detergents and washing powders.

Previous cartels in hydrogen peroxide and perborate were prohibited by the Commission in 1984. The 1984 case involved Degussa, Solvay, Atochem (now Arkema) and L'Air Liquide.

The infringement was found to involve discussions and assessment of price increases, scheduling of future price increases, as well as monitoring compliance with guidelines on price increases.

The Commission considered these practices to be a "very serious" infringement. The Commission noted that the EEA market size in 2000 for hydrogen peroxide and perborate combined was some €470 million. Fines on recidivists (i.e. Arkema/Atochem, Solvay and Edison) were increased by 50 per cent.

The ultimate individual fines were: Solvay €167.06 million, Arkema/Atochem €78.66 million, Akzo Nobel/Eka Chemicals €25.2 million, FMC Corp/FMC Foret €25 million, Kemira €33 million, Edison/ex-Ausimont €58.13 million and Snia/Caffaro €1.08 million.

Degussa obtained immunity from a fine which the Commission said otherwise would have been €129.94 million. Akzo Nobel obtained a reduction of 40 per cent, Arkema/Atochem 30 per cent and Solvay 10 per cent for their co-operation.

The Commission did not fine L'Air Liquide because the five-year prescription period had expired when the Commission started the investigation (the company left the hydrogen peroxide market in 1998). Nevertheless, the Commission took a decision as regards L'Air Liquide. The Commission noted in its press release that L'Air Liquide had participated in the previous infringement and clearly participated in the infringement until it exited. The Commission added that "the Decision can help injured parties to bring claims before national courts against all cartel participants".

Acrylic glass

In May 2006, the Commission announced that it had imposed fines of some €344 million on Arkema/Atofina, ICI, Lucite and Quinn Barlo for participating in a price fixing cartel on the EEA market for acrylic glass.[17] Acrylic glass (technically polymethyl-methacrylate) is widely used in cars for headlamps, tail-lights and dashboards, DVDs, lenses, household appliances, electronics, baths and showers. (This case is also known as the "methacrylate cartel".)

It appears that between 1997 and 2002, five companies fixed and monitored (target) prices for acrylic glass and exchanged commercially sensitive information. The agreement included timing of price increase announcements, as well as determination as to which company would announce the price increase in a specific geographic area.

The Commission considered these practices to be a "very serious" infringement. The Commission indicated that the size of the EEA market was some €665 million. Fines were increased by 50 per cent for Arkema and ICI for recidivism. Arkema and Lucite had fine reductions of 40 per cent and 30 per cent respectively.

The ultimate individual fines were: Arkema/Atochem €219.13 million, ICI €91.4 million, Lucite International €25 million and Quinn Barlo €9 million.

Degussa obtained full immunity from a fine which the Commission stated otherwise would have been €264.5 million.

Road bitumen

In September 2006, the Commission announced that it had imposed fines of some €266.7 million on 14 companies for participating in a cartel on the market for road bitumen in the Netherlands.[18]

13. Above fn.3, paras 270 and 361–363.
14. Above fn.3, paras 355 and 366.
15. Above fn.3, para.57.
16. IP/06/560, May 3, 2006.
17. IP/06/698, May 31, 2006.
18. IP/06/1179 and Memo/06/324, September 13, 2006. With thanks to Helena Dolezalova.

Bitumen is a by-product of fuel production that is mainly used for asphalt production. The cartel covered all bitumen used for road construction in the Netherlands. The market was valued at some €62 million in 2002.

Interestingly, the Commission indicated that it assumed jurisdiction in the case mainly because initially the leniency application which it received covered several EU Member States. Inspections were conducted in five Member States. In addition to that, bitumen sold in the Netherlands was sourced from at least three countries. The Commission therefore considered that it had jurisdiction over the case because trade between the EU Member States was affected by the infringement. Moreover, the current arrangements for allocation of cases within the European Competition Network did not exist at the time when the case was initiated. The Commission states that it would now discuss with the Member States concerned who should do the case since the decision only covers the Netherlands.

The Commission found that eight bitumen suppliers and six bitumen purchasers participated in this cartel in the period between 1994 and 2002. The companies held joint meetings of suppliers and purchasers, as well as separate meetings between the two sides.

In the joint meetings, participants set the gross price of road bitumen to be invoiced to asphalt production plants and two rebates for construction companies which owned these asphalt production plants. This included a uniform rebate for road construction companies, which were part of the cartel and a lower maximum rebate for other construction companies which were not part of the cartel. Regular monitoring took place and "fines" could have been imposed on suppliers that granted extra rebates to non-members of the cartel.

The Commission found that construction companies not involved in the cartel (mostly smaller firms) had to pay higher prices for bitumen than the members of the cartel. The Commission also stated that this arrangement caused the price of bitumen in the Netherlands to rise above the level of the neighbouring countries.

The Commission found that this was a "very serious" infringement. Some fines were increased by 50 per cent for recidivism (Shell) and for playing an instigating and leading role in the cartel (Shell and Koninklijke Volker Wessels Stevin—KWS).

In addition, it appears that the fine imposed on KWS was increased by 10 per cent for obstructing the Commission's investigation, because during the inspection in 2002, KWS twice denied the Commission inspectors access to its premises. In the end, the Commission requested the assistance of the Dutch Competition Authority and the Dutch police.

The fines in this case were based on the 1998 Fining Guidelines because they were in force at the time of the SO. The ultimate individual fines ranged from €4.65 million (imposed on bitumen *purchaser* Ballast Nedam) to €108 million (imposed on bitumen *supplier* Shell). BP obtained full immunity from fines. Kuwait Petroleum had a 30 per cent fine reduction for its co-operation.

Copper fittings

In September 2006, the Commission announced that it had imposed fines of some €314 million on 30 companies (belonging to 11 groups) for participating in a cartel on the market for copper fittings in various Member States.[19] Copper fittings connect tubes for conducting water, air, gas, etc., in plumbing, heating, sanitation and other installations.

The Commission found that between 1988 and 2004 the companies involved had fixed prices, discounts and rebates, agreed mechanisms to co-ordinate price increases, allocated customers and exchanged commercially sensitive data. The companies held meetings and exchanged information via various means.

The Commission considered that this arrangement was a "very serious" infringement. The companies' co-operation was assessed under the 1996 Lenience Notice.

The Commission increased the fines by 60 per cent for Aalberts, Delta, Advanced Fluid Connections and Legris because it found that they had continued the cartel after the Commission's inspections. Advanced Fluid Corp received an additional fine increase of 50 per cent for providing the Commission with misleading information.

The ultimate individual fines ranged from €1.35 million (Flowflex) to €100.8 million (Aalberts). Mueller was granted immunity from fines as being the company which disclosed the cartel.

MCAA decision

In October 2006, the Commission published on its website the non-confidential version of its 2005 decision concerning the *Monochloroacetic acid* cartel.[20]

This case concerned a long cartel from 1984 to May 1999, for an organic acid used as a chemical intermediate in the manufacture of, among other things, detergents, adhesives, textile auxiliaries and thickeners, in foods, pharmaceuticals and cosmetics. In 1998 the worldwide value of the market was €323 million, while the EEA value was €121 million. The case originated in an immunity application by Clariant in 1999. It appears that there have been parallel procedures in the United States and Canada.

19. IP/06/1222, September 20, 2006.
20. See [2006] I.C.C.L.R. 53.

The Commission found that there were agreements and concerted practices allocating volume quotas and customers, agreeing price increases and compensatory mechanisms and related information exchanges and contacts.[21] The main participants in Europe were Hoechst (until it sold its business to Clariant), Akzo (which also bought another participant Eka) and Atofina (which was bought by Elf Aquitaine).

The Commission deals at length with which companies are the appropriate addressees of the decision, given the changes in the structures concerned over the time of the infringement in, for example, the Akzo and Elf Aquitaine groups.

Both companies and Clariant argued that group parent companies should not be considered liable for the infringements, although they might have controlling stakes in companies involved in the infringement. Notably Akzo argued that:

> ''information on competitive behaviour was restricted to the individuals directly involved, given that such activities were expressly forbidden by the Akzo group''.

Official minutes were also submitted to reverse the presumption of parental control.[22] The Commission rejected these arguments.

The Commission considered that the cartel agreements were implemented and that ''[s]uch continuous implementation over a period of fifteen years must have had an impact on the market''.[23] The Commission decided to use EEA market share for weighting purposes, based on the last full year of the infringement for each participant, 1998 generally, with, for Hoechst, 1996 (since it then sold its business to Clariant).

This resulted in market shares of 44 per cent for Akzo, Hoechst 28 per cent, Clariant 34 per cent and Atofina 4 per cent. Atofina/Elf Aquitaine's basic amount was increased by a multiplier of 2.5 for deterrence and Akzo's basic amount by a multiplier of 1.5. Hoechst and Atofina received 50 per cent increases for recidivism. In Atofina's case the Commission states that it applied a recidivist increase of 1.5 as if Atofina had been the sole addressee of the decision, not 2.5 which would have been appropriate for Elf Aquitaine, as Elf Aquitaine did not control Atofina at the time of the earlier infringement.[24]

Hoechst was considered not to be covered by Clariant's immunity application, given that they were separate companies. However, Clariant AG and Elf Aquitaine were considered covered by the leniency applications of their subsidiaries on the basis that they *were* parts of single economic entities.

Clariant obtained full immunity, Atofina/Elf Aquitaine a fine reduction of 40 per cent, Akzo a fine reduction of 25 per cent. The ultimate fines were: Akzo €84.38 million, Hoechst €74 million, Elf Aquitaine/Atofina (now Arkema) €45 million, Atofina (now Arkema) by itself €13.5 million.

Other[25]

In July 2006, the Commission published its summary of the (now rather old) 2002 *Specialty Graphite* decision.[26] The non-confidential version of the decision was also made available on the Commission's website.

This case concerned infringements of Art.81 EC in two markets: extruded specialty graphite and isostatic specialty graphite. Both products are widely used for electrodes and semi-conductor applications, as well as electrolytic anodes and cathodes, boats, sintering trays and crucibles. The Commission found that these were different markets and that both were worldwide.

The Commission found that the isostatic cartel had operated from 1993 until 1998 and the extruded cartel from 1993 to 1996. The decision dealt with infringements in the EEA from January 1, 1994. They involved price targets, as well as exchanges of sales volume and other commercial information.

The organisation of the cartel appears to have been rather complex: meetings were held on four levels (top, international, regional and local (national) level). The local and regional meetings appear to have implemented principles agreed at the higher levels.

Eight suppliers participated in the isostatic cartel, while two of them (SGL Carbon and UCAR) took part in the extruded cartel.

The Commission classified the cartels as ''very serious'' infringements. The total amount of fines amounted to €60.60 million: €27.75 million for SGL Carbon for participation in the two cartels, €6.97 million for Le Carbone-Lorraine, €3.58 million for Ibiden, €6.97 for Tokai Carbon, €10.79 for Toyo Tanso, €3.58 for Nippon Steel Chemical/NSCC Techno Carbon and €980,000 for Intech EDM NV/Intech EDM AG.

SGL Carbon's basic amount of fine in the isostatic cartel case was increased by 50 per cent for being the leader and instigator of the infringement. Intech obtained a reduction of 40 per cent of the basic amount of fine in the isostatic case owing to the fact that it was mainly acting under instructions from Ibiden, as Ibiden's

21. Above fns 3 and 20, paras 182 and 202.
22. Above fn.20, e.g. paras 238–239.
23. Above fn.20, para.286.
24. Above fn.20, para.314, n.222.

25. With thanks to Helena Dolezalova and Stefano Fratta for their assistance with this section.
26. L180/20, July 4, 2006.

European distributor and because it did not participate in the higher-level meetings.

All others, except for Intech, received a reduction of 35 per cent for having co-operated with the Commission. Intech received only a reduction of 10 per cent, since it did not provide the Commission with any documentary evidence.

SGL Carbon and Nippon Steel Chemical claimed inability to pay, but this was rejected by the Commission. However the Commission reduced SGL's fine by 33 per cent in the circumstances, partly because recently it had also been fined in the *Graphite Electrode* case. This has been controversial and already discussed in previous reviews in relation to appeal cases.

The Commission granted full immunity from fines to GrafTech International (UCAR) for being the first to bring the cartel to the Commission's attention.

In December 2002, the Commission fined nine undertakings a total of €85 million for their participation, together with a trade association, in a cartel covering the Italian concrete reinforcing bars market.[27] The non-confidential version of the decision was published (in Italian) this year.

In July 2006, the Commission also published its summary of the *Copper plumbing tubes* decision.[28] The non-confidential version of the decision was summarised in last year's article.

Other horizontal decisions

Box 3

- **Horizontal decisions**
  - — FA Premier League/Media Rights
    - * Joint selling allowed, with six balanced "packages" up for tender
  - — Cannes Extension Agreement
    - * Collecting societies can rebate their margins in central licensing agreements with music publishers without the consent of all members

FA Premier League—media rights

This case has been going on for some time and concerns the joint selling of media rights to the English FA Premier League football competition.

In October 2005 the Commission received a report from the UK Office of Communications and Consultants Human Capital, with research on viewing trends, stadium attendance, fans' preferences and behaviour and the commercial market for Premier League Football.[29]

In November 2005 the English Football Premier League (FAPL) offered *improved commitments* for the sale of media rights for the 2007 season onwards. These provided for the FAPL to sell a number of packages of media rights: six smaller live TV rights packages, each "showcasing the League as a whole"; with no one bidder allowed to buy all six (although one could still buy five); packages to be sold to the highest bidder for each package; and an auction monitored by a trustee.[30] Rights are also made available for broadcast via mobile phones and individual clubs can exploit rights that are not sold by the FAPL or used by the purchaser. In other words, this followed the model of the *UEFA Champions League* and German *Bundesliga* decisions, although with differences.

Then in March 2006, the Commission adopted an Art.9 decision making these commitments legally binding.[31] The commitments are to remain in force until June 30, 2013. The non-confidential, formally endorsed version of the commitments is also on the Commission's website.

The main points on the Commission decision, which is precisely argued, are as follows.

The media rights concerned are TV, radio, internet and mobile phone rights in the United Kingdom and throughout the world. As in other cases various packages of rights are established for each tender: live TV, live audio/radio, audiovisual for mobile phones, deferred TV rights. The FAPL carries out the joint sale by invitations to tender every three years.

The Commission treats the old UEFA rule (Art.48) about not broadcasting matches live on Saturday afternoon as "an external constraint on FAPL, compliance with which does not give rise to competition concerns".[32]

The Commission's preliminary assessment was that the arrangements affected *various markets* for the acquisition of media rights of premium football matches in the United Kingdom. The Commission considered that the FAPL joint selling was caught by Art.81(1) EC, noting that the arrangements resulted in a single (joint) sales organisation with exclusive rights, enjoying significant market share and pursuing a single sales policy:

> "Markets on which no-one possesses market power and whose development would typically be dictated by the demand for rights become subject to

27. IP/02/1908, December 17, 2002. See also Laina, (Spring 2006) *EC Commission Competition Policy Newsletter* 68.
28. L192/21, July 13, 2006.
29. Available on the Commission's website (152 pages), above fn.3.
30. IP/05/1441, November 17, 2005.
31. IP/06/356, March 22, 2006, together with a non-confidential version of the commitment decision on the Commission's website, above fn.3.
32. Above fn.31, para.10.

> the commercial choices made by a joint sales organisation with significant market share''.[33]

The Commission focused on output restrictions and the way that control of the upstream (content) market may create foreclosure on downstream (TV) markets, notably advertising funded TV and pay-TV.

The 2006 commitments involve six packages (not four as previously),[34] more evenly balanced because there is a mechanism called the ''pick mechanism'', whereby each purchaser in principle has a right to select (''pick'') 23 matches over the course of the season.

Clips of live matches will be available for mobile phones.[35] More audio/radio rights packages will be available. Clubs can exploit certain TV, internet and mobile phone rights on a deferred basis.

There is now a guarantee that more than five packages of live rights will not be sold to any single entity. The Commission considers that:

> ''Even just one package of rights, properly balanced against the other packages, will be sufficient to give an overview [or showcase] of the FA Premier League's season''.[36]

Cannes Extension Agreement

In May 2006, the Commission published an Art.27(4) Notice, indicating its intention to accept and make binding commitments in the case concerning Universal International Music's complaint concerning this agreement.[37]

The Commission noted that the Cannes Extension Agreement is an agreement concluded among 13 European mechanical copyright collecting societies and five major music publishers. The agreement concerned various issues in the administration of mechanical copyright for the reproduction of sound recording on physical carriers.

The agreement was notified under Regulation 17/62, but that lapsed in May 2004.

In January 2006, the Commission initiated proceedings and indicated that it had objections to two clauses in the agreement: cl.9(a), which required a collecting society entering into a Central Licensing Agreement to have the approval of *all of its members* before offering a rebate to a record company; and cl.7(a)(1), which provides that no collecting society shall enter into the activities of a publisher or record company.

While contesting the Commission's assessment, the collecting societies have agreed to amend cl.9(a), so that a collecting society may grant a rebate to a record company, *if that is decided by a competent body of the society.* The Commission's concern was that the previous ''full member consent'' provision was so burdensome in fact that such consent would never be obtained.

The clause also provides that, with the exception of four defined cases, all rebates or discounts are to be included in the rate charged to a record company and shall not reduce the increase of the collecting society members. In other words, it appears that any rebate is to come from collecting society margin, not members' royalties/income. The collecting societies also agree to delete cl.7(a)(1) and not enter into similar clauses in the future.[38]

On October 4, 2006, the Commission announced that it had adopted the Art.9 decision.[39]

Box 4

- **Vertical restraint cases**
  - *Peugeot Netherlands*
    - A sales target can be linked to a territory, but bonuses are to be paid on all cars sold
  - *BMW/General Motors*
    - Facilitating multi-brand sales
    - Generic infrastructure, tailored targets
    - BUT some showrooms may not have room for two representative ranges of cars
    - A service repairer cannot be required to invest in ''redundant capacity''
  - *Repsol*
    - Opening up a network of service stations
    - Issues of compensation to buy out financing arrangements

Distribution

Peugeot Netherlands

In March 2006 the Commission published on its website a summary and non-confidential version of its decision in the *Peugeot Nederland parallel imports* case. It may be recalled that the Commission fined Peugeot €49.5 million in October 2005 for two practices:

- Linking remuneration of its Dutch dealers to the final destination of vehicles sold (so that performance bonuses were refused if dealers

33. Above fn.31, para.25.
34. Above fn.31, para.40.
35. Above fn.31, para.36(b).
36. Above fn.31, para.41.
37. [2006] O.J. C122/2, May 23, 2006.
38. See further the Commitments published on the Commission's website, above fn.3.
39. IP/06/1311, October 4, 2006.

sold cars which were not then registered in the Netherlands).

- Pressure on exporting dealers not to do so, through "direct action" and threats to reduce the number of cars supplied.[40]

It appears these measures were applied between 1997–2003 and 1997–2001 respectively.

The key issue appears to have been how cars sold *had to be registered in the Netherlands* to be taken into account for the dealer's bonus. The Commission stresses that it does not object to an agreement with a sales target in a dealer's territory (which is allowed under Regulation 1475/95).[41] What it objected to is that having achieved the sales target, payment of the bonus was only for cars registered in the Netherlands (not other cars sold abroad).

As regards the pressure, there appear to have been a number of specific incidents.

The Commission states that these acts were part of the contractual relationships between Peugeot and the dealers. There was tacit acquiescence by the dealers in the bonus scheme and Peugeot's "call for discipline in limiting exports" was "endorsed in principle" by all members of the network.[42]

BMW/General Motors

In March 2006, the Commission indicated that it had closed its investigations into *BMW and General Motors' distribution and servicing agreements*, after the two companies introduced changes.[43] Both investigations were prompted by complaints by dealer associations. The issues appear to have been:

- Whether certain contractual requirements were hindering multi-brand sales and servicing.
- Whether requirements for the repairer network went beyond what was qualitatively necessary (thereby deterring garages from becoming authorised repairers).

Multi-branding issues

On these issues, the Commission states that the case was in part about clarifying ambiguities in existing contracts. It appears that BMW and General Motors have now indicated that they accept that all facilities other than the part of the showroom dedicated to their brands can be shared/brand neutral (e.g. the reception counter, customer area, outside façade and back office). Both car manufacturers also explicitly recognise the co-existence of competing brands as regards trade marks, distinctive signs, etc., to be displayed inside or outside the dealer premises.

Both allow their dealers to use *generic (multi-brand) informatics infrastructure and management systems* (e.g. for accounting), provided that they are equivalent functionally and in terms of quality to their own recommended solutions.

General Motors also adjusted its *sales targets and performance targets*. It appears that dealers were benchmarked comparing a dealer's *local* market share against *national* market shares, which was considered a deterrent to a dealer handling competing brands. General Motors said the system would not be used to sanction dealers and agreed that targets had to be agreed taking into account local circumstances. General Motors also indicated that its dealers could set up multi-brand internet sites; that Opel trained sales personnel could be used to sell cars of other brands; and that Opel-specific training was not required for staff selling competing brands.

Other reporting obligations were clarified so that dealers do not have to give commercially sensitive information on dealers' activities with competing suppliers.

Interestingly, the Commission also looked at BMW's minimum display range requirements. It appears that for smaller dealers the contractual standard is only three or four display cars. The Commission did not consider this an indirect non-compete obligation, even where the dealer then had insufficient showroom space to display other brands, which was found to be the case in less then half of the BMW dealer networks investigated. The Commission accepted that:

> "[s]howrooms below a certain size may in certain cases simply not be suitable for displaying a representative range of cars by more than one brand, without additional investment".

This was consistent with the block exemption.[44]

On repair network access

On these issues it may be recalled that access to repair networks is meant to be subject only to qualitative criteria under Regulation 1400/2002, although car manufacturers can require that services offered be "high quality", leaving some room for debate.

Again, BMW and General Motors agreed to modify some practices to remove any concern.

40. IP/05/1227, October 5, 2005, above fn.3, and Dussart, (Spring 2006) *EC Commission Competition Policy Newsletter* 49.
41. Above fn.40, paras 7 and 20.
42. Above fn.40, paras 14–16.
43. See MEMO/06/120, IP/06/302 and IP/06/303, March 13, 2006; and Becker and Hamilton (Summer 2006) *EC Commission Competition Newsletter* 33.
44. See MEMO/06/120, above fn.43.

BMW and General Motors removed all *quantitative* criteria (e.g. minimum turnover targets and minimum throughout capacity requirements). Interestingly, in that context, BMW has agreed to change its system from a variable one, in which the service infrastructure was a function of potential local demand, to one where each authorised repairer is now required to have a minimum of three mechanical work bays and corresponding equipment. The Commission considered that BMW's previous system created entry barriers, because a repairer would have to invest in *redundant capacity*, duplicating that of other existing authorised repairers.[45]

BMW and General Motors also introduced what was called an ''opening clause'' to their servicing contracts. This allows authorised repairers to source all repair equipment, including tools and IT hardware/software from suppliers other than those designated by BMW and General Motors, again provided that such equipment is of equivalent functionality and quality. The idea is to create an opening for *generic infrastructure*, removing the need for investment duplication.

General Motors indicated that workshop facilities or equipment could be used to service competing brands and reduced the number of special tools which authorised repairers must hold.

BMW and General Motors also accepted that authorised repairers do not have to have their own warehouses on site and may limit the stocks of spare parts which they hold to those frequently demanded by customers. Repairers could also cooperate on joint warehousing and joint purchasing of spare parts.

Finally, BMW started to include repairers who do not sell BMW cars into some of its information systems (e.g. on-board service booklets and in-car navigation systems).

Repsol

In April 2006, the Commission adopted an Art.9 settlement decision making binding Repsol's commitments in the Spanish petrol station market.[46]

It will be recalled that the issue was whether the non-compete clauses in Repsol's supply agreements significantly foreclosed the fuel retail market in Spain. This was noted to be highly concentrated and without the development of unbranded and supermarket petrol stations. Repsol was found to have a market share of some 40 per cent, with CEPSA, BP and Shell on 10 per cent each.

The commitments relate to the distribution of petrol and diesel to service stations. Repsol has agreed to allow all service stations, with which it has signed long-term supply contracts giving Repsol ''rights *in rem*'' in return for financing the construction or refurbishment of the stations, to terminate these contracts, subject to compensation which is said to offer the service stations concerned a ''concrete financial incentive'' to terminate. That compensation has been revised since the Commission first sought comments. The principles are set out in a related article in the EC Commission's Competition Policy Newsletter.[47]

Repsol will not sign any new exclusive supply contracts with a duration of more than five years until December 2011. Repsol will also not buy independent service stations which it does not supply for two years after the Commission's decision. The Commission considers that this will open up wholesale supply to such stations.

Service stations in the Repsol network are also said to be free to offer discounts on retail prices. (It appears that there is a separate investigation in Spain as to whether Repsol service stations in practice are able to offer such discounts.)

Articles 82/86 EC[48]

Rough diamonds

In February 2006 the Commission took an Art.9 decision accepting the commitments of De Beers (the world's leading rough diamond producer), phasing out its rough diamond purchases from Alrosa, the Russian diamond producer, which is the world's second-largest producer.[49]

The Commission noted that this arrangement had been in operation since 1959 and that the amounts involved corresponded to Alrosa's rough diamond exports. The Commission described the arrangement as a ''continuous purchase relationship'', which was not considered normal competition in the circumstances, given the way that it appeared to reinforce De Beers' position as ''market maker''. The commitments provide for termination of purchases from Alrosa as of 2009, after a phasing out from 2006 to 2008.[50]

It appears that after the Art.27(4) Notice in June 2005 the Commission received 21

45. Above fn.43.
46. IP/06/495 and MEMO/06/163, April 12, 2006; short decision [2006] O.J. L176/104; a non-confidential version of the commitments decision and mandate of the trustee is available on the Commission's website in Spanish, above fn.3.
47. See Chauve (Summer 2006) *EC Commission Competition Newsletter* 25.
48. With thanks to Cormac O'Daly for his assistance.
49. IP/06/204 and MEMO/06/90, February 22, 2006.
50. The Commission is still considering complaints against De Beers' supplier of choice distribution system and says it will now take into account that there will be an alternative, independent source of supply for rough diamonds outside De Beers' channels.

Box 5

- **Article 82 EC decisions**
  - — *Diamonds (De Beers/Alrosa)*
    - * Shorter transition period
    - * Very limited access to file if only preliminary assessment
  - — *Reverse vending machines*
    - * Tomra €24 million fine for exclusionary rebates/bonuses
    - * Economic assessment of likely effects
  - — *Microsoft*
    - * Usable specification disclosure struggle—a media event
    - * Decision on non-compliance, with €280.5 million fine
  - — *Coca Cola*
    - * Delinkage of "must stock" items within product family
    - * All circumstances count—no safe haven for quarterly rebates
    - * Leaving the door open for competitors to linked/tied products
  - — *AstraZeneca*
    - * The use of public procedures and regulations may be abusive, if with an intent to foreclose

observations, a large majority of which indicated that the identified competition concerns would not be resolved by the proposed commitments. These came from industry associations, diamond bourses and market operators downstream of De Beers, active in cutting, polishing and trading diamonds.

As a result the commitments have been revised, reducing the phase-out period in the purchase agreement from *six* years to *three* years. De Beers' purchases will also change from some US$600 million in 2006 to US$400 million in 2008 (instead of from US$700 million in 2005 to US$275 million in 2010).[51] Thereafter De Beers is not to purchase rough diamonds from Alrosa directly or indirectly.[52] It is argued that the transitional period is necessary to give sufficient time to build up competitive distribution channels for Alrosa's rough diamonds.[53]

Interestingly, it appears that there was some dispute on access to file. De Beers accepted it had had sufficient access to the third-party observations based on a confidential summary. The Commission considers this sufficient access, given that the Art.9 decision does not involve a finding of infringement, but rather a settlement based on a preliminary assessment. (De Beers had received, however, two SOs which were considered comparable to a preliminary assessment.)

Alrosa, on the other hand, was considered not *a party* to the Art.9 procedure. Nevertheless, the hearing officer noted that Alrosa was *directly and individually concerned*. As a result, Alrosa was "informed of the essence of De Beers' amended proposal" and allowed to comment. Alrosa did so, but still wanted to know which objections to the commitments the Commission considered warranted. The hearing officer rejected the request for further clarification.[54]

Tomra Group

In March 2006, the Commission imposed a fine of €24 million on the Norwegian Tomra group for abuse of its dominant position on the market for supply of so-called "reverse vending machines" in Austria, Germany, the Netherlands, Norway and Sweden.[55] These machines are installed in retail outlets for the collection of used drink containers in return for a deposit.

The Commission found that Tomra had implemented an exclusionary strategy on five different national markets from 1998–2002. These practices included:

- *Exclusive or preferred supplier agreements* with customers (some explicit, others not), with rewards for exclusive or preferred supplier status of discounts, free machines or free upgrades. It appears that, on occasion, customers were reminded that discounts would have to be paid back if competing machines were bought. Some agreements explicitly forbade customers from installing free test machines of competing manufacturers.
- Agreements for *individualised, high-volume quantity orders* during a specific time frame, based either on demand estimations or the customers' past purchases, which usually corresponded to total or almost total machine requirements of its customers.
- *Individualised retroactive discounts or bonuses for targets by the end of a given reference period*, which were also set at expected customer demand. Bonuses were in the form of cash refunds or, in kind, e.g. free machines.

51. Please note that in last year's article [2006] I.C.C.L.R. 83 at p.84, there is an error—the Euro figures should have been indicated as US dollars.
52. See the summary of the decision at [2006] O.J. L205/24.
53. See Mische and Visnar (Summer 2006) *EC Commission Competition Newsletter* 30.
54. [2006] O.J. C175/4.
55. IP/06/398, March 29, 2006. See also Maier-Rigaud and Vaigauskaite, (Summer 2006) *Newsletter* 19.

Such practices were found to have been aimed at, or hindered the ability of other machine suppliers to enter the market efficiently. The case arose from a complaint by a competitor, Prokent.

The Commission's case was based on *Hoffmann La Roche* and *Michelin II*, i.e. the position that the conduct in question was capable of restricting access to the reverse vending machine market. The Commission relied on the factual proof of the practices concerned, including lack of market entry despite positive demand ''shocks'' (in a market with low barriers otherwise); several market exits; and internal documents showing a general strategy of foreclosing competition.

Moreover, it appears that the Commission also went into *the likely effects* of Tomra's practices, and described the suction/exclusivity effects of Tomra's practices.[56] This prompted economic submissions in defence from Tomra, mainly focused on rebate scheme effects. There then appears to have been debate on issues such as:

- whether suction effects had to be assessed in a static or dynamic way;
- whether the suction effects were to be assessed on the basis of ''perfect information'' or not (with the Commission arguing not);
- whether there was sufficient excess of demand above the threshold level to allow entry;
- whether ex post data was relevant;
- whether a competitor would be able to price above cost in such circumstances, so that competitors would not have been foreclosed.

As with predatory pricing effect in *Wanadoo*, the Commission's position appears to be that it does not *have* to do this sort of ''likely economic effect'' assessment. However, to be more ''modern'' and in the light of its Art.82 EC Discussion Paper, the Commission preferred here to show that its reasoning was supported by economic analysis.

Microsoft

This has been another busy year in the *Microsoft* case, with a succession of Commission press releases and virtually daily press reporting.

It will be recalled that the Commission's 2004 decision obliged Microsoft, among other things, to supply complete and accurate interoperability information (called ''specifications''), which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers.

Since the order of the President of the Court of First Instance in December 2004 rejecting Microsoft's interim application for suspension of remedies, Microsoft has been obliged to produce these specifications, so that they can be licensed to competitors wishing to produce interoperable products in the relevant market.

It appears that Microsoft then put forward proposals, which were market-tested and not accepted.

In November 2005, the Commission adopted a decision under Art.24(1) of Regulation 1/2003, warning Microsoft that, unless it produced complete and accurate specifications on reasonable terms by mid-December 2005, it could be fined a daily penalty of up to €2 million from that date. The decision is now available on the Commission's website.

Microsoft then revised the specifications. However, the Commission's preliminary view was that this was not enough and the Commission sent an SO in December 2005, outlining the Commission's view, based on input from the Monitoring Trustee, that Microsoft had not complied with its obligations.[57]

In January 2006, Microsoft indicated that it was offering a source code licence to all potential licensees. However the Commission indicated that this was not a substitute for the technical information disclosure required by its March 2004 decision.[58]

In March 2006, the Commission sent Microsoft further reports from the Monitoring Trustee (a professor of computer science, assisted by two others) and its technical advisers (the European subsidiary of a US technical litigation support firm), with the factual information supporting the Commission's objections.[59]

In April 2006, it also appears that Microsoft unsuccessfully sought documents from third parties to the EC case through actions before the US courts. Such application had been denied in the European Union, on the basis that the documents were confidential.

After a two-day hearing at the end of March 2006, the Commission concluded that, as of June 20, 2006, Microsoft's specifications still were not adequate.

In July 2006, therefore, the Commission decided to fine Microsoft *€280.5 million*, i.e. *€1.5 million per day* for 187 days for the period from December 16, 2005 (the date fixed in the Art.24(1) decision) to June 20, 2006, under Art.24(2) of Regulation 1/2003. The decision is on the Commission's website.

The Commission considers that Microsoft is not explicitly setting out *what is required to achieve interoperability*. Rather, Microsoft is just *describing the choices it made when developing*

56. See Maier-Rigaud and Vaigauskaite, above fn.55, pp.20–22.

57. IP/05/1695 and MEMO/05/499, December 22, 2005.

58. MEMO/06/76, February 15, 2006.

59. IP/06/298, March 10, 2006.

its protocols.[60] The Commission also noted that, as of June 20, 2006, Microsoft had only supplied documentation for 24 out of 64 protocols.[61] It appears that the Trustee had concluded in November 2005 that:

> "using the documentation is an absolutely frustrating, time-consuming and fruitless task. The documentation needs quite drastic overhaul before it could be considered workable".[62]

Microsoft's position appears to be, broadly, that the disclosure is adequate for an informed industry user and that specification documents could be improved in dialogue with Microsoft, a process which is industry practice in relation to specifications.[63] However, the Commission states that Microsoft has itself questioned whether that process is satisfactory in a recent status report on compliance in the United States.[64]

In addition, the Art.24(2) decision amended the Art.24(1) decision from November 2005 to allow the Commission to impose a penalty of up to €3 million per day for each day of non-compliance after July 31, 2006.

This is the first example of the Commission imposing such penalties under Art.24 of Regulation 1/2003, which allows it to fine undertakings up to 5 per cent of their average daily turnover in the preceding business year per day of non-compliance. It appears that this is also the first time that a company has been fined for failure to comply with a decision under either Art.81 or Art.82 EC. Previous periodic penalty payment decisions have been for procedural infringements that obstructed Commission investigations.

To date, the Commission has not imposed any further penalties. The Commission has also not taken a position on the obligation on Microsoft in its 2004 decision to offer access to such information "on reasonable terms", pending technical disclosure compliance. Otherwise it appears that Microsoft has provided a version of Windows without Media Player, but it is said that it was "a market failure".

Meanwhile, the hearing in Microsoft's substantive appeal of the 2004 decision took place before the Court of First Instance for a full week at the end of April 2006. The appeal challenges the Commission's finding that Microsoft unlawfully refused to supply the specifications to its competitors, that it unlawfully bundled Windows Media Player with the Windows Operating System and, in the alternative, the level of the fine imposed. Judgment is expected in early 2007.

Finally, there has been ongoing activity regarding Microsoft's release of Vista, which is now scheduled for 2007. The next round of concerns appears to be as to whether internet search, document imaging and security features will be tied.

Coca Cola

In November 2005, the Commission put on its website the non-confidential version of its Art.9 decision in *Coca Cola*.[65]

The commitments in the settlement were essentially described last year. Broadly they apply until 2010, where Coca Cola has more than 40 per cent market share and double the market share of the nearest rival in the markets concerned.

The following are the main points in the decision:

The product market definition taken was carbonated soft drinks (CSDs), not including water, sport and energy drinks. The Commission distinguished the "take-home channel" (supermarkets) and the "on-premise channel". Markets were considered to be national.

The Commission took the view that Coca Cola and its bottlers (here collectively termed Coca Cola) were *jointly dominant* in a number of countries and channels, among other things, in view of the way they form "the Coca Cola system". They were dominant because of their strong market positions due to high market shares, unique brand recognition, the:

> "must stock nature of Coca Cola's strongest brands and the exceptional breadth of Coca Cola's portfolio, protected from competition by barriers to entry in the form of sunk advertising costs".[66]

The Commission appears not to have accepted that there was countervailing buyer power, because most customers were weak as compared to Coca Cola.

The Commission's investigation led to the preliminary view that some of Coca Cola's business practices led to *de jure* or *de facto* exclusive supply of CSDs (e.g. through financing agreements, repayable by a certain quantity and assortment of CSDs). The Commission also appears to have had concerns about foreclosure through beverage coolers and fountain dispensers, where such equipment is reserved for Coca Cola only and space constraints prevent another CSD source in the outlet.

It appears that Coca Cola applied *target rebates and growth rebates* in the take-home channel, mostly calculated on a *separate quarterly basis*, with respect to total turnover in colas and

60. Above fn.59, paras 17 and 130.
61. Above fn.59, para.92.
62. Above fn.59, para.115.
63. Above fn.59, para.172.
64. Above fn.59, para.219.
65. Above fn.3, and see also Gasparon and Visnar, (Autumn 2005) *EC Commission Competition Policy Newsletter* 60.
66. Decision, para.25; above fn.65, p.61.

non-colas. Notwithstanding this, the Commission found competition concerns as regards these rebates, because they increased switching costs and the loyalty of customers. Smaller rival suppliers were generally unable to match the rebate owing to their limited size.[67]

The Commission also objected to linkage of Coca Cola's strongest brands (e.g. Coca Cola and Fanta Orange) with the purchase of less well-selling CSDs and non-carbonated soft drinks; and payment incentives linked to the customer taking large assortments of products/entire ranges.

The Commission also had concerns about Coca Cola offering ''space-to-sales arrangements''. It appears Coca Cola offered incentives for a retail customer to reserve part of its CSD shelf space for Coca Cola branded products in proportion to Coca Cola's sales share in the take-home channel. While based on leading brands like Coca Cola Regular and Light and Fanta Orange, Coca Cola might then use the space to favour its less well-selling products. Coca Cola therefore:

> ''reserved more shelf-space for the less selling products than would be the case in the absence of such arrangements, where space would be allocated in relation to productivity''.[68]

These elements were considered to make it more difficult for rival suppliers of CSDs to access shops, especially those competing with Coca Cola's less well-selling CSDs.

All of this is a preliminary view, but interesting. It underlines that the compliance ''bright line rules'' as to what is allowed for dominant company rebates should be treated with care. Notably, where a company appears to be very dominant and where it appears to have certain key products around which the company may seek to operate a ranging policy, even inside a product family.

Put shortly, Coca Cola committed:

- To a limit of five years on the repayment term for its financing agreements, to allow customers to repay in cash and terminate and repay the balance without penalty.
- To obligations on a customer to make available certain Coca Cola products also limited to five years.
- That rent-free beverage coolers could only be exclusive if the outlet had other installed chilled beverage capacity, which could offer access to other rival CSDs. If not, there must be access to at least 20 per cent of the beverage cooler.
- That if a cooler is *rented*, the customer must be able to use at least 20 per cent for any product of his choosing.
- That fountain dispenser arrangements would not prevent outlets from offering rival beverages.
- Coca Cola would refrain from offering target and growth rebates.
- The commitments also ban tying the sales of Coca Cola and Fanta Orange to purchases of other Coca Cola beverages and assortment arrangements linking these CSD brands to other Coca Cola beverages.
- Shelf space reservations in the take-home channel are to be separate for Coca Cola, Fanta Orange and other CSDs, with caps on shelf space for Coca Cola and Fanta Orange items.[69]

AstraZeneca

In July 2006, the Commission published a non-confidential version of its decision in *AstraZeneca* on its website.[70] The main points are as follows:

The Commission fined AstraZeneca €60 million for two infringements of Art.82 EC, designed to protect the position of its anti-ulcer product Losec.

The Commission found that the relevant market was for proton pump inhibitors (PPIs) sold on prescription, of which Losec was the first. Astra AB (now AstraZeneca) had filed patent applications for omeprozole (the active substance in Losec) in 1979, giving basic patent protection until 1999. The Commission distinguished Losec from previous ulcer treatments (so-called ''H2 blockers''), noting that the latter did not exercise a significant competitive constraint on Losec and that Losec was therapeutically superior. Rather, the Commission found that there was a one-way substitution pattern between PPIs and H2 blockers. PPIs were also considerably more expensive than H2 blockers. Markets were national.

The Commission found that AstraZeneca was dominant on the PPI market in seven EEA Member States for defined periods (Belgium, the Netherlands, Norway, Sweden, Denmark, the United Kingdom and Germany). This was based on market share and position as ''incumbent'' on the PPI market, meaning here apparently that AstraZeneca had the first mover advantage and maintained it with higher prices than later entrants (Takeda and Byk Gulden).

The Commission also notes that AstraZeneca was not constrained by the monopsony power of national health systems. Faced with a genuinely innovative product, the Commission considers any bargaining power much reduced.

67. Decision, para.32; above fn.65, p.62.
68. Decision, para.36; above fn.65.
69. Decision, para.43.
70. The decision is extensive (214 pages), see Commission's website, above fn.3. See also Fagerlund and Rasmussen, (Autumn 2005) *EC Commission Competition Policy Newsletter* 54.

The Commission found *a first abuse* in:

> "a pattern of misleading representations made by AstraZeneca before patent offices in Belgium, Denmark, Germany, the Netherlands, Norway and the United Kingdom and before national courts in Germany and Norway".[71]

The misleading information was provided in applications in 1993 and 1994 to several patent offices in the EEA for extra protection for omeprozole, so-called "supplementary protection certificates" (SPCs). These are available under an EU Regulation to compensate pharmaceutical companies for time lost between the start of the patent and market authorisation (allowing recoupment of related investments). Thereby the patent protection can be extended for five years.

The Commission considered that such conduct was not normal competition, nor errors or unauthorised behaviour on behalf of AstraZeneca. The effect of the behaviour was to obtain such SPC protection incorrectly, delaying the entry of generic versions of Losec, forcing competitors into litigation over the SPCs and causing "uncertainty, delays and disruption" to generic firms' market entry.[72]

Interestingly, the Commission states that the use of public procedures and regulations may be abusive, where there is a clear intent to foreclose competition on the part of a dominant company, in particular where (as the Commission found was the case here) the authorities had little or no discretion to vet the data submitted and competitors had limited information on SPC procedures.[73]

Nor was the existence of other remedies (e.g. to invalidate the SPC) considered a bar to the application of competition law.

The Commission found a second abuse in AstraZeneca's requests for the deregistration of its market authorisation for Losec capsules in Denmark, Norway and Sweden, combined with its withdrawal from the market of Losec *capsules* and the launch of Losec MUPS *tablets* in those three countries.[74]

The Commission considers that this was done in order to exclude competition from generic firms and parallel traders. The Commission found that deregistration was *selective*, only in countries where AstraZeneca sought to block such competition.[75]

The key effect of deregistration is to remove the reference to market authorisation on which generic firms and parallel traders rely to enter and/or remain in the market. Again, the Commission found that the idea was to extend the protection obtained by patents, SPCs and data exclusivity. The Commission found no objective justifications for AstraZeneca's behaviour.

Clearly, this is a novel case and controversial.

Other

In December 2005, the Commission announced that it had closed its investigation into *ETSI* (European Telecommunications Standardisation Institute) standard-setting rules, after changes designed to avoid the risk of "patent ambushes".[76] (A "patent ambush" being where a company conceals that it has IP rights essential for a standard while it is being developed and then declares and identifies them *after* the standard has been agreed. The company then controls the standard and can create a barrier to entry.)

In February 2006, the Commission announced that it had closed its investigation into *CD-R Disc licensing programmes administered by Philips*, after changes to those programmes.[77] Notably, Philips undertook:

- To discontinue its joint patent portfolio licence (with Sony and Taiyo Yuden, a Japanese technology company) with effect from December 15, 2005.
- To revise its own individual licence agreement to its own CD-R patents.
- To make available on its website summary reports of independent experts regarding Philips' patents essential to produce CD-R discs.
- To address technical problems associated with the management of the CD-R standard.
- To update the CD-R standard to clarify that discs which do not use Philips' multi-speed proprietary technology, but alternative high-speed recording technologies, qualify as CD-R discs.
- To reduce the level of royalty from 4.5 US cents to 2.5 US cents per disc, applying this retroactively from October 1, 2005.

In the course of the year the Commission has also continued to advocate more competition in *securities clearing and trading services*. In March 2006 the Commission called on the industry to remove barriers to cross-border trading.[78] Then in May 2006, the Commission published on its website an *issues paper* related to competition in

71. Decision, paras 773–776; see Fagerlund and Rasmussen, above fn.70, p.54.
72. See Fagerlund and Rasmussen, above fn.70, p.54.
73. See Fagerlund and Rasmussen, above fn.70, p.55.
74. Decision, paras 860–862.
75. Decision, paras 788 *et seq.*
76. IP/05/1565, December 12, 2005.
77. IP/06/139, February 9, 2006.
78. IP/06/273, March 7, 2006.

securities trading and post-trading activities in the European Union.

ECN developments

During the year there have been various developments in the European Competition Network (ECN). For present purposes four may be noted:

First, the ECN now has a dedicated webpage on DG Competition's website. This is a mine of information as to competition law developments of the ECN and the NCA (National Competition Authority) with weblinks to NCA websites. (However, clearly it does not tell you the current or prospective agenda!) There are also useful summaries of recent ECN activities in the 2005 Commission Competition Report and Kris Dekeyser's paper to the IBC London Conference in May 2006 (which is being published by *World Competition*).

Secondly, it appears that the ECN is meeting at numerous levels, through ''plenary meetings'', six topic-based working groups and 15 sectoral subgroups. For example, according to the 2005 Commission Competition Report, the abuse of dominant position working group has discussed margin squeezing this year and the telecoms group price squeezing.

There are also numerous contacts with the NCAs. For example, in the 2005 Commission Competition Report, the Commission notes that its cartel investigations into flat glass were prompted by NCA information.[79] Otherwise, the Commission was informed of some 76 envisaged decisions in 2005 from 18 different NCAs. The Commission also replied to three requests from national judges and issued six opinions to national courts.[80] There is some information on the issues in the opinions in the Competition Report.

Thirdly, the ECN has been working on *leniency issues* for which there is a working group. This year its activities have resulted in the ECN Leniency Programme, described in the previous issue of the journal.

Finally, one has the sense that the ECN is working as a team on *many* issues, with a two-way soft harmonisation process, both from the Commission to NCAs and the other way. For third parties that has its pluses and minuses. It is good to see the best practices develop. However, there is also a slight concern that it is not clear who is suggesting what when. (ECN communications are also internal documents in the Access to File Notice.)

79. Available at the Commission's website, above fn.3, para.213.

80. Paras 216 and 219, updated by reference to the ECN webpage, above fn.3.

Sectoral reviews

During the year we have seen a huge amount of activity on the Commission's sectoral reviews, designed to promote the Lisbon Agenda on competitivity. As said last year, these inquiries are of a scale unprecedented. They appear far more detailed, broadly based and (apparently) structural than previous EU sectoral reviews.[81]

Energy[82]

In February 2006, the Commission published its ''Preliminary Report on the Sector Inquiry on the European markets for gas and electricity''. The non-confidential version of the report can be found on the dedicated web page of DG Competition's website.

It will be recalled that the sector inquiry was launched in June 2005 and is a competition investigation based on Art.17 of Regulation 1/2003. The purpose of the inquiry is to assess the competition conditions of the gas and electricity markets in Europe and to identify potential competition, regulatory and structural remedies to any market distortion.[83]

Generally, the report advocates major action to promote increased competition in European energy markets.[84] The process is geared to the planned liberalisation by July 2007, i.e. directed to relatively short-term action, even though inevitably any new energy legislation package will take longer than that.

The Commission invited comments on its preliminary report and received many submissions which again are on the Commission's website. The Commission is understood to be working towards a final energy report for the end of 2006.

The preliminary report deals with natural gas and electricity separately, but adopts a similar structure for the assessment of both industry sectors. Some of the main findings of the inquiry are summarised below for both gas and electricity and are organised according to five main sections: market concentration, vertical foreclosure, market integration, transparency and price formation.

81. See also Van Haasteren and Georgiev (Autumn 2005) *EC Competition Policy Newsletter* 51.

82. With thanks to Antonio Capobianco for his assistance with this section.

83. An ''Issues Paper'' was also published in November 2005, which anticipated the Preliminary Report. Again this is available on the Commission's website, above fn.3. See also IP/05/1421 and MEMO/05/425, November 15, 2005; and MEMO/05/427, November 14, 2005.

84. IP/06/174 and MEMO/06/78, February 16, 2006.

Findings in natural gas markets

Market concentration

The Commission found that in general wholesale gas markets in Europe are highly concentrated and that the first round of liberalisation has not produced the expected market openings. National incumbents have maintained dominant positions on their traditional markets, largely through high shares of gas imports and/or domestic gas production. Hubs are not developed to the point that they could represent a viable alternative source of supply to the incumbent.

Vertical foreclosure

The Commission appears focused on opening up dominant incumbents' long-term contracts, notably downstream supply agreements. Independently of the EU sectoral inquiry, the Bundeskartellamt has already challenged such contracts with local utilities this year.

One of the Commission's objectives appears to be to increase market fluidity by improving hub supply or importer supply.

Market integration

The inquiry has also highlighted the lack of sufficient cross-border flows of gas. The main reason is stated to be the lack of available import/export capacity which prevents new entrants from securing the necessary transit capacity (in pipelines and storage) on key routes and therefore from exerting significant competitive pressure on incumbents.

Legacy ''grand-fathered'' transit contracts between countries are discussed. The Commission notes that the main pipeline axes in Europe are ''sold out'' until about 2015. The Commission also appears to be critical of derogation from third-party access rights for *new* infrastructure (pipelines, storage and LNG terminals). This all appears controversial, since often these infrastructures were and still are built in response to specific demand and ''sold out'' accordingly. The Commission's idea is apparently that they should be ''energy highways'', which is far from the concept of the investments concerned.

The Commission is also reviewing whether there is adequate, non-discriminatory access to all relevant infrastructure (from the transit pipeline to storage) and whether it is blocked by long-term reservations. There is also discussion on preferential rights for the prolongation of capacity reservations beyond the originally foreseen date and structural ownership unbundling of incumbents. The intention here appears to promote what would be a UK style market across Europe.

It also appears that the Commission found in its survey last summer various provisions whose legality is questioned (e.g. territorial restrictions, reduction clauses, use restrictions and provisions involving the exchange of commercially sensitive information).

Transparency

The Commission favours more transparency as regards pipeline and storage capacity reservation and more use of a ''use-it or lose-it principle''. In general, the Commission appears to want to open up low season capacity to allow flows and increase storage around the European Union. The Commission appears also to be looking for more transparency on capacity in transit pipelines and release of it on a ''use-it or lose-it'' principle.

The Commission appears critical of claims that information cannot be disclosed because it is commercially sensitive.

Pricing issues

In order for consumers to fully benefit from liberalisation, the Commission states that it would like price mechanisms to be more effective and transparent. The Commission makes comments about the linkage of gas prices to oil prices, although interestingly notes that in the United Kingdom, where more is linked to other indexation patterns, price levels are still similar.

The Commission's argument is partly that such linkage means that prices are not in line with variations in the gas market, reducing incentives for seasonal buying and storage and undermining liquidity in the market. The Commission appears to prefer to see prices indexed (at least in part) to gas hub prices. Some suppliers may well agree, but generally note that when these agreements were entered into (and even today) such functioning hubs are still not generally available (as the Commission itself says).

Findings in electricity markets

Market concentration

As for natural gas, the inquiry's preliminary conclusions are that most wholesale electricity markets are highly concentrated at production/generation level. Such markets remain national in scope. The inquiry found that some incumbent generators had the ability to exercise market power by withdrawing generation capacity or by imposing higher prices when they know they are indispensable to meet demand.

Vertical foreclosure

The inquiry showed that the electricity industry across Europe is still vertically integrated in most instances. The Commission suggested that the current unbundling obligations are not sufficient to deal with the reduced incentives for network operators to grant non-discriminatory access to third parties on the grid. According to the

Commission, there are still many instances where vertically integrated electricity companies engage in practices favouring their own affiliated companies to the detriment of consumers.

Market integration

The Commission is concerned by the low level of cross-border trade which means that competition from imports is insufficient to erode the market power of incumbents. The Commission notes that more interconnecting infrastructure between national systems is required. Further, many interconnectors are chronically congested. Long-term capacity reservations also reduce capacity available for new entrants.

The Commission also thinks that the incentives to build capacity are not sufficient. Those that benefit from congestion may not have incentives to expand the interconnectors concerned.

Transparency

The inquiry found that in Europe there is a "serious lack of transparency" in electricity wholesale markets. According to the Preliminary Report, more than 80 per cent of market participants are not satisfied with the current levels of transparency.

Pricing issues

Price formation was found to be complex and the Commission is interested to better understand why prices for electricity have increased; and also what effect the EU emissions trading scheme has had on electricity prices.

Retail banking and insurance[85]

Again, it will be recalled that in June 2005 the Commission opened a series of sector inquiries in financial services, namely banking and business insurance.[86] The Commission stated that these were primarily designed as information-gathering exercises. As in the case of energy, various questionnaires were set out. There have also been meetings with banks, insurance and credit card companies. Again, the Commission's competition inquiry is linked to other regulatory measures at EU level, as the Commission seeks to improve the Community markets in each case.

Retail banking inquiry

The retail banking inquiry is composed of two parts:

- An inquiry into the European payment cards market.
- An inquiry into the markets for current accounts and related services.

The sector inquiry started in summer 2005 with the payment cards inquiry.

Following a series of questionnaires to interested parties, in April 2006, the Commission published an interim report on preliminary findings on the payment cards industry.[87]

Again, the report is available on a dedicated webpage on DG Competition's website, together with other materials on the inquiry. The findings consist of two parts: financial findings and potential barriers to competition.

As regards the financial findings, the interim report states that the payment cards industry is very profitable and that this profitability correlates with the high fees charged to merchants and cardholders. This is controversial. The report concluded that the issuing of cards is more profitable than acquiring, which casts doubt on the necessity of interchange fees to make the card issuing industry sufficiently profitable.

As regards the merchant fees (merchant's payments to the acquirer for accepting the card as a payment means), the Commission notes that they vary across Europe. In some countries the fees are three to four times higher than in others and higher fees are on average charged for accepting a credit card compared to a debit card. In some countries, higher fees are charged for accepting international debit cards compared to domestic debit cards and small businesses pay 60 to 70 per cent higher fees on average than large businesses. Some business sectors pay much higher fees on average than others. In addition, the Commission suggests that inter-system competition (e.g. Master Card v Visa) appears to be reduced, owing to pricing practices of the acquiring banks which charge business the same level of merchant fees for accepting cards issued by different networks ("blending").

As regards cardholder fees (fees paid by the cardholder to the issuing bank) the inquiry suggested that there is no significant negative relationship between the level of cardholder fees and the interchange fee per country. As regards the interchange fees (fees paid between the banks) there is a considerable variation across the European Union.

The potential barriers to competition identified in this sector are:

- *Structural*: such as high vertical integration; joint-ventures between banks and acquiring

85. With thanks to Helena Dolezalova for her assistance with this section.

86. IP/05/719 and MEMO/05/204, June 13, 2005.

87. IP/06/496 and MEMO/06/164, April 12, 2006. See also Brenning-Louko, Panova, Repa and Teixeira, (Summer 2006) *EC Commission Competition Policy Newsletter* 12.

merchants removing pressure on merchant fees; and the need for a central clearing house.

- *Technical*: such as diverging technical standards across Europe.
- *Behavioural*: such as agreements on interchange fees; non-reciprocal sensitive information sharing within the systems; restrictive membership and fee rules reducing intra-system competition; some systems appear to hinder non-banks from acquiring; rules requiring issuers and acquirers to be financial institutions; rules requiring a local presence to join a payment system; high joining fees; co-branding and prohibition on surcharging.

These findings were reviewed during a public consultation which was completed in June 2006. The Commission received over 80 written comments from interested parties. According to the Commission most of these replies agree that the interim report has identified the most important obstacles to competition in the payment cards industry. On the other hand, the views of the banks and business on the current level of fees differ. While banks consider variations in fees merely a result of different maturity of the markets, businesses are concerned about the level of fees in some countries.

The second part of the retail banking inquiry focused on core retail banking services, i.e. current accounts and related services. The interim report was published in July 2006 with a hearing.[88] Again, it was followed by a public consultation, which was closed only recently, in October 2006.

The inquiry focused on current market structures, conduct of market players, pricing, payment systems, consumer behaviour and mobility and cross-border activities and barriers to entry.

In its interim report the Commission found that overall the retail banking markets remain fragmented along national lines. This applies in particular to payment systems and credit databases. The same is true for clearing systems for inter-bank payments, because the banks have to join the various national systems, which have different technical standards, membership rules and fees.

Customer mobility is low. Customers hold their current accounts with the same bank on average for over 10 years.

The profitability of retail banking services varies across the European Union and so do the costs of services for customers.

As regards potential barriers to entry, it is reported that payments systems are a particularly fragmented market. The diverging fee structures and membership rules may deter new entrants from membership. It is suggested that this situation should change following the introduction of the Single Euro Payment Area (SEPA), but the report suggests subjecting some aspects of SEPA to a close competition scrutiny owing to the importance of SEPA for the entire EU banking sector.

The final report, covering both payment cards and core retail banking services, is due for the end of 2006.

Business insurance

The Commission is also investigating all types of insurance provided to businesses, including property and casualty insurance and reinsurance. Also, insurance and reinsurance intermediation are covered by the inquiry. The publication of the interim report on business insurance is now expected for mid-December 2006.

Current policy issues

Box 6

- **Current policy issues**
  - — ''Plea bargaining''
    - * Settlement offer with the SO?
  - — Damages Green Paper
    - * Wide-ranging ideas and consultation/ hearing
    - * More cases in any event
  - — Article 82 EC Staff Discussion Paper
    - * The ''as efficient'' competitor test
    - * Focus on minimum efficient scale to compete
    - * Rebates and bonuses benchmarked on the dominant company's costs?
    - * Rules for competition authorities and national courts

Plea bargaining

During the year it appears that the Commission has been quietly moving forward in its thinking as to what extent the Commission might be able to pursue ideas for ''direct settlements'', or rather what appears to be an accelerated settlement procedure, including acceptance of infringement in cartel cases.[89]

Current indications are that the Commission is thinking of a procedure based on Arts 7 and 23 of Regulation 1/2003, applying from the SO stage, with then a settlement offer available to be accepted in a given time. Acceptance of

88. IP/06/999, July 17, 2006.

89. See also Ratliff, ''Plea Bargaining in EC Anti-Cartel Enforcement—A System Change?'', paper given at the European University Institute, Fiesole, Florence, in June 2006, available at *www.iue.it.*

the settlement would require acceptance of the infringement, the sanction and the Commission continuing to a decision.

There are still many issues, including what to do with ''hybrid cases'' (where some cartel participants may not wish to settle). Interestingly, it appears that there are some national precedents in France, the United Kingdom and the Netherlands. It also appears that these ideas have been discussed at OECD level this year.

Otherwise the Commission is trying to accelerate its investigations, but is still concerned at the amount of its resources devoted to the many cartel appeals.

Damages Green Paper[90]

In December 2005, the Commission adopted its *Green Paper on Damages Actions*,[91] together with a Commission Staff Working Paper on the topic. The Green Paper follows the Ashurst study in 2004 which found a ''total underdevelopment'' of private actions for breaches of EC Competition law, as well as an ''astonishing diversity'' in Member States' approaches.[92]

The Commission wishes to increase the level of private enforcement in order to help victims of infringements obtain compensation. It also would like the additional deterrent effect it hopes private enforcement will bring and the greater level of compliance which it may ensure.

In the Green Paper, the Commission identified a number of obstacles to effective damages actions, with possible remedies, in the following areas:

- *Access to evidence*: Evidence is not readily available and held by a party responsible for anti-competitive behaviour, in particular for stand-alone actions. The Commission proposed for consideration: mandatory disclosure of evidence submitted by the defendant to a competition authority; access for national courts to documents held by the Commission; an obligation to preserve relevant evidence; the provision of lists of documents in the party's possession; and the possibility of alleviation of the applicant's burden of proof (making an infringement decision of the national authorities of the Member States binding on national courts and an unjustified refusal to give evidence to influence the burden of proof). (Clearly all very controversial.)
- *Standard of fault required*: Damages claims require in many Member States proof of a fault. The Commission proposed consideration as to whether there should be a fault requirement for damages actions. (Again controversial.)
- *Scope of damages*: The Commission proposed for consideration the following issues:
  - — How should the damages be assessed (compensatory damages or recovery of illegal gain, or punitive damages, with double damages for cartels and prejudgment interest).
  - — Calculation of quantum/approaches to assessment?
  - — Should the Commission issue guidelines?
  - — The possibility to split the proceedings (between liability and quantum).
- *Passing-on defence and indirect purchaser standing*: The Commission proposed to consider whether such a defence should be allowed and, in which case, whether the indirect purchaser should have standing.
- *Defending consumer interests*: The Commission proposed to consider whether there should be special procedures for collective actions by consumers and consumer associations and groups of purchasers.
- *Cost of actions*: The Commission proposed to consider a rule that the unsuccessful claimant would pay costs only ''if they acted in a manifestly unreasonable manner by bringing the case''.
- *Co-ordination of private and public enforcement*: The Commission raised the following issues: the possibility of excluding discovery of leniency applications; a conditional rebate on any damages claims for a leniency applicant; and removal of joint liability from the leniency applicant, thus limiting its exposure to damages claims.
- *Jurisdiction and applicable law*: The Commission proposed to consider whether Regulation 44/2001 on courts' jurisdiction and the Commission's proposal for a regulation on the law applicable to non-contractual obligations (the Rome II Regulation) should be used, or whether there should be specific rules for damages claims in cases involving a number of Member States. The Commission also proposed that the claimant could have a choice of forum.
- *Other issues*: The Commission proposed also to consider the use of experts (who would be appointed by the court); suspension of limitation periods for damages claims; and discussion on whether clarification of the

90. With thanks to Helena Dolezalova for her assistance.

91. European Commission, Green Paper, ''Damage actions for breach of the EC antitrust rules'', December 19, 2005, COM (2005) 672 final, available on the Commission's website, above fn.3. See also IP/05/1634 and MEMO/05/489, December 20, 2005.

92. Ashurst, ''Study on the conditions for claims for damages in case of infringement of EC competition rules'', August 31, 2004, available on the Commission's website, above fn.3.

legal requirement of causation is necessary to facilitate damages actions.

The Commission invited interested parties to give their views to the Commission before April 21, 2006. The Commission received more than 140 submissions from various interested parties, national competition authorities and associations. These submissions were published on the DG Competition website in June 2006. At the moment, the Commission is studying these submissions and awaits the European Parliament's views which are expected later this year.

In the meantime, one may note that there appears to be more private enforcement of the competition rules in national courts in general.[93]

Article 82 EC Modernisation

In December 2005 the Commission published a *Staff Discussion Paper on the application of Art.82 EC to exclusionary conduct (tying, rebates and bonuses)*.[94] The Commission indicated that other forms of abuse, such as discrimination and exploitative conduct would be the subject of further work. The Commission invited comments and then, in June 2006, held a hearing. Again, the related submissions have been published on the Commission's website.

The Commission indicated that it had essentially two objectives:

- To clarify the applicable rules for companies and their advisers.
- To provide for consistency amongst the ECN competition authorities and the national courts.

General

The Discussion Paper is some 72 pages long. It starts with some general statements on the Commission's approach. For example, that the Commission's proposed approach is based on the likely effects on the market of the practices concerned[95] and that a company holding a dominant position may also benefit from an Art.81(3) EC exemption, if the conditions of that paragraph are fulfilled (confirming parallel statements in recent Commission Guidelines to the same effect).[96]

The Commission then makes some comments on market definition and dominance, which bear careful reading. For example, in para.27 the Commission states that:

> "the fact that an undertaking is compelled *by the pressure of its competitors' price* to lower its own prices is, in general, incompatible with the independent conduct which is the hallmark of a dominant position".

It is a surprising statement because, as the Commission itself says only a paragraph later, the classic legal test from *Hoffman La Roche* and other cases is wider and also takes account of buyer power, i.e. dominance is the ability to act independently of competitors *and customers* to an appreciable extent.

This is one of various signs in the Discussion Paper that the Commission generally does not appear to accept that buyer power may constrain otherwise apparently "dominant" suppliers, despite the legal test quoted above and despite having recognised that in merger control.

Thus later, at para.41, the Commission states again, in a narrow interpretation of the law:

> "The presence of strong buyers can only serve to counter a finding of dominance if it is likely that in response to prices being increased above the competitive level, the buyers in question will pave the way for effective new entry or lead existing suppliers in the market to significantly expand their output so as to defeat the price increase. *In other words, the strong buyers should not only protect themselves but effectively protect the market*" (emphasis added).

This is not clear. Why is the standard so high? On the law the issue appears somewhat different, i.e. can customers effectively constrain an apparently dominant supplier's behaviour? One might think that usually this includes conduct forcing price reductions or certain types of rebate. However, one may also note that the Commission's views may be coloured by some recent experience, e.g. in *Coca Cola* and *AstraZeneca* the Commission appears to have rejected buyer power arguments on the facts. Interestingly, the Commission also notes that arguably market differences could be found according to the size of the buyer.

Echoing the new "SIEC" approach in merger control, the Commission also focuses on product differentiation and emphasises that when products are differentiated the competitive constraint that they impose on each other is likely to differ even where they form part of the same relevant market.[97]

Interestingly, there is also emphasis on whether rivals can reasonably replicate circumstances which give advantages to the alleged dominant

93. See the ECN Enforcement panel at the IBC London conference in May this year, especially papers by Helmut Brokelman and Peter Willis concerning Spain and the United Kingdom respectively.
94. IP/05/1626 and MEMO/03/486, December 19, 2005. The Discussion Paper is available on DG Competition's website, above fn.3.
95. Above fn.94, para.4. See also para.58.
96. Above fn.94, para.8.
97. Above fn.94, para.33.

undertaking[98] and, in particular, on what is the *minimum efficient scale* on the market concerned. In other words, in economists' terms, ''the level of output required to minimise average cost, exhausting economies of scale'',[99] or, in non-technical terms, the minimum scale of activity required in order for a company to compete viably.

A framework for assessing exclusionary abuses

Then the Commission suggests a general framework for analysis of exclusionary abuses.[100] Here, the Commission states that if, in a particular case, it is not possible to apply the more detailed assessments which it proposes, i.e. because relevant data is not available, then the Commission will analyse the case based on general principles.[101]

This is important for two reasons: first, because it is apparent that this may often be the case where, for example, a court may not be able to obtain competitors' data. Secondly, because the Commission refers to *itself*, ''the Commission'', not ''a competition authority or national court faced with such an issue''. This is indicative of the approach taken in the Discussion Paper and is important, because it appears unlikely that courts will be able to do reviews of the type proposed given the nature of their procedures.

This may have implications for any general legal rule to be formulated in any possible general guidelines for the Commission, the NCAs and national courts, much as all would like to see such rules focused on economically sound approaches. Should there be one rule for the competition authorities and, in practice, another for the courts? One would think not.

Then the Commission emphasises that, for Art.82 EC to apply, an *actual or likely* market distorting foreclosure effect must be established.[102] It is, in general, necessary not only to consider the nature or form of the conduct, but also *its incidence*, i.e. the extent to which the company is applying the practice in the market. (Reference to such ''incidence'' is another theme in the Discussion Paper, comparable it appears to implementation assessments in cartel cases.)

In assessing abusive effect here, the Commission is not claiming to assess the *actual effects* of a given behaviour, but is assessing the basis for concluding that such behaviour is *likely* to foreclose a market.[103] For some, this does not go far enough, but the approach appears in line with current judicially approved Commission practice, taking into account also that, in general, an ex post review of actual effect will not be enough to prevent abusive behaviour and *preventive action* is often particularly relevant in Art.82 EC cases.

We then move into a core part of the Discussion Paper. The Commission notes that pricing behaviour may have different exclusionary effects depending on how efficient the rivals are. What the Commission proposes is principles for assessing exclusionary conduct based on the premise that, in general, only conduct which would exclude a hypothetical ''as efficient'' competitor is abusive. The ''as efficient'' competitor is a hypothetical competitor having the same costs as the dominant company.

Foreclosure of an ''as efficient competitor'' can then only result, in general, if the dominant company prices below its own costs.[104]

At this point, the Commission acknowledges that to apply the ''as efficient competitor test'', ''the authority'' in principle needs to have reliable information on the pricing conduct and costs of the dominant company. Further, that if that information is not available, it may be necessary to apply the ''as efficient competitor test'', using cost data of ''apparently efficient competitors''.

This is a complex proposition, with again the Commission apparently thinking in terms of competition authority enforcement. Notably, if the Commission relies on such data, one would think that the defendant would need access to it. If we are talking about a competitor's costs data, how could that be done? If a national court is to apply the rule, would it have powers to obtain competitors' costs? Even if possible, how would the plaintiff, defendant and any third party concerned deal with the considerable confidentiality issues raised? All of this is therefore very challenging.

It is also not clear that the ''minimum efficient scale'' to compete should be benchmarked against the *dominant company's* costs, as opposed to being determined objectively for the market in question. It might be favourable to the entrant, if the dominant company is not efficient. However, there may be much scope for debate on the subject of what is the ''minimum efficient scale'' in particular circumstances, which may make the legal test uncertain.

What is positive about all this, however, is the open focus on whether the dominant company is denying its competitors the minimum efficient scale to survive and compete since that is, in practice, precisely what is often the core issue.

98. Above fn.94, paras 40 and 165.
99. Above fn.94, para.40.
100. Above fn.94, paras 51 *et seq.*
101. Above fn.94, para.56.
102. Above fn.94, paras 58–60.
103. See also above fn.94, paras 144–145, 149.
104. Above fn.94, paras 63–67.

The Commission then turns to another core issue in Art.82 EC cases, namely that it may be necessary to protect competitors that have not yet reached the minimum efficient scale and that it may not be easy for the smaller market entrant or market participant to match the economies of scale and scope, first mover advantages, etc., of the dominant/incumbent company.[105]

This is also welcome, although also complex. If it is not taken into account, then competition may be restricted to geographic or product expansion of large rivals, leveraging off their economic advantages from *other* markets, rather than competition on the merits *in the market concerned*, weakened as it is considered to be, in principle, by the presence of the dominant company.

The need to protect the ''not yet as efficient'' competitor is another theme of the Discussion Paper. It is also a theme of many Art.82 EC decisions (albeit that this may not have been set out in precisely those terms). It may also be controversial with some advocates of pure economics in this context.

The Commission then has *a section on objective justifications* for behaviour by dominant companies, including *objective necessity* (e.g. health and safety grounds), *meeting competition* (e.g. to minimise losses in response to low pricing by others) and *efficiency defences*.[106] The criteria to raise such defences remain demanding.

Specific sections—focus on rebates and bonuses

The Commission then has detailed specific sections on predatory pricing, single branding and rebates, tying and bundling, refusals to supply and aftermarkets.

Given space constraints, it is proposed only to make a few comments on rebates and bonuses, since the Commission's ideas here have been very topical. The author would note three points.

First, the Commission's assessment appears based in part on the view that the dominant company has a high degree of market power which makes it an *unavoidable trading partner* (e.g. because the dominant company offers ''must stock'' items, or the competition is capacity constrained, or the competition is not a realistic alternative for the entire demand of the customer).[107]

Secondly, in assessing the suction effect of a dominant company's rebate system (i.e. the extent to which it will induce a customer to buy from the dominant company rather than a competitor), the Commission proposes to focus on whether the rebate system hinders competitors from supplying commercially viable amounts to customers. ''The rebate system should not hinder as efficient competitors to expand or enter.''[108]

The Commission states that to assess this, the Commission will endeavour to calculate:

> ''in view of the level of the rebate percentage, what is the *effective price* for the buyer over such a *commercially viable share*, in case this share would allow the buyer to benefit from the rebate on the purchases below the threshold''.

If the effective price is *below* the average total cost of the dominant company, the Commission infers that efficient competitors will not be able to compete. If the effective price is *above* total cost market, a foreclosing effect is unlikely, although it may still occur exceptionally.[109]

The concept is therefore to see whether the rebate system will deny the competitor such *share* as is *required* to compete with the dominant company. In the case of a potential entrant, the idea is to assess the effect of the rebate system on a company entering at a minimum efficient scale.[110]

This is all interesting, but it is an open question whether *these* complex assessments are an improvement over the *current* complex assessments. As expressed, it is not simple and there appear to be many variables, giving scope for debate.

Thirdly, the Commission then summarises principles from existing practice (e.g. concerning whether targets are on total requirements or individualised, length of reference period selectivity, etc.) and links such principles to the approach just explained.[111]

The Commission concludes that all of this only leads to a presumption of abuse which may be rebutted and accepts again that sometimes the data may not be available to do the cost-based assessment envisaged. Then the Commission states that in such cases it will revert to a more classic investigation of the circumstances, including the performance of the dominant company and its competitors.[112] One has the impression this may happen quite often, if these rules are retained for the future.

It will be interesting to see where the Commission (and the ECN) plans to go from here, bearing in mind also Advocate-General Kokott's Opinion. It might be useful to sound out the views

105. Above fn.94, para.67.
106. Above fn.94, paras 77–92.
107. Above fn.94, paras 143 and 146.
108. Above fn.94, para.154.
109. Above fn.94, paras 154–156.
110. Above fn.94, para.157.
111. Above fn.94, paras 158–162.
112. Above fn.94, paras 163–164.

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of other judges who will also have to apply these rules, if that has not already happened. It will also be interesting to see if the Commission thinks that this round of debate has given it enough to attempt to produce guidelines.

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