Major Events and Policy Issues in EC Competition Law, 2007–2008 (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 2007 until the end of October 2008.[1] The article is divided into an overview of:

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

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

The main themes of the year are shown in Box 1.

These are discussed in the appropriate sections below and in Part 2.

Box 1

- **Major themes/issues in 2008**
  - — The adoption of the cartel settlements procedure
  - — The CFI's continuing, detailed review of cartel decisions (and use of its unlimited jurisdiction)
  - — Developing experience with the new 2006 Fining Guidelines
  - — A huge procedural fine for breach of a seal—€38 million!
  - — A huge fine on Microsoft for non-compliance—€899 million!
  - — Energy measures: Possible German electricity unbundling through an art.9 settlement and a decision to open up Greek lignite
  - — A sectoral inquiry into pharmaceuticals

Legislative developments

Box 2

- **Legislation/Notices (Overview)**
  - — *Cartel settlements package*
    - * 10% reduction
    - * Commission discretion to offer
    - * Discussion on facts and likely fines pre-SO
    - * Short decision
    - * Some hesitation, but generally welcome
  - — *Guidelines on maritime transport services*
    - * Guidance on self-assessment
    - * Sector specific, but some material of wider application (e.g. re information exchanges)
  - — *Various review proposals*
    - * IBE, MVBE, Regulation 1, Consortia BE

Adopted

Cartel settlement procedure

In June 2008, the Commission adopted its new *cartel settlement procedure* based on arts 7 and 23 of Regulation 1/2003.[2] The related Notice and amendment to Regulation 773/2004 were published in July 2008.[3]

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With many thanks to Ingrid Cloosterin for her general help in the production of this article.

1. The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the Commission's website are to DG Competition's specific competition page: *http://ec.europa.eu/comm/competition/index_en.html* [Accessed December 16, 2008].

2. IP/08/1056; MEMO/08/458, June 30, 2008. Regulation 1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1.

3. Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to

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The core idea here is that, in some cases, the Commission will offer those in cartel proceedings the possibility to ‘‘settle’’ their case and thereby gain a *10 per cent reduction in fine* which, as appropriate, may be cumulated with any leniency reduction for which they qualify. In addition, where applicable, a company facing a deterrence increase will have its increase factor capped at a multiplier of 2.[4]

This will not allow a company just to go into the Commission and settle a case at an early stage (although a company can indicate a willingness to settle early if it wishes). Settlement opportunities will only come when the Commission has carried out its investigation, which must be expected still to take some time.

The main step for a company wishing to deal with a cartel liability is still to seek amnesty or leniency reductions by going into the Commission first, or early in its investigation and thereby earning the appropriate reduction in fine (if it is still available).

What this new procedure does is to allow a company, if the Commission decides to make the procedure available, to meet with the Commission and discuss the alleged facts (i.e. the scope of the infringement), their classification, the gravity and duration of the infringement and the liability of the individual company, with access to the evidence on which the Commission relies. The discussion will include the range of potential fines. In principle, it will also be possible to apply for other documents where relevant to a company’s position and therefore justified.

The idea is that, through these discussions, *a company will be able to put its case to the Commission before any Statement of Objections* (SO) is issued and thereby influence it. Moreover, critically, a company will also be able to discuss *the potential maximum fine, net of any other reduction*.

A company which wishes to settle after these discussions will then have to introduce a settlement submission, according to a defined template, among other things acknowledging ‘‘in clear and unequivocal terms’’ its liability in a summary way and indicating the maximum fine for which it is willing to settle.[5] These submissions can be written or given orally.

If, after consulting the Advisory Committee, the College of Commissioners agrees with the proposed maximum fine, the Commission then sends what is expected to be a shorter, more limited SO. The defendant then has to send a short reply confirming the settlement. This should then lead to a shorter decision. If all settle, the Commission also envisages that the final stages of the procedure will be quicker because, in addition to the shorter SO, there will be no broader access to file and no formal hearing.

If not, the submission is deemed to be withdrawn and the contents are not to be used against the company.

In principle, a company’s settlement offer is also not to be disclosed. The company cannot do so, or it risks losing the possibility to settle. If all defendants settle, there is no further access to file. If only *some* settle (so-called ‘‘hybrid’’ cases), those not settling will be allowed to see other parties’ settlement submissions on Commission premises, but cannot make a mechanical copy thereof. Further, the Commission states that they can only use the submissions for their defence in procedures where the EC competition rules are at issue (apparently to deny third parties discovery). Sanctions/penalties are envisaged for breach of this (controversially also on outside counsel).

The Commission hopes this will lead to shorter procedures. Notably, ‘‘the file’’ of documents relied on, which has to be prepared as appropriate, dealing with confidentiality issues, may be much less (e.g. 1,000–2,000 pages, as compared to 30,000 pages if full access is given). There are short time limits for various steps in the settlement procedure. The Commission appears also to anticipate fewer appeals, although repeating that even cartel settlement decisions can be appealed.

An ‘‘undertaking’’ has to appoint a joint representative (i.e. covering both parent(s) and subsidiaries, as appropriate). The Commission stresses that this will not ‘‘prejudge’’ the issue of joint and several liability (e.g. whether only a subsidiary should be fined).

First reactions

Clearly there is still much debate about this procedure. Companies may be expected to welcome anything reasonable to reduce their fines. It is clear also that a lot of work (and consultation) has gone on to try and achieve a fair procedure to speed things up.

However, some are worried about the apparent trade-off of fine reduction for full defence rights (e.g. access to file, a detailed SO and full hearing).[6] There is concern that, in practice, the procedure may only be used in a limited number of cases where the Commission expects it to promote a ‘‘group settlement’’. There is also concern as to what incentives and pressures will

art.7 and art.23 of Regulation 1/2003 in cartel cases [2008] OJ C167/1; Regulation 622/2008 amending Regulation 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3.

4. Commission’s Notice, point 32.

5. Commission Notice, point 20.

6. With the settlement submission the defence also has to confirm that it has been sufficiently informed of the objections against it and that it does not envisage further access to file or seek an oral hearing.

result for defendants, both initially when the settlement opportunity is given and later when each is discussing their maximum fine with the Commission.

Many question how, if settlements fail, the Commission cannot be influenced by what companies say in settlement discussions, unless in practice different people and "Chinese walls" are used between the ordinary case team and those involved in the settlement (difficult as that may be for the Commission, which may be expected to want to use the same team).

Importantly, the final cartel settlement package now accommodates requests for oral procedures to help deter discovery (irritating and cumbersome though these are).

What remains unclear is why the Commission does not hear defendants on projected fines in more detail before *any* decision. It would involve another procedural round (and related administrative burden), but one would think that might be more efficient than the current system, where appeals may be brought because companies are surprised on these issues.

The position of complainants has been defined in these changes. Already in the Commission's Notice, the Commission indicates that complainants cannot have access to settlement submissions.[7] In Regulation 622/2008, amending Regulation 773/2004, it is also stated that complainants will not have a right to a non-confidential version of the SO in settlement cases. However, it appears that they will be informed "of the nature and subject matter of that procedure" and can give their views.[8]

Guidelines on maritime transport services

In September 2008, the Commission adopted and published its Guidelines on the application of art.81 EC to maritime transport.[9]

The Guidelines are intended to assist those considering self-assessment of liner shipping services, cabotage and international tramp services, after the termination of the block exemption in Regulation 4056/86 from October 18, 2008.[10] Joint services in the context of shipping consortia are still covered by Regulation 823/2000 (although this is also now under review: see below).[11]

The Commission essentially seeks to outline its approach to market definition and co-operation in the sector. In part, the Guidelines summarise existing case law and practice. Interestingly, the Commission states that, as regards third-country services with non-EU ports, a "careful analysis" has to be made to see if there is Community jurisdiction.[12] As regards co-operation the Commission describes its position on technical agreements, exchanges of information and pools (which involve joint selling). The Commission notes that caution should be exercised as regards exchanges of capacity forecasts even in aggregate form, especially on concentrated markets.[13]

Data release is also to be taken carefully. The more information is shared *with customers*, the less likely it is to be problematic. However, if market transparency benefits suppliers only, it may deprive customers of "hidden competition".[14]

As regards pools, some agreements may fall *outside* art.81(1) EC, some generally will be caught and others may fall within art.81(1) EC depending on whether they will have an "appreciable adverse effect on the parameters of competition in the market".[15] Further, art.81(3) EC may be applicable, if appropriate efficiency gains (e.g. in geographic fleet spreading) are generated and passed on to customers.[16]

Proposed

Review of insurance block exemption

In April 2008, the Commission announced that it was launching a public consultation into the insurance block exemption (IBE) Regulation 358/2003,[17] with a view to reviewing, with the European Competition Network (ECN), whether or not to renew the block exemption when it expires in March 2010.[18]

The consultation appears mainly driven by the Commission's drive to eliminate sector-specific block exemptions (BE) unless there are particularly strong grounds for retaining them. It may be recalled that, in the context of the Sectoral Enquiry into Business Insurance, the Commission had already questioned whether the IBE should be retained. On the other hand, generally the insurance industry would prefer the certainty of

7. Commission Notice, point 35.

8. Regulation 622/2008 art.1, amending art.6 of Regulation 773/2004.

9. Guidelines on the application of art.81 of the EC Treaty to maritime transport services [2008] OJ C245/2; IP/08/1063, July 1, 2008.

10. Regulation 1419/2006 repealing Regulation 4056/86 laying down detailed rules for the application of arts 85 and 86 of the Treaty to maritime transport, and amending Regulation 1/2003 as regards the extension of its scope to include cabotage and international tramp services [2006] OJ L269/1.

11. Regulation 823/2000 on the application of art.81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2000] OJ L100/24.

12. Guidelines (2008), para.14 and fn.14.

13. Guidelines (2008), para.53.

14. Guidelines (2008), para.56.

15. Guidelines (2008), paras 67–71.

16. Guidelines (2008), para 74.

17. Regulation 358/2003 on the application of art.81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [2003] OJ L53/8.

18. IP/08/596, April 17, 2008.

the IBE, rather than more costly and demanding individual self-assessments, which also may be less certain.

The Commission started the process with a DG COMP Consultation Paper, which asks specific IBE-related questions, makes some comments about the context of the sector, notes some comments from national competition authorities (NCAs) and notes the Commission's experience and some NCA decisions. These notes are particularly useful, because cases are described, as are changes in the Commission's approach under the more recent IBE, as opposed to the old one. Comments were requested for July 17, 2008.

In general, DG COMP appears not to be questioning that there may be co-operative practices which fall outside art.81(1) EC and/or justify clearance under art.81(3) EC. The focus of the inquiry is rather on whether *the IBE* promotes or inhibits competition or saves compliance costs. A frequent question in DG COMP's paper is whether the IBE itself is inhibiting demand and supply of insurance, innovative insurance products (e.g. through the standardisation it promotes) and/or raising prices. On the other hand, another theme is that the joint activities or pools exempted may facilitate new entry by smaller competitors because, without the related burden sharing, the new entrant would face increased costs of entry. The Commission also appears interested in the extent to which the IBE is *used*, noting that in concentrated markets, it may not be.

To recall, the IBE is concerned with: (1) joint calculations, tables and studies; (2) standard policy conditions and models; (3) common coverage of certain types of risk (through pools); and (4) security devices and safety equipment (and their installation and maintenance).

The Commission also asks some general questions, for example, on how special ''information asymmetries'' are in insurance as compared to other industries and how many ''greenfield'' (new) entries have occurred in the past five years.

The Commission is planning a report with proposals for amendments to the IBE, as appropriate, by March 2009.

Review of motor vehicle block exemption[19]

In May 2008 the Commission published its evaluation report on the motor vehicle block exemption (MVBE), Regulation 1400/2002.[20] The report, based on a fact-finding exercise launched in 2007, is the first step in a process to decide on what rules should apply to the car sector after the Regulation expires on May 31, 2010. The main issue is whether it should be retained in some form or whether the motor vehicle sector should come under the general vertical restraints rules then in force (noting that these also may be revised).

The Commission notes that, since 2002, the real price for new motor vehicles has declined, inter-brand competition is more intense and, in the after-market, both numbers of authorised repairers and overall network density have increased significantly. Repairers also have more access to technical information.

The report examines the main objectives underlying the MVBE. This exercise suggests that, although most objectives have been met, the positive outcome is either due to the market forces or could be achieved through more suitable means such as application of arts 81 and 82 EC, the general vertical restraints BE, Regulation 2790/1999[21] and other secondary legislation which is already in place. The Commission appears to think that the MVBE offers little value to the existing legal framework and that in some ways it is overly complex, counter-productive and strict with its sector-specific rules. Clearly, however, the evaluation report is only the first step in the Commission's review procedure and more debate may again be expected.

Review of Regulation 1/2003[22]

In July 2008, the Commission launched a public consultation on the functioning of Regulation 1/2003, the general EC competition procedural regulation, almost four years after the Regulation took effect in May 2004.[23] The consultation was launched in preparation for the report on Regulation 1/2003 which, pursuant to art.44 of that Regulation, the Commission has to present to the European Council and the European Parliament in May 2009, five years after the Regulation's adoption.

The Commission invites comments from all interested parties, but mainly from businesses, seeking to gain insight into the private sector's experience with competition law enforcement under Regulation 1/2003.

The consultation includes several questions under seven main headings:

19. With thanks to Janusz Zielinski for his assistance with this section.

20. IP/08/810, May 28, 2008. The evaluation report is available on the Commission's website (together with several related DG Competition staff working documents). Regulation 1400/2002 on the application of art.81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L203/30.

21. Regulation 2790/1999 on the application of art.81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

22. With thanks to Lisa Arsenidou for her assistance with this section.

23. IP/08/1203, July 24, 2008. The related Commission questionnaire is on its website.

- First, the Commission is seeking to identify any practical or other issues arising from the direct applicability of *art.81(3) EC,* which have come about with the abolition of the negative clearance/exemption system. What was the impact of this change on companies?
- Secondly, the Commission is asking questions on the relationship between EC and *national competition law*. In particular, how was the convergence rule applied, pursuant to which agreements with cross-border effects which are not prohibited by EC law cannot be prohibited by national law? What has been the experience with parallel application of arts 81/82 EC and national competition law? Were there any cases where the national provisions on unilateral conduct were stricter than art.82 EC?
- Thirdly, the Commission is seeking to find out what experience there is with the enforcement of Regulation 1/2003 by the Commission itself, in view of its enhanced powers (in particular, the power to take statements, the power to seal premises during inspections and the power to conduct inspections in locations other than business premises).
- Fourthly, the Commission is seeking to find out what experience there is with the enforcement of *arts 81 and 82 EC by NCAs*. Are there any issues or practical difficulties related to the differences in institutional structures and the procedural frameworks of the various national authorities? Further, are there any issues or practical difficulties related to the imposition of sanctions for violations of arts 81 and 82 EC? What has the respondents' experience been with national courts reviewing NCA decisions?
- Fifthly, the Commission is interested in the co-operation in the ECN. In particular, are there any instances where an NCA in charge of a case was not the best placed one to deal with the case? What has been the practical experience with case reallocation or information exchange between NCAs? Were there any difficulties due to *parallel actions* by multiple NCAs in the same case? Were there any instances where art.16(2) was raised, pursuant to which NCAs should not take decisions which run counter to art.81/82 EC decisions taken by the Commission? Were there any instances where an NCA used evidence collected by another NCA conducting inspections or fact finding on behalf of the former? Were there any instances where an NCA used information exchanged between ECN members as evidence to impose sanctions? Were the principles regarding the transmission of information submitted by leniency applicants respected?
- Sixthly, the Commission is interested in issues arising from the co-operation between competition authorities and judicial authorities. What has been the practical experience with amicus curiae actions or the transmission of information by NCAs to courts in civil or criminal litigation cases?
- Seventhly, the Commission is interested in international co-operation, in particular in instances where third-country authorities requested the provision of documents forming part of a Commission or a NCA file.

Clearly, these are very interesting questions. The deadline for response was set as September 30, 2008.

Proposed revision of the liner shipping consortia block exemption[24]

In October 2008, the Commission published a preliminary draft regulation to replace the liner shipping consortia BE, Regulation 823/2000, which expires in April 2010.[25] The review process was launched in 2007 with a market investigation on the basis of questionnaires sent to carriers and shippers, as a result of which the Commission concluded that the justifications for the block exemption for consortia are still valid, albeit within a new legislative and economic environment.

The Commission also published a technical paper which identifies the main issues considered in the review process and provides a background to the proposed changes. The review process has two main objectives: to take account of the repeal of Regulation 4056/86 exempting liner conferences (to which Regulation 823/2000 refers); and to move towards applying the same competition rules that apply to other sectors also to the transport sector, whilst taking into account current market practices in the liner industry.

Interested parties were asked for comments by November 21, 2008, with adoption of the new BE planned for the second half of 2009.

In brief, the main changes to note are the following:

- First, the new Regulation would slightly broaden the definition of consortia to include also cases where a consortium is made by a

24. With thanks to Gabriele Accardo for his assistance with this section.
25. IP/08/1566 and MEMO/08/644, October 22, 2008 and Notice pursuant to art.4 of Regulation 479/92 on the application of art.81(3) of the EC Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2008] OJ C266/1.

set of separate, but interrelated agreements (e.g. reciprocal slot charters), under which the parties operate the joint service.

- Secondly, the list of exempted activities would be revised to take into account the repeal of Regulation 4056/86 exempting liner shipping conferences, thus deleting all those activities related to conferences. Capacity adjustments, which continue to be considered an essential feature of the consortia, will be exempted to the extent that such adjustments within consortia are limited to what is indispensable to respond to fluctuations in supply and demand (or on account of unavoidable operational reasons) rather than based on the fact that they are ''temporary''.
- Thirdly, the Commission is proposing a *single market share threshold* which all consortia should meet in order to benefit from the BE. This market share threshold would be reduced from 35 per cent to *30 per cent*, in line with the general market share threshold applied for horizontal co-operation. In general, the Commission considers that a lower threshold is likely to avoid potentially anti-competitive vertical restraints (e.g. linked to the use of port terminals, when a consortium member owns a terminal and enters into operational agreements with other carriers), while ensuring that a consortium will operate in a situation of effective competition.

The Commission also clarifies that it is necessary to aggregate the market shares of carriers providing joint services when such carriers are parties to various agreements on the same relevant market, thereby potentially interlinking these agreements. Such cross-participations have to be taken into account when analysing whether the consortium is subject to effective competition on the relevant market, so that the calculation is based on market reality.

European Court judgments

General

Box 3

- **Main European Court cases**
  - — *Deutsche Telekom*
    - * Margin squeezing to be assessed by reference to the dominant undertaking's own costs (not those of competitors)
    - * Idea that competitor could compensate through cross-subsidy from other charges no defence
    - * Need for competitor to be on an equal footing as regards access to Deutsche Telekom
    - * National regulation no bar to EC intervention
  - — *GSK (Greece)*
    - * A.G. Ruiz-Jarabo Colomer's Opinion:
      - · Recommended no ''per se'' abuse rules and instead art.81(3) type assessment in economic context
      - · Critical of GSK's ''pharma market'' pleas in the circumstances
    - * ECJ ruling:
      - · Dominant pharmaceutical supplier may limit supply in defence of legitimate interests, if purchases are ''out of the ordinary'' given previous relations and market size, but not just to block parallel trade

Italian tobacco market

In December 2007, the European Court of Justice (ECJ) ruled on a reference from the Italian *Consiglio di Stato* in the context of an appeal against a decision of the Italian Competition Authority. The Authority had imposed fines on Ente tabacchi italiano (ETI) for a cartel with Philip Morris on the sale price of cigarettes in Italy.[26]

The key issue was whether ETI could be held responsible for the acts of the autonomous body administering state monopolies (the AAMS), insofar as ETI had taken over AAMS's tobacco supply activity.

It appears that, until February 1999, the AAMS managed the Italian state tobacco monopoly, answerable to the Italian Ministry of Economy and Finance. AAMS then continued to manage *other* commercial activities, but its tobacco activity was transferred from March 1999 to the Italian tobacco office *(Instituzione dell' Ente tabacchi italiani)*. Then, in June 2000, that office was transformed into a public limited company, becoming ETI. In 2003 ETI was sold to BAT.

The Italian Competition Authority found in 2003 that Philip Morris had participated in a cartel with first AAMS, then ETI between 1993 and 2001 and fined Philip Morris €50 million and ETI €20 million. The Authority treated ETI as responsible for AAMS's acts on *the principle of economic continuity*.

The *Consiglio di Stato* noted that, on the transfer of AAMS's activity to ETI, there was a ''clear break'' of continuity *in terms of organisational management*: ETI was purely commercial, AAMS

26. *Autorità Garante della Concorrenza e del Mercato v ETI SpA* (C-280/06) [2008] 4 C.M.L.R. 11 ECJ.

had also public administrative duties. Since AAMS also continued to pursue an economic activity, the *Consiglio* queried what were the relevant criteria in EC competition law (to which Italian competition law refers). ETI argued that *the principle of personal responsibility* applied and there were no exceptional circumstances to make it liable for AAMS's acts, when AAMS still existed.

The ECJ ruled that:

- When an entity infringes the competition rules, on the principle of personal responsibility that entity is answerable for the infringement.
- Another entity *might* be held responsible if the first infringing entity has ceased to exist, either in law or economically (to prevent avoidance of penalties through restructurings).
- If, *economically*, one entity takes over the activity of its predecessor so that economically they are identical, the entity may still be liable for its predecessor's acts.

Here, ETI might be regarded as the economic successor of AAMS, even though the court noted that AAMS continued an economic activity on other markets.

The court noted that the fact that AAMS had no legal personality was not a factor justifying the imposition of a penalty on ETI. However, making ETI liable for AAMS's acts ''could be justified by the fact that ETI and AAMS answer to the same public authority'' (the Ministry of Economy and Finance).[27] The idea is that both entities would have been subject to the same commercial instructions. As a result, the principle of personal responsibility would not prevent ETI being held liable for AAMS's acts, if the *Consiglio di Stato* determined that, by participating in the cartel concerned, AAMS *and* ETI were subject to the control of the Ministry.[28]

Doulamis

In March 2008, the Court of First Instance (CFI) ruled on a reference from the *Tribunal de Première Instance* of Brussels on whether a Belgian law barring dentists from advertising was contrary to art.81 EC, read in conjunction with art.3(1)(g) EC and the second paragraph of art.10 EC.[29]

It appears that criminal proceedings had been brought against Mr Doulamis, a dental technician, for having placed advertisements in a telephone directory for the ''John Doulamis Dental Laboratory'' and the ''John Doulamis Dental Clinic''. The inserts contained factual information on services provided such as ''Ceramics—Metal frame dentures—Descaling'', the address, telephone number and opening hours of the two establishments.

It was claimed that this was contrary to a Belgian law from 1958 which prohibited advertising in dental care matters. The *Tribunal* questioned whether such a Belgian law was unlawful, given these articles and the circumstances.

In a remarkably short judgment, on the substantive issue a mere seven paragraphs, the ECJ noted that the Belgian law did not fall within any of the acknowledged situations for the combined application of arts 10 and 81 EC on the (now settled) case law. In other words, there was no evidence in the file to show that the Belgian law encourages, reinforces or codifies concerted practices or decisions by undertakings. Nor was there anything in the order with the reference to the court to suggest that the Belgian State had delegated to private economic operators responsibility for taking decisions affecting the economic sphere (so that the Belgian ''law'' was not really legislation). Finally, it did not follow from the order for reference that the case concerned an agreement between undertakings liable to affect trade and competition in the Common Market.

The result was a ruling that the national law was *not* at odds with art.81 EC, read with arts 3(1)(g) and 10 EC.

However, one is left wondering a little whether this was one of those cases where genuine national governmental laws and choices were correctly respected, or whether there is more to know. At least, the court appears quietly to emphasise that its ruling is based on what is in the order for reference and there is no discussion of the context or scope of the original law. Advocate General Bot gave an Opinion in November 2007[30] in which, essentially, he took the same line as the court, but also notes that his view is based on the facts in the reference file.[31] Otherwise, he suggested that the Belgian law might not be compatible with arts 43 and 49 EC on the freedom of establishment and the freedom to provide services.

Deutsche Telekom

In April 2008, the CFI ruled on Deutsche Telekom's (DT) appeal against the Commission's Decision of May 2003, finding that DT had infringed art.82 EC through abusive pricing in the form of a ''margin squeeze''. The Commission found that the price DT charged its competitors

27. *ETI* [2008] 4 C.M.L.R. 11 ECJ at [47] and [52].
28. *ETI* [2008] 4 C.M.L.R. 11 ECJ at [51].
29. *Criminal Proceedings against Doulamis* (C-446/05) [2008] 5 C.M.L.R. 4 ECJ.
30. *Doulamis* [2008] 5 C.M.L.R. 4 AGO.
31. *Doulamis* [2008] 5 C.M.L.R. 4 ECJ at [71]–[73].

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for wholesale access was higher than its price for retail access for narrow and broadband (telecom) connections.[32] The judgment is under further appeal.

It may be recalled that the Commission had found that, for one period, the difference between DT's wholesale access price and its retail access price was negative, so that competitors would have to charge end-users prices higher than the prices which DG charges its own end-users for similar services.[33] For another period the Commission found the difference was positive, but still below DT's own product-specific costs at retail level. So, in each case, the Commission found that a competitor could only take access at a loss. DT was fined some €12.6 million.[34]

There was much controversy at the Commission's intervention, insofar as DT's prices were subject to national regulation, which included consideration of possible margin squeezing.

Much of the appeal is highly fact-specific (e.g. what charges should be included in certain calculations), or specific to the regulatory framework and type of business in question. The following appear to be the main points of general interest:

- First, the CFI found that the relevant German regulatory framework allowed DT sufficient scope to fix its charges at a level which would have enabled it to end or reduce the margin squeeze. Notably, the court found that DT could have adjusted its prices, albeit that it would have had to apply to the regulator for authorisation to do so.[35] Furthermore, the court stated that DT was *obliged* to do so, when these charges had the effect of restricting competition in the Common Market.[36]
- Secondly, the court observed that, although the German regulator had noted that there was a negative spread between DT's wholesale and retail prices, the regulator found that acceptable because other operators could offset it by *cross-subsidising* from other charges.[37] However, the CFI stated that this showed that the regulator had not applied art.82 EC in its review or had done so incorrectly![38]
- Thirdly, the court found that, even if the regulator had considered whether DT's charges were compatible with art.82 EC, the Commission was not bound by a decision of a national body (applying *Masterfoods Ltd v HB Ice Cream Ltd*[39]).[40] So, in short, the national regulator's review was no bar to the Commission's case.
- Fourthly, the CFI upheld the Commission's approach whereby whether there is a margin squeeze should be *assessed by reference to the charges and costs of the dominant undertaking, rather than the particular situation of competitors on the market.*[41] So there is margin squeezing if the difference between the retail prices charged by DT and the wholesale prices which DT charged its competitors for comparable services were negative, or insufficient to cover DT's product-specific costs of providing its own retail services on the downstream market. The Commission had found that, in such circumstances, a competitor which was "just as efficient" as DT could not offer competitive prices, unless they found additional efficiency gains. The CFI considered that the abusive nature of a dominant undertaking's pricing practices:

  > ". . . is determined, in principle, on the basis of its *own situation* and therefore on the basis of its *own charges and costs*, rather than on the basis of the situation of actual or potential competitors"[42] [emphasis added].

  Further, "any other approach would be contrary to the general principle of legal certainty". The court went on:

  > ". . . [I]f the lawfulness of the pricing practices of a dominant undertaking depended on the particular situation of competing undertakings, particularly their cost structure information, which is generally not known to the dominant undertaking the latter would not be in a position to assess the lawfulness of its own activities."[43]

  This is important material given the current discussions on how to apply art.82 EC.
- Fifthly, the CFI considered that the Commission had correctly focused on revenues from *access services* in assessing margin squeezing, excluding revenues from other services, such as call services. The court considered

32. *Deutsche Telekom AG v Commission of the European Communities* (T-271/03) [2008] 5 C.M.L.R. 9 CFI.
33. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [38], [41].
34. John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2002–03 (Part 2)" [2004] I.C.C.L.R. 55, 68–69.
35. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [98]–[105], [140].
36. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [122].
37. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [116].
38. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [119] (and also [238] and [268]).
39. *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd* (C-344/98) [2000] E.C.R. I-11369.
40. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [120].
41. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [193]–[194].
42. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [188] *et seq*.
43. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [192].

this necessary for competitors to be on an "*equal footing* with DT with an *equal opportunity* to compete" in the provision of call services[44] [emphasis added].

- Sixthly, the CFI accepted the Commission's approach in comparing the price of wholesale access to the weighted average of the retail prices for all downstream services which DT offered.[45]
- Seventhly, the CFI rejected DT's claim that the margin squeezing had no effect on the market. The court found that such pricing "in principle" would hinder the growth of competition in downstream markets.[46] The court found that access to DT's infrastructure was indispensable for viable market access. The court also found that competitors could offset their losses with profits from other markets but, in the court's view, that would not be a solution because it would entail a further distortion of competition on those markets.

GlaxoSmithKline (Greece)[47]

In 2008 we saw two further events in the pharmaceuticals and parallel trade debate: an Opinion by A.G. Ruiz-Jarabo Colomer, which takes a rather different approach to that of A.G. Jacobs in *Syfait*,[48] and then a ruling from the ECJ on whether measures by GlaxoSmithKline (GSK), which limited supply in Greece, could be justified by an overt intent to stop parallel trade undermining its business in other EU Member States.

The proceedings are *Sot Lelos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proïonton (formerly Glaxowellcome AEVE)*.[49] The Advocate General's Opinion was given in April. The court's judgment was in September 2008.[50]

To recall the underlying facts, which overlap with the earlier *Syfait* case, GSK supplied medicinal products including Imigran (for migraines), Lamictal (for epilepsy) and Serevent (for asthma) to pharmacists and pharmaceutical wholesalers through its Greek subsidiary.

Until November 2000, GSK met all orders in full, although a large amount was then exported to other EU Member States. After November 2000, GSK stopped supplying wholesalers, while continuing to supply hospitals and pharmacies, because it said such exports were resulting in shortages in Greece. Then later, in February 2001, GSK resumed supplies to wholesalers, but with only limited amounts, i.e. with enough for Greek consumption, plus some 20 per cent, but not with enough to meet the complainants' orders in full.

GSK also made a notification to the Greek Competition Authority seeking negative clearance for its system. Following hearings, the Greek Competition Authority decided in January 2003 to suspend the case and refer various questions to the ECJ.

In October 2004, A.G. Jacobs delivered his Opinion in the *Syfait* case suggesting that, in defined circumstances, refusal to supply by a dominant pharmaceutical undertaking might *not* be an abuse. In particular, as concerns the "highly specific" context of the European pharmaceutical industry, the Advocate General considered that even a supply restriction in order to limit parallel trade can be *objectively justified*, as a reasonable and proportionate measure to protect the producers' legitimate commercial interests. He stressed that his conclusions were limited to the pharmaceutical market only and were based on very specific considerations[51]: the regulated nature of the European pharmaceutical market; the fact that the incentive for dominant companies to innovate and invest in research and development would be harmed by a requirement to supply; and the fact that parallel trade mainly benefited wholesalers rather than purchasers. In short, he appeared to be persuaded by GSK's arguments.

However, the ECJ ruled in May 2005 that the Greek Competition Authority could *not* make a reference to the ECJ and therefore did not rule on the substantive issues.

In parallel to the proceedings before the Greek Competition Authority, the Greek wholesalers brought actions before the Athens Court of First Instance. They claimed that the conduct of GSK constituted an abuse of the dominant position and asked for GSK to be ordered, first, to supply them with quantities of medicines corresponding to the monthly average of those it had delivered to them from January to October 2000 and, secondly, to pay them damages for the refusal to supply in 2000–2001.

When the matter came to the Athens Court of Appeals it referred to the ECJ essentially the same questions as the Greek Competition Authority had done in *Syfait*. In other words, the court asked whether, in the circumstances, a refusal to supply

44. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [197]–[203].
45. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [205]–[206].
46. *Deutsche Telekom* [2008] 5 C.M.L.R. 9 CFI at [237].
47. With thanks to Lisa Arsenidou for her assistance with this section.
48. *Synetairismos Farmakopoion Aitolias & Akarnanias (SYFAIT) v Glaxosmithkline Plc* (C-53/03) [2005] E.C.R. I-4609.
49. *Sot Lelos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proïonton (formerly Glaxowellcome AEVE)* (C-486/06) [2008] 5 C.M.L.R. 20.
50. Opinion of April 1, 2008; the ECJ judgment was on September 16, 2008.
51. See Ratliff, "Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 1)" [2005] I.C.C.L.R. 47, 60.

could be justified by an intent to prevent parallel trade (or was that "per se" abusive) and otherwise explored whether there could be other legitimate justifications from that context.[52]

A.G. Ruiz-Jarabo Colomer gave his Opinion, taking a different view from A.G. Jacobs.

At the outset, he considered whether there could be abuses "per se" under art.82 EC. In his view, on the case law the answer was "yes", although he recommended the court *not* to continue with that line, since otherwise dominant companies were forced into a "*dialectical debate*" with the authorities, to compensate for the lack of exemption as in art.81(3) EC. The "per se" approach also did not allow for the full economic and legal context to be taken into account.[53]

Then the Advocate General focused on the *justifications* for GSK's practices to see if they could override the apparent conflict with restrictions on EC trade and competition. On the facts, he did not think that the state's intervention in the pharmaceutical market was enough to justify GSK's conduct. Nor did he think that GSK's arguments about losing the key profits which it needed for innovation were enough. However he noted that, on the case law, a dominant company has the right to protect its legitimate business interests. Further, he saw no economic benefit to the consumer, just GSK seeking to win back profit margins, which the parallel traders had appropriated.

In short, therefore, he was willing to consider a framework to justify abuses in appropriate cases based here on market context, evidence of intent to legitimately defend a business and economic benefits, but he found the criteria not met in the circumstances. If the criteria had been met, it appears he would have looked at proportionality.[54]

Then, in September 2008, the ECJ gave its ruling. First, the ECJ found that, in this case, by refusing to meet the Greek wholesalers' orders, GSK aimed to limit parallel exports by those wholesalers to other EU Member States, in which the selling prices of the medicines in dispute were higher.

The court then found that the specific circumstances of the pharmaceuticals sector *did not*, generally, justify a refusal to meet orders. In particular, the court found that, even with the relevant state intervention in price setting, parallel exports had some benefit for final consumers, because they opened up an alternative source of supply to buyers of medicines in EU Member States at lower prices than those applied in those markets by the pharmaceutical companies concerned.[55]

Further, state regulation did not entirely remove the prices of medicinal products from the law of supply and demand insofar as, for example, pharmaceutical suppliers negotiated prices with the relevant national authorities.[56] Therefore the degree of price regulation in the pharmaceuticals sector could not preclude the application of the EC competition rules.

Nevertheless, the court noted that state intervention was one of the factors creating opportunities for parallel trade and that a dominant company must be able reasonably to defend its commercial interests. Interestingly, the court then noted that:

> ". . . [T]he Community rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceutical company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level."[57]

So a dominant pharmaceutical company *had* to be in a position to take steps that were *reasonable* and *in proportion* to the need to protect its own commercial interests. The court then followed the formula in *United Brands*[58] and stated that the national court had to assess whether the orders were (out of the) ordinary, taking into consideration two factors[59]: the previous business relations between GSK and the wholesalers concerned; and the size of the orders in relation to the requirements of the market in the Member State concerned.

One may think at first sight that this is a somewhat anti-climatic result for the parties and the referring court, because clearly the issue remains "What is out of the ordinary?" However, clearly the assessment is for the national court and the implication appears to be that a dominant company *may* be entitled to limit supply to a Member State, by reference to some compromise between wholesalers' previous demand and the size of the national market in defence of its commercial interests (and that previous order levels, plus 20 per cent, as was in issue here, *might* be acceptable).[60] This is an important development of principle.

52. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 ECJ at [23].
53. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 AGO at [AG76].
54. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 AGO at [AG120]–[AG121].
55. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 ECJ at [53]–[56].
56. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 ECJ at [61]–[69].
57. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 ECJ at [67]–[68].
58. *United Brands Co v Commission of the European Communities* (27/76) [1978] E.C.R. 207 at [182].
59. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 ECJ at [49]–[50], [70].
60. *Sot Lelos kai Sia EE* [2008] 5 C.M.L.R. 20 ECJ at [70]–[77].

Otherwise, the court noted that if parallel trade led to product shortages in a Member State, it was up to the Member State concerned to resolve the situation, through appropriate and reasonable steps and the dominant company.

CEPSA[61]

In September 2008, the ECJ ruled on a request for a preliminary ruling from the *Audiencia Provincial de Madrid* concerning the applicability of art.81 EC and the former block exemption Regulation 1984/83[62] on exclusive purchasing, to a contract concluded between a petroleum products supplier (CEPSA) and a petrol station (Tobar).[63]

The context was that Tobar had ceased to obtain supplies from CEPSA and concealed CEPSA's logo on the service station. Tobar brought an action against CEPSA arguing that its supply agreement was not compatible with art.81 EC, notably insofar as CEPSA determined Tobar's resale prices.

The parties disagreed on the nature of the contract. The national court left that open and asked the court whether art.81 EC was applicable if the contract was a genuine agency agreement or if it was an agreement between two independent undertakings.

The court emphasised that it was required to interpret the relevant EC law, but that it is for the national court to apply it to the relevant facts.

The ECJ then recalled various considerations:

- First, the ECJ noted that in the *CEEES* case involving CEPSA and concerning an identical contract, it had stated that art.81 EC applies to agreements concluded between two independent undertakings and detailed the criteria to determine whether two undertakings are independent or not (i.e. the criteria going to an assessment of the allocation of financial and commercial risks).[64]
- Secondly, the court stressed that a genuine agency agreement does not fall within the ambit of art.81 EC as regards the obligations imposed upon the agent concerning the sale of the goods to third parties on behalf of the principal. On the other hand, art.81 EC applies to exclusivity and non-competition clauses between the principal and the agent since, in that respect, both parties act as independent operators.[65]
- Thirdly, the ECJ addressed the issue of the exclusive purchasing obligation in relation to Regulation 1984/83 and also the subsequent vertical restraints block exemption Regulation 2790/1999. (The relevant agreement was entered into in 1996 for a period of 10 years with an ability to extend it. Regulation 1984/83 was superseded by Regulation 2790/1999 in 2000, albeit that there were various transitional provisions.) The court noted that Regulation 1984/83 applied to an exclusive purchasing obligation included in a service station agreement, provided two conditions were met: a maximum duration of 10 years and the grant by the supplier, in return for exclusivity, of commercial or financial advantages specific to the agreement and substantial in the sense that they contributed to more efficient distribution.[66] The ECJ then noted the conditions for application of Regulation 2790/1999,[67] notably, that under that Regulation the maximum duration for such an exclusive agreement was five years.
- Fourthly, as regards retail price maintenance, the court noted that under *both* block exemptions provision for minimum resale prices prevented application of the relevant exemption.[68] This raised a question of fact, since in 2001 CEPSA had unilaterally authorised Tobar to lower its prices "without reducing CEPSA's receipts"[69] and CEPSA argued that, in fact, Tobar had also done so before.
- Fifthly, the ECJ emphasised that it was a question of national contract law as to whether an agreement which is automatically void because of the existence of a resale price maintenance clause could become valid with an amendment of that clause eliminating the resale price maintenance. However, the court also recalled that such an amendment could not result in *retroactive validity* of the contract under Regulation 1984/83.[70]
- Finally, the ECJ recalled its case law concerning nullity under art.81(2) EC. Such nullity did not affect the entire contract, but solely those parts of the agreement infringing art.81 EC unless they are not severable from the rest of the agreement.

61. With thanks to Stéphanie Strievi for her assistance with this section.
62. Regulation 1984/83 on the application of art.85(3) of the Treaty to categories of exclusive purchasing agreements [1983] OJ L173/5.
63. *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* (C-279/06) [2008] 5 C.M.L.R. 19 ECJ.
64. See *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* (C-217/05) [2006] E.C.R. I-11987 at [33]–[44] and Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 1)" [2008] I.C.C.L.R. 29, 35–36.
65. *CEPSA* [2008] 5 C.M.L.R. 19 ECJ at [41].
66. *CEPSA* [2008] 5 C.M.L.R. 19 ECJ at [45]–[62].
67. *CEPSA* [2008] 5 C.M.L.R. 19 ECJ at [56]–[62].
68. *CEPSA* [2008] 5 C.M.L.R. 19 ECJ at [63]–[73].
69. *CEPSA* [2008] 5 C.M.L.R. 19 ECJ at [66].
70. *CEPSA* [2008] 5 C.M.L.R. 19 ECJ at [73].

Scippacercola

In January 2008, the CFI dismissed an appeal by two Greeks living in Brussels, concerning the Commission's rejection of a complaint that certain charges (security, passenger terminal facilities and parking) at the international airport in Athens were excessive, contrary to art.82 EC.[71]

In the course of the proceedings, it appears that the Greek Government eliminated by law a discrimination in passenger departure fees between international and domestic flights so that, for all EU destinations, the same fee applied. As regards other issues raised, the Commission was found to have reviewed the available evidence carefully and to have correctly exercised its discretion under *Automec II*[72] to decide which cases to pursue in the Community interest.

Cartel appeals

Box 4

- **Cartel appeals (1)**
  - — *Parent–subsidiary presumption of control—Akzo Nobel*
    - * Holding companies and two-tier structures
    - * Reporting lines/"authority schedules"
    - * Subsidiary autonomy has to be shown
    - * "Deemed" rather than actual involvement in infringement
  - — *Unlimited jurisdiction to review a fine—BASF/UCB*
    - * N.B. Court applied its own rules to adjust duration (not the Commission Guidelines, so 38%)
    - * Significant changes after two infringements found, one time-barred
    - * For a single infringement need for:
      - · Global plan
      - · Complementary in nature
      - · By interaction contributed . . .

Choline chloride

In December 2007, the CFI gave judgment in appeals by Akzo Nobel, BASF and UCB against the Commission's Decision of December 2004.[73]

It may be recalled that the Commission had found that these companies had participated in a single and continuous infringement comprising: (1) a global allocation of worldwide markets (with four North American producers), between 1992 and 1994; and (2) then a European cartel, involving, among other things, price fixing and market sharing in the EEA between 1994 and 1998. The overall fines were €66.34 million: €20.99 million on Akzo Nobel, €34.97 million on BASF and €10.38 million on UCB. Choline chloride is vitamin B4, a product used in the animal feed sector.

In short, the CFI dismissed Akzo Nobel's application. As regards BASF and UCB the court found that there were, in fact, two separate cartels: a global one and a European one and the Commission's action against the global cartel was time-barred. As a result, the roles of the companies concerned had to be reassessed and the fines reset, which the court did in its unlimited jurisdiction. The result was a small increase in BASF's fine and a large decrease in that of UCB.

There are various points of interest in the two judgments.

In *Akzo Nobel*, there was detailed argument on the liability of a parent company for the acts of its subsidiary. Akzo Nobel sought to show that the Commission should not have attributed joint and several responsibility to the ultimate parent, but rather should have held responsible the relevant business unit and related subsidiaries. Looking at the *two-tiered* organisational structure of the Akzo group, it was argued that there was no evidence that *the ultimate parent* had been involved in the infringements concerned.

However, the Commission considered that all the companies concerned were 100 per cent subsidiaries of the ultimate parent, that the business plans of the lower level companies in the structure were required to fit into the overall plans of the group and noted that there was a chain of appointment from the board level in the ultimate parent downwards.

It will be recalled that, on the case law, where a subsidiary is 100 per cent owned, there is a presumption that its parent is responsible for the subsidiary's acts. Akzo Nobel was therefore seeking to rebut that by showing that, in fact, the relevant commercial decisions were taken at the lower level, with only "macro" economic strategic control from above. As a result, *Akzo Nobel argued that the parent had not been shown to have had a decisive influence on the commercial activities concerned* (i.e. pricing, etc.).[74]

The Commission's reply was that it is sufficient for parental liability if the parent company exercised decisive influence over the general

71. *Scippacercola v Commission of the European Communities* (T-306/05) [2008] 4 C.M.L.R. 20 CFI, see in particular [187]–[190].

72. *Automec Srl v Commission of the European Communities* (T-24/90) [1992] E.C.R. II-2223 CFI.

73. *Akzo Nobel NV v Commission of the European Communities* (T-112/05) [2008] 4 C.M.L.R. 12 CFI; *BASF AG v Commission of the European Communities* (T-101/05 & T-111/05) [2008] 4 C.M.L.R. 13 CFI.

74. *Akzo Nobel* [2008] 4 C.M.L.R. 12 CFI at [36].

commercial strategy of its subsidiaries, without it being necessary to show that a parent was aware of, or directly involved in the infringement.[75]

Clearly these are classic and important issues raised frequently in practice and in a number of cases now.

The court found for the Commission, focusing on the notion of an undertaking as a ‘‘single economic entity’’. Noting the ‘‘simple presumption’’ that if a parent company owns 100 per cent of a subsidiary, it exercises decisive influence over that subsidiary's conduct, the court stated that to rebut the presumption a parent company had to adduce evidence that its subsidiary was independent, i.e.:

> ‘‘. . . that the subsidiary does not, in essence, comply with the instructions which [the parent company] issues and, as a consequence, acts autonomously on the market.’’[76]

On the facts, notably considering the international ‘‘Authority Schedules’’ in *Akzo Nobel*, the CFI found that such autonomy had *not* been shown.

In *BASF* and *UCB*, the main issues were whether there were two cartels or one and what that meant in terms of leniency applications, since BASF's leniency co-operation essentially related to the global infringement, but there are several points of interest:

- First, BASF challenged the recidivist increase in its case, noting that some of the activity concerned was in the ‘‘distant past’’ (i.e. 1964). The Commission had relied on two previous infringement decisions (*Dyestuffs*, in 1969; and *PVC* in 1994) the earlier of which covered an infringement which went that far back. As is often suggested now, BASF argued that there should be some limitation (prescription) to findings of repeat infringement, a point underlined by comparison to the time bar on the global cartel here. The court disagreed with BASF and also corrected the Commission's recidivist review, noting in its unlimited jurisdiction that a third previous infringement, *Polypropylene* in 1986, had *not* been mentioned by the Commission and should have been taken into account.[77] On the principle therefore the CFI found that the Commission ‘‘cannot be *bound* by any limitation period’’ in its consideration as to whether to increase a fine for recidivism. However, the Commission:

  > ‘‘. . . *may* . . . take into consideration *indicia* which tend to confirm a propensity to breach the competition rules, including the time which has elapsed between the infringements at issue’’[78] [emphasis added].

  The court found therefore that the three previous infringements made a 50 per cent recidivist increase appropriate.
- Secondly, as already noted, after a detailed review, the court found that there were two cartels in issue here, not one and the action against the global cartel was time-barred. In doing so, the CFI rejected the Commission's position that the two cartels were closely linked. Notably, the court rejected the idea that the worldwide market allocation underpinned the European division of the market (since the global cartel had ended before the European one started).[79] The CFI also rejected the idea that the two cartels could also be linked through a broad single *objective* of destroying competition in the choline chloride market. Rather, the court emphasised that it was necessary to show somewhat more, that the various agreements and concerted practices were the constituent elements of a single infringement. Here it was relevant whether the unlawful actions concerned were ‘‘complementary in nature’’ to a common anti-competitive objective and, ‘‘by interaction’’ contributed to the realisation of the set of anti-competitive effects intended within the framework of a global plan, having a single objective.[80]
- Thirdly, the CFI focused on what this meant for BASF's fine. Importantly the court held that in its unlimited jurisdiction, the court was empowered in addition to carrying out a mere review of the lawfulness of the penalty:

  > ‘‘. . . *to substitute its own appraisal* for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed where the question of the amount of the fine is before it’’[81] [emphasis added].

  The CFI then put this into effect and, on an important detail, varied the duration increase from the Commission's approach of 10 per cent *per* year of infringement and 5 per cent for each additional full six months, *to a proportionate approach taking into account that BASF had infringed for three years and 10 months*. The result was a *38 per cent* increase for duration to the starting amount of the time (instead of 55 per cent as applied by the Commission).[82] Having reviewed BASF's contribution to the

75. *Akzo Nobel* [2008] 4 C.M.L.R. 12 CFI at [47].
76. *Akzo Nobel* [2008] 4 C.M.L.R. 12 CFI at [60]–[62], [65].
77. *BASF* [2008] 4 C.M.L.R. 13 CFI at [70]–[72].
78. *BASF* [2008] 4 C.M.L.R. 13 CFI at [67].
79. *BASF* [2008] 4 C.M.L.R. 13 CFI at [201].
80. *BASF* [2008] 4 C.M.L.R. 13 CFI at [159], [179]–[210].
81. *BASF* [2008] 4 C.M.L.R. 13 CFI at [213].
82. *BASF* [2008] 4 C.M.L.R. 13 CFI at [219]–[220].

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Commission's case in detail, the court also found that it went only to the global cartel, which was time-barred, not the European cartel. (BASF had not offered information on European arrangements.) As a result, BASF's fine reduction of 10 per cent for that co-operation was taken away.[83] The net result was that BASF, although successful with UCB in showing the shorter duration of the infringement, finished with a slightly higher fine of €35,024 million (some €54,000 more).

- Fourthly, the court also had to correct the position of UCB, after the finding that the global cartel was time-barred. Here, interestingly, UCB argued that it had been the first to provide evidence of the European cartel and that the Commission should have granted it immunity (a 100 per cent reduction). UCB also argued that the Commission was bound to apply retroactively the ''*lex mitior*'', a subsequent rule more favourable to the defence, if available. In practice, that meant the 2002 Leniency Notice applied rather than the 1996 Leniency Notice, which UCB argued was ''softer'', providing for complete immunity.[84] This issue of the more favourable later rule is again an argument frequently raised in practice (in various forms, e.g. in relation to co-operation accepted outside leniency). The Commission disagreed, considering that such a rule applied only to criminal law, not competition law.[85] The CFI also disagreed, noting simply that since the Commission could apply rules (guidelines) retroactively, to the detriment of those concerned (on certain conditions), it was under no obligation to apply the more favourable rule.[86] The CFI then corrected UCB's fine, considering that, in the circumstances, UCB should obtain a 90 per cent reduction. As a result UCB's fine was reduced to €1.87 million (i.e. by some €8.51 million).

Methionine[87]

In May 2008,[88] the ECJ dismissed an appeal by the German methionine producer Degussa against the CFI's judgment in April 2006,[89] by which that court generally upheld the Commission's finding that Degussa had participated in a price fixing cartel in the animal feed sector.

The CFI had *reduced* the basic amount of Degussa's fine from €35 million to €30 million to account for the fact that the impact of the infringement on prices could not be demonstrated for the entire period of the infringement. The CFI also reduced the multiplying factor applied by the Commission to Degussa from 100 to 80 per cent by reference to the difference in size between Degussa and Aventis.

However, Degussa argued further (among other things) that art.15(2) of Regulation 17 was insufficiently certain and therefore contrary to the fundamental principle of the legality of sanctions.

The ECJ disagreed, noting that the maximum fine and methodology was known, that the Commission's decisions were subject to fundamental principles such as equality of treatment and proportionality and the Commission's Fining Guidelines were also clarified through the court's own published case law.[90]

Degussa also challenged the CFI's reduction of the fine from €35 million to €30 million. The ECJ noted that it was not for the ECJ in its legal review of the CFI's ruling to substitute its own equitable appraisal of the facts and the appropriate fine for that of the CFI.[91]

Box 5

- **Cartel appeals (2)**
  - — *Hoechst*
    - * Race for immunity
      - · Come bearing documents!
      - · Delay because of parallel US proceedings treated as non-co-operation
    - * Reduction in fine for possible procedural irregularity
  - — *Treuhand*
    - * If consultants are actively involved in cartels, they may be liable, even though they are not on the product market concerned

Sorbates[92]

In June 2008, the CFI ruled on Hoechst's appeal in the *Sorbates* cartel case.[93] It will be recalled that this related to a Commission Decision from October 2003 in which the Commission fined Hoechst €99 million. However, there was controversy as to whether a firm called Chiaso or Hoechst had been the first in to seek immunity.

83. *BASF* [2008] 4 C.M.L.R. 13 CFI at [222].
84. *BASF* [2008] 4 C.M.L.R. 13 CFI at [225].
85. *BASF* [2008] 4 C.M.L.R. 13 CFI at [230].
86. *BASF* [2008] 4 C.M.L.R. 13 CFI at [233]–[234].
87. With thanks to Sophia Lange for her assistance with this section.
88. *Evonik Degussa GmbH v Commission of the European Communities* (C-266/06 P) ECJ May 22, 2008.
89. *Degussa AG v Commission of the European Communities* (T-279/02) [2006] E.C.R. II-897.
90. *Degussa* (C-266/06 P) ECJ May 22, 2008 at [39]–[58].
91. *Degussa* (C-266/06 P) ECJ May 22, 2008 at [95].
92. With thanks to Vivien Terrien for his assistance with this section.
93. *Hoechst GmbH v Commission of the European Communities* (T-410/03) [2008] 5 C.M.L.R. 12 CFI.

Hoechst also argued that it had not been warned in the SO that it would be treated as co-leader of the cartel, with a corresponding fine increase.

On appeal Hoechst raised those arguments but *did not show that it was the first in* ''with decisive evidence'' of the existence of the infringement. However, in the process it came out that the Commission had told Chiaso that it would be warned if it appeared that another company would overtake it in the immunity process. Whether or not that had been done (which was not shown) the CFI considered this to be a procedural irregularity and, as a result, the CFI reduced Hoechst's fine by 10 per cent.[94]

On the *leadership* issue, the CFI noted that, although Hoechst had been told in the SO of the various elements from which the Commission might decide that it was a leader of the cartel, Hoechst had not been told sufficiently clearly that such a characterisation of Hoechst's role could be made by the Commission and therefore had not had an opportunity to answer that objection and exercise its defence rights.[95] As a result the 30 per cent fine increase on Hoechst for being a leader in the cartel was annulled.

The net result was *reduction* of Hoechst's fine by €24.75 million to €74.25 million. Various other grounds raised by Hoechst were dismissed.

As regards the Chiaso/Hoechst immunity controversy, it appears that what happened is broadly as follows[96]:

- First, lawyers for Chiaso and then Hoechst (treated here as including Nutrinova, which bought Hoechst's relevant business) contacted the Commission, indicating that the companies wanted to co-operate with the Commission as regards a worldwide cartel on the sorbic acid market.
- Then, Chiaso gave an oral description of the cartel's activities, *plus some 156 pages of documentary evidence*, supplemented with further explanations and clarifications.
- Then, it appears that Hoechst gave the Commission a memorandum on the sorbates market, but also wrote to the Commission saying that it would not be able to go further because of parallel pending US criminal and civil proceedings.[97] To the latter, the Commission reacted strongly, stating that this amounted to a refusal to co-operate with the Commission and that any benefit from earlier contacts was wiped out.[98]
- Then later Hochst came in with a memorandum on the anti-competitive activities and documentary evidence.

Hoechst therefore sought to show that its early oral contacts should be treated *by themselves* as offering decisive evidence to earn the immunity position. The Commission's response was to say that those contacts were insufficient, because they had been only vague and equivocal and, that, in any event, the first decisive evidence was the combination of Chiaro's oral description and the documents provided by Chiaso. On this the CFI agreed with the Commission.[99]

There are two clear messages coming out of this:

- First, an immunity applicant should go in *with documents* or other solid evidence to secure its position.
- Secondly, despite the difficulties this may cause, it appears that defence counsel cannot normally expect to use parallel US proceedings (even with related criminal sanctions) as a reason for not providing evidence to obtain leniency *and* keep their position in the leniency order.

Consultant liability

In July 2008, the CFI gave judgment in the appeal by AC Treuhand, the Swiss consultancy firm, against the fine imposed on it for activities in relation to the *organic peroxides* cartel.[100]

It may be recalled that, in December 2003, the Commission had fined three producers for their participation in this cartel *and* also imposed a symbolic fine of €1,000 on AC Treuhand. That firm was found to have done various things facilitating the cartel from 1993 (carrying on from Fides): notably, storing secret cartel agreements in its safe, calculating deviation from agreed quotas, organising ''unofficial'' meetings between the producers, participating in some meetings and handling travel expenses so that these did not appear in the records of the business people concerned.

This appears to have caught AC Treuhand by surprise. In 1980 the Commission had attributed liability to a consultancy firm for its supporting activities to a cartel in the *Italian cast glass* Decision.[101] However, in several subsequent decisions the Commission had *not* approached such activities as an infringement. The Commission

94. *Hoechst* [2008] 5 C.M.L.R. 12 CFI at [137], [582].
95. *Hoechst* [2008] 5 C.M.L.R. 12 CFI at [424], [431]–[433].
96. *Hoechst* [2008] 5 C.M.L.R. 12 CFI at [8]–[15], [518] et seq.
97. *Hoechst* [2008] 5 C.M.L.R. 12 CFI at [547], [574].
98. *Hoechst* [2008] 5 C.M.L.R. 12 CFI at [573], [575].
99. *Hoechst* [2008] 5 C.M.L.R. 12 CFI at [557]–[559], [568]–[569].
100. *AC-Treuhand AG v Commission of the European Communities* (T-99/04) [2008] 5 C.M.L.R. 13 CFI.
101. Decision 80/1334 relating to a proceeding under art.85 of the EEC Treaty (IV/29.869-*Italian cast glass*) [1980] OJ L383/19.

also itself stated that its action in this case was a ‘‘novelty’’.

AC Treuhand argued that art.81(1) EC was only directed at *perpetrators* of cartel infringements, *not their agents*, responsible for the related and subordinate activities. AC Treuhand was only an agent of the cartel members and a ‘‘complice’’ to the infringement. In other words, only the parties to the actual cartel agreements were liable, being actors on the organic peroxides market concerned.

Further, AC Treuhand argued that the Commission had infringed the principle that penalties may not be imposed if the relevant legislation is not clear and precise, so that those concerned may know what they have to do to comply (*nulla poena sine lege*). All of this was underpinned by detailed arguments based on the related principles of the European Convention of Human Rights and EC case law.

The Commission disagreed, notably taking the view that the cartel agreements and the agency agreements with AC Treuhand (and, before 1993, Fides) had to be viewed *as a whole*,[102] that AC Treuhand had participated in the infringement (even if it did not operate on the market concerned) and that, given the circumstances, AC Treuhand had known that it was facilitating unlawful anti-competitive agreements.

The CFI decided for the Commission. Importantly, taking a ‘‘literal, contextual and teleological’’ interpretation of art.81(1) EC, the court ruled that an ‘‘agreement’’ under art.81(1) EC should be interpreted broadly and was not just limited to ‘‘perpetrators’’ of the infringement (i.e. here the producers) in the market concerned.

The court noted that the notion of agreement under art.81(1) EC was to be construed broadly. Notably, *accessories* to an infringement (i.e. in the same market), who contributed to it, even tacitly or passively, could still be liable for the infringement.[103]

Further, the court reasoned (following the Commission's argument) that if liability for an infringement were limited only to actors on the market concerned, there could be evasive tactics whereby companies would employ others, not on those markets, to manage cartels for them.[104]

Nor was the court persuaded of the *nulla poena sine lege* argument, taking the view that even if the *relevant legislation* did not spell out the liability of a supporting service provider like this, it was reasonably foreseeable on the case law and the Commission's practice that such liability could exist.[105] In this, the court appears to have been influenced in particular by the Commission's 1980 *Italian cast glass* decision. Further, the fact that the Commission had ‘‘re-oriented’’ its decisional practice made no difference in terms of legitimate expectations, because the Commission had been wrong to do so and should have been applying art.81(1) EC all along![106]

This remains controversial. The court's reasoning is rather broad. Can one really argue that because *a market participant* sits in a trade association meeting, failing to object to a cartel so that it is held to have tacitly agreed and contributed to a cartel, *a statistical office* which provides data, rooms for meetings and other services should be partly liable for the *entire* infringement? The two situations are *very* different.

While it may well be that AC Treuhand knew that what it was doing was not laudable, one may understand that they did not think they could be held liable for just providing services to the actors on the market.

However, one senses that, from an equitable perspective, the court did not *want* to allow AC Treuhand to succeed with the idea that it was a ‘‘non-punishable complice’’ under the law and, from a policy view point, to narrow the notion of agreement under art.81(1) EC.

There is also another way that AC Treuhand was caught by surprise. They received the first request for information in this case in early February 2003, answered it on March 5, 2003 and met with the Commission on March 20, 2003. At that meeting they were told that they were also concerned in the proceedings (i.e. might be held to have infringed themselves) and then the Commission imitated the formal procedure and adopted the SO *only seven days later*.[107]

AC Treuhand argued, as a result, that they had not been given a reasonable opportunity to exercise their defence rights effectively and, in particular, to counter assertions by Akzo, the immunity applicant as to AC Treuhand's role in support of the cartel.

The court found that this was *not* an infringement of AC Treuhand's defence rights on the facts, but appears not to have been happy with what had happened.

The court first recalled that the Commission's procedure could be divided into two: the investigative part up to the SO; and the inter partes part, when those objections were sent to those concerned for their comments.

The court held that the Commission should have made it clear in its request for information, not only that the ‘‘putative infringement’’ concerned organic peroxides, but also that AC

102. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [105].
103. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [130]
104. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [127]–[128].
105. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [145]–[146] and 150, applying *Dansk Rorindustri A/S v Commission of the European Communities* (C-189/02 P) [2005] E.C.R. I-5425 at [217]–[219].
106. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [163].
107. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [4]–[6].

Treuhand might be considered itself to have infringed.[108] All the more so, as the court noted that the Commission had conceded that the decision to investigate a consultancy firm constituted a reorientation of its former decision-making practice and, therefore, AC Treuhand ''could not necessarily expect to be directly concerned by the Statement of Objections''.[109]

However, it appears that at the hearing, the court asked AC Treuhand if it had been prejudiced by not being warned in this way. Apparently AC Treuhand replied ''no'', at least as regards the February request for information.

The court found that AC Treuhand had not produced concrete evidence that it had been prejudiced by not being able to counter Akzo's evidence earlier. AC Treuhand argued that, since the Commission had been co-operating with Akzo for some three years before AC Treuhand was made aware of the proceedings, that meant that the Commission had already formed its view on the matter.

The court therefore concluded there was no prejudice to AC Treuhand's defence rights, justifying annulment of the decision.

Again, this remains controversial in practice. One may understand that the Commission must be allowed to carry out its investigation, but it is far from clear that AC Treuhand should only have been put on notice of the investigation with the Request for Information, and even then incompletely, *seven weeks* before the SO. Equally, in the circumstances, it might have been fairer to contact AC Treuhand earlier even if only a symbolic fine was contemplated.

In any event, subject to the further appeal, clearly all consultancy firms providing statistical services must be expected to be concerned to stay within the law.

Box 6

- **Cartel appeals (3)**

Plasterboard

— *BPB*
  - * No general right to SO replies
  - * No proportionate increase for duration so 65% upheld (contrast *BASF*)
  - * Recidivism trigger can be after start of second infringement (contrast *Thyssen Stahl*)
  - * In such a case, the amount of increase does not have to be ''pro rata''
  - * No mitigation for executive dismissal, no defence that acting against instructions

— *Lafarge*
  - * Court does not have to look at exculpatory evidence in file of own motion
  - * The defence has to show what evidence it thinks might have made a difference
  - * No right to cross-examine
  - * ''Recidivism trigger'' decision under appeal has provisional validity

Electrical and mechanical carbon graphite

— Categorisation challenges failed
— Commission can treat unlawful activities on two products as single infringement
— Fact that parent owned a holding company which owned the infringing subsidiary did not stop parental liability

Plasterboard[110]

In July 2008, the CFI gave judgment in the appeals against the Commission's *Plasterboard* Decision from November 2002.[111]

It may be recalled that, in its Decision, the Commission had fined BPB, Knauf, Lafarge and Saint Gobain Gyproc for participating in a cartel in the United Kingdom, Germany, France and the Benelux between 1992 and 1996. Fines totalling €478 million were imposed.

Overall the CFI upheld the Commission's decision. However, it *reduced the fine* on BPB from €138.6 million to €118.8 million, because it considered that the Commission had not given BPB enough credit for its co-operation. The court therefore *increased BPB's fine reduction* from 30 per cent to 40 per cent.

At the outset one may note that these appeals took a long time. They were filed in February 2003. Judgments were in July 2008, i.e. more than five years later. It is not clear what the reason for this was. However, these were very comprehensive appeals with challenges to many points, which may explain the delay.

The judgments are interesting on a number of points. As regards *BPB*:

- First, there was an issue as to whether the Commission had to give access to the evidence of an *anonymous informant*. The Commission considered not, where it did not rely on the evidence in the SO. The CFI agreed and added that, even if there was an obligation to make exculpatory evidence available to the defence, the Commission

108. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [51]–[52], [56], [57].
109. *Treuhand* [2008] 5 C.M.L.R. 13 CFI at [57].
110. With thanks to Eleonora Wäktare for her assistance with this section.
111. *BPB Plc and others v Commission of the European Communities* (T-50/03, T-52/03, T-53/03 & T-54/03) [2008] 5 C.M.L.R. 18 CFI.

was also under an obligation to respect the confidentiality requested by the informant.[112]

- Secondly, BPB complained that it had been prejudiced because it had been *denied access to the replies of others to the SO* (a point often raised in practice). The CFI confirmed that, if such replies reveal evidence *on which the Commission wishes to rely* in its Decision, then the passages or documents concerned have to be communicated to the defence for their comment.[113] The court also confirmed the position that it is for the defence *to show* that documents which have *not* been communicated to it and on which the Commission relied, *affected* the result which the Commission reached in its decision.[114] The court then reviewed the Commission's use of one reply and, finding that it had been relied on, but not communicated, disregarded it as evidence and considered whether that made a difference to the case against BPB.[115]
- Thirdly, there is detailed review by the court of various claims by BPB that the contacts in question were too broad and unspecific to amount to an anti-competitive agreement or concerted practice. As regards *the qualitative appraisal of the evidence*, the court repeated several times the statement in *Aalborg Portland*, about evidence in cartel cases being fragmentary and sparse, so that it is often necessary to reconstitute details by deduction and that the existence of an unlawful practice or agreement may be inferred from "a number of coincidences and *indicia* which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement".[116] One point in this case was the fact that a company sent a copy of its announcement of a price increase to the private address of a director of another company.[117]
- Fourthly, there are statements by the court as to the difficulty of showing the impact of a cartel on a market. The court notes that this involves recourse to assumptions and assessments of reasonable probability.[118] Generally, the court concluded that the Commission had shown that the cartel had an actual impact on the market for the purposes of the Fining Guidelines.[119] As regards one aspect, a finding of market stability, the CFI found that the Commission had not shown that this resulted from the infringement.[120] However, the court considered that it did not change the Commission's assessment of the gravity of the infringement.
- Fifthly, the CFI confirmed that there was no requirement that the Commission set a fine so that it was proportionate to the total turnover of an undertaking, or the turnover of the undertaking concerned in the product market concerned.[121]
- Sixthly, interestingly given the *BASF* case, the CFI did *not* vary a fine increase for duration on BPB for *six years and seven months* on a purely proportionate basis. The Commission had increased the fine by 65 per cent and BPB reasoned this should have been only 60 per cent, i.e. 10 per cent for each complete year. 65 per cent was considered proportionate in the circumstances.[122]
- Seventhly, the court held that if there were less intense periods of infringement, that should not result in variations in percentage increase for duration; rather that should be reflected in the percentage increase for gravity as a whole.[123]
- Eighthly, the CFI confirmed its position in *Groupe Danone* that the Commission is not *bound* by any limitation period when making a finding of recidivism. However, the Commission could take into account the time that has elapsed between infringements in its discretion. There is also no requirement for recidivism that a fine be imposed in the first infringement; the finding of an infringement of EC competition law (of the same type) suffices.[124]
- Ninthly, interestingly BPB argued that any increase for recidivism should only apply *from the date of the first decision finding an infringement*, where the second infringement was contemporaneous. It may be recalled that in *Thyssen Stahl*[125] the court had rejected a finding of recidivism where the greater part of the second infringement was before the first decision finding an infringement. Here, it appears that BPB continued the infringement for *four* years after the first decision finding an infringement, it being recalled that the second infringement was for *six years and*

112. *BPB* [2008] 5 C.M.L.R. 18 CFI at [34], [36] and [38].
113. *BPB* [2008] 5 C.M.L.R. 18 CFI at [41].
114. *BPB* [2008] 5 C.M.L.R. 18 CFI at [45].
115. *BPB* [2008] 5 C.M.L.R. 18 CFI at [54].
116. *Aalborg Portland A/S v Commission of the European Communities* (C-204/00) [2004] E.C.R. I-123 at [55]–[57].
117. *BPB* [2008] 5 C.M.L.R. 18 CFI at [226]–[228].
118. *BPB* [2008] 5 C.M.L.R. 18 CFI at [300]–[301].
119. *BPB* [2008] 5 C.M.L.R. 18 CFI at [302]–[311].
120. *BPB* [2008] 5 C.M.L.R. 18 CFI at [312]–[314].
121. *BPB* [2008] 5 C.M.L.R. 18 CFI at [338]–[340].
122. *BPB* [2008] 5 C.M.L.R. 18 CFI at [363].
123. *BPB* [2008] 5 C.M.L.R. 18 CFI at [364].
124. *BPB* [2008] 5 C.M.L.R. 18 CFI at [383]–[388]. See *Groupe Danone v Commission of the European Communities* (T-38/02) [2005] E.C.R. II-4407.
125. *Thyssen Stahl AG v Commission of the European Communities* (T-141/94) [1999] E.C.R. II-347 at [617]–[625].

seven months. In the circumstances, the CFI upheld the fine increase for recidivism and considered that the Commission could still set the increase at 50 per cent, rather than some lower amount to reflect the duration (such as two-thirds of 50 per cent). The Commission's 50 per cent recidivist increase, set in its discretion, was therefore considered proportionate.[126]

- Tenthly, another practical issue raised was that an *executive of BPB had continued the infringement apparently despite instructions not to do so*. BPB argued that it should not be liable in such circumstances. The CFI disagreed, stating that, if not, an undertaking's liabilities could be too easily circumvented. *Nor was it mitigation that BPB had dismissed the executives in question*. That could not reduce BPB's liability, although the court noted that BPB and/or its owners were "free to pursue any action deemed appropriate" against the executive concerned.[127] This is a hard approach. While one can understand policy hesitations to allow such issues to be taken into account, it may well be argued that such a tough line by the company should have been reflected in a reduced fine, if only to support such compliance efforts.
- Finally, as noted, the court reviewed BPB's evidentiary contribution to the Commission's case through co-operation, and in its unlimited jurisdiction decided to increase BPB's fine reduction.[128]

In *Lafarge*, the following points are of particular interest:

- First, Lafarge also complained that the Commission's Decision contained hundreds of references to the other undertakings' replies to the SO and that it had not been granted access to these replies. The court took a similar position as in *BPB*, and stressed that *it is for the defence* to determine the evidence to which it had not been granted access which it considers might have led to a different decision. The court added that a breach of the rights of the defence, which by its nature is individual, does not fall within the scope of an infringement of essential procedural requirements and, therefore, must not be raised by the court of its own motion.[129] This remains difficult because it is not clear how the defence can determine what is relevant if the defence has not had access to it!
- Secondly, Lafarge contested the Commission's right to hold a confidential hearing of Gyproc and BPB, arguing that this violated its rights of defence. Lafarge considered that it should have been allowed to *cross-examine*. The CFI rejected this and referred to *Aalborg Portland* (cited above) to refuse cross-examination, stating that the Commission is not a tribunal in the sense of art.6 of the European Convention on Human Rights and that the procedure before the Commission has an administrative nature.[130]
- Thirdly, Lafarge also disputed the increase of fine for recidivism. An interesting point was that the 1994 decision on which the Commission based itself to find recidivism was *under appeal* at the time of the infringement in the present case and only became definitive in 2000. Lafarge argued that recidivism could only occur after that date. The CFI rejected the argument on the basis of *the provisional validity* of the first decision, while indicating that if the first decision were to be annulled, that would be a new fact triggering a new deadline to file an action against the second decision to rectify any fine increase for recidivism.[131]

In *Knauf*, the CFI confirmed the provisional character of the SO and that the definitive conclusions on the facts may not correspond precisely to their intermediate qualification in the SO. Knauf argued that its rights of defence had been violated because it did not have the opportunity to present its observations on certain facts concerning a key meeting. To show how different the SO was to the final decision, Knauf pointed to a description of only one page and a half in the SO against six pages in the Decision.

The CFI rejected the point and noted that the difference in length was because the Commission had added BPB's observations on the meeting.[132] This did not change the fact that the relevant allegations against Knauf had been explained in the SO.

Electrical and mechanical carbon graphite

In October 2008, the CFI dismissed the various appeals in this cartel.[133] It will be recalled that the Commission's Decision from 2003 had imposed fines ranging from €101 million to

126. *BPB* [2008] 5 C.M.L.R. 18 CFI at [391]–[396].
127. *BPB* [2008] 5 C.M.L.R. 18 CFI at [430]–[431].
128. *BPB* [2008] 5 C.M.L.R. 18 CFI at [478]–[482].
129. *Lafarge SA v Commission of the European Communities* (T-54/03) CFI July 8, 2008 at [70]–[86].
130. *Lafarge* (T-54/03) CFI July 8, 2008 at [140]–[148].
131. *Lafarge* (T-54/03) CFI July 8, 2008 at [734]–[737].
132. *Knauf Gips KG v Commission of the European Communities* (T-52/03) CFI July 8, 2008 at [80]–[88].
133. *SGL Carbon AG and others v Commission of the European Communities* (T-68/04, T-69/04 & T-73/04) CFI October 8, 2008.

€1.6 million. The cartel had lasted more than 11 years in relation to these products, which allowed electricity to be conducted to the internal mechanisms of electric motors in all kinds of products.[134]

SGL Carbon was fined €23 million, including a reduction of 20 per cent (as the last undertaking to co-operate) and 33 per cent (taking into account that SGL Carbon had serious financial difficulties and had also been fined for three other cartels which occurred simultaneously).[135] On this account, the Commission considered that a larger fine was not required to ''ensure effective deterrence''.

SGL Carbon raised a number of specific claims about the fining calculation and the approach of the Commission to fining in general. The following points may be noted:

- First, SGL Carbon challenged the Commission's definition of the starting amount of the fine as insufficiently reasoned. The court disagreed, considering that it is important to ensure that ''fines are not easily foreseeable by economic operators''.[136]
- Secondly, SGL Carbon challenged the differential treatment/categorisation of defendants, arguing that there should have been more ''steps'', allowing for more precision in fines. The court disagreed, although it checked carefully whether the categorisation was coherent and objectively justified. (The other defendants also raised this claim unsuccessfully.)

Le Carbone-Lorraine (LCL) was fined €43.05 million (after a reduction of 40 per cent for its co-operation during the Commission's investigation).[137] Again, its appeal was dismissed but certain particular points may be noted.

- First, much of LCL's appeal related to arguments that, since LCL was focused on the supply of only *some* of the products concerned, it should have had a lesser fine. It appears LCL mainly produced *electrical* carbon products and asserted that it had little or no role in the infringement as regards *mechanical* carbon products or *carbon blocks*. LCL therefore challenged the Commission's decision to treat electrical and mechanical carbon products as one. The CFI rejected this and upheld the Commission's Decision to treat the products together as all part of a ''single complex infringement''.[138]
- Secondly, the CFI rejected LCL's argument that the base amount for gravity should be individually assessed for each company. The court agreed with the Commission that the base amount for gravity concerned the infringement as a whole. The position of each company came into the Commission's assessment *later*, as differentiated between the market participants.[139]
- Thirdly, the CFI rejected the contention that LCL was not treated by the Commission on the same footing as Morgan Crucible (the immunity applicant). The CFI stated that the principle of equal treatment has to be reconciled with the principle of legality, under which no one may invoke, to his benefit, an unlawful act committed in favour of another (a principle which has also been noted in several other judgments recently).[140]
- Fourthly, the court found that the Commission had not treated LCL less favourably than SGL Carbon, which had obtained a 33 per cent reduction of fine because of its grave financial situation, the other fines which had been imposed and the fact that these cases were contemporaneous. The court stated that the Commission is not *obliged* to take into account the financial situation of a company when determining fines. Moreover, LCL had not shown that it was in a comparable financial situation to SGL Carbon.[141]

The Commission apparently had stated that the fines on SGL Carbon amounted to some 10 per cent of its worldwide turnover in 2002, whereas those on LGL amounted only to 1 per cent. The Commission also said that SGL Carbon's financial ratios were much worse than those of LGL.

Schunk was fined €30.87 million (after a reduction of 30 per cent for its co-operation during the Commission's investigation). Again its appeal was dismissed, but raises a number of interesting points:

- First, Schunk challenged the legality of art.15(2) of Regulation 17, claiming that this provision gives almost unlimited discretion to the Commission as regards the setting of fines (again an argument often raised

134. See Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 2)'' [2005] I.C.C.L.R. 109, 110.
135. *SGL Carbon* (T-68/04) CFI October 8, 2008 at [21].
136. *SGL Carbon* (T-68/04) CFI October 8, 2008 at [32].
137. With thanks to Stéphanie Strievi for her assistance with this section.
138. *Carbone-Lorraine v Commission of the European Communities* (T-73/04) CFI October 8, 2008, see, e.g. [40]–[49].
139. *Carbone-Lorraine* (T-73/04) CFI October 8, 2008 at [99]–[100].
140. *Carbone-Lorraine* (T-73/04) CFI October 8, 2008 at [295], citing *Williams v Court of Auditors of the European Communities* (134/84) [1985] E.C.R. 2225 at [14].
141. *Carbone-Lorraine* (T-73/04) CFI October 8, 2008 at [307]–[317].

and, one may think, a key driver behind many appeals in recent years). The CFI rejected this, explaining how it considered that this discretion was indeed limited.[142] In the process the court noted that it considered the 10 per cent turnover fine ceiling to be reasonable[143] and noted that the CFI and ECJ had unlimited jurisdiction over Commission Decisions which fix fines. The Commission's administrative practice was therefore ''subject to unlimited review by the Community judicature''.[144]

- Secondly, Schunk tried without success to claim that, since only its 100 per cent subsidiary (SKT) directly participated in the cartel, it could not be jointly and severally liable for the infringement. On the contrary, the CFI found that Schunk was correctly liable. Schunk's main point was that SKT was *a holding company* for other entities (again a point frequently raised in practice). After a detailed review, the CFI found that Schunk had not rebutted the presumption that SKT did not behave independently of its parent. Even if Schunk had not itself committed the infringement, it was *deemed* to have done so because of its legal and economic links with SKT, by which it could determine SKT's conduct on the market.[145]
- Thirdly, interestingly Schunk sought to contest various parts of the infringement to show that it was less serious and should have led to a lesser fine. This raised specific issues because Schunk had not substantially contested the facts in the SO and prompted the Commission to counterclaim for an increase in fine. Interestingly, in dealing with these claims the court noted that, where Schunk was seeking to do so now for the first time, that challenge was *simply barred*.[146] Then, the court ruled on the Commission's counterclaim that, since Schunk had contested facts previously admitted, it should have its 10 per cent fine reduction for not contesting the facts cancelled. *Interestingly, insofar as these challenges had been barred*, the court decided that there were no grounds for cancelling the 10 per cent reduction. Further, the court noted that the only grounds for setting a fine under art.15(2) of Regulation 17 were the gravity and duration of the infringement. The fact that Schunk's claims had obliged the Commission to draw up a defence dealing with such issues was held to be a matter going to costs, but not justifying an increase in the fine for the infringement.[147]

Welded steel mesh

In December 2007, the ECJ ruled on an interesting question as to the limitation and enforcement of judgments for cartel infringements in *Commission v Ferriere Nord*.[148]

Ferriere Nord was one of the companies found to have participated in the welded steel mesh cartel *in 1989*. A fine of €320,000 was imposed. Ferriere Nord provided a bank guarantee, while appealing, for the fine and the interest which the Commission had stipulated in such cases. Ferriere Nord's ultimate appeal to the ECJ on the decision was dismissed in *July 1997*.

Ferriere Nord then wrote to the Commission seeking a reduction in the fine and interest, noting the severe devaluation of the Italian lira and that the duration of the legal proceedings had been almost *eight years*. The Commission refused.

Ferriere Nord repeated its request in *December 1997* and tendered to the Commission a sum in Italian lira corresponding to the amount of the fine at the exchange rate in 1989, giving a value of €249,918. The Commission did not respond to that letter.

Then, it appears that in *February 2004, i.e. more than five years later*, the Commission informed Ferriere Nord that it still owed the Commission €564,402, allowing for the balance in the principal fine amount, plus interest! Ferriere Nord responded that the Commission's demands were unjustified and out of time, insofar as the Commission had only five years to enforce sanctions under Regulation 2988/74, which had expired in September 2002.

Then, in April 2004 the Commission replied that Regulation 2988/74 did not apply, since the bank guarantee was a provisional payment which could be called in at any time. However, the Commission accepted that it had not reminded Ferriere Nord to pay its debts once the ECJ had confirmed the *Welded Steel Mesh* Decision and ''agreed'' that interest should accrue *only for five months* from that judgment. The Commission therefore offered to accept only €341,932 as outstanding, rather than €564,402.

On appeal by Ferriere Nord, the CFI found that the Commission's letters of 2004 were ''acts'' and open to challenge as making a distinct change

142. *Schunk GmbH v Commission of the European Communities* (T-69/04) CFI October 8, 2008 at [28]–[50].
143. *Schunk GmbH* (T-69/04) CFI October 8, 2008 at [38].
144. *Schunk GmbH* (T-69/04) CFI October 8, 2008 at [41].
145. *Schunk GmbH* (T-69/04) CFI October 8, 2008 at [54]–[76].
146. *Schunk GmbH* (T-69/04) CFI October 8, 2008, e.g. at [84]–[85], [258].
147. *Schunk GmbH* (T-69/04) CFI October 8, 2008 at [258]–[262].
148. *Commission of the European Communities v Ferriere Nord SpA* (C-516/06 P) [2008] 4 C.M.L.R. 10 ECJ.

in Ferriere Nord's legal position and that the Commission's right to enforce the outstanding balance of the fine, plus interest was time-barred.

The Commission appealed. Interestingly, the ECJ then held that the Commission's letters were *not* acts, but had to be regarded ''as giving notice of enforcement of a decision taken previously'', i.e. the *Welded Steel Mesh* Decision:

> ''As such, whether they occur before or after any time-bar, those acts cannot be regarded as having produced legal effects binding on, and capable of affecting the interests of Ferriere Nord. In reality they merely constitute acts preparatory to enforcement. Neither the former, nor the latter acts constitute acts open to challenge.''[149]

The fact that the Commission had agreed that interest should only accrue for five months from the ECJ's judgment was found *not* to change this.

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

- the Commission's recent decisions on cartels, horizontal co-operation, vertical restraints and arts 82/86 EC, including first fines under the 2006 Fining Guidelines, a procedural fine on E.on of €38 million for breach of a seal during a dawn raid; and structural energy cases like *Greek lignite*;
- the Commission's new sectoral review into pharmaceuticals and generic medicines; and
- various policy issues ranging from the Commission's ''White Paper'' on damages actions to topical discussion on resale price maintenance and online commerce and competition.

149. *Ferriere Nord SpA* [2008] 4 C.M.L.R. 10 ECJ at [29].

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Major Events and Policy Issues in EC Competition Law, 2007–2008 (Part 2)

JOHN RATLIFF*

LT Cartels; Competition law; EC law; Fines; Private enforcement; Seals

This is the second and final part of the overview of "Major Events and Policy Issues in EC Competition Law in 2007–2008", following on from Part 1 published in 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 arts 82/86, including first fines under the 2006 Fining Guidelines, a procedural fine on E.ON of €38 million for breach of a seal during a dawn raid; and structural energy cases like *Greek Lignite*;
- the Commission's new sectoral review into pharmaceuticals and generic medicines; and
- various policy issues ranging from the Commission's "White Paper" on damages actions to topical discussion on resale price maintenance, online commerce and competition and Commission priorities for art.82 EC enforcement.

European Commission Decisions

Cartels—new[2]

Professional videotape

In November 2007, the Commission announced that it had imposed fines of €74.79 million on Sony, Fuji and Maxell for fixing prices for professional videotapes.[3] The Commission found that, from 1999 until 2002, the parties discussed and co-ordinated price increases. The Commission had evidence of some 11 meetings. There was no immunity applicant. There were dawn raids in May 2002, which the Commission states yielded "abundant" cartel evidence.

In setting the fines, the Commission applied for the first time the 2006 Fining Guidelines. Fuji's and Maxell's fines were reduced by 40 per cent and 20 per cent respectively under the 2002 Leniency Notice. However, Sony's fine was increased by 30 per cent as the Commission found that it had obstructed its investigation during inspections at the company's premises.

The Commission notes that the annual sales for the videotapes concerned (two types of Betacam tape) totalled €118 million in the European Economic Area (EEA) in 2001 and the three companies accounted for an estimated 89 per cent market share. The main customers are TV stations and independent producers of TV content and advertising films.

Overall, Sony was fined €47.19 million, Fuji €13.2 million and Maxell €14.4 million. It appears that the Commission set the "variable amount" (a proportion of sales value concerned) at a single rate for all of *18 per cent*, with a single "additional amount" (*entry fee*) for all set at *17 per cent*.[4] The duration was two years, eight months, giving a multiplier of three. Sony's fine was also increased for 10 per cent "specific deterrence" (other turnover beyond the goods concerned).

Additional points which may be noted from the full (non-confidential) decision are as follows:

- First, it appears that the cartel was driven partly by a gain in the value of the yen (which the companies appear to have sought to pass on) and differences in pricing between direct supplies (e.g. to TV stations) and indirect sales (to wholesalers serving smaller customers).
- Secondly, it appears that the obstruction was that one Sony employee refused to answer all questions put by the Commission on-site and another shredded documents in a file called "competitors pricing" during the investigation! This was *not* treated as a separate infringement, but as aggravating circumstances justifying a 30 per cent increase in the basic amount of fine (i.e. here €33 million, so some €9.9 million) relying on point 28 of the 2006 Fining

* *Wilmer Cutler Pickering Hale and Dorr LLP, Brussels.* *With many thanks to Ingrid Cloosterin for her general help in the production of this article. The views expressed in this article do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP.*

1. John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2007–2008 (Part 1)" [2009] I.C.C.L.R. 61.

2. With thanks to Sophia Lange for her assistance with this section.

3. IP/07/1725, November 20, 2007. The summary of the Decision was published in [2008] OJ C57/10, and the full (non-confidential) Decision is now on the Commission's website.

4. IP/07/1725 at [215] and [217].

Box 1

New cartel fines
(November 2007–October 2008)*

Total fines		**Highest company fines(s)**	
Professional videotape	€74.9	Sony	€47.19
Flat glass	€486.9	Guardian	€148
Chloroprene rubber	€247.63	ENI	€132.16
Synthetic rubber	€34.2	Bayer	€28.87
International removal services Belgium	€32.6	Ziegler	€9.2
Sodium chlorate	€79.7	Arkema/ ElfAquitaine	€59
Aluminium fluoride	€4.97	Soc. Des Industries Chimiques du Fluor	€1.7
Paraffin wax	€676	Sasol	€318.2
Bananas	€60.3	Dole	€45.6
TOTAL	**€1,697.2**		

* All figures are € million

Guidelines.[5] Interestingly, Sony argued that, if taken as a separate infringement, the Commission's fine would have been time-barred. The Commission considers, however, that the fact that it also has the power to impose a separate sanction does not prevent it from treating obstruction as an aggravating circumstance (see also discussion concerning E.ON, under ‘‘Procedure'' below).

- Thirdly, the Commission deals in detail with the liability of parents and subsidiaries in what appears now to be standard treatment. One particularity here was that the Commission found that there had been one meeting in Japan (i.e. apparently at parent company level),[6] although the general structure appears to have involved delegated decision-making to European subsidiaries.
- Fourthly, a great deal of the decision is treated as confidential in the full version (people, names, some figures—although not sales in the products concerned—and evidence). (As is occurring, in other cases now also.)

Flat glass

In November 2007, the Commission announced that it had imposed fines of €486.9 million on four flat glass producers, Asahi, Guardian, Pilkington and Saint-Gobain, for co-ordinating price increases and other commercial conditions for deliveries of flat glass in the EEA.[7] The decision is being appealed.

It appears that the case started after information exchanged in the European Competition Network (ECN) under art.12 of Regulation 1/2003 (and other informal exchanges) relating to letters or informal complaints concerning systematic parallel price increases.[8]

The Commission then conducted two rounds of inspections at the premises of Asahi, Guardian, Pilkington, Saint-Gobain and the European Association of Flat Glass Producers in February and March 2005. Between the two, Asahi and its subsidiary Glaverbel applied for immunity, which was rejected, because the Commission after the dawn raid already had copied the contemporaneous notes of cartel meetings on which it appears to have relied. Asahi's duration factor was, however, ‘‘adjusted'' (reduced) insofar as its evidence allowed the Commission to extend the duration of the cartel back in time.

The Commission states that the cartel operated from January 2004 to February 2005. The duration of the infringement found was therefore short, *varying from 10 months to 1 year and 1 month.*

The flat glass concerned is for use in the construction sector for windows, glass doors and mirrors. The Commission noted that in 2004 the sales of the companies concerned to independent customers in the EEA amounted to €1,700 million. Mainly the producers supply processors which then transform the glass into finished products.

Fines were assessed under the 2006 Fining Guidelines.[9] Deterrence increases were imposed

5. IP/07/1725 at [45] and [219]–[227].
6. IP/07/1725 at [175].
7. [2007] OJ C127/11; IP/07/1781, November 28, 2007. The Commission published a summary of its February 2007 Decision in this case in May 2008: [2008] OJ C127/9. The full (non-confidential) Decision is also available on the Commission's website.
8. IP/07/1781 at [60]. Regulation 1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L1/1.
9. Guidelines on the method of setting fines imposed pursuant to art.23(2)(a) of Regulation 1/2003 [2006] OJ C210/2.

Box 2

- **Main issues**
  - First applications of new (2006) Fining Guidelines
  - Recidivist increases above 50%
    - *Sodium Chlorate*: Arkema 90%; *Chloroprene rubber and Wax*: ENI 60%
  - High fines for short infringements
    - (e.g. *Flat glass*)
  - Variable amount 18%; entry fee 17%
  - Adjustments for inability to pay (Interdean—*International removal services*) and agricultural regulation (Dole and Weichert—*Bananas*)
  - Sony: obstruction as aggravating circumstance, 30% increase to basic amount
  - Continuing debate about parent–subsidiary liability

(for companies with particularly large turnover beyond the sales of the goods concerned). It appears the 10 per cent of turnover fine ceiling was also applied. Asahi was granted a leniency reduction of 50 per cent. Overall, Asahi was fined €65 million, Guardian €148 million, Pilkington €140 million and Saint-Gobain €133.9 million.

Additional points which may be noted on the Commission's full (non-confidential) decision are as follows:

- First, the focus on the Commission's case was on unlawful meetings and general price increase announcements (some defendants arguing that, in fact, actual prices were different, reflecting individual negotiations with customers).[10]
- Secondly, in a detailed section, most of the defendants raised arguments that the ultimate parent should not be considered liable for the acts of their subsidiaries (even where 100 per cent owned) in the absence of additional evidence as to their influence over the latter. These were rejected by the Commission.[11]
- Thirdly, Asahi/Glaverbel contested that the 2006 Fining Guidelines should apply insofar as at the time of its leniency application the 1998 Fining Guidelines were still applicable. This was rejected based on *Dansk Rohrindustri*.[12]
- Fourthly, in assessing gravity under the new Fining Guidelines, again a single rate for the variable amount (proportion of sales) was applied (18 per cent) and a single rate for the additional amount (entry fee) (17 per cent).[13]
- Finally, the Commission emphasises that evidence which merely *strengthens* the Commission's case, complementing what the Commission already has, is not enough to earn immunity under point 8(b) of the 2002 Leniency Notice (as evidence enabling the Commission to prove an infringement).[14]

Chloroprene rubber

In December 2007, the Commission announced that it had imposed fines of some €247 million on five groups of companies for participating in a price-fixing and market sharing cartel in the chloroprene rubber sector.[15] Chloroprene rubber is a synthetic rubber used for components in industrial products such as latex, for the production of diving equipment, the inner soles of shoes and as adhesive. The companies concerned in the cartel were: Bayer, Denka, DuPont, Dow, ENI and Tosoh.

The cartel was found to have operated for some nine years, from at least 1993 until 2002.

It appears that Bayer lodged an application for immunity with the Commission in 2003. The fine on ENI was increased by 60 per cent for multiple recidivism. The fines on ENI and Dow were also increased for "specific deterrence". Tosoh and DuPont/Dow were granted reductions of their fines of 50 per cent and 25 per cent respectively.

Overall, Tosoh was fined €4.8 million, DuPont €59.25 million, Dow €4.43 million, ENI €132.16 million and Denka €47 million. The Commission noted that, but for immunity, Bayer's fine would have been €201 million.

Synthetic rubber

In January 2008, the Commission announced that it had imposed fines of €34.2 million on the Bayer and Zeon groups for fixing prices for *nitrile butadiene rubber* (NBR), a rubber used mainly in the motor industry for fuel and oil handling hoses, seals, o-rings and water handling applications.[16]

The Commission found that from late 2000 until 2002, Bayer and Zeon discussed and co-ordinated price increases. In setting the fines, the Commission took into account that both Bayer and Zeon co-operated with the Commission and

10. IP/07/1781 at [263]–[364].
11. IP/07/1781 at [385]–[454].
12. *Dansk Rorindustri A/S v Commission of the European Communities* (C-189/02 P) [2005] E.C.R. I-5425 at [463], [466].
13. IP/07/1781 at [482], [486].
14. IP/07/1781 at [527].
15. IP/07/1855, December 5, 2007. The summary of the Decision was published in October 2008; see [2008] OJ C251/11.
16. IP/08/78, January 23, 2008.

submitted additional evidence under the 2002 Leniency Notice.

The fines for Bayer and Zeon were reduced by 30 per cent and 20 per cent respectively. Zeon benefited from a further reduction for being the first to disclose evidence regarding the duration of the cartel. Bayer's fine was increased by 50 per cent for recidivism (although its participation in other rubber cartels was not taken into account, insofar as it was contemporaneous with this infringement). Overall, Bayer was fined €28.87 million and Zeon €5.36 million. The Commission states that its investigation (which involved dawn raids in March 2003) had been prompted by an immunity application.

International removal services in Belgium

In March 2008, the Commission announced that it had imposed fines of €32.75 million on 11 companies for price fixing, market sharing and bid rigging in the international removal services sector.[17]

It appears that the cartel operated for a period of *19 years*, from October 1984 until September 2003. The companies concerned agreed on prices, attributed removal contracts by way of bid rigging in the form of bogus quotations and operated a system of financial compensation for lost bids.

As regards fines, the Commission granted a 50 per cent reduction to Allied Arthur Pierre, which co-operated with the Commission under the 2002 Leniency Notice. Interdean's fine was reduced by 70 per cent to €3.185 million, the Commission ''exceptionally'' taking into account its inability to pay and particular circumstances. One company, Exel Investments (which was a former parent of Allied Arthur Pierre) was denied the leniency granted to that company because it could have applied for leniency but did not do so.

Fines ranged from €9.2 million on Ziegler, €8.9 million on Exel Investments and €4.5 million on Goesselin to €1.5 million on Mozer.

Sodium chlorate

In June 2008, the Commission announced that it had imposed fines of €79.7 million on four groups of companies for allocating sales volumes and fixing prices for sodium chlorate.[18] Sodium chlorate is an oxidising agent used mainly for bleaching in the pulp and paper industry.

The companies concerned were: EKA Chemicals, Akzo Nobel, Finnish Chemicals, Erikem Luxem, Arkema France, Elf Aquitaine, Aragonesas Industrias y Energia and Uralita. It appears that the companies operated the cartel for some six years, between late 1994 and 2004.

The investigation was triggered by Akzo Nobel and its subsidiary EKA Chemicals which obtained full immunity. Finnish Chemicals also made an application for leniency and had its fine reduced by 50 per cent for co-operation.

The fines were based on the 2006 Fining Guidelines. *Arkema's fine was increased by 90 per cent as it had been fined for cartel activities in three previous Commission Decisions.*

Overall, Arkema was fined €59 million, Finnish Chemicals €10.15 million and Aragonesas/Uralita €9.9 million. The Commission indicated that EKA Chemicals/Akzo Nobel had avoided a fine of €116 million through immunity.

Aluminium fluoride

In June 2008, the Commission announced that it had imposed fines of €4.97 million on five aluminium fluoride producers for fixing worldwide target prices and dividing markets.[19] Aluminium fluoride is used to lower the smelting temperature of aluminium, significantly reducing energy consumption in the smelting process.

The companies involved were: Boliden Odda, Fluorsid SpA, Minmet Financing Company SA, Société des Industries Chimique du Fluor, Industrial Quimica de Mexico SA de CV and Q.B. Industrias SAB de CV.

It appears that the cartel operated only for a period of six months, from July 12 to December 31, 2000, and essentially related to one meeting in Milan, with then, bilateral follow-up contacts. The Commission's investigation was triggered by an application for immunity by Boliden Odda in 2005.

The Commission noted that it is the first time that it has applied point 18 of the 2006 Fining Guidelines, which provides for a method of calculating the input of individual cartel members into a cartel that is geographically wider than the EEA. (The Commission looks at the total value of the wider market and the companies' market shares thereon and applies those shares to the aggregate sales of the undertakings concerned in the EEA.)

Boliden Odda received full immunity from fines, whilst the remaining cartel members received fines of between €1.6 and €1.7 million.

Wax producers

In October 2008, the Commission announced that it had imposed fines of some €676 million on nine groups for a cartel in the supply of *paraffin wax* in the EEA for some 13 years (between 1992 and 2005).[20] Paraffin waxes are used in a wide variety of products ranging from candles, to the wax coating on cheese, to the adhesive and chewing

17. IP/08/415, March 11, 2008.
18. IP/08/917, June 11, 2008.
19. IP/08/1007, June 25, 2008.
20. IP/08/1434, October 1, 2008.

gum industries. The market is stated to be worth almost €500 million.

The infringement of some of the companies also related to *slack wax*, the raw material required for the manufacture of paraffin waxes. It is a by-product of base oil manufacture from crude oil.

As regards paraffin wax price fixing was found and, for some producers, also market allocation. Certain producers also were found to have fixed prices for slack wax to end-customers in Germany. It appears that Shell first sought leniency under the 2002 Leniency Notice and was granted immunity. The Commission then carried out dawn raids in April 2005. Three groups then co-operated, earning fine reductions ranging from 50 per cent to 7 per cent.

The fines were based on the 2006 Fining Guidelines. Sasol's fine was increased by 50 per cent because it was found to be co-leader of the cartel with Shell. The fine on ENI was increased by 60 per cent for recidivism.

The net result was a huge fine on Sasol of €318.2 million, €128 million on Total, €83 million on ExxonMobil and five other fines ranging from €37 to €12 million. The Commission indicated that Shell's fine, but for immunity, would have been €96 million.

Bananas

In October 2008, the Commission announced that it had imposed fines of some €60.3 million on two banana importers, Dole and Weichert, for their participation in a cartel with Chiquita between 2000 and 2002. Dole was fined €45.6 million, Weichert/Del Monte €14.7 million.

The companies are said to have co-ordinated the setting of their reference prices for bananas in eight EU Member States through bilateral phone calls and announcements each Thursday of their prices for the following week. The cartel concerned Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden. The Commission stated that the retail value of the market concerned was some €2.5 billion.

Weichert traded mainly Del Monte bananas and was controlled by Del Monte at the time of the infringement. Chiquita was not fined as it was the first to give information on the cartel (but the Commission states would otherwise have faced a fine of some €80 million).

The fines on Dole and Weichert were reduced by 60 per cent, partly in view of the specific regulatory regime for the bananas market at the time. Weichert's fine was reduced by a further 10 per cent as it did not participate in part of the cartel.

Other

In May 2008, the Commission closed its investigation into alleged cartel arrangements for *shipping liquids in bulk on deep sea routes*. It appears the Commission concluded that the services concerned could be tramp vessel services excluded from Regulation 4056/86, which established the procedural basis for the Commission to apply the EC competition rules to maritime transport.[21]

Cartels—old

Gas insulated switchgear

In January 2008, the Commission published a summary of its 2007 Decision in this case.[22] The non-confidential version was placed on the Commission's website in November 2007.

It may be recalled that the cartel related to a worldwide cartel involving European and Japanese producers of equipment used to control energy flow in electricity grids. The cartel was found to have operated from April 1988 until May 2004, some *16 years*.[23]

The worldwide value of the market in 2001–2003 was some €1,700–2,300 million, with an EEA value of €320 million in 2003. Very significant fines were imposed, ranging from €396.56 million on Siemens Germany and €86 million on Toshiba to €2.4 million on Fuji Electric, with deterrence multipliers from 1.25 to 2.5 and long duration increases.

It appears that the case started after ABB made an application for immunity in April 2004, resulting in dawn raids shortly afterwards.

The main points to note from the Commission's Decision, which covers a wide range of issues, are as follows:

- First, the Commission found a single and continuous infringement involving bid rigging mainly for public procurement contracts.[24] It appears that European and Japanese companies co-ordinated their bids for coming projects, essentially "by block", so there was a joint European worldwide quota of bids and a joint Japanese worldwide quota of bids, with exchange of information between the two. The focus of the decision is on the global and European market allocation, but apparently there was also allocation

21. MEMO/08/297, May 8, 2008. Regulation 4056/86 laying down detailed rules for the application of arts 85 and 86 of the Treaty to maritime transport [1986] OJ L378/4.
22. Summary for publication of Decision relating to a proceeding under art.81 of the Treaty establishing the European Community and art.53 of the EEA Agreement (COMP/38.899-*Gas Insulated Switchgear*) [2008] OJ C5/7.
23. Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 2)" [2008] I.C.C.L.R. 79, 83 (where it was incorrectly suggested that the cartel only operated *six* years).
24. e.g. *Gas Insulated Switchgear* Decision [2008] OJ C5/7 at [270], [475].

among European companies within "home countries".

- Secondly (and perhaps not surprisingly for such a long cartel), there were many changes in structures of the companies involved, with various acquisitions and joint ventures. As a result the Commission deals in considerable detail with which companies were the appropriate addressees for which period and successor and joint venture liability.[25] Different years were also used for fining for some companies based on their last year in the infringement.[26]
- Thirdly, it appears that the arrangements were detailed, with written agreements and "notification and allocation" mechanisms; and European and Japanese "secretary companies". The Commission also noted that mobile phones with encryption were used.
- Fourthly, interestingly some companies left the cartel for a period (e.g. Siemens Germany, Hitachi and VA Tech), but returned, with the relevant years of absence not therefore counted by the Commission in the overall infringement and fines.
- Fifthly, the Commission noted that the Japanese companies "did not even consider" contesting the market for 16 years. However, as a result their role and fines were not based on their turnover in the EEA, but rather on worldwide figures.[27]
- Sixthly, the Commission essentially derived its case from ABB's immunity application (the reliability of which was challenged by others, but defended by the Commission) and the subsequent dawn raids. The Commission rejected all other leniency applications as not "adding value".
- Seventhly, there is (again) a detailed section on parent–subsidiary liability,[28] a recurring argument being the idea that the relevant managers exceeded the powers bestowed on them in a delegated power structure. Broadly the Commission rejects these arguments, among other things, because those concerned were appointed by more senior levels in the company and also may have held dual roles at senior and junior level.

25. *Gas Insulated Switchgear* Decision [2008] OJ C5/7 at [337]–[339], [340] et seq.
26. *Gas Insulated Switchgear* Decision [2008] OJ C5/7 at [482].
27. *Gas Insulated Switchgear* Decision [2008] OJ C5/7 at [481].
28. *Gas Insulated Switchgear* Decision [2008] OJ C5/7 at [334]–[336], [340] et seq.

Butadiene rubber[29]

In July 2008, the Commission published the non-confidential version of its 2006 Decision.[30] It will be recalled that this case relates to certain types of synthetic rubber: *butadiene rubber and emulsion styrene butadiene rubber* (BR/ESBR), used mainly in tyre production, but also for consumer goods such as shoe soles, floor coverings and golf balls.

Huge fines were imposed, based on the 1998 Fining Guidelines, for a six-year infringement, in part because of high deterrence multipliers (e.g. ranging from 1.5 to 3) and recidivist increases of 50 per cent. The Commission estimated the combined value of the products concerned in 2001 as €550 million.

Bayer obtained immunity. Dow and Shell had reductions for co-operation. Stomil's fine was limited by the 10 per cent of turnover fine ceiling. The net result was a fine of €272 million on ENI, €160 million on Shell, €64 million on Dow, Kaucuk €17.5 million and Stomil €3.8 million.

Of particular interest in the Commission's Decision are the following further points:

- First, the position of Czech and Polish companies involved is unusual insofar as *agency arrangements* are considered. The Czech firm, Kaucuk, is held liable for the acts of its agent Tavorex, whereas a Polish producer Dwory was not held liable. Instead, its agent Trade-Stomil was, being responsible for the export activities of Dwory until 2001.[31] Kaucuk's agent was considered to have worked closely with and for its principal. It also went into voluntary liquidation in 2004. Stomil, on the other hand, was found to have had significant economic independence (in terms of risk).
- Secondly, ENI argued that the parent–subsidiary liability presumption based on 100 per cent ownership created an *impossible burden* to rebut (*probation diabolica*) and was at odds with the personal liability of a company. The Commission disagreed, stating that liability was based on effective control of subsidiaries which were materially implicated by facts. However, the Commission agreed that it was "extremely rare" that a subsidiary is "entirely autonomous", hence the presumption.[32] Otherwise, there was the

29. With thanks to Stéphanie Strievi for her assistance with this section.
30. Summary of Decision relating to a proceeding under art.81 of the Treaty establishing the European Community and art.53 of the EEA Agreement (COMP/F/38.638-*BR/ESBR*) [2008] OJ C7/11; see also Ratliff, "Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 2)" [2008] I.C.C.L.R. 79, 80.
31. *BR/ESBR* Decision [2008] OJ C7/11 at [297], [413]–[441].
32. *BR/ESBR* Decision [2008] OJ C7/11 at [396]–[397].

(apparently now standard) detailed treatment of this issue.

- Thirdly, the Commission disagreed with the alleged absence of credibility of statements received during the investigation, for example, as applicants seek immunity. Some statements were given even though their authors knew that they would be used against them, others after the Statement of Objections (so that they would not affect leniency). The Commission also noted that they were extensively corroborated. Otherwise the Commission referred to the cartel evidentiary principles in *Aalborg Portland* (referred to above already).[33]

Dutch beer

In May 2008, the Commission published a summary of its April 2007 Decision in this case.[34]

Elevators and escalators

In March 2008, the Commission published a summary of its Decision in this case.[35]

PO/Thread

In January 2008, the Commission published a summary of its September 2005 Decision in this case.[36]

Steel beams

In September 2008, the Commission published a summary of its November 2006 Decision, re-adopting the decision under art.65(1) of the ECSC as regards Arbed, now Arcelor, following its annulment by the European Court of Justice (ECJ).[37]

The Commission is certainly persistent! This means that in 2006, it reimposed a fine for an infringement which occurred between July 1988 and the end of 1990 (i.e. some *16–18 years* before).

It may be recalled that the issues leading to annulment were that the decision imposing fines had been addressed to Arbed, whereas the Statement of Objections had been sent to Trade Arbed, Arbed's subsidiary. Moreover, Arbed had not had access to file because the Statement of Objections was not addressed to it.

The summary states that prescription did not apply because it was suspended by Arbed's appeal, not only as regards Arbed itself, but also as regards all the companies in the economic undertaking ''presided over'' by Arbed.[38] The Commission reset the fine as €10 million, in line with the Court of First Instance's (CFI) ruling, prior to the ECJ annulment.

Procedure

Box 3

E.ON—Breach of seal

- €38 million!
- VOID (but not shown that door opened/ documents taken)
- As compared with Sony in *Professional videotapes*: 30% aggravating circumstance for refusal to answer questions and shredding a file

E.ON[39]

In January 2008, the Commission imposed a €38 million fine on E.ON Energie AG (E.ON) for the breach of a seal during an on-site investigation.[40]

Under Regulation 1/2003, the Commission cannot remove *original* documents from business premises, but has the power to ''*seal*'' any business premises, books or records during the course of an unannounced inspection. This is intended to prevent the possibility of evidence being lost or removed during an inspection. In practice, the Commission does this with a blue plastic adhesive film (with blue and yellow stripes and the yellow circle of stars of the European Union). The seals are made by 3M.

It appears that in May 2006, at the end of the first day of an unannounced inspection relating to alleged anti-competitive practices on the German electricity market, the Commission sealed Room G.505 on E.ON's premises to secure documents collected during the day. However, when the inspection team came back the next day, it found

33. *BR/ESBR* Decision [2008] OJ C7/11 at [315]–[325].
34. Summary of Decision relating to a proceeding under art.81 of the Treaty establishing the European Community (COMP/B/37.766-*Dutch beer market*) [2008] OJ C122/1.
35. Summary of Decision relating to a proceeding under art.81 of the Treaty establishing the European Community (COMP/E-1/38.823-*Elevators and Escalators*) [2008] OJ C75/19.
36. Summary of Decision relating to a proceeding under art.81 of the EC Treaty and art.53 of the EEA Agreement (COMP/38.337-*PO/Thread*) [2008] OJ C21/10.
37. *Arbed SA v Commission of the European Communities* (C-176/99) [2003] E.C.R. I-10687.
38. *Arbed v Commission* [2003] E.C.R. I-10687 at [11].
39. With thanks to Gabriele Accardo for his assistance with this section.
40. IP/08/108, January 30, 2008. A summary of the Commission's Decision is now published in [2008] OJ C240/6, and the full (non-confidential) version is now available on the Commission's website. See also the article by Koch and Schnichels, (2008) 2 *EC Competition Policy Newsletter* 21, 24, referring to a paper by Calvino, ''Public Enforcement in the EU: Deterrent Effect and Proportionality of Fines'', given at the European University Institute, Fiesole, 2006 EU Competition Law and Policy Workshop/Proceedings (Hart Publishing, 2007).

that the seal, although still sticking on the door, was no longer intact. Notably, the seal showed what were apparently the typical indications of a seal breach, i.e. "VOID" signs were visible on the entire surface of the seal and on the underlying surface concerned. There were also traces of glue alongside and on the back of the seal and it looked as if the seal had moved a few millimetres.

The inspection team was not able to ascertain whether the pre-sorted documents stored in the room were still complete, essentially because the documents had not yet been catalogued.

The state of the seal was duly documented in a "breach-of-seal report" and a number of digital photographs were taken of the damaged seal still attached to the door frame (although only some hours after the discovery of the breached seal).

However, E.ON denied that it had broken the seal and suggested various possible explanations for its state; these included that: the seal was old, the seal could have been wiped with and affected by a cleaning product, vibrations, humidity on the seal or lack of adherence to the door.

After a long investigation and much debate (including expert evidence as to what might have happened), the Commission decided that there was no technical malfunction of the seal and concluded that the arguments put forward by E.ON were not valid. As a result, the Commission held that the only explanation for the state of the seal on the morning concerned was that E.ON (or persons within E.ON's sphere of influence) had broken the seal.[41]

Importantly, the Commission also held that the evidence of the breach of the seal could not be put into question by a declaration that a key holder had not opened the door. E.ON had supplied affidavits by the 20 persons who held a key for the sealed room to that effect.

The Commission found that art.23 of Regulation 1/2003 did not require proof that the sealed door had been opened, since the object of art.23 was the breaking of the seal, not the opening of a door.[42] It considered that the whole point of the seal was to avoid issues as to whether or not the door has been opened and/or documents removed.[43]

The Commission also questioned the value of such affidavits in any event.[44] On the facts, the Commission stated that the affidavits were drawn up a year and a half later and did not exclude that others could have used the keys concerned. As a matter of principle, the Commission also noted that an affidavit was just a "unilateral declaration to make certain facts credible" with very limited weight in the current procedure.[45] The Commission also suggested that those concerned were employees of E.ON or in its sphere of influence so might not be perfectly neutral. Nor had the Commission corroboration of the affidavit contents, whereas the Commission had evidence of the broken seal and a possible opening of the door.

This is controversial, since the whole point of an affidavit is that it is a *sworn* declaration of the truth of its contents and they are widely accepted as evidence.

Although the Commission could not prove an *intentional* breach of the seal, the Commission noted that the breach occurred, at the very least, as a result of *negligence*: E.ON was informed of the significance of the seal and the consequences of any breach of it, had control of the relevant building and had the responsibility to ensure that the injunction not to break the seal was respected.[46]

The Commission decided to fine E.ON for this breach. It noted that, in principle, such a fine could be up to a maximum of 1 per cent of E.ON's annual turnover under art.23(1). In setting the fine, the Commission took into account:

- the fact that the breach of a seal is a serious infringement;
- that the fine had to be set so as to effectively deter;
- that art.23(1) had been adopted in order to significantly reinforce the procedural rules (as compared to the lesser sanctions under Regulation 17); and
- the importance of ensuring that the effectiveness of its investigations was not undermined.[47]

On the other hand, the Commission noted that this was the first case where art.23 was applied.

This is a significant development. The fine is huge, especially when it is not clear whether the door to Room G.505 was actually opened (which, given the Commission's approach to the infringement, was not treated as mitigation).[48] The Commission, on the other hand, appears to consider that the fine should be set so that the risk of the *procedural fine* is not less than the related *substantive* one, giving incentives for obstruction of investigations.[49]

Otherwise, one may note the comparison with the Sony obstruction in *Professional videotapes*, where a 30 per cent increase of the base amount of

41. The bulk of the Decision is on this. See, notably, IP/08/108 at [48]–[70] and [74]–[97].
42. IP/08/108 at [98].
43. IP/08/108 at [111].
44. IP/08/108 at [98].
45. IP/08/108 at [98].
46. IP/08/108 at [101]–[103].
47. IP/08/108 at [104]–[108].
48. IP/08/108 at [111].
49. See, e.g. Koch and Schnichels, (2008) 2 *EC Competition Policy Newsletter* 21, 24.

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fine was imposed (as noted, on the facts, some €9.9 million). One must expect further debate on the proportionality of these fines and there may well be a need to clarify the principles and expand the Fining Guidelines accordingly, so that companies can better know what to expect.

Sanofi-Aventis

In the course of the year, the Commission has also noted that it does not have to produce a national search warrant in order to carry out on-site inspections. Apparently, in January 2008, Sanofi-Aventis in France refused to allow the Commission to examine and copy relevant documents until such a warrant was produced (in part of the pharmaceutical sector inquiry). Initially, the Commission announced the opening of proceedings for obstruction based on arts 23(1) and 20(2) of Regulation 1/2003. However, after extensive discussions with Sanofi-Aventis, the Commission stated that it was confident that Sanofi-Aventis now understood its obligations and closed the proceedings.[50]

The Commission also stressed in the *Wax* case, noted above, that search warrants are not required for its on-site investigations.

Commission Decisions/settlements

MasterCard multilateral interchange fees[51]

In December 2007, the Commission decided that MasterCard's multilateral interchange fee (MIF) for cross-border payment card transactions with ''MasterCard'' and ''Maestro'' branded debit and consumer credit cards within the EEA violated art.81 EC.[52]

The Commission held that MasterCard's MIF, a charge levied *on each payment* at a retail outlet when the payment is processed, inflated the cost of card acceptance by retailers without leading to proven efficiencies. It was not illegal ''as such'' but, in the circumstances, did not qualify for clearance under art.81(3) EC.

MasterCard was given six months (until June 21, 2008) to comply with the order to remove the fees or face daily penalty payments of up to 3.5 per cent of its daily global turnover. MasterCard did not do so, but announced on June 12, 2008 that it would temporarily repeal its MIF to avoid such sanctions.[53] It appears that MasterCard is continuing to search for evidence to demonstrate the benefits of a MIF.

It will be interesting to see how this develops. It will be recalled that MasterCard has been negotiating with the Commission for many years on these issues, seeking to justify its system, after notifying the MIF arrangements. There have also been proceedings against MIFs in the United Kingdom and Poland and the issue is linked by the Commission to the creation of the SEPA (Single Euro Payments Area).

VISA

In March 2008 the Commission also announced that it was opening proceedings against VISA's MIF within the EEA for consumer payment cards and the ''honour-all-cards rule'' (which obliges merchants to accept all valid VISA-branded cards, irrespective of the identity of the issuer, the nature of the transaction and the type of card being issued).[54]

It may be recalled that there were previous proceedings on VISA's MIF which led to a reduction in the charge and exemption by the Commission until December 2007.[55]

Groupement des Cartes Bancaires

During the year the Commission also put on its website the full (non-confidential) version of its decision concerning the French *Groupement des Cartes Bancaires*. This was summarised last year.[56]

Collecting societies[57]

In July 2008, the Commission announced a Decision requiring collecting societies in 24 EU Member States to amend reciprocal representation agreements so as not to divide up the European market along national lines.[58] The Decision does not impose any fines.

It may be recalled that the Commission was considering proposed commitments on these issues last year.[59] However, it appears that the market test was negative. More than 80 observations were submitted and the Commission states that market players, even including certain collecting societies which offered the commitments, generally thought they would not be effective. Notably, it is argued that, given the exceptions and conditions

50. MEMO/08/357, June 2, 2008.
51. With thanks to Sophia Lange for her assistance with this section.
52. IP/07/1959 and MEMO/07/590, December 19, 2007. A provisional non-confidential version of the Decision was also made available on the Commission's website. See also the useful article by Repa, Malczewska, Texeira and Martinez Rivero, (2008) 1 *EC Competition Policy Newsletter* 1.
53. MEMO/08/397, June 12, 2008.
54. MEMO/08/170, March 26, 2008.
55. IP/02/1138, July 24, 2002.
56. See Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 2)'' [2008] I.C.C.L.R. 79, 87. See now also Martinez Rivero and Schwall (2008) 1 *EC Competition Policy Newsletter* 37.
57. With thanks to Sophia Lange for her assistance with this section.
58. IP/08/1165 and MEMO/08/511, July 16, 2008.
59. See ''Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 2)'' [2008] I.C.C.L.R. 79, 86.

concerned, nearly no commercial users would have been eligible to obtain a multi-territorial and multi-repertoire licence.[60]

To recap, collecting societies collect copyright fees on behalf of musicians and songwriters who have signed over the rights to manage the copyright of their musical work. These rights are held as a ''repertoire'' by the collecting societies who, in order to offer a broader repertoire, enter into reciprocal representation agreements among themselves collectively to manage the public performance rights of the authors' and artists' musical works.

The decision, prompted by a complaint by the broadcasting group RTL and online music provider Music Choice, prohibits collecting societies from doing three things:

- First, requiring authors and artists to adhere to *membership restrictions* which prevent them from choosing or moving to another collecting society.
- Secondly, entering into *territorial restrictions* which prevent a collecting society from offering licences to commercial users *outside* their domestic territory, notably, an *exclusivity clause* by which a collecting society authorises another collecting society to administer its repertoire on a given territory on an exclusive basis (apparently 17 EEA collecting societies still have such clauses in their agreements).
- Thirdly, a concerted practice among all collecting societies which the Commission found results in a segmentation of the market on a national basis (this is as regards internet, cable and satellite exploitation).

The Commission notes that the net effect is that there is not competition among collecting societies (e.g. on management costs and quality of service) and commercial users such as RTL or Music Choice, which want to offer a pan-European media service, cannot obtain a licence covering several Member States, but have to deal with each individual national collecting society. This is in an era when much verification of (often online) broadcasting can be centralised. The checking of ''offline'', local, exploitation is not covered by the Commission's Decision.

Interestingly, it appears that collecting societies could keep the system of bilateral agreements concerning the internet and cable and satellite retransmission, but had to review ''the territorial delineation of the mandate'' and inform the Commission what they planned to do within 120 days.[61]

60. MEMO/08/511, p.7.
61. MEMO/08/511, p.6.

It will be interesting to see the full Decision. The Commission's announcements so far stress that the position of authors and local repertoires reflecting cultural diversity should not be undermined.[62]

Dutch bricks complaint

It may also be of interest in these times of recession to note that in July 2008, the Commission Ombudsman rejected a complaint by a German company against the Commission's approval in 1994 of the co-ordination between Dutch brick producers to reduce production capacities.[63] The case was called *Stichting Baksteen* and was described in the 1994 journal.[64]

Technical information from car suppliers

It may be recalled that in September 2007, the Commission took decisions accepting commitments concerning access to car repair information from DaimlerChrysler, Fiat, Toyota and Opel. The proceedings were summarised last year.[65] The Commission has now published its Decisions.[66]

Apple/iTunes

In January 2008, the Commission announced that it ''welcomed Apple's announcement that it would equalise prices for music downloads from iTunes in Europe within six months''.[67]

It appears that the UK consumer organisation Which? had complained. Such downloads were 10 per cent more expensive in the United Kingdom than in the Euro-zone, with the residence of a purchaser being checked through their credit card details.

62. In November 2007, the Commission published a summary of its 2006 Decision on the Cannes Extension Agreement, relating to the management of mechanical copyright of music licensed to record companies for the reproduction of sound recordings on physical carriers [2007] OJ L296/2. See also the discussion in Capobianco, ''Licensing of Music Rights: Music Convergence, Technological Developments and EC Competition Law'' [2004] E.I.P.R. 113.
63. Case 1640/2007/GG; available at *http://ombudsman.europa.eu/decision/en/071640* [Accessed January 20, 2009]; see Crofts, MLex, July 31, 2008.
64. Ratliff, ''Outline of Important Developments in EEC Competition Law in 1993'' [1994] I.C.C.L.R. 55, 59.
65. See ''Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 2)'' [2008] I.C.C.L.R. 79, 89.
66. See Decision 2007/788 relating to a proceeding pursuant to art.81 of the EC Treaty (COMP/E-2/39.140-*DaimlerChrysler*) [2007] OJ L317/76; Decision 2007/831 relating to a proceeding pursuant to art.81 of the EC Treaty (COMP/E-2/39.142-*Toyota*) [2007] OJ L329/52; Decision 2007/836 relating to a proceeding pursuant to art.81 of the EC Treaty (COMP/E-2/39.143-*Opel*) [2007] OJ L330/44; Decision 2007/841 relating to a proceeding pursuant to art.81 of the EC Treaty (COMP/E-2/39.141-*Fiat*) [2007] OJ L332/77. See also Clark and Nykiel-Mateo, (2007) 3 *EC Competition Newsletter* 50.
67. IP/08/22, January 9, 2008.

Otherwise, the Commission states that it verified that there was no agreement between iTunes and the major record companies on how the iTunes store is organised in Europe (with different national ''views''). It appears that the structure is chosen by Apple and reflects the country specific aspects of copyright laws.

Article 82/86 EC

Box 4

- **Articles 82/86 EC**
  - — *Microsoft*
    - * €899 million fine for non-compliance with 2004 Decision
  - — *Greek lignite*
    - * Greek state infringing art.86 by extending dominance of publicly owned electricity producer (giving special advantage to cheap lignite through deposits allocation)
    - * N.B. PPC only supplied itself with lignite
    - * Proposed remedy? Allocate deposit rights to others and offer lignite-based electricity production to others?
  - — *E.ON proposed commitments*
    - * Divestiture of generation capacity *and* transmission system business!
    - * Alleged withdrawal of capacity to raise prices
    - * Alleged purchasing from own production affiliate increasing prices

Microsoft[68]

This time last year the author queried whether the Microsoft saga was over with the announced settlement after the CFI's ruling, the question being whether the Commission would *still* fine Microsoft for non-compliance with its 2004 Decision.

The answers are ''no'' and ''yes''! In February 2008, following on from its Statement of Objections in March 2007, the Commission imposed a *€899 million periodic penalty payment* on Microsoft for its failure to provide interoperability information on reasonable and non-discriminatory terms, as required by the 2004 Decision[69] (which was summarised in the 2004–2005 review).[70] In October 2007 the Commission announced that it considered that Microsoft had complied with the 2004 Decision, so this fine relates to the period of non-compliance between June 2006 and October 2007.

Under the 2004 Decision, Microsoft is entitled to charge reasonable royalties for the interoperability information, but is not entitled to charge for purely ''strategic value'' owing to its market power on the client PC operating system market or work group server operating system market.[71] In its latest Decision, the Commission found that Microsoft had charged unreasonable amounts for interoperability information under its ''no patent'' licence.

To reach this conclusion, the Commission applied three pricing principles, which had earlier been agreed with Microsoft.[72] The most important of these were as follows[73]:

- First, with the assistance of its monitoring trustee, the Commission assessed whether Microsoft's *non-patented* innovation claims were actually innovative.[74] For 166 of the 173 claims, the Commission concluded there was ''prior art'' or the so-called innovations were ''obvious''.[75] The Commission did not carry out a similar analysis of Microsoft's *patented* technology, but instead assumed, for the purposes of this Decision and without prejudice to the validity of the patents, that they covered innovative technology.[76] The Commission also emphasised that the term ''innovation'' must be understood, in the context of enforcing the 2004 Decision, to go beyond the mere value of enabling interoperability with Microsoft's products and that the effectiveness of the Decision ''may be hampered if royalties are excessive''.[77] Broad definitions of innovation which are used in a macroeconomic context were not therefore relevant.[78]
- Secondly, the Commission compared Microsoft's proposed royalties with the market value of comparable technology, again

68. With thanks to Cormac O'Daly for his assistance with this section.
69. IP/08/318 and MEMO/08/125, February 27, 2008. The full (non-confidential) decision is on the Commission's website.
70. Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 2)'' [2005] I.C.C.L.R. 109, 118 and ''Major Events and Policy Issues in EC Competition Law, 2005–2006 (Part 2)'' [2007] I.C.C.L.R. 73, 84; see now the Commission's summary published in [2008] OJ C138/10. The non-confidential text is on the Commission's website.
71. 2004 Decision, IP/08/318 at [1008(ii)].
72. IP/08/318 at [111]–[128].
73. The other criterion is that the protocols be Microsoft's own creation, not already in the public domain.
74. IP/08/318 at [169]–[219] and see the 69pp. Annex to the Decision considering the issue.
75. IP/08/318 at [175] and Annex to the Decision.
76. IP/08/318 at [132].
77. IP/08/318 at [135], [136].
78. IP/08/318 at [143].

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excluding any ''strategic value'' stemming from the dominance of these technologies. It concluded that such technology was generally marketed royalty-free.[79]

- Thirdly the Commission also compared the royalties with remuneration rates applied in standard-setting organisations. Microsoft had argued that standard-setting was not an appropriate comparison as participation in standard-setting also generates *non-royalty benefits* (such as cross-licensing).[80] The Commission found that Microsoft could not base arguments on its current licensing incentives as its market position had been achieved through illegally distorting competition. On the contrary:

> ''. . . [T]he appropriate yardstick should be how Microsoft would or other industry players do act if their protocol technologies were or are not the *de facto* industry standard.''[81]

In setting the definitive amount of the periodic penalty payment, the Commission stated that Microsoft had persistently failed to comply with the 2004 Decision before October 2007. During this period Microsoft ''was able to reap the benefits of non-compliance''.[82] The Commission also recalled the need to deter Microsoft and other undertakings from not complying with Commission Decisions.[83]

In principle, the Commission could have applied a €2 million per day periodic penalty payment for the period for June 2006 to July 2006[84] and €3 million per day periodic penalty payment for the period from August 2006 to October 2007.[85] This could have amounted to a total fine of at least €1.4 billion! However, the Commission, taking into account that Microsoft had satisfied the obligation that the periodic penalty payment was intended to enforce[86] and that the decision only concerns non-patented technology,[87] settled on a lower, yet still huge, fine of *€899 million*. Microsoft has appealed the Commission's Decision.

Otherwise, the Commission announced in January 2008 that it was opening *two new investigations into Microsoft's conduct*.[88] One investigation, in response to a complaint by the European Committee for Interoperable Systems (ECIS), concerns alleged refusal to supply interoperability information for Office products, server products and the Net Framework. The second, following a complaint by Opera, a browser vendor, concerns alleged unlawful tying of Internet Explorer to the dominant Windows Operating System.

Greek lignite[89]

In March 2008, the Commission adopted a Decision under art.86(3) EC finding that certain measures taken by the Hellenic Republic as regards the Greek public undertaking Public Power Corp SA (PPC) infringed art.86(1) EC, in conjunction with art.82 EC to the extent that such measures created an *inequality of opportunity* between economic operators as regards access to lignite (which is brown coal).[90]

Lignite was found to be the primary fuel for the production of electricity in Greece, since it was the cheapest. The measures were found to have enabled PPC to maintain or reinforce its dominant position on the Greek wholesale electricity market because it had a low-cost advantage (giving it the ''base load supply'' to the electricity system). This ''extension of dominance'' was an abuse, contrary to these articles. The decision concerned the Greek mainland and islands connected thereto, the so-called ''interconnected system''.

To go into a little more detail: the Commission's intervention was prompted by a confidential complaint. The Decision contains detailed descriptions of the lignite and electricity markets in Greece and Greece's regulatory compliance in terms of liberalisation of electricity. It also appears that there have been state aid issues concerning the allocation of licences to PPC. The Commission noted that virtually all lignite deposits in Greece are owned by the State and that the Greek State decides on the allocation of exploration and exploitation rights for publicly owned deposits of lignite. In principle, such allocation could be by public tender. However, it could also be by specific government decision, which is what had happened as regards PPC.[91]

In various ways the Commission found that PPC received special treatment. The Commission also noted that would-be competitors in the electricity market had been denied permission to build power plants, in part because of concern that they would have inadequate lignite supplies.[92]

The core idea is therefore that PPC has been given a special advantage in access to a cheap fuel input, with the result that PPC can compete more effectively in the electricity market and

79. IP/08/318 at [224]–[237].
80. IP/08/318 at [262].
81. IP/08/318 at [266]–[270].
82. IP/08/318 at [293].
83. IP/08/318 at [294].
84. This would have been under the Commission's art.24(1) Decision of November 11, 2005.
85. Under the July 12, 2006 Decision, which amends the November 11, 2005 Decision.
86. IP/08/318 at [288].
87. IP/08/318 at [297].
88. MEMO/08/19, January 14, 2008.

89. With thanks to Gabriele Accardo for his assistance with this section.
90. IP/08/386, March 5, 2008. The Commission's Decision is on the DG COMP webpage, with a one-page summary at [2008] OJ C93/3.
91. IP/08/386 at [20], [22], [44], [184] of the Decision.
92. IP/08/386 at [77], [211].

competition is distorted on that market. Since PPC has some 85 per cent of the electricity market, that is abusive. Such advantages make it more difficult for others to enter and compete on the electricity market.

PPC was found to have a quasi-monopoly in the exploitation of lignite in Greece. The Commission also noted that lignite-fuelled electricity generation currently represents more than 60 per cent of total generation in Greece. Further, that access to lignite depots is a pre-requisite for PPC's potential competitors in order to diversify their portfolio of fuel and compete in the wholesale electricity market.

Interestingly, the lignite market itself appears to be purely Greek, if not even more local, insofar as lignite is not transported far (usually the related energy plant is built very close to the deposits). It also appeared that there was not much scope for trade in electricity on the interconnectors concerned. However, the Commission construed ‘‘effect on trade’’ broadly to include potential impact on established/market entry (including by the complainants).[93]

The Greek State argued, among other things, that there cannot be an infringement in these circumstances because PPC does not supply lignite to third parties, but as a vertically integrated company, just supplies itself.[94] The Commission's response, based on *IMS Health*,[95] is that it is enough if a ‘‘potential’’ or ‘‘hypothetical’’ upstream market can be identified (and that PPC is at least a potential supplier of lignite to third parties).[96]

Otherwise the Commission states that, on the case law, a Member State infringes art.86(1) EC, in conjunction with art.82 EC if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position,[97] or if inequality of opportunity between economic operators is distorted.[98]

By granting and maintaining the quasi-mono polistic rights of PPC for lignite exploitation and thus privileged access to the cheapest source of generation, the Greek State had reinforced the dominance of PPC in the wholesale electricity market. With those rights, PPC could maintain a quasi-monopolistic share of the downstream market, despite efforts to liberalise and open the market to competition.[99]

93. IP/08/386 at [244].
94. IP/08/386 at [122], [191(b)].
95. *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C-418/01) [2004] E.C.R. I-5039 at [43]–[44].
96. IP/08/386 at [175].
97. Citing *Criminal Proceedings against Raso* (C-163/96) [1998] E.C.R. I-533 at [27]–[29].
98. Citing *Connect Austria Gesellschaft für Telekommunikation GmbH* (C-462/99) [2003] E.C.R. I-5197 at [84].
99. IP/08/386 at [188]–[190].

The result of this is radical to say the least:

- First, the Commission is asking the Hellenic Republic to identify measures to *rectify* the lignite imbalance and has suggested that the rights to certain deposits should now be allocated to others than PPC (unless some of PPC's rights/plants should be reallocated). *Even if there is a public tender, PPC should not be awarded the rights unless no other reliable offer for them is available*. The Commission states that these rights should account for just less than 40 per cent of the exploitable lignite deposits in order to create a level playing field in the electricity market.[100]
- Secondly, the Commission is saying that, insofar as all this will take several years to work through (i.e. for the deposits to be developed as an open cast mine, with a newly constructed power plant nearby) Greece should indicate what measures it will take *within eight months* (or face further Commission action).
- Further, Greece should take transitional measures to promote lignite-based competition in the electricity market in the meantime, for example, through access to lignite-based generation ‘‘available on cost-based terms’’ to future owners of competing plants to PPC. Otherwise the Commission states that this will hold up liberalisation in practice.

In short, the Commission is requiring complex and far-reaching *structural* steps. The issues here are clearly fundamental, involving some of the more difficult principles of arts 86 and 82 EC. PPC has appealed.

E.ON's proposed commitments[101]

In parallel with the Energy Sector inquiry the Commission published, in February 2007, a dedicated study on the ‘‘Structure and performance of six wholesale electricity markets in 2003, 2004 and 2005’’.[102] Germany was one of the markets considered. The Commission also carried out inspections at the premises of E.ON and other German electricity wholesalers in May and December 2006.

Then, in February 2008, the Commission announced that E.ON had ‘‘proposed structural remedies to increase competition on the German electricity market’’.[103] This was, to say the least, a surprise and controversial since at the time Germany was opposing ownership unbundling,

100. See, e.g. IP/08/386 at [236] and [248].
101. With thanks to Eleonora Wäktare for her assistance with this section.
102. Available on the Commission's website.
103. MEMO/08/132, February 28, 2008.

with the meeting on the third liberalisation package the very same day as the Commission's announcement!

In June 2008, the Commission published an art.27(4) Notice asking for interested third parties' observations on the proposed commitments offered.[104]

The Notice is very short and does not really tell us enough to understand what the issues are to which the proposed commitments are meant to be an answer (presumably given confidentiality issues). However, it appears that the Commission carried out two investigations involving E.ON, one concerning the wholesale electricity market in Germany and the other concerning the German electricity balancing market.

The Notice states as regards the *wholesale* case that E.ON is, together with RWE and Vattenfall, collectively dominant on the German electricity wholesale market. The Commission's Preliminary Assessment appears to have expressed the concern that E.ON may have abused its dominant position under art.82 EC by withdrawing available capacity (deliberately not offering the production of certain plants which were available and economical to run) with a view to raising electricity prices to the detriment of consumers; and by deterring third parties from making new investments in electricity generation.

As a proposed commitment, E.ON therefore proposes to divest or grant drawing rights in a number of facilities generating electricity from wide-ranging sources. The total capacity concerned amounts to 5018.9MW, which corresponds to roughly 20 per cent of E.ON's generation capacity.

As regards the *balancing* case, it appears that the Preliminary Assessment considered E.ON to be dominant on the market for secondary balancing energy in the E.ON network area, where E.ON, as transmission system operator, acts as a monopoly purchaser. It appears that the concern has been raised that E.ON may have abused its dominant position by increasing its own costs favouring its own production affiliates and passing on those costs to the final consumers; and by preventing producers from other EU Member States from selling balancing energy into the E.ON balancing markets.

As a proposed commitment, E.ON proposes *to divest the transmission system business* (the 380/220kV-line network, which corresponds to about 10,000km of wires), the accompanying technical equipment, such as interconnectors, switchgears and transformers, *and the system operation of its control area*.

The full commitments, inspired by EC merger control formats, are available on the Commission's website. In both cases, in order to maintain a structural effect, E.ON commits not to acquire any divested business in the next 10 years.

Both commitments are of major importance. The unbundling proposal has been the most publicised. However, generation capacity divestiture is a major development also, since it appears to change the structure of the German electricity market considerably.

It appears that the art.9 commitment decision has not yet been adopted by the Commission. It will be interesting to see what happens. If adopted, it will also be interesting to see how the Commission will argue that the possible competition concerns were of such gravity, that E.ON should divest its *entire electricity network* in the area concerned and 20 per cent of its generation capacity. A separate issue, going more to the political context, is that all this would be by art.9 settlement, rather than full art.7 decision.

Otherwise, the Commission is pursuing various other cases in the energy sector. In May 2008, it *announced that RWE had also offered structural remedies to settle proceedings in the gas sector*. Inspections were carried out in 2006 related to concerns that RWE might be creating obstacles to third party access to the regional wholesale market in its core area of North Rhine Westphalia. The issue appears to have been whether RWE had raised its rivals' costs and prevented new entrants from gaining access to capacity on the gas transport infrastructure. According to a Commission press release, RWE proposes to sell its gas transmission system in the west of Germany to an independent operator once the internal company approvals have been obtained.[105]

In July 2008, the Commission welcomed certain amendments in the contractual framework between *EDF and Exeltium*, a consortium of large industrial electricity consumers in France. It appears members of the consortium will have an opt-out to buy from other suppliers in a long-term contract and certain resale restrictions have been removed.[106]

Distrigas

In December 2007 the Commission published the non-confidential version of its art.9 Decision in this case on its website.[107] The proposed commitments were described in detail last year.[108] Two additional points may be noted.

104. [2008] OJ C146/3.

105. MEMO/08/355, May 31, 2008 and MEMO/07/186, May 11, 2007.

106. MEMO/08/533, July 31, 2008.

107. Summary of Decision relating to a proceeding pursuant to art.82 of the EC Treaty (COMP/B-1/37.966-*Distrigaz*) [2008] OJ C9/8.

108. See Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 2)'' [2008] I.C.C.L.R. 79, 91.

- First, in considering contracts with *tacit renewal provisions*, the Commission states that it took a "conservative approach" and did not consider that they were of indefinite duration. Given that the customers were professional buyers and that gas represented a significant part of their costs, it was assumed they *would* terminate a contract when they were able to do so, if it was in their economic interest.[109] Customers were therefore tied only until the first opportunity they had to terminate the contract.
- Secondly, after *Alrosa*,[110] the Commission includes some two and a half pages addressing *the proportionality* of the amended commitments.

Prokent/Tomra[111]

In August 2008 the Commission published a summary of its 2006 Decision imposing a €24 million fine on the Norwegian Tomra group for abuse of dominant position on the market for supply of so-called "reverse vending machines" (RVMs).[112] The full (non-confidential) version was also placed on the Commission's website.[113]

The following additional points may be noted:

- First, it will be recalled that the Commission stated that, in this Decision, it not only looked at whether the practices in question "tended to restrict" competition, or were "capable of" having that effect. The Commission states that it also looked at "likely" restrictive effects. What that means in practice is that, in its Decision, which is 159 pages long, the Commission lists in detail the agreements and other sales terms which it considers restrictive, with specific sections on "impact"[114] *and* rebuts economic argument by Tomra on rebates.[115] *In addition*, the Commission makes extensive reference to internal emails, notably on Tomra's strategy.
- Secondly, while not saying that Tomra's acquisition of competitors was anti-competitive (Tomra bought two rivals and also sought to buy Prokent),[116] the Commission noted that such acquisitions reduced the chances for the development of credible competition.[117]
- Thirdly, on the facts, the Commission rejected arguments of buyer power (insofar as Tomra often supplied large retail chains). Notably, in this case there was no credible alternative supplier to which customers could turn.[118]
- Fourthly, the Commission found that, taking into account the long lifecycle of the product and irregular demand from the customers' side, Tomra's exclusivity agreements concluded for short periods of time and affecting only a small portion of the demand were also harmful as part of Tomra's overall exclusionary policy.[119]

Other

In April 2008, the Commission published a summary of its Decision in *Wanadoo/Telefónica*.[120]

Sectoral investigations

Pharmaceuticals/generics[121]

In January 2008, the Commission initiated an inquiry into the pharmaceutical sector under art.17 of Regulation 1/2003.[122]

The underlying aim of the inquiry is to investigate the reasons behind: (1) a perceived decline in innovation as measured by the number of novel medicines reaching the market; and (2) instances of delay in entry by suppliers of generic medicines.[123]

According to the Commission, this situation might reflect anti-competitive behaviour such as unlawful agreements to settle patent disputes and artificial barriers to innovative or generic

109. *Distrigaz* Decision [2008] OJ C9/8 at [22].
110. *Alrosa Co Ltd v Commission of the European Communities* (T-170/06) [2007] E.C.R. II-2601; see in particular [98]–[104].
111. With thanks to Gabriele Accardo for his assistance with this section.
112. Summary of Decision relating to a proceeding under art.82 of the Treaty establishing the European Community and art.54 of the EEA Agreement against Tomra Systems ASA, Tomra Europe AS, Tomra Systems BV, Tomra Systems GmbH, Tomra Butikksystemer AS, Tomra Systems AB and Tomra Leergutsysteme GmbH (Case COMP/E-1/38.113-*Prokent/Tomra*) [2008] OJ C219/11.
113. See also Ratliff, "Major Events and Policy Issues in EC Competition Law, 2005–2006 (Part 2)" [2007] I.C.C.L.R. 73, 83.
114. See, e.g. *Prokent/Tomra* Decision [2008] OJ C219/11 at [159]–[166], [271] et seq., [296].
115. *Prokent/Tomra* Decision [2008] OJ C219/11 at [364]–[390].
116. The complainant Prokent went bankrupt (although its assets were then purchased by another company).
117. *Prokent/Tomra* Decision [2008] OJ C219/11 at [186].
118. *Prokent/Tomra* Decision [2008] OJ C219/11 at [89].
119. *Prokent/Tomra* Decision [2008] OJ C219/11 at [287].
120. *Prokent/Tomra* Decision [2008] OJ C83/6.
121. With thanks to Eleonora Wäktare and Janusz Zielinski for their assistance with this section.
122. IP/08/49 and MEMO/08/20, January 16, 2008. See also the specific section on DG COMP's page on the Commission's website and the article by Alfaro Nurcia, Gasparon, Largen, Mische and Van Barlingen, (2008) 1 *EC Competition Policy Newsletter* 45.
123. Commission Decision of January 15, 2008, opening the Sector Inquiry, is available on the Commission's website.

product entry through the misuse of patent rights, vexatious litigation or other means.

For example, the Commission notes that, between 1995 and 1999, an average of 40 novel products were launched per year, whereas between 2000 and 2004 only 28 were launched.[124]

Otherwise the Commission quotes cases like *AstraZeneca*, in which it found that the company had misused public procedures and regulations to exclude generic firms and parallel traders from competing against AstraZeneca's anti-ulcer product Losec.[125] It appears the Commission has also opened proceedings against Boehringer as regards chronic obstructive pulmonary disease drugs.[126]

The inquiry is into prescription medicines for human beings. The Commission also emphasises that it will take account of the regulatory frameworks and is not challenging IP rights. However, it is investigating to see if there are *abusive* practices in relation thereto.

Clearly this is controversial and contested *on the substance*. The inquiry is also controversial *procedurally* insofar as it started with unannounced inspections at the premises of various pharmaceutical companies. The Commission justified this by the highly confidential nature of the information sought and concern that it could be easily withheld, concealed or destroyed. It is understood that there may also be debate about claims of privilege.

The Commission has also sent out two rounds of questionnaires to some 200 stakeholders, ranging from original product manufacturers and generic producers to marketing authorisation authorities, wholesalers, parallel traders and national competition authorities.

The Commission published its preliminary findings and factual data on November 28, 2008 on its website (after this article was prepared). A final report is expected by June 2009.

Policy

"White Paper" on damages actions[127]

In April 2008, the Commission published its White Paper on damages actions for breach of the EC competition rules[128] and sought comments by mid-July 2008. It appears the Commission has had some 170 submissions.

Box 5

- **White Paper on damages actions**
  - — Suggestions to promote damages actions
  - — ''Passing-on'' defence recommended
  - — Indirect purchasers to be *presumed* to have suffered harm
  - — ''Opt-in'' class actions *and* representative actions
  - — Possible privileges for immunity applicants (limited civil liability)
  - — Actual damage, plus loss of profit and pre-judgment interest
  - — Judges to be able to order disclosure of categories of evidence?

The White Paper contains recommendations for legislative action to promote private antitrust enforcement before national courts. The White Paper follows on from the Commission's earlier Green Paper focusing on the obstacles linked to damages actions.[129] Even though several of the following issues are merely linked to cartel cases, the Commission aims to facilitate private enforcement for *all* EC antitrust rules.

The White Paper is accompanied by a more detailed Staff Working Document[130] and an Impact Assessment, explaining the reasons and likely impact of the solutions advocated in the White Paper.

In general, the Paper should be seen as competition advocacy, seeking to persuade the *Member States* to adopt the measures proposed. However, there are a number of aspects which could involve *Community legislation or notices* (which the Commission is also advocating).

The main points appear to be the following:

- First, in its judgments in *Courage/Crehan* and *Manfredi*,[131] the ECJ confirmed that victims of violations of the EC antitrust rules are entitled to seek full compensation in national courts for the losses they suffered. Building on these judgments, the Commission hopes that barriers to damages claims

124. See Alfaro Nurcia at al., (2008) 1 *EC Competition Policy Newsletter* 45, 46.
125. IP/05/737, June 15, 2005.
126. See MEMO/08/20.
127. With thanks to Alexander Israel and Janusz Zielinski for their assistance with this section.
128. COM(2008) 165 final, April 2, 2008. See also the useful summary in Becker, Bessot and de Smijter, (2008) 2 *EC Competition Policy Newsletter* 4; and IP/08/515, April 3, 2008.
129. Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, December 19, 2005; and Comparative Report, Study on the conditions of claims for damages in case of infringement of EC competition, August 31, 2004. See also Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2005–2006 (Part 2)'' [2007] I.C.C.L.R. 73. 92.
130. COM(2008) 165 final, SEC(2008) 404.
131. *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297 and *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04 to C-298/04) [2006] E.C.R. I-6619.

may be worn down through the "principle of effectiveness" (that effective enforcement of EC rights governs if there are conflicting procedural hurdles). However, in addition, the White Paper offers suggestions to facilitate all victims' rights to claim compensation for losses caused by infringements of competition law, while ensuring effective public enforcement.

- Secondly, the Commission emphasises the legal standing of *all persons* harmed by competition law infringements. In other words, stating that this should include *indirect purchasers* and ultimately *consumers*, which can be harmed through the passing on of overcharges resulting from anti-competitive infringements.
- Thirdly, to facilitate claims based on smaller individual losses, the Commission suggests so-called "collective redress measures". In other words, representative actions by qualified entities and "opt-in", rather than opt-out[132] class actions. Qualified entities should be officially designated by the Member States in advance, or certified on an ad hoc basis for individual cases. As possible examples, the Commission lists consumer associations, state bodies and trade associations.
- Fourthly, the Commission is clearly concerned that private actions should not undermine competition authority leniency programmes. The Commission therefore proposes that *corporate statements* submitted in a leniency application *should not be disclosed*, irrespective of whether leniency status is obtained or not. It appears that the Commission also suggests this for *cartel settlement offers*. In addition, *voluntary* disclosures by immunity applicants should be precluded until the Commission has issued its Statement of Objections. For further consideration, the Commission also proposes *a limitation of civil liability* for infringers who are granted immunity status. Thus, only direct or indirect contractual partners of the immunity recipient should be able to claim damages.
- Fifthly, in general, the Commission is critical of the need to show fault (intentional or negligent behaviour) for a damages claim. The Commission also states that in exceptional cases, there should be a way for an infringer to escape liability if he can show that an "excusable error" led to the infringement (e.g. in novel and complex situations). As the standard for "excusable error", the Commission suggests that a reasonable person applying high standards of care could not have been aware that the conduct restricted competition.
- Sixthly, based on the principle of full compensation of losses, the Commission suggests that victims should be entitled to claim the actual loss, directly resulting from the infringement with related loss of profits, as well as (pre-judgment) interest. However, this is *single, non-punitive damages*, not US-style treble damages. To facilitate the often difficult issue of the calculation of damages, the Commission plans non-binding guidelines on calculation methods and stresses that some pragmatism by judges may be required. The Commission has issued a tender for a study on this topic.
- Seventhly, the Commission advocates that defendants should be entitled to use the so-called "passing-on defence", where overcharging has been passed down the supply chain, but suggests that defendants which invoke this defence should be subjected to at least the same standard of proof as required for the damage. Such "passing on" would not, however, affect claims for reduced sales as a result of the overcharge, if made out. However, in the case of *indirect purchasers*, the Commission proposes that there should be a *rebuttable presumption* that overcharges were in fact passed on to them. The reason for this is the lesser incentives of ultimate consumers to bring actions for what often may be smaller amounts of damage.
- Eighthly, in general, the Commission suggests that *the losing party should have to pay the winning party's fees*. However, the Commission encourages Member States, besides fostering settlements, to set court fees at a reasonable level and allow courts to lessen the costs in justified cases. The idea is that such costs risks may deter *valid* claims, but also that they are an accepted filter of *unmeritorious* claims.
- Ninthly, the Commission identifies *access to evidence*, which in most cases is in the possession of the infringer or third parties, as an important obstacle to bringing damage actions. It suggests that there should be a *minimum standard* on the issue across all EU Member States. The Commission therefore suggests that *national courts should be able to order the disclosure of categories of relevant evidence*, where a claimant has presented all the facts or evidence reasonably

132. "Opt-out" class systems allow actions to be undertaken on behalf of a category of plaintiffs which meet a set of defined characteristics. All companies and individuals falling within the definition are included in the action without having express to consent, unless they explicitly decide to leave the class. "Opt-in" class actions require express consent to be obtained of each plaintiff on behalf of which a claim is brought.

available to him and potential harm has been plausibly shown. Further, the claimant must be unable, applying all reasonable efforts, to produce the evidence of which disclosure is sought. Disclosure should be of precise categories of evidence and necessary and proportional in scope. The Commission notes that there are similar ideas in Directive 2004/48 (the Intellectual Property Directive).[133] One may note, however, that there remain difficult issues as to how to deal with the disclosure of confidential information.

- Tenthly, the Commission suggests that the binding effect on national courts of final Commission Decisions on the existence of the infringement should be extended to final decisions of national competition authorities and national courts in cases of EC competition infringements. Further, that this effect should work *in every Member State* (i.e. including other Member States than that of the ruling). The Commission also notes that art.6(1) of Regulation 44/2001[134] explicitly provides for tort victims to be able to cumulate their damages actions against all co-defendants before one court of the country where at least one of them is domiciled.
- Finally, the Commission suggests for stand-alone actions (i.e. not following on from competition authority procedures) that *limitation periods* should not start before the infringement has ended, or before the victim could reasonably be expected to have knowledge of the infringement and the harm it caused him. In the case of follow-on actions, the Commission suggests that the limitation period should start once the decision (on which a follow-on claimant relies) has become final and should last at least two years.

Box 6

- **Other policy issues**
  - — Enforcement priorities for art.82 EC
  - — Online commerce and competition
  - — Revision of Transparency Regulation
  - — Regulation 1/2003 review, various BE reviews and coming EC Vertical Guidelines review

133. Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L195/16.
134. Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

Resale price maintenance

In June 2007, in a case called *Leegin*,[135] the US Supreme Court reversed its approach to resale price maintenance in vertical agreements, so that they should be subject to "rule of reason" assessment, departing from previous case law since a precedent in 1911 had held that such a practice was illegal per se in US antitrust law.

This has led to debate as to whether EC competition authorities should also soften their approach against resale price maintenance, notably in the context of the coming review of the EC Vertical Guidelines. However, at present at least, it appears that the competition authorities are aligning against such change and stating that it is very difficult to show appropriate efficiencies.[136]

Online commerce and competition

In September 2008, Mrs Kroes announced a public consultation on online commerce and competition with a first meeting of celebrities ranging from Bernard Arnault of LVMH to Stephen Jobs of Apple and Sir Mick Jagger.[137]

A variety of issues are raised, some relating to copyrighted material, others more to the question of reconciling internet selling with other forms of distribution.

As regards *copyrighted material*, for example, the issues paper states that the online provision of copyrighted content as digital data files (electronic downloads) is often limited to the territory in which the consumer requesting the service is located. The provision of the same content in physical format is, however, usually not subject to the same territorial limitation.[138] Mrs Kroes invites the consultation group to consider, among other things, the role of collecting societies and direct licensing and whether the absence of a multi-repertoire, pan-European licensing system is impeding the developments of online markets.

As regards *non-copyrighted material*, the paper appears to raise a number of fundamental and topical issues. For example, in exclusive distribution, whether the distinction between active and passive sales is useful in the internet

135. Greenfield, Ohana and Olsky, "The Lessons of Leegin: Supreme Court Overturns 96-Year-Old Ban on Resale Price Maintenance", June 2007, available at *http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3845* [Accessed January 20, 2009].
136. See, e.g. the articles by Crofts in MLex, March 28, 2008 and September 15, 2008; Peeperkorn, "Resale Price Maintenance and its Alleged Efficiencies" (2008) 4(1) *European Competition Journal* 201.
137. IP/08/1338, September 17, 2008 and see Commission website.
138. Issues paper, p.2.

context. Or in selective distribution, whether a producer can require its dealers to have a physical (''brick and mortar'') shop or showroom so that products actually can be experienced, thus excluding ''internet only'' shops. The paper even appears to query intra-group/single undertaking sales organisations where one subsidiary may not sell to customers in other territories served by other subsidiaries. It is suggested that this restricts online sales and the organisation is questioned where there is market power or not.

These are important issues relevant not only to the *collecting society* and *iTunes* cases noted above, but likely also to the Commission's coming review of its Vertical Guidelines.

Article 82 EC priorities[139]

It will be recalled that in December 2005 DG Competition published a Discussion Paper to launch a consultation on the application of art.82 EC to exclusionary abuses.[140] This led to extensive debate, paralleled by a number of orthodox confirmations of the law in the European courts.

Until recently it was uncertain whether or not this consultation process would lead to the adoption of any formal Guidelines. However, in September 2008 at the Fordham University symposium, Mrs Kroes gave a speech on the European Commission's approach to art.82 EC and announced that the Commission would be adopting a ''Guidance document'', at least on its ''enforcement priorities''.[141]

It is an interesting speech:

- First, it appears that progress is advanced. The document has already gone to the EU Member States and the ECN.
- Secondly, Mrs Kroes emphasises that the Commission wants to leave sufficient room for dominant firms to compete on the merits.
- Thirdly, acknowledging the difficulty of assessing the difference between legitimate competition and foreclosure in pricing conduct, she states that the Commission's first *screening of cases* will focus on an ''as efficient competitor'' test: could a hypothetical competitor as efficient as the dominant undertaking meet the prices set by the dominant firm? If yes, the Commission usually should not intervene.
- Fourthly, Mrs Kroes emphasised that, while the Commission will apply an ''effects-based'' approach, it will not always require technical economic reasoning and evidence. (''Economics . . . are a useful servant, but a terrible master!'') The Commission will look for ''likely'' harmful effect, not actual effect and will take into account internal documents evidencing an exclusionary strategy. On the other hand, competitors who are just not as good as the dominant firm would not be favoured.
- Fifthly, the Commissioner stated that she wanted to apply a ''consumer welfare balancing test'' in art.82 EC weighing the negative and positive consequences of the behaviour under scrutiny, in terms of efficiencies. The test, although not provided for by art.82 EC, is seen by the Commissioner both as part of the ''effects-based'' analysis (some effects can be negative and some positive) and as a necessary requirement to put art.82 EC in line with art.81, the latter taking into account efficiencies as a defence. Clearly interesting, not least because this parallels remarks by Advocate General Ruiz-Jarabo Colomer in the *GlaxoSmithKline* case noted in Part 1 in last month's journal.
- Finally, Mrs Kroes emphasised that the Commission is still enforcing art.82 EC hard, with between one-third and a half of its cases having an art.82 EC aspect.

Proposed amendment of Transparency Regulation[142]

In April 2008 the Commission published its proposal for an Amended Regulation regarding public access to European Parliament, Council and Commission documents[143] (currently Regulation 1049/2001; the Transparency Regulation).[144]

Importantly for competition law practice purposes, the Commission proposes to *remove from the scope of the Regulation documents forming part of an administrative file* of an investigation or proceedings concerning an act of individual scope *until the investigation has been closed or the act has become definitive*. Documents with information from natural or legal persons in the framework

139. With thanks to Stéphanie Strievi for her assistance with this section.
140. See Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2005–2006 (Part 2)'' [2007] I.C.C.L.R. 73, 93.
141. See Kroes, ''The European Commission's enforcement priorities as regards exclusionary abuses of dominance—Current thinking'', September 25, 2008, available on MLex; see also *Competition Law International*, October 2008, p.4.

142. With thanks to Janusz Zielinski for his assistance with this section.
143. COM(2008) 229 final of April 30, 2008, available on the Commission's website.
144. Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

of such investigations shall not be accessible to the public.

The idea is that the Transparency Regulation is about legislation, not such proceedings (where more specific rules apply).[145] Under the existing rules it will be recalled that such documents, although *covered* by the Regulation, can benefit from one of the art.4 exceptions, provided that certain conditions (including the lack of overriding public interest) are fulfilled.

Clearly this will be controversial with plaintiffs, but welcome for defendants and is in line with the Commission's general drive to protect immunity/leniency disclosures and not *itself* be a discovery tool for private actions.

145. See Transparency Regulation art.2(6) and also the judgment of the CFI in *MyTravel Group Plc v Commission of the European Communities* (T-212/03) [2008] 5 C.M.L.R. 21.

Other

Finally, the author would note again the reviews described in the ''Legislation'' section in Part 1 (in last month's journal), on the insurance and motor vehicle block exemptions, Regulation 1/2003 and the proposed liner shipping consortia block exemption.