ICCLR

Major Events in EC Competition Law 1995 Part I

JOHN RATLIFF

John Ratliff, Barrister, Stanbrook and Hooper, Brussels, 2 Harcourt Buildings, London

The object of this article is, as in previous years, twofold: First, to give an overview of the main developments in EC competition law in 1995, focusing on Articles 85, 86 and 90 of the EC Treaty but not dealing with merger control or state aid cases.[1] Second, to offer some comments on current policy directions and major events in the year. In general, it has not been a dramatic year either at the European courts or in Commission activities but there have been important rulings. Many await with interest possible policy developments at the InterGovernmental Conference and in relation to distribution.

OVERVIEW OF MAIN DEVELOPMENTS

Main EC legislation and Commission notices

Adopted legislation and notices

- shipping consortia block exemption
  - market share caps
- motor vehicle distribution block exemption
  - franchising block exemption exclusion/ interpretational questions/last time?
- new, detailed Form A/B
- merger control revision package
  - wider notion of concentrative joint venture/no final text on airline or telecoms turnover/new, detailed Form CO
- Notice on Agreements of Minor Importance update
  - ECU300 million
- cross-border credit transfer notice
  - essential facility principles
  - multilateral fee agreements usually in Article 85(1)
- Telecoms Directives (for example on Cable TV)
- Terms of Reference for Hearing Officers

Austria, Finland and Sweden entered EU!

This year's legislative workload in many ways simply carried on from last year. In other words, the shipping consortia block exemption was adopted,[2] the motor vehicle distribution and servicing block exemption was adopted[3] and debate continued on the proposed technology transfer block exemption which has, thus far, still not been adopted. As a result, the patent licensing block exemption has been extended twice. There were, however, new developments on cross-border credit transfers.

The new Form A/B was adopted.[4] The package of revisions to EC merger control which, among other things, amended Form CO was introduced, in general without change.[5] The Notice on Agreements of Minor Importance was updated. The Terms of Reference for Hearing Officers were published.[6] The EU/US Co-operation Agreement has now been amended and readopted by a joint decision of the EU Council and the European Commission.[7]

The shipping consortia block exemption clears various practices of liner conferences, from the joint fixing of sailing timetables to the joint operation of port terminals. The block exemption involves various conditions and obligations, notably that there should be no joint fixing of freight rates, nor agreements providing for the non-utilisation of existing capacity.

The main point of wider interest than the shipping sector is that the block exemption is available only if the consortium in question has a defined maximum share of the direct trade between the range of ports it serves (30 per cent if within a conference, 35 per cent if outside a conference).[8] Interesting, when compared with the Commission's controversial proposals for market share caps in block exemptions (for example in technology transfer). The Commission seems to wish that block exemptions be limited only to cases of clearly effective competition.

The motor vehicle distribution and servicing block exemption was adopted in July. The main developments

The second part of this article will appear in the next issue of this journal.

1 This is a slightly revised version of a presentation given at the IBC Conference in Brussels, 7 to 8 November 1995. The reference period covered is from November 1994 to November 1995. For previous annual reviews, see [1993] 2 ICCLR 56, [1994] 2 ICCLR 55 and [1995] 2 ICCLR 56.

2 Commission Regulation 870/95, OJ 1995 L89/7.

3 Commission Regulation 1475/95, OJ 1995 L145/25.

4 Commission Regulation 3385/94, OJ 1994 L377/28.

5 Commission Regulation 3384/94, OJ 1994 L377/1; Commission Notice on Concentrative and Co-operative JVs, OJ 1994 C385/1; Commission Notice on the Notion of Concentration, OJ 1994 C385/5; Commission Notice on the Notion of Undertakings Concerned, OJ 1994 C385/12; Commission Notice on the Calculation of Turnover, OJ 1994 C385/21. Notably the Notice on the Calculation of Turnover was reduced in scope, leaving out text in difficult areas: air transport and telecommunications.

6 OJ 1994 L330/67.

7 OJ 1995 L95/47; rectified OJ 1995 L131/38.

8 Article 6.

in comparison to the proposed text[9] were two: the duration was shortened from ten years to seven years (notably after criticism from the EFTA Surveillance Authority) and, at the last minute, the Commission introduced a provision stating that car manufacturers could not apply the franchising block exemption to their arrangements.[10] Apparently, the provision was introduced as a result of BMW asking the Commission whether franchising could be used. This is still controversial. Some argue that if the relevant agreements meet the criteria of that block exemption, they should not be denied its use. Others, that to do so would undermine the specific regime for car distribution (for example new positions on multi-make dealers and so on) which has been carefully worked out, taking into account the specific market conditions of car distribution. The Commission's approach has been to deny application of the block exemption, but to note that exemption could perhaps still be obtained on individual notification.

DG IV has since produced a booklet on how to interpret the block exemption which is itself the source of some debate. For example, it is stated in Regulation 1475/95 that a dealer could represent two makes but that in such a case showrooms would have to be in separate premises. The booklet suggests that those premises can be in the same building.[11]

Finally, even as the block exemption was adopted, many have started to look seriously at what may happen if it is not renewed again because there were various comments that this would be the last time. In particular, it appears that the linked clearance of exclusive new car sales rights and exclusive servicing rights may be in issue, especially if market practices develop showing that such a link may not be indispensable, for example if manufacturers own or appoint dealers with large showrooms on the edge of town for sales and separately franchise service centres in different locations (as Daewoo is apparently doing).

The Commission's proposed block exemption on technology transfer has evolved through the year amid two extensions.[12] In January 1995, there was a hearing on the Commission's proposals. An important feature of this was repeated statements by in-house and external counsel as to the very large number of notifications required if the proposed market share caps were retained (market share of 40 per cent or significant shares in oligopolistic markets). By then, the Commission was suggesting that the opposition procedure would be retained after all. In June 1995, the Commission indicated that it would probably drop the oligopoly thresholds, that the market share assessment would occur at the moment of the conclusion of the agreement only (that is taking into account then existing substitutes) and that such assessment would concern the licensee's market share only (not the licensor).[13]

However, criticism of the proposed regulation was still ongoing. Some argued that the reduced blacklist increased uncertainty. The Commission has itself emphasised that 'the exclusion of such clauses does not mean that they are automatically exempted'.[14] If such clauses are included they will still have to be notified or a risk taken as to whether they are violations of Article 85 EC. It was then thought that adoption would be in October 1995. However, this has not occurred and continued opposition to the market share cap has since been seen, apparently both inside and outside the Commission. Last month, it was reported that adoption of the regulation is being postponed again.[15]

In November 1994, the Commission published a draft notice on the application of the EC competition rules to cross-border credit transfer systems. This is based in large measure on the principles set out in the annex to the Commission's 1992 Working Document 'Easier cross-border payments: Breaking down the barriers'[16] and is designed to complement the proposed Council Directive on cross-border credit transfers.[17] The finalised notice has already been adopted.[18]

The notice addresses two main issues: market access and price competition (although there are also provisions on interbank operational standards). As regards market access, the key point is that the notice applies essential facility principles. In other words, where a cross-border credit transfer system constitutes an 'essential facility', it must be open for further membership (as distinct from ownership), provided that candidates meet appropriate, objectively justified criteria (for example on financial standing and technical capabilities). The notice envisages 'indirect' participation in such systems also by the smaller banks which cannot meet a requirement as to a minimum number of transactions. The Commission also explains that such systems, whether or not they are essential facilities, may be capable of exemption under Article 85(3) EC if they prevent individual members from taking part in other systems in order to ensure adequate volume.

As regards pricing, the Commission first stresses that banks must not make agreements fixing the type or level of pricing *vis-à-vis* customers. In a change from the 1992 Principles, the Commission then states that (interbank) multilateral free agreements are usually caught by Article 85(1) EC – notably, if there is limited or no intersystem competition. The Commission's position is that such collectively agreed interbank fees will be capable of exemption only in exceptional cases where such fees are shown to be 'actually necessary for the implementation of certain forms of cooperation, positive in themselves', for example, if the aim is to avoid double charging of the sender and beneficiary when the sender seeks to pay all the charges of the transfer (called an 'OUR' transfer) and provided that the fee is set by reference to the actual costs incurred.

In December 1994, the Commission amended the 1986 Notice on Agreements of Minor Importance, raising the turnover threshold from ECU200 million to ECU300 million.[19] The new Form A/B came into force in March 1995.

9 It may be recalled that, among other things, the block exemption allows advertising outside a dealer's territory, requires the compulsory arbitration of various issues such as dealer targets and gives third party repairers some access to technical information.

10 Article 12.

11 Article 3.3; and 'Distribution of Motor Vehicles', DG IV Explanatory Brochure, at 12.

12 Commission Regulation 70/95, OJ 1995 L12/13; Commission Regulation 2131/95, OJ 1995 L214/6.

13 Letter from Mr J.F. Pons to those offering comments on the Commission's draft regulation, 16 June 1995.

14 1994 European Commission Competition Report, point 115.

15 Europe 6586, 18 October 1995.

16 SEC(92) 621, 27 March 1992. Compare 1993 review, [1994] 2 ICCLR at 65, where similar competition principles in relation to payment cards are outlined.

17 Amended proposal COM(95) 264 final, OJ 1995 C199/16.

18 OJ 1995 C251/3.

19 OJ 1994 C368/20.

Its more detailed requirements were discussed last year.[20] It is a very different exercise to fill it in and far more demanding than the old Form A/B. On the other hand, first signs are that the Commission is achieving its stated objective of a faster reaction time as a result. Further Article 90 directives for telecommunications have also been adopted and put forward.[21]

Proposed legislation and notices

- technology transfer block exemption (still stuck on market share cap)
- further merger control revision?
- Green Book on vertical restraints (renewal of Regulations 1983/83 and 1984/83)
- Notice on Co-ordination with National Authorities
- Notice on Co-ordination with National Courts on State Aids

In terms of imminent legislation or notices, debate has also started on the renewal of the four block exemptions which expire at the end of 1997: on exclusive distribution, exclusive purchasing, R&D and specialisation. In that context, we have been promised a 'Green Book' on vertical restraints which will be discussed further in the second part of this article (in the next issue of this journal). The Commission's thoughts about R&D and specialisation are still awaited. There is also talk of a Commission Notice on Co-ordination with National Competition Authorities and a Notice on Co-ordination with National Courts in the field of State Aids.[22]

Last but not least, Austria, Finland and Sweden joined the European Union as from 1 January 1995, applying the competition rules to the other sectors not dealt with under the EEA Agreement. From DG IV's point of view, the initial impact was that 500 cases moved from the EFTA Surveillance Authority to the Commission from one day to another.[23]

Main European Court cases

In this section, it is proposed to deal with the more important cases from a general point of view. Others on more specific issues, such as *Magill*, procedure or transport issues are referred to in later sections.

In December 1994, the ECJ made an important ruling in the *Danish Cooperatives* case.[24] The case arose as an Article 177 reference from the Østre Landsret (Eastern Regional Court) of Denmark and related to a provision in the statutes of a co-operative purchasing association that members could not also participate in competing associations.

What happened was that certain members of the DLG co-operative ('DLG') started importing certain fertilisers separately, arguing that the products sold by DLG were too expensive. The members formed another co-operative, for that purpose called the LAG. The DLG reacted by forcing the members either to cease their joint activities or to leave the DLG. The LAG members objected on various grounds, notably arguing that they had only started such activities in order to lower prices for fertilisers, that they needed access to DLG for other products, and that DLG's actions were contrary to Articles 85(1) and 86 EC.

The ECJ held that the DLG's prohibition of dual membership was not 'necessarily' a restriction of competition within the meaning of Articles 85(1) and 86 EC. While such a prohibition would discourage members of the co-operative association from obtaining supplies elsewhere, neither article was infringed, provided such restriction was necessary to ensure that 'the cooperative functioned properly and maintained its contractual power in relation to producers'.[25]

In what seems to have been a finely balanced judgment, the ECJ took into account that the LAG had been operating within the DLG and could therefore have access to its trade secrets, that members could still buy outside the co-operative (but not through an organised consortium) and that, 'in the last analysis', even after being excluded from DLG, LAG (which had extended its range of activities) had been able to successfully compete against DLG.[26] Clearly, the ruling could have wider implications for other co-operative and purchasing group rules.

In January 1995, the ECJ overturned the CFI's ruling on the *Net Book Agreements* and therefore annulled the Commission's 1988 decision, which had denied Article 85(3) EC exemption to those agreements.[27]

The Net Book Agreements date from 1957 and lay down standard conditions for the sale of books at fixed prices, subject to certain exceptions (for example second-hand books). Some 75 per cent of books sold in the United Kingdom or exported by British publishers to Ireland are marketed under the agreements. In 1988, the Commission decided that the agreements infringed Article 85(1) EC to the extent that they covered the book trade between EU Member States. The Commission also refused to grant Article 85(3) EC exemption.

In 1989 the CFI confirmed the Commission's decision, rejecting arguments that it was not properly reasoned because it failed to explain why the restrictions concerned were not indispensable to the objectives of the agreements (for example avoiding a decrease in the number of booksellers,

20 1994 review, [1995] 2 ICCLR at 64 to 65.

21 For example Commission Directive 95/51 on the use of cable TV networks for liberalised services, OJ 1995 L256/49; Draft Commission Directive amending Directive 90/388 regarding the implementation of full competition in telecoms markets, OJ 1995 C263/6; Communication by the Commission on the status and implementation of Directive 90/388 on competition in markets for telecoms services, OJ 1995 275/2.

22 The Commission has also stated that it is planning to publish a booklet on how to bring actions before national bodies in competition cases in 1995.

23 See, A. Schaub, 'Competition Policy from a European Perspective', CBI/Baker & McKenzie Competition Conference, 26 September 1995, at 16.

24 *Gøttrup-Klim Grovvareforeninger and Others*, Case C–250/92, judgment of 15 December 1994.

25 Points 35 and 52.

26 Point 43. Contrast the Commission's approach regarding crossborder credit transfers, discussed above, where restrictions to safeguard adequate volume were inside Article 85(1) EC, but exemptible.

27 *Publishers Association v Commission*, Case C–360/92 P, judgment of 17 January 1995.

Main European Court cases

- *Danish Cooperatives* – co-operative purchasing association can prohibit dual membership if necessary for contractual power.
- *Net Book Agreements* – Commission had to consider RPC evidence of positive effects on intra-Community trade before denying Article 85(3) exemption.
- *BEMIM/Tremblay* – *Automec 2* applied to French discotheque royalty cases/Commission could leave complaints to courts after 14 years.
- *Langnese/Schöller* – Commission not entitled to prohibit future outlet exclusivity agreements/conflict with principle of equal treatment.
- *Soda Ash* cases – *PVC (1) (ECJ)* applied; decisions annulled/denial of access to file breach of essential procedure.
- *Magill* (ECJ) – compulsory licensing confirmed where refusal prevented new product on secondary market.
- Cartels – Commission decisions in general confirmed (*Welded Steel Mesh/Dutch Construction* cases)
- *Bosman* – Opinion on football player quotas and transfer fees.

smaller print runs and a rise in book prices). In particular, it was argued that the Commission had not properly dealt with evidence contained in judgments of the English Restrictive Practices Court ('RPC') as to the benefits of the agreements and had only considered effects in the United Kingdom, but not in Ireland. The Commission had also treated the English system as if it were the same as the Dutch system, considered in the *Dutch Books* cases (which it was not).

The ECJ overruled the CFI and held that too little account had been taken of the way that the United Kingdom and Ireland were, in fact, a single language area forming a single market for books. The ECJ stated that the Commission should have considered the argument that the agreements had positive benefits for intra-Community trade (for example the book trade in Ireland) and the related RPC evidence produced. The ECJ also agreed that the reference to the *Dutch Books* case was 'manifestly inappropriate'. That case concerned a collective resale price maintenance system covering all publications – the English system only provided for uniform standard conditions for books which publishers chose to sell as 'net books'. It is an open question as to what will happen now since the Net Book Agreement has, in fact, collapsed in recent weeks.[28]

In January 1995, the CFI made further rulings in the *French discotheques* cases.[29] It will be recalled that an association of discotheque operators, BEMIM, and an individual operator, Roger Tremblay, had challenged the Commission's rejections of their complaints. They had complained that French collecting societies charged unfair royalty levels for playing music and argued before the CFI that the Commission's decisions had only referred to Article 86 EC aspects (not the Article 85 issues raised). Further, that the Commission had wrongly assessed the Community interest by leaving the matter to the French courts. First signs at the hearing were that the CFI was not impressed by the Commission's position, in particular the long time – some 14 years – which the Commission took before rejecting the complaints.

In a judgment following *Automec 2*, the CFI has upheld the Commission's approach. The CFI agreed that the Commission's letters rejecting the complaints had been flawed, insofar as they failed to explain why the Commission rejected the complainants' arguments on Article 85 EC. The CFI therefore annulled the relevant parts of the Commission's decisions. However, the ECJ then ruled the complainants had no right to obtain a decision from the Commission, even if the latter had been persuaded that there was an infringement of Article 86 EC.

The ECJ went on to find that the complaints had been rejected solely because of the Commission's view of the Community interest and then made several findings of wide importance:

(1) The Commission's position that it would not make a ruling on whether there was an infringement did not affect the position of individuals in national courts because the national courts were not bound by the Commission's appraisal of the applicability of Articles 85 and 86 EC.[30]
(2) The Commission was entitled to decide that it would not pursue the case, insofar as the national practices in question were essentially national, with their 'centre of gravity' in France and when similar matters were before a number of French courts and the French Conseil de la Concurrence.
(3) The rights of a complainant would not be adequately safeguarded in national courts, if these courts were not reasonably able, in view of the complexity of the case, to gather the factual information necessary to decide if the practices infringed Articles 85 or 86 EC. However, on the facts there was no specific evidence of this. The ECJ seems to have doubted that the French courts were in such a poor position as the French competition authorities were also involved and the Commission had made available to them a comparative study on pricing levels for discotheque royalties.

28 See *Financial Times*, 27 September 1995, at 16.
29 Cases T–114/92 and T–5/93, judgments of 24 January 1995.
30 Those seeking to sue, 'piggybacking' on Commission decisions may not be pleased with this reminder.

These rulings have been appealed. As they stand they confirm the Commission's position in *Automec 2*. One senses that the ECJ wanted to support the decentralisation process and ultimately decided to overlook the 14-year delay in dealing with the cases.

The ice-cream war has continued again in 1995 before the CFI, which has ruled that the Commission exceeded its powers when it prohibited Langnese and Schöller from entering into exclusive purchasing agreements in Germany for five years from its decisions.[31] These rulings uphold the Commission's basic decisions, one withdrawing the benefit of the exclusive purchasing block exemption from certain agreements of Langnese to the extent that they might qualify for such exemption and the other denying Schöller an individual exemption under Article 85(3) EC. However importantly, the ECJ held that the Commission did not have the power to prohibit these companies from concluding exclusive purchasing agreements in the future.

The CFI held that Article 3 of Regulation 17/62 gives the Commission only the power to prohibit existing agreements which are incompatible with the competition rules. Any reintroduction of a network of exclusive purchasing agreements would only be caught by Article 85(1) EC if these agreements contributed significantly to a closing off of the market. Further 'according to the hierarchy of legal rules' the Commission could not by individual decision limit the effects of a legislative measure such as a block exemption regulation, unless that regulation provided a legal basis for doing so. Although Article 14 of Regulation 1984/83 empowered the Commission to withdraw the benefit of the regulation in relation to an exempted agreement in defined circumstances, that Article did not provide any legal basis for the benefit of a block exemption to be withheld from future agreements. The ECJ went on:

> it would (also) be contrary to the principle of equal treatment, one of the fundamental principles of Community law, to exclude for certain undertakings the benefit of a block exemption regulation as regards the future, whilst other undertakings ... could continue to conclude exclusive purchasing agreements such as those prohibited by the decision. Such a prohibition would therefore be liable to undermine the economic freedom of certain undertakings and create distortions of competition in the market contrary to the objectives of the Treaty.

In *Schöller*, the ECJ's findings were the same – the Commission only had the power to prohibit existing exclusive purchasing agreements which were incompatible with the competition rules.

This is important for at least two reasons. First, it makes clear that the Commission's radical approach to opening up the German market, by totally prohibiting the market leaders from entering into exclusive purchasing agreements, goes too far. Such leading firms can still sign such agreements, either with the benefit of Regulation 1984/83 (provided that they do not make access by other suppliers to the various sales outlets difficult to a significant extent), or if they otherwise meet the conditions of Article 85(3) EC (and notify). The idea is that there should be a level playing field where a lesser number of agreements and/or less restrictive agreements could still be allowed.

Second, the decision suggests that the fact that other competing firms can sign such exclusive purchasing agreements is relevant to whether a leading firm can use them. The point here is that such agreements are viewed as normal competition and only prohibited to the extent that their effects are excessive. It is interesting to see that now on three occasions in the ice-cream war, the general currency of exclusivity contracts in the industry appears to have been a factor for allowing them.[32]

The Commission has suffered further procedural setbacks in cartel cases in 1995. Thus, in June 1995, the CFI quashed the Commission's decisions in the *Soda Ash* cases, which had imposed heavy fines on Solvay and ICI. The CFI ruled that the decisions were void for breach of two types of essential procedural requirement. First, as regards the Article 85 infringements, Solvay and ICI had been denied proper rights of the defence because they had been refused access to the Commission's file. Importantly, the ECJ held that it was not for the Commission alone to decide whether documents were useful to the defence. The Commission had to give legal advisers the opportunity to examine documents and judge their value to the defence.

Second, the Commission's decisions were annulled because they had not been properly authenticated by the President and Secretary-General of the Commission. Apparently the Commission had said in the press that it had not authenticated any decision for some 25 years! The parties noted the point and thereby were allowed to introduce the issue of non-authentification before the ECJ! The ECJ stated that subsequent authentification, after notification to the firms concerned, was not enough. Nor did it matter that there was no discrepancy between the text adopted and that later authenticated. Authentification had to precede notification in the interests of legal certainty and the person affected.[33] In April 1995, the CFI similarly annulled[34] the Commission's *LdPE* decision applying the ECJ's ruling in *PVC I*,[35] that the similar flaws in that decision were not of such 'obvious gravity' that the decision must be treated as legally non-existent.

On the other hand, the CFI on the whole confirmed the Commission's decision in the *Welded Steel Mesh* cartel (albeit reducing some fines on the basis that specific infringements had not been established[36]) and upheld the *Dutch Construction Cartel* decision.[37]

31 *Langnese-Iglo v Commission*, Case T–93; *Schöller Lebensmittel v Commission*, Case T–9/93, judgments of 8 June 1995.

32 Keane J in *Masterfoods v HB Ice-Cream* [1994] ECC 1 at point 227 (freezer exclusivity); the Commission in *Van den Bergh Foods*, discussed below, at point 53 (freezer exclusivity); and the CFI in *Langnese* (outlet exclusivity); compare the 'rule of reason' approach of Lord Wilberforce in *Esso Petroleum v Harper's Garage* [1968] AC 269 at 331 to 333, considering English restraint of trade doctrine; and similar ideas in relation to abuse in *Bellamy & Child*, 4th edn, at §9-042; Goldsmith and Ratliff, 'Rebate and Bonus systems after *Michelin*', [1984] *International Business Lawyer* 431 at 435.

33 *Solvay and ICI v Commission*, Cases T–30/91, T–31/91, T–32/91, T–36/91 and T–37/91, judgments of 29 June 1995.

34 *BASF and Others v Commission and Others*, Joined Cases T–80/89 and Others, judgment of 6 April 1995.

35 *Commission v BASF and Others*, Case C–137/92 P, [1994] ECR I-2555.

36 This case was interesting in part because of interplay with a structural crisis cartel authorised under German law (see, for example *Baustahlgewebe v Commission*, Case T–145/89, judgment of 6 April 1995) and with a decision of the French Competition Commission imposing fines on French companies for similar anti-competitive practices (*Sotralentz v Commission*, Case T–149/89, judgment of 6 April 1995).

37 *SPO and Others v Commission*, Case T–29/92, judgment of 21 February 1995.

Mention should also be made of the CFI's rejection of the challenge by Viho to Parker Pen's group distribution policy, on the basis that Parker Pen's different subsidiaries were not under common control and therefore did not form a single economic unit.[38] Viho objected to Parker Pen's system whereby it required its subsidiaries to restrict distribution to their allocated territories, referred requests for supplies from customers to the local Parker Pen subsidiary and refused to give Viho similar prices and terms to its independent distributors. The Commission rejected its complaint, on the basis that the ECJ's conditions for concluding that there was no agreement between independent economic entities were met. The CFI agreed, noting that the Parker Pen group was a single economic unit within which the subsidiaries did not enjoy real autonomy, since their distribution strategies regarding product ranges, advertising, margins, prices and discounts were centrally controlled.

Finally, for those interested in the application of the EC competition rules to sport, mention should again be made of the *Bosman* case.[39] On 20 September 1995, Advocate General Lenz gave an opinion that:

> 1. Article 48 of the EC Treaty is to be interpreted as prohibiting:
>
> (a) a football club from being able to demand and receive a sum of money, when one of its players whose contract has expired is engaged by another club;
> (b) the access of players who are nationals of another Member State to the club competitions organised by the national and international associations from being restricted.
>
> 2. Article 85 of the EC Treaty is to be interpreted as precluding agreements between clubs and decisions of sports associations whose content is as described at 1(a) or 1(b) above.

If the ECJ follows this opinion, the consequences for foreign quota and transfer fee systems could be dramatic, not only in football but other sports, with a major impact on individual contracts, player values and club balance sheets.

Senior officials in UEFA are already reported to be lobbying for a change to the EC Treaty at the IGC to create a 'sports exception'.[40] Others are already working hard on distinguishing their systems from the Belgian one involved in the *Bosman* case. It will be interesting to see what happens because, from the Juge Rapporteur's report for the hearing, one sensed more sympathy for Mr Bosman's plight – in the face of a boycott of clubs who would not engage him contrary to the UEFA system, rather than concern to keep local teams local – especially when many clubs are so overtly run as businesses, offering leisure services and 'manufacturing' players for sale!

Main European Commission decisions and notices

Cartels and other prohibitions

On 30 November 1994, the Commission imposed a total of ECU248 million in fines on companies and trade associations found to have participated in various anti-competitive practices on the grey and white cement markets.[41] The highest individual fines were ECU32.49 million on an Italian firm, Italcementi and ECU24.7 million and ECU22.8 million on the French companies Ciment Français and Lafarge respectively.[42] In total, some 42 entities were fined.

Cartels and other prohibitions

- Cement cartel
  - no minutes of this meeting!
  - delivered pricing discussion
- New cartel unit
  - prosecution service and/or co-ordinator?
- Code of conduct for compliance and coming forward?
- COAPI
  - minimum scales of charges for Spanish industrial property agents unlawful, despite legislative context
- Danish petrol stations
  - environmental pool for clean-up
  - barriers to site reopening
  - Danish parallel action

The companies and trade associations concerned were found to have participated in various practices:

- an agreement on non-transhipment and the regulation of sales from one country to another within the EU, with practical implementation being pursued through multilateral and bilateral contacts;
- the exchange of pricing information;
- specific agreements on market-sharing (for example on the Côte d'Azur, in the Saarland and concerning trade between Portugal and Spain);
- collective action to stop exports of Greek cement (among other things by using floating cement silos) to the United Kingdom, Italy and other countries; these included 'dissuasive measures' (such as attacking the export markets of producers destabilising the market, called 'stick actions') and persuasive measures (such as buying up the cement in question for export elsewhere, called 'carrot actions'); and
- the establishment of a joint trading company with the object of implementing such actions (although in fact the company remained dormant).

The Commission's decision is long and detailed, some 96 pages of the EC *Official Journal* on the facts alone. As often, there is extensive citation of colourful phrases from documents, such as 'we must establish rules of the game amongst ourselves to avoid improper competition', 'Needless to say there will be no minutes of this meeting' and 'War is pointless. Agreements must be concluded to avoid conflict'.

The Commission has imposed fines based on infringements lasting from 1983 to 1993 (although this is dealt with more specifically for each company) and there are careful explanations on participation and fines, no doubt in anticipation of the appeals which have now occurred. The

38 *Viho v Commission*, Case T-102/92, 12 January 1995.
39 Case C-415/93.
40 See for example *The Times*, 19 October 1995.
41 OJ 1994 L343/1.
42 These related to the grey market, there were smaller, additional fines concerning the white cement market.

decision is somewhat narrower in scope than the allegations originally levied. After the responses to Statement of Objections and the oral hearings, the Commission dropped various objections and proceedings against 12 German and six Spanish undertakings.

There are two points of general interest. First, the Commission has deliberately fined associations and 'associations of associations' to dissuade trade associations in future from taking part in or facilitating restrictive practices (for example CEMBUREAU – the European Cement Association was fined ECU100,000). Second, there is interesting material in the decision on delivered pricing systems. In particular, the Commission describes the basing point system, whereby a delivered price is set using certain agreed base prices to which the cost of the place of delivery from a predetermined basing point is added, not necessarily the place where the seller's factory is located. The Commission notes such systems are outlawed in the United States, yet are officially adopted under the ECSC Treaty. Later in the decision, the Commission notes industry documents suggesting that the basing point system was being considered specifically to 'avoid ruinous competition'. In the context of a Belgian/Dutch notification on such issues, the Commission appears also to have indicated that 'it was considering the possibility that the publication of the delivered prices alongside the ex-works prices could give rise to anti-competitive situations'.[43]

This was the most important cartel case of the year. The Commission is also reported to have started investigations into a possible newsprint cartel, with dawn raids in April,[44] and into the prices for pre-insulated tubes for urban heating in Germany, Austria, Denmark and Finland in June 1995.

Another potentially important development was the creation of a special 'cartel unit' headed by Julian Joshua. This appears to reflect the Commission's renewed commitment to the priority of challenging 'hard core cartels'.[45] It will be interesting to see if this develops into an internal DG IV 'cartel prosecution service' to improve detection and prevent more reversals on appeal or more of a co-ordination unit, since various Directorates deal with cartel cases.[46] The main issue at the moment appears to be limited staff.

The Commission has also suggested that it would establish a clear policy that parties coming forward to the Commission with infringements before these are brought to light would not be fined.[47] Mr Van Miert has spoken of a structured 'code of conduct' which would be proposed for discussion by the end of the year. Presumably, this would, in fact, be of general application, not just for cartels and might not involve incriminating others (although some of the leading examples of co-operation leading to no or reduced fines so far are of this nature and come from cartel cases). If so, it would be a welcome initiative.

In January 1995, the Commission took an important decision prohibiting the fixing of minimum scales of charges by the Spanish Official Association of Industrial Property Agents ('COAPI').[48] The case concerned charges applicable to clients resident in Spain, for services relating to the grant or renewal of industrial property rights abroad, as well as minimum scales of charges applicable to clients resident abroad. The case arose as a result of an informal complaint. It is of interest partly as a further indication of the Commission's drive to apply the competition rules to services. Partly also because the rules in question were adopted in a relevant legislative context, which, as in other cases the Commission carefully distinguished and denied as a defence.

COAPI is a professional association, representing all industrial property agents practising in Spain. Its operation is governed by Spanish Law 2/1974, as amended, which lays down provisions for all professional associations, including placing responsibility on those associations to regulate minimum fees. The general rules of such associations, including their rules on charges and penalties are submitted to the Spanish Government for approval. In addition, Article 36 of the Spanish Constitution lays down that the legal rules applicable to professional associations shall be governed by law. COAPI was established by specific regulations, including two provisions, which governed minimum scales of charges. There were various categories, including specific minimum tariffs for foreign clients (correspondent agents or direct clients). There was undisputed evidence of such scales of charges being increased periodically through COAPI board meetings.

COAPI argued that it is a public service body, not an association within the scope of Article 85(1) EC and that its regulations providing for the minimum charges were part of the laws of the Spanish State. The Commission rejected this, finding that the agents were undertakings and the regulations were 'both an agreement and a decision ... autonomous and separate' from the related Spanish legislation. The minimum scales affected trade between EU Member States, at least to the extent that cross-border services were concerned. The Commission ruled that even if Law 2/1974 specified that professional associations were responsible for regulating minimum professional fees that did not constitute an obligation for them to do so, and noted that the Spanish Competition Court (Tribunal de Defensa de la Competencia) had ruled that the acts of such associations were not administrative acts. The Commission went on to say:

> Even if a State delegates to an association of undertakings power to fix the prices to be applied by its members and, in doing so, commits a breach of Article 3(g), the second paragraph of Article 5 and Article 85 of the EC Treaty, the associations exercise of that power does not escape the application of Article 85 of the EC Treaty.[49]

Those offering international services between EU Member States with minimum or fixed scales of charges, even endorsed by the State, should pay heed – even lawyers. As one commentator put it: 'if there was any doubt, the decision makes it clear that Articles 85(1) and 86 can apply to the

43 At 9, 23 and 25.

44 European Report 2037, 29 April 1995; Europe 6469, 27 April 1995. The industry quickly denied that there is a cartel, see, for example *Wall Street Journal Europe*, 27 April 1995, at 2; *Financial Times*, 27 April 1995.

45 1994 EC Commission Competition Report, points 8, 17, 132 and onward.

46 'European Community Competition Policy', 1994, at 9 (the Commission's new, short annual report, introduced in addition to the usual long version). According to the Competition Policy Newsletter Vol. 1, No. 5, Summer 1995, in a recent DG IV reorganisation, this cartel unit is now attached to Directorate E rather than reporting directly to the Director-General for Competition (compare the Merger Task Force which is also now organisationally within Directorate B, rather than separate to the other Directorates).

47 See for example Europe 6570, 25 September 1995.

48 OJ 1995 L122/37.

49 Point 48.

activities of the (English) Law Society.'[50] The only safe haven for the undertakings would appear to be where the State obliges undertakings to follow scales of charges (and even this may need careful review to ensure that this is not just the endorsement of a pre-existing private agreement).

An interesting case in the environmental protection area this year concerned a Danish 'environmental pool' to distribute funds for cleaning up polluted petrol station sites.[51] In 1992, the Oliebranchens Faellesrad (organisation of Danish oil companies) notified an agreement creating such a pool and laying down certain rules for obtaining funds. The pool is financed by contributions from members calculated on the basis of quantities sold. Under the scheme, it was possible for a petrol station owner to apply to the pool and, if his request was accepted (after the pool had consulted with the regional authorities on the risk of pollution), funds were provided for the clean-up.

However, site owners who received funds for a clean-up were restricted from reopening a petrol station on the same site within ten years. If the site owners wished to reopen a petrol station on a cleaned-up site, they had to reimburse the pool for the actual costs and pay a further DKr.250,000 by way of 'risk premium' (according to the parties so as to prevent speculative applications to the pool).

The Commission was concerned about four aspects of the scheme:

(1) the 'risk premium' payment which it considered liable to restrict competition (by deterring reopening);
(2) that the selection criteria for cleaning up existing stations should be based entirely on environmental considerations;
(3) that the cost of clean-up should be fair and reasonable, among other things, so as not to deter reopening after clean-up;
(4) that the system should not be operated so as to unduly induce independent petrol stations to withdraw from the market.

The Danish competition authorities had similar concerns. As a result, the environmental pool abandoned the risk premium payment. However, site owners wishing to reopen a petrol station still had to reimburse the pool for the clean-up and related administrative costs and to take adequate insurance against the risk of future pollution.

The Commission then closed the file, the Danish authorities having indicated that they reserved the right to intervene again if the pool in practice restricted competition – another interesting example of co-operation between the Commission and national authorities, showing how their roles can be complementary.

Joint ventures

Probably the most important development as regards joint ventures this year was the Commission's decision to widen the scope of 'concentrative' joint ventures.[52] This was welcomed by most, insofar as the relevant clearance procedure should be faster and the substantive issue should usually be easier to comply with.[53] It remains to be seen whether this change in approach will in fact prove easier to apply or whether it is in line with the ECJ's case law.[54]

Joint ventures

- new Commission approach to concentrative joint ventures
- high technology cases
  - *Olivetti Digital*: purchasing commitment versus increased dissemination of Alpha AXP technology
  - *Fujitsu AMD/Semi-Conductor*: flash memories/sales territories
  - *Saint-Gobain/Asahi*: bilayer products/30 years' co-operation reduced to five
- Telecoms
  - *Atlas*: a case of companies or governments? Proposed clearance if alternative infrastructure liberalised
  - *Mobile Satellites*: Commission jurisdiction and requests for information. Issues of dominance, access and sales territories

From the point of view of individual decisions, mention should be made of the following technology-related cases. In *Olivetti Digital*[55] the Commission exempted a technological co-operation agreement. Digital undertook to provide Olivetti with its Alpha AXP ('RISC') technology, used in computers to increase processing speed and also agreed to continue to purchase Intel-based PCs from Olivetti for its European operations. In return, Olivetti undertook:

(1) to use the Alpha AXP technology for its computer platform offerings and related software for five years (save as regards one line of products using Intel-type microprocessors);
(2) to purchase Alpha AXP components up to specified proportions of its requirements/or to agreed values; and
(3) to purchase from Digital $70 million worth of other computer system products.

Digital also bought 8 per cent of Olivetti's share capital and was given a proportional representation on Olivetti's Board of Directors.

The Commission cleared Olivetti's technological commitment to Digital, Digital's share stake and also its board representation as outside Article 85(1) EC, finding, in the circumstances, that these did not allow Digital to take control of Olivetti or have access to strategic information facilitating anti-competitive co-ordination.

The Commission found that Olivetti's purchasing commitments restricted competition in supplies to Olivetti and also between Digital and its licensees of Alpha AXP

50 *European Union News*, Issue 2, February 1995, at 8.
51 1994 European Commission Competition Report, at 454.
52 Commission Notice on the Distinction between Concentrative and Co-operative Joint Ventures, OJ 1994 C385/1, especially points 8, 17 and 18.
53 Whether a dominant position is created or strengthened, as compared to a general appraisal of the pro- and anti-competitive effects of the joint venture under Article 85(3) EC; usually one month review as against often years!
54 For example *Philip Morris*; *BAT Reynolds v Commission*, Cases 142 and 156/84, [1987] ECR 4487. For example, at the IBC conference, it was suggested by a speaker (and agreed by a Commission official present) that a distinction should be made between co-ordination at the moment of creation of the joint venture, subject to merger control appraisal, and later co-ordination concerning the activities of the joint venture, to which Article 85 would apply, even though the actual co-ordination in issue might be the same.
55 OJ 1994 L309/24. In fact, Digital subsequently sold its shares.

technology. However, the Commission considered that these restrictive effects were outweighed by the positive advantage of increased dissemination of Digital's technology in Europe and that there was no risk of competition being eliminated because there were alternative technologies on the market. The case was heralded as an important 'strategic alliance' for European industry in the global market-place.

In *Fujitsu AMD Semi-Conductor*,[56] the Commission cleared a joint venture established in Japan by Fujitsu Ltd and Advanced Micro Devices Inc. to produce semiconductor wafers with certain types of 'non-volatile memory'. The wafers, called EPROMS and 'flash memories', are then incorporated as chips into equipment or memory cards.

The main interest of the case lies in the fact that each parent was allowed a non-exclusive sales territory (active sales right) in the European Union, in the areas where they already had an established infrastructure (Fujitsu, the United Kingdom and Ireland, AMD the rest of Europe) for the initial start-up period of the joint venture, that is five years from first commercial sales in the EEA. Otherwise, sales by the joint venture itself (up to 10 per cent of production) were restricted to certain Asian countries, a restriction which was found not to be appreciable on the facts. The Commission was again influenced by the benefits of a dissemination of new technology – here, a new generation of semiconductors – and accepted that introduction of the new product would be assisted by using the parents' established sales strengths.

In *Saint-Gobain/Asahi*[57] the Commission cleared joint R&D agreements between these companies for 'bilayer products', mainly for the manufacture of safety glass for car windshields. The Commission accepted that motor vehicle windshields using this technology (laminating mineral glass with polyurethane film, as opposed to conventional laminated glass) would add considerably to safety protection. The firms were found to have complementary know-how and experience. However, the original agreement provided for a 30-year period of co-operation. This was too much for the Commission, which required the parties to shorten it to five years from the date of commercial production in the Community and at the latest 2005 (in line with Article 3 of Regulation 418/85).

Finally, mention should be made of two points from recent telecoms joint venture cases. The most remarkable case is *Atlas*.[58] This is a joint venture between France Telecom and Deutsche Telekom to offer advanced, value-added telecoms services internationally and team-up with Sprint in a worldwide global alliance, *Phoenix*. At first sight, the deal would appear difficult to clear (to say the least) in the light of the parties' domestic monopolies, control of infrastructure and overlaps in their services. In short, the joint venture may be expected to increase each party's dominance in its home territory.

However, after a long battle, it appears that the deal may now be cleared next year on certain conditions:

(1) the parties are to hold their data transmission activities (Transpac and Datex-P) separate from Atlas until liberalisation in 1998;
(2) France Telecom is to sell Info AG, an important competitor of Datex-P in Germany;
(3) the French and German Governments have agreed to liberalise alternative infrastructure use for telecoms by 1 July 1996 and confirmed that they will liberalise all telecoms services and infrastructure by 1998;
(4) FT and DT will be subject to undertakings in relation to issues such as cross-subsidisation; all Atlas and Phoenix entities to be distinct from the parent entities and subject to regular auditing;
(5) FT and DT also undertake to maintain access to their public switched data networks on a non-discriminatory, open and transparent basis and to ensure non-discriminatory access through appropriate standard interconnection.[59]

The Commission has also sent requests for information to two mobile satellite systems, GlobalStar and Iridium, apparently concerned about basic issues such as dominance, access and exclusive sales territories.[60]

It will be seen that a great many joint venture cases these days are in these 'high-tech' and telecoms areas (save for the odd chemicals restructuring)!

Distribution

The main topics of the year in the field of distribution are the motor vehicle block exemption and the proposed 'Green

Exclusive distribution
- *Tretorn*
  - export ban
  - ECU600,000 fine
  - Swiss jurisdiction
  - tennis balls
- *BASF L&F*
  - export ban
  - ECU2.7 million fine
  - car paint product

Selective distribution
- *Chanel*
  - only if 20,000 inhabitants or substantial tourist trade
- *Sony PEDA*
  - only if wholesalers included ...

Exclusive purchasing
- *Irish ice-cream*
  - Commission 'reorientation'
  - inclusive pricing ended
  - 1,750 freezers sold off
  - hire purchase option
  - freezer exclusivity retained
- *Beer*
  - Commission request to OFT to investigate differential pricing

56 OJ 1994 L341/66.
57 OJ 1994 L354/87.
58 European Report 2076, 18 October 1995; the Commission is also investigating the AT&T/Unisource alliances, see IP/95/288.
59 IP/95/1138.REV. The Commission's approach to the case will be discussed further in the second part of this article.
60 IP/95/549.

Book' on vertical restraints discussed elsewhere in this article. However, there has still been a steady flow of important decisions.

As regards export bans, in *Tretorn*,[61] the Commission imposed a fine of ECU600,000 on a Swedish group and four fines of ECU10,000 on distributors for practices designed to prevent parallel exports in tennis balls. The most interesting feature of the case is, perhaps, the way that restrictions to the *Swiss* market are caught (on the basis that they prevented Swiss dealers from buying in one Member State and selling in another).[62]

The Commission has also imposed a fine of ECU2.7 million on BASF, Lacke & Farben[63] and ECU10,000 on its exclusive Belgian distributor Accinauto, for preventing the exportation of glasurit, a car refinish paint product, to the United Kingdom. It is reported that Accinauto had stopped supplying two parallel importers after a request from BASF's UK subsidiary Coatings and Inks. The Commission carried out a dawn raid and discovered that Accinauto was bound contractually to refer all orders from customers outside its territory to BASF, Lacke & Farben.

As regards selective distribution, the Commission has indicated that it intends to clear a selective distribution system for luxury watches sold under the Chanel brand name.[64] Chanel made various changes to the agreement it had originally notified, providing for admission based on objective criteria and establishing an admission procedure. Chanel decided not to assign an exclusive territory to its concessionaires but still requires them to be established in a town with over 20,000 inhabitants or with a substantial tourist trade. Chanel also abolished an export ban outside the European Community in respect of all EFTA countries, including Switzerland and all countries which have concluded free trade agreements with the Community.

The Commission has now also cleared the Sony Pan European Dealer Agreement for consumer electronics but only after requiring Sony to admit wholesalers to the network. Sony were also required to organise an independent arbitration procedure for any retailer or wholesaler refused admission to the network and to give written justifications for refusals to supply the contract products.[65] Finally, 'in order to justify the selectivity of sales by mail', clauses were introduced in the related Mail Order Dealer Agreement, allowing for home delivery with a trial period free of charge for goods bought by mail order.

61 OJ 1994 L378/45.

62 One distributor was not fined. It had argued that a fax it sent concerning parallel exports had been a complaint about Tretorn offering lower prices to other distributors and further collaborated with the Commission, confirming the existence of an 'unwritten but actual' prohibition on exports. Territorial issues are also raised in the context of car leasing in the ECJ's recent rulings in *BMW and ALD Autoleasing*, Case C-70/93 and *Bundeskartellamt and VW, VAG Leasing*, Case C-266/93, judgments of 24 October 1995. The court ruled that leasing companies which do not offer an option to purchase to their customers were not generally to be considered resellers of new motor vehicles within Regulation 123/85 but final users. Manufacturers could not therefore prohibit sales to such leasing companies operating with customers outside a dealer's territory. Dealers could also not be required to act as exclusive agents for a manufacturer's leasing company.

63 European Report 2057, 12 July 1995; Europe 6522, 14 July 1995; IP/95/746.

64 OJ 1994 C334/11.

65 European Report 2057, 12 July 1995, IP/95/746.

As regards exclusive purchasing, in March 1995 the ice-cream war in Ireland between Mars and Unilever took a new direction, as the Commission 'reoriented' its proceedings against HB Ice-cream (a Unilever subsidiary, now trading as Van de Bergh Foods Ltd). It may be recalled that Keane J had ruled in the Irish High Court in May 1992 that HB Ice-cream's requirement of 'freezer exclusivity' (that is that shopkeepers given a freezer to stock and sell HB ice-cream could not put competing brands in it) did not infringe Article 85 EC.

However, the Commission had disagreed and in July 1993 sent HB Ice-cream a Statement of Objections on the issue. This caused a considerable storm because it thereby appeared to undermine the Commission's policy of decentralising enforcement to the national courts.

A compromise settlement has now been worked out. The Commission has accepted the legality of freezer exclusivity, which HB Ice-cream will continue. However, HB Ice-cream has made certain changes to its distribution arrangements, mainly meeting other Commission concerns. In particular, that HB Ice-cream was 'inclusive pricing', including the cost of freezer provision and maintenance irrespective of whether retailers actually took its freezer.[66]

The main changes are:

(1) HB Ice-cream introduced a differential pricing scheme, whereby retailers stocking HB Ice-cream but not taking an HB Ice-cream freezer were paid a lump sum provided that the retailer achieved a minimum annual turnover with HB Ice-cream. The sum reflected the purchase and maintenance cost savings to HB Ice-cream in not supplying a freezer to the retailer.

(2) HB Ice-cream introduced an optional hire purchase scheme enabling retailers to buy their own freezers at the wholesale price HB Ice-cream paid for them, with an obligation not to put competing products in the freezer during the repayment period, which was to be over a maximum of five years. During that period Unilever maintains the freezer but in the repayment period the retailer qualifies for the differential pricing lump sum, less a charge for that maintenance.

(3) HB Ice-cream agreed to sell off during 1995 and 1996 some 1,750 'front-of-shop' freezers (some 10 per cent of its total stock) with a 'useful remaining life' to retailers. This is viewed by the Commission as a means of achieving a substantial freeing up of outlets in the short term.

The new distribution arrangements were notified to the Commission. In the light of these changes the Commission indicated that the arrangements appeared 'at first view' to meet the conditions of Article 85(3) EC exemption and has published an Article 19(3) notice accordingly.[67] Unilever has also undertaken to introduce differential pricing schemes in all other EU Member States.

This is another interesting stage in the ice-cream war. Not surprisingly, in its notice the Commission does not directly take issue with Keane J's ruling, which was strongly influenced by respect for HB Ice-cream's property rights. However, in its Press Release the Commission argues its position is consistent with Community law even if property

66 Commission Press Release IP/95/229, 15 March 1995.

67 OJ 1995 C211/4.

rights are restricted in the public interest.[68] The Commission also noted that the practice of freezer exclusivity is widely employed by ice-cream manufacturers and distributors throughout Europe, both by Unilever and by many of its competitors.[69] Views may still be split on the legality of freezer exclusivity but for the moment at least it has survived.[70]

Finally, it is reported that the Commission's investigation into UK beer supply has been suspended since the Commission has asked the OFT to examine differential pricing by Courage as between Inntrepreneur tied houses and independent pubs.[71] At times therefore, the Commission–national authority relationship is more co-operation than conflict!

PROCEDURE

Apart from the new Form A/B, there are relatively few big issues on procedure this year. For present purposes, mention should be made of four points. First, that AKZO was fined ECU5,000 for failing to submit to an investigation in relation to its activities on certain salt markets[72] (a story of refusal of admission to offices in different places in the Netherlands).[73]

Second, in November 1994, the CFI rejected a challenge by the Scottish Football Association[74] which argued that the Commission had unlawfully adopted an Article 11(5) decision, requiring the association to provide information. The Commission had sent the association an Article 11 letter requesting information about contacts between the Scottish and Argentinian football associations in the context of a complaint by the European Sports Network, TESN, that the association was intending to prevent it from broadcasting Argentinian football matches in Scotland. The association had not supplied the information requested but had offered to meet the Commission to discuss the matter. It also suggested that 'the Commission need not be troubled about an exchange of correspondence between two fraternal associations ...'! The ECJ held that the Commission was entitled to treat this as a refusal to co-operate and proceed to the formal decision.

Third, in December 1994, the *Postbank* case moved into another phase.[75] This time, the bank successfully obtained an order from the President of the CFI suspending a Commission decision which authorised two companies to produce in national legal proceedings the Statement of Objections and minutes of a hearing related to Article 85 EC proceedings. The President considered such disclosure an 'extremely delicate question', taking into account the preliminary nature of a Statement of Objections and issues of confidentiality and business secrets.

Finally, as already noted the Commission published revised Terms of Reference for Hearing Officers.

In the second part of this article, John Ratliff will discuss:

- **New Policy Directions:**
  - proposals coinciding with the InterGovernmental Conference for (1) EC Commission Merger Control if multiple national filings are required, (2) a decentralisation of Article 83(3) powers to national authorities, and (3) a European Cartel office;
  - a possible rethink of the Commission's approach to distribution;
  - the current status of EU/US co-operation and new US International Guidelines
- **Competition and IPRs:** the ECJ's ruling on compulsory licensing in *Magill*, clearance of ETSI's revised standardisation policy and the EU/US settlement over *Microsoft's* licensing practices
- **Transport issues:** ranging from further essential facility cases in ports, to third party access to railway links and airport landing fees

68 IP/95/229, at 2.
69 OJ 1995 C211/4, at 10.
70 Exclusive purchasing is also raised in the food sector in *MD Foods/Forenede Dansk Brugsforeninger (Competition Policy Newsletter*, Vol. 1, No. 5, Summer 1995, at 11). A retail chain undertook to buy more than 90 per cent of its milk requirements over five years from the largest Danish dairy producer. After negotiations, these percentage levels were reduced to a descending scale from 70 per cent to 30 per cent. (Compare also *UCB Almirall. Competition Policy Newsletter*, Vol. 1, No. 3, Autumn/Winter 1994, at 15).
71 IP/95/104.
72 OJ 1994 L294/31.
73 See also, *Groupement des Cartes Bancaires v Commission*, Case T-275/94, judgment of 14 July 1995. Commission entitled to charge default interest for non-payment of a fine from the day on which it first became payable, even though the fine may have been subsequently reduced.
74 *Scottish Football Association v Commission* Case T-46/92, judgment of 9 November 1994.
75 *Postbank v Commission*, Case T-353/94 R, Order of 1 December 1994.

ICCLR

Major Events in EC Competition Law 1995 Part II

JOHN RATLIFF

John Ratliff, Barrister, Stanbrook and Hooper, Brussels, 2 Harcourt Buildings, London

POLICY DIRECTIONS

InterGovernmental Conference, Article 85(3) and national authorities

InterGovernmental Conference – institutional issues

- Merger control threshold reduction?
  - ECU2 billion WWT; ECU100 million CWT?
  - another subsidiarity concept for multiple jurisdictional filings?
- Article 85(3) to national authorities?
  - not now, but later (enabling provision?)
  - 'convergence criteria' to meet first?
  - decentralise cases with main effect in one Member State (proposed notice)
  - more efficient Commission, but limited resources
  - can you delegate half of the enforcement powers?
- Eurokartellamt?
  - 'competition policy is not neutral, it's politics'
  - should the decision-taker be the policy-maker and legislator (*Atlas*)?
  - combined 'public' and 'private' roles of the Commission: a weakness or a strength? Would you divide these roles?
  - transparency

In 1996, as most will know, there will be an InterGovernmental Conference ('IGC') whose main objective is to review institutional issues after enlargement, the development of common foreign and security policy and the issue of co-operation in the areas of justice and home affairs.

Officially therefore, as the Commission points out, competition is not on the main agenda but is only a side issue. Nevertheless, there *is* an institutional competition agenda because the merger control thresholds come up for review again and because others wish it.

Merger control threshold reduction

There are three main issues. First, should the EC merger control thresholds be lowered and if so, how? The Commission's desire for lower thresholds, set at the level of a worldwide turnover of ECU2 billion and a Community-wide turnover of ECU100 million, is well-known. In the last two years, the Merger Task Force has been carefully preparing its case for a lowering of the thresholds, notably with questionnaires to industry and lawyers reviewing what level to seek and why. Such parties are, in general, in favour of a lowering of the thresholds because the prospect of a one-stop-shop in Brussels is very attractive in comparison with the difficulties which can occur with multiple jurisdictional filings. This is something which has become even more complicated in recent years as more EU Member States adopt competition laws which include merger control.

However, the core debate remains the institutional balance between centralised powers in Brussels and subsidiarity in the Member States and the issue as to who will have control over the related industrial policy. Some argue that the merger control thresholds should be kept high, precisely because that would permit issues of local competition policy to be dealt with locally. It is said that this is the best way to take account of the differences in market structure between the larger EU Member States, such as France and Germany, and those countries where higher levels of concentration have developed for specific reasons (notably, Scandinavian countries with geographically large, numerically small markets where high levels of concentration are frequent).

A related issue is whether there could be a variation in the current provisions of Article 9(7) of the Merger Control Regulation concerning the referral of cases back to Member States. Some argue that lower thresholds *could* be accepted, if Member States could have wider powers to request cases. Others counter that this paragraph has already been the subject of intense negotiation over the years and should therefore be left strictly as it is.

Another idea is to leave the current thresholds where they are but introduce another subsidiarity concept for cases *below* the normal thresholds but with Community impact. In other words, where multiple filings are required under national competition laws, for reasons of efficiency it would be better if there were one competent decision-making body which could be the Commission. Again, this is attractive to industry and lawyers to the extent that it reduces the compliance burden. It may also be more politically acceptable, focusing as it does on resolution of a real practical problem for business, rather than a perceived political gain for Brussels.

Decentralisation: Reform of Regulation 17/62

The second issue is whether Regulation 17/62 should be reformed. The issue has already been debated hard in recent years. Should the Commission continue to have a monopoly over Article 85(3) EC exemption or should it share those powers with national authorities? There are fundamental issues of efficiency involved. For many the target is to move away from a few Commission decisions, supported

Part I of this article appeared at [1996] 1 ICCLR 6.

by many comfort letters, in favour of more EC decisions taken both in Brussels and in the national authorities (and in the national courts) and less informal clearances.

The Commission has been taking all these issues seriously, as indeed it must because many national competition authorities are in favour of a sharing of Article 85(3) EC powers. In the 1994 Competition Report, the Commission explains that various meetings have been held between the national authorities and the Commission in 1994 on decentralisation issues. The Report suggests that there is a divergence between the Member States as to how to deal with the issue of when Community and national competition laws should apply and equally as to whether national authorities should apply Article 85(3) EC. It is suggested that, at present, the division of powers laid down in Article 9(1) of Regulation 17/62 should therefore not change.[1]

On the other hand, the Commission explains that it is preparing with national authorities a new notice on co-ordination between the Commission and national authorities, which is meant to be a parallel to that concerning the Commission and national courts. The notice is therefore designed to allow national authorities to proceed with cases as far as possible and to limit the effect of defensive notifications in Brussels, which block further national proceedings. The main idea of this notice is that national authorities should handle clear enforcement cases (Articles 85(1) and 86 EC) whose main effect is in a single Member State[2] but that the Commission would retain its monopoly of Article 85(3) EC exemption. As in the co-ordination notice with national courts, the Commission would, however, be available to give appropriate information on the status of its procedures and so on.

This may help. It may, among other things, encourage some national authorities to enforce these provisions – not all do (being busy enough already!). Not all have the enabling legislation to do so. However, in general, there is doubt whether this approach is adequate because one still comes back to the problem that the Commission is trying to decentralise enforcement without a proper delegation of the full package of relevant powers. This form of decentralisation should still 'boomerang' back to the Commission in, one would think, the relatively high number of cases where Article 85(3) EC issues are raised.

It may be of interest to mention proposals which were put forward in a meeting of the German Competition Law Association in Brussels in May 1995.[3] At this conference, there was a panel discussion involving Dr Ehlermann and the heads of the French, Italian, German and UK competition authorities. The first point of interest was that these four national 'Directors General' were all in favour of national authorities applying Article 85(3) EC powers.

Second, having regard to the need for cohesion both in the application of EC law and parallel national competition laws, some suggested that there should be some sort of EMU-style 'convergence criteria' before such a decentralisation could occur. The idea was that provision should be made in the EC Treaty for the EU Council to devolve such powers to national competition authorities, when and if the Member States had reached the same levels of competition law and enforcement.[4] Some Directors General clearly felt that they already had the relevant laws and competence to apply Article 85(3) EC. It was noted, however, that there are still some national competition laws which are not yet based on Articles 85 and 86 principles (for example Denmark, Netherlands and the United Kingdom – although all three have reforms in view).

Some might view this as a stalling tactic, to the extent that it is put forward by the Commission. However, some Member States were also clear advocates of such a 'convergence' approach.

One should also recognise that there are two approaches in play – decentralisation in favour of national competition law enforcement, where it is relevant how developed the national competition laws are and decentralisation of the enforcement of the EC rules including exemption powers, where the law exists already throughout the EU and the main issues are whether each Member State has suitable resources and how to organise a suitable division of labour and/or cohesion in such decisions.

The important thing is to decide the primary objective. That objective should be to ensure that there is a greater level of enforcement than is currently achieved through DG IV's limited resources and the limited number of cases that can be pursued as private actions.

One should give credit to the Commission for having reduced a considerable backlog in recent years. In the last Competition Report, the Commission indicated that in 1987 it had some 3,427 cases open, whereas at the end of 1994 it had only 1,052,[5] a reduction of over two-thirds. But that is still a great many cases. The Commission still registered 392 new cases in 1994 and has just received a large pile from the EFTA Surveillance Authority. In short, even giving credit to DG IV for having become more efficient, one has to consider whether fully decentralised enforcement is not advisable.

A 'Eurokartellamt'?

The third institutional issue on the competition agenda is whether there should be a 'Eurokartellamt'.[6] The main question is whether the Commission, which is already the prosecutor and administrative tribunal for competition matters, should also be the policy maker. Would it be better for DG IV simply to be applying the rules to individual cases without, at the same time, trying to engineer the direction of competition policy?

A classic illustration of the issue has arisen this year in the context of *Atlas*.[7] As explained earlier, the Commission was

1 1994 European Commission Competition Report, point 40.
2 See, 'European Community Competition Policy' (the Commission's new, short annual report at 23) and compare the 'centre of gravity' ideas put forward in the *BEMIM* and *Tremblay* cases, discussed in Part I of this article, at [1996] 1 ICCLR 9 to 10.
3 *Studienvereinigung Kartelrecht, XVI Internationales Forum für Eüropaisches Wettbewerbsrecht*, 11 and 12 May 1995.

4 A variation would be that the EU Council and the Commission should have to jointly initiate the change. Dr Ehlermann has also suggested an 'enabling clause' for a European Cartel Office, discussed below. See, for example Ehlermann, 'Reflections on a European Cartel Office', [1995] 32 CML Rev. 471.
5 At 620.
6 It has also been suggested that the ECSC Treaty should be repealed and the special rules for the coal and steel sectors rationalised into the general rules of the EC Treaty. Another practical issue is increased funding/staff for DG IV given its increased workload after enlargement.
7 See Part I, at [1996] 1 ICCLR 14.

faced with a joint venture between telecoms monopolists in France and Germany. Some argue that there are industrial policy arguments for the creation of a European 'super-carrier' for telecommunications – the European match for the American firm, AT&T. However, this also involves allowing two dominant entities in neighbouring geographical markets to combine. That combination should also enhance their domestic positions where they currently face no competition because there has not as yet been any liberalisation or privatisation there. Liberalisation for France and Germany is currently not due until 1998 and real competition cannot be expected to develop for a while after the relevant directives have been implemented.

In this context, instead of just saying 'no' to the notification concerning the Atlas joint venture, the Commission has preferred to leverage on the French and German Governments' desires to push the joint venture through now and has obtained commitments that those governments will liberalise alternative infrastructure in 1996. Leaving aside for the moment questions as to whether Mr Van Miert actually made a good deal, the wider issue is whether the Commission should be engaged in serving its wider policy objectives in this way – actually forcing a change to market conditions in order to give clearance to a specific joint venture between companies. Should the Commission not, as administrative tribunal and decision maker, simply have denied clearance to Atlas, leaving the parties to come back for clearance when and if the proper conditions for competition in their respective countries had been established?

These are difficult issues. The Commission enjoys a unique position, being empowered to take on Member States as well as to decide specific cases. Mr Van Miert emphasises two points. First, that 'competition policy is not something neutral, it is politics',[8] which may be true, at least for the 'big' cases with which Mr Van Miert will be involved, like *Atlas/Phoenix*. However, it is less true for the ordinary rank and file Commission decisions, involving medium-sized companies. Dr Wolf in the Bundeskartellamt also argues, with some force, that insofar as the Commission acts as a legal tribunal, there should neither be such politics, nor such a difference between the large and small cases.

Second, Mr Van Miert stresses that European competition policy involves more than just taking decisions in individual cases. He suggests that what would happen is that a European Cartel Office would only have the 'private business' cases involving Articles 85, 86 EC and merger control, while the 'public' cases, involving Article 90 and state aids and legislation/policy would stay with the Commission. As such, the unified concept of European competition policy, rooted in its broader Community context, would be lost and that policy ultimately weakened.[9] In other words, the perceived political weakness of competition policy enforcement should be viewed as its strength.

There is some force in this. It makes some sense to suggest that the combination of the decision-making and policy-making roles of the Commission work to the advantage of both functions. However, a problem remains – 'transparency' – because it is not clear that the political level of negotiations is procedurally fair to the parties. On the other hand, few would want the long procedures of say, the UK system with an MMC inquiry after the OFT one. One must also recognise that even in other national competition systems, political factors often come into play, as the competition authority 'decision' needs the approval of the relevant Economics Minister.

A 'Green Book' on vertical restraints

Green Book on vertical restraints

- what is the current state of European distribution?
- market analysis in vertical restraints/only intervene if market power, cumulative foreclosure
- are block exemptions OK? (with or without market share caps)
- 'hard core' infringements
- 'just in time' practices and buyer power
- Regulation 1983/83 and agents?
- 'macro' concept for EC rules

During the year a new catchword has entered EC competition law jargon – the 'Green Book'. This means a discussion paper and appears to borrow from Anglo-Saxon legislative practice of 'Green Papers'. A Green Book should, in principle, lead to a 'White Paper' or draft legislation. At present, a Green Book on vertical restraints has been promised for the beginning of 1996. What is likely to be in it? There is much speculation.

The main ideas seem to be the following: First, to take a close look at the current state of distribution in the different EU Member States in order to see what changes may be required. Notably, there has been some discussion as to whether the Commission needs to do something about the concentration of purchasing power and there is talk of a need to modernise in line with new 'just in time' supply practices.

Second, to consider whether the current framework of EC intervention is the right one. Here, the accent is on 'refocusing' the EC rules, so that the Commission only intervenes if, after a market analysis, it considers that there are anti-competitive problems. In other words, where a network of exclusive distribution agreements leads to cumulative foreclosure of the market. On this 'structural approach', only vertical restraints by firms with market power would fall within Article 85(1) EC. A critical issue may, however, be to distinguish between the Commission's enforcement thresholds and redefining the law, insofar as the Commission has to act within the framework of the relevant European court judgments. It has been suggested that the Commission might have a related notice setting out its enforcement priorities.

Third, to revisit the whole idea of block exemptions, in favour of a system where agreements would *only* become notifiable if the parties concerned have a certain level of market share (say 25 per cent), or in favour of a general regulation setting out black-listed clauses. Here the Commission seems to be listening to suggestions that block exemptions focus too much on the legal form of

8 Europe 6393, 7 January 1995.

9 See Van Miert, 'The Competition Policy of the New Commission', *Studienvereinigung Kartellrecht*, 11 May 1995 and A. Schaub, 'Competition Policy from a European Perspective,' CBI/Baker & McKenzie Competition Conference, 26 September 1995.

arrangements, although such regulations are also seen as administratively practical for all concerned.[10] There is also talk of a framework regulation for all block exemptions, setting out general rules which would govern the particular block exemptions.

Fourth, to refocus Commission priorities another way, essentially leaving the block exemptions intact, but continuing to develop 'hard core' or *per se* type rules in relation to serious infringements: resale price maintenance and, because of the goal of an integrated market, absolute territorial protection. It seems a little early for the Commission to abandon intra-brand concerns in favour of pure inter-brand ones. Certainly, enforcement practice in this area shows little sign of being on the wane (as *Tretorn* shows).

Fifth, there is talk of a general block exemption or notice on selective distribution, designed to clarify and consolidate the extensive case law in this area and perhaps remove the need for the sectoral block exemption for motor vehicle distribution.

Hard text is still awaited. There was a conference on vertical restraints in April 1995 touching on many of these issues, the papers of which will apparently be published shortly.[11]

At a less ambitious level, one may also note that there are at least three other pressing, if more technical, issues on the agenda:

(1) whether to build in the position of independent agents to the exclusive distribution block exemption, so as to provide a more consistent structure for agency and distribution and remove one problem with the Commission's proposed agency notice;
(2) whether to update these regulations with opposition procedures; and
(3) whether to redefine the target of the regulations – notably insofar as block exemptions apply both to the national wholesaler agreements and more local dealer agreements (many of which are now governed by local, perhaps differing competition block exemptions).

US/EC co-operation and the new US International Guidelines

US/EC co-operation and new US International Guidelines

- 'Direct, substantial and reasonably foreseeable' effect on US exports/controversial jurisdiction, but claimed
- OECD and bilateral co-operation/confidentiality waiver issue

The object of this article is to focus on EC competition law. It may therefore be asked why a reference to American law should be made. The answer is twofold: First, it is important to emphasise that some European infringements may also fall foul of the US anti-trust laws. This is becoming increasingly relevant as markets become more international. There are also various examples of US restrictions on exports to the EU in recent cases.

In this context, it should be noted that in April 1995, the US Department of Justice and the Federal Trade Commission issued new, updated 'Anti-trust Enforcement Guidelines for International Operations' ('the International Guidelines'). These explain, notably, that in appropriate cases, US agencies may take enforcement action against anti-competitive conduct, wherever occurring, that restrains US exports, if (1) the conduct has a 'direct, substantial and reasonably foreseeable effect' on exports of goods or services from the United States and (2) the US courts can obtain jurisdiction over persons or corporations engaged in such conduct (for example where the defendant has minimum contacts with the United States).[12] In deciding whether to enforce US anti-trust laws, the US agencies take into account international comity and foreign sovereign compulsion.

This jurisdiction is controversial, above all because of its emphasis on unilateral action by the US agencies and the way international comity and foreign sovereign compulsion are narrowly construed. Some see the guidelines as a tool for trade policy. However, the message for European companies is clear. There is a claimed US 'extra-territorial' jurisdiction based on effects doctrine which could include EC activities.

Second, the US International Guidelines give much emphasis to the development of competition law enforcement in various parts of the world and the related increase in international co-operation. It is suggested that the US agencies are prepared to work with foreign authorities, if they are better situated to remedy the anti-competitive conduct in question and if they are prepared to take action under their own laws to address US concerns. Such action may, in some cases, be a reason for inaction in the United States.

In practice, this should mean more notifications between OECD countries under the 1986 OECD Recommendation[13] and pursuant to specific bilateral agreements, such as the EC/US Co-operation Agreement. In this context, it may be interesting to note that 36 notifications were received by the Commission under the EU/US Co-operation Agreement in 1994 (the US side of the agreement continuing uninterrupted) and 128 have been received in total since the co-operation started. Notifications under the Agreement were suspended after the European Court's ruling that the act concluding the Agreement was void but requests for information continued under the 1986 OECD Recommendation. There were 28 notifications in all by the Commission[14] in 1994. The Commission sent 103 notifications to the US authorities in total up to the end of 1994. The majority of notifications on both sides related to mergers and acquisitions.

The main practical issue remains the point that confidentiality laws limit the amount of information which can be exchanged, unless the parties are willing to waive confidentiality provisions and to co-operate with a joint

10 See Mr Schaub's speech cited at Note 9 above.

11 See Laudati, 'The First European Competition Forum: Vertical Restraints', *Competition Policy Newsletter*, Vol. 1, No. 5, Summer 1995, at 7.

12 Foreign Trade Anti-trust Improvements Act 1982, subsection 1(B), the International Guidelines, at 12, 16, 17 and 30. Examples given are joint action to induce distributors not to carry US products or the development of standards excluding US technology.

13 Point B.4 of the Revised Recommendation of the OECD Council concerning Co-operation between Member Countries on Restrictive Business Practice Affecting International Trade, 21 May 1986.

14 1994 European Commission Competition Report, point 413.

investigation.[15] This is what occurred in *Microsoft* outside the EU/US Co-operation Agreement.

COMPETITION AND INTELLECTUAL PROPERTY RIGHTS ('IPR'): COMPULSORY LICENSING AND STANDARDS

Competition and IPR: compulsory licensing and standards (again)

- *Magill* (ECJ) – reservation of secondary market abusive despite copyright.
  - *Commercial Solvents* approach: raw material, basic information/a case of discrimination or an indirect attack on Anglo-Saxon copyright? Or more equity than principle?
  - (But *Lederle-Praxis Biological*)
- *Microsoft* – *de facto* standard dominance, EU/US settlement not enough for Sporkin J because did not pry open the market after illegal restraints.
- *ETSI* – advance commitment to license essential IPR for standard abandoned.

The main 'event' of the IPR year was a non-event: the fact that the Commission was not able to adopt the new technology transfer block exemption. In a sense, it is a pity because, market share caps aside, it *would* be useful to merge the patent and know-how block exemptions.

In April 1995, the European Court gave its long-awaited ruling in the *Magill* case.[16] The Court decided to uphold the CFI's confirmation of the Commission's decision and therefore disagreed with Advocate-General Gulmann's opinion that the decision should be annulled.

It may be useful to briefly outline the background. Magill was an Irish company which attempted to publish a comprehensive, weekly television guide in Ireland with details of BBC, ITV and Irish programmes. At the time, no such guide was available on the market, whether in the Republic of Ireland or Northern Ireland. Each television channel published a guide covering exclusively its own progammes and claimed copyright protection for its weekly programme listings. However, each channel provided daily listings and allowed 'highlights of the week'. When Magill attempted to launch its guide, it was faced by injunctions prohibiting publication (and recognising copyright in the listings).

After a complaint by Magill the Commission intervened and ruled that BBC, ITP and RTE (the companies responsible for the listings and publications) had infringed Article 86 EC. The Commission held that the firms held legal and factual monopolies of the information produced as a result of the TV companies' broadcasting activities, which information was required to produce a derivative product, namely television guides. The firms had abused those dominant positions in order to give themselves an unfair advantage in the derivative market, the television guides being highly lucrative. The BBC, ITP and RTE had thereby prevented the emergence of a new, competing product – the comprehensive guide. The firms were ordered to supply third parties with advance weekly programme listings on a non-discriminatory basis and to permit reproduction thereof, which, if through licences, should be on reasonable royalties.

There were parallel OFT proceedings in the United Kingdom with the result that such guides have now been available there for some time, even though the Commission's decision was suspended through an interlocutory action in 1989. The ongoing issue has been concern that the Commission's decision is a precedent, requiring the owner of intellectual property rights to grant compulsory licences in certain circumstances.

The CFI upheld the Commission's decision. While noting that the exercise of the exclusive right to reproduce a protected work was not in itself an abuse, the CFI held that this was not true when it was apparent that the right was being exercised in order to pursue an aim manifestly contrary to Article 86 EC. In that case, copyright was no longer exercised in accordance with its essential function which was to protect the moral rights in the work and ensure a reward for creative effort. The CFI had, in particular, clearly disliked the way that the BBC, ITP and RTE authorised publication of information in various ways but specifically not where there would be competition to their own 'downstream' derivative products.

On appeal, the firms concerned were supported by interveners and argued, among other things:

- that the restriction of competition in issue was the very essence of the copyright held;
- that on *Volvo v Veng*[17] the exercise by an owner of exclusive intellectual property rights, in particular his refusal to license, could not in itself be an abuse;
- that in the absence of Community harmonisation of copyright, national copyright laws can only be defined by national legislation, not the application of Article 86 EC; and
- that the Commission's reasoning based on an abuse of *factual* monopoly was an 'artificial construct' to use competition law to change the specific subject-matter of copyright.

The European Court agreed with the CFI's decision. The Court first confirmed that BBC, ITP and RTE were in a dominant position as a result of their *de facto* monopoly of the 'basic information' used to compile listings. The Court then noted, citing *Volvo v Veng*, that the exercise of an exclusive right by the proprietor may 'in exceptional circumstances', involve abusive conduct. The abusive conduct here was the reliance on copyright covered by national law to prevent Magill publishing, on a weekly basis, information, together with comment and pictures obtained independently of the firms.

15 See the International Guidelines, at 23 and the EU Council's Exchange of letters cited in Part I, at [1996] 1 ICCLR 6, emphasising that the Agreement does not permit the Commission to derogate from its obligations on confidentiality in Regulation 17/62 and the conditions when the Commission would inform Member States on the implementation of the Agreement.

16 *RTE and ITP v Commission*, Joined Cases C–241/91 P and C–242/91 P, judgment of 6 April 1995.

17 Case 238/87, [1988] ECR 6211.

The Court then went on to apply a *Commercial Solvents*[18] approach: the firms were the only sources of the 'indispensable raw material' for compiling a weekly television guide, they gave viewers no choice but to buy their weekly guides and prevented the appearance of a new product for which there was a potential demand:

> [the firms] by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on the market ... since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.[19]

Relying again on *Commercial Solvents*, the European Court held that the Commission had the power under Article 3 of Regulation 17/62 to require the firms to provide the information, with the payment of royalties as appropriate.[20]

This result has clearly been a source of much renewed debate.[21] Could, for example, third parties now seek diskettes of telephone guides[22]? Some are now wondering if they have to organise so that 'monopoly material', whether copyright or not, could be made available at various stages along a production process, *if* there is a demand! But it is clearly still difficult to say how many slices should be available for secondary markets and when an owner is allowed just to focus on its target end-product.

Others argue that the European Court's judgment should be construed narrowly as influenced by at least two factors: first, that the infringement was more a question of discrimination than anything else – the calculated act of the firms in licensing some but not others in order to protect their 'downstream' products. Second, that the whole saga has reflected a negative view of the Anglo-Saxon, broad notion of copyright which includes not just reward for creative effort but reward for hard toil. Further, some argue that the judgment is still not radical in impact because the circumstances were so exceptional. Practically, the computer software, publishing and media industries (and indeed all IPR owners) have little choice but to take note and to try to work out where they stand on a day-to-day basis!

It may be a partial relief to some to note that the Commission sometimes takes a different view of IPR. In *Lederle-Praxis Biological*,[23] a vaccines case, the Commission stated:

> at the current stage of EC Competition law, it is highly doubtful whether one could impose an obligation upon a dominant firm ... as a remedy to ensure the maintenance of effective competition ... to share its intellectual property rights with third parties, to allow them to develop, produce and market the same products which the dominant firm is seeking to develop, produce and market ...

It may also be useful to briefly mention the *Microsoft* settlement on which there were developments on the American side during the year and which is now described in detail in the 1994 Competition Report.

In June 1993, the Commission received a complaint from Novell, the world's second largest personal computer ('PC') software company alleging that Microsoft's licensing practices foreclosed competitors from the market for PC operating systems software, contrary to Article 86 EC. Interim measures were sought. The Commission investigated the complaint and found[24] that there were basically three layers of software which could be installed on a PC and which constituted separate markets:

(1) the disk operating system ('DOS');
(2) a graphical user interface ('GUI'); and
(3) application software (for example for word processing, spreadsheets, and so on).

The Commission noted that operating systems software is generally distributed by Original Equipment Manufacturers ('OEMs') such as IBM and Olivetti, which preload their PCs with licensed software, thereby offering the end-user a package of hardware *and* the most commonly used software (for example Microsoft's DOS 'MS-DOS' and GUI 'Windows') for which thousands of application softwares have been developed.

The Commission considered that Microsoft's products could be considered a *de facto* industry standard because the vast majority of all PCs were shipped with a pre-installed version of MS-DOS and Windows. Microsoft's market power was derived therefore from its compatibility to hardware and the availability of application software. The main barriers to entry were the existence of IPRs and the fact that Microsoft's systems had become *de facto* industry standards – of great appeal both to manufacturers and end-users.

The Commission found that through its policy pricing, rebates and the licensing of its software, Microsoft effectively foreclosed the European market for PC operating software. In particular, the Commission challenged:

- the use by Microsoft of 'per processor' and 'per system' licences, that is clauses requiring payment of a royalty on every computer produced by a PC manufacturer or in a particular model series, regardless of whether a particular computer is shipped with pre-installed Microsoft software; it was argued that such provisions effectively forced OEMs to buy all their needs from Microsoft;
- the use of 'minimum commitments' in such licences, that is requirements that licensees pay a minimum amount of royalty to Microsoft, regardless of actual use of Microsoft products; and
- the duration of Microsoft's licences.

Since the US authorities were investigating similar concerns, Microsoft actively promoted the exchange of information between the Commission and the Department of Justice. These then negotiated jointly with Microsoft resulting in an undertaking from Microsoft to the Commission and a parallel draft US consent decree. Novell also dropped its complaint.[25] Under the six-and-a-half-year undertaking:

- Microsoft was not to enter into licence agreements with a duration of more than one year;

18 Joined Cases 6/73 and 7/73, [1974] ECR 223.
19 Point 56.
20 Points 90, 91.
21 For example, R. Greaves, 'Magill Est Arrivé', [1995] 4 ECLR 244 and the articles quoted therein.
22 See now also the Draft Commission Directive on full competition in telecoms markets, OJ 1995 C263/6, which provides that Member States should abolish exclusive rights for directory services (Article 4(b)).
23 1994 European Commission Competition Report, at 410.
24 *Ibid.*, points 197, 200, 206, 208; at 442 and IP/94/653.
25 It should be noted that since the 1991 EU/US Co-operation Agreement was under appeal at the time this co-operation was independent therefrom and *ad hoc*.

– Microsoft was not to impose minimum commitments on licensees and not to use per processor type licences in future.
– per system licences were allowed, but only if licensees could clearly *not* buy Microsoft products if desired and avoid royalty payments in such cases;
– existing licences which were contrary to these provisions were not to be enforced and could be terminated.

The Commission considered this a victory insofar as it opened up the market for PC operating systems software and a major example of EU/US co-operation. However, subsequently in 1995 there was a hiccup, since the US federal court with jurisdiction over such cases rejected the proposed US settlement![26] In *USA v Microsoft Corp.*,[27] Judge Sporkin held that the proposed decree was not in the public interest, because among other things:

– the proposed decree was too narrow: for example it would not apply to operating systems to be developed for new microprocessors;
– the proposed decree would be insufficient to effectively pry open to competition a market that had been closed by Microsoft's illegal restraints; and
– the decree failed to provide an adequate compliance or monitoring mechanism.

The Commission stated that this did not affect the European side of the deal and has noted that Microsoft has complied with its undertaking.[28] It is understood that Judge Sporkin's judgment has since been overruled on appeal.

In similar vein, it may be of interest to see the sequel to the *ETSI* standards case, discussed two years ago.[29] In March 1995, the Commission issued an Article 19(3) notice indicating its intention to clear the IPR policy of ETSI (the European Telecommunications Standards Institute). It will be recalled that this Institute has as a task to establish common European standards in the telecommunications sector and has various categories of member, including public network operators and manufacturers.

In 1993 ETSI developed an 'Interim IPR policy' designed to prevent the blockage of new standards by members owning IPR essential to a standard it was developing. Members had, in effect, to agree in advance to allow their IPRs, if deemed 'essential' for an ETSI standard, to be included in that standard, unless the IPR owner identified IPR which it wished to withhold within six months of ETSI deciding to include it in the draft standard.

This was known by some as a 'licensing-by-default' obligation and differed from practice in other standard bodies where IPR holders had to explicitly agree to include their technology in a standard. In addition, the related ETSI 'IPR Undertaking', which members *had* to sign, required that:

– the terms of the essential IPR licence granted be for monetary compensation, with the maximum royalty rate notified by the IPR holder to ETSI; and
– that non-exclusive licences be granted covering the whole area of the European Conference of Posts and Telecommunications Administrations, as well as associate members such as Australia.

In 1993, CBEMA (the Computer and Business Equipment Manufacturers Association) filed a complaint with the Commission alleging that these IPR arrangements amounted to a compulsory licensing scheme contrary to Articles 85 and 86 EC. In 1994, ETSI notified the IPR arrangements to the Commission, but, in the light of its comments, abandoned the IPR undertaking and revised the IPR policy.

It is this revised IPR policy which the Commission has now proposed to clear.[30] Under the revised policy:

– Each member has to use its reasonable endeavours to inform ETSI of 'essential IPRs' of which it becomes aware, in particular, if it submits a technical proposal for a standard. An 'essential IPR' is one which a manufacturer would have to have, in order to be able to meet a particular standard.
– If a member notifies ETSI that it is not prepared to license an IPR in respect of a standard, ETSI first looks for a viable alternative, but if it can find none, work on the standard ceases.
– It is agreed that IPR holders are entitled to be 'adequately and fairly rewarded' for use of IPRs in standards.
– When an essential IPR is identified, ETSI requests the owner to give an undertaking in writing to grant irrevocable licences on 'fair, reasonable and non-discriminatory terms' and 'conditions to manufacture, sell, lease or otherwise dispose of equipment so manufactured'.
– If licences in respect of a standard are not available from third parties, ETSI may decide not to recognise the standard. The interim policy, in effect since November 1994, is to be reviewed after four years.[31]

TRANSPORT ISSUES: SHIPPING, PORTS AND TUNNELS

In May 1995, the Commission took a further decision applying essential facility doctrine to port access, this time concerning ferry services between Ireland and Morlaix in Brittany.[32] There were some confusing press reports at the time but what appears to have happened is as follows.

Irish Ferries applied to the French authorities to start services between Ireland and Brest in Brittany. To do so would have required the construction of a new jetty, which was however not authorised by the relevant authorities.[33] Irish Ferries then turned to the port of Roscoff, operated by the Chamber of Commerce and Industry of Morlaix. There were initial negotiations and in December 1994, Morlaix agreed that Irish Ferries could offer services in Roscoff for

26 *Competition Policy Newsletter*, Vol. 1, No. 4, 1995, at 24 to 25; see now also reports that the Commission and the Department of Justice are concerned about the way that Windows 95 was launched, including an on-line service called the Microsoft Network (MSN) which will give access to on-line information systems for an extra charge; European Report 2050, June 1995.
27 Civil Action 94-1564; decision of 14 February 1995.
28 *Competition Policy Newsletter*, Vol. 1, No. 4, Spring 1995, at 24.
29 1993 Review, [1994] 2 ICCLR, at 63.

30 OJ 1995 C76/5.
31 The Commission also plans to clear agreements involving plant breeders' rights and strict territorial restrictions in *Sicasov*, OJ 1995 C95/8.
32 [1995] 5 CMLR 177; European Report 2042, 17 May 1995; 2045, 31 May 1995. See also on essential facility doctrine, Temple Lang, 'Defining Legitimate Competition: Competitor's Duties to Supply Competitors and Access to Essential Facilities' 18 *Fordham International Law Journal* 437.
33 It is reported that this refusal might also be the subject of Commission action; European Report 2034, 19 April 1995.

Transport issues

- *Morlaix* – denial of port access to competitor unlawful
  – development contract for port.
- *Shipping* – prohibition of multi-model price fixing again (*FEFC*)
  – suspension by CFI of *TAA*
  – proposed removal of immunity from fines for *TACA*.
- *Eurotunnel* – BR and SNCF required to give up capacity to allow for third party potential competition despite sensitive financial investments.
- *Zaventem landing fees* – Belgian decree favouring SABENA contrary to Article 90 EC/discount scale challenged and rejected.

the 1995 summer season. Certain details were still to be ironed out but slots were agreed.

Relying on this agreement, Irish Ferries started to advertise and take bookings. Since many holidays are organised around Christmas time, bookings rapidly amounted to several thousand. It then appears that Morlaix started to backtrack, suggesting that there was no agreement with Irish Ferries and that it could not make the investments required without assurances that Irish Ferries would use Morlaix in 1996 also (that is rather than move to Brest). More seriously, Morlaix stated to the press that 'at no time did it seek to open the port of Roscoff to a competitor of Brittany Ferries' (the sole ferry company then operating from the port).

Irish Ferries then filed a request for interim measures with the Commission. The position of Morlaix appears to have been further complicated by its relationship with Brittany Ferries. Notably that company had a development contract with Morlaix, whereby Brittany Ferries guaranteed Morlaix certain revenue for a number of years, justifying its development of the Roscoff port, in return for priority in the use of the port. It appears Morlaix may also be a shareholder in Brittany Ferries.

In any event, the Commission intervened and ordered Morlaix to allow Irish Ferries access to Roscoff for the 1995 season, starting in June. The Commission found that Morlaix was, in the circumstances, dominant, as the only port providing port facilities under acceptable conditions between Ireland and Brittany. Morlaix's refusal to allow Irish Ferries access to an essential facility, thereby preventing competition with Brittany Ferries, was an abuse of that dominant position. In this respect, the Commission found that Morlaix's prevarication in the negotiations amounted to a refusal of access, in particular because all knew that timing was critical if Irish Ferries' services were to be available for the 1995 season.

There was, it appears, some debate as to whether Irish Ferries could show 'serious and irreparable harm', the point being that Irish Ferries itself was not at risk; rather the damage suffered was in the negative impact on its commercial reputation and other services if it had to cancel or vary the thousands of bookings which had been made.

Morlaix was ordered to allow Irish Ferries reasonable, non-discriminatory access to Roscoff for the 1995 season on the basis of the agreement reached in December 1994. Irish Ferries was, however, to pay the cost of any materials or infrastructure it would need (for example for ticket offices and so on) pending final resolution of the dispute. It is understood that Morlaix then entered into a five-year agreement with Irish Ferries.

In December 1994, the Commission adopted a decision prohibiting the members of the Far Eastern Freight Conference ('FEFC') from jointly fixing prices for the inland transport of containerised cargo and thereby the prices for 'multi-modal door-to-door' transport.[34]

In 1989, various German organisations related to the German Shippers Council ('DSVK') filed a complaint against the FEFC, arguing, among other things, that although the FEFC was entitled to operate joint tariffs for international maritime services under Regulation 4056/86, it was not entitled *also* to operate joint tariffs for the related inland transport to and from the ports at each end. It was argued that this restricted competition in such inland services. The FEFC, on the other hand, argued that such activities were covered by Regulation 4056/86 and essential if they were to provide 'door-to-door' services (which customers generally sought). The Commission agreed with the DSVK. The effect of the joint price fixing was to restrict shippers' choice as to who carries out their inland haulage and distorted competition between those carriers concerned and their competitors. The Commission prohibited the joint price fixing of such multi-modal transport. It considered whether the practices could be exempted under Regulation 1017/68 (on inland transport by rail, road and inland waterway) but decided not. Although the Commission noted that the infringement was a 'very serious' one, it took into account that this was the first time Regulation 1017/68 had been applied to a liner shipping conference! However, the Commission had also repeatedly given preliminary advice to the FEFC that these practices were unlawful without the parties terminating the infringement. The Commission therefore imposed symbolic fines of ECU10,000 on the shipping lines concerned.

To some extent, the FEFC decision covers the same ground as the *Trans-Atlantic Agreement* ('TAA') decision in October 1994.[35] That case was somewhat wider, because the TAA decision also dealt with a non-exempted price-fixing practice which established a two-tier tariff structure and a capacity management programme designed to limit part of the capacity of the ships concerned, overtly in order to 'stabilise' the market (and thereby increasing freight rates).

No fines were imposed but the decision caused great controversy and there have been various sequels. First, in March 1995 the President of the CFI suspended the decision insofar as it prohibited the relevant shipping lines from jointly exercising rate-fixing authority in respect of inland sections of door-to-door intermodal transport services. The lines argued that interruption of this practice would lead to a general collapse of maritime transport which could affect the regularity of maritime services and that some carriers might disappear from the market. The President accepted that there was a risk that implementation of the Commission's decision would imply major changes to the framework in which the shipping lines operated and accepted this as sufficient risk of serious and irreparable damage.[36]

34 OJ 1994 L378/17.
35 OJ 1994 L376/1.
36 *Atlantic Container Line AB and Others v Commission*, Case T-395/94 R, Order of the President, CFI, 10 March 1995. An appeal by the Commission was rejected; *Commission v Atlantic Container Line AB*, Case C-149/95 P(R), judgment of 19 July 1995.

Second, the Commission is now taking similar action against the *Trans-Atlantic Conference Agreement* ('TACA'), to which all former members of the TAA are members.[37] Mr Van Miert has indicated that he is planning to withdraw immunity from fines through exemption for TACA and to send a Statement of Objections on the substance of the Agreement.

In December 1994, the Commission renewed its exemption of the agreement between Eurotunnel, the holder of the Channel Tunnel concession and British Rail ('BR')/SNCF, on use of the Tunnel ('the Usage Agreement') – however, this time with controversial conditions and reasoning concerning third party access.

The Usage Agreement was concluded in 1987, first notified under Regulation 1017/68 and exempted for three years under the tacit exemption procedure of that regulation.[38] The Agreement provides that the 'fixed link' under the Channel should be used half for international trains transporting passengers and freight and half for the car shuttle. BR and SNCF undertake to operate regular services of such trains for the term of the Agreement, to provide on their territories sufficient railway infrastructure to transport minimum amounts of passengers and freight and to provide enough suitable rolling stock. On the other hand, BR and SNCF were each entitled to 50 per cent of the capacity of the fixed link per hour in each direction. As consideration for use of the fixed link, BR and SNCF also paid Eurotunnel a minimum amount for the first 12 years and agreed to reimburse Eurotunnel a portion of its costs for the fixed link. The Usage Agreement is for 65 years, the same time as the concession.

In its decision, the Commission appears to have been concerned to do things. First, to set a precedent concerning access to infrastructure and the application of essential facility doctrine in the rail sector in the light of Directive 91/440 EC.[39] Second, to make clear that infrastructure supply lies outside the scope of the special procedural regulations concerning the supply of transport services and falls under Regulation 17.[40] Access to the fixed link was treated as an infrastructure issue.

The most controversial part of the decision is the Commission's conditions. The Commission required that BR and SNCF allow Eurotunnel to make available to third parties up to 25 per cent of the hourly train capacity in the Tunnel in each direction for 12 years, when the figure would be reviewed. BR and SNCF could have more if other railway undertakings did not use that capacity, but similarly other undertakings could have more than 25 per cent if BR and SNCF did not use the 75 per cent of capacity reserved to them.

The Commission took into account in awarding the exemption that BR and SNCF's undertaking to operate trains in the Tunnel 'manifestly contributed' to the success of the project. Also that the rail companies' undertakings made a 'direct contribution to the project's financial equilibrium', and were important guarantees for the banks financing the overall Eurotunnel project. Nevertheless, the Commission still felt that the undertakings had to be loosened in favour of third party potential competition. All essential facility providers (and related lenders) should take note.[41]

Finally, before leaving the subject of railways, mention should be made of the CFI's ruling in June 1985, annulling the Commission's decision in the *Railway tickets* case.[42] The court held that the Commission had been wrong to treat the sale of tickets as not ancillary to the sale of transport services and therefore to consider collective rules between the railways and travel agents under Regulation 17/62, rather than Regulation 1017/68. There were fundamental differences between the two regulations as regards procedural safeguards, so this error amounted to a breach of an essential procedural requirement.

Finally, in June 1995, the Commission took an important Article 90 EC decision in relation to the system of discounts on landing fees at Zaventem airport.[43] British Midland had filed a complaint in 1993 arguing that the system of stepped discounts, which increased in line with an airline's volume of traffic, unlawfully discriminated against small carriers and placed them at a competitive disadvantage. Although British Midland had 144 flights a week, it stated that it was unable to reach the first level of discount, whereas competitors such as SABENA received an annual reduction of BFr.74 million.

The Commission agreed with British Midland. The Commission found the aircraft landing and take-off services in question were provided by the Brussels Airways Authority, a Belgian public body entrusted with running Zaventem but that the landing fees were set by Royal Decree. Noting that the Belgian State still controls some 61 per cent of SABENA, the Commission found that the Belgian State was, through the Airways Authority, giving preferential treatment to SABENA.

The Commission found that the discount system, with its high threshold and progressive steps, was non-linear. The Commission also accepted British Midland's submission that there were no economies of scale in these services, save perhaps for negligible savings in invoicing costs for large customers. The Commission therefore ruled that the system of discounts was contrary to Article 90(1) EC, in conjunction with Article 86 EC and required Belgium to cease the infringement within two months.

This is an interesting decision in three main ways: first, as another powerful example of the way that the Commission can act against Member States which distort competition; second, as an air transport decision, insofar as there are other current disputes concerning discrimination in landing fees and ground handling services; third, as a rare example of the Commission challenging a discount scale in an Article 86 EC case. Most of the cases so far have been 'loyalty' issues. This goes further in challenging the actual basis of the 'cost saving' curve involved (and denying it on the facts).

© 1995 J. Ratliff

37 European Report 2024, 15 March 1995.
38 Article 12.
39 Which sets out for railway undertakings and international groupings a right of access to railway infrastructure of Member States to provide international rail transport services; OJ 1991 L237/25.
40 Council Regulation 141; OJ 1962 No. 124 p. 2751/62; Regulation 1017/68, OJ 1968 L175/1. The Commission relied on port cases such as *Port of Genoa I* to show that infrastructure support was distinct from the services themselves.
41 BR and SNCF have appealed. Applications to suspend the conditions were dismissed by the President of the CFI in May 1995. Since there were no third parties seeking to use the hourly capacity made available, there was no immediate risk of serious and irreparable damage: Cases T–79/95 R and T–80/95 R, Orders of 12 May 1995.
42 *Union Internationale des Chemins de Fer v Commission*, Case T–14/93, judgment of 6 June 1995.
43 OJ 1995 L216/8.