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Major Events in E.C. Competition Law 1996, Part 1

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The object of this article, as in previous years, is to provide an overview of significant developments in E.C. competition law (Articles 85, 86 and 90 of the E.C. Treaty) in 1996. The focus is on areas of general interest, leaving aside merger control, transport and state aid, save for points of wider relevance.[1] The article is divided into three sections: (1) a general overview; (2) an outline of current policy issues; (3) a brief focus on two areas which are particularly topical: competition and sport and recent developments in the energy sector.*

In the author's view, the most important aspects of the year are in the Commission's proposals for decentralisation and joint ventures, the Commission's decisions concerning group trading conditions and parallel trading, and the rude awakening of sport to E.C. competition law. The Green Book on Vertical Restraints is still awaited.

Box 1: Legislation or Notices

- **Main Legislation or Notices adopted**
  - *Transfer of technology block exemption (240/96)*
    No market share cap but withdrawal possible
    Individual notification if licensee's market share is greater than 40%?
  - *"Leniency policy notice"* (draft, then final version)
    No or reduced fines for cartel informers
- **Other**
  - *Notice on co-operation with national courts on state aids*
  - *Withdrawal of block exemption for tariff consultations on air freight* (1617/93 amendment)
  - *Implementation rules for Europe Agreements* (*e.g.* the Czech Republic)
  - *Telecoms: Liberalisation/Full Competition Directive*

OVERVIEW OF MAJOR EVENTS

Legislative developments (adopted and proposed)

Transfer of technology block exemption (240/96)

This time last year there was considerable uncertainty as regards the future of the proposed block exemption for technology transfer agreements. The central issue was the Commission's determination that this block exemption would not apply where certain market-share thresholds were met. The Commission has now relented on this point and, in January 1996, the technology transfer block exemption was adopted.[2]

Two points should be emphasised. First, although there is no market-share cap, the Commission has reintroduced a market-share concept in the provisions dealing with its right to withdraw the benefit of the regulation. Thus, in Article 7(1) of the regulation it is provided that such withdrawal can occur if the licence products are not "exposed to effective competition in the licence territory ... which may, in particular, occur where the licensee's market share exceeds 40%". The Commission has explained "the block exemption can be withdrawn if enterprises use their exclusive licences to monopolise the market for a product and prevent third parties from gaining access to new technologies".[3] In Recital 27 to the regulation, the Commission also suggests that parties may wish to notify agreements obliging the licensor not to grant other licences in the territory, where the licensee's market share exceeds or is likely to exceed 40 per cent. No flood of notifications therefore, but a measure of uncertainty where licensees have large market share. Second, in general, the regulation is to be welcomed, as reflecting much useful simplification and bringing together the patent and know-how licensing block exemptions.[4]

"Leniency policy notice"

In July 1996 the Commission adopted a notice on the non-imposition or reduction of fines in cartel cases.[5] This notice is closely modelled on the "Corporate Leniency Policy", issued by the U.S. Department of Justice in August 1993 and aims to give companies good reasons to inform on cartels and/or co-operate with the Commission in proving them.

According to the notice, if a company informs the Commission about a secret cartel before the Commission has undertaken an investigation, it "will benefit" from a reduction of at least 75 per cent of the fine or even from total exemption, provided that four other conditions are met.

(1) The company must be the first to offer decisive evidence of the cartel's existence.
(2) The company must put an end to its involvement in the cartel no later than the time at which it discloses the cartel.

* Sections (2) and (3) will be discussed in Part 2 of this article, to be published in the next issue of the journal.

1 The reference period covered is from November 1995 to November 1996.

2 Commission Regulation (E.C.) 240/96, [1996] O.J. L31/2.

3 1995 EC Commission Competition Report, p. 35.

4 The new regulation provides that licensing agreements in force on March 31, 1996, which fulfil the requirements of the patent or know-how regulations will continue not to be caught by Article 85(1) EC.

5 The draft notice was published in [1995] O.J. C341/13; the final notice was published in [1996] O.J. C207/4. The notice does not apply to competition rules in the transport sector.

(3) The company must provide the Commission with all relevant information, documents and evidence available to it regarding the cartel, and maintain "continuous and complete co-operation" throughout the investigation.
(4) The company must not have compelled another company to take part in the cartel and not have acted as an instigator or played a determining role in the legal activity.

It will be noted that there is no automatic right or guarantee that there will be no fine, although it is suggested that, if these (demanding) conditions are met, a reduction within the range outlined should follow.

Where a company only discloses the cartel to the Commission after the latter has already started an investigation, the company can still achieve a substantial reduction in fine. The notice says that in such cases the firm will benefit from a reduction of 50–75 per cent of the fine. The idea here is that the new evidence and/or co-operation provided gives the Commission, for the first time, sufficient evidence to initiate proceedings.[6]

Where a company co-operates with the Commission, without having met all of these conditions, it will still benefit from a reduction of 10–50 per cent of the fine that would have been imposed in two cases:

(1) where such co-operation is before the issue of a Statement of Objections and the company provides the Commission with information which materially contributes to establishing the existence of infringement;
(2) where the contact or co-operation is after the issue of a Statement of Objections, and the company in question does not substantially contest the facts on which the Commission bases its allegations.

Finally, any company considering the use of this notice should bear in mind that the leniency concerned is as regards the Commission's fines, and will not prevent any subsequent damages claim. The company will still be identified in the Commission's decision as having infringed the rules. The Commission also expects a company benefiting from a reduction in fine not to contest the facts subsequently before the CFI. If the company does so, the Commission will normally ask that court to increase the fine imposed.

The importance of these proposals is difficult to assess. The Commission has already suggested that the notice has incited a firm to approach DG IV to denounce a cartel.[7] On the other hand, one of the first businessmen to whom I spoke about the notice was quick to point out that "whistle blowers do not tend to have great careers"!

Comparison with the U.S. policy suggests two main comments. First, the U.S. policy actually makes a condition of leniency that "where possible, the corporation makes restitution to injured parties". The Commission notice does not go so far, probably because it is debatable whether the Commission would have the right to impose such a condition.[8] Second, the U.S. policy seems to have had some success. Notably, in August 1994, when announcing an extension of the policy to individuals, the U.S. Anti-trust Division indicated that since the introduction of the Corporate Leniency Policy a year earlier, 12 companies had offered to co-operate, a rate of one per month.[9]

Otherwise, the notice deals with what may be termed "calculated infringements" of the EC competition rules. It would be useful if the Commission were able to consider a similar policy for the more general type of negligent infringement which one comes across in practice. In particular, it would significantly increase the sense of EC competition compliance programmes and "audits", if companies could know that, if they detected infringements in their own organisations themselves, eliminated them, and then, where appropriate, brought them to the Commission's attention, they would not be fined. One can understand that the Commission might be reluctant to establish a blanket rule in this respect, just as it has not done so in the case of the notice on cartels. However, it would be very useful (and efficient in terms of overall EC competition compliance), if companies could be encouraged to act in this way, with the clear incentive that they are removing a significant potential liability from their balance-sheet through such "corporate amnesty".

Other developments

The Commission has also published a notice on co-operation with national courts on state aids,[10] a text which echoes the similar notice for anti-trust cases. In the air-transport sector, the Commission has withdrawn the block exemption applicable to tariff consultations on air freight transport between Community airports. The Commission has found that interlining agreements between airlines in respect of such transport are virtually non-existent and that the consultations concerned are leading airlines to set tariffs at levels appreciably higher (70 per cent) than normal market prices. The result has been to amend Regulation 1617/93 to remove the block exemption.[11]

Implementation rules for the application of the competition provisions in Europe Agreements are also nearing or have been finalised by the relevant Association Councils (*e.g.* the Czech Republic).[12]

In March 1996 the Commission also adopted Directive 96/19 on the liberalisation deadlines for the creation of full competition in telecoms markets.[13]

Overall therefore, not a great deal of competition legislation has been adopted this year. However, the Commission has been very active in putting forward new proposals.

Green Paper on merger control and joint ventures

The most important of the new proposals are the Commission's proposals for reform of EC merger control and full function joint venture review. The Commission's ideas were

6 See Joris, Competition Policy Newsletter, Vol. 2, No. 2, 1996, p. 13.
7 *ibid.* at p. 14.
8 Although one may recall that in the *Rover* case a firm, in effect, seeking and obtaining leniency from the Commission, did set up a scheme to pay £1 million to potentially affected parties. See [1995] 2 ICCLR at pp. 61–62.
9 See U.S. Department of Justice Press Releases, October 28, 1993; August 10, 1994. Some argue that it is the leniency programme *for individuals* which is the effective one, as executives seek to avoid gaol (American anti-trust law involving criminal proceedings for individuals).
10 [1995] O.J. C132/8.
11 Commission Regulation (EC) 1523/96, July 31, 1996. In March 1996 the EU Council also adopted a Common Position on the Ground Handing Directive: [1996] O.J. C134/30.
12 [1996] O.J. L31/21.
13 [1996] O.J. L74/13.

put forward in a Green Paper, published in January 1996.[14] This resulted in a Communication from the Commission to the EU Council and the European Parliament in September 1996, putting forward various proposals.[15]

Box 2: Legislative Developments Proposed

- **Main Legislation or Notices (proposed or coming)**
  - *Green Paper on merger control and joint ventures*
    Threshold reductions: 3 billion WWT, 150 million CWT
    "Multiple filings" jurisdiction in Brussels, if three or more national filings required
    Full function joint ventures under EC MCR *and* Articles 85(1) and (3)?
    "Housekeeping" improvement measures

  NB: now reflected in two proposals to the EU Council and European Parliament (September 1996 communication)

- **Other**
  - *Proposal for a notice on co-operation with national competition authorities* (in the application of Articles 85(1) and 86 E.C.)
  - *Draft notice on competition in the postal sector*
  - *Prolongation of the exclusive distribution and exclusive purchasing block exemptions by two years*
    Delay with the Green Book on Vertical Restraints
    A similar approach for R&D and specialisation?
  - *Telecoms: DG IV Access Notice?*
  - *"Appreciability" notice?*

There are four principal aspects to these proposals. First, the Commission advocates a reduction in the merger control thresholds from ECU5,000 million worldwide turnover and ECU250 million Community-wide turnover, to a new level of ECU3,000 million worldwide turnover and ECU150 million Community-wide turnover. The "two-thirds" rule would stay the same.

This represents a compromise for the Commission, which previously sought a reduction to ECU2,000 million for worldwide turnover and ECU100 million for Community-wide turnover. However, this is linked to the second aspect of the Commission's proposals, which is the creation of a new jurisdiction where companies have to make multiple filings to many national competition authorities.

The idea is that between these new thresholds and the original thresholds requested by the Commission, where a concentration would be notifiable to at least three national competition authorities under their merger control laws, then, in the future, it would be notifiable only to Brussels. For these purposes, national systems setting out rules for voluntary notification would be considered in the same way as systems providing for compulsory notification.

The proposal appears to be popular with business, looking to widen the "one-stop-shop". The critical issue is whether the Member States are willing to allow the subsidiarity logic behind the proposal[16] outweigh their desire to retain direct control over as many concentrations affecting their territory as possible.

The third aspect of these proposals relates to the treatment of joint ventures. This aspect is probably the most complex and also the most controversial. The background is the considerable on-going concern about the difficulty of distinguishing between co-operative and concentrative joint ventures, and the important differences in the substantive review tests and procedural consequences attached to that classification. After various proposals in the Green Paper, the Commission is suggesting that full function JVs, currently classified as co-operative, should in the future be dealt with under the Merger Control Regulation (MCR). In the first place, the test of substantive review would be the MCR one, whether there is the creation or strengthening of a dominant position, preventing the maintenance of effective competition. However, the idea is that Articles 85(1) and (3) E.C. would still be applied, where the JV would lead to the co-ordination of competitive behaviour between companies which remain independent. Both reviews would be carried out, however, in a timetable similar to that provided for in the MCR, rather than Regulation 17.

Clearly, this is a very delicate and controversial proposal. It would appear that neither the Commission nor the E.U. Council/European Parliament has the constitutional power to relax the application of the E.C. Treaty to co-operative behaviour between independent companies, in effect subjecting co-operative joint ventures only to an abuse control system, rather than the more general "prohibition" test in Article 85 E.C.[17] On the case law of the European Court, it is clear that contractual or *de facto* co-operation between competing companies comes within Article 85(1) E.C. For this reason, some argue that the better solution should be rather a procedural one, turning the Commission's voluntary "Accelerated JV Procedure" into a new regulation with binding MCR-type phases and deadlines.

However, beyond *vires* issues, there is the question as to what substantive and procedural rules should be applied. Procedurally, this is not too difficult. Most wish to see the review of structural joint ventures subject to a fast review procedure by the Commission.[18] Equally, it is clear that in some situations both business and lawyers may be dissatisfied with comfort letters. There is a call for procedures leading to full (if short) decisions, rather than such letters, simply for reasons of legal certainty. Thus far, a consensus can be established.

The more difficult issue is whether the Commission should seek to apply a substantive review test of abuse control to the main JV competition issue as to whether a combination is desirable, rather than the current prohibition system, with an analysis as to whether actual or potential competitors can be expected to go it alone. That would be rather more than a "refocusing" of the rules. On the proposals, the Commission appears to be talking about applying Article 85 E.C. as well as the MCR but only to the spill-over effects, not to the combination itself.

14 COM(96) 19 Final.
15 COM(96) 313 Final, September 12, 1996.
16 *e.g.* that in view of the number of merger control procedures involved, it would be more efficient to have such cases decided by a single pan-European authority.
17 See, *e.g.* the Green Paper, point 105.
18 See, *e.g.* UNICE, "Refocusing the Scope and Administration of Article 85", p. 12.

Perhaps such a change would be a good idea. It may well be a popular move with business, but it would also involve a very major shift in policy. These proposals need careful consideration. Whatever happens, JV competition review will continue to be complex. However, if these proposals are adopted, the issues *may* be more substantive than procedural.[19]

Fourth, the Commission proposes some technical amendments to the Merger Control Regulation. These have been on DG IV's agenda for some time now. For example, the creation of a legal basis for first phase undertakings by companies. Here the Commission proposes to extend the first phase to six weeks to allow for consultation with E.U. Member States and third parties. The Commission also proposes to use a new approach to banking turnover, based on gross banking income, rather than the present assets test. The geographic allocation of turnover would be based on where the branch or division is situated, which provides the loan or the service.[20]

If these rules were accepted, it appears that full function JVs would have to be notified to the Commission before they were implemented, instead of the current position, whereby notification and clearance in advance are not required, albeit that immunity from fines is only available if notification has occurred. The Commission proposes to grant an exemption for the lifetime of the JV,[21] although the Commission may revoke its decision, if, in exceptional cases, the market position of the parent companies were strengthened to such an extent that effective competition was eliminated.

The Commission has divided its proposals into two regulations, one based on Article 1(3) of the Merger Control Regulation, providing for change through a qualified majority in the E.C. Council. The other, based on Articles 235 and 87 of the E.C. Treaty, which require unanimity. The Commission's proposals for the reduction of thresholds and creation of a new multiple national filings jurisdiction are included in the proposal requiring qualified majority, whereas the proposed changes for joint ventures and the general "housekeeping" amendments require unanimity. An interesting political combination!

Other developments

In September 1996 the Commission published a preliminary draft notice on co-operation with national competition authorities in handling cases under Articles 85 or 86 E.C.[22] This is the third piece of the Commission's "decentralisation architecture" (after the notices on co-operation with national courts on Articles 85(1) and 86 E.C. and on state aids). The notice is discussed under "decentralisation" in Part 2 of this article.[22a]

The Commission has also put forward a draft notice on the application of competition rules to the postal sector. [23] This draft notice was produced in parallel with a proposed directive establishing common rules for the development of postal services.[24] The draft notice describes the approach which the Commission plans to adopt in analysing state restrictions on the freedom to provide services or compete on postal markets. For those used to telecoms issues, much of the material is very familiar, *e.g.* there are extensive passages on Article 86 E.C. issues, including potential abuses such as not fulfilling demand, the need to abolish exclusive rights for express mail services and emphasising that the supervision of postal operations should be independent.

The proposed directive is controversial. When the draft notice was issued, Mr van Miert commented that he was prepared to postpone its final adoption until the European Parliament and the E.U. Council had taken a definitive position on the proposed directive for the sector. However, he suggested that if a decision on the directive were not taken by the end of 1996, the draft notice would have to be adopted without further delay.

The Commission has been keeping remarkably quiet about progress on the Green Book on Vertical Restraints. The Commission hoped to have the Green Book out this time last year. It is understood that it is now undergoing "Inter Service" review within the Commission. There was a conference involving the Member State competition authorities which was summarised last year[25] and since the Commission has published a "Survey of the Member State National Laws Governing Vertical Distribution Agreements".[26] We shall have to see what options the Commission puts forward and why.

In the meantime, the Commission has indicated that, in the light of delays with the Green Book, and conscious of the need for widespread consultation, the Commission is considering extending the life of Regulations 1983/83 and 1984/83 (the exclusive distribution and purchasing agreement block exemptions) until 1999. These block exemptions were due to expire on December 31, 1997, and both the oil and brewery industries have been lobbying about the degree of uncertainty now affecting investment decisions in the petrol station and pub/café sectors. The Commission also notes that this might allow the distribution regulations to be considered at the same time as the franchise block exemption, which comes up for review at the end of 1999.[27]

Thus far, there has been no public proposal about what will happen to the R&D and specialisation block exemptions, which are also due to expire at the end of 1997. Indirectly their future was raised in the Green Paper on Merger Control and Joint Ventures because there was discussion about considerably widening their scope and/or establishing a new general block exemption for joint ventures.[28] Some have now suggested that another Green Book

19 See the Green Paper, point 118.

20 Referrals to Member States should also be made easier. Practically, it may be noted that in its financial statement included with the communication, the Commission also talks of charging a registration fee for merger control cases, which might be ECU6,000. (See p. 15 of the communication.)

21 See, the Commission's communication, para. 29.

22 [1996] O.J. C262/5.

22a Part 2 to be published in the next issue of the journal.

23 [1995] O.J. C322/3.

24 [1995] O.J. C322/22. This proposal provides for mandatory universal services and proposes harmonised criteria for the services which may be reserved to universal service providers. It is suggested that domestic mail in the E.U. Member States weighing not more than 350 grams, direct mail and incoming cross-border mail may continue to be reserved until December 31, 2000 (subject to review of the direct mail sector by June 30, 1999). See also the notice issued by the Commission concerning the *Reims*, terminal dues agreement for remuneration of mandatory deliveries of cross-border mails, [1996] O.J. C42/7.

25 See [1996] 2 ICCLR 48–49.

26 Compiled by Laraine Laudati and DG IV trainees.

27 *Financial Times*, October 15, 1996, Europe No. 6834, October 17, 1996.

28 See Green Paper, point 115.

for horizontal restraints and related prolongation of these regulations will also be required.

There is also a proposal for a Commission (DG IV) Notice on Telecommunications Access.[29]

Finally, one should note as well a reference in the 1995 E.C. Commission Competition Report to the Commission considering new proposals for a revised notice on Agreements of Minor Importance.[30] This appears to be a reference to the idea of an "Appreciability Notice" which would go rather further than the current notice on agreements of minor importance. This issue is discussed in the policy section (in Part 2).

European Court cases (ECJ and CFI)

In November 1995 in *Federation Française des Sociétés d'Assurance v. Ministère de l'Agriculture et de la Pêche*,[31] the European Court of Justice (ECJ) held that Article 85(1) E.C. applied to the activities of a non-profit-making organisation which manages an old-age insurance scheme intended to supplement a compulsory scheme. The organisation was established as an optional scheme and operated on the principle of capitalisation. As such, the Court held that the organisation was carrying on an economic activity in competition with life assurance companies, distinguishing *Poucet*, where the social-security schemes were compulsory and based on the principle of solidarity.

In December 1985 the ECJ gave two judgments concerning competition and Dutch agricultural co-operatives.[32] In each case the context was proceedings between dairy farmers and the co-operatives of which they were members, concerning the fee payable by them under the statutes of those co-operatives on withdrawal or expulsion from the co-operative.

There are two issues of general interest. First, were such provisions restrictions liable to be caught by Article 85(1) E.C. and/or exempted by the Commission under Regulation 26/62? Second, if so, how should the national court proceed, given that Regulation 26/62 gives the Commission exclusive power to decide whether such provisions are to be exempted as a specified agricultural arrangement, which neither excludes competition nor jeopardises the objectives of Article 39 E.C.[33]

On the first issue, in *Oude Luttikhuis* the ECJ confirmed its "rule of reason" approach from the Danish Co-operatives case. The Court held that, in order to escape Article 85(1) E.C., the restrictions imposed by the statutes of the co-operative which were intended to secure members' loyalty had to be limited to what is necessary to ensure that the co-operative functions properly, with a sufficiently wide commercial base and a certain stability of membership. The Court went on to find that a combination of clauses requiring exclusive supply and payment of excessive fees on withdrawal, tying members to the association for long periods, and depriving them of the possibility of approaching competitors could restrict competition. Furthermore, it could not be ruled out that the cumulative effect of such clauses, jeopardised the objective of increasing individual earnings in the agricultural sector. Those active in the sector would not be able to benefit from competition in purchase prices for raw materials paid by different processors.[34]

On the second issue, in *Dijkstra* the ECJ essentially repeated the principles in cases such as *Delimitis*, concerning the need for the national court to avoid conflict with a possible Commission decision. A development here is that, in assessing whether it is clear that the Commission will not exempt an agreement, the Court stated that a national court could have regard to more informal indicators of Commission policy, not just decisions. Thus, the national court should take into account the Court's case law "and the practice of the Commission, apparent not only from the decisions adopted by it but also, in particular, from its reports on competition policy and its communications".

Box 3: Main European Court Cases

• *French old-age insurance fund*	– undertaking within Article 85(1) E.C. because scheme optional and fund based on capitalisation
• *Dutch Agricultural Co-operatives*	– clauses requiring exclusive supply by members and the payment of excessive fees on withdrawal inside Article 85(1) E.C. – national courts can look at informal Commission sources to assess what the Commission may do
• *French Garages (Albigeois, Nissan)*	– Regulation 123/85 does not prevent an independent dealer handling cars subject to selective distribution or being an authorised intermediary at the same time
• *EBU/ Eurovision*	– Commission decision annulled; failure to analyse membership criteria to see if access discriminatory and therefore incorrect review of indispensability; incorrect use of Article 90(2) "public mission" grounds in Article 85(3)
• *Belgian Maritime*	– Commission decision on "fighting ships" upheld, slightly reduced fines.
• *Eurotunnel*	– Commission decision annulled; error on the facts, Eurotunnel could allow other railway operators through; not rigid 50:50 rail/car Shuttle division

29 See Schaub, "Competition Policy in the Telecoms Sector", Competition Policy Newsletter, Vol. 2, No. 1, 1996, p. 5. It is understood this will develop the Commission's 1991 Telecommunications Guidelines.

30 1995 E.C. Commission Competition Report, p. 43.

31 Case C-244/94, Judgment of November 16, 1995.

32 Joined Cases C-319/93, C40-94, C-224/94, *Dijkstra and Others*, and C-399/93, *Oude Luttikhuis*, Judgments of December 12, 1995.

33 The Court also held that Article 2(1) of Regulation 26/62 did not confer provisional validity on the agricultural agreements concerned. It merely reversed the burden of proof in favour of the farmers.

34 Advocate-General Tesauro had found in his Opinion of September 12, 1995 that obligations on members: (1) to deliver all their production to a co-operative; and (2) on withdrawal to have to give six months' notice and pay a fee equal to 2 per cent of the price paid to them for milk over the last five years, were prohibited by Article 85(1) and could not be exempted under Article 2(1) of Regulation 26/62.

In December 1995 in *Banchero*,[35] the ECJ held that Italian legislation, reserving the retail sale of manufactured tobacco products to distributors authorised by the Italian Tobacco Monopoly was not contrary to Articles 5, 90 and 86 E.C.

In February 1996 the ECJ made two rulings on the old car distribution block exemption, Regulation 123/85, which should be equally relevant to Regulation 1475/95. In the first case, *Grand Garage Albigeois and Others v. Garage Massol*,[36] a number of sole concessionaires for Citroën, Ford, Honda, Peugeot and Renault vehicles had brought an action alleging unfair competition by Garage Massol, an independent dealer which was (somehow) reselling new vehicles of various makes registered less than three months earlier or having completed less than 3,000 km. The concessionaires sought an order requiring Garage Massol to stop and to pay them damages for "poaching their customers", disruption of the network, and the discounts which they were obliged to grant to avoid losing customers. The Tribunal de Commerce, Albi asked if Regulation 123/85 prevented a trader, who is neither an approved intermediary under terms of that regulation, nor an approved reseller, from carrying on business as an independent seller of new vehicles of that make.

The ECJ's answer, not surprisingly, was no. Regulation 123/85 concerns only relations between suppliers and their approved distributors. It does not serve to regulate the activities of third parties, in particular independent dealers which may operate in the market outside the framework of distribution agreements.

In the second case, *Nissan France v. Garage Sport Auto*,[37] another unfair competition action was brought. This time against parallel importers of new Nissan vehicles purchased abroad and sold in France, which were not approved as dealers by Nissan. One such garage also advertised that it had new Nissan vehicles in stock. Again, the ECJ held that Regulation 123/85, as an exemption regulation, did not regulate the activities of third parties. The Court also held that, for the same reasons, Regulation 123/85 does not prevent an independent trader from being at the same time an authorised intermediary under the terms of the regulation, and a non-approved reseller of vehicles acquired by way of parallel imports.

In December 1995 in *van Schinjndel*,[38] the ECJ had to consider whether a national court was obliged to apply Articles 3(f), 85, 86 and 90 E.C., even when the party with an interest in their application had not relied on them. The case concerned compulsory membership of a pension scheme. Physiotherapists required to be members argued on appeal that the court concerned should have considered, if necessary of its own motion, whether such compulsory membership was contrary to the E.C. Treaty rules. The ECJ said no. That issue depended on what domestic law required. If national rules required the application of binding domestic rules or gave the national court a discretion to do so, then E.C. rules had to be treated the same way. But such an obligation did not require a court to abandon the passive role assigned to it under domestic law, and require that the court go beyond the ambit of the dispute defined by the parties. Neither did the court have to rely on facts and circumstances other than those on which the party with an interest in the application of the E.C. Treaty bases his claims.

In the absence of Community rules governing the matter, it is for the Member States' legal systems to designate the appropriate courts and procedural rules. However, such rules could not be less favourable than those governing similar domestic actions, nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

In January 1996 in *Koelman*,[39] the Court of First Instance (CFI), ruled that the Commission was entitled to reject a complaint concerning certain standard agreements between rights holders and the Dutch copyright society BUMA. The Commission had sent a (common form of) letter stating that, on the basis of the facts and law brought to its notice by the complainant, the agreements satisfied the conditions of Article 85(3) E.C. The court rejected Mr Koelman's view that first the Commission had to have adopted a decision exempting the agreements, or have definitely ruled on the compatibility of those agreements with Article 85(1) E.C.

In July 1996 the CFI annulled the Commission's decision, exempting the *EBU/Eurovision system*.[40] The ruling has a specific interest to the organisation of TV broadcasting and appears to have a more general interest as regards "political" factors and Article 85(3) E.C. exemptions.

The EBU (European Broadcasting Union) is an organisation of radio and television organisations which represents its members' interests in various ways, notably in promoting the exchange of radio and television programmes and in negotiating on their behalf. In June 1993 the Commission exempted this co-operation. Controversially, because access to the EBU as an "active member" is restricted mainly to public broadcasters (except for Canal Plus). Its active members are drawn from organisations providing broadcasting services:

- of national character and national importance;
- under an obligation to cover the entire national population, and substantially doing so already while using their "best endeavours" to achieve full coverage;
- under an obligation to provide "varied and balanced" programming for all sections of the population and doing so; and
- actually involved in the production or commissioning, under their own editorial control, a substantial proportion of the programmes broadcast.

Other TV stations had been denied active membership insofar as they were "commercial broadcasting organisations" and could not meet these criteria.

There had also been a dispute involving *Screensport* over access to television rights for sports events, a key activity for the EBU. The Commission indicated in 1988 that the EBU and its members had to grant non-members sub-licences for a substantial part of the rights in question on reasonable terms, if their co-operation was to be exempted. In 1989 the EBU notified its rules, including those concerning contractual access by third parties to TV rights of sports events. Access was, however, limited, being subject to the "embargo" principle—non-members obtained only the right to "deferred", not live transmission. After objections by third parties and

35 Case C-387/93, Judgment of December 14, 1995.
36 Case C226/94, Judgment of February 15, 1996.
37 Case C-309/94, Judgment of February 15, 1996.
38 Joined Cases C-430/93 and C-431/93.
39 Case T-575/93, Judgment of January 9, 1996.
40 Joined Cases T-528/93, T-542/93, T543/93 and T-546/93, *Métropole Télévision SA and Others v. Commission*. The Commission is appealing.

the Commission, a revised sub-licensing scheme was filed and cleared, on conditions as to such third-party access.

Third-party commercial TV stations appealed, arguing mainly that the discriminatory access conditions to active membership should have precluded exemption, and that the Commission had incorrectly taken into account the EBU's "public mission". The CFI agreed with these submissions and held that the Commission's decision was contrary to Article 85(3) E.C. for two main reasons.

First, having noted that competition *vis-à-vis* purely commercial channels was distorted, the Commission had failed to examine whether access to the EBU on its membership rules was "objective and sufficiently determined". The criteria (as described above) were not sufficiently determinate. The Commission was not therefore in a position to assess whether these restrictions were indispensable within the meaning of Article 85(3) E.C. Second, the Commission was wrong to find that the constraints of fulfilling a particular public mission, a fundamental component of the Commission's decision, were such as to justify giving the EBU a special status with regard to the competition rules. In doing so, the Commission was taking over into Article 85(3) E.C., factors which fell rather within the scope of Article 90(2) E.C. (which did not apply to the case). The Court accepted that "in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with pursuit of the public interest in order to grant exemption under Article 85(3)".[41] However, such considerations had to be shown to require exclusivity of the right to transmit sports events, which was authorised for EBU members through the Commission's decision and that exclusivity was indispensable for the EBU members to obtain a fair return on investments. This, the Commission had not done, with no economic data nor adequate reasons on the point.

The debate on these issues continues. Clearly, it has a specific broadcasting interest. Notably, because private broadcasting consortiums, including one backed by News Corporation, have competed against the EBU for TV rights to sports events such as the Olympics. The private broadcasters argue that the EBU has an unfair advantage through its combination (as well as its privileged public funding), whereas the EBU broadcasters argue that with only their public-based budgets, they could never compete with the strength of commercial channels and combinations.[42]

On a more general front, the CFI appears to have objected to the political agenda in the Article 85(3) E.C. reasoning. Perhaps Mr van Miert may need a two-tier decision-making system after all! If he cannot put "political pragmatism" into Article 85(3), he may need a political overlay mechanism to achieve aims perceived as politically desirable, but not justifiable on pure competition grounds.

In October 1996 the European Court upheld the Commission's decision in the *Belgian Maritime (CEWAL) shipping conference* case.[43] This case concerned various practices including "fighting ships", designed to drive a competitor out of the market. However, the CFI reduced the level of fines on the basis that there was no evidence that the infringement had lasted as long as the Commission found (*e.g.* the fine on CMB from ECU9.6 to 8.6 million).

41 para. 118.
42 See *Financial Times*, January 20/21, 1996, July 12, 1996.
43 Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, *Compagnie Maritime Belge and Others v. Commission.*

In October 1996 the CFI annulled the Commission's decision approving the Usage Agreement between British Rail, SNCF and Eurotunnel for use of the Channel Tunnel, only on conditions requiring BR and SNCF to make available at least 25 per cent of their hourly capacity to use the tunnel.[44] There was a fundamental error in the Commission's factual findings. The Commission found that BR and SNCF shared 100 per cent of the capacity for rail services through the tunnel, the other half being reserved to Eurotunnel for the (car) Shuttle. This was incorrect. BR and SNCF had, in principle, secured 50 per cent of the capacity of the tunnel in return for their contributions (although BR/SNCF had to allow third parties access in any event in some circumstances), but Eurotunnel was free to allow rail operators through its capacity (and indeed might be required to do so as an essential facility). Since this was key to the Commission's decision, it was annulled.

Commission decisions (formal or informal)

Cartels and other prohibitions

In June 1996 in a case called *Fenex*, the Commission took a decision prohibiting a Dutch association of forwarding agents from issuing recommendations as to forwarding charges.[45] Fenex had been preparing minimum recommendations for the sales prices of the services concerned (ranging from customs declarations to handing costs) since the beginning of the century. Although in principle non-compulsory, the Commission found that these prices were at least guidance on "target prices" or annual price adjustments which affected competition by enabling participants to predict with a reasonable degree of certainty what the pricing policy of their competitors would be.

Such practices were not capable of exemption. However, the Commission imposed only a nominal fine of ECU1,000 for the four years of infringement not covered by prescription. In doing so, the Commission appears to have accepted Fenex's mitigating pleas that its actions reflected inexperience and were negligent rather than intentional. The Commission also gave Fenex credit for amending its practices to comply with E.C. and Dutch competition law.

The case is interesting, partly because the Commission applied Regulation 17 as opposed to Regulation 1017/68,[46] and partly because the Commission distinguished between the establishment of recommended tariffs for sales prices (which are illegal) and the creation of cost-calculation models (which are legal).[47] The Commission states (referring to a decision of the French Conseil de la Concurrence):

> The circulation of recommended tariffs by a trade association is liable to prompt the relevant undertakings to align their tariffs, irrespective of their cost prices. Such a method dissuades undertakings whose cost prices are lower from lowering their prices and thus creates an artificial advantage for undertakings which have the least control over their production costs.

44 Case T-79/95 and T-80/95, *SNCF and British Railways Board v. Commission*, Judgment of October 22, 1996.
45 [1996] O.J. L181/28.
46 Finding that the services in question were not transport services covered by Regulation 1017/68 and that the forwarding agents were not ancillary to transport undertakings.
47 See Competition Policy Newsletter, Vol. 2, No. 2, 1996, at p. 22.

Box 4: Main Commission Decisions on Cartels and Other Prohibitions:

- *Fenex/Dutch Cranes* – Associations cannot recommend tariff/price rates, but can provide cost-calculation models
- *Dutch Crane Hire cartel* – Safety certification systems must add something to statutory controls, provide for open access and accept equivalent quality guarantee systems
  – Interplay of Commission and Court enforcement
- *Visa's proposed rule change* – No "quasi-exclusive" proprietary network for Visa JVs; AMEX can sell via banks in EU also
- *GSM licence fee interventions* – Italy, Spain, etc.

> Such a risk is not, however, inherent in the circulation of information that would help the firms to calculate their own price structures so as to enable them to establish their selling prices independently.[48]

In November 1995 the Commission imposed fines of ECU11.5 million on the Dutch Crane Hire Federation (FNK) and ECU300,000 on the Dutch Crane Hire Certification Foundation (SCK).[49] This is a case which has been running for some time. It may be recalled that in 1994 the Commission removed the immunity from fines of these entities after related notifications.[50] This decision is interesting mainly for the Commission's ruling on safety certification practices and the way that the Commission's procedure ran in parallel to national proceedings, with some correlation of the two.

The case arose as a result of a complaint by a firm called van Marwijk and 10 others, alleging price-fixing and market-foreclosing practices on the Dutch mobile crane hire market.

The Commission found that FNK, whose members account for 50–80 per cent of the market, had a number of rules and practices which infringed Article 85 E.C. First, FNK required that crane hire firms charge "reasonable" rates when hiring out cranes, with a special, preferential, "internal" rate for other members. To this end, FNK published cost calculations and recommended rates based on them which the Commission found members were obliged to follow. According to an independent survey such rates were generally higher than market rates, reportedly by at least 10 per cent.[51] FNK also required its members to give preference to other members when hiring extra cranes.

Second, the Commission found that SCK operated a system called *inhuurverbod*, requiring firms not to hire mobile cranes from firms which were not affiliated to SCK. Although SCK was an independent certification body, it was closely linked to FNK, its entire board being appointed and capable of dismissal by the Executive Committee of FNK.

SCK argued that this *inhuurverbod* requirement was necessary to ensure that crane hire was fully safe in the Netherlands, an argument rejected by the Commission on the basis that the SCK certification provided no real added value to existing statutory controls and that, in any event, SCK had to accept equivalent guarantees from other systems. The effect of the rule was to place restrictions on members hiring cranes from outside those certified by SCK and to impede market access for non-SCK affiliated firms, including those based abroad. Those restrictions outweighed any safety advantages claimed by SCK.

The Commission's reasoning on cost-calculation models and recommended rates is similar to that in *Fenex*, discussed above. The Commission clearly regarded SCK as an entity designed, at least in part, to capture the Dutch mobile crane hire market for FNK members. On the other hand, discussing the case, the Commission has stressed that it does not object to private law certification systems, designed to provide supplementary monitoring of compliance with statutory provisions, on condition that these comply with the competition rules (by providing for open access and acceptance of other equivalent quality guarantee systems).[52] Such systems could benefit from Article 85(3) E.C. exemption.

The case is also interesting because of the procedural interplay with the Dutch courts, in the light of what the Commission has proposed and is proposing in its Notices on Co-operation with National Courts and National Competition Authorities.

The stages of the procedure appear to be as set out in Box 5. One may note the complainants went to the Commission first, (perhaps mindful of *Automec 2*), but sought interlocutory relief in the national courts shortly afterwards (presumably because the latter is usually quicker than Commission interim measures). The (arguably defensive) notifications by FNK and SCK served to reduce the fineable period and to hold up the national court proceedings for some time. The Commission appears to have reacted to what it would probably now call a "dilatory" notification, but not that quickly, applying its own pressure through a Statement of Objections (see the draft notice on co-operation with national authorities in Part 2). It appears that the Commission's views were made known through that first Statement of Objections, a sort of "discomfort letter" might now be used. Not yet a perfect "co-ordinated compliance" scenario, although considering court delays and the time required for Commission procedures, perhaps not that slow after all.

This is a case partly known for the defence position (on the issue of effect on trade between Member States) that "mobile cranes are by their nature not meant to be transported". It may be interesting to note the Commission's contradictory response, "Krupp cranes can travel at maximum speeds of between 63 and 78 kilometres an hour"![53]

An important case in the credit-card sector this year concerns Visa's proposed change in its European byelaws requiring its members not to handle competing cards. In January this year, faced with the introduction of such a rule, American Express (AMEX) filed a complaint with the Commission alleging infringements of Articles 85 and 86 EC.[54] This was followed by complaints from Dean Witter Discover and Diners Club.

48 See paras. 61–62.
49 [1995] O.J. L312/79. FNK and SCK have appealed, been denied interim measures in the CFI and appealed against that ruling.
50 See [1994] O.J. L117/30.
51 See Europe No. 6616, November 30, 1995.
52 1995 E.C. Commission Competition Report, pp. 27–28, 117–119.
53 para. 31.
54 European Report, January 24, 1996.

Box 5: FNK/SCK: Commission/Court Interplay

January 13, 1992	Complaint to the Commission requesting interim measures
January 15, February 6, 1992	Notifications by FNK and SCK seeking negative clearance or Article 85(3) E.C. exemption
February 11, 1992	Utrecht District Court grants interlocutory injunction, ordering FNK to suspend the "preference for members" rule and the system of recommended and internal rates; SCK required to suspend *inhuurverbod*
July 9, 1992	Successful appeal before Amsterdam Court of Appeal, which considered that exemption might possibly be granted by the Commission; *inhuurverbod* reinstated
December 16, 1992	Commission's first Statement of Objections (Article 15(6) immunity from fines)
July 6, 1993	New interlocutory order of Utrecht District Court requiring that the *inhuurverbod* be suspended *NB*: Commission had, in the meantime, made it clear that the agreements had "no chance" of being exempted
October 28, 1993	Confirmation of Utrecht District Court order by Amsterdam Court of Appeal
November 4, 1993	SCK withdrew *inhuurverbod*, as required by the Dutch courts, pending the Commission's definitive ruling
April 13, 1994	Commission decision removing immunity from fines for the *inhuurverbod* and the restriction on foreign firms joining SCK
October 1994	Commission's second Statement of Objections (main proceedings)
November 29, 1995	Commission decision imposing (limited) fines and "cease and desist" orders; (Appeals)

Visa has had such a rule in the United States for some years, albeit subject to an exception called "duality" under which it allows its members to handle Mastercard. Visa's proposal was apparently prompted by the fact that AMEX had started to sell its cards through banks (*e.g.* in Portugal and Greece), something it had not done before.

Opponents of the proposed rule change argue that it would have denied its competitors access to the very large number of banks which are now members of Visa, a question both of preventing competitors' finding joint venture partners and denying them access to a key sales channel. Visa argued that it was unhealthy for competition that banks should handle both AMEX and Visa and that AMEX was, in effect, taking a free ride on the system Visa had built up.[55] Its opponents countered that to allow Visa banks to handle Mastercard, but not others, was discrimination and that they were *not* seeking to use Visa's system or name.

In May 1996 the Commission intervened. Mr van Miert announced that Visa's proposal "could not be accepted" just before a Visa Board meeting to decide on the change. Visa then dropped its proposal and confirmed to the Commission that its American rules also do not prevent the E.U. operations of Visa USA's members from issuing competing cards. In its Press Release,[56] the Commission indicated that it had reached the preliminary view that Visa's proposal, if adopted, would have infringed the E.C. competition rules because it would have restricted competition between international card systems, as well as between banks which issue cards using those systems.[57]

These are big issues. Visa is the leading credit-card system in Europe by far. What this means is that there should not be proprietary networks for such cards and a competition "polarisation", with some banks exclusively with some cards and others exclusively with others. Instead the same banks should be offering a range of competing credit and charge cards, at least if they wish to.

The Commission has also pushed for the creation of a more level playing-field for GSM mobile phone licensees. In November 1995 the Commission took a decision against Italy under Article 90(3) E.C. for discriminating against Omnitel Pronto Italia (OPI), in favour of the state operator Telecom Italia Mobile. The Commission held that Italy reinforced the dominant position of Telecom Italia by requiring OPI to pay a licence fee of some 750 billion without a similar payment being required of Telecom Italia, and without compensation for OPI, in the form of corrective measures equivalent in economic terms (*e.g.* rebates in the prices for use of the phone network).[58]

The Commission has continued this campaign through the year acting against a similar problem in Spain, where the second GSM operator, Airtel was ordered to pay 85 billion pesetas for its licence. Another Article 90 decision is expected.[59]

The Commission is also reported to have just fined five cross-channel ferry companies a total of ECU645,000 for having operated a price cartel. In 1992 it appears that P&O, Stena-Sealink, Brittany Ferries, Sea France and North Sea Ferries agreed to impose a surcharge on their freight shipments to compensate for the devaluation of the British pound. The surcharge was introduced by the five companies in the same month, at identical rates and with the same method of calculation. The surcharge was not successful and

55 *The Economist*, July 27, 1996, pp. 15–16.

56 *Wall Street Journal* (Europe), June 6, 1996, pp. 15, 26. IP/96/585, July 3, 1996; Competition Policy Newsletter, Vol. 2, No. 2, 1996, p. 27.

57 Mastercard has since announced that in the United States, it is planning a similar rule to that of Visa USA, but not excluding Visa. The U.S. Department of Justice is also now looking at the effects of "the prohibition of certain joint ventures in the credit card market".

58 [1995] O.J. L280/49.

59 European Reports No. 2018, March 23, 1996; No. 2165, October 12, 1996. It is reported that Belgium is now also insisting on a BFr. 9 billion GSM fee from Belgacom.

was applied only for a limited period of time and for this reason the Commission has decided to impose moderate fines (except on P&O and Stena-Sealink which started and organised the concertation).

Joint ventures

In April 1996, the Commission issued an interesting Article 19(3) notice, envisaging clearance of a pan-European purchasing group for plumbing, heating and sanitary ("PHS") products called "EUDIM".[60]

Box 6: Main Commission Decisions on Joint Ventures

EUDIM	– Pan-European (parallel) purchasing group outside Article 85(1) E.C., in the face of concentrated supply, (but no market sharing or sales co-ordination)
BNP/Dresdner Bank	– Banking co-operation for the global market-place – Restrictions to protect know-how
Atlas/Global One	– Or how to force liberalisation through decisions! – Use of conditions rather than obligations to allow decentralised enforcement

As a result of a complaint, the Commission investigated EUDIM and found that its members, some 10 PHS wholesalers across Europe, had a gentlemen's agreement according to which they were, in principle, not allowed to operate on the domestic markets of other EUDIM members. Furthermore, the Commission found that the EUDIM members exchanged confidential information in two ways: (1) they exchanged information on purchase prices, with the aim of allowing each to obtain the lowest purchase prices and better compete with D-I-Y stores; (2) they exchanged information on their respective businesses, including know-how and "individual, sensitive" information on financial and commercial ratios, profitability, etc. Such exchange was on the purchase/costs side. There was no evidence of an exchange of information as regards selling.

The Commission noted that the PHS market can be divided from a wholesaler's point of view into a purchase market and a sales market. On the purchasing side, the suppliers are concentrated, with manufacturers focusing on particular product groups. In most of these groups, the top two to three manufacturers have shares of 60–80 per cent. The relevant market is Community-wide. On the sales side, the position is rather different. Markets tend to be mainly national, partly because of differences in national standards and norms, partly because customers are mainly national installers. Except in Norway, Sweden, Finland and Austria, the EUDIM members had relatively small market shares (1.3–12 per cent), albeit that they might be prominent players, because the market is fragmented.

In the light of the Commission's investigation, EUDIM adopted a specific "EC Compliance Resolution", stating that its members were free to sell their products and to establish their businesses wherever they felt appropriate. As regards the information exchange, EUDIM clarified its practices so that the exchange of information on their businesses was to relate to general concepts and methods only, without reference to specific sales transactions, prices, customer or product-related information. While denying that there had been any infringement of Article 85(1) E.C., EUDIM notified its arrangements.

The Commission has now indicated that it plans to clear this co-operation. The Commission's reasoning is that the exchange of information on the purchasing side, whether general (opinions or experience) or individual (specific purchase prices and supplier rebates) does not restrict competition on the relevant wholesale PHS market. The exchange of information was otherwise found not to infringe Article 85(1) E.C. The exchange of general non-confidential information was not a restriction on competition. The exchange of confidential and individual information (*e.g.* on sales volumes and market shares) also did not appreciably affect the competitive structure of the market, in particular because that market was too fragmented to be considered oligopolistic.[61]

Although this decision turns on the specific market structures and circumstances, it is of wider interest. This sort of European co-operation is found in many sectors in various forms, often with a "one member per country" rule and related sales areas. Often such information exchanges are designed to be pro-competitive as groups exploit supplier price differentials across the Community and parallel import. Or more simply as small and medium-sized enterprises, which do not see themselves as potential competitors, team up to try to match the integrated distribution chains.

After EUDIM it appears that in such cases market division is, in principle, not allowed (or at least needs Commission exemption),[62] whereas purchasing co-operation may fall outside Article 85(1) E.C. altogether, at least when in the face of concentrated suppliers.

In June 1996[63] the Commission exempted an exclusive co-operation agreement between the French bank BNP and the German Dresdner bank. There has been a pattern of co-operation between the two in Eastern Europe, already cleared in merger control cases. Here the Commission has exempted a far more extensive concept, involving the exchange of information and staff, co-operation in international financing, merchant banking and securities in the E.U. BNP and Dresdner will also co-operate on third countries and on their home markets in France and Germany.

Each party is still able to operate or establish in the other's domestic market (*e.g.* by purchasing a competitor). However, they are not allowed to co-operate with a competitor of the other, if that would involve the use of know-how or business secrets learned from the other or resulting from the co-operation. Ten per cent cross-holdings are planned.

60 [1996] O.J. C111/8.

61 Cf. the *Tractor Exchange* case, Cases T-34, T-35/92, Judgment of October 27, 1994.

62 *e.g.* see EEIG *Orphe*, 1990 E.C. Commission Competition Report, point 102.

63 [1996] O.J. L188/7.

The Commission found that, while there would be a "fairly considerable potential restriction on competition between the two banks" in France and Germany, in the light of the benefits from the co-operation and the parties' relatively small market shares, exemption could be granted for 10 years before further re-examination of the co-operation.

In July 1996 the Commission took its decisions in *Atlas*[64] and *Phoenix/Global One*.[65] These are remarkable decisions in what, as mentioned last year, is a remarkable political story, as the Commission pursues its "1998" telecoms legislative agenda through its decision-making powers.[66]

In each case, there are strong arguments for denying exemption completely because of the lack of effective competition in affected markets. Rather than do so, the Commission is granting a "conditional exemption" which is to be for a number of years *from a date in the future* (exemption applies only when two or more licences for the construction or ownership and control of alternative infrastructure for the provision of liberalised telecoms services take effect in both Germany and France). In other words, these exemptions only come into effect when the governments concerned have liberalised such infrastructure and there are actual competitors.

This raises various questions. First, as to the basis on which the parties are trading now. It would appear that they are not yet allowed to do so (insofar as the conditions for exemption are not yet met). Secondly, does this actually meet the requirements of Article 85(3) E.C., insofar as effective competition will still not have been achieved? The two new licensees will just be starting in the market. Thirdly, one must ask again if this is a proper use of Article 85(3) E.C. exemption powers. Admittedly, it is a "public" case, given the state's interests in the parties, but some operators affected are private.

Interestingly, there are extensive conditions (some four pages) covering (in the case of *Atlas*, divestiture of Info AG and Transpac integration issues), non-discrimination, interconnection, cross-subsidisation (including debt financing), bundling and accounting. There are also auditing and compliance obligations, including the unusual obligation to give the Commission access to business premises to inspect records and receive oral explanations on reasonable notice.

The Commission aims to decentralise enforcement. To that end, it emphasises that the "most crucial behavioral requirements to safeguard competition" are attached as conditions, which can be enforced in national courts. That should occur if there are "systematic or repeated" violations of those conditions.

For those interested in the application of the competition rules to the environment there is another important passage in this year's Competition Report.[67] The Commission outlines its views on "voluntary agreements", *i.e.* contracts between industry and public administrations setting a number of environmental objectives to be achieved by the industry in question according to a given timetable.

Noting that such agreements are growing in most OECD countries the Commission points out:

> (1) that it is currently examining several complaints on restrictions of competition in such agreements;
> (2) that in applying Article 85(3) E.C., it accepts that "improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress";
> (3) the Commission states that it will remain firmly against measures closing off national markets to foreign operators or denying access by third parties to a system and agreements which could result in a product being squeezed out of the market.

The Commission also takes a negative view of multilateral tariff or price-fixing resulting from an agreement on the environment. Such practices will be reviewed on a case-by-case basis, but environmental protection "is not necessarily sufficient in itself to warrant an agreement on prices being regarded as indispensable".[68]

Distribution

This year there have been two important and controversial cases involving parallel imports of pharmaceutical products.[69] One concerns ADALAT, a so-called "calcium antagonist" product made by Bayer, which is used to counter coronary heart disease and arterial hypertension. The other concerns Marvelon and Mercilon contraception pills made by Organon, a subsidiary of AKZO. In *ADALAT*,[70] the Commission fined Bayer ECU3 million. In *Organon*[71] the case was settled.

In *ADALAT*, what happened is that an extensive parallel export trade developed between low-priced European markets, notably France and Spain, and the United Kingdom, where prices are high. The reason for such trade and price variations lies in differences in the national pricing rules concerned and the impact of differing levels of reimbursement under national social-security systems. Prices for one type of ADALAT were therefore 35–47 per cent lower in Spain and 24 per cent lower in France than in the United Kingdom. The variation was even higher on other ADALAT products.[72]

As a result, Bayer appears to have decided to have a deliberate policy of only supplying wholesalers in Spain and France with enough product to meet domestic demand. Faced with orders too great for local demand or which were clearly for export, Bayer "blocked" supply, or "controlled" supply to levels considered appropriate for local demand arguing mainly lack of stock. In response, the wholesalers concerned first gave Bayer better information on their requirements in order to allow Bayer to better manage stocks. When Bayer still continued to undersupply or not supply likely exporters, the wholesalers spread and increased their orders through other agencies not categorised as likely to export. They also

64 [1996] O.J. L239/23; Article 19(3) Notice, [1995] O.J. C337/2.
65 [1996] O.J. L239/57; Article 19(3) Notice, [1995] O.J. C337/13.
66 See now also the settlement in the *Deutsche Telekom Business Tariffs* case, partly conditional on alternative infrastructure liberalisation; European Report No. 2143; Europe No. 6757, June 26, 1996; apparently a further settlement was reached in November 1996, Europe No. 6847, November 6, 1996.
67 1995 E.C. Commission Competition Report, pp. 40–41.
68 In January 1996 the Commission also cleared the *Lufthansa/SAS* co-operation with conditions, [1996] O.J. L54/28.
69 The Commission's decision in *BASF Lacke + Farben/Accinauto* was also published: [1996] O.J. L272/16.
70 [1996] O.J. L201/1
71 1995 E.C. Commission Competition Report, pp. 25–26 and 142–143.
72 See paras. 31, 151, 194.

Box 7: Main Commission Decisions on Distribution

ADALAT/Organon	– When is a unilateral refusal to supply a "continuous commercial relationship"? – Should parallel trade in pharmaceuticals be illegal or a special case given the influence of national price controls and reimbursement schemes?
Interbrew	– *NB*: There are limits to intra-group task allocation; agreements with third parties and under Article 86 E.C.
Novo Nordisk	– A refusal to honour guarantees must only be related to genuinely incompatible secondary products

tried to convince Bayer that local demand had increased, but still could not obtain all the supplies they wanted.

Bayer was not dominant. However, the Commission found that Bayer had infringed Article 85 E.C. The Commission considered that Bayer imposed an export ban, which became an integral part of its commercial relations with its wholesalers. The Commission found that the wholesalers had accepted the ban insofar as:

> (1) they did not react to the export ban suggested; and
> (2) they had aligned their conduct on the ban and "stopped placing orders explicitly for destinations outside the national territory, realising that only products intended for domestic consumption would be supplied to them".[73]

The Commission's evidence and reasoning on this is set out in some 32 paragraphs of its decision. It is not very convincing. While one may understand the Commission's desire to get at such practices, there clearly is a case for arguing that Bayer's acts were unilateral. Can one really say that the wholesalers agreed or concerted with Bayer in the export ban when they only spread their orders through other agencies, *specifically to circumvent it*, the goods still being exported whenever possible?

If the Commission is correct, many multinational groups trading across Europe will clearly have to review their "intra-group" trading policies in the light of the Commission's approach, which, as we shall see is a theme to other Commission cases this year.

The Commission ordered Bayer, in addition to the fine, to send out a circular in France and Spain explaining that exports are allowed within the Community and to include a clarification to that effect in its terms and conditions.

Bayer has since appealed and successfully obtained an order against these requirements.[74] The order of the CFI is interesting, above all because it emphasises the dilemma facing Bayer. Notably, that as a result of the parallel trade, sales of ADALAT by Bayer U.K. fell by half between 1989 and 1993 and its turnover fell by DM230 million, representing a loss of revenue to Bayer of DM100 million.

Bayer also argues that it was entitled to decide how much it would sell in each market "without being bound by an obligation under Article 85(1) to supply its customers". It is argued that this is a critical right given the differences in prices for the products concerned, set not by Bayer, but the authorities in Spain and France. These are interesting questions. All the more so as one would think that a non-dominant multinational does not *have* to sell in all parts of the Community, if to do so would act as an overall depressant for its prices across Europe.

The Commission's line is that, even where a company is not responsible for setting its prices, the ordinary rules should apply, this factor only being relevant to the level of fine. Others argue that parallel trade in the pharmaceutical sector is a very special case.[75]

The issue in *Organon* was again parallel trade, but this time in the context of the introduction of a differential pricing scheme. It appears that in May 1994 Organon changed the price regime applicable to the sale of two contraceptive pills which it makes. The result was that pills intended for export no longer qualified for a 12.5 per cent discount, which applied to pills for the United Kingdom. Previously, Organon had sold to all customers with the 12.5 per cent discount applicable to all products, whatever their destination.

Organon sent all wholesalers a circular setting out this new system, explaining that to qualify for the 12.5 per cent discount they had to prove the pills were not for export. Organon also wrote to British wholesalers asking them not to sell to exporters of the product at the U.K. price, plus discount. It appears one wholesaler followed this request.

Organon had notified its new price system. In the light of three complaints, the Commission sent Organon a Statement of Objections, arguing again that Organon's terms were caught by Article 85 E.C. as "continuous commercial relations" between Organon and its wholesalers. The Commission also threatened to remove Organon's immunity from fines. While disputing the Commission's interpretation, Organon withdrew its new price regime.

There is some debate about the effect in this case. The Commission argues that Dutch consumers now benefit because they can obtain U.K. Marvelon at a price level which is fully reimbursed in the Netherlands, whereas the price of Dutch origin Marvelon was higher than that level of reimbursement. Organon argues that consumer price levels were unaffected, it was only parallel trader's margins which were reduced.

In the latest Competition Report the Commission explains its policy on parallel trade in pharmaceutical products. This is essentially to prevent such trade being blocked, irrespective of the external factors which determine the price differences and, interestingly, to challenge those differentials indirectly.

> "It is believed that the unrestricted operation of market forces in this way is likely to act as a catalyst for the gradual convergence not only of prices *but also of price control mechanisms*. Prices in the high cost countries should fall, while those in the low-price countries should, *if they fail to offer pharmaceutical companies a reasonable return on investment, ultimately increase in reaction to the real threat of product withdrawal* ..."[76] (*Emphasis added*).

73 See *e.g.* paras. 171, 177 and 180 *et seq.*
74 Case T-41/96R, Order of June 3, 1996.
75 *e.g.* Fernandez Vicien, "Why Parallel Imports of Pharmaceutical Products Should be Forbidden" [1996] 4 ECLR 219.
76 1995 E.C. Commission Competition Report, p. 25.

Is the Commission again using decisions to pursue a legislative agenda? For the moment, the conclusion appears to be that a non-dominant pharmaceutical company could withdraw its product from low-priced countries, but if it does not do so, then it cannot impose restrictions on parallel trade.

Another important intervention of the Commission this year involves a notification by *Interbrew*[77] of its intra-group policy on sales territories. Interbrew notified an internal circular explaining the sales policy which its subsidiaries were to follow. Subsidiaries were required:

- only to sell in their allocated territories;
- to refer orders from outside those territories to the subsidiary responsible for the country concerned;
- to refer each order for goods destined for another country, but coming from a local purchaser not based locally, to the subsidiary responsible;
- to practise the same referral for local purchasers who had carried out parallel imports, unless the latter could show that the order was for a client in the local territory; and
- to do the same for purchasers whose orders reflected a disproportionate increase with respect to the local market.

Interbrew asked if such a policy complied with Article 85 E.C. The answer was "yes" for the relations between companies in the Interbrew group, applying the CFI's judgment in *Viho*.[78] However, the Commission went on to state that the position was different for the obligation on each subsidiary to make orders by local suppliers subject to an express or implied obligation not to export. Such an obligation was caught by Article 85(1) E.C., as soon as such an agreement was concluded between the subsidiary and his distributor.[79] The "continuous commercial relations"/implied agreement issue again.

Furthermore, the Commission held that the implementation of the various instructions contained in the circular amounted to an abuse of the dominant position which Interbrew holds on the Belgian beer market. The behaviour in question allowed Interbrew to protect the Belgian market from intra-brand competition with Interbrew beers coming from other Member States, such as France, where certain Interbrew products were cheaper. The Commission sent Interbrew a warning letter. Interbrew then withdrew the circular.

To some extent such a position is to be expected after cases such as *Tetra Pak II*,[80] where the Commission insisted that a purchaser must be able to buy from any subsidiary in a dominant group on the prices and terms practised by that subsidiary. It is still an interesting ruling, defining the limits of the "intra-group" exception to the competition rules.

The Commission has also applied the logic of *Bayer Dental*[81] to pharmaceuticals this year. In *Novo Nordisk*,[82] the Commission found that this Danish pharmaceutical company was in a dominant position on the insulin market and on the markets for the various components of "pen delivery systems". The "insulin pen" is a new method of insulin self-injection, using an injection device ("the pen") and non-refillable insulin cartridges, rather than the traditional method of hypodermic syringes.

The Commission found that Novo Nordisk had abused its dominant position by disclaiming liability for the malfunction of its pen products and refusing to guarantee such products when they are used with the compatible components of other manufacturers. The Commission objected not only to explicit disclaimers of this type, but also to disclaimers phrased so as to create unfounded confusion or uncertainty in the minds of consumers as to the safety or effectiveness of using non-Novo Nordisk components in its pen delivery systems.

The Commission also objected to claims that certain products were incompatible with Novo Nordisk pen systems because they lacked "function check" of dosage accuracy. Novo Nordisk contested these conclusions but undertook to meet the Commission's objection. An important reminder for those dominant on related "secondary product" markets.

Finally, it should be mentioned that in December 1995, the Commission reported that it had carried out several dawn raids in relation to Volkswagen sales in Italy.[83] It is alleged that Volkswagen and/or its dealers there have been refusing to sell cars to Austrians and other E.U. nationals seeking to take advantage of low prices after devaluation of the lire. Volkswagens are said to be some 20–25 per cent cheaper in Italy than in Austria. This case has provoked speculation as to whether, if this were true, the provisions in the new car block exemption might be applied, denying the benefit thereof to those concerned.

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

- *Current Policy directions*: on-going discussions about a European Cartel Office and the separation of law enforcement and policy in the light of decisions such as *Atlas/Global One* and recent pharmaceutical cases; the introduction of multi-lateral competition rules in the World Trade Organisation; and whether the E.C. Competition rules should be refocussed, above all in the case of vertical restraints.
- *Important developments on decentralisation and damages*: the English High Court judgment in *Iberian Estates/British Plasterboard*; Commission plans to organise a co-ordinated enforcement approach with national competition authorities; and *RWE* objections to the Commission allowing the *Bundeskartellamt* to apply the E.C. competition rules in the energy sector.
- *Specialist areas*: the rude awakening of the sports world to E.C. competition law after *Bosman* and the proposed directive for liberalisation in the electricity sector.

77 Competition Policy Newsletter, Vol. 2, No. 2, 1996, pp. 24–25.
78 Case T-102/92, [1995] E.C.R. 11–17.
79 Cf. also the position of Advocate-General Trabucchi in *Centrafarm v. Winthrop*, Case 16/74 [1974] E.C.R. 1183.
80 [1992] O.J. L72/1, especially at p. 42.
81 [1990] O.J. L351/46.
82 Competition Policy Newsletter, Vol. 2, No. 2, Summer 1996, pp. 25–26.
83 On car distribution, see also the notice concerning Ford's service outlets. The notice relates to distribution changes whereby existing Ford dealers whose main business is servicing and whose sales are marginal will be integrated with Ford's main dealers and redesigned as service outlets. Interestingly, after the car block exemption debate on multi-brand dealership, service outlets will be allowed to enter into similar agreements for servicing or distribution of vehicles of other manufacturers. Service outlets can also sell vehicles on behalf of their affiliated dealer on a commission basis: [1996] O.J. C227/11.

ICCLR

Major Events in E.C. Competition Law 1996, Part 2*

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CURRENT POLICY DIRECTIONS

Box 1. Current Policy Directions

- *Euro-Kartellamt*
  - Italian Anti-trust Authority supports the *Bundeskartellamt*
  - The combination of law and policy, a strength or a weakness (*Atlas/Phoenix-Global One, EBU*, pharmaceutical cases)?
- International dimension
  - Competition in the WTO to deal with
    (i) export cartels
    (ii) market access
    (iii) unfair competitive disadvantage
    (iv) increased degree of co-operation
  - A "plurilateral" co-operation/comity agreement?
- Appreciability
  - Refocus or straight relaxation!?
  - CBI/UNICE proposals
  - A wider "Appreciability Notice" would be a good idea.

"Euro-Kartellamt"?

During the year, the debate as to whether part of DG IV's competencies should be spun off into a special, independent cartel agency has continued.

In March 1996 the German Government put forward the proposal in the context of the Inter-Governmental Conference. Thereafter, in May 1996, Mr Amato, former Italian Prime Minister and head of the Italian Anti-trust Authority pledged his support for such an agency.

In the summer, Mr van Miert published an article restating his opposition to such a proposal. He continues to argue that it is a strength of Community competition policy, rather than a weakness that it is not applied in isolation but as an integral part of other Community policies. Moreover, he argues that to the extent that the Commission has room for discretion in its decisions it is good that the Commission can use that room to apply the rules in an "evolutionary manner" and in the light of other Community policies. Others argue that cases such as *Atlas/Global One*, the *EBU* and (apparently) *ADALAT/Organon* (discussed in Part 1) show the need to separate decision-making on competition criteria from broader public/legislative interest considerations.

Mr van Miert thinks that a two-stage approach with an agency dealing with strict competition matters and the Commission dealing with political ones (as a possible appeal/overlay) is not a good idea, and could even lead to more "politicisation" of the decision-making process.[1] He may be right, but there might at least be a clearer framework for the different types of assessment. He may also be right that the prospect of two stages with judicial review of each stage (*Euro-kartellamt* competition decision and Commission political decision) may be a problem. The procedure could be long and judicial review of political decisions is always delicate.

In September 1996 Mr van Miert is reported as saying that he thought the German proposal would be "short lived".[2] We will have to see if that turns out to be true, as the E.U. Member States focus on wider issues of institutional reform, and reflect on whether the Commission's *Atlas/Global One and ADALAT/Organon* type of approach is a strength or a weakness to the system.

The international dimension of competition policy

In June 1996 the Commission adopted a Communication to the Council advocating the adoption of an "international framework of competition rules". What is being proposed here is that there should be the development of a "plurilateral" approach to international competition problems in the WTO, going beyond the current political structures, and the limited number of bilateral agreements which exist. It is hoped that a plurilateral agreement would include all the elements already incorporated in bilateral agreements, but to these would be added a set of minimum competition rules, a binding "positive comity instrument" and an effective dispute settlement mechanism.[3]

In practical terms, there are four main items on the Commission's agenda.

(1) The Commission would like to develop a means of controlling export cartels more efficiently. In such cases the competition authority in the country where the cartel participants are based may have neither interest nor jurisdiction to act. On the other hand, the country in which the negative effects of the cartel are felt will have jurisdiction, but may have difficulties in obtaining the relevant information. *Woodpulp* already says that such export cartels are illegal, but clearly the Commission is looking to go further than this

* Part 1 of this article appeared at [1997] 2 ICCLR 34.

1 Competition Policy Newsletter, Vol. 2, No. 2 (1996), at 1 to 4.
2 European Report, No. 2160, September 25, 1996.
3 1995 E.C. Commission Competition Report, at 102.

and develop better means of investigating and controlling them.

(2) The Commission is concerned about market access issues, whether they involve vertical supply agreements or horizontal cartels which block access. Again, there are some remedies available, and here the Commission quotes the action brought by *Kodak* under section 301 of the U.S. Trade Act concerning access to the Japanese market for film and paper. In June 1996 the U.S. authorities initiated a dispute settlement procedure in the WTO on the issue. Again, the Commission is looking for better and more effective remedies.

(3) The Commission is concerned about the unfair competitive disadvantage which European firms face when they compete on world markets with foreign producers operating from home markets which are subject to less vigorous competition policies. The remedy is less specific here. The proposed solution being that such countries, even if developing, should be encouraged to adopt competition rules and to apply them effectively.

(4) The Commission is looking to increase the degree of co-operation in cases where conflicts could occur between different competition authorities. In other words, in those cases where parallel filings are required in different parts of the world. Examples abound, in Global Satellite Systems such as *Iridium*,[4] and the Global Alliances in areas such as telecoms and now air transport.[5]

The Communication is a political document, advocating that the Community seek the establishment of a working party on these issues in the context of the WTO Ministerial Conference in December 1996.

It may also be noted here that the Bilateral Co-operation Agreement between the U.S. and E.C. authorities is still being actively used. According to the 1995 E.C. Commission Competition Report, the U.S. authorities notified their European counterparts of a total of 35 cases in 1995, 21 of these were merger cases. For its part, the E.C. notified the U.S. on 43 occasions in 1995, of which 30 involved merger cases.[6] The Commission has just published a report on such co-operation between April 1995 and June 1996.[7]

Appreciability

At present, there appears to be a major industry drive to refocus the way in which Article 85 E.C. is applied, above all to vertical restraints.[8]

Last year, the English Confederation of British Industry ("CBI") published a set of proposals for the reform of Article 85 called *Loosening the Straight-jacket*. This booklet advocated "a more realistic approach" to what is appreciable, suggesting that Article 85 should still be applied strictly to serious restrictions (such as price-fixing), but that all other restrictions should be subject to a balancing approach, in which notification may not be required if the pro-competitive effects outweigh the anti-competitive effects.[9]

Such less harmful restrictions should be considered as agreements of minor importance and only be notifiable if a market share threshold of 25 per cent is reached. Above that threshold, the CBI advocates an opposition procedure whereby agreements notified would have "deemed negative clearance", if not opposed by the Commission within an opposition period. The idea is that this could apply to agreements containing the less harmful restrictions which fall between a band of 25 to 40 per cent market share.[10]

Similar, but not identical ideas have now been put forward by UNICE in a booklet published in December 1995, *Refocusing the Scope and Administration of Article 85*. UNICE advocates that Article 85 should not be applied to a number of agreements considered to be of minor competitive impact. On a quantitative level, UNICE suggests that the current tests in the notice of minor importance should be alternative rather than cumulative. In other words, in order to benefit from the notice on agreements of minor importance (laying down a 5 per cent market share test *and* a ECU300 million turnover test), in future a company should only have to meet one of these tests. The argument is that this could allow agreements between small companies and large companies to benefit from the notice where the large company only has a small market share of the market concerned.[11]

UNICE also advocates the application of a rule of reason test in Article 85(1) E.C. and that new appreciability guidelines be issued drawing on existing notices on co-operation between enterprises, subcontracting agreements and on exclusive dealing contracts with commercial agents.[12] The most topical proposal is probably that in the context of vertical restraints where UNICE advocates "that Commission intervention in vertical agreements should be limited to situations where the businesses involved *abuse their dominant position on the relevant market or hinder the access of market entrants*" (*emphasis added*).[13] Here it may also be recalled that a few years ago there were interesting Commission ideas suggesting that the Commission should have a variable approach for:

(1) "hard core" or "classic" restrictions;
(2) restrictions in horizontal agreements; and
(3) vertical restraints.

It was also suggested that the Commission could leave more cases to national competition law.

Again, we shall have to see what the Commission has in mind in its proposal for a new Appreciability notice. It would be useful if such a notice were to pull together the case law and practice concerning so-called "flexible approach" or "rule

4 In November 1995 and September 1996 the Commission issued Article 19(3) Notices concerning its intention to take favourable views of the *Inmarsat-P* and *Iridium* satellite personal communications systems: [1995] O.J. C304/6, and [1996] O.J. C255/2, respectively.
5 In October 1996 the Commission issued notices inviting comments on three *Airline Alliances* by European and American carriers, based in part on Article 89 E.C. insofar as services between Europe and the United States are concerned (see [1996] O.J. C289/4, C289/6, C289/8). It is reported that there are also concurrent proceedings by the German and U.K. competition authorities, based respectively on Article 88 E.C. and the Fair Trading Act.
6 1995 E.C. Commission Competition Report, at 99.
7 COM(96) 479 final, October 8, 1996.
8 There is also a fast-developing literature. See, *e.g.* Lugard [1996] 3 ECLR 166; Carlin [1996] 5 ECLR 283.
9 See *Loosening the Straight-jacket*, CBI publication, at 17.
10 *Ibid.* at 16.
11 See *ibid.* at 10. There are various other proposals such as widening the scope of Article 4(2) of Regulation 17/62 (the national agreements exception).
12 See *ibid.* at 9.
13 *Ibid.* at 10.

of reason" cases, to see if a more general principle can be developed, rather than just a series of apparently narrow precedents (separate to the issue of vertical restraints) in addition to setting quantitative guidelines.

Decentralisation and damages

Box 2. Decentralisation and Damages
- Commission proposals on Articles 85(1) and 86 E.C., not 85(3)
  - Confidentiality issues
  - "Dilatory" notifications response
  - *RWE/Nordhorn* (German electricity) case
- Commission decision may be used as proof of facts/ infringements in English courts. *Iberian U.K./British Plasterboard.* Still damages issues to come.

The Commission's preliminary draft notice on co-operation with national authorities aims to encourage firms to approach national competition authorities more frequently, to inform firms about referral procedures and to explain where to go for remedies.

The Commission emphasises that the competition authorities of the E.U. Member States have power by virtue of Article 9(3) of Regulation 17 and Article 88 E.C. to apply Articles 85(1) and 86 E.C.[14] The Commission argues that since authorities are often closer to the companies and markets in question, they may be better able to perform the role of "competition watchdog".

The general theme of the notice is to suggest that where an anti-competitive practice has effects mainly in one Member State, then it should be considered by the national competition authority of that Member State, applying Articles 85 and or 86 E.C. as appropriate or, if not, applying national competition rules but still in line with E.C. principles. The Commission suggests as one guideline that "agreements or practices ... which involve businesses which all have their registered office in the same Member State will generally be national issues".

On the other hand, the Commission wishes to retain the ability to deal with certain types of case. Thus, the Commission states that even if most of the existing foreseeable effects of the practice concerned are confined to a single Member State, the Commission may intervene where:

(1) a new point of law is raised; or
(2) important interests of firms from other Member States are at stake; or
(3) a case involves Article 90 E.C. and therefore displays particular Community interest.

These second and third categories appear to be precautionary steps so that the Commission may intervene if it considers that there is a national bias or risk of local political influence. The Commission suggests that the basic system should be that one single authority will be responsible for considering the competitive situation of a particular practice, with concurrent jurisdiction being only the exception.

14 Cf. the German position in the *Airline Alliances* cases noted above.

The Commission also explains how it proposes to apply its discretion not to pursue cases which do not display sufficient Community interest (*e.g.* after *Automec 2*). In particular, where the centre of gravity of an infringement is clearly situated in a single Member State. The Commission also emphasises that, in assessing the effectiveness of national action, it will consider whether interim measures are available.

The preliminary draft addresses many of the practical issues involved in such a system.

(1) As regards the Commission's exclusive right to give Article 85(3) E.C. exemption, the Commission restates the accepted view[15] that where there is a risk of a national authority reaching a solution which may conflict with that of the Commission, the competition authorities/national courts should avoid that conflict by staying the matter until the Commission's decision.

(2) There is an issue on confidentiality. After the *Spanish Banks*[16] case, it is clear that national competition authorities are not entitled to use as evidence, for the purpose of applying either E.C. or national competition rules, unpublished information obtained through replies to Commission Article 11 letters or through dawn raids. On the other hand, the Commission states that it plans to place the "relevant documents in its possession" (presumably complaints) at the national authority's disposal and to suggest that "to avoid duplication of the Commission's investigation by the national authority, the latter may ... ask the firm concerned not to invoke [the *Spanish Banks*] case-law". It is far from clear whether firms may wish to do so. This will not be an exemption context, just the application of the prohibitions in Articles 85(1) and 86 E.C.

(3) Another important area covered by the notice is the question of defensive, blocking notifications. In other words, where faced with proceedings at the national level, a party may make a notification to the Commission for exemption both in order to block the national proceedings and to gain immunity from fines. The position under Regulation 17, Article 9, being that once the Commission has initiated proceedings, then the national authorities can no longer apply Article 85 or 86 E.C. Interestingly, the Commission, which describes these notifications as "dilatory" notifications, indicates that it aims to give "provisional opinions" on the likelihood of exemption and, in effect, to go slow on initiating proceedings, if that seems appropriate, thereby not preventing the national authority from continuing with its proceedings. The notifying parties would still retain immunity from Commission fines. Again, this is an interesting proposition.

On this issue of "dilatory notifications", one may note the Commission's current approach in the *Dutch Crane Hire cartel* case discussed above, and in the German energy case involving the city of Nordhorn, near the German–Dutch border. The *Bundeskartellamt* applied Article 85(1) E.C. (and § 47 of the German Competition Act) to an agreement by a municipality not to grant any other company the right to start up a public electricity supply business in the area.

15 Case 14/68 *Walt Wilhelm and Other v. Bundeskartellamt* [1969] E.C.R. 1; Case C-234/89 *Delimitis* [1991] I E.C.R. 935; and now *Dijkstra* discussed above.
16 Case C-67/91, [1992] E.C.R. I-4785.

The parties then notified the agreement to the European Commission seeking negative clearance or exemption. In its latest Competition Report, the Commission stated that it "has since informed the [*Bundeskartellamt*] that it has no objections to a resumption in the proceedings".[17] This has resulted in an appeal by RWE to the CFI, challenging the Commission's whole approach of delaying the initiation of proceedings. RWE argues "there is no scope for a decentralised application of Article 85" because of the Commission's exclusive Article 85(3) exemption powers.[18] An important tactical battle given the politics of energy liberalisation at the European level, discussed below!

(4) As the Commission notes, one problem is that some of the Member States' national competition authorities still do not have competence to apply Articles 85(1) and 86 of the E.C. Treaty because the relevant national implementing laws have not been taken. According to the 1995 Competition Report, those countries were Denmark, Ireland, Finland, The Netherlands, Austria, Sweden and the United Kingdom.[19] The Commission is urging Member States to adopt such implementing legislation, or if not, to apply its national competition rules in an equivalent way.[20]

For present purposes, I would make two comments.[21] First, I think it is very useful that the Commission introduce this sort of notice. Patently it is not yet a perfect solution. It does not involve a full delegation of powers and some of the procedures suggested may need further clarification.

For some years, it has already been a big issue in many cases whether one should go under national or E.C. competition law, or to a national competition authority or court or to the Commission seeking relief. This notice helps to explain the Commission's proposed practice in this area. If it encourages more national authorities to become involved in applying Articles 85 and 86 E.C. and/or their national rules more frequently and clarifies the best route to the effective remedy, then so much the better. That should help the backlog in the Commission's cases[22] and achieve a higher level of enforcement. Even without the decentralisation of Article 85(3) E.C. powers, the notice therefore appears to be a step in the right direction.

The main issue now (apart from resolving some of the difficulties in the procedure envisaged) must be that these rules should not lead to complex conflicts cases with "double *renvoi*", nor a lack of cohesion.[23] It will also be interesting to see if Member States will be willing to take up their powers and use them more fully. Do they have the resources the Commission lacks to take up the surplus?

Secondly, I am still not sure whether the idea of national competition laws having a very limited role, in favour of mainly E.C. competition law is correct. This should promote cohesion, which is positive. The problem is that, given the different sizes and structures of the various markets in the E.U., there is a case for variations in national competition laws, reflecting local market conditions. Part of the answer is that those differentiating, competition-related factors will have to be taken into account in the way that the E.C. rules are applied to local conditions. But there appears still to be a case for a broad role for national competition rules.

Damages

In the context of decentralisation, another important issue is the extent to which damages are available in national courts. A case to watch in this area is a ruling in the English courts that a plaintiff seeking damages for infringement of the E.C. Competition rules can rely on the findings of fact and interpretations of law contained in an E.C. Commission decision.

The case concerns the Commission's decision in *British Plasterboard*.[24] Iberian UK Ltd which, it will be recalled, was an importer of Spanish plasterboard into the United Kingdom, is suing BPB and British Gypsum on the basis of the Commission's findings that there were various practices, including loyalty rebates, designed to harm their import trade.[25] Laddie J. has held that the decision of the European Commission cannot amount simply to *res judicata*, since the European proceedings were administrative rather than civil. However, he has still held that, as a matter of public policy, a similar result should be reached. Laddie J. was influenced by the practical reality that the Commission and European Court proceedings had already taken some nine years, and that a plaintiff seeking damages for Articles 85 and 86 E.C. could be faced with a decade of litigation.

In a bold judgment, he considered that since national courts are required to defer to the Commission to avoid any risk of conflict *before* a Commission decision is taken, similar deference and weight should be given to Commission decisions *after* they are taken. He held:

> ... to allow the defendants to argue afresh here all those points which they have argued and lost in the course of 8 or 9 years of detailed proceedings before the Competition authorities in Europe would be absurd. I can see no compelling reason why they should be allowed a second bite of the cherry for the purpose of persuading the English courts to come to a conclusion inconsistent with that already arrived at in Europe. It follows that, in my view, it would be an abuse of process to allow the defendants to mount a collateral attack on the Commission decision in proceedings against *any* party before any national court.

This ruling is the subject of an appeal. However, if upheld, it is clearly of landmark importance. It will mean that, at least in the English courts, the plaintiff/victim will be a long way towards judgment. The attractiveness of so-called "piggy-backing" on E.C. competition decisions to obtain

17 1995 E.C. Commission Competition Report, at 298.
18 See [1996] O.J. C318/19.
19 1995 E.C. Commission Competition Report, at 296.
20 Another practical issue is the question as to whether the national competition authorities will have similar fact-finding powers, on which the Commission published a survey last year.
21 See also Ehlermann, "Implementation of E.C. Competition Law by National Anti-trust Authorities" [1996] 2 ECLR 88.
22 According to the latest Competition Report, DG IV opened 559 new Article 85 and 86 E.C. cases in 1995 and closed 433 formally or informally. The backlog or "stock" of cases now stands at 1,178. 78 cases came from the EFTA Surveillance Authority because of Austrian, Swedish and Finnish entry to the E.U. (see pages 305 and 45 to 47).
23 In its latest Competition Report, the Commission states that it is pursuing "uniformity in the substance and application of national competition laws" through "communication and cooperation between Community and national enforcement officials" rather than "any formal act of harmonisation" (1995 E.C. Commission Competition Report, at 44).
24 [1989] O.J. L10/50.
25 [1996] 2 C.M.L.R. 601.

damages will also be confirmed. There may still be difficult questions (*e.g.* as to how the plaintiff can prove and quantify damage in the circumstances), but it is already a huge step forward to would-be plaintiffs to shift the debate only to such damages issues, rather than having to make out the case for liability as well.

One would think that even a judgment such as this will not lead to a flood of actions. Commission decisions do not always deal adequately with the infringement affecting the complainant's damages claim, as the Commission settles for an infringement which is more easily proved. Nor do they always focus on actual effect, since it is enough for the Commission to find that the object of an agreement is to infringe the competition rules. The Commission also does not have to quantify damage, although it may do an assessment of the benefit gained by infringers, for the purpose of the fine calculation.

Box 3. Policy: Vertical Restraints

• *Per se* rules/ "Classic" infringements?	*Less harmful restrictions*	*Market-share threshold*
	• individual exemption or "specific block exemption"	• effective competition or 40% threshold
	• general block exemptions or opposition procedures • "minor" agreements	• 25%? or amended NAMI?
	• "rule of reason"/ "flexible approach" cases	

The "realignment" of E.C. competition policy

It must be largely conjecture as to what the Commission is about to propose concerning vertical restraints. However, the very length of time that the Commission has spent reviewing what should happen fosters speculation as to whether a major change is being planned. At this stage, the point I would like to make is simply that if one takes the appreciability ideas on the one hand and the decentralisation initiatives on the other, we are talking about a major realignment of E.C. competition policy and enforcement.

It appears that such a realignment is being driven by two factors: first, the Commission's (sensible) determination that it cannot go on having such a large backlog of cases and secondly, the broader political issue as to whether the focus of E.C. competition policy is correct. Is it good for so many agreements to be caught by the competition rules (whether for reasons of compliance cost, burdens on regulators, or substantive competition reasons)? It is important to distinguish these factors. Clearly the Commission should not be looking to relax the rules, simply because it does not have the staff to deal with the cases.

Companies can be expected to favour any reduction in regulatory burden. That must be right where the regulatory burden is disproportionate to the overall aims sought to be achieved. This is something that readily comes to mind when one is filing the new Form A/B for a quantitatively minor agreement which, nevertheless, is clearly caught on the rules. On the other hand, that is not to say that there should only be some sort of "macro" focus which catches only the big companies with the big market shares involving major restrictions for competition. It may be that DG IV should only be doing that sort of case, but that does not mean that others affected by somewhat lesser restrictions should not be able to obtain effective remedies in cases which are crucial for them, whether from other competition authorities or in the national courts.

For the purposes of debate alone, I have attempted to present some of the ideas being put forward in the diagram set out in Box 3. This is one way in which one could imagine, on the ideas put forward so far, that an "Appreciability Notice on Vertical Restraints" might be presented.

To explain the diagram: First, there is a category of *per se* rules, in European terms "classic" infringements which are, in principle, to be caught by Article 85(1) E.C. irrespective of market share. The question I have here is whether that *per se* group would be greater than merely pricing restrictions. On the European case law, absolute territorial protection is, for example, a classic infringement.

Secondly, there is provision for a group of cases, falling outside Article 85(1) E.C., even though they do contain restrictions, because of the so-called "rule of reason" or "flexible approach" in certain circumstances by the European Court.

Thirdly, there is a group of agreements, called "minor" agreements, which might be somewhat larger than the Commission's current notice on agreements of minor importance ("NAMI"). A conservative approach might suggest that the notice would just be modified slightly. A bolder approach would suggest that all agreements containing "less harmful restrictions" up to a certain market share, such as 25 per cent, should be treated as minor.

This has its problems. For example, it puts a lot of emphasis on a market-share threshold. How, in practice, should companies and their lawyers deal with that? Would it mean in practice that we would have agreements underneath the 25 per cent threshold which would include clear infringements of Article 85 E.C. (while not including *per se* restrictions), relying on appreciability as a defence? Or would the agreements have to be drafted in line with stricter rules anyway, but simply not notified? For example, because a franchising chain would start as a small regional operation, but then rapidly expand across borders or throughout a whole Member State to breach the 25 per cent threshold? A related issue is whether parties should still be able to go into national courts to attack restrictions underneath the 25 per cent threshold. At the moment, if you go into a court with a restriction in circumstances covered by the notice on agreements of minor importance, it is very unlikely that a judge will find in your favour. But perhaps the restrictions *would* still be significant on the facts. Moving the threshold up too high not only reduces the work of the competition authorities, but it may also reduce available remedies for companies affected by anti-competitive practices.

Fourthly, there might be a general category of agreements which would not be deemed minor, yet not be the difficult cases in concentrated markets. The CBI has suggested a grouping between 25 and 40 per cent market share. It advocated an opposition procedure, but one could also think of

using block exemptions in this area. Even though criticised by some as "strait-jackets", they have the advantage of being useful models in many cases and enforceable in national courts. Perhaps the opposition procedure should be modelled on, say the rail transport model.[26] Then clearance would only be given for a period and the Commission could always pick up the relevant agreement on expiry of that period. Or is that too little legal certainty for the parties? Such procedures and block exemption regulations may not be necessary if national competition authorities could be given Article 85(3) E.C. powers.

Following the CBI proposal, there would then be some sort of ceiling to this general category of agreements. The CBI talked of a 40 per cent threshold. UNICE has put the threshold higher by suggesting that intervention should only occur where businesses abuse their dominant position on a relevant market or hinder the access of market entrants.

One could speculate that it might be surprising for the Commission to try a market-share cap again after the difficulties with the transfer of technology block exemption. However, even if such a market-share cap is not included, one would expect an "effective competition" test as the ceiling for any general approach. This might then lead to the category of more difficult individual filings where one would be considering special circumstances justifying exemption, or looking for a specific sectoral solution through a "sectoral block exemption". More of a "bundle of decisions" than the general type of block exemption, applicable to the more normal agreements in more competitive markets.

It may be that these ideas are completely to one side of what the Commission is planning. However, I hope they may at least serve to show some of the difficulties in the Commission's apparent realignment to a refocused E.C. competition policy with decentralised enforcement. In my view, we all need to be thinking about this very carefully, because these sort of issues are fundamental to our clients' competition interests and remedies.

SPECIALIST AREAS

Competition and sport

Box 4. Sport
- *Bosman* hard to accept for some
- Article 85 E.C. should apply as well as Article 48 E.C., but if both apply there is no room for Article 85(3) exemption
- Query the position of national transfer systems?
- Other sports, other issues to come: *e.g.*
  - Danish tennis ball endorsement scheme
  - TV rights issues *KNVB/Sport 7, EBU (2)*?

Bosman and its aftermath

On December 15, 1995 the ECJ gave judgment in *Bosman*.[27] The court ruled that the "3+2" nationality rule[28] and the UEFA system for payment of transfer fees on the termination of football players' contracts violated Article 48 E.C. because they restricted players in their fundamental right to work anywhere in the E.U. The court chose not to rule on whether these rules infringed Article 85 E.C., stating that this was not necessary given its ruling on Article 48 E.C., and limited its judgment in time, so that it only applied to court proceedings or equivalent claims running at or after that date.

The sports world appears to have been completely stunned, even though the likelihood of such a ruling had been clear for some time. As a result, this seems to have been one of the rare cases where compliance with the ECJ's ruling was not immediate. UEFA, in particular, was concerned that there was no transitional period and therefore the changes would occur mid-season. UEFA also argued that it could maintain the 3+2 rule for its European competitions, arguing that, in a sense, clubs "represented" their countries.[29] As a result, the Commission sent FIFA and UEFA a warning that if it did not comply, the Commission would take action.[30] Insofar as FIFA and UEFA had notified its systems in July 1995, there was talk of removing immunity from fines.

There were also political reactions, as the Belgian Prime Minister, Mr Dehaene pleaded for a "sports exception" to be introduced in the E.C. Treaty and the InterGovernmental Conference[31] (even though it is hard to see how one can have such an exception to a fundamental right under the Treaty). Meanwhile players and large clubs invoked their newly confirmed rights and freedoms. Ultimately, UEFA relented. National leagues have generally already done so.[32] As you will know, many football teams have now changed dramatically, becoming very international. Other sports with similar rules (such as basketball) are also being affected.

There are a number of competition issues which remain. First, insofar as Article 85 E.C. was not part of the ECJ ruling, is it clear that the rules infringed that Article? If so, could they be exempted? The answer is, it appears, "yes" and "no". Certainly Advocate-General Lenz considered the rules contrary to Article 85(1) E.C. and that no exemption could be given to a practice contrary to Article 48 E.C. This is why Mr van Miert was so explicit in saying there was little room for manoeuvre. Some have, however, questioned where the restriction on competition is.

Secondly, insofar as the *Bosman* case relates to European transfers, does that mean that national transfer fee systems are lawful?[33] Most argue that Article 48 E.C. does not apply insofar as national rules involve at most reverse discrimination. The position is not so clear as regards Article 85 E.C., if it could be shown that the effect of such systems of national rules was to distort competition/trade between Member States. Mr van Miert appears to be arguing that Article 85 could apply here also. The facts in *Bosman* were the context of a European transfer, so clearly the ruling does not directly deal with this (or with transfers from non-E.U. countries), but it may be that notification of national systems could now

26 Regulation 1017/68, Article 12; [1968] O.J. L175/1.
27 Case C-415/93 *Royal Club Liegeois and Others v. Bosman.*
28 The rule that a club would only field three "foreign" players and two other foreign nationals assimilated to local nationality through having played in the country for some time.
29 Cf. Case 13/76 *Dona v. Mantero* [1976] E.C.R. 1333.
30 IP/96/62.
31 European Report, No. 2094, December 20, 1995.
32 Although there were reports of *Fortuna Köln* blocking a transfer by the German player, Mikkel Beck to Middlesbrough by exercising an option to extend his contract by one year; See *Europe*, No. 6755, June 24/25, 1996; No. 6803, September 4, 1996.
33 See European Report, No. 2101, January 24, 1996; No. 2018, March 23, 1996.

be required, either under E.C. law or national competition rules.[34]

In practice, although there has been much discussion as to whether *Bosman* would also "puncture" international and national transfer systems, because players could always move abroad for no transfer fee, such questions did not stop Newcastle United paying £15 million for Alan Shearer!

Thirdly, there were suggestions that the unlawful practices might be maintained through "gentlemen's agreements" among clubs at least until the end of the season.[35] Normally, such practices would also be caught by the E.C. competition rules, exposing the participants to the risk of fines and/or damages claims.

Mr van Miert is still saying that he would like to assist if UEFA and others were to design proposals to foster the training of younger players and to allow the smaller clubs to survive (without the possibility of "selling" home-grown players on to finance the clubs' activities). For example, through "solidarity" schemes for the sharing of remuneration from TV deals.[36]

The wider impact

In general, it appears that the Commission's long-standing tolerance of Treaty violations in sport is over. As the Court said in *Bosman*, the Commission does not have the power to authorise practices contrary to the Treaty.

There are now a number of sports-related cases in the Commission's workload and recent reports have emphasised the impact of E.U. law (including competition) on sport.[37] For example, one may note the Commission's notice concerning the licensing arrangements between the Dutch Football Association ("KNVB") with a new TV channel Sport 7 (which it partly owns).[38] These parties have notified to the Commission a seven-year "rights" agreement, granting Sport 7 the exclusive right to exploit their recording and television rights. The licence does not include all rights since, for example, pay-per-view or video-on-demand rights are not covered. Sport 7 has the right to sub-license to third parties in the Netherlands and abroad. At the end of the seven-year period, renewal of the right is to be subject to a bid procedure. The Commission has invited comments but already indicated that "it may be necessary to impose obligations on the parties, including a requirement for a clear licensing policy, known and applicable to all interested broadcasters".[39]

The Commission has also issued an Article 19(3) Notice concerning the *Danish Tennis Federation's* ("DTF") selection and endorsement of tennis balls.[40] This is a case the Commission has been discussing for some time.

Apparently in November 1998 a Danish parallel importer of tennis balls, PTD Sport, informed the Commission that it was having difficulties in selling tennis balls in Denmark. It was argued that the Danish system of "Official" balls selection caused this. Under the system, DTF had entered into agreements with Danish distributors for Penn, Slazenger and Tretorn balls, whereby in return for financial support, these distributing companies could attach stickers to their packaging indicating that they were "DTF's Official Balls" and using DTF's logo. The relevant agreements were for three years' duration. This meant that only those companies distributed the "Official" balls and that other manufacturers/distributors could not sell the products. This blocked parallel imports. The Commission also found that the description "Official" made people think (incorrectly) that these balls were technically superior to others. DTF had also explicitly prohibited the use of other brands and of parallel imported tennis balls in the tournaments which it organised.

The Commission found that these arrangements infringed Articles 85 and 86 E.C. In April 1994 the DTF notified revised agreements. These provide that all manufacturers meeting certain objective criteria can become members of a so-called DTF "ball pool", and can advertise as such using the DTF logo. DTF will call for tenders among ball pool members for the right to be the "supplier" of DTF tournaments and to identify its products as such.

At the Commission's insistence, the resulting supply and endorsement agreement is for one year only, and selection is to be on the basis of the "best bid" (subject only to verification of the type and quality of the balls and other equipment). Use of the "Official" sticker and the terms that the balls had been "selected" and "approved" are dropped. Instead the supplier can simply present himself as "supplier" and use the ball pool logo. In such circumstances, the Commission considers that the notified agreement does not come within Article 85(1) EC.[41]

In the meantime, new court cases are testing other sports rules. For example, in April 1996, the Tribunal de Première Instance, Brussels asked whether rules of a basketball federation prohibiting a club from fielding a player in competition if he is engaged after a specified date are contrary to Articles 6, 48, 85 and 86 E.C.[42]

Energy

Box 5. Energy issues

- Proposed Electricity Directive
  - phased liberalisation for eligible customers (>40 GWh at the beginning, 9 GWh after six years)
  - "coexistence" of negotiated third-party access and single buyer systems
- DG IV case load on various issues
  - Electrabel share stake in return for long-term supply contracts—15 years only
  - long-term purchase agreements with new power plants in Italy/Portugal (exclusivity only for 15 years)

34 See also the English case *Eastham v. Newcastle United* [1963] Chancery Cases 413.

35 European Report, No. 2098, January 13, 1996.

36 European Report, No. 2018, March 23, 1996.

37 See *The Impact of European Union Activities on Sport*, 1995 Edition (E.C. Commission/Cooper & Lybrands).

38 [1996] O.J. C228/4.

39 Cf. also earlier sports broadcasting cases, such as the *English Football Association and BBC/BSkyB*; IP/93/614.

40 [1996] O.J. C138/6.

41 An apparently similar related case concerns the licensing of the FIFA name for footballs. In March 1996 it was reported that the Commission carried out a dawn raid on FIFA's offices in London. It appears that the Commission has had complaints that the licensing fee is unduly high, and again it is thought that there are issues about the use of the term "official" and agreements with national federations, requiring the use of such balls in official competitions. It is reported that under FIFA's system, FIFA charges 3 Swiss francs for each ball used in international competition, and 1 Swiss franc for training balls. The cost of the official trade mark, approval and licence may be up to 12 per cent of the sale price of a ball (European Report, No. 2113, March 6, 1996).

42 Case C-176/96 *Jyri Lehtonen and Others v. Belgian Basketball Federation* [1996] O.J. C197/15.

The Proposed Electricity Directive

The other topical area which I would like to mention this year is the application of competition to energy. In some ways, this is an old story, since for some years it has been clear that the competition rules apply to measures by commercial operators, whether public or private, which restrict competition in the provision of energy (electricity or gas).

It will be recalled that the Commission took a landmark decision in this respect in 1991 concerning the Dutch *Ijsselcentrale* case.[43] Hence also the cases such as the German electricity case referred to above. Article 90(2) E.C. may also be invoked in appropriate circumstances as the *Almelo* judgment shows.[44] The framework of these cases is broadly one of loosening exclusive supply arrangements and third-party access, restricted in cases where competition has to be limited in order to fulfil public-service obligations.

In parallel to this, there have been negotiations for some years to achieve a liberalisation of the energy markets in the Community. Here, we are talking about the development of specific directives which aim to establish common rules for the relevant internal markets in those products.[45] These proposals are extremely political because they reflect a variety of policy concerns. First, the need to improve the competitiveness of the European economy and to allow competition to take place to that end. Secondly, the need to ensure an appropriate security of supply to all users, which is a sensitive issue both in terms of balancing the flows of the different energies concerned within the Community, and insofar as some of those energy sources come to a large extent from outside the E.C. (*e.g.* gas). Thirdly, the question of environmental protection and the desire to move energy sources into the cleanest possible products. Last, but not least, there is a practical issue concerning employment in the public sector, if the consequence of liberalisation should be the reduction of the relevant workforces.

All of this has resulted in slow progress on liberalisation. In particular, because Member States have different approaches to the issue of security of supply. Some believe that this can be organised and controlled through public-service obligations. Others believe that rather more is required, there should be a single buyer who buys in the energy source and sells it on. At least this is the case for electricity and this is where there have been important developments this year.

On June 20, 1996 the E.U. Council reached a Common Position on the Directive concerning common rules for the internal electricity market. The agreed text has just been published in the Official Journal.[46] The proposed Directive is now scheduled for a second reading in the European Parliament in early December.

The main idea in the proposed directive which is of relevance to companies is the idea that certain so-called "eligible customers" will be able to obtain their electricity supply from the producer of their choice. On the Common Position, eligible customers are to be those consuming more than 40 GWh per year. Apparently, if the threshold is set in this way that should liberalise national markets in electricity by 22 per cent. The idea is that there should then be a progressive opening of the national markets by a lowering of the threshold as to what is an eligible customer over a six-year period. Three years after entering into force of the directive, this threshold should be reduced from 40 GWh to 20 GWh per year. After another three years the threshold should be further reduced to 9 GWh which corresponds to an opening up of national electricity markets by 30 per cent. The definition of "eligible customers" is slightly more complex than this, insofar as Member States are to designate who they are and there is an issue as to whether distributors may be considered in that category. However, the theme is clear.

The proposed directive then goes on to provide that access to the electricity system is to be organised in one of two ways, which are meant to be equivalent. The first is the "negotiated third-party access procedure" under which electricity producers and eligible customers, either inside or outside the territory covered by the system to which access is sought, can negotiate access to that system so as to conclude supply contracts with each other on the basis of commercial agreements. The other system is one called "the single buyer system". Here the concept is that a Member State may designate a person to be the single buyer within the territory. While eligible customers are to be free to conclude supply contracts with producers outside the territory covered by the system or with independent producers inside the territory, the mechanism is different because the single buyer buys the electricity in and then sells it on to the customer, subject, however, to an obligation to supply the customer at the best price. The idea of the "co-existence" of these two systems is controversial, but that is the political compromise which has been struck.

It will be interesting to see how this all works in practice if the proposed directive is adopted in this form—above all to see how DG IV will react in the future. Given the tendency to "pragmatism" one might think that the Commission might not go faster than the liberalisation envisaged. On the other hand, in the face of specific cases and complaints, it could be that there will be rather difficult issues of Community interest which might still have to be resolved in the sense of decisions accelerating the rate of liberalisation.

Work has now also started on the proposed Gas directive. The issues are not exactly the same, in part because more of this energy source comes from outside the Community. On the other hand, there has been talk of trying to achieve the same levels of liberalisation as in electricity.

Clearly, these are fundamental issues to large industrial consumers seeking to become as competitive as possible in the global market-place. At the moment, it is less clear how directly this will affect the smaller consumers in the Community.

Recent cases

This year we have seen one interesting intervention by the Commission, several Article 19(3) Notices concerning long-term supply agreements in the context of the establishment of new power plants and a proposed clearance for a North Sea gas sales arrangement.

43 [1991] O.J. L28/32. Subsequently, the subject of extended litigation in the CFI and ECJ, see, *e.g.* Case T-16/91 *Rendo and Others v. Commission* [1992] E.C.R. II 2417; Case C-19/93P Judgment of October 19, 1995, as rectified by the Order of the Court dated April 24, 1996.

44 Case C-393/92, [1994] E.C.R. I 1477.

45 See, *e.g.* the Amended Proposal for a European Parliament and Council Directive concerning common rules for the internal market in natural gas, COM(93) 943 final—COD 385, [1994] O.J. C123/26; Amended proposal for a European Parliament and Council Directive concerning common rules of the internal market in electricity, COM(93) 643 final—COD 384, [1994] O.J. C123/1.

46 [1996] O.J. C315/18.

The intervention concerned *Electrabel* in Belgium. What happened is that Electrabel proposed to give municipal and regional power suppliers in Belgium the option to acquire 5 per cent of Electrabel's capital, in return for long-term supply contracts for as much as 30 years. The Commission intervened, arguing that this would tie up regional markets for far too long, contrary to Articles 85 and/or 86 E.C.[47] There are reports that the parties have agreed to reduce the 30-year duration of the relevant contracts to only 15 years. However, recently it appears that Mr van Miert has been seeking confirmation of this and a clearer explanation of how much freedom the local authorities will have to end contracts with Electrabel and choose to go for another supplier.[48]

There have also been two interesting Article 19(3) Notices concerning power purchase agreements for power stations in southern Europe. In *REN/Turbogas*,[49] the Commission has allowed a power purchase agreement whereby REN, the sole operator and system manager of the Portuguese electricity grid, undertakes to purchase all the power generated by a new combined cycle gas turbine power station at Tapada in Portugal for 15 years. As originally notified, the agreement provided that thereafter the power station could supply electricity to third parties, provided that the power was not required by REN. After intervention by the Commission, the parties agreed that this option system should be amended so as to allow the power station to simply sell the capacity to third parties after 15 years.

In *ISAB Energy*,[50] the Commission is proposing to clear a similar power purchase agreement for the supply of electricity to ENEL, the operator of the national transmission network in Italy. The Commission's view was that it was unable to take a favourable view of the power purchase agreement while the power station was bound to supply all of its capacity and power to ENEL for 20 years. As a result of the Commission position, the parties have not changed the agreement, but the Commission has indicated that it will re-examine the position after the first 15 years of commercial operations, and that its favourable position is only valid for those 15 years. The Commission's position is that after the 15 years, the power station should be able to deliver electricity to consumers other than ENEL, either in Italy or in other Member States.[51]

The Commission is also proposing to take a favourable position concerning a joint sales arrangement between participants in a North Sea gas field, but only it appears, insofar as at the relevant time there was no effect on trade between Member States. In *Britannia Gas Condensate Field*,[52] the Commission considered a notification by those companies involved in the Britannia field, whereby one of the member companies was to be responsible for the conduct of negotiations with potential gas buyers. This agreement was enforced between February 1992 and the end of 1994. Sales were concluded in that period for delivery from 1998.

Although it appears that there is a gas connector with Ireland which has been operational since October 1993, the Commission noted that this is more of a "security of supply measure", designed only to back-up production in Ireland when this runs down sometime after the year 2000. At the time of the Britannia agreement, there was no potential continental competitor to Britannia for such gas supplies, since there was no means of transporting such gas to the United Kingdom and no certain prospect of being able to do so. However, the position on this is changing as a result of the construction of the Gas Inter-connector, which was itself cleared by the Commission in May 1995.[53] There are other cases,[54] but the point which I would like to bring out here is simply that there is a developing case law in this area which shows that the competition rules already apply.

47 European Report, No. 2115, March 1996.
48 European Report, No. 2169, October 26, 1996.
49 [1996] O.J. C118/7.
50 [1996] O.J. C138/3.
51 See also the Article 19(3) Notices concerning *Nuclear-Electric/British Nuclear fuels*, [1996] O.J. C89/4; and *Scottish Nuclear/British Nuclear fuels*, [1996] O.J. C89/6.
52 [1996] O.J. C291/10.
53 See 1995 E.C. Commission Competition Report, at 125.
54 *e.g.* the *British Gas Network Code* [1996] O.J. C93/5.