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Major Events in E.C. Competition Law in 1997, Part 1

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The object of this article is to provide an overview of the main developments in E.C. competition law (Articles 85, 86 and 90 E.C.) in 1997.[1] The focus is on areas of general interest, leaving aside merger control, save in so far as this is of wider relevance (*e.g.* as it is this year with some joint ventures coming into the E.C. merger control system).

The article is divided into three sections:

(1) a *general overview* of legislation, notices and cases;
(2) an outline of *current policy issues*; and finally
(3) some comments on *areas of particular interest*. It is proposed here to discuss *competition and sport* and, conscious of the decentralisation process which is going on, to mention some *new national competition laws*, based on E.C. principles. Sections (2) and (3) will be discussed in Part 2 of this article, to be published in the next issue of this journal.

In the author's view, the most important aspects of the year are in the Commission's very extensive legislative programme. Above all, the new rules on E.C. Merger Control and J.V.s (which come into force in March 1998) and the Commission's Green Paper for Vertical Restraints (and related hearing in October 1997). There have been some interesting European and national court judgments (ranging from damages issues in Germany to European Court confirmation that luxury sales can be a justification for selective distribution). The Commission has not taken many full, formal decisions but has intervened in many cases less formally.

There is so much important "legislation" that discussion of it is spread through the article and given priority over some European Court and Commission cases.

OVERVIEW OF MAJOR EVENTS

Legislative developments (adopted and proposed)

Box 1: Legislative Developments

- *Council Regulation 1310/97*
  - — New layer of merger thresholds to avoid "multiple national filings"
  - — New joint venture rules
    - * prior clearance
    - * one + four month review if meet new (or old) thresholds
    - * substantive test? Should be usual Article 85(3)
      But *N.B.*: "in particular" considerations in new Article 2(4)
      Keywords in Preamble recital: "direct", "appreciable", "primarily structural", "as a general rule"?
    - * *Optical Fibres* scenarios

New merger control and joint venture rules

In June 1997 the E.U. Council of Ministers ("the E.U. Council") amended the current E.C. Merger Control rules by adopting Council Regulation 1310/97.[2] This development follows from the Commission's Green Paper on Mergers and a groundswell of support for a one-stop shop clearance system to reduce the number of cases where multiple national filings are currently required. There are five main points:

(1) A new layer of thresholds is added, designed to catch concentrations with cross-border effects in at least three EEA Member States. The current thresholds are retained (combined worldwide turnover ("WWT") of ECU 5,000 million, individual Community-wide turnover ("CWT") of ECU 250 million, not more than two-thirds of such CWT in one and the same Member State).

Now a concentration *also* has to be filed in Brussels if a new set of thresholds is met.[3] The combined WWT of the parties must be more than ECU 2,500 million. At least two parties to the concentration must have more than ECU 100 million CWT individually. Two or more of the parties must have a combined turnover of more than ECU 100 million in the same three Member States and lastly, in those three Member States, two or more parties must have turnover of

1 The reference period covered is from November 1996 to November 1997. I would like to thank various members of Stanbrook and Hooper for their help with drafting the cases and Global One sections of this article and in particular, Flavia Distefano and Ingrid Cloosterin for their assistance in the final editing and production of the text. This is a slightly revised version of a paper given at the IBC E.C. Competition Law Conference, November 1996 in Brussels.

2 [1997] O.J. L180/1.

3 New Article 1(3) in Regulation 4064/89.

at least ECU 25 million individually. (The "two-thirds rule" still applies.)

At first sight, this is very complicated. Above all, because to do the assessment you need national turnovers straight away. However, in comparison to the current situation, where one may be reviewing various sets of criteria (including market shares and/or turnover tests) the new threshold is a light burden. The system is not quite what the Commission asked for. The Commission had proposed a general reduction of jurisdiction based on E.C. merger control thresholds and a system of a single filing in Brussels where national filings were required in at least three EEA Member States, based on those Member States own national rules (including voluntary systems). The adopted formula reflects less "variable geometry" in the thresholds, but does require close attention to detail from the outset.

(2) All full function joint ventures meeting the thresholds for E.C. merger control (the old or the new) will now be dealt with under Regulation 4064/89, which has been adjusted accordingly.[4] This means that such J.V.s benefit from the procedural timetable of one-month review, plus four further months in the case of serious doubts as to compatibility with the Common Market. It also means that such J.V.s can no longer be implemented before the Commission's clearance, as was possible under Regulation 17/62.

Such J.V.s will now benefit from "one-stop shop" clearance in Brussels. It will no longer be necessary to decide if a J.V. is concentrative or co-operative just to know where to file.

It is less clear on Council Regulation 1310/97 how the Commission will deal with J.V.s *substantively*. J.V.s which have the object or effect of co-ordinating the competitive behaviour of undertakings which remain independent will be assessed under Article 85(1) and (3) E.C., as opposed to the dominance/"substantial fetter on the maintenance of competition" tests of E.C. merger control. The Regulation also emphasises, "in particular", the risk of spillover between the parents (but not the parents and the J.V.) and the risk of eliminating competition (*e.g.* Article 85(3) fourth element[5]). The Preamble also provides for the Commission to apply Article 85(1) and (3) E.C. to J.V.s: "to the extent that their creation has as its *direct* consequence an *appreciable* restriction of competition between undertakings that remain independent; whereas if the effects of such joint ventures on the market are *primarily structural*, Article 85(1) does not *as a general rule* apply"[6] (*emphasis added*). It will be interesting to see how the Commission will deal with these aspects and key words in practice. Once again it should be emphasised that, while it is understandable that the Commission should have wanted to delete "vertical" spillover issues between the parents and their J.V. in order to widen the procedural gateway into the E.C. merger control regulation in recent years (with industry support[7]), the Commission is still bound to look at the issue in its substantive assessment under Article 85 and not just where two parents remain on the same or adjacent markets. Vertical and horizontal spillover issues are sometimes difficult to assess in practice. Both can still be very important.

For example, in an *Optical Fibres*[8] type of scenario, A may be in J.V.s with B, C and D on neighbouring product or geographic markets. It is possible that A could use its influence to prevent a J.V. from expanding into another J.V.'s market or into a market A wants for itself. Any such practice could harm A's business partner(s') interests anti-competitively. Such possible influence by A should therefore remain caught by Article 85(1) E.C. Perhaps this is evident, but it is as well to mention it because the Commission gives so much weight to horizontal spillover between parents, which is often the significant issue, but is not the only spillover to assess in the substantive review.

A variation on this theme is where A enters into a J.V. with B, B has interests in other sectors and "industrial leadership" type arguments do not apply (*i.e.* the J.V. is jointly controlled by A with B, but B is an active participant in the J.V. maximising its interests, not just a passive investor with A running the J.V. and B pursuing other interests elsewhere). Here, issues which look vertical are, in fact, horizontal. The assessment cannot just stop at the level of establishing whether there are two parents in the same or adjacent markets. A's possibility of anti-competitive influence brings the agreements within Article 85(1) E.C. (on case law such as *BAT Reynolds* and previous Commission practice).

Subject to this point and conscious that, in general, greater clarification is needed as to how the J.V. substantive test will work, the new rules are welcome. It will be interesting to see how the Commission copes after its experiences with the Accelerated J.V. procedure and the concern that more J.V.s will now have to be filed. Adjustments to the procedural rules in Regulation 3384/94 and Form CO are in the pipeline and there is talk of amending the related notices.

(3) The Commission has been formally given the power to accept undertakings dealing with its concerns in the first phase of review.[9] This, the Commission has been doing for some time informally, while voicing the concern that it would be better to have the power to extend the procedure to seek third-party comment and consult with Member States. This is now introduced, the Commission being allowed to extend the first phase review to six weeks, where appropriate. Again, this is a welcome improvement, which may lead to more open, early settlements.

(4) The definition for banking income is changed.[10] As it is now, the banking test is a complex one, based on a percentage of assets with a ratio of loans to advances and turnover is allocated according to where the borrower is. Now, the income definition is based on the relevant E.C. credit and financial institutions legislation and such income is allocated to the E.U. branch or division of the bank which receives it.

(5) There are amendments to the rules on referral of cases to Member States, which increase the scope for such referral.[11] If the distinct market is not a substantial part of

4 See, *e.g.*, new Article 2(4) of Regulation 4064/89.
5 *ibid.*
6 Regulation 1310/97, Preamble, paragraph 5, second "whereas" recital.
7 See the new approach in the 1994 Cooperative/Concentrative Notice, and now the amendment in Article 3(2) of Regulation 4064/89, deleting co-ordination between the parents and the joint venture.
8 [1986] O.J. L236/30.
9 New Articles 6(1)(a), 6(1)(b) and wording in Article 10.
10 New Article 5(3) of Regulation 4064/89.
11 New Article 9(2) and (3) of Regulation 4064/89.

the Common Market, there is no need to show that the concentration threatens to create or strengthen a dominant position. Effect on competition in a distinct market is enough.[12]

The new E.C. merger control and J.V. rules are to enter into force on March 1, 1998.[13]

New de minimis rules/Appreciability notice

Box 2: Legislative Developments

- *New de minimis/ Appreciability Notice*
  - — 5% horizontal agreements
  - — 10% vertical agreements (parallel network effect reservation)
  - — 5% "mixed" agreements
  - — No (ECU 300 million) turnover ceiling
  - — *per se* rules for national authorities and courts
  - — SME exception
  - — national laws can still apply

In January 1997 the Commission published a draft Notice on Agreements of Minor Importance which, after comments, was adopted last month,[14] and replaces the 1986 Notice (as amended). There are significant changes.

(1) The Commission introduces a market-share threshold which varies according to whether a restriction is horizontal or vertical. Agreements between firms are considered not to fall under Article 85(1) E.C. if the market share held together by all of the participating undertakings does not exceed 5 per cent for horizontal agreements, 10 per cent for vertical agreements or 5 per cent for mixed horizontal/ vertical agreements.[15]

(2) The additional quantitative threshold is dropped (previously that the parties' turnover was less than ECU 300 million), thereby allowing large companies which enter into agreements in markets where they have small market shares to benefit from the Notice.

(3) The Commission develops its policy of defining *per se* infringements of Article 85(1) E.C., confirming that agreements which have as their object to fix prices or production or sales quotas or to share markets or sources of supply may infringe Article 85(1) E.C. even below these thresholds. However, the Commission emphasises that even in such *per se* cases "in the first instance it is for the authorities and courts of the Member States to act".[16] Decentralisation features all through Commission Notices these days!

(4) The Commission indicates that agreements between SMEs (small and medium-sized enterprises)[17] are "rarely capable of significantly affecting trade between Member States and competition". Even if they do so exceptionally, the Commission states that they will not be of sufficient Community interest to justify any intervention. The Commission will not do so either on request or its own initiative even if the above thresholds are met. The Commission nevertheless reserves the right to intervene where they cover a substantial share of the relevant market and/or where competition in the relevant market is restricted by the cumulative effect of parallel networks of similar agreements made between several producers or dealers[18]—another old theme, which is also a strong one in recent Green Paper discussions.

This is a welcome development. The Notice appears to reflect the first step in the Commission's revised approach to vertical restraints. The Notice also usefully reflects a widening "appreciability" approach, gathering together other examples of Commission practice and European Court case law where "restrictive" agreements are considered not to present difficulties from the point of view of E.C. competition policy (albeit that they might still fall to be examined under national law).[19]

The Commission's draft Notice on relevant markets

Box 3: Legislative Developments

- *Relevant Market Notice*
  - — current "arena of competition" factual test
  - — 5%–10% "hypothetical price increase" test, where appropriate (*e.g.* for colas definition? Merger cases or more?)
  - — Variable market analysis according to issue (structural, behavioural) and "time horizon"
  - — demand substitutability > supply substitutability and potential competition
  - — degree of market integration (developing Single Market?)
  - — open approach to empirical evidence > hierarchial approach (sworn statements, etc.)
  - — market dominance next?

In October 1997 the Commission published its third draft of the proposed "Relevant Market" Definition Notice. It is understood that adoption of the Notice is imminent.[20]

Although the drafting appears to have been led by the Merger Task Force, the Notice is intended to apply to all

12 A concentration is now also automatically suspended until the Commission gives a final decision on the case.

13 Competition authorities in the United Kingdom, Germany and France have now also decided to simplify procedures for mergers which fall in the jurisdiction of more than one of these countries. The changes are merely procedural as the substantive tests and the remedies available in the legal systems of the three countries remain unchanged. Companies involved will submit the same information on one standard questionnaire to each of the relevant authorities. The form is available in all three languages.

14 The draft was published in [1997] O.J. C29/3. At the time of writing, the final text has not yet been published. References here are to the draft.

15 Point 9.

16 Point 11.

17 Generally SMEs are independent enterprises with fewer than 250 employees, and either an annual turnover not exceeding ECU 40 million or an annual balance sheet total not exceeding ECU 27 million. See Commission Recommendation of April 3, 1996, on the definition of small and medium-sized enterprises, Annex, [1996] O.J. L107/4.

18 Points 19, 20.

19 Points 1, 2, 8.

20 For an earlier Commission study, see Fishwick, "The Definition of the Relevant Market in Community Competition Policy", 1986.

areas of E.C. competition law including Regulations 17/62 and 4064/89, their equivalents in other sectors and the relevant provisions of the EEA agreement.[21] Again, it is an important document.

The Commission starts the Notice by recalling standard definitions of product and geographic market, based on cases such as *Hoffmann La Roche*, E.C. regulations and in Forms A/B and CO. In other words, a relevant product market comprises "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use". A relevant geographic market is "the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas". The "arena of competition" test, as it is sometimes called.

The Commission also addresses the issue that its approach to the relevant market is closely related to the objectives pursued under E.C. competition policy and may therefore change according to the competition issue concerned.

This is an important point because it may lead to differing results according to whether the Commission is focusing on structural changes (*e.g.* under the Merger Control Regulation) or behavioural issues (under Article 86 E.C.). Interestingly, the Commission notes that:

> (f)or instance, the scope of the geographic market might be different when analyzing a concentration, where the analysis is essentially prospective, than when analysing past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products, depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or issues relating to certain past behaviour.

This is interesting and welcome clarification. Many find it not easy to explain to their business clients that they could be infringing Article 86 E.C. today yet that their proposed merger with a competitor on the same market might be cleared tomorrow!

The Commission then explains that to define the product market it looks mainly at demand substitutability rather than supply substitutability or potential competition. The Commission refers, in particular, to the approach whereby small price increases are postulated and an evaluation is done whether customers would switch to other products or suppliers located elsewhere, in response to a hypothetical small, permanent price increase (5–10 per cent) by all the producers concerned. If sufficient numbers would switch, making the move unprofitable, then the products to which they would switch are added to "the market", and the process repeated until a point where a set of products is identified for which a price rise would not induce a sufficient substitution in demand. That is then the limit of the market. (This is generally being called the "5 per cent test".)

The price generally taken is the prevailing market price, in particular for merger cases. This may not be the case if the prevailing price has been set in the absence of sufficient competition (*i.e.* Article 86 cases).

21 Elements of the approach outlined may also be relevant to state aid cases.

This is all very interesting. In practice, it is not a process which the Commission appears to go through in ordinary cases. In most cases, the Commission only appears to undertake a broad review of the functional characteristics of the product and consumer demand, arguing that a more precise and detailed market analysis (*e.g.* of cross-elasticities) is not justified. This is often true. The "normal" focus on the simple facts and businessmen's general views often yields very acceptable results.

Where appropriate, the Commission's approach may be both relevant and interesting. However, to many it may still be a rather theoretical approach. One also wonders how often a company will have done such studies already (unless they were looking at profit maximisation strategies).

Then the Commission emphasises that it follows an "open approach to empirical *evidence*",[22] aimed at making an effective use of all available information. The Commission states that it does not follow a rigid hierarchy of different sources of information or types of evidence.

Where appropriate, the Commission will look at evidence of substitution in the recent past (including evidence relating to recent past events or shocks in the market, actual examples of substitutions between two products and the available quantitative evidence "capable of withstanding rigorous scrutiny". If appropriate, the Commission will contact the main customers and companies in the industry to inquire into their views on the boundaries of product markets and obtain the necessary factual evidence. The Commission also looks at consumer preferences, favouring consumer surveys and marketing studies carried out before the companies concerned are involved in a proceeding, because these are pre-existing studies prepared in the normal course of business not just for the case. The Commission will also look at barriers and costs associated with switching demand to potential substitutes and whether a group of customers could be subject to price discrimination.

The process for defining the geographic market is similar. The Commission takes a broad preliminary view of the market's scope considering the distribution of market shares of the parties and their competitors as well as a preliminary analysis of pricing and price differences at national and E.U. or EEA level. The Commission then tests this working hypothesis. The Commission looks at past evidence of diversion of orders to other areas, basic demand characteristics, customers and competitors' views, the current geographical pattern of purchases, trade flows and patterns of shipment, etc.

The Commission also states that it looks at the degree of market integration in the E.U. Interestingly, the Commission noted in its April draft that:

> The basic goal of increased economic efficiency of the internal market ... requires in certain cases structural reorganisations of companies which may take the form of concentrations that anticipate an emerging new competitive environment and have as their purpose to exploit fully possible economies of scale or scope. (paragraph 43)

With such encouraging statements as these, no wonder there has been a recent increase in mergers in the EEA! In the October draft, the text is more cautious but the theme is the same.

22 *Cf.* Continental notions of evidence—*e.g.* Germany "*freie Beweisbewurdingung*", rather than the (in principle) more structured Anglo-Saxon evidence approach.

Finally, the Commission outlines how market shares are calculated and additional considerations in complex cases.

There is some debate as to how new this approach is for the Commission. Clearly, existing European Court and Commission practice has been taken into account. There has also been debate as to whether the 5–10 per cent test should be applied to cases other than merger control. To many the 5 per cent test is more familiar as a (rough) measure of market dominance for one firm's products than as applied to relevant market determinations. Perhaps it may appear in that form again soon, since the Commission has said it may take on the task of a "Market Dominance" Notice next!

The draft Notice on access in telecoms

Box 4: Legislative Developments

- *(Telecoms) access*
  - — filing with NRA may suffice
  - — complaints to be resolved within six months!
  - — clarifications to essential facility doctrine
    - * facility cannot be replicated "by any reasonable means"
    - * facility owner right to recoup first, or at least to get established?
  - — "net revenue test" for excessively low pricing > average variable cost rule in some cases?

In March 1997 the Commission published its Draft Notice on the Application of the E.C. Competition Rules to Access Agreements in the Telecoms Sector.[23] This is an important document for all, not just for telecoms. It addresses a wide range of issues of general relevance from decentralised enforcement to what are abusive access and pricing practices. The main points to note, from a general perspective, are as follows:

(1) The draft Notice parallels and cross-refers to the Commission's decentralisation Notices, suggesting that often the local NRA ("National Regulatory Authority") will be the most suitable enforcement authority, applying E.C. competition rules and other regulatory telecoms requirements together. Interestingly, while emphasising that notification to a NRA does not make notification to the Commission unnecessary, the Commission states that, in general, if such notification has occurred it will not impose a fine in respect of an agreement infringing Article 85 E.C. unless the infringement is "particularly serious" (and the Commission might still fine if there is an Article 86 E.C. infringement).[24]

Similarly, the Commission makes it clear that it does not want to pursue complaints if these can be dealt with equally well by a NRA or in the courts. The interesting point here is that the Commission suggests it should still intervene in some cases, notably where an access dispute before a NRA has not been finally resolved within six months. The Commission argues that a longer period in telecoms cases would deny effective protection of the parties' rights.[25] Most would agree for other sectors also!

(2) The draft Notice makes various statements about market definition, market dominance and what is an abuse which are reflected in or may be reflected in the Commission's coming Notices. For example, that demand substitutability is the main tool for market definition, in preference to supply substitutability and potential competition constraints.[26] The Commission states that it will define the relevant market, "when appropriate" by asking whether, if all the suppliers of the service in question raised their prices by 5 to 10 per cent, their collective profits would rise. If so, the market is considered separate.[27] A simple summary of the 5 per cent test!

(3) Not surprisingly, there is interesting discussion about what is an essential facility, defined as "a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business and which cannot be replicated *by any reasonable means*". (*emphasis added*).[28]

(4) There is discussion about joint dominance, where the Commission states that it does not consider that it has to show (contractual/formal) links between the companies in question if they have substantially the same position *vis-à-vis* their customers and there is "a sufficient economic link", *i.e.* if there is a "kind of interdependence which often comes about in oligopolistic situations".[29]

(5) There is extensive and interesting discussion about essential facility abuses, drawing parallels to the Commission's transport (port) cases. For example, where a company argues that access is "essential", the Commission explains that it is not enough to show that the position of the company requesting access would be more advantageous if access were granted. Refusal of access must lead to the proposed activities being made either "impossible or seriously and unavoidably uneconomic".[30] In considering objective justifications for refusing to provide access the Commission states:

> Relevant justifications in this context could include an overriding difficulty of providing access to the requesting company *or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market* (*emphasis added*).[31]

Interesting material for those facing *Magill* type compulsory licensing issues!

Finally, mention should be made of some comments made by the Commission on excessively low pricing. Having

23 [1997] O.J. C76/9.
24 Paragraphs 15 and 32.
25 Paragraphs 21 *et seq*, especially at 25, 26.
26 Paragraph 34 *et seq*.
27 Paragraph 41.
28 Paragraph 59.
29 Paragraph 69, based on *Nestlé/Perrier*.
30 Paragraph 79(a).
31 Paragraph 79(e).

stated the *AKZO* rules (*i.e.* that in general a price is abusive if it is below a dominant company's average variable costs or if it is below average total costs and part of an anti-competitive plan), the Commission adds in a footnote:

> However, the average variable cost rule cannot be applied in many situations in the telecommunications sector, since the variable costs of providing access to an already existing network are almost zero. Accordingly, *the test which the Commission considers should be applied is whether a company charges a price for goods and services*—other than in the context of a new product or service—*which, although above the average variable cost* of providing the specific goods or services for which the price in question is paid, *is so low that the overall revenues for all the goods or services in question would be less than its average total costs* of providing them *if it sold the same proportion of its output at the same price on a continuing basis*, even where no intent to exclude a competitor is proved (*emphasis added*).[32]

This heavy wording, called by some a "net revenue test" is very important, both in itself and insofar as it suggests one basis for "normal" pricing in an area where the principles are still evolving. There is also a cross-fertilisation of these specialist ideas. Hence what is an excessively low price for air transport purposes may be relevant for telecoms.

The final Notice is expected this Autumn. From a telecoms viewpoint, it certainly does not solve all issues (as incumbents and entrants currently wrestle with interconnection pricing issues), but it is a useful survey of a complex area.[33]

Competition aspects of the Amsterdam Treaty

Box 5: Legislative Developments

- *Amsterdam Treaty*
  - — Articles 81, 82 and 86 Amsterdam E.C. for the 21st-century competitive world?!! (Seriously, a pity and a mistake to change)
  - — *No*: Article 90 E.C. rewrite for:
    - * German regional banks
    - * French utilities
    - * Belgian broadcasters

    (But recognition that Article 90 E.C. involves a question of balance!)
  - — *No* exception for sport!
  - — *Eurokartellamt*?
- *Horizontal agreements next?* Questionnaire. Review starting.
- *Other*
  - — Access to file notice
  - — ECSC notice re merger filings?
  - — Clarifications re competition and (construction) infrastructure bids

In July 1997, the Amsterdam Treaty was signed. It still has to be ratified by the Member States before it enters into force. Its main interest for competition lawyers lies in what it did not do, rather than what it did. In particular, (1) the text of Article 90 E.C. has not been rewritten; (2) no *Eurokartellamt* has been set up; and (3) there is no general E.C. Treaty exception for sport!

On the other hand, to the consternation of businessmen and lawyers who have finally discovered Articles 85 and 86 E.C., the Amsterdam Treaty renumbers these competition provisions! E.C. competition law for the twenty-first century will be assessed on Articles 81 and 82 of the new E.C. Treaty (and Article 90 will become Article 86) provided that the Treaty is ratified.

The initiatives which did not succeed are still important. As regards Article 90 E.C., the proposition had been made that the Commission should no longer have the power to issue directives pursuant to Article 90(3) E.C. defining the obligations of Member States for liberalisation. Certain parties had argued that Article 90 E.C. is "ultra-liberal" and biased to free competition over national public services. It had been suggested that this needed rebalancing.[34]

Mr Van Miert has argued that this is not so, that the competition rules have to be applied in an evolutionary and pragmatic manner[35] and that a reasonable balance between national public service and competition can be achieved within the existing rules (notably Articles 90, 92 and 222 E.C.). Furthermore, that it is not possible to exempt certain operators in key sectors of the European economy from Community control. In practice, what the Commission has done is to introduce a new Article 7d confirming the commitment of the Community to the objectives of general economic interest.[36]

In parallel, certain Member States were specifically concerned about the impact of the E.C. competition rules on their ability to intervene in the media and on behalf of regional public banks,[37] where such action was considered necessary in the public interest. The Commission has emphasised existing rules. The result is a Protocol on public broadcasting services and a Declaration on public credit institutions in Germany.[38] The Commission is now studying the German case further to see if a more general rule can be established.

32 Paragraph 91, n. 66.

33 See generally Coates, "EU Competition Rules and Access Problems in the Telecoms Sector" [1997] 25 I.B.A. *International Business Lawyer* 310, and Van Liedekerke, "European Commission's Draft Notice on Access in the Telecommunications Sector", *ibid.* 318.

34 Mr Van Miert, "La Conference Intergouvernemental et la politique communautaire de concurrence", *EC Competition Policy Newsletter*, Vol. 3, No. 2, at 1.

35 See the Commission Communication on "Services of General Interest in Europe" [1996] O.J. C281/3; and generally the 1996 E.C. Commission Report at 23 and 53.

36 See CONF/4001/97 at 81.

37 See, *e.g.*, European Report No. 2232, June 14, 1997; No 2231, June 11, 1997; No. 2229, June 4, 1997. Germany had proposed that the state guarantee granted to banks owned by regional or local government, enabling the banks to obtain top credit ratings and to borrow at favourable market rates, should be confirmed in the E.C. Treaty as being fully compatible with E.C. law. It is thought that this was in response to calls by private banks on the Commission to investigate substantial capital injections made to the German *Landesbanks*. France had tabled a proposal aimed at protecting public utilities from the full extent of competition rules. Belgium is concerned about cultural/linguistic issues and public service broadcasting.

38 See CONF/4001/97 at 82, 83.

As regards the *Eurokartellamt* proposal, this seems to have been shelved at a fairly early stage in the negotiations. One can infer perhaps that Mr Van Miert's view that E.C. competition policy necessarily involves political issues has prevailed for now. I have touched on this before. There is something in what Mr Van Miert says—above all for Article 90 and big cases where large economic interests are at stake. However, it also remains true that the political mix in the institutional framework is hard to reconcile with the Commission's role as a judge applying rules.

As regards the sports issue, again one may recall that, after *Bosman*, there were various high-level calls for a general exception to the E.C. Treaty rules for sport. It was hard to see how these could be countenanced, in so far as fundamental rights in the Treaty were in issue. What has happened is another declaration broadly affirming the social significance of sport.[39]

Commission review on horizontal agreements

The Commission has now also started a review of its policy towards horizontal co-operation agreements, given that the block exemptions for R&D and specialisation are due to expire on December 31, 1997. What the Commission has done is to issue a questionnaire on DG IV's Internet site, seeking answers for the end of August 1997,[40] while proposing an extension of these block exemptions until December 31, 2000.[41]

Other: Access to file, ECSC mergers, infrastructure agreements, etc.

In January 1997, the Commission published a Notice clarifying the rules of access to files for companies subject to competition proceedings under Articles 85/86 and the Merger Control Regulation.[42] The Notice defines the scope and the implementing rules for obtaining such access. Business secrets, confidential information and the Commission's internal documents will not normally be accessible. The Notice establishes a procedure in the event of litigation over the confidential nature of a specific document. In order to limit the risk of litigation, however, companies will be systematically asked to provide a non-confidential version of their documents.

In July 1997, the Commission is reported to have indicated that it intends to adopt a Notice on a new procedure for assessing mergers in the coal and steel sector. These mergers, which are currently regulated by the ECSC Treaty, will be examined under provisions analogous to the E.C. merger control procedural rules. Companies will be required to use the E.C. Form CO when notifying. The Commission wants ECSC companies to get accustomed to the E.C. merger control rules, since they will be automatically subject to those rules when the ECSC Treaty expires in 2002. The main advantage is to harmonise the procedure for mergers involving ECSC and non-ECSC products which are presently treated under separate rules.[43]

Finally, mention should be made of a recent clarification of the application of the competition rules to new transport infrastructure projects.[44] This contains an interesting invitation to contact the Commission early, in full confidentiality, in order for all those involved in (construction) infrastructure projects to clarify where they stand early on.[45] A useful idea because promoters and construction companies are often uncertain about the legality of their bidding vehicles in terms of the ad hoc consortium and ordinary J.V. rules. Notifying after winning the bid may be late for the parties (and their defeated competitors), yet notifying earlier could be wasted effort for the Commission and is therefore not usually encouraged.

European Court cases (ECJ and CFI)

Box 6: Main European Court Cases

• *Dutch Electricity*	— *Rendo* still going; *Ijsselcentrale* decision; implied rejection of complaint, not enough reasoning
• *French Perfumes*	— *Givenchy/Yves Saint Laurent* decisions confirmed on the whole, but not all, *e.g.* not "other business done" criterion
• *French/German Car Dealers*	— *Fontaine, Guérin, VAG*: problems of parallel importing and selective distribution; whether Commission right not to intervene on dealership terminations (Guérin in liquidation)

The European Courts dealt with many competition cases, but in the author's view there have been no "landmark cases" this year.

In December 1996 the CFI had to consider the ECJ's ruling in *Rendo*.[46] It will be recalled that the ECJ had partially set aside the CFI judgment. The CFI therefore had to reconsider the *Ijsselcentrale* decision insofar as that decision impliedly rejected the complaint about the electricity import ban, applicable prior to the entry into force of the Dutch electricity law. The CFI focused on the Commission's duty to state its reasons. Having stated that the Commission is not under a duty to respond to all factual and legal issues raised by a complainant, the Court stated that the Commission's reasoning still had to be enough to be capable of review and understood by the person concerned. It followed that "the decision had to be self-sufficient and that the reasons on which it is based may not be stated in written or oral explanations given subsequently when the decision in question is already the subject of proceedings brought before the Community judicature". On the facts the implied rejection was not adequately reasoned and that part of the *Ijsselcentrale* decision was annulled.[47]

39 See CONF/4001/97 at 75.
40 See, *e.g. EC Competition Policy Newsletter*, Vol. 3, No. 2, at 25.
41 See [1997] O.J. C190/4.
42 [1997] O.J. C23/3.
43 See European Report No. 2239, July 9, 1997.
44 [1997] O.J. C298/5.
45 Point 19.
46 Case C-19/93P, [1995] E.C.R. I-3319.
47 Case T-16/91 RV, Judgment of December 12, 1996.

In December 1996 the CFI also confirmed that *Givenchy* and *Yves Saint Laurent* luxury perfumes may continue to be sold by specialised retailers. The Court agreed to the criteria for selecting distributors, except the condition which demands that the main business of a distributor should be in selling perfumes. A criterion as to the importance of other business done at the point of sale was discriminatory in that it penalised outlets such as supermarkets, where perfume can only account for a minority of the business. The Court indicated that this condition can no longer be included in the agreements.[48]

In February 1997 the ECJ gave a preliminary ruling in favour of independent car resellers. Questions were raised in the context of a French legal action brought by authorised dealers against the activities of *Aqueducs Automobiles*, a parallel importer. The Court held (again) that the car distribution block exemption cannot be used as a legal basis to stop independent traders from reselling vehicles, as it does not aim to regulate activities outside the official car network. A manufacturer would, however, be entitled to stop its dealers from supplying resellers outside the network.[49]

In March 1997 the ECJ ruled that a private company entrusted by a public authority to carry out preventive anti-pollution services on its behalf (*i.e.* exercising official authority) is not pursuing economic activities caught by the E.C. competition rules. In 1991 the *Genoese Port Authority* granted an exclusive concession to a private company, SEPG to carry out anti-pollution surveillance to prevent accidental spillages of hydrocarbons into the sea.

It was common ground that the dispute did not relate to the invoicing of action by SEPG as regards pollution actually produced during loading or unloading operations. SEPG invoiced Cali for such anti-pollution surveillance services, provided in relation to the loading and unloading of acetone products transported by Cali in the oil port of Genoa. The ECJ ruled that the anti-pollution surveillance for which SEPG was responsible was a task in the public interest which forms part of the essential functions of the state regarding protection of the environment in maritime areas.[50]

In April 1997 the ECJ ruled, in an Article 177 case concerning rules established by a *trade association for commercial trade in books in the Netherlands*, that "old agreements"[51] duly notified to the Commission before November 1, 1962, enjoy provisional validity as long as the Commission has not given a decision on them, but only if their terms remain unchanged, or in the event of amendments, if these do not have the effect of reinforcing or extending the agreement's restrictive effects.[52] The fact that a "fairly lengthy" period of time had elapsed since notification of the old agreement (1962–1996?) without the Commission having taken any position cannot have the effect of bringing the provisional validity of that agreement to an end! The Commission has recently relaunched its book policy!

In May 1997 the CFI gave two rulings concerning the *Dutch flower auctions* cases.[53] The Court annulled the Commission's decisions definitively rejecting complaints that a user fee and certain trade agreements infringed Article 85(1) E.C.

In June 1997 the CFI partially annulled the Commission decision which had dismissed Ladbroke's attempt to obtain retransmissions rights in Belgium for horse racing organised by the principal horse racing associations in France.[54] The Court disagreed with the Commission's view that the agreement not to license such rights in Belgium fell outside of Article 85(1) E.C., because none of the associations took bets on this betting market, and consequently there was no restriction. Instead, the Court held that there was a restriction of potential competition as the associations individually were prevented from entering this market.

In June 1997, in *VAG SYD Consult*,[55] the ECJ had to consider whether Article 85(3) E.C. and Regulation 123/85 must be interpreted as precluding the application of German case law on unfair competition, under which a selective distribution system, even if enjoying exemption under those provisions, is not enforceable against third parties, unless it is impervious (*i.e.* there are no sales outside the system). The ECJ's answer was "no". Regulation 123/85 did not therefore prevent a German parallel trader from relying on the German case law, obtaining Volkswagen cars from Italian VW dealers and parallel importing them into Germany.

The Court first noted that, according to the German case law in question, a selective distribution system is binding on the parties and is enforceable against third parties only if it is absolutely impervious. In such a case a third party, who has succeeded in obtaining products covered by the system is presumed to have taken advantage of a breach of contract by an approved distributor.

The ECJ then recalled that in paragraph 28 of its judgment in *Cartier*, the Court had found that the imperviousness of a selective distribution system is not a condition for its validity under Community law. It followed that a selective distribution system which is not impervious and cannot therefore, under national case law on unfair competition, be enforced against third parties may be valid under Article 85(1) E.C. What was true for Article 85(1) E.C. was all the more true for Article 85(3) E.C. or for a Commission regulation, such as Regulation 123/85.

Moreover, as held in previous case law, Regulation 123/85 did not affect the position of third parties (*i.e.* independent dealers) in relation to contracts included between car manufacturers and their dealers.

In May 1997 the CFI is also reported in *Peugeot*[56] to have clarified the applicable rules in situations where the

48 Cases T-19/92 and T-88/92 *GALEC v. Commission*, T-87/92 *BVBA Kruidvat v. Commission*, Judgments of December 12, 1996. (The *Perfume* exemption decisions have been due for review since May 1997.) See generally Cesarini, "Developpements récents de la jurisprudence en matière de distribution selective", [1997] *EC Competition Policy Newsletter*, Vol. 3, No. 2, at 9–11.

49 Case C-128/95, *Fontaine*, Judgment of February 20, 1997. *Cf.* the earlier *Nissan* case. (Guérin's actions concerning the termination of its dealerships with Volvo France and Nissan have been unsuccessful.)

50 Case C-343/95 *Diego Cali & Figli v. Servizi Ecologici Porto di Genova ("SEPG")*, Judgment of March 18, 1997.

51 *i.e.* an agreement in existence prior to the entry into force of Regulation 17/62.

52 Case C-39/96 *Free Record Shop*, Judgment of April 24, 1997.

53 Joined Cases T-70/92 and T-71/92 *Florimex* and *VGB*, Judgments of May 14, 1997.

54 Case T-504/93 *Tiercé Ladbroke v. Commission*, Judgment of June 12, 1997.

55 Case C-41/96 *VAG v. SYD Consult*, Judgment of June 5, 1997.

56 Cases T-90/96 and 136/96, *Peugeot SA v. Commission*, Orders of the CFI of May 2, 1997.

Commission intends to disclose a document which constitutes an undertaking's business secret and companies want to contest that disclosure in competition cases. First, the Commission must inform the undertaking by letter that it does not consider the information to be a business secret and set a time-limit for the undertaking to submit its comments to the Hearing Officer. Secondly, the Hearing Officer will decide on the matter in a second letter, rejecting or confirming the undertaking's position. The undertaking must consequently wait for the Hearing Officer's letter to lodge an action for annulment, as only this letter will determine the Commission's definitive position.[57]

Commission Decisions

Box 7: Commission Decisions

- *Prohibitions/ Cartels* — *Ferry Surcharges/TACA*
- *JVs*
  - — *UIP Pay-TV* (J.V. dissolution ordered, joint selling and distribution by large enterprises in an "anti-competitive" structure)
  - — *IFCO, DSD* (issues of exclusive use of crates, horizontal relationships, undertakings of the parties, access to "Green Dot" trade mark and related fees)
  - — *Finnish Roundwood Timber*, special case

Article 85 EC: prohibitions, cartels, etc.

In November 1996 the Commission decided to lift the immunity from fines for an agreement between shipping companies, members of the *Trans-Atlantic Conference Agreement (TACA)*. The Commission particularly objected to a system of price-fixing of inland transport services by its members. The decision means that the parties are no longer protected against the risk of fines. The Commission clearly hopes this should incite them to terminate the alleged infringements as soon as possible.[58] In parallel, Mr Van Miert has been seeking a more pragmatic solution to this ongoing conflict.

Main joint venture clearances

The most important joint venture case this year is probably *UIP Pay-TV*, if only because it is not often that the Commission imposes the dissolution of a joint venture. *UIP Pay-TV* was created by Paramount, MGM and MCA to distribute the films which they produce to pay-TV broadcasters. DG IV has indicated that it could no longer clear such joint selling and joint licensing by large enterprises within an anti-competitive structure, unless it had a beneficial effect on the market. Inside the E.U., the three companies will no longer be able to join forces to license or market their films to pay channels. The remaining UIP Pay-TV activities will be brought to an end within 18 months, and UIP Pay-TV will then be dissolved. A separate inquiry is still being carried out on UIP's activities relating to the distribution of films in cinemas.[59]

For those interested in *environmental recycling schemes*, the Commission has issued Article 19(3) Notices in relation to the *IFCO* and *DSD* schemes.[60] In February 1997 the Commission invited interested parties to submit their comments on a new multi-trip transport packaging system for fresh fruit and vegetables using collapsible/reusable plastic crates which was first notified to the Commission in 1992. The *IFCO* system itself was first notified following complaints by crate and packaging producers who considered the system to be exclusive in that only certain types of crates were allowed into the system. The Commission now believes that the system is non-exclusive but opened an investigation on the horizontal relationships between the traders promoting the system. The Commission is considering taking a favourable position after the notifying parties agreed to amend the standard service contracts between IFCO and the traders.[61]

In March 1997 the Commission also published an Article 19(3) Notice about *DSD*, the only company operating a packaging collection and recycling scheme in Germany. Under the 1991 Packaging Law, companies participating in such schemes are exempted from their take-back packaging obligations and are also entitled, on paying a fee, to use the "Green Dot" trade mark on their packaging. The notification relates to the statutes of DSD, the trade mark licensing agreement, and the service and guarantee agreements with third companies. The Commission indicated that it intended to take a favourable view of the application, after DSD offered various undertakings.[62]

57 In December 1996, the CFI rejected the Van Megen Sports Group's appeal in the *Tretorn (tennis balls)* case, T-49/95, Judgment of December 11, 1996 (Van Megen was Tretorn's Dutch distributor fined for participation in Tretorn's activities to prevent parallel imports). In March 1997 the ECJ rejected the Commission's appeal in the *UIC (Railway tickets)* case, Case C-264/95P, Judgment of March 11, 1997. (The appeal relates to the CFI's annulment of the Commission's decision on the distribution of railway tickets by travel agents, and whether the Commission should have acted under Regulation 1017/68, rather than Regulation 17/62.) See also Case T-227/95, *Assidomän Kraft Products*, Judgment of July 10, 1997. (*Woodpulp* partial annulment, position of party who did not appeal. Right to claim repayment of fine.) In July 1997 the ECJ also confirmed the CFI judgment upholding the Commission's *Welded Steel Mesh* decision. Case C-219/95P, *Ferrière Nord and Others v. Commission*, Judgment of July 17, 1997. *GT Link* is discussed further below.

58 1996 E.C. Commission Competition Report, at 44, point 91. In January 1997 the Commission published its decision in the *Ferry Surcharges case* [1997] O.J. L26/23. Otherwise, the Commission is understood to be investigating a number of alleged cartels.

59 Commission Press Release, IP/97/227, March 17, 1997. In March 1997 the Commission also issued a Notice in relation to the partnership agreement to set up and operate *Music Choice Europe*, a pay-radio business with around 60 channels of music without interruption, to be made available through direct satellite broadcasting. A second service, AEI Music Choice, will be available to business customers. Time Warner and Sony are among the partners. The partnership, which has a duration of 40 years, has been in effect since the end of 1993. At present, the service is transmitted via satellite to cable operators, [1997] O.J. C70/7.

60 See also [1997] I.C.C.L.R. 44 for the Commission's 1995 position on "voluntary agreements".

61 [1997] O.J. C48/4.

62 [1997] O.J. C100/4.

An unusual clearance of co-operative behaviour this year relates to *Finnish Roundwood Timber*.[63] The Commission has finished a procedure started by the EFTA Surveillance Authority, to clear certain agreements relating to the purchase and supply of such timber, because of the unusual structure of supply. These agreements cover both sawn wood logs and pulp wood. Previously, the large timber purchasers in Finland had co-operated closely on prices. Since the Commission's Decision in November 1995, finding that the agreements infringed competition rules against cartels, these buyers have decided not to negotiate with forest owners and sellers as a group.

Equally, until recently the forest owners, the sellers had co-operated on prices, arguing that it was necessary to create and maintain confidence so that such owners, often small holders growing wood as a sideline, continued to invest in the raw material. The sellers, of which there are hundreds of thousands, will appoint joint representatives for negotiations with each individual buyer, in order to reach a "common understanding" on the market situation and of price expectations. These are not to be binding, recommended or reference prices for any subsequent actual trading. The clearance is for five years and follows a similar Finnish competition case.

As often in recent years, there have been a variety of cases in the telecoms sector. In February 1997 the Commission issued two Article 19(3) Notices indicating its intention to take a favourable view of the *Unisource/Telefonica* and *Uniworld* alliances.[64] (Unisource is the alliance of the Dutch, Swedish and Swiss TOs, which the Spanish T.O. was then joining; Uniworld is the alliance between Unisource and the American AT&T.) It is now reported that Commission clearance has been agreed.[65] The conditions in Unisource include undertakings to prevent discrimination by the parents and that Switzerland must liberalise its market by January 1, 1998! There are similar conditions in Uniworld. AT&T has also agreed to offer European T.O.s accounting rates equal to the lowest one given to any Unisource member.

The decision does not cover Telefónica which has announced its withdrawal from the alliance. The exemption will be valid until the year 2001 (five years from the date of liberalisation of alternative networks on July 1, 1996).

In March 1997 the Commission also cleared an agreement between Europe's main telecoms operators to provide high-quality digital links between Member States. The "Global European Network" agreement was cleared following amendments to preserve competition. In particular, the parties will refrain from entering into collective concerted pricing arrangements, and will offer capacity on a non-discriminatory basis to third parties. The Commission indicated its main concern was fair access to third parties and ensuring that there were no discriminatory or excessive conditions.[66]

There has also been quite a lot of activity in the banking sector. Thus, in September 1997, the Commission indicated that it is considering authorising an agreement, notified by the Dutch Association of Banks in 1991, which introduces an interbank charge for the processing of pre-printed credit transfer orders (the "GSA Agreement"). Under this agreement, the debitor's bank will receive a charge as a compensation for the costs incurred in converting written information into electronic form. The Commission has decided to take a favourable position after the notifying party agreed to eliminate a clause providing that such charge be fixed and uniform. On the basis of the new system, the charge is fixed only as a maximum amount, banks being free to agree a lower sum on a bilateral basis.[67]

In the transport sector, the main cases relate to the trans-Atlantic air alliances and the changing market structure on Channel ferries. In April 1997 the Commission published an unusual "ad hoc Notice", inviting third parties to comment on a whole series of co-operation agreements between the airline companies KLM and Northwest. The Commission stated that the publication of this Notice did not open the time period of 90 days, as would be normal with Article 5(3) of Regulation 3975/87. Article 5(3) provides that an agreement shall be deemed exempted if the Commission has not raised serious doubts before the expiry of this period. Regulation 3975/87 is one of the legal bases for the proceedings. The Commission clearly did not wish time to begin running until third parties have had an opportunity to make their comments.[68] The nature of the Notice is a fair indication as to why the Commission is seeking new powers to allow it to simply regulate competition on third-country routes. This is discussed further below.

In March 1997 the Commission invited third parties to submit their observations on a joint venture company between P&O and Stena Line. The two companies had notified their intention to combine their respective ferry operations in the English Channel to offer an alternative to the cross-Channel system managed by Eurotunnel. Both companies claim that Eurotunnel enjoys an exceptional level of market power and that they would be unlikely to be able to provide sustainable, effective competition in the future without entering into the J.V.

Recently the Commission indicated that it needed more time to complete its examination of the proposed J.V. If approved, the companies would get control of 40 per cent of the Channel tourist vehicle market, combining operations on certain routes. The deal has now been approved in France. Before the Commission grants its approval, however, it is expected to press for a number of guarantees from the parent companies, including one that they will continue to act independently on other routes.[69]

Distribution/licensing

Box 8: Commission Decisions

• *Systemform*	— low fine because complaint not upheld, quick mitigation, compliance
• *Swedish Cigarettes*	— long term licensing arrangement restructured to ensure competition on price. *N.B.*: Commission against exclusive arrangements (distribution/licensing) with dominant business partner
• *Cars*	— Dawn raids continue (also warning clarifications re intermediaries in general)

63 Commission Press Release, IP/96/1183, December 17, 1996.
64 [1997] O.J. C44/15 and [1997] O.J. C44/4.
65 Commission Press Release, IP/97/932, October 30, 1997.
66 Commission Press Release IP/97/242, March 20,
67 [1997] O.J. C273/12.
68 [1997] O.J. C117/8.
69 [1997] O.J. C80/3.

In December 1996 the Commission adopted a decision fining a German firm Systemform,[70] a manufacturer of machinery for handling certain types of computer printouts, ECU 100,000 for export bans and vertical price restrictions.

The case is interesting in two main ways. First, it will be apparent that this was a low fine for such so-called "classic" infringements. What happened is that the Commission discovered a whole series of contracts containing provisions that

- orders from outside an exclusive dealer's territory were to be referred to the manufacturer/supplier;
- sales were not to be made to customers who had the known intention to export outside the territory; and
- requiring distributors to agree their resale prices with Systemform.

The discovery was caused by an investigation prompted by a complaint. However, Systemform reacted quickly to bring all the territorial provisions of the contracts within the normal active/passive rules of Regulation 1983/83 and also undertook to the Commission that it would end the pricing restrictions. It was also not clear that the various clauses had, in fact, been enforced.

Secondly and relatedly, the complaint was not upheld. The Commission found that what was going on was that one company (in France) was claiming that it could not obtain the machinery in question from the Greek exclusive distributor of Systemform, whereas, in fact, both the French and Greek firms were owned and/or controlled by a third company, so as to be a single economic unit. In such circumstances, the sale of the machinery by the Greek distributor to the French firm amounted to active export sales, which ban could be allowed under Regulation 1983/83 (provided that the other criteria of that Regulation were met). All of this amounted to mitigation justifying only a nominal fine in contrast to the more typical fines of cases such as *Toshiba* and *Dunlop Slazenger*.

In January 1997 the Commission approved a revised co-operation arrangement between Skandinavisk Tobakskompagni ("S.T."), a Danish tobacco conglomerate and Swedish Match ("S.M."), a Swedish tobacco producer, for the contract manufacture and distribution of *PRINCE* cigarettes in Sweden.[71]

Since 1961 *PRINCE* had been produced, distributed and sold in Sweden by S.M. under an exclusive licensing arrangement. This was notified to the Commission on Swedish accession. The Commission found that S.M. dominated the Swedish cigarette market and that the *PRINCE* brand also had a strong position in that market. The Commission stated that it had serious concerns under Articles 85 and 86 E.C., noting in particular that the arrangement was exclusive and long term, that prices for *PRINCE* were set by S.M., and the cigarettes sold by S.M.'s sales force.

The parties then agreed to alter their arrangements so that, in the future, there would be two separate agreements, one for contract manufacture and another for physical distribution of *PRINCE* by S.M. S.M. will manufacture the currently licensed variants of *PRINCE* for sale by S.T. itself in Sweden and S.M. will handle the physical distribution of *PRINCE* cigarettes on a non-exclusive basis. S.T. is to be solely responsible for all sales, marketing and pricing of *PRINCE* in Sweden. These arrangements are to continue until the end of 2001, taking into account the substantial investments made by S.M. in the production and distribution of the *PRINCE* brand, prior to Swedish accession. After 2001 the contract manufacture and distribution agreements will be terminable on one year's notice.

This case bears some similarities to the *Carlsberg Interbrew* case and emphasises that the Commission is not usually prepared to accept exclusive licensing/distribution arrangements with a dominant competitor.[72]

In the summer of 1997 the Commission cleared a new licensing system applied by Nintendo, a leading supplier of video games, *vis-à-vis* software companies developing Nintendo-compatible games. The Commission had sent Nintendo a Statement of Objections in May 1996. Nintendo then agreed to amend the original scheme. Under the revised system, licensees are no longer required to release their games on the market in limited numbers each year, nor is Nintendo's prior approval required before marketing. In addition, licensees will be no longer required to supply games exclusively manufactured by Nintendo. It is reported that the Commission worked closely with the U.K. authorities on the case.[73] (There was a recent MMC report on the supply of video games in the United Kingdom.)

Last year, the Commission was said to be investigating *practices affecting parallel trade in Volkswagen and Audi Cars* between Italy and other Member States, notably Austria.[74] This has now been confirmed. In the 1996 Competition Report, the E.C. Commission states that the object of its dawn raids was to find out whether some manufacturers have developed a "strategy", together with their Italian contract partners, aimed at preventing German, French and, in particular, Austrian final consumers from acquiring a vehicle on favourable terms in Italy.[75] On the basis of documents collected during these inspections, the Commission has now provisionally concluded that the undertakings concerned pursued such a strategy and sent the two car manufacturers a Statement of Objections. In the course of 1997, there have been further reports of other dawn raids involving other manufacturers.[76] As suggested last year, the spectre of Regulation 1475/95 being disapplied is raised again, in particular since the Commission appears to be focusing on whether there was a general strategy, not just a particular infringement.

The Commission has also had a number of complaints by end-consumers concerning other Member States

70 [1997] O.J. L47/11.

71 EC Commission Press Release, IP/97/80, January 31, 1997.

72 See also the Commission's clearance of the *Coca Cola/Schweppes* licensing arrangements in the United Kingdom, *e.g.* in Agence Europe, No. 6291, February 24/25 1997.

73 See Commission Press Release, IP/97/676, July 22, 1997; European Report, No. 2243, July 23, 1997.

74 See [1997] I.C.C.L.R. 34 at 46. In September 1997 the Commission cleared the Ford "Smart Car" distribution and Ford Servicing systems by comfort letters. The latter is considered to be outside the block exemption on car distribution because it separates selling and servicing activities. The system basically allows the smallest Ford dealers to stop selling cars and mainly concentrate on repair and maintenance, whilst maintaining links to the Ford network. See European Report, No. 2247, September 3, 1997.

75 At point 55; see also IP/96/1095, November 28, 1996.

76 In February 1997, it was reported that the Commission had carried out a series of dawn raids at the offices of Mercedes and Opel. Raids were triggered by consumers' complaints alleging that the two manufacturers are blocking parallel trade between Germany, Belgium, Spain and the Netherlands.

(Denmark, Finland, Sweden, the Netherlands and Spain) where dealers refused to sell to non-residents, or were prepared only to sell at a higher price, or imposed requirements on end-consumers or intermediaries acting on their behalf.

This has prompted the Commission to clarify the requirements which manufacturers and suppliers demand of an intermediary's authorisation. The Commission states that the following appear to exceed the limits of Regulation 1475/95 as they may hinder parallel trade:

- limiting the validity for purchase and collection of a car together to a period of three months;
- asking for a witnessed signature or that the document be certified by a notary; and
- disclosing the amount of the intermediary's commission and the payment for the service provided.

The Commission adds "if manufacturers or suppliers ask their dealers to accept only authorisations containing such requirements, they risk automatically losing benefit of the block exemption".[77]

The Commission has also made a useful statement concerning how to deal with standard form distribution contracts which combine selective and exclusive distribution systems.[78] The context is motorcycle distribution not covered by the car block exemption. The Commission has explained that motorcycle manufacturers, must choose between:

- *Regulation 1983/83 and the Commission's Explanatory Guideline.*[79] They can establish a network of exclusive dealers, where such dealers are free to sell the contract goods to other non-selected distributors both within and outside their exclusive territories. The Commission will, however, allow the manufacturer to lay down objective criteria which must be satisfied by non-authorised distributors who wish to be supplied by dealers; or
- *set up a selective distribution system, without allocating exclusive territories to the distributors concerned.* They can require authorised dealers not to sell to distributors outside the network. Manufacturers can also confer some territorial responsibility on each distributor, which means that the manufacturer "retains the right to appoint another distributor in a territory if that territory is badly represented, but all distributors must remain free to sell to any final customer regardless of their respective areas of responsibility".

Otherwise, it would appear that the Ice-cream war is still continuing! DG IV is reported to have sent Unilever a further Statement of Objections concerning its sales system for ice-cream in Ireland.[80] In 1993 the Commission already asked Unilever to open up its system for the supply of ice-cream freezer cabinets on free loan, provided that they were used exclusively for the storage of Unilever products. Among other things, Unilever then modified its agreements, offering retailers the alternative of buying freezer cabinets on hire-purchase, which could then be used for the storage of products, whatever their supplier. The Commission has concluded that the changes have not been effective in achieving their objective.[81]

Article 86 cases

Box 9: Commission Decisions

- *Article 86*
  - — Many cases this year
  - — *Irish Sugar* (various market foreclosing rebates and pricing practices)
  - — *IRI Nielsen* ("country bundling" by company dominant in most material markets for retail tracking services for fast-moving goods in Europe)
  - — Pricing focus: *Belgacom* "cost-oriented" approach; *Digital* rules on discounts for packages and all discounted prices to remain above average total costs
  - — *IPS Péchiney* bringing an anti-dumping procedure not, in itself, an abuse (but anti-dumping duties can be relevant to merger control clearance— Italian *Solvay/Sodi* case)

There have been a lot of these cases this year.

In May 1997 the European Commission fined *Irish Sugar,*[82] Ireland's only sugar manufacturer, ECU 8.8 million for abusing its dominant position in the Irish Republic. According to the Commission's findings, the company engaged in special "border" rebates product swaps, fidelity rebates, and discriminatory pricing where customers exported sugar (among other things).

An interesting case under Article 86 E.C. this year was *IRI Nielsen.*[83] There are two main facets of the case. (1) the substantive aspects; (2) the procedural co-ordination with the U.S. authorities under "positive comity" type principles. Nielsen, a U.S.-based company, is specialised in retail tracking services, *i.e.* the gathering and processing of information on actual product sales, prices, promotions and other market data to analyse performance. Such tracking is now often done electronically using checkout scanners. Nielsen is present in 80 countries. As a result of a complaint by IRI, the second largest retail tracking company, also U.S.-based, the Commission and the U.S. DOJ investigated Nielsen's contractual practices. The Commission sent a Statement of Objections which reflected the position that Nielsen was dominant in most of the material markets in Europe for retail tracking services for fast-moving goods. The Commission objected that Nielsen had, among other things:

- concluded exclusivity contracts to purchase data from retailers in Austria, preventing any competitor from obtaining data and therefore preventing market entry;
- concluded contracts in other countries stipulating that data should not be sold to third parties at more favourable prices than those offered to Nielsen, which allowed Nielsen to raise barriers to entry by raising the price to be paid to retailers;

77 1996 E.C. Commission Competition Report, point 56.
78 1996 E.C. Commission Competition Report, at 132–133.
79 Commission Notice on Regulations 1983/83 and 1984/83, [1984] O.J. C101/2, at point 20.
80 Commission Press Release, IP/97/147, February 21, 1997.
81 The *Whitbread* case is discussed further below.
82 [1997] O.J. L258/1.
83 1996 E.C. Commission Competition Report, at 144–148.

- concluded contracts with multinational customers with substantial discounts in exchange for commitments to use Nielsen in a wide range of countries (called by the Commission the "bundling of countries", because countries where Nielsen was a monopolist were linked with others where IRI was entering the market). The Commission objected that this forced IRI to offer substantially lower prices to stay in the market in these countries and that "in the specific circumstances", this amounted to an abuse.

Nielsen offered an undertaking which the Commission accepted, closing the file. The main terms are that Nielsen agrees: not to conclude with retailers any exclusivity contracts or contracts preventing the supply of information to another retail tracking service provider; not to conclude contracts with retailers requiring "most favoured nation" (or better) type preferences for Nielsen; to unbundle the contracts covering more than one country with multinational customers. These can switch to a competitor for any single country, without losing the benefit of the conditions granted in other countries. The undertaking is for three years.[84]

On the procedural side, the main interest is that the parties waived confidentiality restrictions on the exchange of information, the Commission and the DOJ co-operated extensively on the case, and since most of the alleged abuses took place in Europe, the Commission took the lead in investigating them. The DOJ closed its investigation in view of the result in Europe.

There have been a number of interesting cases related to Article 86 pricing. Thus, in April 1997, the Commission, following its Statement of Objections issued at the end of 1995, indicated that it had reached a settlement with *Belgacom* on the conditions under which telephone directories' publishers in Belgium are given access to subscribers' data. As a result of this agreement, ITT Promedia N.V. has withdrawn its complaint lodged against Belgacom for infringement of Article 86. Belgacom has now agreed to replace its variable pricing based on the publisher's turnover or profit, considered as excessive and discriminatory, with a "cost-oriented" approach, allowing it to cover costs and to benefit from a reasonable profit margin.[85]

In October 1997 the Commission also indicated that it had decided to drop proceedings under Articles 85 and 86 against *Digital* for alleged discrimination and exclusionary practices in the supply of hardware and software maintenance services for its computers.[86] This is an important precedent for the computer industry and other sectors.

Two points are emphasised here. First, the Commission's decision was made after Digital undertook, among other things, to offer hardware maintenance services for Digital systems on a stand-alone basis and to implement a pricing policy for its software support services based on a single flat fee per central processing unit. Interestingly, it is reported, that although Digital will continue to offer a software and hardware service package "DSS" package, the price of the DSS package will not be less than 90% of the sum of the list prices of the individual component services. The report continues, "the difference of up to 10% allows cost savings or other benefits to be passed on to system users while ensuring effective competition in the supply of hardware services is maintained". Digital will also give separate quotations for each of the individual component services included in a package. Secondly, all discounted prices will remain above average total costs. However, the Commission accepted Digital's reservation of the right to grant non-standard price reductions to meet competition. Such price reductions are not to be granted on the DSS package, but only on the individual component services which will remain separately available and Digital undertakes to verify that they are proportionate and do not foreclose or distort competition.

These are interesting points for those seeking to clarify what is lawful competitive pricing for dominant companies on the existing E.C. case law and practice! (Digital has since emphasised that such practices were already part of its policy before the Commission's intervention.)[87]

In September 1997 the Commission indicated that it had dropped proceedings against the Society for Worldwide International Financial Telecommunications ("SWIFT") after it undertook to open its network to non-SWIFT shareholders. The SWIFT network, which is owned by banks, is a worldwide data communication and processing system for financial transfers. The Commission considered that SWIFT is an essential facility because it is the only network with connections throughout the world. As a result, access cannot be reserved to its shareholders, but should be open to any institution authorised to provide cross-border payment services in the E.U. Proceedings were started after the French *La Poste* was refused access to the network and lodged a complaint with the Commission for abuse of a dominant position.[88]

There has also been a trade-related Article 86 point. This involves a complaint by a French firm Industrie des Poudres Sphériques ("IPS") against Péchiney Electrométallurgique, a specialist producer of highly reactive metals in France ("Péchiney").[89] Péchiney is the sole producer of raw calcium in Europe and a downstream competitor of IPS in the market for calcium powders for steel and calcium treatment. IPS complained that Péchiney had sought to reinforce its dominant position and to cut off its rival's sources of supply by (1) instigating an anti-dumping inquiry into the imports of Russian and Chinese calcium (used by IPS), (2) failing to supply IPS with a suitable product claiming false technical difficulties.

84 The full text is included in the 1996 E.C. Commission Competition Report.

85 Commission Press Release, IP/97/292, April 11, 1997.

86 Commission Press Release IP/97/868, October 10, 1997; European Report, No. 2258, October 11, 1997. (There has also been a parallel Finnish case.)

87 In April 1997, it is reported that the Commission carried out a dawn-raid at the premises of KLM Royal Dutch Airline. European Report No 2211, March 28, 1997. The raid followed a complaint lodged by the British airline Easyjet for unfair, predatory pricing on the Luton–Amsterdam route. The two companies started a price war in November 1995 through spiralling decreases of both companies' fares on that route. Easyjet is now alleging that KLM's fares are predatory. In September 1997 the Commission announced that it has launched a formal investigation.

88 Agence Europe, No. 7082, October 18, 1997.

89 1996 E.C. Commission Competition Report, at 138–139.

The Commission found that having recourse to a legitimate instrument of Community law such as the anti-dumping procedure did not, in itself, constitute an abuse.[90] The Commission also found that while Péchiney did not have a suitable advertised range calcium product to meet IPS particular requirements, it had offered a suitable specialised product and a tailor-made one. Both had been rejected by IPS because they involved paying a premium over the normal commercial product. The Commission held that "as a matter of law, nothing obliges an enterprise in a dominant position to modify a product in its existing range in order to meet the unusual needs of a single client". Furthermore, if an already dominant producer does exceptionally agree to do so, nothing requires it to set its price at the same level as an inferior product in its existing range.[91]

Article 90 E.C.

In March 1997 the Commission published a decision under Article 90 E.C., finding that Spain had infringed E.U. competition rules by imposing an initial payment of PTA 85,000 million on Airtel for the second concession for digital mobile telephone services (GSM).[92] The other GSM operator, Telefónica de España, was not subject to any such payment and did not take part in any tendering procedure. The decision obliged Spain to remove the distortion of competition. Spain has now agreed to take several corrective measures, such as the extension of the duration of Airtel's licence and the right to set up its own infrastructure. The Commission considers them broadly equivalent in economic terms to the fee paid by Airtel.

90 It may also be interesting to note that under Italian Competition Law, when Solvay bought a Bulgarian soda ash producer which was the other main supplier to Italy, it was required to undertake not to oppose the lifting of dumping duties on soda ash from the United States, as a condition of the Italian merger control clearance. *Solvay/Sodi*, Case C-2626B, Decision of April 10, 1997 in Boll. No. 15/1997.

91 1996 E.C. Commission Competition Report, at 139.

92 Commission Press Release, IP/97/374, April 30, 1997.

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

- *Current Policy Issues*: The Commission's Vertical Restraints Green Paper and October hearings, with focus on recent proposals for widening retroactive exemption under Regulation 17/62
- *International co-operation and conflict*: The draft E.U./U.S. "positive comity" agreement and experience with cases (*e.g. Nielsen, Boeing/McDonnell Douglas* and others)
- *Decentralisation and damages*: The Commission's final Notice on co-operation with national competition law authorities and damages cases/national actions: *Atlas/Global One* in the German Courts; *GT Link* at the ECJ
- *Areas of particular interest*: Competition and sport (*Bosman* sequels, centralised marketing of TV rights in the English and German courts); new national competition laws (in the United Kingdom, The Netherlands, Denmark, Finland and other countries)

ICCLR

Major Events in E.C. Competition Law 1997, Part 2*

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CURRENT POLICY ISSUES

Box 1: Current Policy Issues

- *Green Paper* — careful survey
- *Consten/Grundig* — agreement tending to restrict *intra*-brand competition does not escape Article 85(1) E.C. because it might increase *inter*-brand competition
- *Four options*
  - — maintain the current system
  - — widen the existing block exemptions to cover different clauses, broadening the legal certainty they offer, with no market share ceiling
  - — more focused block exemptions, which would apply only where the parties have less than 40% market share of the relevant market
  - — block exemptions with a measure to specify the economic circumstances in which Article 85(1) E.C. applies
- *Useful hearing* — new French and U.K. proposals. Question of widening Regulation 17/62 Article 4(2) with more general retrospective exemption right? The case of *Whitbread*

Vertical restraints—the Green Paper[1]

In January 1997 the Commission published its "Green Paper on Vertical Restraints in EC Competition Policy".[2] This is an 82-page document with a 13-page Executive Summary, which addresses issues related to the potential renewal of three block exemptions (for exclusive distribution, exclusive purchasing and franchising) and also related to the Commission's treatment of selective distribution. Given the amount of debate which has been going on, it is a relatively short work!

What the Commission does first is to survey the trends in European distribution in order to see if the current rules are up to date. The Commission explains, for example, that in many cases modern retail distribution has grown greatly, leading to closer ties with suppliers. Traditional "arm's-length" distribution, where each step in the distribution chain seeks to sell to further its own interests has declined in some cases, as has the role of wholesalers, save in sectors such as pharmaceuticals. The Commission states that some of the efficiency gains in such "modern" distribution are lost if the retailer sources outside its normal supply chain or engages in parallel trading. The Commission concludes that the scope for parallel trade has become limited by the increased retail and supplier concentration, and that "modern distribution systems could therefore 'copperfasten' the isolation of national markets, given that distribution in retailing is still nationally orientated".[3] The Commission also notes how there is greater potential for domination of a supply chain[4] (*e.g.* by large retailers dictating to their suppliers).

Secondly, the Commission surveys economic thinking on vertical restraints, emphasising above all that:

> — the formalistic appraisal of individual clauses is not considered meaningful by many, in the absence of an appraisal of the market structure and the impact of the agreements in question;
> — vertical restraints are not considered anti-competitive, where inter-brand competition is strong and barriers to entry low;
> — the key question is often therefore whether as a network the restrictive agreements in question foreclose competition market entry or whether, coupled with market power, they can lead to producers or distributors discriminating in prices as between Member States; and
> — some restraints promote competition and or protect material investment.[5]

Thirdly, the Commission surveys the procedures and institutional framework in which it operates, noting developing decentralisation and that, by rejecting complaints where adequate redress is available through national courts, the Commission hopes significantly to increase the number of competition law actions in the national courts.[6] One senses, amongst other things, that the Commission does not like the fact that it has to take a full decision to withdraw the benefit of a block exemption (*e.g.* the *German Ice-Cream* case[7]), and that there is some disappointment that opposition procedures have not been used more extensively.

* Part 1 of this article appeared at [1998] I.C.C.L.R. 1.

1 In July 1997 the Commission prolonged Regulations 1983/83 and 1984/83 until December 31, 1999, Commission Regulation 1582/97, [1997] O.J. L214/27.

2 COM(96) 721 final.

3 Green Paper, paras 45 and 52.

4 *ibid.*, para. 51.

5 *ibid.*, paras 54 and 85.

6 *e.g. ibid.*, para. 108.

7 See, *ibid.*, para. 99.

Fourthly, the Commission outlines the current rules, starting with the famous statement in *Consten and Grundig* that:[8]

> Although competition between producers is generally more noticeable than that between distributors of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85(1) merely because it might increase the former.[9]

It is clear that the Commission's options have still to respect the limits set by the Treaty rules, and their interpretation by the European Court. There is a useful review of the block exemptions, serving in part to highlight some of their limits (*e.g.* that Regulation 1983/83 relates to finished goods—not OEM branded goods; the Regulation allows the appointment of only one dealer per territory, not several; nor does it apply to services). Interestingly, the Commission also mentions its developing practice of clearing exclusive (or non-exclusive) agreements between competitors individually (*e.g.* in *Carlsberg/Interbrew*, where the Commission allowed the agreement on condition that price determination, advertising and strategic marketing were *not* to be left to the discretion of the concessionaire[10]).

The Commission also highlights that the requirement that a dealer takes minimum quantities (*e.g.* in exclusive distribution) must not be "formulated or applied" so as to amount to a restriction on competition.[11] One senses that perhaps the Commission would like to take a more flexible line on maximum resale pricing, perhaps to promote more low end inter-brand competition, by allowing a supplier to keep a ceiling on distributor's margins.[12] One sees clearly the flexibility in deciding whether Article 85(1) E.C. applies in selective distribution and franchising on qualitative (so-called "rule of reason") grounds, contrasted with the (apparently) more limited quantitative appreciability grounds in exclusive distribution and purchasing.

Fifthly, the Commission considers the advantages of the present system. It notes, in particular, that decisions are in effect more the exception than the rule. "Decisions lay down policy, establish procedure, bring to an end serious violations of the rules (*e.g.* interference with parallel trade) and punish (fine) their perpetration. Block exemptions and comfort letters are the 'instruments' the Commission uses for the bulk of cases."[13] Also that block exemptions involve legal certainty.

Sixthly, the Commission compares some Member State and third country laws applicable to vertical restraints, noting, in particular, that in Italy and France a more flexible approach is taken to whether a restriction is within Article 85(1) E.C.—looking at the economic context, not just formal aspects (*e.g.* clauses). Exclusivity in sales or purchasing does not in itself restrict competition.[14] While such countries generally have *per se* rules against resale price maintenance, other vertical restraints are often dealt with more flexibly.[15]

Seventhly, as a result of its fact-finding the Commission has various conclusions, notably that the tendency of large retailers only to list products which are in the Number 1 or Number 2 market position "copperfastens" the position of those Number 1 and Number 2 suppliers.[16] Also the pleas of buying groups/retail associations of small and medium-sized traders to be able to have forms of co-operation, currently caught by Article 85(1) E.C., in order to compete better with the integrated retail chains (*e.g.* through a block exemption).[17]

The Commission concludes its study by requesting that parties comment on these issues and, in particular, the four possible options, which the Commission is considering separately or in combination. The Commission emphasises that Treaty amendment is not an option. Article 86 E.C. remains applicable as does the European Courts' case law on Article 85. Furthermore, that resale price maintenance and impediments to parallel trade should be *per se* contrary to Article 85(1) E.C., provided that inter-Member State trade is appreciably affected.

The four options are broadly:

Option I	maintain the current system;
Option II	widen the existing block exemptions to cover different clauses, broadening the legal certainty they offer, with no market share ceiling (*e.g.* through covering services, "distribution" of goods whose economic identity is significantly changed by the distributor, allowing maximum resale price maintenance for franchisees and considering a block exemption for retail chains of SMEs, provided that the market share remains below a certain threshold);
Option III	more focused block exemptions, which would apply only where the parties have less than 40 per cent market share of the relevant market. Above that threshold, there would be no block exemption, at least for protection against sales from outside the territory, or for exclusive dealing (prohibition to sell competing products/services). There is also mention of a more sector-specific solution for exclusive beer supply agreements above the threshold, *e.g.* possibly limiting the extent of the exclusivity to a given percentage of the total beer throughput of a particular pub (*e.g.* 3/4 tied, 1/4 free);[18]
Option IV	block exemptions with a measure to specify the economic circumstances in which Article 85(1) E.C. applies. The idea here is to develop a more flexible approach to

8 *ibid.*, para. 118.

9 Joined Cases 56 and 58/64 [1966] E.C.R. 299 at 342. It will be recalled that the applicants (and the German Government) had argued in the case that the Commission, before declaring Article 85(1) E.C. to be applicable, should, by basing itself upon the "rule of reason", have considered the economic effects of the disputed contract on competition between the different makes. It was argued that there was a presumption that vertical sole distributorship agreements are not harmful to competition and, that in the case, there was nothing to invalidate that presumption. On the contrary, the contract in question had increased competition between similar products of different makes. The Court stated that the principle of freedom of competition concerns the various stages and manifestations of competition and then made the quoted statement. The Court held that the absence in the Commission's (challenged) decision of any analysis of inter-brand competition did not, of itself, constitute a defect.

10 1994 E.C. Commission Competition Report at 351.

11 Green Paper, para. 147.

12 *ibid.*, paras 137 and 163.

13 *ibid.*, para. 186.

14 *ibid.*, paras 195 and 196.

15 *e.g.* in the United Kingdom, Green Paper, para. 202.

16 *ibid.*, para. 233.

17 *ibid.*, paras 253 *et seq.*

18 *ibid.*, para. 292.

vertical restraints between parties with no significant market power. First, by a Commission Notice, later by a "negative clearance" regulation. Agreements between parties with, for example, only 20 per cent market share in the contract territory would benefit from a presumption of compatibility with Article 85(1) E.C., rebuttable on the basis of a market analysis. Agreements shown to fall within Article 85(1) E.C., could then benefit from block exemptions (wider or more focused as appropriate), if they meet the relevant conditions.

The Commission requested comments by the end of July and, by all accounts, appears to have received a huge response. There seem to be a number of forceful arguments in play. For example, that:

— it simply is not effective compliance to have firms and lawyers focusing on (sets of) individual clauses;
— it may not be possible to fall back to a reduced scope, single block exemption highlighting certain black-listed clauses; that may not cover enough of the clauses caught by Article 85(1) E.C. on the European Courts' case law, nor be clear enough in practice because not tailored, *e.g.* to petrol or beer supply;
— a "negative clearance" notice is not good enough (1) to prevent parallel actions in national courts; a 20 per cent market share threshold may fairly reflect whether the Commission wishes to deploy resources on a case, but not whether Article 85(1) E.C. is actually infringed on the case law, and (2) it will also not block parallel national competition law. Some sort of regulation may therefore be required; such issues speak in favour of continued block exemptions from a low starting-point (*e.g.* from the Commission's *de minimis* Notice), or allowing a degree of "re-nationalisation";
— the "inter-brand" approach in competitive markets may be confusing and "too economic"; it may also be perceived as a general relaxation of the E.C. rules, rather than a refocusing of their scope and it may be too complex for what are meant to be the small cases;
— it is reasonable to say that agreements in concentrated markets need specific treatment and therefore should not be "block exempt";
— to have a market share ceiling increases the compliance burden on companies with higher market shares which may be unfair, with such normal distribution methods as exclusive distribution;
— it is unreasonable to require the Commission to have to show why block exemptions should not apply; rather, what should happen is that effective competition "conditions" should be introduced for the application of block exemptions, so that the company has the burden of proving that it is "block exempt" or its case for exemption, but starts not with a decision against it, just an arguably concentrated market to deal with;
— the "straitjacket" effect of block exemptions can be loosened by the sort of modifications suggested in Option II;
— the opposition procedure could also be more effective and proportionate, with notifications initially only in a "short form", where only limited restrictions and/or small market shares are concerned, and a Commission ability to call in the agreements concerned and ask for fuller notification when appropriate;
— perhaps such a short form filing for small agreements could be generalised as a system.

There is a clear consensus that filing big Form ABs for small agreements is not acceptable or rational, but a recognition that parallel networks of small agreements can be a problem.

My understanding is that Option II is what most of industry wants (if it cannot have "Option V"—general abuse control!) and that some development of Options III and IV at the two ends of the market scale is what the Commission wants.

Commission hearings

The Commission held hearings at the beginning of October 1997. The hearings focused on four issues: how to measure market power; what should be *per se* prohibitions; how to deal with free riders in distribution; and which of the proposed options in the Green Paper would be best.

Interestingly, the Commission explained that there had been considerable support for Option II, wider block exemptions, but emphasised that there was also support for an economic approach which would suggest that there should be limits to block exemptions, where there is significant market power (*i.e.* Option III).

The overall package seems to be taking the direction that the E.C. rules would be more tolerant where low market shares are in play, since the markets are more competitive, but there will be greater scrutiny where markets are concentrated. It was apparent from the hearings that representatives of the beer and petrol industries are very concerned as to what sort of changes may come about, which is not that surprising given the heavy investments which they have made in distribution, the running disputes with their tenants —notably in the United Kingdom—and the Commission's recent emphasis that special rules have to be justified again.

The Commission also revealed that there have been French and U.K. proposals (amongst other Government proposals) which are on the table as well as the options in the Green Paper. The French solution envisages a negative clearance regulation, with a presumption of legality for all vertical restraints, but the possibility for the negative clearance regulation to be declared inapplicable if there is no effective competition. The U.K. proposals envisage one block exemption regulation specifying only black-listed clauses, with all others deemed legal. There would again be the possibility of withdrawing the benefit of the block exemption in some circumstances, with mandatory notification in others.

The Commission will now consider all the comments received and has suggested that proposals may be put forward early next year. It seems quite possible that the final outcome might well be a combination of Options II, III and IV.

There is also talk of a possible widening of Article 4(2) of Regulation 17/62 to allow for more retrospective exemption for non-notified agreements under Article 6(2) of Regulation 17/62. This needs to be addressed cautiously because retrospective rules/decisions are, always, at first sight, disturbing. It is also not clear how this would affect decentralisation and developing national competition law enforcement at authority and court level. There is also concern that plaintiffs should have some legal certainty, as well as the parties to the agreements concerned. They should not be faced with

the prospect of technically justified and valid litigation being ultimately frustrated by a retrospective exemption, years after the relevant injury started and perhaps turning on some larger, political settlement of wider issues. On the other hand, we are talking of a limited group of restraints viewed as less harmful. We are also trying to find a solution to (arguably) undesirable filings which are not dealt with for extended periods because of Commission workload.

It would be useful if these important developments—the French and U.K. proposals and the Commission's ideas on retrospective exemption—could be made public in more detail and debated further.

Some in the debate have expressed the view that invoking Article 85(2) E.C. unenforceability in national proceedings is somehow wrong. One needs to be careful here. The risk of unenforceability is the most important E.C. competition compliance factor in practice, not fines of which there are relatively few. Judges already eke out false Euro-defences regularly, using practical criteria such as the need to show the nexus between an infringement and the claim sought, and detailed special pleading requirements. The judges are, moreover, only applying the substantive rules laid down in the Treaty, by the European Courts and taking account of Commission practice!

Retroactive exemption—A working example: U.K. beer supply

An important example of what may be coming is the Commission's approach to the English pub company and brewery leases.[19] There are three main points.

First, in relation to both types of lease, the Commission has now indicated its intention to grant retroactive exemptions. It would appear that the Commission plans to grant such exemption back to the date of the introduction of such leases (in each case approximately three and a half to four years' pre-notification) on the basis that for their duration the conditions of Article 85(3) E.C. are fulfilled. The Commission considers that the specifications of the beer tie by type and for extended periods is acceptable in the specific context of the U.K. on-trade beer market. Notably in the *Inntrepeneur* (pub company) lease (published in 1993),[20] the tie will represent less than 4 per cent of the total outlets in the United Kingdom, accounting for less than 5 per cent of the total market for the sale of beer through such outlets. In the *Whitbread* (brewery) lease (published in September 1997),[21] the tie concerns some 2.4 per cent of the fully on-licensed premises in the United Kingdom, and the beer purchased from Whitbread by these licensees represents 1.6 per cent of the 1996 on-trade beer consumption in the United Kingdom. Although the Commission's Article 19(3) Notices do not go into any detail, it would appear that Article 4(2) of Regulation 17/62 is to be relied on.

Secondly, the Commission appears to have divided up the review process with the Office of Fair Trading, broadly according to the centre of gravity of the infringement alleged. Thus, the Commission has focused first on overall market structure and the degree of foreclosure represented by these ties, while (initially) leaving to the OFT the question as to whether the widening differential in beer prices offered to pub company or brewery tenants in comparison to that offered to the free (non-tied) trade might preclude the operation of tied pubs on a level playing field.[22] The Commission appears to have carried out some inquiries of its own, but building off the OFT work. Apparently the earlier notice has still not led to an exemption and the whole subject is still highly debated, both procedurally and on the substance.[23] What I would like to highlight is how this enforcement is operating.

The third point is that if full exemption decisions are granted retroactively that may have a decisive impact on various cases brought in the U.K. courts, arguing that these leases, or at least the beer tie, infringe E.C. competition law.[24] An exemption may also limit the scope for any other U.K. action. The question is—is that the right result or should the Commission just exempt, as it would in the normal case, from the date of notification at the earliest, or from the date of appropriate amendment to reflect full compliance?[25]

International co-operation and conflict

Box 2: International Co-operation and Conflict

- "Positive Comity" proposals
  - — presumption that will defer or suspend if conditions met
  - — ?limited use? different substantive criteria?
  - — parallel to multi-lateral system at WTO
- Experience with cases
  - — *IRI/Nielsen* (co-operation)
  - — *Sabre/Amadeus* (U.S. asked E.U. to investigate)
  - — *Boeing/McDonnell Douglas* ("divergence")
  - — *SGL Carbon* investigations (dawn raids?)
  - — *Microsoft* again (co-operation/verification)
- E.U. issues re: trans-Atlantic alliances
  - — Articles 88/89 E.C. jurisdiction (new E.C. proposed regulations)
  - — Merits of the case: how many slots should be divested? 353 or 140?
  - — Can slots be traded?

19 See generally Van Erps, "The Application of EC Competition Law to UK Pub Contracts", DG IV Website, June 17, 1997. The United Kingdom is also understood to be modifying the "guest beer" rule to allow for a bottle conditioned beer, not just one cask-conditioned beer insofar as the letter may prevent free movement of goods and thereby infringe Article 30 E.C. See also Spink and Milne, "Calling Time on the Guest Beer Provision" [1997] 2 E.C.L.R. 79.

20 [1993] O.J. C206/2.

21 [1997] O.J. C294/2.

22 See *Whitbread* Notice, point 30 *et seq*; IP(95) 104 of February 8, 1995.

23 It is understood that the tenants argue, amongst other things, that they are charged a high rent in the circumstances, indirectly forcing them to keep their prices up (a "*per se*" infringement of the E.C. rules?), while the free trade has been able to negotiate better price terms which cut into the margins of the tied tenants. The brewers argue that the tenant receives certain advantages which are the consideration for the high price. The tenants argue this is still too expensive and, in effect, a bundling of services which they do not want and cannot afford. In any event, a tie by type is not block exempt. Many are small traders unable to take major loans to move into the "free trade" sector and have incurred heavy losses. A similar struggle has now developed in the U.K. petrol industry because of the growth of non-tied competition from supermarkets to chains of tenant garage operators.

24 See European Report, No. 2255, October 1, 1997, at 2; IP/97/821 of September 29, 1997.

25 *e.g.* based on Article 6(1) final sentence of Regulation 17/62.

The draft E.U./U.S. "positive comity" agreement

In June 1997,[26] the Commission adopted a proposal for a joint E.U. Council, European Commission decision to adopt a new agreement between the E.U. and the United States on the application of positive comity principles in competition law enforcement.[27] The agreement still has to be adopted by the E.U. Council. It will be recalled that the idea of "positive comity" is that a party adversely affected by anti-competitive behaviour occurring in whole or in part in the territory of another party may request that other party to take action.[28]

What is new here is that the agreement creates a presumption that in such circumstances, the party suffering injury from the anti-competitive behaviour will normally defer or suspend its enforcement activities in favour of the other party in certain conditions.[29] Mergers are not within the scope of the proposed agreement, because neither E.U. nor U.S. legislation would allow for such a deferral or suspension of action in merger cases.

For the system to work, it is necessary to show that anti-competitive activities are occurring in the territory of one party, adversely affecting the interests of the other and that the activities in question appear to be impermissible under the competition laws of the party in whose territory the activities are occurring.[30]

This is important, because in practice, this may well limit the use of the agreement. What, for example, changes where the United States provides for an anti-trust immunity by law in cases of export (Webb-Pomerene Associations), or contexts such as transport (*e.g.* recent trans-Atlantic airline alliances), or simply applies different substantive criteria so that different results could occur (*e.g.* because, in practice, different approaches are taken to consumer welfare and protecting the structure of competition/competitors)? The agreement does not change substantive rules. It will be interesting to see how this develops.

It appears that the proposals have been put forward, in parallel to a multi-lateral system, which is still being advocated by the Commission at the WTO. From the E.U. side, they also involve the idea of re-balancing E.U./U.S. bilateral relations in the face of what is perceived as the extra-territorial reach of U.S. anti-trust law.[31]

The draft positive comity agreement still embodies the principle that the exchange of information must continue to be limited by the respective system rules on confidentiality. However, it is clear that the Commission would like to promote a broader exchange. At the moment, such exchange is conditional on specific waiver by the party concerned and many companies do not like the idea (1) that they might expose themselves thereby to anti-trust challenge (*e.g.* because of differences in substantive rules) and/or (2) that the information could be used by the other administration against their interests (*e.g.* if the information were to get out to their trans-Atlantic rivals).

26 Commission Press Release, IP/97/544, June 20, 1997.
27 A draft, dated January 24, 1997, was put on the Internet by DG IV in February 1997 for comment.
28 See Articles I and III.
29 Article IV.
30 Article I.1(a) and (b).
31 See Rakovsky, paper given at the Forschungs Institut für Wirtschaftsverfassung und Wettbewerb Conference, October 1997; DG IV Website, October 10, 1997.

Experience with cases

The first point to note here is that the Commission has published a second report on practice under the U.S./E.U. Cooperation Agreement for 1996. Both are reproduced in the 1996 E.C. Commission Annual Report.[32]

The second point is that there has been a varied case law practice this year. At the beginning of 1997 there was *IRI Nielsen*[33] where the U.S. authorities let the Commission take the lead in the investigation, in effect applying the sort of positive comity principles set out in the new draft agreement.

Then, in May 1997, it was reported that the U.S. authorities for the first time specifically asked the Commission to investigate a case, where Computerized Ticket Reservation System, *Sabre*, alleges market foreclosing/access issues of its European rival, *Amadeus*. More specifically, the DOJ asked the Commission to investigate alleged anti-competitive conduct by European airline companies which have prevented U.S.-based airline reservation systems from entering certain E.C. Member States. Amadeus (owned by Lufthansa, Air France and Iberia), the largest reservation system in the E.U., is alleged to have withheld air fare information from U.S. systems in Europe. Sabre, the U.S. reservation system, owned by American Airlines, complained that airfares were not provided in time, or failed to provide information on certain promotional fares.

Then, there was the less harmonious note of *Boeing/McDonnell Douglas* in the early summer, where essentially there appears at times to have been divergence between the E.U. and U.S. authorities (over questions such as remedies and exclusivity issues), perhaps driven by differences in the way that substantive rules are applied. Formal requests were made to take into account the specific interests of the other party.[34]

In June 1997 there appears to have been a parallel investigation of *SGL Carbon* on both sides of the Atlantic, involving dawn raids,[35] in what appears to be a cartel case. If so, this will be interesting because the Commission has emphasised that it would like to use the E.U./U.S. co-operation for cartels and access issues, not just merger cases where the co-operation is already active.

Finally, there are reports of new verifications of *Microsoft* under the co-operation. In October 1997 the Commission indicated that, in parallel with the U.S. anti-trust authorities, it has begun investigating practices used by Microsoft to integrate its Internet Web browser, Microsoft Internet Explorer, with the Windows 95 operating program.

32 at 299–318.
33 Discussed above, under Article 86 E.C. cases.
34 See the Commission's Press Release IP/97/729 of July 30, 1997 and the earlier FTC Press Release of July 1, 1997, and Rakovsky, FIW Conference, cited n. 31 above, at 6. In October 1997 it was reported that Mr Van Miert had ordered an inquiry after Delta Air Lines said it had signed a final agreement to purchase 644 airplanes from Boeing over 20 years, *Financial Times*, October 23, 1997.
35 *SGL Carbon* is reportedly the world's leading carbon and graphite products manufacturer. The DOJ is also understood to have sent out subpoenas to Carbide/Graphite Group Inc. and UCAR International Inc. in connection with the case, which appears to relate to possible price-fixing for graphic electrodes. European Report No. 2231, June 11, 1997.

The B.A.–A.A. Alliance case, Article 89 E.C. and the Commission's powers over airline traffic with third countries

This has been extensively covered in the Press. I would just sketch some of the struggles going on.

In November 1996 the Commission issued a formal objection to the proposed *B.A./A.A. Airline Alliance*. British Airways objected that the E.C. lacked direct competition jurisdiction under Article 89 E.C., as such authority is limited to services between Member States rather than between the E.C. and the United States. Significantly, the Commission is looking at the Alliance's potential impact on specific routes such as New York–London. There was a parallel investigation by the U.K. authorities (and another dispute between the Commission and Germany over who had jurisdiction over the parallel *Lufthansa/SAS/United Alliance*). In May 1997 the Commission published proposals intended to clear up the matter of jurisdiction by giving it authority to investigate deals between European and third-country airlines, and take block exemptions to clear them, avoiding recourse to Article 89 E.C. and preventing the parallel proceedings with the U.K. and German authorities.[36]

In July 1997 the Commission announced which amendments it considered necessary in order for it to approve the Alliance between British Airways and American Airlines on the "trans-Atlantic air transport market". The main amendments concern:

— the need for the airlines to renounce, without compensation, 353 timeslots at London (Gatwick and Heathrow);
— the exclusion of services between Heathrow–Dallas from the Alliance; and
— the reduction of the current level of their flights between the United Kingdom and other U.S. destinations.

In September 1997 the B.A.–A.A. case was still in a stalemate. Mr Van Miert was reported as saying that he required the two airlines to give up 353 slots at Heathrow, as opposed to the 140 odd that they are currently proposing. Both sides seem to have taken entrenched positions, and B.A. suspended flights to the United States from Glasgow on the basis that it is incurring losses on that route while awaiting approval. B.A. is also complaining that the *Lufthansa/SAS/United Airlines* alliance has not received a Statement of Objections, although the Commission is expected to issue one soon. That alliance has received anti-trust immunity in the United States, which B.A.–A.A. has not.

Controversy still rages over whether slots can be bought and sold insofar as to have a market for them would raise barriers to entry for (small) airlines in favour of current holders. Both the use of Article 89 E.C. in airline cases and the forced divestment of slots in airline link-ups are not new. What is different is (mainly) the Commission's renewed drive to extend its mandate over airline agreements with third countries (*e.g.* over landing rights), the whole global alliance context and the entrenched positions of all concerned—Member States and airlines alike!

36 Commission Press Release IP/97/420, May 20, 1997; COM(97) 218 final of May 16, 1997.

Decentralisation and damages

The finalised notice on co-operation with national competition law authorities

Box 3: Final Commission Co-operation Notice with National Competition Authorities

- what the Commission thinks desirable (E.C. if possible, if not national law)
- useful guidance: signposts on what happens according to nature, type and geographic scope of infringement (and where you start!)
- new sections on possibly divergent national decisions, *e.g.* if comfort letter, individual/block exemptions, etc.
- more and more parallel cases
- Article 85(3) E.C. still in Brussels only! N.B. National laws offer full exemption powers, if they can be applied

In October 1997 the Commission finalised its "Notice on Co-operation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86".[37] The Notice is in many respects similar to the Preliminary Draft published last year[38] which I summarised then.[39]

There are certain important changes. First, recognition that the "specific nature of the role of the Commission and of national competition authorities is characterised by the powers conferred on those bodies by the Council Regulations adopted under Article 87 EC".[40] This is slightly more formal than the previous text and rightly so, since the distribution of powers in Articles 9(1) and (3) of Regulation 17/62 is fundamental to the co-ordinated decentralisation which the Commission is trying to achieve.

Secondly, the Commission emphasises that the Notice describes the practical co-operation which (the Commission thinks) is "desirable" between the Commission and national authorities.[41] That does not affect the extent of the powers conferred by Community law on either the Commission or national authorities for the purpose of dealing with individual cases.

Thirdly, the Commission's desired model is that Member States national competition authorities should apply Community law, or failing that, apply their national laws so as to achieve a similar result to what would have been obtained had Community law been applied.[42] While one can see what the Commission is trying to achieve, it is an open question how this will work because there is a fundamental difference in E.C. law. The national authorities cannot apply Article 85(3) E.C. whereas, if applicable, they can apply their often comparable national exemption provisions. One would expect therefore a (natural) bias to the system, allowing the authority to take the full decision (if applicable). It will be interesting to see what happens.

37 [1997] O.J. C313/3.
38 [1996] O.J. C262/5.
39 See [1997] 3 I.C.C.L.R. 75 at 77.
40 point 5.
41 *e.g.* points 9, 10, para. 3, and 15 para. 2.
42 See *e.g.* point 10, para. 3.

Fourthly, the Commission has introduced a new set of paragraphs dealing with possibly divergent national decisions.[43] The Commission outlines its view in various situations:

> — where an infringement is established by Commission decision (precluding a contrary national ruling);
> — where the Commission has previously taken an individual decision or the situation is covered by a block exemption (where the position is less clear on the law and in practice); and
> — where the Commission sends either a comfort letter in lieu of an exemption decision or suggesting negative clearance (technically not binding, but a factor to take into account; no bar to the application of national laws) or an *Automec 2* type of (dis)comfort letter, indicating that there is an infringement but that the Commission will not pursue it because of its internal priorities (which leaves national authorities to take action).

In the case of individual or block exemptions the Commission emphasises the need for the uniform application of Community law, although in other contexts, the Commission's position has been more nuanced.[44] Thus, in 1991 John Temple Lang accepted that a national authority could prohibit some clauses in a class exemption, if there were special reasons for doing so, which apply only or specially in a national market.[45] Similarly, in response to an E.P. question on the U.K. Supply of Beer Order (which is considered more stringent than the beer supply provisions of Regulation 1984/83), the Commission stated that such national regulations can be compatible with block exemptions, "provided they do not affect the essential conditions of such exemptions".[46] The Commission therefore considered the U.K. Government's Supply of Beer Order compatible with Regulation 1984/83.

Fifthly, the Commission sets out various guidelines on case allocation, based on whether the effects of the infringement are mainly national or not, capable of exemption or not, or whether a case is of particular significance to the Community (*e.g.* involving a significant restriction on access to another Member State market, Article 90 E.C. issues etc.).

The notice is clearly essential reading for practitioners as it sets out many procedural signposts as to when to go to which forum and what may happen according to whether the Commission or a national competition authority is approached first. It is, in principle, a welcome document fostering the idea that provided effective treatment/remedies can be obtained at national level, national competition authorities have a significant role to play and that they may be in a better position than the Commission to deal with cases.[47]

The problems derived from the Commission's Article 85(3) E.C. monopoly, multiple enforcement and how to achieve cohesion remain although, at least as regards the latter, there appear to be more and more parallel cases.[48]

43 points 17–22.
44 See Ratliff, "European Competition Laws: Cooperation, Conflict and Complementarity" in the coming *Festschrift in Honour of Professor V. Korah* (Sweet & Maxwell).
45 "The Effects of European Community Law on National Competition Cases", paper given at the Irish Centre for European Law, November 1991.
46 Question by Anne McIntosh MEP, March 11, 1992.
47 point 12.
48 See *e.g.* this year the Commission's decisions on *Finnish Roundwood Timber* and *Digital*, both echoed in earlier Finnish competition law decisions as noted above. See [1994] 4 E.C.L.R. R-111; [1997] 3 E.C.L.R. R-50; [1994] 3 E.C.L.R. R-75, respectively.

Damages cases/national actions: Atlas/Global One, GT Link

Box 4: Damages Cases

- *Atlas/Global One* — a German *Iberia/British Plasterboard* case?
  - — context of exemption decision with preconditions
  - — trading before preconditions met
  - — informal Brussels "clearance", no answer to national damages claim
  - — N.B. Comply and file first!
- *GT Link*
  - — Advocate General Jacobs on discriminatory pricing
  - — Danish "*provokation*" technique/principle

There have been some important cases on damages this year.

(1) Before the German courts, *BT Viag/Atlas/Global One*
In December 1994 the telecoms joint venture Atlas, owned 50 per cent by France Telecom ("F.T.") and 50 per cent by Deutsche Telekom ("D.T.") was notified to the European Commission. The J.V. was linked to a separate agreement for the creation of another joint venture between F.T., D.T. and American telecoms company Sprint, now called "*Global One*". Atlas was created to serve the markets for the provision of non-reserved telecommunications services to corporate users. In July 1996 the Commission, after examining the agreement under Article 85 E.C., decided to exempt Atlas for a period of five years, starting from the date on which two or more licences for the construction, ownership or control of alternative infrastructure for the provision of liberalised telecommunications services had become effective in both Germany and France.

Although this condition was not fulfilled until December 1, 1996, D.T. and F.T. began to offer Atlas/Global One services before that date. Last autumn, British Telecom ("B.T.") and Viag Interkom, the joint venture created by B.T., Tele Danmark and three German utilities, asked for an interim injunction against Atlas providing these services, but their request was turned down. They appealed and on April 16, 1997, the Landgericht, Dusseldorf delivered its judgment.

The Landgericht ruled in favour of B.T. and Viag Interkom and held D.T. and Atlas liable to the plaintiffs for actual losses suffered and for future losses which the plaintiffs will suffer as a result of activities which D.T. and Atlas should not have carried out. Causation and damages issues are still to be determined.

The Landgericht held that:

> • the defendants' liability arose from § 823 subsection 2 of the German Civil Code which entitles a party to request damages when a protective law has been violated. The Court held that Article 85(1) E.C. is a protective law within the meaning of § 823 subsection 2. The court ruled that the defendants' contravention of Article 85 also infringes section 1 of the German Unfair Competition Act;

- the agreements between D.T. and F.T. required an exemption by the European Commission under Article 85(3) E.C., because they substantially restricted competition in the common market. Prior to the granting of the exemption, the execution of the Atlas and Global One joint ventures, together with all business activities, were prohibited and, as they contravened Article 85(1), these agreements were void pursuant to Article 85(2);
- the Court also stated that the J.V. agreements only became effective, and the respective business activities became lawful, once the E.C. Commission exemption decision allowed them. Hence, they were not allowed to be implemented before then;
- the defendants claimed that they met Commissioner Van Miert after the notification but before the exemption had been granted. They claimed to have agreed with the Commission on the activities that they could undertake before any exemption decision would be effective. According to the defendants, the Commission agreed not to take action against these activities. The Court states that, notwithstanding these considerations, the agreements should not have been implemented and that any understanding with the relevant Commissioner was of no effect in this respect;
- the exemption ruling did not become effective before December 1, 1996, the day on which, according to a notice published in the Official Journal of the European Communities, the conditions were fulfilled;[49]
- the court found that D.T. and Atlas had in fact already commenced offering Global One telecommunications services before that date. The defendants did not deny this;
- the German High Court finally ruled that D.T. and Atlas acted unlawfully and anti-competitively, because all their market activities prior to December 1, 1996 violated Article 85(1), were therefore unlawful (section 823 of the Civil Code) and anti-competitive (section 1 of the Unfair Competition Act). They also acted with the required degree of fault, because they were fully aware of the state of the exemption proceedings;
- actual damages were likely to have occurred as a result of this unlawful conduct because the parties are competitors for the same potential customers. If D.T. and Atlas had not begun operating before December 1996, potential customers might have preferred the plaintiffs' offers rather than the defendants' offers. As stated by the Court, any contract concluded by the defendants in the Federal Republic of Germany, could have gone to the plaintiffs, had it not been for the anti-competitive early start of the defendants.

It is believed that damages could amount to millions of D.M. For this purpose, D.T. and Atlas have been asked to produce a complete account of Global One's business activities.

The implications of this judgment are clearly considerable. Apart from the particular telecoms context, I would mention two points:

First, as regard damages actions, the case appears to be similar to *British Plasterboard* last year. Liability is established (subject to appeal?). The questions now are: what contracts did Atlas/Global One win which B.T./VIAG Telekom tendered for and lost? How likely is it that *B.T./VIAG Telekom* would have won them but for Atlas/Global One's unlawful bid? If *B.T./VIAG* would have won, what is the extent of damages which can be recovered under German law?

Secondly, the case highlights the need *to comply and file first*, if there is any doubt about being caught by Article 85(1) E.C., in particular where J.V.s bid for important contracts. In principle, the Commission's exemption cannot antedate notification[50] and can start later (*i.e.* from the date that suitable corrective measures by the parties are (1) notified to the Commission and (2) in operation, or other conditions for exemption are met—the case here).

(2) European Court ruling in *GT link*

Another important case on damages this year is the European Court's ruling in GT Link.[51] In a dispute related to allegedly discriminatory port levies, charged pursuant to Danish law, the ECJ had to rule on three issues in relation to the competition rules.

First, to what extent did Community law impose special requirements with regard to national procedural rules on the burden of proving that the conditions of Articles 86 E.C. have been satisfied? The ECJ held that it was for:

> the domestic legal order of each Member State to lay down the detailed procedural rules, including those relating to the burden of proof, governing actions for safeguarding rights which individuals derive from the direct effect of Article 86 of the EC Treaty, provided that such rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

In practice, a system called "*provokation*" in Danish law therefore appears to be permitted. Here, if one party invites the other party to provide relevant information and that party fails to comply and the court considers that it does, in fact, have the information, the court may shift the burden of proof of the facts concerned to that party (*i.e.* require the defendant to rebut the case asserted).

Secondly, questions going to liability under Article 90(1) and 86 E.C. in the circumstances. The ECJ held that:

> where a public undertaking which owns and operates a commercial port occupies a dominant position in a substantial part of the common market, it is contrary to Article 90(1) in conjunction with Article 86 of the EC Treaty for the undertaking to levy port duties of an unreasonable amount pursuant to regulations adopted by the Member State to which it is answerable, or for it to exempt from payment of those duties its own ferry services and, reciprocally, some of its trading partners' ferry services, in so far as such exemptions entail the application of dissimilar conditions to equivalent services. It is for the national court to determine whether, having regard to the level of the duties and the economic value of the services supplied, the amount of duty is actually unfair. It is also for the national court to determine whether exempting its own ferry services, and reciprocally those of some of its trading partners, from payment of duties in fact amounts to the application of dissimilar conditions to equivalent services.

Thirdly, if such liability is established, do those on whom the duty was imposed have a right to seek reimbursement or compensation? The ECJ confirmed that, in principle, this is

49 [1997] O.J. C47/8, February 15, 1997.

50 Article 6(1) of Regulation 17/62.

51 C-242/95, Judgment of July 17, 1997.

the case. There are parallel actions based on Article 95 E.C.[52]

Much of the judgment is confirmatory of principles in other cases but it is useful and important.[53]

Finally, mention should be made of a note in a recent Commission newsletter called "Suspect clauses in an 'out of court' settlement". Such a settlement in respect of a complaint lodged before the Commission led DG IV to express its "disquiet" at certain of the provisions of the agreement between the complainant company and the company complained of, since they threatened to impede the proper investigation of the complaint.[54] The settlement provided that the complainant would withdraw its complaint, and that the company complained of would modify certain of its practices and pay the complainant some ECU 4 million. However, in the original version of the settlement, the complainant was obliged to reimburse part of the sum paid if the Commission decided, before a certain date, to address a Statement of Objections to the company complained of, attacking the practices mentioned in the complaint.

The original version also stipulated that the complainant should not, directly or indirectly, encourage the Commission services to pursue or resume their investigations, notwithstanding the obligation on the complainant to reply to a request from the Commission for information, under Article 11 of Regulation 17/62. DG IV strongly criticised these provisions.

The Commission was then informed that all references to mandatory requests for information had been removed from the agreement, that the agreement had been modified to explicitly guarantee the complainant's right to discuss with the Commission services the terms of the settlement and all matters relating to it, and that the company complained of had renounced its right to partial reimbursement as set out in the original version of the agreement.[55]

AREAS OF PARTICULAR INTEREST

Box 5: Areas of Particular Interest

- *Sport*
  - — *Bosman*
    - * numerous sequels at FIFA/UEFA and national level
    - * Van Miert/Flynn reaction to Circular 616
    - * explosive German and English challenges in national courts to the centralised marketing of TV rights
- *New national competition laws*
  - — United Kingdom, The Netherlands, Denmark, Finland ...

52 Cases C–90/94 *Haahr Petroleum*; Joined Cases C–114/95 and C–115/95 *Texaco* and *Olieselskabet Danmark*, Judgments of July 17, 1997.

53 See also Advocate General Jacobs's Opinion of February 27, 1997, making a number of remarks going to whether there was discrimination under Article 86(c) E.C. on the facts, at 33–40, especially at points 128–136.

54 See *EC Competition Policy Newsletter*, Vol. 3 No. 1 (Spring 1997).

55 Reported in English in (1997) 9 *European Union Law Reporter.*

Competition and sport

Bosman sequels

This year has seen several further sequels to *Bosman.*

First, UEFA is reported to have put forward proposals for transfer fees which have apparently not satisfied the Commission. The idea of the new transfer system was to give clubs compensation for their players aged 21 to 24 who transfer to other clubs.[56]

Secondly, in some Member States, steps have been or are being taken to abolish or reduce the scope of national transfer fees, conscious that players may challenge the right of clubs to require a transfer fee when an out-of-contract player moves between clubs within the same country based on competition laws and/or labour laws and/or national constitutional rights.

Thirdly, the Commission has clarified that the obligation imposed by FIFA on national football associations to implement similar systems to the now unlawful FIFA UEFA international system at national level was contained in a notification made to the Commission in July 1995. The Commission has explained that the notification was withdrawn by UEFA and FIFA.

In all this, one senses again that perhaps the Commission would like the "centre of gravity" *Automec 2* principles to apply and for national laws, authorities and courts to handle at least the national phase of any *Bosman* sequel if there is to be one![57]

Fourthly, it appears that FIFA has decided that the *Bosman* rule will apply to all cross-border transactions from 1999, not just E.C. transactions. However, the relevant FIFA circular, No. 616, was challenged by Commissioners Flynn and Van Miert in July 1997 as in contravention of Articles 48 E.C. and 85 E.C., 53 EEA when applied either to E.U. players or to non-E.U. players insofar as the resultant effects have an impact within the EEA.[58] The matter arose in the context of *Ronaldo*'s decision to leave Barcelona and join *Inter Milan*, reportedly carried out not by a transfer fee, but by Ronaldo buying out his contract (with Pta 4 billion provided by Inter Milan) and then joining Inter Milan. There have been suggestions that Barcelona may also have been paid more money, as some form of compensation.[59]

Centralised marketing of TV rights

To some extent the application of the E.C. competition rules to sport has already moved on to new issues. Thus, there have now been national rulings suggesting that the centralised marketing of television rights infringes competition law

56 See European Report No. 2182, December 11, 1996.

57 See 1996 EC Commission Competition Report, points 104–107. In Germany, after a transitional period of one year, transfer fees have been abolished and in the United Kingdom there are initiatives to allow out-of-contract players over 24 to move "freely". (Cf. the French system discussed by Advocate General Lenz in his Opinion in *Bosman.*)

58 See Commission Press Release IP/97/615; July 4, 1997.

59 See *e.g. Financial Times*, July 5, 1997. In March 1997 the Commission is reported to have received a complaint by the Spanish football club Valencia, and their Croatian player Vlaovic, over a decision taken by the world football authority FIFA. FIFA ordered the Spanish club to pay the Italian club Padua a transfer fee of ECU 3.3 million, even though the contract with Padua had expired. Vlaovic being a non-E.U. national, the complaint was based not on Article 48 E.C., but on Article 85 E.C.

(E.C. or national) and may also not be capable of exemption.[60] There are rulings by the *Bundeskartellamt* and *Kammergericht* Berlin[61] in relation to the Deutsche Fußball Band and also in the Frankfurt courts in relation to the European Truck Racing Championship.

The logic of the German decisions is that the rights to a particular event belong to the club(s) which take the financial risk in organising them. They do not belong to the national or international associations to which the clubs belong or through which they participate internationally (*i.e.* the DFB, UEFA or the FIA, etc.). To the extent that these organisations claim the right to market the events internationally or have grants of the rights from their members (*i.e.* in return for appropriate royalties, etc.), there is a centralisation which is anti-competitive. The centralisation may be viewed as a common sales agency (with a dominant position?). Instead of TV operators being able to negotiate freely with individual event organisers or member clubs for particular matches to purchase broadcasting rights individually, they are faced with the sale of matches as blocks usually for extended periods.

Similarly, where there might have been an open market for the production of the relevant TV coverage by different TV companies for different event organisers, there is a single party deciding who makes which film when and where and on what conditions for a whole championship or series of events.

All of this is very interesting at a time when the *EBU* decision is meant to be under further review. Practically, Formula 1 is apparently looking for a public flotation where the centralised marketing of the related TV rights appears fundamental. The whole balance as between event organisers/clubs and national/international sports organisations may be affected. If the events/clubs own rights, they are, in principle, to earn the revenue, with these associations only assisting if chosen. Exclusive contracts with joint marketing agents may also be affected.[62]

Other new issues

The E.C. competition rules are also being invoked in other contexts. Thus, the *English Football League* has complained to the E.C. Commission about a UEFA ruling that no Premier League club which plays more than 34 domestic league matches can earn a place in the UEFA Cup through the Football League Cup, apparently in an effort to pressurise the Premier League to reduce in size and to free up the weekday timetable for more European matches. It is argued, amongst other things, that this severely harms the interests of an unrelated party, the Football League and the smaller clubs which it represents, and is an abusive exercise of UEFA's control of access to competitions in Europe.

New national competition laws

At the time of completion of this article, a new U.K. Competition Act is planned, which moves closer to Articles 85 and 86 E.C. In Denmark, the law is still based on concepts of transparency and abuse control,[63] although again, a revision is taking place to bring Danish law more in line with the E.C. model. This will be in place in 1998. The Netherlands has also recently taken a major "U-turn" towards a system of more E.C.-style prohibitions.[64] Again the new system should apply in 1998. A new Finnish law is also planned for 1998 which should bring the current Act closer to E.C. practice.[65]

60 *e.g.* under § 5(2) of the German Competition Act, having found an infringement of § 1. The issue has also been raised in U.K. competition law, see *e.g.* the *FA Premier League/BSkyB/BBC* summarised in 1996 EC Commission Competition Report, at 334. There the focus is on whether the collective sale of clubs' TV rights is significantly anti-competitive. The case is before the U.K. Restrictive Practices Court.

61 1996 *Wirtschaft und Wettbewerb* 635.

62 The DFB case is currently before the *Bundesgerichtshof*. A final judgment is expected in 1998. There are various issues, including the idea that the association is a co-organiser of the events with some of the rights or in some sort of consortium with the event organisers.

63 The Competition Act 1989, Statute No. 370 of June 7, 1989.

64 See *e.g.* Bos and Kamerling "U-turn in Dutch Competition Policy" [1994] 6 E.C.L.R. 344.

65 See Report of the Finnish Working Group on Competition Law, "Reforming the Finnish Competition Law—Merger Control and Competence Issues", January 1997. There is a general trend to revision of national competition laws at the moment. For example, there is also a new law in Switzerland and new proposals are coming in Germany, and the Czech Republic.