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Major Events in E.C. Competition Law 1998, Part 1

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The object of this review is to provide an overview of the main developments in E.C. competition law (Articles 85, 86 and 90 E.C.) in 1998 following a similar format to previous years.[1] The focus is on areas of general interest, without covering E.C. merger control or state aid. The article is divided into three sections: (1) a general overview of legislation, notices and cases; (2) an outline of current policy issues; and (3) some comments on particular areas: sport, books and energy.

In the author's view, the most interesting themes of the year are:

(1) Commission focus on cartels, with related fines according to new guidelines, and signs of greater international co-operation;
(2) the Commission's proposals on vertical restraints;
(3) questions of competition law and property rights, as regards freezers, airport space or slots;
(4) Commission focus on ground handling, including inefficiency issues;
(5) the running theme of 40% market share, held by one or more companies, being a trigger for a more detailed analysis to see if there is effective competition;
(6) signs of developing Commission practice on excessive and predatory pricing;
(7) decentralisation issues, *e.g.* in the *HB ice-cream* and the *Trans-Atlantic Air Alliance* cases.
(8) ideas for a flexible approach to Articles 85(1) and 85(3) E.C. in sport.

The main emphasis this year is on Commission decisions, since these appear to be the most important.

OVERVIEW OF MAJOR EVENTS

Legislative developments (adopted and proposed)

Guidelines on Fines

In December 1997 the Commission adopted *Guidelines on the setting of fines.*[2] This was, to some extent, a surprise since previously DG IV had resisted the idea on the basis that infringers could then work out whether it was profitable to infringe or not. The Guidelines were issued quickly, just before the Commission imposed fines in several cases and are important because, taken with the Notice on Non-Imposition or Reduction of Fines (the "Leniency Notice"),[3] there are important new considerations, in particular for those defending alleged cartels. The Guidelines apply to fines for infringements of Articles 85 and 86 E.C. and Article 65(5) ECSC.

Box 1: Legislative Developments

- *Commission Guidelines on Fines:* plus and minus system
- *(Final) Notice on Access to Telecoms:* predatory pricing discussion
- *(Final) Notice on Postal Services*
- *Regulation 1310/97:* the new regime for full-function co-operative J.V.'s
- *E.U./U.S. Positive Comity Agreement:* a drive towards international cartels?
- *"Orientation Document" on the Broadcasting of Sports Events and E.C. Competition Law*

The idea is that a base sum is defined by reference to the gravity and the duration of the infringement, without reference to turnover; although large firms are expected to know the rules and to comply, smaller firms may have more room for discussion on this point. The basic amount defined in this way is then increased or reduced by aggravating or attenuating circumstances. In assessing gravity the Commission looks at the nature of an infringement and its actual market impact. Minor infringements are likely to be fined between ECU1,000 and ECU1 million. These may be trade restrictions, often vertical, with limited effects on the market and in the Community. Serious infringements are likely to be fined between ECU1 million and ECU20 million. These may be horizontal or vertical restrictions with greater effects and Community impact. Abuses of dominant position (such as refusals to supply, loyalty rebates) are examples given. Very serious infringements are likely to be fined more than ECU20 million. Generally, these will be horizontal restrictions (price cartels, market-sharing quotas, other measures to compartmentalise national markets and clear-cut abuses of dominant position by firms with a virtual monopoly). Commission examples are the *Soda Ash, Cement, Cartonboard, Tetra Pak* and *Steel Beams* cases. Particular circumstances will also be considered. Fines may reflect a deterrent effect.

As regards duration, the Commission envisages no increase in the amount of the fine for infringements of up to one

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1 The reference period is from November 1997 to the end of October 1998. This is a slightly revised version of a paper given at the IBC E.C. Competition Law Conference, November 1998, in Brussels.
2 [1998] O.J. C9/3; Commission Press Release IP/97/1075, December 3, 1997.
3 [1996] O.J. C207/14.

year; an increase of up to 50 per cent for infringements of one to five years; and up to 100 per cent for infringements of five to ten years.

Aggravating circumstances will include: recidivism, refusal to co-operate, where a company is the leader or initiator of an infringement, and "the need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement, where it is objectively possible to estimate the amount".

Attenuating circumstances include: a passive or a "follow-my-leader" role in an infringement; not fully applying the relevant restrictions; terminating an infringement when the Commission intervenes; reasonable doubt as to whether an infringement exists; non-intentional infringement; and effective co-operation.

The total amount can still not exceed 10 per cent of aggregate worldwide turnover of the undertaking in Articles 85 and 86 E.C. cases. The Commission will also take account of the circumstances, including the specific economic context and the ability of the offender to pay.

The Guidelines have been already applied this year (see *e.g. Alloy Surcharges* and *V.W.* discussed below).

E.U./U.S. Positive Comity Agreement

In March 1998 the E.U. and the United States signed a new *"Positive Comity"* Agreement which was described as a draft in last year's review.[4] The Agreement complements the 1991 E.U.–U.S. Co-operation Agreement developing principles of positive comity. The concept is that anti-competitive activities, which occur in one party's territory but have adverse effects in the other party's territory, will be dealt with only in one territory. In such cases, the party suffering the adverse effects requests the party where the activities are occurring to investigate and remedy the anti-competitive activities, and should defer or suspend its own enforcement activity against those practices whilst the other takes "effective action". The activities concerned have to be unlawful in the territory where they are occurring. The Agreement concerns general competition law prohibitions, but not merger control, since neither the E.U. nor the U.S. is able to defer or suspend its merger control review procedures. The Agreement preserves the confidentiality principles of the 1991 E.U.–U.S. Co-operation Agreement (*e.g.* no disclosure without consent).

Effective action required under the Agreement involves, among other things: keeping the other authority fully informed (on request or at reasonable intervals); best efforts to obtain a remedy or initiate proceedings within six months; and co-operation. For example, the enforcing party has to take into account the views of the requesting party before settlement, initiation of proceedings, remedy, etc.

The Agreement is seen by the E.U. and U.S. authorities as:

– *strengthening the positive comity provisions of the 1991 E.U.–U.S. Co-operation Agreement:* under Article V of that agreement the parties could already ask each other to take action against practices which would harm the requesting party's interests. The point about the 1998 Agreement is that clearer rules are set out and there are now presumptions as to when positive comity will be used[5];

– *a way to limit unilateral action by the United States*: the Agreement reflects a commitment on the part of the E.U. and the United States to co-operate rather than apply antitrust laws extraterritorially. This is perceived as redressing the imbalance arising from the U.S. Foreign Trade Improvements Act 1982[6];

– *likely to assist in cases of access to foreign markets*[7]: *e.g.* market foreclosing practices, foreign cartels, etc.;

– *providing a better basis for international enforcement than multilateral competition structures, such as the WTO*: at least in the United States, where the WTO's handling of *Fuji/Kodak* is perceived as unsatisfactory. In the E.U., both multilateral and bilateral co-operation is favoured[8];

– *useful:* in so far as it provides for a more rational allocation of resources; it is difficult to obtain evidence or enforce remedies overseas; and "extraterritorial" enforcement causes political friction.

The Agreement could be important in so far as it reflects a clear theme on both sides of the Atlantic to co-operate more and act against international cases including cartels. Apparently there have been co-ordinated cartel investigations. Thus, in the latest report on E.U./U.S. co-operation the Commission states: "Factual elements relevant to (a) case were also exchanged within the limits of legal constraints on the protection of confidential information. Cooperation under this heading has recently involved a successful synchronisation of investigations and searches".[9] Recent speeches by Gary Spratling, Deputy Assistant Attorney General in the U.S. Department of Justice, have also advocated further action against international cartels.[10] It is also interesting to see six months as the benchmark for effective action (cf. E.U. Telecoms Notice, point 30).[11] It would be great if that could become the norm!

Other adopted texts

In December 1997 the Commission adopted the *Notice on the Application of the Competition Rules to the Postal Sector.*[12]

In March 1998 the Commission adopted the *Notice on Access to Telecoms.*[13] The main points of general interest were outlined in last year's review.[14] The notice is of general interest, in so far as it envisages decentralised enforcement, practices which could constitute abuses and, in particular, discussion of various pricing issues: excessive, discriminatory and predatory pricing.[15] For present purposes it should be

4 Ratliff, [1998] 1 I.C.C.L.R. 43.

5 E.C. Press Releases IP/97/544, June 20, 1997, and IP/98/507, June 4, 1998; Department of Justice, Press Release, June 4, 1998.

6 C. Rakovsky, Paper to the Forschungs Institut für Wirtschaft und Wettbewerb, October 1997.

7 Joel Klein, *Global Competition Review* (August/September 1998), p. 3.

8 See "Towards an International Framework of Competition Rules", Communication by Sir Leon Brittan/Karel Van Miert, COM(96)284. Mr Van Miert's "Wise Men" Group in 1994 advocated positive comity at multilateral levels also.

9 1997 E.C. Commission Competition Report, p. 318.

10 *e.g.* Paper to the 1998 ABA Criminal Justice Section, March 6, 1998. There has also been an OECD recommendation this year, advocating closer co-operation between competition authorities against hard-core cartels.

11 [1998] O.J. C265/2.

12 [1998] O.J. C39/2. The draft was summarised in Ratliff, [1997] 2 I.C.C.L.R. 37.

13 [1998] O.J. C265/2.

14 See Ratliff, [1998] 1 I.C.C.L.R. 5.

15 See also Coates, "Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector", 1998 E.C. Commission Competition Policy Newsletter, No. 2, pp. 45–46.

mentioned that the debated definition of predatory pricing in the former "footnote 66" has now been replaced by text reflecting the principle that predatory pricing occurs if an operator charges a price for a good or service below which it could only make a profit by weakening or eliminating one or more competitors. Such a determination would tend to be based on costs which are incremental to the provision of the service over a period of longer than one year.[16]

In March 1998 the changes to *the procedural treatment of full function joint ventures* came into effect. These were described in last year's review.[17] The main point to note as regards J.V.s is that full function J.V.s are now caught and, if above the Community thresholds, have to be notified under the E.C. Merger Control procedure. In other words, before they are implemented. Where they involve a risk of co-ordination between undertakings which remain independent, they are then assessed under dominance and Article 85 principles.[18] This is discussed further below.

In the Commission's June Competition Newsletter, it published an *"Orientation Document on the Broadcasting of Sports Events and E.C. Competition Law"*. This important document is discussed in the second part of this review to be published next month.

Box 2: Legislative Developments Proposed

- E.U./Canada Co-operation Agreement
- Reform of Regulation 99/63 (and transport regulations)
- Communication on Vertical Restraints
- Reform of Regulations 19/65 and 17/62 (Article 4(2))
- Horizontal restraints review

Proposed E.U./Canada Co-operation Agreement

The proposed *E.U./Canada Co-operation* agreement was agreed by the Commission and the Canadian Bureau for Competition in June 1998, and published on DG IV's website. It generally follows the 1991 E.U./U.S. Co-operation Agreement. The Agreement now has to be reviewed by the European Parliament and then adopted together with the E.U. Council.

Proposed reform of Regulation 99/63

This was mentioned in the Commission's 1997 Competition Report. A preliminary draft was published on DG IV's website in August 1998, together with proposals to amend forms and procedures for transport notifications.

The Commission aims to have a single system governing hearings, with all relevant matters covered in one regulation. This is a welcome initiative.

The main points of discussion on the draft are three. First, the Commission wants to do away with the requirement to do minutes, although it may supply tapes. Many defence counsel are not keen on this, even though it may save time, because important factual or legal issues may be raised at hearings which need formal recording. Second, the Commission would like to provide that it is not bound to take into account submissions made after the hearing. Many argue this may not be fair at all, because such submissions may be on key issues raised for the first time only at the hearing. Given the nature of the proceedings, it is argued that the Commission cannot be entitled to ignore such papers if they are important. Third, some, such as the English Bar, argue that the draft does not go far enough and there should be an integration of the Hearing Officer's Terms of Reference and rules on access to file into the Regulation.

Commission Communication on Vertical Restraints (and related procedural changes)

The Commission's *Communication on Vertical Restraints*, with related amendments to Regulations 19/65 and 17/62, have now also been published. The main point is that a single broad block exemption is proposed with two layers of market share cap related to the restraints used and the possibility of retroactive exemption for unnotified vertical agreements, provided the conditions of Article 85(3) are met. These documents are outlined below.

Horizontal restraints review

The Commission's *horizontal restraints* review is also progressing. The Commission had some 94 replies to the 150 questionnaires it sent out and considers that there is a need to review and modernise Commission policy on horizontal co-operation. It has also been comparing notes with the Federal Trade Commission on J.Vs.[19] The Commission is now carrying out a review of how horizontal agreements are reviewed in national laws and has asked Member States to assist. This is interesting in itself because, in the reform of vertical restraints, Member State views appear to have been highly influential. Soft harmonisation can work both ways: E.C. to national law and vice versa!

European Court cases (ECJ and CFI)[20]

Collective dominance

In March 1998 the European Court gave its judgment in *Kali+Salz*.[21] It will be recalled that this was a merger control case, in which the Commission accepted a failing firm defence, while imposing various restrictions on the basis of the collective dominance remaining in the market.

The key point made by the ECJ of non-merger control interest is that, in assessing collective dominance, the Commission should focus not on signs of previous co-ordination but look forward using a "prospective analysis" of the market. The Commission should assess whether effective competition in the market would be significantly impeded

16 See points 110–116.
17 See Ratliff, [1998] 1 I.C.C.L.R. 2.
18 The Commission has now also published a new "Yellow Book", including up-to-date versions of old notices, a new notice on full function J.V.s and the relevant market notice: "Merger Control Law in the European Union, situation in March 1998", European Commission, 1998.
19 1997 E.C. Commission Competition Report, at points 15 and 47; cf. Gräper, "E.C. Revisits Horizontal Cooperation Agreements" (September 1997) *Global Competition Review* 34.
20 European Court of Justice ("ECJ") and Court of First Instance ("CFI").
21 Joined Cases C-68/94 and C-30/95, Judgment of March 31, 1998. On collective dominance, see also Advocate-General Fennelly in Case C-395/96P *CEWAL*, Opinion of October 29, 1998.

Box 3: Main European Court Cases

• *Kali+Salz*	– collective dominance to be assessed prospectively
• *Javico/Yves-Saint Laurent*	– export bans outside E.U. do not by their nature infringe Article 85(1) E.C.; depends on effects including oligopolistic nature of market
• *Silhouette*	– EEA trade mark rights not exhausted by putting on market outside the Community
• *ITT Promedia*	– vexatious litigation can be abusive, so can enforcing contractual rights in changed circumstances
• *Silvano Raso*	– laws creating a conflict of interest for a dominant state company are contrary to Articles 90(1) and 86 E.C.
• *Corsica Ferries*	– laws providing for mooring charges above cost can be allowed if to finance universal service
• *CNSD*	– Italian law fixing tariffs for customs services contrary to Articles 5 and 85 E.C.

by the merging parties and other companies, which together could adopt a common policy on the market as a result of "correlative factors" which exist between them and could behave to an appreciable extent independently of competitors and customers.[22]

Grey imports from outside the E.U.

In two cases this year, the European Court has focused on the legality of grey imports from outside the European Community. In April 1998 the ECJ had to consider whether bans on exporting from territories outside the Community fell within Article 85(1) E.C.[23] *Yves-Saint Laurent* ("YSL") had appointed *Javico International* ("Javico"), a German firm, its importer for Russia, the Ukraine and Slovenia. In each case there were contractual restrictions on exporting or marketing outside those territories. The Slovenian contract indicated that such a ban was designed "to protect the high quality of the distribution of the products in other countries". Shortly afterwards YSL found products which it had sold to Javico in the United Kingdom, Belgium and the Netherlands, terminated the contracts and sought damages. The Tribunal de Commerce in Nanterre upheld YSL's claim. On appeal, the Cour d'Appel in Versailles referred questions to the ECJ on the issue as to whether such contracts were caught by Article 85(1) E.C.

The ECJ stated that an agreement is only caught by Article 85(1) E.C. if it is capable of affecting competition and trade between E.U. Member States in a significant way. In such an assessment, the position and importance of the parties on the market had to be considered. Even an agreement imposing absolute territorial protection might escape Article 85(1) E.C., if it affected the market only insignificantly given the weak position of the parties concerned.[24]

The ECJ found that an agreement for selling goods outside the Community, with related export/marketing bans was not to be construed as intended to exclude parallel imports, but as designed "to enable a producer to penetrate a market outside the Community by supplying a sufficient quantity of contractual products to that market".[25] Bans on exporting from territories outside the Community were not by their very nature prohibited by Article 85(1) E.C.

The ECJ considered that the fact that YSL had a selective distribution system cleared under Article 85(3) E.C. had to be taken into account. In particular, it was necessary to see if the Community market in the relevant products was oligopolistic, allowing only limited competition within the Community network for the distribution of the products. It was also necessary to see if there was an appreciable price differential for the contractual goods inside and outside the Community (allowing for the effect of customs duties and transport costs on re-imports). Then, one had to consider whether, in the light of those considerations, the export bans had an appreciable restriction on the pattern of trade in the common market.[26] This would not be the case if the products intended for markets outside the Community accounted only for a small percentage of the total market in the Community. All of these were issues for the national court to assess on the facts.

Finally, the ECJ held that the fact that YSL distributed the goods in the Community under an individual exemption did not affect these issues. The exemption related to distribution inside the Community, while the contracts related to distribution outside the Community. The provisions did not escape Article 85(1) E.C. because of the exemption.

In July 1998 the European Commission considered a case called *Silhouette*,[27] relating to the intellectual property aspects of such grey imports. The case has a clear impact on selective distribution and intra-brand competition in the Community. Silhouette is an Austrian company specialised in the production of high-priced fashion spectacles. In October 1995 Silhouette sold 21,000 spectacle frames to a Bulgarian company with instructions that frames supplied could only be sold in Bulgaria or within the former USSR. Another Austrian firm called Hartlauer, specialised in the sale of low-cost spectacles, acquired the goods and offered them for sale in Austria. Silhouette had previously refused to supply Hartlauer on the basis that to do so could harm its brand image. Silhouette sought an injunction to stop Hartlauer selling its spectacles in Austria, arguing that it had not exhausted its trade mark rights under Directive 89/104,[28] and that the spectacles had not been marketed in the EEA by the trade mark owner or by third parties with his consent.

The Oberster Gerichtshof (Higher Appeal Court) referred to the ECJ questions as to whether "exhaustion" of rights in

22 para. 221.
23 Case C-306/96, Judgment of April 28, 1998.
24 para. 17.
25 para. 19.
26 paras 23–25.
27 Case C-355/96, Judgment of July 16, 1998.
28 [1989] O.J. L40/1.

the sense of the Directive meant "international exhaustion" or only "EEA exhaustion". Further, as to whether that Directive gave a trade mark owner the right to seek an order against a third party, prohibiting use of the trade mark as regards goods put on the market in a non-contracting state. (It appears that otherwise Silhouette had no legal basis for the injunction in Austrian trade mark law.)

The ECJ found that the Directive provided only for the harmonisation of laws having effect within the contracting states and that national laws which provided for international exhaustion were contrary to the Directive. Silhouette could therefore argue that it had not exhausted its trade mark rights, by putting the goods on the market in Bulgaria. The ECJ also held that the Directive required Austria to implement provisions to allow a trade mark owner to protect his rights, but that this was not a basis for such rights by itself.

The case has led to a twofold controversy. First, Silhouette was, in practice, left without a procedural remedy. Second, while brand owners were happy, parallel traders and retailers were not because its potential impact on "grey imports" from outside the Community is great. There were, notably, complaints from retailers in the United Kingdom that a way should be found to overturn the ruling, which presumably means attempted change to the Directive.[29]

Cartels appeals

In May 1998 the ECJ rejected further appeals in the *Tractor Exchange* cases.[30] In doing so, the ECJ reiterated that in such appeals parties may not simply repeat all the claims made before the CFI, including those based on findings of fact expressly rejected by that court, since the ECJ has no jurisdiction to generally re-examine a case. The ECJ review concerns infringements of rules of law. The ECJ stated that it only has jurisdiction to review the legal characterisation of the facts established or assessed by the CFI and the legal conclusions which the CFI has drawn from them. Provided that the evidence has been properly obtained and the general principles of law and rules of procedure in relation to burden of proof and the taking of evidence have been observed, it is for the CFI alone to assess the value which should be attached to the evidence produced to it. The ECJ only reviews the CFI's appraisal of evidence where it appears that such evidence has been fundamentally misconstrued.[31]

In May 1998 the CFI ruled on 16 appeals in the *Cartonboard cartel* case.[32] The court generally upheld the fines imposed. One firm (Enzo) had its fine annulled, the CFI finding that there was not adequate proof of its involvement even though Enzo had attended certain meetings.[33] In the remaining cases the CFI found that the Commission had not adequately proved participation in certain aspects of the collusion and that fines could be reduced where a company's co-operation with the Commission in the investigation period enabled it to find an infringement more easily and to bring it to an end. Overall, the total amount of fines was reduced from ECU131.7 million to ECU120.3 million.[34] The fine of ECU11,250,00 on Stora (which had co-operated with the Commission extensively and been given credit for so doing) was unchanged.

State measures

In December 1997 in *Job Centre Coop Sarl* the European Court, applying *Höfner*, ruled that public placement offices such as job centres come within the scope of Article 86 E.C. in so far as application thereof would not prevent them performing their assigned tasks.[35] Member States which do not allow private employment agencies may therefore infringe Article 90(1) and Article 86 E.C. if public placement offices are clearly unable to satisfy market demand for all types of employment activity, private companies are prevented by law from placing employees, and placement activities could extend to nationals or the territory of another E.C. Member State.

In 1998 the ECJ gave two main rulings on Article 90(1) and Article 86 E.C., first in the context of the Italian dock employment legislation in *Silvano Raso*[36] and then in relation to the Italian laws on mooring service charges in *Corsica Ferries*.[37]

In *Silvano Raso*, the ECJ held that the Italian port legislation establishing a monopoly in the supply of temporary dock labour was incompatible with Articles 90(1) and 86 E.C. The Italian legislation governing ports was amended in 1994, following the ECJ's judgment in *Port of Genoa I*. In that case, the ECJ had ruled that the Italian provisions creating monopolies in the organisation and in the supply of dock work were contrary to Articles 90(1) and 86 E.C. As a result, Italy had opened up the market for the organisation of dock work, by authorising other undertakings to compete with concessionaires in the supply of services to port users, and enabling dock companies to use their own employees to execute dock work, thus indirectly abolishing the monopoly in the supply of dockwork. However, a new monopoly was established because the former dock-work companies, which also competed now with other undertakings in the provision of port services, were granted an exclusive right to supply competitors with temporary labour.

In *Silvano Raso*, the context was criminal proceedings against a terminal concessionaire and four other companies authorised to carry out dock services at the port of La Spezia, which were accused of having unlawfully used and supplied labour in breach of the monopoly in the supply of temporary dock labour. The defendants argued that such a monopoly infringed E.C. law.

The ECJ ruled that the Italian provisions were incompatible with Articles 90(1) and 86 E.C. because, by granting a company competing in the dock services market the exclusive right to supply temporary labour to competitors, they placed the entrusted company in a position where it had a conflict of interest and enabled it, by merely exercising its monopoly, to distort competition in its favour on the dock services market. As a result, the entrusted company was led

29 *Financial Times*, July 24, 1998; *Wall Street Journal Europe*, July 17–18, 1998.
30 Case C-7/95 *John Deere v. Commission* and Case C-8/95P *New Holland Ford v. Commission*, Judgments of May 28, 1998.
31 See paras 17–22.
32 Case T-295/94 *Buchmann and Others v. Commission*, Judgment of May 14, 1998.
33 Case T-337/94, Judgment of May 14, 1998.
34 See European Court Press Release 35/98 of May 14, 1998.
35 Case C-55/96, Judgment of December 11, 1997.
36 Case C-163/96, Judgment of February 12, 1998.
37 Case C-266/96, Judgment of June 18, 1998.

to abuse its dominant position, by imposing on competitors unduly high costs for the supply of labour or by supplying them with labour less suited to the work to be done. The ECJ held that it was not necessary to identify particular cases of abuse, since the legal framework was in itself illegal.[38]

In *Corsica Ferries,* the context was an action brought by Corsica Ferries against the Genoa and La Spezia mooring groups challenging charges for mooring services. Corsica Ferries argued that the Italian law conferring a monopoly in the supply of mooring services was incompatible with Article 90 E.C., and that the imposition of prices, higher than the actual cost of the services provided and varying from one port to another for equivalent services, amounted to excessive and discriminatory pricing.

The ECJ held that a Member State may, without infringing Article 90(1) and Article 86 E.C., grant exclusive rights for the supply of mooring services in its ports to local mooring groups, provided that the undertaking in question does not abuse its dominant position nor is led necessarily to commit such an abuse, as a result of the exercise of the exclusive right.

The ECJ then held that mooring operations benefit from the derogation under Article 90(2) E.C., since they are services of general economic interest. Mooring groups are obliged to provide at any time and to any user a universal mooring service, for reasons of safety in port waters. Italy could also have decided to grant such exclusive rights to local operators on grounds of public security. The ECJ therefore ruled that it was compatible with Articles 90(1) and 86 E.C. to include in the price for the service a component designed to cover the cost of maintaining the universal mooring service, inasmuch as that additional cost was designed to cover the supplementary cost occasioned by the special characteristics of the service. Further, that such a charge could vary from port to port taking into account the particular characteristics of each port.

The ECJ also found that in the circumstances there was no infringement of Article 85 E.C. in the way the tariffs for mooring services were fixed. It was not clear from the file in the case that there was an agreement between undertakings, the purpose or effect of which was to restrict competition.

In June 1998 the ECJ ruled that the Italian Republic had failed to fulfil its obligations under Articles 5 and 85 E.C., by adopting and maintaining in force a law which required the *CNSD* (the National Council of Customs Agents) to adopt a decision setting a compulsory tariff for all customs agents.[39] This is an interesting ruling, above all as a direct challenge by the Commission based on Articles 5 and 85. There have been many such cases through references to national courts, but thus far the Commission appears to have been reluctant to take such actions directly. Clearly, it is of interest to other "quasi-public" tariffs for professional services also.

It will be recalled that there has already been a decision against the CNSD, treating its decisions as those of a national association of economic operators. The Commission has also argued, without success, that Italy infringed Articles 9 and 12 by approving the tariff.

To recap on the specific CNSD circumstances: the profession of customs agent is regulated by law in Italy. Such agents provide services relating to customs clearance procedures. The CNSD is the national governing body for the profession and is responsible for setting a tariff for the services provided on the basis of proposals from Departmental (Regional) Councils of customs agents, such tariffs being compulsory and, if not observed, enforced by sanctions. The tariff lays down minimum and maximum amounts to be paid for customs transactions. In 1988 the CNSD adopted a tariff for customs services provided by customs agents, which was then approved by the Italian state and in December 1989 the CNSD increased the tariff by 8 per cent.

The Italian state took various points on admissibility, which were rejected by the European Court, but otherwise did not lodge a defence. At the hearing, the Italian government argued that there was no infringement of Article 85(1), because although customs agents exercised a liberal profession like lawyers, they were not "undertakings" within the meaning of Article 85(1) E.C.

The ECJ found that the public law status of the CNSD as a national body did not preclude the application of Article 85(1) E.C. The members of the CNSD were also all representatives of customs agents, and nothing in the legislation prevented them from acting in the exclusive interest of that profession. In particular, there was no rule requiring them to take into account public interest criteria. The uniform, compulsory tariff established by the CNSD restricted competition and affected trade between Member States in so far as it applied throughout a Member State reinforcing the compartmentalisation of markets, and moreover affected import and export operations.

Italy was considered responsible for the CNSD infringement because, by adopting the relevant Italian legislation surrounding the CNSD's activities, Italy not only required the conclusion of an agreement contrary to Article 85(1) E.C., but declined to influence its terms (in the sense that the state relinquished its public powers to set the tariff to private economic operations). Italy also made the tariff look like a public regulation, by publishing the tariff in the Italian Official Journal.

Vexatious litigation

In July 1998 in *ITT Promedia* the CFI gave an important ruling on when vexatious litigation may be an abuse under Article 86 E.C.[40] The context was the Commission's rejection of a complaint by ITT that Belgacom had infringed Article 86 E.C. by bringing vexatious counterclaims against ITT. ITT also claimed that Belgacom had abusively demanded performance of certain contractual terms which required the transfer of intellectual property to Belgacom.

The Commission considered that bringing litigation could be an abuse (1) where the action could not reasonably be considered as an attempt to establish the rights of the undertakings concerned and could therefore only serve to harass the opposing party, and (2) it was conceived in the framework of a plan to eliminate competition. The court did not specifically rule on the correctness of these criteria,

38 paras 28–31.

39 Case C-35/96 *Commission v. Italian Republic,* Judgment of June 18, 1998. There has also been a judgment concerning Articles 3(f), (g), 85, 86 E.C. and Italian legislation on road haulage tariffs this year. See Case C-38/97 *Autotransporti Librandi,* Judgment of October 1, 1998.

40 Case T-111/96, Judgment of July 17, 1998.

confining itself to reviewing the Commission's application of those rules. The court did, however, emphasise that restrictions on the right to go to court should be construed strictly and only exceptionally would litigation be abusive.[41] On the facts, the CFI found the first criterion not satisfied.

The CFI also agreed that to insist on performance of a contractual obligation could be abusive. In particular, where the claim exceeds what the parties could reasonably expect under the contract or if the circumstances applicable at the time of conclusion of the contract have changed in the meantime.[42] On the facts, the CFI found no abuse by Belgacom.

Other

In September 1998 the CFI overturned the Commission decision in *ENS*, "European Night Services".[43] It may be recalled that railway operators in the United Kingdom, France, Germany and the Netherlands had obtained exemption from the Commission for their co-operation to provide overnight passenger services through the Channel Tunnel. Under the arrangements, the railway operators agreed to provide ENS with certain services over their networks. To provide the overnight service, the operators acquired specialised rolling stock through ENS, for some £158 million under long-term leasing over 20 years. The Commission exempted the agreements only from January 1993 until December 2002, subject to the condition that the operators supply the same rail services as they had agreed to supply to ENS, to any third-party international grouping of rail operators or any transport operator wishing to offer night passenger trains through the tunnel. ENS challenged most aspects of the Commission's assessment, this condition and the short duration of the exemption.

The CFI annulled the Commission's decision in a critical judgment. The court found that the Commission had given an insufficient statement of reasons on market shares and potential competition so that the appreciability of any effect on trade between E.U. Member States was not established. The CFI also disagreed with the Commission's assessment of ENS' legal status as a transport operator, was not satisfied that the ENS agreements restricted access to essential facilities and found that the decision did not adequately explain the basis for the limited duration of the exemption in comparison to the investments made.

On request for a preliminary ruling from a French court, in *Cabour* the ECJ has also clarified the interpretation of certain provisions of the block exemption on car distribution.[44] The two main questions related to the validity of the non-competition and sales target clauses in Peugeot and Citroën dealership agreements. The ECJ held first that a non-competition clause prohibiting multi-dealership at separate commercial premises in the absence of objective reasons is not in line with the block exemption; and second that a dealership agreement may validly be terminated if the dealer fails to meet its sales targets, provided that such sales targets are simply an obligation to use best endeavours and are determined by common agreement between the parties or, if they disagree, by an expert third party.

In September 1998 in *IECC* the CFI partially upheld actions seeking the annulment of three Commission decisions concerning an agreement on fixing postal rates and the practice of certain public postal services of intercepting "remailed" post.[45] The Commission had lawfully rejected the elements of a complaint by the International Express Carriers Conference alleging price-fixing by certain public postal operators in the Community. However, the Commission had erred in deciding that public postal operators, entrusted with the provision of the universal service, are entitled to protect their monopoly against circumvention, particularly where there is an imbalance between the costs borne and the sums recoverable under the system of terminal dues. The court ruled this was not sufficient to justify the interception of commercial remail and annulled this part of the Commission's decision.

Commission Decisions

Article 85 E.C.: cartels and other horizontal prohibitions

In November 1997 the Commission prohibited an information exchange under Article 65 of the European Coal and Steel Treaty ("ECSC") in so far as it concerned homogeneous products in a concentrated market.[46] The exchange was allowed for other markets where a large number of competitors was present.

The association of German steel enterprises, *Wirtschaftsvereinigung Stahl* had notified the proposed exchange before putting it in place. The Commission found that the exchange would have involved the exchange of sensitive, recent and individualised data on some 40 steel products. It would also have concerned market shares on the German market. As regards the markets for flat products, beams, sheet piling, track material and machine rods, the Commission found that there were high levels of concentration, low access to imports, great stability of exchange flows between Member States and chronic overcapacities. The Commission found that market transparency through the exchange would reduce the scope for independent acts of competition, which would be quickly revealed to competitors and therefore would be exposed to the risk of retaliatory measures.

In January 1998 the Commission fined six E.C. *stainless steel producers* a total of some ECU27.3 million under Article 65 of ECSC for price-fixing.[47]

Unusually a great deal of what had occurred was accepted by the companies concerned. There was a system whereby the E.C. producers agreed a standard surcharge for certain alloys used in stainless steel production. The prices for these alloys were highly volatile and the producers thereby avoided frequent changes in basic price. The system had existed since 1988, but was not applied for some years because the price of the alloy ingredients was low. In December 1993, faced with increased prices, the companies met in Madrid and a consensus was achieved to reintroduce the surcharge

41 See paras 60–62.
42 See para. 140.
43 Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, Judgment of September 15, 1998.
44 Case C-230/96, Judgment of April 30, 1998. In May 1998 the ECJ dismissed Somaco's appeal that the Commission had been wrong to find state compulsion on auto dealers to comply with a quota system for Asian autos in Martinique, the French overseas department and therefore no infringement of Article 85(1) E.C. Case C-401/96 *Somaco*, Judgment of May 7, 1998.
45 Cases T-28/95, T-110/95 and Joined Cases T-133/95 and T-204/95 *IECC v. Commission*, Judgments of September 16, 1998.
46 [1998] O.J. L1/10.
47 [1998] O.J. L100/55.

Box 4: Main Commission Decisions on Cartels and Prohibitions

- *German Steel producers* – exchange of information in mature/concentrated market illegal
- *Stainless Steel Alloy Surcharge* – when calculation models amount to price-fixing—values and dates of implementation
- *TACA Shipping Conference* – fines for banning individual service contracts and inducing potential competitors to join; no exemption if no effective competition. Application of fines guidelines gives important results
- *U.K. Sugar producers* – fines for meetings developing a "collaborative strategy" of higher prices; acting contrary to own compliance programme
- *District Heating Pipe Cartel* – bid-rigging across Europe. Huge fine for ABB (ECU70 million) for orchestrating cartel (more than turnover of product division?)
- Next?
  - *Amino acids? Austrian banks? European gas buyers?*
  - *20 cartels being investigated*
  - *Santa Cruz/Microsoft* – settlement for contract restricting innovation

based on September 1993 nickel prices and following a standard calculation model. After the Madrid meeting, one party faxed its conclusions to the others, including the surcharges it was going to apply. Almost all then fell into line, introducing new prices based on the surcharge at the same time (one producer was the exception, only applying the formula on its home market a little later). As required under ECSC law, they then also notified the Commission of the new prices! Later, acting on complaints, the Commission "dawn raided" the companies, finding various documents.

The Commission found that the activities amounted to price-fixing, at the least a concerted practice on the values used in the surcharge and the date for its implementation. The cartel was precisely organised, with each producer aligning on the surcharge of the home producer in its territory and historical leaders in other territories. The Commission noted that at least some of the virtual doubling in stainless steel prices in 1994–5 resulted from the system and that there had been fines on stainless steel producers for price-fixing in 1990–2.

The Commission stressed that this was more than a "cost calculation model", considered not to restrict competition in its 1968 Co-operation Notice. Rather, the situation here was that there had been an unlawful price recommendation agreed to by competitors, where specific values were included, "[it is] necessary to distinguish between longstanding use of a calculation method which allows fluctuations in alloy prices to be reflected in product prices and the adoption of a uniform calculation method".[48] The Commission then applied its new Guidelines on fines, together with the Leniency Notice.

The infringement was treated as "serious" in nature: the uniform increase of a cost component. It was "blatant", but not so grave as to require very substantial fines. The fine for the gravity of the infringement was therefore set at ECU 4 million. This was then varied to reflect the duration of the infringement. Here the Commission focused only on the period after the Madrid meeting. This gave increases between ECU0.4 and 1.6 million, according to when firms ceased to infringe and a "basic amount" of fine for each company.

The party which led the calculations and follow-up to the Madrid meeting had its fine increased by 25 per cent for aggravating circumstances. All companies then had their amount reduced by 10 per cent, to take account of the critical economic situation, with a 30 per cent reduction for the firm which had introduced the surcharge later than the others.

The Commission then assessed the degree of co-operation the companies had given under the Leniency Notice. The Commission reduced the fine by 40 per cent for one firm which had broken away from the system to end the infringement, introducing a radically different calculation system. This was considered to be "a major commercial risk". The Commission also reduced the fine by 40 per cent for another firm which was the first to inform the Commission of the Madrid meeting. Otherwise, it reduced the fine by 10 per cent on the other companies because they (generally) admitted the facts.

A complex, "plus and minus" system leading in this case to fines between ECU2.8 and 8.1 million and a powerful indication that there are important new points to watch in dealing with Commission cartel inquiries! For example, the main player in the Madrid meeting and follow-up ended up with the *fourth* largest fine! It would appear that the Commission hopes to create major incentives for cartel members not to hold together and "stonewall" the Commission, fighting every evidential point.

On evidence, it is also interesting to note that the Commission relied on oral statements during an investigation and market findings from an earlier merger control case.

In September 1998 the Commission imposed fines totalling ECU273 million on the parties to the *Trans-Atlantic Conference Agreement* ("TACA").[49] It will be recalled that this is another phase in a long running battle. First, there was a conference agreement called the TAA which was notified to the Commission in 1992 and prohibited in 1994. Then, the parties established the TACA and again notified it to the Commission. Then, the Commission withdrew immunity from fines under Article 15(6) of Regulation 17/62. Now the Commission has prohibited the conference and imposed fines. While expressly reserving the right to take further

48 points 55–56 and 62–63.

49 Commission Press Release IP/98/811, September 16, 1998.

proceedings on inland transport aspects, the Commission indicates that it hopes now to develop a basis for avoiding further conflict through discussions with the industry.

At the time of writing, the Commission's decision has not been published. However, from what we know, the position is as follows. The TACA members are considered to have fixed prices for maritime transport services between North Europe and the United States, and for inland transport services in the Community. They are also found to have agreed on the terms and conditions on which they may enter into service contracts with shippers, and to have fixed the prices they pay to freight forwarders. Only the first of these practices is covered by the liner conferences block exemption. The Commission refuses exemption for the remaining agreements.

Otherwise, the TACA parties are found to have been in a joint dominant position, which they have abused in two ways: (1) by banning individual service contracts (contracts between individual customers and shipping lines) and/or making them available only on restrictive conditions; (2) by inducing potential competitors to join TACA, among other things by allowing dual pricing (*i.e.* permitting them to charge lower rates than the conference for service contracts) and leaving certain parts of the market to new conference members. It is for these last infringements that the Commission imposed fines.

The Commission is particularly concerned that two major Asian liner shipping companies chose to join the TACA between 1994 and 1996 rather than to compete against it. Between 1993 and 1995 the TAA and TACA had, moreover, imposed price increases of more than 80 per cent. On notification TACA had argued that potential competition would be an effective competitive restraint on the TACA parties and their prices. The Commission has apparently applied the Guidelines on fines, although we do not know the details yet. Fines ranged from ECU6.88 to 41.26 million.

In October 1998 the European Commission imposed fines on two U.K. *sugar producers* (British Sugar and Tate & Lyle), as well as two sugar merchants (Napier Brown and James Budgett), for violation of Article 85(1) E.C. The Commission found that between 1986 and 1990, the four companies had pursued the objective of restricting competition by co-ordinating their pricing policy on the British white granulated sugar market.

The Commission found systematic participation at regular meetings leading to a "mutual certainty" and a "collaborative strategy" of higher pricing. The Commission did not find evidence of joint price-fixing. Fines ranged from ECU1.8 to 39.6 million, with the highest one for British Sugar, due to its leading role in the cartel and reflecting not only that it acted contrary to its own compliance programme, but that the collaborative strategy was practised while British Sugar was involved in other Commission procedures. The other companies were fined less because they had co-operated with the Commission during the investigation, including providing two self-incriminatory letters.[50]

In October 1998 the Commission imposed fines totalling ECU92.21 million on 10 suppliers of *pipe for district heating systems,* for running a cartel which was involved in bid-rigging, market-sharing and price-fixing. The heaviest fine, ECU70 million, was imposed on ABB which was found to have orchestrated the cartel. The cartel was also found to have attempted to eliminate a competitor, Powerpipe, which had refused to join it. The cartel began in Denmark in 1990 and was then extended to Germany and other markets so that, from 1994 onwards, it covered the whole European market. In Germany and Denmark, the two largest markets, there was clear bid-rigging. A firm was nominated to win each contract with other cartel members putting in higher offers.

In setting the fines, the Commission considered as aggravating factors that: the main producers concerned had taken action against Powerpipe; the cartel "flouted the EC Public Procurement rules"; bid-rigging is particularly serious ("no better than fraud"); and that the cartel had continued for nine months after the Commission's investigations started in June 1995.[51]

ABB is understood to be appealing the fine. Debated issues include the point that ABB's fine appears to be more than the turnover of the product division in question. A senior ABB Executive has apparently resigned. It is an interesting case since, while bid-rigging has been condemned at national level before (*e.g.* in France and Finland), it is something which has not been tackled much by the Commission.

There also appear to be many other "cartel" cases being considered by the Commission. The Commission is reported to have carried out dawn raids on *Austrian banks,* suspected of price-fixing in something called the "Lombard Club",[52] and on certain producers of *amino acids,* based in the United Kingdom and Germany. It is reported that this investigation focuses on the pricing of lysin, an additive used in the manufacturing of feedstuffs for poultry and pigs and was prompted by a parallel U.S. investigation in 1996, which found a cartel for lysic and citric acid supply.[53] The Commission is also investigating alleged cartel behaviour by *Ruhrgas* and four other European gas buyers after a complaint by *Marathon Oil.* Dawn raids were carried out last year. Marathon claims that the five companies were price-fixing by co-ordinating their gas buying.[54] According to the 1997 Commission Competition Report, some 20 cartels were being examined in January 1998![55]

At a different level, in November 1997, the Commission closed its case against *Microsoft* concerning its contract with rival software producer *Santa Cruz.*[56] Santa Cruz had taken over AT & T's activities in relation to the UNIX system for powerful microcomputers, inheriting a contract with Microsoft under which Microsoft was to produce a single version of the UNIX system, previously manufactured by both AT & T and Microsoft. The parties were bound to base any new version of the UNIX system on Microsoft's original version and to make it compatible with the programmes developed by Microsoft and AT & T prior to 1987 (so-called "backward compatibility").

50 Commission Press Release IP/98/898, October 14, 1998.

51 Commission Press Release IP/98/917, October 21, 1998; *Europe,* No. 7328, October 23, 1998.

52 *Financial Times,* June 24, 1998.

53 *European Report,* No. 2232, June 14, 1997.

54 *Wall Street Journal Europe,* October 30, 1998. In August 1998 the Commission indicated that it is also looking at the accounting rate system between seven telephone operators in the E.U. to see if excessive transfer prices for terminating calls are involved. *Europe,* No. 7284, August 14, 1998.

55 1997 E.C. Commission Competition Report, at point 344.

56 Commission Press Release IP/97/1027, November 24, 1997.

Box 5: Main Commission Decisions on Joint Ventures

• *Full-function Co-operative J.V.s : First Themes*	– dominance of J.V. *and* risk of co-ordination assessed
• *Old/non-full-function cases*	– *P & O Stena:* temporary clearance, pending situation after duty-free abolition? – *Environmental co-operation:* EACEM on "stand-by modes" and German battery collection schemes; "economic and technical progress" – *E.U./Japanese semi-conductor industries:* getting ready for anti-dumping cases! – *UIP:* benefits do not justify joint film distribution?

The Commission objected to this on the basis that this restricted Santa Cruz's ability to compete with Microsoft through innovation on the market for operating systems, in particular workstations and servers (where Microsoft's NT product competes with UNIX). Microsoft settled the case, releasing Santa Crux from the relevant obligation.[57]

Joint Ventures

Full-function co-operative J.V.s

In March 1998 the new full-function J.V. fast-clearance system under the E.C. Merger Control Regulation entered into force. As of mid-August 1998 the Commission had received 11 cases concerning the creation of a full-function J.V. which raised questions as to co-operation between the parents on adjacent markets or in the J.V.s market.[58] None of these cases has led to the opening of a procedure. In other words, all were found to be not dominant and outside Article 85(1) E.C., applying the new Article 2(4) in Regulation 4064/89.

It is still early to see how the Commission will assess such cases. However, in the latest Competition Policy Newsletter, Jonathan Denness has reviewed the Commission's practice after its first ten cases and explains the methodology by reference to the *Internet in Sweden* case, relating to a J.V. with three parents (Telia, Telenor and Schibsted) designed to offer Internet gateway services and website production services.

He indicates that the Commission looked at three markets from the point of view of dominance: advertising on the web, paid for content, and website production. Website production was also considered under Article 2(4) for risk of co-ordination because the J.V. and the two parents were also present on the market. The Commission found no appreciable restriction of competition because the market share of the parties and the J.V. on the same market was less than 10 per cent on the narrowest market definition.

The Commission also considered the risk of co-ordination in dial-up Internet access services, since the parents were both present in that market. The parties' market shares were 25–40 per cent and 10–25 per cent, respectively. These were held not to be of significance in a market which was growing and relatively open. In such circumstances, the market structure was not conducive to the co-ordination of competitive behaviour. In addition, the likelihood of co-ordination was reduced because the dial-up Internet market was very large compared with the other markets on which the J.V. could be active. In other words, the parties were more likely to put their own interests first, rather than co-ordinate on this market.[59]

He concludes that, thus far, themes going to the "Article 2(4) assessment" are:

– the relative size of the "Article 2(4) market" and the J.V.'s market;
– the nature of the markets themselves; and
– the nature of existing links between the parent companies.

The simple, yet interesting point so far is that the Commission is applying both the dominance test and Article 85. We have yet to see what happens under Article 85(3) E.C.

"Old" or non-full-function cases

In the *telecoms field*, in November 1997, the Commission published its decisions in the *Unisource* and *Uniworld* telecoms J.V. cases.[60] In September 1998 the Commission also proposed to authorise agreements between SNCF and Cégétel establishing a structural J.V., *Télécom Développement* ("T.D."), to run a long distance telecoms network using surplus capacity on the SNCF optical fibre network and the optical fibre capacity of Cégétel. After Commission objections, the parties clarified that although T.D. would have priority access to SNCF land to deploy its network, others may have access, provided this does not affect T.D.'s installation plan unduly.[61]

In the *financial services* sector, in November 1997, the Commission published the undertaking given by *SWIFT*, in settlement of the case involving *La Poste*.[62] The Commission also considers that Article 85 E.C. applies to certain levels of the *TARGET* payment system created by the European Monetary Institute and Member States' central banks where the parties involved in transactions are economic operators.[63]

In August 1998 the Commission also proposed to clear (after amendments) the *International Group Pooling Agreement*

57 There are also other Microsoft issues pending, *e.g.* Microsoft's *Internet Explorer Licensing Agreements*, [1998] O.J. C175/4.

58 Speech by Mr Van Miert to the European Parliament, September 24, 1998.

59 1998 E.C. Commission Competition Newsletter, No. 3, pp. 30–32; Commission Press Release IP/98/476, May 28, 1998; see also the *Wind* and *Orange* cases, Commission Press Releases IP/98/557, June 23, 1998 and IP/98/761, August 12, 1998.

60 [1997] O.J. L318/1 and 24. In October 1998 the Commission also published an Article 19(3) Notice on the Bib "digital interactive" TV Services J.V. [1998] O.J. C322/6.

61 [1998] O.J. C293/5.

62 See Ratliff [1998] 1 I.C.C.L.R. 13 and [1997] O.J. C335/3.

63 See 1997 E.C. Commission Competition Report, at point 95 and pp. 142–143.

between P & I Clubs. The Agreement concerns claim sharing between mutual associations for high level of cover, which the individual P & I clubs could not otherwise offer. Previously, the Commission had sent the clubs a Statement of Objections related to the minimum common level of cover (considered to be too high), and lack of suitable criteria/ procedures as to whether a club could provide reinsurance to a third insurer.[64]

As regards *ferries and shipping,* in November 1997, the Commission cleared the pooling of *P & O and Stena's* ferry services on the English Channel in a new joint venture.[65] The Commission's clearance is, however, temporary in so far as the Commission reserves the right to reconsider its position in the future once the new market structure has become clearer. The case is complex in two senses. First, traditionally there has been opposition to concentration on cross-channel services for fear of price increases, but recently two new factors have come into play, competition from the Channel Tunnel and the imminent abolition of duty-free, which is expected to reduce revenues from sales abroad. The Commission is still concerned about an oligopolistic dominant position being created between the J.V. and Eurotunnel. Second, the J.V. qualified as a merger in U.K. and French competition law and has been cleared in those jurisdictions. A contrary decision would therefore again raise delicate decentralisation issues.

During 1997 and 1998 the Commission also granted individual exemption to several *liner shipping conferences* which did not fall in the consortia block exemption, usually because of high market shares. The Commission's analysis focused on the benefits in terms of rationalisation, quality and frequency of the services concerned, but also on whether the conference concerned still faced effective competition. Instructive examples of what happens when market share caps are built into block exemptions.[66]

For those interested in *environmental co-operation* questions, this has been another important year. In April 1998 the Commission exempted a voluntary agreement entered into by 16 large producers of televisions and video recorders in *EACEM,* the European Association of Consumer Electronics Manufacturers.[67] The agreement is designed to reduce the electricity consumption of these machines when they are in stand-by mode. Under the agreement, from January 1, 2000 each product marketed by the parties will have a stand-by power use not exceeding 10W and the average consumption of all TVs and VCRs they will sell is not to exceed 6W in stand-by mode. The scheme is administered by a third-party consultant to preserve confidentiality and avoid unlawful exchanges of information.

What is interesting here is that the Commission treated the energy saving and environmental advantages involved as "economic and technical progress" in the sense of Article 85(3), first condition. DG XVII (the Commission's Energy Directorate) also appears itself to have been involved in promoting the agreement. The policy may save Community consumers some ECU480 million per year.

In June 1998 the Commission also proposed clearance of the agreement between German battery producers, importers and traders for a voluntary undertaking for the recovery, sorting and disposal of batteries. The *ZVEI/AgreBat*[68] agreement had been notified in 1996. It expanded a previous voluntary undertaking to include not just batteries containing pollutants, but all batteries.

In Germany, manufacturers and distributors of batteries are obliged to take back the batteries they market, either through a joint collection scheme or by setting up their own system. The battery manufacturers undertake to make batteries without the use or with the most limited use of certain pollutants and to mark batteries so that the different types can be distinguished.

Manufacturers, importers and traders established a non-profit making "pool foundation" responsible for the disposal of batteries. It will usually put the relevant tasks out to tender. The cost of the pool are to be divided between manufacturers and importers, in proportion to their shares of the previous year's sales. Payment of contributions is co-ordinated by an independent accounting entity to preserve confidentiality. Product lists offered to customers are to show their current disposal costs by individual battery system and type, with such costs forming an integral part of the price of the battery. The traders involved state they are willing to carry only batteries for which disposal costs are indicated and where battery manufacturers or importers show they have organised recovery through the pool or by themselves.

In April 1998 the Commission announced that it had cleared an *advanced technology* agreement between five leading photographic companies (Kodak, Fuji, Canon, Minolta and Nikon) for the development of a new film system: *Advanced Photographic System* ("APS").[69] It appears the five companies started their co-operation in 1991 and the system was launched in April 1996. The product may become an industry standard. It is new, in so far as it is designed amongst other things to interface with computer equipment. The Commission took account of the fact that the new system would have been too expensive for a single firm to develop itself, but was concerned to maintain competition because the five companies enjoyed some 45 per cent of the world photographic market in 1995. Interestingly, as a result, the Commission asked the parties to grant licences to third parties two years before APS was introduced and well before the final phase of its development, with increased technical know-how and assistance, so that third parties could put licensed products on the market in time to compete effectively with the five.

An unusual co-operation notice this year was that concerning an *industry-to-industry agreement between the European and Japanese semi-conductor producers associations* (EECA and EIAJ). In May 1998 the Commission proposed to clear such an agreement, designed solely to collect and maintain company and product-specific data on costs of production, home market prices and export prices for semi-conductors. Such information will be held in strict confidence and made available to the E.C. and Japanese anti-dumping authorities as the case may be once an anti-dumping investigation is opened.[70]

64 [1998] O.J. C256/2.

65 1997 E.C. Commission Competition Report, at points 81–84.

66 1997 E.C. Commission Competition Report, at points 81–84; *Europe,* No 7174, March 6, 1998.

67 Commission Press Release IP/98/346, April 15, 1998.

68 [1998] O.J. C172/13. In May 1998 the Commission also declared Articles 85(1) and 86 E.C. inapplicable to the German IFCO packaging system, rejecting complaints against the system. See Birkenmauer and Suurnäkki, "Commission Clears the IFCO Packaging System", 1998 E.C. Commission Competition Newsletter, No. 2, pp. 48–49.

69 *European Report,* No. 2308, April 18, 1998.

70 [1998] O.J. C156/10.

In February 1998 there was new interest in the *UIP* film distribution J.V. as the Commission was reported to have sent a Statement of Objections to UIP and Mr Van Miert suggested that the Commission now considered that exemption could not be justified.[71]

It will be recalled that UIP is a collective sales and distribution entity for MGM, Paramount and Universal Studios. The J.V. has been granted exemption in the past on the basis that it would create cost-savings, making more money available for investment in films and that the resulting benefits would accrue not only to the parent companies involved, but also to others, because there would be a better distribution structure for all films in Europe. All studios would have more money to invest in films giving a better choice for European consumers. It has been stressed that the American film industry both invests and distributes European productions.

The current problem appears to lie in changing market structures. Several other film producers distribute their films separately, suggesting that co-operation may not be indispensable. It also appears that the American film industry's market share may have grown in recent years (from 59 per cent in 1986 to 74 per cent in 1995; while the share of European films dropped from 29 to 16 per cent). It is suggested therefore that the UIP distribution system has not had a beneficial impact on the European film industry (although other factors than UIP's joint distribution activities would appear behind these figures). In short, the Commission appears now to prefer a more level distribution playing field with each producer distributing its own films, as it would normally require in other industries.

Distribution

Box 6: Main Commission Decisions on Distribution

V.W.	– huge fines (ECU102 million) – extensive documents and e-mails – sales terms and practices to deter "organised sales" and "re-imports" in context of currency fluctuations
Glaxo Wellcome investigation	– dual pricing or one price, modified by Spanish law? Better than *Bayer* or *Organon?*

In January 1998 the Commission found that *Volkswagen* ("V.W.") had infringed Article 85(1) E.C. by entering into agreements with its Italian dealers restricting parallel imports to foreign consumers and authorised dealers.[72] The Commission imposed its highest fine to date, ECU102 million.

The case is interesting as one of the first applications of the Commission's fines Guidelines, the apparently blatant nature of the infringements and for highlighting again the difficulties created for manufacturers by large currency fluctuations. The case may also be significant in deciding whether the car block exemption will be renewed again.

The case arose as a result of numerous complaints from German and Austrian consumers that they were being prevented from buying V.W. cars (mainly Audi A4's and V.W. Polo's) from Italy. The Commission carried out dawn raids and discovered extensive documentation (including internal V.W.–Audi memos and e-mails). These showed that Audi, a subsidiary of V.W., and Autogerma, its Italian importer were pursuing various policies in order to block what they call "grey imports" and "re-exports" to Germany and Austria. V.W. argued that what it was doing was acting to stop "organised sales" (apparently meaning "active sales") outside a territory and sales to unauthorised distributors. The Commission rejected this, noting that V.W. made no effort to define its instructions and did not act so as to catch *only* those practices. Rather, the Commission found that V.W. deliberately chose an unclear formula of instructions which blurred enforcement of lawful restrictions with the unlawful.

The scale of the re-exports was great, in periods between 1993 and 1995 as much as 12–13 per cent of all vehicles delivered to customers in Italy. The Italian market was not strong and there were lira devaluations in 1992 and 1995. There were significant price differentials. In short, there was a ready climate for parallel trading.

The Commission found that V.W. (via Audi and Autogerma) had engaged in a whole series of measures which were designed to stop parallel imports and managed to do so.

Thus, V.W. had, among other things:

- made bonus payments conditional only on sales within a dealer's contract territory; and/or cars being registered in the contract territory;
- allowed bonus to be paid on sales outside the contract territory, provided that such sales did not exceed 15 per cent of the dealer's total deliveries;
- under-supplied and reduced dealer's stocks in the Italian market;
- operated a split margin system whereby part of a dealer's discount was paid on invoice, with the balance payable only if the car was registered in a dealer's contract territory;
- required written undertakings from customers not to resell cars bought for three months or until the car had travelled 3,000 kms;
- terminated dealerships where dealers had sold abroad using the right to terminate on due notice without giving reasons;
- tracked re-exports (*e.g.* through chassis numbers).

The Commission found that such agreements and concerted practices were part of V.W.'s ongoing contractual relations which had been accepted by V.W.'s Italian dealers, so they did not amount to unilateral acts (even though they were imposed by V.W.).

The Commission found and relied on extensive documentary evidence, suggesting a clear management plan to prevent re-exports and an awareness that certain acts might infringe Regulation 123/85. As already noted, this included e-mails.[73] It also appears to have included in-house counsel's documents, despite V.W. claims that these should be privileged.[74]

V.W. is appealing, emphasising, among other things, the problem of currency fluctuations. The Commission's response

71 *European Report*, No. 2289, February 7, 1998.

72 [1998] O.J. L124/60. See also the *Van den Bergh* (Irish ice-cream) decision discussed below under Article 86 E.C.

73 See point 178.

74 See points 198–199.

Box 7: Main Decisions in Article 86 Cases

• *Unilever "Phase 3"*	– HB ice-cream's freezer exclusivity illegal; property rights must give way to the public interest. Shared competence conflicts to be resolved at ECJ? Ice-cream and freezer supply to be unbundled even if "normal"
• *AAMS*	– a competitor's duties to others if supplying their goods
• *Frankfurt ground handling monopoly*	– access to the ramp for self-handlers and third parties; assessment of space constraints and efficiencies; property rights have to be limited
• *Orly ground handling*	– discriminatory pricing

is that in any event, fundamental consumer rights to buy anywhere they wish in the E.U. override other concerns, the "euro's" introduction should eliminate such fluctuations, and manufacturers can eliminate the problem through alignment of their base prices to different parts of the E.U. The car manufacturers argue that such measures will still not be enough because of variations in national taxes on car sales.[75]

The Commission calculated the basic amount for the fine on V.W. as ECU50 million, taking the view that the gravity of the infringement was "very serious". Mr Van Miert has since called it a "systematic, covert operation, endorsed by the management of the company". This basic amount was increased by taking into account the duration of the infringement (from December 1987 until, for some aspects, the date of the decision, January 1998) and periods of severity (*e.g.* 5 per cent between 1988 and 1992 and by 10 per cent between 1993 and 1996 in so far as in this period a great number of reinforcing measures were taken).[76] This added up to an increase of ECU35 million.

The Commission then looked at aggravating and attenuating circumstances. Here the Commission focused on two points: V.W. had been warned of possible infringements in the first half of 1995 by the Commission and issued a circular suggesting compliance, without ending the infringing practices outlined above. Many Italian dealers had also suffered significant losses. The Commission also found that 50 contract dealers had been threatened with the termination of their contract, if they continued selling to foreign customers, including final consumers. Dealer contracts had been terminated in 12 cases. The Commission therefore increased the basic fine by 20 per cent, *i.e.* ECU17 million, giving an overall result of ECU102 million. Currency fluctuations were not considered attenuating circumstances, the Commission noting that it had said that they represented no ground for restricting parallel imports in a 1995 communication. V.W indicated that it would pay the fine and take measures to comply with the Commission's decision but appeal, arguing, among other things, that the fine is disproportionate to the alleged violations.

The main concern for the car industry as a whole now is whether this case may affect the Commission's willingness to have a sectoral block exemption for cars in the future, especially since it is understood that the Commission may have other car investigations under way. It is reported that there is another V.W. enquiry in relation to Denmark and that the Commission has also carried out dawn raids on Mercedes-Benz and Opel.[77]

During the course of the year, the Commission has also published a series of notices in which it proposes to exempt *U.K. beer supply* agreements retroactively[78] (*e.g.* applying Article 4(2) of Regulation 17/62). In April 1998 the Commission published an Article 19(3) notice inviting comments on renewal of the exemption for the *Yves-Saint Laurent ("YSL") selective distribution system.* In line with the CFI's judgment in 1996, YSL has dropped the condition requiring that the main business of a distributor should be in selling perfumes, which the CFI had considered discriminatory. According to the 1997 Competition Report, the Commission had also cleared the "*Best Western*" hotel franchise system, as coming within Regulation 4087/88.[79]

An interesting development in *pharmaceutical distribution* is *Glaxo Wellcome's* introduction of a new pricing policy in Spain.[80] Apparently Glaxo sets a price for all its sales, with an exception where a lower price is fixed by the Spanish authorities. The result is that there are two prices: one for goods exported (*i.e.* sold to wholesalers in Spain but not consumed there) and another for those consumed in Spain. Both the Spanish health authorities and the Commission are reported to be investigating, as a result of complaints by firms which previously exploited the "normal" differential between prices in Spain and elsewhere in Europe. It will be interesting to see what happens in the light of previous Commission interventions, *e.g. Bayer Adalat* and *Organon.*

Article 86 E.C.

This year there have been a series of decisions in Article 86 cases (See Box 7). First, the *Irish ice-cream* case (which involves both Article 85 and 86 issues) has entered a third phase, with a Commission decision prohibiting HB ice-cream (the Unilever Irish subsidiary now called *Van den Bergh Foods*) from insisting on freezer exclusivity in those outlets where only HB freezer cabinets are used, amounting to some 40 per cent of the market for impulse purchased ice-cream in Ireland and from offering cabinets with such exclusivity to those retailers without their own freezer or that of a competitor.[81]

The decision is important for a variety of reasons. First, the decision may be viewed as in conflict with the judgment of the Irish High Court in 1992 that freezer cabinet exclusivity was not contrary to Articles 85 and 86 E.C. (the "first phase" in this battle). The Commission's position is that it has received complaints from competing producers and

75 *European Report,* No. 2292, February 18, 1998.
76 See point 217.
77 *e.g. Financial Times,* January 27, 1998; *European Report,* No. 2286, January 28, 1998.
78 *e.g. Scottish & Newcastle,* [1998] O.J. C8/4.
79 at 148.
80 *European Report,* No. 2307, April 10, 1998; *Financial Times,* April 8, 1998.
81 [1998] O.J. L246/1.

therefore has a duty to deal with the issues involved. The Commission also noted that the Irish High Court did not contact it, nor make an Article 177 reference to the European Court, allowing any possible conflict to be resolved earlier. Moreover, the Commission considers that the case concerns fundamental questions about business practices not only in ice-cream markets in Europe, but also in many other markets where suppliers provide equipment to resellers in connection with the sale of goods. Finally, the Commission notes that an appeal by Unilever from the Commission's decision could link up with a reference from the Irish Supreme Court to which an appeal from the Irish High Court ruling is pending.[82]

All this may be true, and shows that the Commission has not taken the decision to take these proceedings lightly. However, there can be little doubt that such procedures are cumbersome. The overall proceedings are now becoming *very* long. The net effect has been to highlight difficulties in effective decentralisation of E.C. competition enforcement. The case shows the importance of trying to unify administrative and judicial approaches *before* the first decision, wherever that is.

Second, this decision also represents a change in the Commission's own position on HB's freezer exclusivity in Ireland (the "second phase" in the battle). Previously, in 1995, while clearly not liking freezer exclusivity, the Commission accepted proposals from HB designed to loosen up market access. There had been plans for the selling-off of some of HB's cabinets, facilities for retailers to buy such cabinets on hire-purchase and changes to HB's pricing practices so that those not taking HB's cabinets were not charged for them. What has happened is that these proposals have not had the desired effect. No retailers have elected to buy HB's cabinets on hire-purchase, preferring to leave their current arrangements in place. Moreover, in the last few years HB's market position has steadily increased at the cost of its competitors (partly as a result of new freezer replacement campaign by Unilever).

The Commission's position is therefore that freezer exclusivity must be broken at least in those outlets where it is tantamount to outlet exclusivity, some 40 per cent of the outlets in the impulse ice-cream market in Ireland, and that HB must not offer cabinets with freezer exclusivity to retailers which do not have their own cabinets or cabinets from other competitors. This is considered necessary to break the "structural inertia" in the market, where HB's dominance has been maintained for a long time.

Third, it will be clear that the Commission is also taking a strong line in deciding that, in these circumstances, the property rights of HB are to be restricted. HB argued that this is at odds with Article 222 of the E.C. Treaty and that it will be giving a "free ride" to its competitors. It will also be recalled that respect for property rights was an influential consideration for Keane J in the Irish High Court case.

The Commission's position, relying on *Hauer*[83] is that property rights can be restricted "in the public interest", the protection of competition under the E.C. Treaty being such an interest.[84] The public interest in increasing competition must take priority over HB's property rights for the relevant part of HB's sales network, where freezer exclusivity means outlet exclusivity. Moreover, the Commission argues that its intervention is limited. It does not stop HB from charging a rental fee for the use of its property. The Commission only stops HB from supplying cabinets with an exclusivity condition, with the payment therefore built into the prices for its ice-cream.

Fourth, as in the *German ice-cream* cases, there is a very detailed assessment of the relevant market and the significance of the restriction in issue, based on various market surveys and economic reports. An interesting aspect is the fact that other ice-cream manufacturers also use freezer exclusivity. The Commission's position on this is that their networks are too small to constitute appreciable restrictions on competition with Article 85(1) E.C. but if that were to change, then the relevant part of the network concerned would equally fall foul of Article 85(1) E.C. However, the existence of such networks was part of the background to assessing the effect of the HB network. HB argued that it was unfair to challenge HB's freezer exclusivity, while not touching that of its competitors, all the more so as freezer exclusivity was a "normal commercial practice" in the ice-cream sector. HB argued that normal competition in the relevant ice-cream product market included also competition in the supply of exclusive freezer cabinets. Such practices were therefore outside Article 85(1) and 86 E.C. (cf. the position of Keane J).

The Commission's response was, as regards Article 85(1) E.C. that competition in ice-cream supply should not compel ice-cream manufacturers also to compete on freezer supply. To do so substantially restricted competition by raising barriers to entry, reducing in-store competition and inter-brand competition. On the contrary, the Commission considers that the supply of ice-cream and the provision of freezer cabinets should be unbundled. Such considerations might apply in a normally competitive market, but they could not be "unreservedly accepted" where competition in a market is already weakened by the dominance of a firm.[85]

HB has already obtained a suspension of the Commission's decision pending an appeal.[86] It will be interesting to see what happens. In its decision the Commission noted that even if freezer exclusivity is taken away, it is likely that the products stored would reflect the market shares of the different manufacturers in the relevant market, so HB's position may not be affected greatly.[87] The essential difference may be, however, that competition would be on the merits of the ice-cream products alone. It is also reported that Mars may be preparing to sue Unilever for damages.

It will also be interesting to see if the Court of First Instance agrees with the Commission's assessment of the illegality of the practices concerned, above all the proportionality of the remedy envisaged to the competition problem. Finally, those thinking about what cases will be likely above the proposed market share caps for the Vertical Restraints Block Exemption may also think this is a relevant example of what is to come in concentrated markets.

In June 1998 the Commission also took a decision under Article 86 E.C. against the *Italian Tobacco Monopoly Administration* ("AAMS") responsible for the distribution of

82 points 274–280. The Irish High Court judgment is outlined at Ratliff, [1993] 2 I.C.C.L.R. 59.

83 Case 44/79, [1979] E.C.R. 3727.

84 points 211–22 and 269–270.

85 point 267.

86 Case T-65-98 *Van den Bergh Foods v. Commission,* Order of July 7, 1998.

87 point 228.

cigarettes in Italy.[88] The case is of particular relevance to the situation where a company is obliged to use a dominant competitor for the distribution of its products. The key issues were the terms of the standard distribution contract imposed by AAMS on foreign producers seeking to use its services and behaviour by AAMS designed to favour supply of the brands it produced (Italian brands and Philip Morris brands manufactured under licence). AAMS was fined ECU6 million for its part in the infringements.

The case was prompted by complaints from Reynolds, Rothmans and the International Tobacco Company. Philip Morris and AAMS had together some 94 per cent of the market. AAMS' own brand share had fallen since 1986, essentially moving to its licensed brands. In principle, wholesale distribution of cigarettes had been liberalised in 1975 allowing imports to warehouses other than those of AAMS. However, in practice, AAMS still performed all wholesale distribution, the barriers to entry to such distribution being very considerable. AAMS was therefore still an obligatory trading partner for such distribution services. AAMS also continued to have a public regulatory function for the distribution of tobacco products through authorised outlets at different levels. Sales to the public are still subject to the Italian tobacco monopoly.

The distribution contract in question contained a variety of clauses to which the Commission objected, because they gave AAMS a right of control and intervention in the many choices of a foreign firm seeking to penetrate the Italian market. The Commission found that using such clauses AAMS could limit the competitive initiative of foreign firms on the Italian market and protect the sale of its own brands. Such clauses included, for example,

- a provision only allowing foreign firms to launch new brands twice a year;
- a provision that (launch) quantities of new brands could not exceed 5,000kg (whereas AAMS itself made available seven times that amount for some product launches);
- provisions restricting the maximum monthly quantities of cigarettes on the market (without objective justification in so far as AAMS had surplus distribution capacities);
- provisions restricting increases in the monthly quantities of cigarettes allowed on the market with, among other things, increased fees for doing so;
- a requirement that every cigarette be printed with the word "Monital" (an abbreviation for "Italian monopolies"), when an indication per packet could have sufficed to distinguish lawful and contraband sales.

AAMS also refused on several occasions to allow foreign firms to increase quantities of imported cigarettes without relevant justification and, the Commission found, took action to ensure that distributors and retailers favoured domestic tobacco brands, in particular, by requiring that retailers purchase minimum quantities of domestic cigarettes or by ruling that retailer requests for foreign cigarettes were excessive. This was in breach of a contractual duty to be impartial in the distribution of all products and respect market requirements.

AAMS amended some of the clauses itself during the procedure. Other measures were required by Italian law (*e.g.* the duty of retailers to favour domestic tobacco). Some restrictions were also not "weight bearing" to the extent that the Italian authorities already had restricted market access by other measures. These aspects were taken into account in the Commission's order which required AAMS only to change still infringing clauses and fined AAMS a basic amount of ECU3 million, increased by 100 per cent because the duration of the contractual infringement was at least 13 years and AAMS' abusive behaviour extended over seven years.

In January 1998 the Commission took a decision under Article 86 E.C. against *Frankfurt Airport's* refusal to allow airlines to provide certain ground handling services themselves (so-called "self-handling") and to allow third parties to compete with the airport in the provision of such services.[89] The services concerned were those on the "ramp" (apron) of the airport, such as loading and unloading baggage, cabin cleaning, push-back towing of aircraft, etc.

The decision is interesting because it involves a close analysis as to whether Frankfurt was justified in retaining such a monopoly on space and efficiency grounds. It was taken in parallel to another Commission decision under the Ground Handling Liberalisation Directive denying a request by the German government for an extension of the monopoly.

The case arose as a result of complaints by various airlines, which have been campaigning to have airport charges reduced in various E.U. airports for some years.[90] The Commission's decision is detailed, including a critical review of various expert reports on the feasibility of adding more operators and offering such facilities in the space available.

The Commission rejected Frankfurt Airport's arguments that self-handlers and third parties could not be admitted because there was not enough space to park their equipment and/or because there would be such an increase in traffic on the ramp that safety and the minimum connection time for transit traffic would be put at risk (save in the case of one end of a terminal). It also generally rejected Frankfurt's position that its monopoly resulted in an optimal allocation of limited resources (save as regards Frankfurt Airport's operation of the automatic conveyor system for luggage where it accepted the argument).[91]

The Commission considered that Frankfurt Airport was using its dominant position as exclusive provider of airport facilities to deny potential competitors (airlines and independent suppliers) access to the ramp (*e.g.* a *Telemarketing* approach). Frankfurt Airport was extending its dominant position on the market for the provision of airport landing and take-off facilities to the neighbouring but separate market for ramp handling services.

The Commission again had to counter claims that this was an unjustified interference with property rights. Again, the Commission cited *Hauer*, and considered that restrictions on the exercise of property rights had to be accepted in the public interest. The Commission stated:

> In this instance, any potential independent operator is obliged to encroach (against remuneration) on [Frankfurt Airport's]

88 [1998] O.J. L252/47.

89 [1998] O.J L72/30; Commission Press Release IP/98/27, January 14, 1998.

90 See *e.g. Financial Times*, January 20, 1998.

91 point 65.

> right to property, because of the lack of alternatives ... Limiting Frankfurt Airport's right to property would therefore be neither disproportionate nor excessive, but simply the result of the lack of alternatives.[92]

The Commission also stressed that ground handlers could be asked to pay for use of the facilities concerned (within the limits imposed by the competition rules).

The net result of the Article 86 and Directive decisions is that Frankfurt Airport is required to allow a self-handler (immediately) and a third party (in addition to itself) on January 1, 1999 in Terminal 2 and the West part of Terminal 1, but can retain its monopoly at the Eastern end of Terminal 1 until 2001. This is considered a sufficient "market dimension" for the moment.

In June 1998 the Commission also took a decision under Article 86 E.C. against *Aeroports de Paris* ("ADP") concerning discriminatory fees on the suppliers of catering services.[93] *Alpha Flight Services* ("AFS"), a firm providing such services to airlines in Orly airport, had complained that its competitors were having to pay less for the same or equivalent services. In Orly, AFS notably competes against Air France's subsidiary Orly Air Traiteur. In particular, there were variations in fees charged for access to the right to provide ground handling services as between companies providing such services to third parties and self-handlers.

AFS produced evidence that, in having to pay more to ADP than some of its competitors, it was being faced either with losing customers or having to reduce its profit margin. AFS argued that if the fees it had had to pay were identical to one of its main competitors it would have saved some 3.5 million French francs.

The Commission found that ADP was dominant in airport management services in the Paris airports, in so far as it authorised and determined the conditions under which ground handling services operated there. The Commission also found that the fees charged were discriminatory in so far as they were not based on the degree of utilisation of the premises rented to provide such services (*e.g.* the turnover there) but rather were a form of access charge in exchange for the right to operate at the airport. The Commission suggested that an objective non-discriminatory system might be one with standard rates based on turnover or, if that is not possible, to charge catering suppliers on the basis of the number of passengers served. Such discrimination was held to affect trade between E.U. Member States, mainly because of ground handling's relationship to intra-community transport services.

There are also other *Article 86 pricing issues in the air transport sector* at the moment. For example, at the end of 1997 Virgin was challenging B.A., arguing that it was offering *package discounts* whereby if a company used B.A. on a less popular route it could obtain favourable discounts on more popular routes such as the trans-Atlantic ones. Virgin and British Midland have also claimed that B.A. was offering unlawful target bonuses to travel agents. It is reported that the Commission has sent B.A. Statements of Objections on at least the agents issue and a similar point is included in the relevant *Trans-Atlantic Air Alliance* notice (discussed below).[94]

There has also been an attempt by *EasyJet to stop B.A. from launching its new discount airline "Go"*. An interim injunction was not granted in the English courts, although it appears the case is still proceeding. EasyJet argues that "Go" is more than a B.A. brand strategy, but has been set up as a *predatory tactic* to drive low-cost rivals out of business. EasyJet argues that B.A. is cross-subsidising Go, for example, by underwriting the leases on Go's aircraft.[95] On October 30, 1998 the Commission rejected a complaint by *Debonair* that B.A. had abused its dominant position on the London–Rome route, through predatory pricing and dumping excess capacity on the route. B.A. was found not to be dominant on the route and, if indirect flights, charter, bus and train services were included, to be even weaker.[96] In the background it is understood that the Commission has also been considering a specific notice for fast interim measures against predatory practices in the air transport sector.

Mention should also be made of the Commission's developing approach to *excessive pricing* in the telecoms area, described in an article by Marcel Haag and Robert Klotz in the Commission's Competition Policy Newsletter.[97] Infrastructure providers in all contexts, not just telecoms, may take note!

Article 90 E.C.

In November 1997 the Commission published its decisions involving the Italian dock labour legislation and on the piloting tariffs in the Port of Genoa.[98] *Silvano Raso,* discussed above, overlaps with the first case. *Corsica Ferries* is different, the ECJ case dealing with mooring charges.

The cases are interesting for the rulings themselves, their reasoning and, in the *Port of Genoa* case, the fact that it was taken in parallel to a national court case involving an Article 177 reference.

Taking the rulings first, in the *Italian dock labour legislation* case, the Commission considered the legality of new provisions, introduced after *Port of Genoa I.* The Commission was concerned that the port reform laws had introduced new distortions of competition benefiting the old dockers' companies. In particular, these companies were given a monopoly of two sectors: the market for temporary labour and the market for subcontracting labour-intensive services. The Commission took a similar approach to that of the European Court in *Silvano Raso,* that the Italian measures infringed Article 90 E.C., together with Article 86 E.C., since they led the old port companies to abuse their dominant position. In the *Corsica Ferries* case the Commission had to consider whether the piloting tariffs of the Port of Genoa, based on an Italian Transport Ministry circular, were

92 point 91.
93 [1998] O.J. L230/10; Commission Press Release IP/98/546, June 18, 1998.
94 *Financial Times,* November 12, 1997; *European Report,* No. 2307, April 10, 1998.
95 *Financial Times,* March 31, 1998.
96 *Financial Times,* October 30, 1998.
97 See Haag and Klotz, "Commission Practice Concerning Excessive Pricing in Telecommunications", 1998 E.C. Commission Competition Policy Newsletter, No. 2, p. 35.
98 [1997] O.J. L301/17 and 27.

Box 8: Main Decisions in Article 90 Cases

- *Italian dock labour legislation* – the creation of a conflict of interest for a dominant state or entrusted undertaking is illegal
- *Corsica Ferries* – no economies of scale for piloting fees
- *Sydkraft/Sweden* – *Second GSM Operators* cases applied to proposed closure of nuclear reactor. Public interest exception to Article 90(1) E.C?
- *Athens ground handling* – *Höfner* applied: inefficiency can be abusive

lawful. The system granted a 65 per cent reduction in the basic piloting tariff to shipping companies whose passenger vessels made at least four calls a week on a scheduled route and according to a regular timetable and frequency. Corsica Ferries argued that this was not justified because the piloting service was the same in each case. The Commission agreed and ruled that the tariff discriminated amongst shipping companies, contrary to Articles 90(1) and 86 E.C.

Turning to the reasoning in these cases, the *Italian dock labour legislation* case is interesting for several points. First, there is a detailed analysis of the relevant services markets (and in particular demand and supply substitutability therein) leading to the conclusion that there were two markets involved (1) the market for the supply of temporary labour and (2) the market for sub-contracted supply of services with a high labour content.[99]

Second, the Commission explains that the core of the infringement lies in the way that the Italian measures put the old dock companies in a position of being able unduly to benefit from certain competitive advantages.[1] Notably, the old dock companies, which competed with others in the provision of port services, could hire out surplus workers to other firms if demand is slack and, being in a monopoly position, could abuse that position by charging competitors excessive prices for temporary labour or by supplying competitors with less efficient workers, making competitors less competitive.

The old dock companies therefore were put in a situation of conflict of interest. Such a conflict of interest was "inherently an abuse". Such a principle had already been laid down in the *RTT* case; however, the point is put very clearly in the Commission's decision:

> It is not necessary to wait until undertakings actually commit such abuses before action can be taken against them. It is sufficient for them to be legally placed in a position in which they are induced to commit abuses if they have an interest in so doing.

The Italian law was therefore itself incompatible with the Treaty.[2]

What is interesting about the Commission's approach in the *Corsica Ferries* case is that the Commission challenged in detail the Italian state's justifications for its tariff which were partly economic and partly public-interest based. The Commission found that no economies of scale justifying a 65 per cent discount, not the protection of the seabed could justify the level of the reduction. Some economies of scale could result from planning pilot services around scheduled activities, but in any event, the current system was not based on that criterion. It will be recalled that the Commission also challenged a state's assessment of economies of scale and the correlation to a discount tariff in the *Zaventem* (Landing Fees) case.

The jurisdictional point of interest here is that the Commission took its dock labour decision while national proceedings were in process with an Article 177 reference to the European Court. The Commission did not decide simply to leave the matter to the national court, which shares competence to apply Article 90(1) E.C. It appears that the Commission went on in order to back up and widen the scope of the national court's ruling. The Commission's decision addresses the illegality of the Italian measures in general, whereas the national court case only relates to specific claims.[3]

In February 1998 a new Article 90 E.C. case started when *Sydkraft*, a Swedish electricity supplier, filed a complaint against Swedish measures ordering the closure of one of two nuclear reactors at Barsebäck in southern Sweden. Sydkraft argued that the forced closure was contrary to Article 90, together with Article 86 E.C. because it strengthened the dominant position of Vattenfall, the state-owned electricity company. There have been parallel proceedings in the Swedish courts, including interim relief suspending the measures concerned pending a final ruling.

What is interesting about the case is the Swedish state's argument in defence that there is a public interest exception to Article 90(1), where the measures concerned are in pursuit of a legitimate objective and proportionate. It is possible that this issue may now be referred to the European Court. Sydkraft argues, among other things, that there should be no such exception to Article 90, in contrast to the so-called "rule of reason" in the European Court's case law on Articles 3(g), 5(2) and 85 or 86 E.C., since that case law deals with the much broader situation of general laws which may have competition effects, not the specific context of the state both trading in a market and regulating it. Further, relying on principles similar to those quoted in the *Italian dock labour* case above and the *Second GSM operators* cases, Sydkraft argues that the Swedish state is giving an unfair commercial advantage to its own company, by weakening its closest

99 points 15–16.
1 point 38. The Commission is also engaged in follow-ups to the *Zaventem* case and has initiated proceedings against similar systems in three other Member States, apparently where landing fees varied according to whether flights were domestic or international in origin.
2 point 30.
3 1997 E.C. Commission Competition Report, points 135–136.

competitor and increasing Sydkraft's cost structure so that "normal competition" is prevented.

Finally, it may be of interest to note that at the end of 1997 the Commission also took proceedings against *Olympic Airways*, following complaints about the poor quality of ground handling services and lack of transparency in the charges at *Athens airport*. Various measures have been taken to rectify this, including a system of quality control and minimum standards and a new pricing structure closer to the actual cost of supply.[4]

It has certainly been a heavy year for ground handling cases, perhaps related to the liberalisation due for January 1999. It is interesting to see the Commission pushing forward on all fronts: justifications for monopoly rights, discriminatory pricing and the *Höfner* case law, that inefficiency can be abusive for the dominant!

4 1997 E.C. Commission Competition Report, p. 166.

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

- *The Commission's Communication on Vertical Restraints*, proposing a single block exemption with market share caps and a "black list" of hard-core unexemptable restrictions
- *The Commission's proposed conditions on the B.A./A.A. and Lufthansa/SAS/United Airlines* alliances
- Decentralisation after the *Unilever ice-cream* and the *B.A./A.A.* cases
- The leading sports issues of the year including cases such as *European SuperLeague, Formula One*, the Commission's "orientation document" on the broadcasting of sports events and competition law, and ideas for Commission guidelines on competition and sport
- Coming issues on *German book rpm* and *energy liberalisation*

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Major Events in E.C. Competition Law 1998, Part 2

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CURRENT POLICY ISSUES

Commission proposals on vertical restraints

In May 1998 a first draft Communication was circulated on the next phase of vertical restraints reform ("the May Draft"). This included a first draft concept for a proposed single block exemption. The final version of the Communication (*without* such a draft) was published on DG IV's website in October ("The Final Communication").[1] It would appear that the Commission prefers to sort out key concepts such as market share caps next, before publishing the proposed block exemption and related guidelines. Suggested procedural changes have now also been published explaining what the Commission proposes and why and what changes may be required to Regulations 19/65 and 17/62 as a result.[2]

The main points in the approach proposed are:

(1) A single, broad "umbrella" block exemption regulation applicable to all goods (including intermediate goods, not just goods for resale) and services, with a "black list" approach of clauses not block exempt, but no "white list" of exempted clauses (which means Regulation 19/65, the enabling regulation for the existing vertical restraint block exemptions, has to be widened and amended).

(2) No "negative clearance regulation". Block exemption would apply from when a restriction is no longer considered inappreciable (*i.e.* 10 per cent market share on the *de minimis* notice).

(3) Use of a balancing approach to the application of Article 85 E.C. on the basis that it is only when interbrand competition is weak and market power exists that it becomes important to control vertical agreements. Focus therefore on the "net" negative effect of agreements.

(4) Use of variable market share thresholds to distinguish between restrictions that are generally block exempt, block exempt only up to 20 per cent market share, block exempt only up to 40 per cent market share and "black listed" (*i.e.* not block exempt, irrespective of market share).[3] 40 per cent market share perceived as when a risk of dominance starts and when there is a risk that the consumer benefit and residual competition elements of Article 85(3) E.C. are not satisfied. A single market share cap is also possible, but would then be at a lower level, between 25 and 35 per cent.

Box 1: Commission Proposals on Vertical Restraints

- **New draft proposals**
  - Single broad block exemption with black list of "hard core" restrictions
  - Goods (intermediate and final) and services and franchising
  - Exemption from *de minimis* to market share caps
  - Variable market share caps at 20% and 40% according to types of restraint or just one cap between 25–35%?
  - Proposed guidelines above these caps (focusing on effective competition structure and "net" competition effects?)
  - Retroactive exemption for wider group of vertical distribution agreements through amendment to Regulation 17/62 (Article 4(2))
  - Block exemption to cover quantitative selective distribution (within limits) with withdrawal mechanism for cumulative effects
  - Retail chains covered, provided no territorial protection, 20% market share limit, SMEs
  - National competition authorities to be able to withdraw block exemption in "distinct antitrust markets"
- **Less notifications required BUT**
  - Greater "auto-compliance" responsibility on companies? Many will file anyway? *Ex post* clearance only back to the beginning of an agreement if correct in the first place!
  - Opportunity to rethink agreements feasible under the old block exemptions
  - Practices for those with market power may have to change

(5) The market share to consider for the block exemption is generally that of the supplier (not the buyer, although that may be relevant in some cases and in individual exemption). Agreements between companies having a turnover of less than ECU 150 million are not subject to these market share caps, save that reciprocal agreements between competitors are excluded if one party has a turnover of more than ECU 100 million.

(6) Clear view that usually in cases involving market share below 20 per cent there is insufficient market power to bring about an appreciable vertical restraint under Article 85(1) E.C.

(7) Proposed guidelines detailing Commission policy on individual exemption above these thresholds and

Many thanks to Ingrid Cloosterin and Flavia Distefano for their considerable help in the production of this paper.

1 COM(98) 544 Final, September 30, 1998.
2 COM(98) 546 Final, September 30, 1998.
3 See the Final Communication, p. 25.

possible withdrawal of the block exemption below the thresholds.
(8) Withdrawal of the block exemption if there is no effective competition, in particular because of cumulative effects through parallel networks; the effect of such withdrawal would then only be for the future "*ex nunc*", rather than back to the date the agreement started.
(9) Extension of the block exemption to agreements for retail chains which do not involve territorial restrictions, provided that the market share of the chain is not above 20 per cent and participating firms are SMEs.
(10) No specific treatment for the beer and petrol sectors. The Commission argues that there are not sufficient economic or legal reasons to do so.
(11) Inclusion of provisions relating to qualitative and quantitative selective distribution, with the idea that the block exemption will not apply if more than a certain percentage of the market is supplied through such networks (*e.g.* two-thirds of the market). Such suppliers would be expected to switch either to a purely qualitative selective distribution system or to apply for individual exemption within six months of a Commission decision requiring the change. In short, a "cumulative effects" withdrawal concept. (This requires changes to Regulation 19/65 which does not allow for the exemption of selective distribution.)
(12) Inclusion of franchising in the single block exemption, with no special treatment but clearance of related I.P. licensing provisions, provided that they are necessary for or complementary to vertical restraints and not more restrictive than otherwise exempted provisions.
(13) National competition authorities may have the power to withdraw the benefit of the block exemption in their territory.
(14) Modification of Article 4(2) of Regulation 17/62 to allow for retroactive exemption of vertical distribution agreements, allowing companies to notify only if required and to obtain clearance back to the date the agreement entered into force (provided no changes are required).
(15) Proposed duration limits on exclusive purchase agreements. A maximum of three years for *final* goods and services; five years for *intermediate* goods and services was suggested in the May Draft. These time-limits are not set out in the Final Communication.
(16) Exclusivity would not just be on a geographic basis, but may include specific groups of allocated customers.

The proposed block exemption "black list" of hardcore restrictions is:

(1) fixed resale prices or minimum resale prices;
(2) maximum resale prices or recommended resale prices which have the same effect or minimum resale prices as a result of pressure by one of the parties;
(3) the prevention or restriction of active or passive resales, imports or exports to final or non-final buyers, other than:

(a) the restriction on active sales in the territory of an exclusive distributor,
(b) the restriction on active sales to exclusively allocated customers,
(c) the restriction of sales to unauthorised distributors in a selective distribution system,
(d) restrictions on a buyer of intermediate goods or services selling them to other direct or indirect buyers;

(4) the prevention or restriction of cross-supplies between distributors at the same or different levels of distribution in an exclusive or selective distribution system or between distributors of these different systems (*i.e.* exclusive or selective distribution combined with exclusive purchasing);
(5) the combination, at the same level of distribution, of selective distribution and exclusive distribution containing a prohibition or restriction on active selling;
(6) the combination at the same level of distribution of selective distribution and exclusive customer allocation; and
(7) an obligation on the supplier of an intermediate good not to sell the same good as a repair or replacement good to the independent aftermarket.[4]

The Commission has emphasised that many aspects of these proposals are negotiable and still to be discussed. However, *not* the market share cap concept, which is key to the whole effect-based system and the idea that Commission and firm resources should only be directed at cases with significant market power. The Commission is also clearly aiming to reduce the number of notifications in vertical restraint cases and as a result favours widening Article 4(2) of Regulation 17/62.

Clearly, these are huge and wide-ranging changes and a considerable development from the Green Paper. It appears that Member State authorities have made significant inputs into the solutions proposed.

It is the author's understanding that *the main structural change is widely favoured*, *i.e.* the shift to an effect-based system, focusing more on economic context than particular clauses. It is also hard to resist the logic that this means market share caps. That is the "trade-off" for not having to file a wide range of minor agreements. Clearly, however, companies are apprehensive as to new obligations and coming rules where market power applies and are worried how it will be assessed.

The Commission's idea that there should be a general block exemption and retroactive exemption for vertical agreements, inciting firms not to notify above the market share ceilings, is also interesting. Many still dislike the whole concept of retroactive exemption as creating a further hurdle of uncertainty for plaintiffs in national courts and allowing practices to happen before they are reviewed. If problems are identified later, any changes required will be late. The specialised sectors also appear to prefer their current special treatment because of the acquired legal certainty.

The main debate now is on the substantive rules proposed, where many are campaigning to widen the proposals, and general uncertainty as to whether businessmen and lawyers will be able to cope with the new "economic" approach after the great simplicity of Regulation 1983/83. Certainly categorisation of restraints as in the "single branding" or "quantity forcing" group are a level above previous Commission guidelines where the only difficult notion to most businessmen was exclusivity with an active/passive sales ban! One senses that the next stage may be a move to a single

4 See the Final Communication, p. 26.

market share cap with the Commission's clause-based approach not in the proposed block exemption but in guidelines applicable to those with market power.

It is proposed now to outline the main changes and points of discussion.[5]

(1) The block exemption is to apply to intermediate as well as final goods. This seems to deal with the difficulty confirmed in the *ICL Fujitsu* case that Regulation 1983/83 does not apply to *OEM/own branded* goods, since these are not goods "for resale" within the definition of that regulation. The change will be generally welcomed as widening the block exemption to cover what is an important category of agreement. However, some will continue to argue that such OEM agreements merit different treatment. It may be noted that goods falling under the *Subcontracting Notice* are now excluded.[6]

(2) If "intermediate" means that raw materials supply contracts are to be covered by the block exemption, this is also a very major change. It could mean, for example, that a company could seek exclusivity of supply for extended periods consistent with the block exemption where it was purchasing ingredients. That might be useful, for example, in the pharmaceutical area where a company has to go through expensive marketing clearances for its ingredients and therefore would wish to obtain exclusivity of supply from ingredients suppliers, if exemption is long enough. The new approach may be designed to cover only limited processing. One may note also that vertical agreements involving the use of know-how or patents are not covered.

(3) The block exemption would apply to services. One might question whether the Commission has extensive experience with individual cases in this sector. There have been few individual decisions (*e.g.* on the appointment of an exclusive distributor of certain financial products in a given area) although there have been some franchising cases involving services. On the other hand, does that matter when up to now lawyers often had to deal with such cases through analogy with a *goods* block exemption? The new rules at least offer more legal certainty.

(4) An important area of discussion is the fact that the classic combination of exclusive distribution and exclusive purchasing seems to be challenged by the new approach. The Commission now sees that as something which is too restrictive and would like to see the possibility for distributors to source elsewhere in a distribution network, if there are significant price differences.[7] That is a major change since a great many European distribution contracts reflect that basic combination. It also suggests a major change in Commission thought-life. In previous exclusive dealing block exemptions the combination was favoured as reflecting a supplier–distributor partnership, with an appropriate clear division of functions which would open up markets. If cross-supplies occur, this may have important effects.

(5) The new approach also suggests that it will now be possible to have exclusively allocated customers. Again, this is a major change since that idea is excluded in Regulation 1983/83.[8] This could have major consequences. In particular, it would appear to mean that someone in, say, the health care sector could appoint an exclusive distributor for pharmacies and another exclusive distributor for hospitals and other large institutional customers in the same territory. This has often been a problem. Companies complain that they are not able to compete in the market according to the way it is structured or reflecting a distributor's strength, but rather have to follow the simple rule of one exclusive distributor per geographic territory.

(6) There is debate about whether it is practical to have two levels of threshold as opposed to just one, with permitted restrictions varying accordingly. This has been recognised in the Final Communication. Some Member States are concerned that a two "tier" system in the proposed block exemption with varied market share caps depending on the type of clause used is just too complex. The Commission argues that the use of two thresholds allows for an economically justified graduation of vertical restraints according to likely effects. If there were not two tiers, there would be one threshold between 25 and 35 per cent.[9] As discussed above, one idea may be to move the graduated approach thought-life into the guidelines for situations where there is clear market power involved.

(7) There is interest in the new provisions as regards associations of retailers. The Commission is treating this, at first sight, "horizontal" co-operation as functionally equivalent to similar "vertical" franchising and selective distribution systems. However, apparently conscious of the horizontal issue, in the Final Communication the Commission has made coverage by the proposed block exemption subject to the provision that these "horizontal aspects do not violate Article 85 EC".[10] The Final Communication also specifies that member retailers must be SMEs within the Commission's Recommendation 96/820/E.C.

(8) There is further debate about which is the relevant market share, the supplier's or the distributor's. The Commission had said that it would take into account the latter market share in future guidelines, but not generally in the block exemption. The question for some is whether that is correct, since it is often not the supplier's market share which indicates the degree of market power, but rather that of the distributor, taking into account the portfolio of other brands it may have. On the other hand, a supplier often instigates a contract and can monitor its market share easier. It is simpler for the block exemption to take the supplier as a reference.

(9) There is interest in the intellectual property provisions, which appear designed to cover franchising, but also may cover computer software distribution with "blister pack" user licensing. This has been confirmed in the Final Communication.[11]

(10) There is discussion on the extent to which franchising will benefit from the block exemption where particular clauses are used (*e.g.* selective distribution

5 See also the Final Communication, pp. 26–30.
6 See the Final Communication, p. 28.
7 See the Final Communication, p. 26. "Hardcore restriction" (4).
8 See Regulation 1983/83, Recital (8) and the Commission's related Guidelines at point 17.
9 See Final Communication, p. 25.
10 See Final Communication, p. 30.
11 p. 29.

with exclusive territories as well as location clauses, in particular, in service franchises). Clearly, the Commission did not *intend* to exclude franchising from the block exemption and, on current market share caps, one would think that most would be covered by the block exemption, unless a very narrow definition of the relevant market is taken (*e.g.* a single brand of hamburger store, as opposed to "fast food", or cafés in general). This needs clarification. If not, it may be necessary to create a separate block exemption for franchising with a special substantive package. Although less unitary in approach, this might be justifiable insofar as franchising is more than product distribution or the supply of services, it is a business format licence with ongoing supply of commercial know-how. On the other hand, franchising may be functionally equivalent to selective distribution and if there were a separate franchising exemption, it would presumably still follow the new approach with market share caps.

(11) Some consider the provisions on selective distribution, in particular as regards cumulative effects, too complex. Nevertheless, one should not lose sight of the fact that in this area many selective distribution systems gain, since *numerical* restrictions may be block exempt in many cases. Sectoral reviews and consequences in concentrated markets also appear to be a coming thing in general.

(12) Some in specialised sectors are unhappy at the lack of specific rules and, in particular, the shortness of the proposed exclusive tie, given the investments made. Others argue that these sectors are not so special and that if they have special rules so should others, such as café chains etc. Also that investment debt can be "transferred" like a mortgage. Much will depend on the duration of tie finally proposed.

(13) Some are critical of the proposed new powers for national competition authorities to disallow the block exemption in their territories. Several Member States have already been doing just that, using *national* competition laws where particular national circumstances applied, usually in co-operation with the Commission. One thinks, for example, of the English "MMC" case on beer supply. Certainly that reduces the ease with which standard contracts can be used across Europe. However, it also reflects the reality that many markets have specific characteristics.

(14) Some are concerned that one consequence of the new *effect-based* approach is that there will be *market-based* assessments and therefore, in principle, one might expect variations within some pan-European distribution systems.

Finally, there are a number of practical points:

(1) How does one deal with the situation that a single contract covers various products with different market shares?

(2) Is it right for some contracts to be covered by the block exemption in a market and others not? Many would say economically "yes", but it does produce a new competitive factor.

(3) How should one draft for the future, for example, to accommodate growth pushing through the proposed market share cap? (For many industries, this is unlikely to be a problem because, if they have achieved 20 per cent of the market they are doing very well!) One would think that a suitable review clause could be drafted with "auto-compliance" by the parties as to what may be required. However, the real issue will be that in some cases, at the higher market shares, unwelcome changes may be required and the parties may not agree.

(4) The idea that agreements between *potential* as well as actual competitors are now excluded from the block exemption (unless between small companies). This is a further complication in assessing if the block exemption applies and may limit its scope.

(5) What is allowed under the thresholds with this new freedom, even post-termination non-competition bans (which are not allowed under Regulation 1983/83)?

Transatlantic air alliances

Box 2: Transatlantic Air Alliances

- **BA/AA and LSU Alliances**
  - 267 and 108 slots to be given up in total, some 25 and 12 frequencies on hub-to-hub routes
  - Sale or surrender of slots
  - Six-month opening on hub-to-hub routes and an ongoing access mechanism
- Also frequent flyer, CRS, travel agent remuneration and interlining issues
- Industry changes in a hugely political environment

This year we have begun to see more clearly what position the Commission is taking on the *Transatlantic Air Alliances*.[12] There were notices on some of these alliances in 1996 and, since then, there has been an extended review process between the Commission, the airlines, the European competition authorities (mainly Germany and the United Kingdom) and the U.S. Department of Transportation and Justice Department. Not surprisingly, with so many involved there has been and still is a major debate, with significant divergence of views.

The key issues relate to:

(1) what remedies the airlines should accept in order to be allowed to combine their forces, in what some officials see as "creeping mergers", since some alliances involve a high degree of integration, including joint fare setting, and might well be mergers but for regulatory constraints on airlines being held by foreign firms;

(2) whether those remedies, designed to overcome the significant barriers to entry created by such alliances should include the *sale* of slots or their simple surrender to the issuing authority; and

(3) whether the relevant decisions in this area should be taken in Europe at the E.C. Commission level, with a suitable new enabling regulation, or through the far less cohesive ad hoc process of Article 89 E.C. recommendations and national competition authority rulings under Article 88 E.C. and national competition laws;

12 See Ratliff [1998] 2 I.C.C.L.R. 44.

(4) the whole structure of Commission powers in this sector. Thus, Mr Van Miert has criticised the policy of Member States which prefer to continue with bilateral agreements with the United States rather than establish a centrally negotiated E.U./U.S. agreement and Mr Kinnock, the Transport Commissioner, has now announced European Court actions against the eight Member States concerned.[13]

It appears that the various competition authorities are working with a broadly comparable analysis:

(1) there are distinct markets for time-sensitive passengers (often business travellers) and non-time-sensitive passengers:
(2) there are relevant geographic markets as between hubs on the two sides of the Atlantic and perhaps also on other specific city pairs, as "point-to-point" traffic (travel from one point to another without changing planes) has grown;
(3) although the relevant regulatory approvals are national or bilateral there is, at the least, a wider transatlantic aspect to E.U./U.S. traffic, insofar as indirect connections play a role;
(4) traffic on certain routes, notably via Heathrow Airport, is particularly important as the most popular hub for traffic with the United States by far.

The Commission has said that it aims to take a position on four E.U./U.S. Alliances in 1998:

(1) *B.A. American Airlines (B.A./A.A.")*;
(2) *Lufthansa/SAS/United Airlines ("LSU")*;
(3) *KLM/Northwest ("KLM/N.W.")*; and
(4) *Sabena/Austrian Airlines, Swissair and Delta Air Lines.*

The Commission has now published two notices on the *B.A./A.A.* and *LSU* Alliances suggesting conditions for clearance. As regards *KLM/N.W.* and the *Air France* arrangements with *Delta Airlines and Continental,* there have been information notices on what seem to be less integrated strategies, at least at the moment.[14]

The main focus of interest is on the *B.A./A.A.* and *LSU* notices.[15] These appear to have two main functions: to be a form of "market testing" of the proposed remedies, comparable to what occurs in E.C. Merger Control and to publicise the Commission's position in what has often appeared to be something of a media battle between those concerned.

The Commission's key idea in the notices is to force an opening for new competition in some markets for a six-month period and to provide for wider access over the coming five years creating more potential competitive constraints, as the *quid pro quo* for the combinations. The Commission is also pushing for the E.U. Member States concerned to undertake to increase the range of potential entrants, currently limited by those airlines admitted to routes with the United States on the basis of bilateral agreements, thereby creating a more competitive market in each hub.

13 See Commission's Press Release, IP/98/966, November 5, 1998.
14 [1998] O.J. C177/10; [1998] O.J. C325/2.
15 [1998] O.J. C239/5; Commission Press Release, IP/98/641, July 8, 1998.

In July 1998 the Commission issued a notice in the *Lufthansa/SAS/United Airlines* case. The main points are as follows:

(1) The Commission appears to base its case mainly on Article 85 E.C. The Commission is proposing to clear the Alliance on condition that the parties be prepared to give up a maximum of 108 slots on routes across the Atlantic (which could increase to 125, if the new Oslo airport does not open on schedule).
(2) There are precise details as to how and when this is to occur. In the case of two hub-to-hub routes, Frankfurt–Washington and Frankfurt–Chicago, the *LSU* Alliance is to reduce its number of weekly frequencies by 12 so as to allow its competitors to operate up to 55 per cent of those routes, while retaining 45 per cent itself. Competitors are to have six months to apply for the frequencies. If they do, the Alliance may not increase its frequencies to compensate beyond a ratio of 55:45. The Alliance does not have to give up more than 50 per cent of frequencies, if there is only one competitor. The Alliance also does not have to give up more than six slots an hour to any one competitor, and the transfer of slots should not result in a competitor or alliance having more than 50 per cent of the total number of slots on any route.
(3) Slots related to the frequencies ceded are to be given up without compensation, and related necessary airport facilities are also to be given up. If competitors cannot otherwise obtain matching slots and facilities at the U.S. airports concerned, the Alliance is also to make these available on the same terms as in Frankfurt.
(4) As regards other transatlantic routes involving Frankfurt and Copenhagen, the members of the Alliance are to give ongoing access to slots and related facilities in those airports on request, if competitors cannot obtain them through normal procedures. The Commission indicates that the maximum number of slots to be given up by the Alliance is therefore 24 on hub-to-hub routes and 84 on other routes (amounting to 108 in total).
(5) Otherwise, Lufthansa has to end its code-sharing agreement with Lauda Air on the Vienna–Munich–Miami route and the Commission imposes conditions on frequent flyer programmes ("FFPs"), CRS "first page" presentation, travel agents' remuneration and interlining.
(6) As regards frequent flyers, the Alliance has to loosen up its effects, apparently on the basis that these raise barriers to entry preventing Article 85(3) exemption. The proposals are either to refrain from pooling the parties FFP's for passenger traffic on routes between Germany/Scandinavia to the United States and not to allow passengers to transfer FFP points in one member's system to those of another, or to allow airlines without comparable FFP's to participate in the Alliance's joint FFP.
(7) As regards travel agent remuneration, the Commission requires that the remuneration of the parties should not include a system securing loyalty to the Alliance (*i.e.* no sales threshold). Fares to large customers should also not be based on loyalty or a system of thresholds. Terms can, however, "be negotiated between airlines and large customers, and may differ provided Article 86 is complied with".
(8) The Commission also takes the view that the Member States concerned and Norway should authorise other Community carriers established in the EEA to

operate services to the United States, setting fares freely, to ensure a sufficient degree of potential competition. The proposed clearance is to be reviewed five years after these measures have been applied. The German authorities are understood to agree with the proposals.

The *B.A./A.A.* Notice follows an essentially similar format.[16] The Commission would like the parties to surrender a maximum of some 267 slots in all: 25 frequencies and 50 slots on hub-to-hub routes between London and Chicago, Dallas and Miami, and 217 more slots for other routes through the ongoing access mechanism. The Commission's proposals are less demanding than those of last year, when it had suggested the *B.A./A.A.* Alliance should cede some 350 slots (and the U.K. authorities wanted only 168 to be given up).

The Commission considers that the *B.A./A.A.* agreement would infringe Article 85 and, as far as hub-to-hub routes are concerned, Article 86. There are similar FFP, CRS "First Page", travel agents' remuneration and interlining points to the *LSU* Alliance Notice. The travel agents point is sensitive here because of specific complaints which the Commission has been examining by Virgin and British Midlands against B.A. practices.

Again the Commission seeks undertakings from the Member State concerned, here the United Kingdom, that it will permit any Community carrier established in the EEA to operate services between the United Kingdom and the United States, setting its fares freely "in order to ensure a sufficient degree of potential competition".

The U.K. authorities have responded to the Commission's proposals.[17] In many respects there is a similar analysis, although there are some differences. Notably the Office of Fair Trading considers:

> that grandfather rights to slots have substantial monetary value which one way or another is recognised now when slots change hands, and that it would be reasonable to allow the Alliance to recoup that value on disposal, just as companies required to dispose of assets as a condition of merger approval are allowed to sell those assets. The OFT also believes a decision by the UK under Article 85(3) could override the Slots Regulation if it is unclear on the matter. Further, that the suggested UK undertaking is not needed to remedy the adverse effects of the Alliance.[18]

Mr Van Miert has responded (again) that the sale of slots is unacceptable to the Commission, both as against the Slots Directive and because it would raise barriers to entry and unduly favour those airlines long established at the most important E.U. airports. In other words, they are not for sale and, even if they were, public interest considerations should override any claimed property rights. Commission officials also point out that slots were not sold in previous remedies on airline mergers or alliances. If the sale of slots raises barriers to entry and makes market entry unattractive to competitors this could also undermine the Commission's case for exemption because if the slots are not taken up, the counter-balancing effective competition may not be created. A lot turns here on how likely it is that other airlines (or alliances) would take up slots, the competitive balance of other alliances and what that means to the market.

16 [1998] O.J. C239/10; Commission Press Release, IP/98/641. July 8, 1998.
17 OFT Press Release, P/98/636, August 6, 1998.
18 points 22–23.

The United Kingdom is also in a difficult position, since the U.K. Transport Minister has suggested that the slots are not B.A.'s to sell and any decision contrary to the Commission's line may be perceived as reflecting national partiality to B.A. and lead to the matter coming before the European Court.

All of this is far from straightforward. It appears that "global reach" and efficiencies arguments for the Alliances are being accepted. The determination as to how many frequencies and slots should be relinquished as a proportionate yet effective remedy and over what period is more controversial. What is required to keep the market reasonably competitive, without unduly hampering the prospects for the Alliances? The United Kingdom and the Commission have taken different views as already explained. It appears that the U.S. authorities have a different approach again, some suggesting that "imposing reductions and freezes on network carriers' capacity will exert upward pressure on fares".[19] Others are reported still to be seeking 336 slot reductions. It is also reported that the United States prefers "carve-outs", which would mean that the airlines are not allowed to co-operate on routes they dominate. Mr Van Miert does not agree with these criticisms, arguing that the reductions only apply if they are taken up by others and that full competition would not occur if there are carve-outs.[20] The validity of any solution chosen also depends on whether similar approaches will apply to other Alliances.

A further complication is the fact that the *LSU* Alliance has been functioning already for some four years, whereas the *B.A./A.A.* Alliance is not yet in place. The former has antitrust immunity in the United States, whereas the U.S. authorities have suggested that they will only grant immunity to the latter if an open skies agreement were signed with Britain.

The procedural context and requests for Member State undertakings are also highly controversial. The Commission has a point from a competitive perspective to argue that these alliances should be considered in parallel and together perhaps by one central authority. As the Commission puts it "reliance on Articles 88 and 89 EC makes for procedural unwieldiness and legal uncertainty".[21] It also make for long delay.

Neither Lufthansa nor B.A. is happy with the Commission's proposals. B.A. has stated that each slot lost "corresponds to 30 jobs BA cannot create" and argues for a slower, phased transfer of slots. More recently, there has also been talk of *B.A./A.A.* scaling back their Alliance to code-sharing with no joint setting of fares to achieve only a gradual opening up of Heathrow Airport to more U.S. airlines. It appears that *B.A./A.A.* may consider it can wait no longer. A lesser co-operation in force *now* may be more important commercially than a more integrated joint approach only at a high price.

Decentralisation issues

This year has highlighted one of the potential problems with decentralisation. Conflicts can occur. The *Unilever/HB Ice cream* case and the *B.A./A.A.* slot issues show that there may well be divergence both as to the application of Article 85(1) E.C. and issues related to exemption. This increases the need for early co-operation systems.

19 *The Financial Times*, May 4, 1998.
20 *The Financial Times*, May 13, 1998.
21 1997 EC Commission Competition Report, point 90.

It appears that DG IV may see its role in the future, once it has less backlog (through measures like amending Regulation 17/62 for vertical agreements)[22] as providing a more active co-operation with national courts and competition authorities. This should be welcome because clearly the sort of divergence described above in these cases is highly unsatisfactory and a long march to the European Court to obtain a cohesive "seal" to the judicial and administrative procedures is far too slow.

Perhaps competition issues could be concentrated in a specialist competition court in each Member State, with an *amicus curiae* role for the E.C. Commission and/or national competition authorities so that cohesion might be improved at the outset.[23] This does not solve the classic problem of shared competences but it may help to head off conflict and promote more co-operation. At the moment there do not seem to be many formal "co-operative questions" to the Commission[24] and, in any event, the answers given may be difficult, if they are confined to the Commission describing its own procedure when it may not yet have completed its own enquiry.

AREAS OF PARTICULAR INTEREST

Sport

Box 3: Sport

- **Mouscron/Wimbledon:** Are "national" league restrictions inherent to the organisation of European sport or contrary to the E.C. Treaty?
- **European SuperLeague:** *Belgian mini-foot* or *Danish co-operatives* or something else?
- **FIA/FOA**
  - Conflict of interest for the FIA to handle several competing motor sports, and/or for FIA directors to be both regulators and marketeers?
  - One sports structure for international motorsport or several?
  - 33% more to screen Formula One if a broadcaster shows Indy car racing also?
  - Assertion that all international motorsport TV and film rights belong to FIA
  - Exclusive TV rights grant for 14 years too long?
- **Danish Tennis Federation**
  - Sponsorship and product selection
- **Guidelines**
  - Reflecting a rule of reason to account for "mutual dependency" of clubs, and Article 85(3) exemption for "solidarity funds" in broadcasting?

Each year since *Bosman* has been an active one for E.C. competition law and sport, but this year even more than usual. As of the end of September 1998 the Commission was understood to be handling some 50 complaints involving sport, many of which centre on broadcasting rights.[25] At least ten major issues are involved. As noted above, this year the Commission has also published an "orientation document on competition law, sports events and broadcasting" and there are signs of some competition-based flexibility appearing, which might lead to guidelines on competition and sport.

For present purposes, mention will be confined to two issues in football, one in motorsport and one in tennis.

First, at the beginning of 1998, issues arose as to whether private restrictions on *clubs* trading abroad infringe the competition rules. It was reported that the Commission had received a complaint by the Belgian football club *Excelsior Mouscron against UEFA.* Mouscron wished to stage its home match against FC Metz in the UEFA Cup in a neighbouring stadium across the border in Lille, France. Mouscron argued that it needed a larger ground to meet demand. It appears that UEFA's position was to require that matches be played in home grounds in the specified country for the event. Then there was a reported complaint by *Wimbledon* seeking to establish if rules requiring it to play in the United Kingdom in order to participate in the Premiership League are contrary to the E.C. Treaty. Wimbledon is reported to be thinking of establishing in Dublin, Ireland[26] yet continuing to play in this English league.

These are difficult issues, since, as in *Bosman*, the restrictions concerned bring into question not only the E.C. competition rules, but also freedoms to establish and to provide services abroad.[27] On the other hand, if the national character of sport is changed in this way, one might see a complete transformation of European leagues.

The possible establishment of a *European SuperLeague* has also raised E.C. issues. Notably, could clubs in such a league lawfully be obliged to leave their own national leagues through which they may participate in the UEFA European Champions League? In October 1998, Media Partners was reported to have filed a complaint with the European Commission arguing that actions by football authorities designed to prevent the new bodies from organising and marketing football competitions in Europe were contrary to Article 86 E.C.[28] UEFA has since responded by announcing an enlarged Champions League with 32 instead of 24 clubs, giving big national clubs more opportunities to obtain revenues from European football.[29]

One may note here that in one case, *Belgian mini (indoor) football*, the Commission already considered (apparently critically) whether a national football association could prevent players from participating in a parallel indoor football league,[30] although in the end the Commission declined jurisdiction for lack of effect on trade between Member States. The case may be a little different, since it involved an extension of sporting control to a *variant* of football, where

22 The Commission's backlog of Article 85 and 86 cases at the end of 1997 was 1,262 cases. See 1997 EC Commission Competition Report, tables pp. 43–45.

23 See *e.g.* Belgian competition law which focuses questions in the Brussels *Cour d'Appel* with a consultation right of the national competition authority, Law of August 5, 1991, Art. 42.

24 See Joris, 1998 EC Commission Competition Newsletter, No. 1 (February), p. 47, and 1997 EC Commission Competition Report, pp. 350–351. There have also been more positive examples of decentralisation, *e.g.* the Commission's decision to leave the *Deutsche Telekom* case on pre-selection and number portability to German national authorities. See Commission Press Release, IP/98/430, May 13, 1998.

25 *The Financial Times*, September 29, 1998.

26 *European Report*, No. 2289, February 7, 1998. It is understood that Clydebank may also have considered such a move.

27 Arts 52 and 59 of the E.C. Treaty.

28 *Independent on Sunday*, October 4,1998.

29 *The Times*, October 7, 1998.

30 See Coopers & Lybrand, "The Impact of European Union Activities on Sport" (1995 Edn), pp. 77–79.

the participants preferred their own separate federation, not a breakaway in the *same* sport.

On the other hand, in some circumstances, restrictions designed to protect the co-operative strength of a trading unit may not be considered restrictions at all. Where, for example, they are objectively justified, necessary and proportionate to ensure the proper functioning of that unit. Thus, in a completely different context, certain *Danish Co-operatives* have been allowed to impose restrictions on their members participating in competing (agricultural) co-operatives, where that would undermine the co-operative.[31] There may be an analogy to sports leagues, which also require mutual dependency between clubs and therefore need the full commitment of participants.

Other mighty battles are developing in the field of *motorsport*. The main case relates to Mr Ecclestone's efforts to organise the stock market flotation of Formula One. As a result, the FIA and the Formula One Administration (FOA) notified agreements which granted Mr Ecclestone's company exclusive rights to market and sell the broadcasting rights of Formula One for some 14 years.[32]

In December 1997, the Commission published two notices seeking comments from third parties.[33] The notice on the *FIA* briefly outlines the FIA statutes and several regulations in its 1994 Yearbook, including the FIA International Sporting Code and Championships regulations. The Commission notes, in particular, Article 27 of the "General Prescriptions" on FIA events, stating that all filming and moving picture rights of any FIA Championships are vested in the FIA and the agreement between the FIA and Mr Ecclestone's company, International Sportsworld Communications ("ISC") whereby ISC manages the promotion and broadcast of certain championships from 1996 until 2010.

The notice on the *FIA/FOA* relates to agreements for the organisation and operation of the FIA Formula One Championship and the exploitation of related television rights (including the Concorde Agreement with the participating "signatory" teams). The Commission notes, in particular, that signatory teams assign any related media rights they may have to the FIA. The FIA in turn grants its commercial rights to the FOA for 14 years. Some of the broadcasting agreements provide for a discount of 33 per cent if the broadcaster does not broadcast any "open wheeler" racing than Formula One. Promoters are also required not to hold certain other motorsport events on their circuits without Formula One consent.

Since then Mr Van Miert has publicly criticised the Formula One arrangements.[34] The Commission is reported to be concerned that the FIA and Formula One may have used its/their position(s) to deter or prevent other motor sports from being broadcast which compete with Formula One for TV time. Thus, Mr Van Miert has cited the discount noted above that TV channels which broadcast rival motor sport, such as Indy car racing, were obliged to pay 33 per cent extra for the right to show Formula One events.[35]

A related concern appears to be the way that the FIA has centralised the marketing of competing motor sports through its claimed international motorsport monopoly. It is argued that this leads to a conflict of interests, as each motor sport seeks to achieve the maximum revenues in competition with the others. It is also suggested that Mr Ecclestone's position in the FIA and as director of the company receiving the broadcasting rights reflects a conflict of interest. Beyond this, the Commission is reported to question that there is just one international monopoly and just one motorsport body per country and that a 14-year exclusive TV rights grant is too long.

It appears that the Commission has sent a letter indicating serious doubts about the agreement between the FIA and FOA. The FIA has rejected such claims arguing, for example, that the idea of recognising one rule-making body per country is just normal for organised sport. However, in May 1998 the FIA announced that the individual event organisers of some 15 international championships will now be free to sell their broadcasting rights.[36] These included European Drag Racing and European Hill Climbing. The FIA continues to manage the sale of broadcasting rights to the four most important motorsport series, including Formula One and Formula 3000.[37]

All of this is very important because it focuses not only on the international organisation of sport but also on the relationship between sports federations and their marketing agents.

This year, the Commission also cleared revised arrangements for the sponsorship of tennis in Denmark. In the *Danish Tennis Federation* ("DTF") case,[38] the Commission cleared agreements where exclusive sponsorship is granted on the basis of a call for tenders, with a transparent, non-discriminatory procedure open to all suppliers. The selected sponsor is to be the sole supplier for tournaments organised by the DTF for two years. Sponsors are to be designated "sponsor of the DTF", rather than "official" supplier. The Commission considers the latter misleading, as suggesting that the chosen products are technically superior. Under the arrangements, each team in a tournament will be able to source the brand chosen by DTF wherever it chooses. In return, the sponsor is to supply a specified quantity of balls at a preferential price below the Danish market price. The case has been closed by "negative clearance", *i.e.* a ruling that Article 85(1) E.C. is not infringed.

Two points deserve mention: first, it should be recalled that the case started as a *parallel* import case. In other words, it was argued that the "official" labelling of tennis balls deterred such trading, because only products with the DTF "official" sticker were used. One may think that this concern has taken the Commission too far, into some sort of consumer protection or "fair trading" role rather than the protection of antitrust. It is not clear that it is a competition issue that a producer is labelled "official" supplier if the parallel trading issue is resolved by allowing sourcing as a purchaser likes.

31 Case C-250/92 *Gøttrup-Klim Grovvareforeninger and Others* [1994] 1 E.C.R. 5641.

32 *European Report*, No. 2272, November 29, 1997, and No. 2279, December 24, 1997.

33 *FIA* and *FIA/FOA* Notices, [1997] O.J. C361/5 and 7.

34 Mr Van Miert reportedly said to the Belgian Parliament that the FIA "infringes practically all the rules of the game", *European Report*, No 2289, February 7, 1998.

35 European Report, No. 2289, February 7, 1998.

36 *European Report*, No. 2315, May 13, 1998.

37 It also appears that in May 1998, the FIA sued the European Commission for damage as a result of the way the Commission has handled the case, in particular Mr Van Miert's public comments. The FIA also seeks a ruling that the Commission has unlawfully leaked documents to the Press, *European Report*, No. 2319, May 30, 1998.

38 Giuffrida, "*Parrainage et homologation d'articles sportifs: le cas de la Féderation danoise de tennis*", 1998 EC Commission Competition Policy Newsletter, No. 2 (June), p. 54. See also the earlier Commission Notice, [1996] O.J. C138/6.

However, the Commission has explained that it sees the label as giving a marketing advantage which is market foreclosing.

Second, those who recall the Commission's notice on the case in 1996 may note that there are significant changes. In 1996 the proposed solution involved a *pool* of sponsors. The DTF has now convinced the Commission that in the circumstances, notably the small size of the Danish market, it is necessary to have a *single* sponsor. The DTF wanted such a sponsor for three years, the Commission has required that to be reduced to two and that selection be on the basis of a tender with transparent non-discriminatory criteria open to all suppliers. All of this is highly important insofar as product selection issues in sport can have significant repercussions on competition between suppliers.

The Commission's orientation document on broadcasting

Box 4: Sport and Broadcasting

- **Access to coverage of major sporting events:** competition neutral as between public and private broadcasters
- **Market definition:** specific and narrow, *e.g.* Formula One motor racing
- **Exclusivity**
  - Exclusive licences do not *per se* infringe Article 85(1) E.C. but may do if appreciable foreclosure
  - Exemption required if there is exclusivity within Article 85(1) E.C.
  - For a long duration may be justified
- **Collective sale of broadcasting rights** affecting inter-state trade will be reviewed from a competitive perspective BUT exemption might reflect "sporting considerations"
- **Sub-licensing**
  - Not always an adequate or satisfactory solution to exclusivity concerns
  - In any event, terms must be known in advance, transparent and non-discriminatory
- **Collective purchasing of broadcasting rights** favoured if by broadcasters with less resources to match the largest buyers

The Commission has also published an *"orientation" document on the Broadcasting of Sports Events and Competition Law.*[39] This is a very important document, prepared in consultation with Member State competition authorities. It provides an overview of the Commission's approach to a wide variety of issues in the broadcasting of sports events.

As regards *access for coverage of major sports events,* the Commission emphasises that the E.C. competition rules are neutral with respect to different types of broadcasting and that, in principle, all categories of broadcaster (*e.g.* public and private) are treated equally (unless Article 90(2) E.C. applies). The Commission also outlines the "major sports event" exception to exclusivity in the amendment to the Television Without Frontiers Directive.[40]

As to *relevant markets,* the Commission emphasises the many different layers of market which may exist and notes that in general the relevant market will no longer be one for sports programmes. Rather, the relevant markets may be for *specific* sports, such as football or Formula One motor racing.[41]

As to *exclusivity,* the Commission confirms the approach taken by the European Court of Justice in *Coditel II,* that exclusive licences of performing rights, even if they confer absolute territorial protection in an E.U. Member State, do not *per se* infringe Article 85(1) E.C., although such a licence may come within Article 85(1) E.C. if, in the circumstances, it leads to appreciable foreclosure. Whether or not there is an infringement therefore depends on issues such as the duration of exclusivity, the market power of the seller and the acquirer of the rights and the likelihood of any foreclosure on a downstream market.

The Commission emphasises that if an exclusive licence is caught by Article 85(1) E.C., the existence of a sub-licensing policy does not, in itself, alter the need for an individual exemption under Article 85(3) E.C. The Commission also notes that the strength of exclusivity is diluted where different types of exclusive licence are granted. Exclusivity with a long duration is considered justified in some circumstances, notably where it assists a new entrant into a market and new and expensive technology is being introduced.

The Commission also states that it will examine the *collective selling of broadcasting rights* where there is an effect on inter-state trade. In this area, the question as to *who* owns the rights to broadcast a given event is not a question of E.C. competition law, but one of national law. The Commission notes, however, that the tendency is to regard (football) clubs as primary owners.

The Commission emphasises that the collective sale of such rights may infringe Articles 85(1) or 86 E.C. However, interestingly the Commission states that the fulfilment of the criteria for exemption under Article 85(3) E.C. should not be based on purely commercial objectives but also on "sporting" considerations:

> The special characteristics of the sport in question have to be taken into account. These could include, for example, the need to ensure "solidarity" between weaker and stronger participants or the training of young players, which could only be achieved through redistribution of revenue from the sale of broadcasting rights. Such aims would have to be a genuine and material part of the objectives and ones which could not be achievable under less restrictive arrangements.[42]

As regards *sub-licensing,* the Commission emphasises that it cannot generally be a solution to all the competition issues which arise. First, it should be established, as far as possible, whether exclusivity can be justified. In any event, the terms on which sub-licenses are granted should be (1) known in advance, (2) transparent and (3) non-discriminatory between licensees in each category. The Commission also expresses

39 1998 EC Commission Competition Policy Newsletter, No. 2 (June), p. 18.

40 Art. 3A, Directive 97/36 [1997] O.J. L202/60.

41 See also John Temple Lang, *Media, Multimedia and European Community Anti-Trust Law* (Fordham Corporate Law Institute, October 1997).

42 s. IV, para. 9.

concern about the possibility of licensors extracting monopoly profits. The Commission states, however, that it will not normally fix the terms of sub-licences.

Whether the *collective purchasing of TV rights to sports events by broadcasting companies* falls within Article 85(1) E.C. depends on the circumstances. The Commission indicates that it will examine issues such as the loss of competition between companies, and the scope and duration of the exclusive rights purchased. The Commission will view collective purchasing favourably where it is pro-competitive, *e.g.* by broadcasters with limited resources facing the big four broadcasters BSkyB, CanalPlus, Bertelsmann and Kirch, on the market for the procurement of broadcasting rights or for major sporting events.

The Commission rounds up the document by stating that, in view of the very rapid developments in this sector, its practice will be developed on a case-by-case basis.

A broader perspective

The interesting issue developing now is whether the Commission may be prepared to take a flexible approach to the application of Articles 85(1) and 86 E.C. and/or exemption. There are signs that it might do so from the orientation document on broadcasting. Mr Van Miert has also given speeches on the same theme. For example, Mr Van Miert gave a speech to the European Forum for Sport in November 1997[43] in which he emphasised that the Commission is sensitive to the particular competitive issues in sport, albeit that it is obliged to apply the competition rules in the normal way. Mr Van Miert said (my translation):

> it is obvious that sport also contains aspects of significant importance which are alien to economic activity—its social integrating and cultural role. Equally, alien to economic activity are the rules of sporting organisations which are based on reasons which concern uniquely sport as such.
>
> I would like to underline that the specific aspects of this sector certainly imply restrictions on production activities and the organisation of sporting events which could not be allowed in other sectors of industry or services. However, these specific aspects cannot justify infringements of the fundamental freedoms established in the (EC) Treaty, if less restrictive means would make it possible to attain the same legitimate objectives in an equally efficient way. This principle, known as proportionality, is one of the fundamental pillars of the application of Community law.

Mr Van Miert then emphasised that in sport one is looking at a *special type of competition*. In particular, because in sport there is a necessity to guarantee some uncertainty as to who will win a competition and there is a mutual dependency amongst clubs which does not exist in the ordinary commercial market, where most companies do not just want to win a game or competition for a client, they want to eliminate all the competition! As he put it, the sporting market is, in its nature, "unstable for as long as there is a lack of financial balance between clubs". This lack of balance has therefore to be "corrected".

43 See *e.g.* Van Miert, *"Sport et concurrence: Développements récents et action de la Commission"*, Presentation to the Forum Européen du Sport, November 27, 1997, DG IV website, January 1998.

It seems that a consensus may now be developing that *guidelines* should be drafted on what is allowed, and on what is not allowed and what is only allowed in certain defined contexts and circumstances. Mr Van Miert has suggested that he wants to encourage the development of such guidelines, while emphasising that for the foreseeable future there will still be two limits on this approach: that the Commission is at the moment only really able to work on the basis of a full understanding of the context case-by-case; and that there are enormous differences in the way that sports are run. Sports are very different in structure and in the extent to which they are commercial.

One may be able to sketch out some of the common restrictions in (team) sport and work out how they might be dealt with in competition laws, following the idea that some restrictions are "purely sporting", some may be wholly commercial and, between the two, there is a mixed group of restrictions, intended to promote a certain concept or balance in sport, but which have clear commercial effects. Purely sporting restrictions normally should be outside the scope of the E.C. competition rules. Wholly commercial restrictions should be dealt with in the ordinary way under the competition rules. The middle group would be covered by the E.C. rules or not, depending on their object, effect, necessity and proportionality, and taking into account the special factors of sport, including the mutual dependency of those in sports competitions.

Books

Box 5: Books/Energy

- **German Books**
  - Special rules for a "cultural" good or no exemption because stifling new distribution?
- **Energy**
  - Electricity liberalisation starts in 1999
  - Agreement on Gas liberalisation, June 1998

Mention should also be made of a new conflict which has developed this year concerning retail price maintenance ("rpm") for books. This time the focus is on the German-speaking area and, in particular, two agreements dating back to the 1880s involving Germany and Austria.

The relevant agreements, called the *Sammelrevers* and the *Einzelrevers*, were notified to the Commission in 1993. The Commission then gave indications that, on the case law (*e.g.* cases such as *VBBB* and the *Net Book Agreement*) it considered clearance difficult. In October 1997 the E.U. Council asked the Commission to study whether the new culture provision in the E.C. Treaty since Maastricht, Article 128(4), might change the Commission's position.[44] DG IV has also commissioned a study of the effects of retail price maintenance for books in various E.U. countries which has found that countries with rpm have "no substantial advantage" over those without rpm in achieving the claimed advantages (*e.g.* to further title production).[45]

44 [1997] O.J. C305/2.
45 1997 EC Commission Competition Report, p. 361.

In January 1998 Mr Van Miert suggested that the Commission consider the agreements to be stifling the development of new modes of distribution in the sector. A Statement of Objections has been sent. It appears the Commission is asking the parties to look at less restrictive means to promote the cultural value of books, and has suggested ideas such as a fund to finance "more ambitious" literary production, targeted aid or some form of selective distribution concept for small booksellers. The German book trade is not happy, claiming that such a fund would be impossible to administer and apparently fearing that without uniform prices for the homogeneous linguistic area of Germany and Austria, parallel trade may develop which would undermine the smaller outlets. The Commission emphasises that it is focusing on cross-border trade, not a purely national system and that in many E.U. Member States rpm for books has already been removed.[46]

Energy

Extensive changes are now imminent in the energy sector. The *Electricity Liberalisation Directive*[47] has to be transposed into national law in 1999 (save in Belgium, Greece and Ireland which have extensions). The Commission has said that this should lead to more than half of the market being opened up to competition on average. The opening has taken time to come and it will be interesting to see how it develops. In particular, whether and to what extent the Commission will have to back up the liberalisation with Article 169 proceedings, as it has in telecoms. Interestingly, the Commission has also emphasised again that the competition rules apply to environmental restructuring in this area: "Projects giving priority to renewable sources of energy, district heating systems and indigenous energy sources will be scrutinised to ensure that they are compatible with the Treaty's competition rules".[48]

In June 1998 the E.U. Council adopted the *Gas Liberalisation Directive.*[49] As in the case of electricity, the directive establishes common rules for the transmission, distribution, supply and storage of natural gas, rules on access to the market, the use of market networks and the criteria and procedures applicable to authorisations for the transmission, distribution, supply and storage of natural gas. The initial opening of national markets will be approximately 20 per cent of annual gas consumption, phased up to 28 per cent after five years and 33 per cent after ten years. The category of customers allowed to negotiate their supply contracts independently will be progressively expanded also, starting with clients purchasing more than 25 million cubic metres of gas a year. As regards access, Member States may choose between negotiated access or regulated access. Derogations can be granted where operators which have entered into take-or-pay contracts face difficulties as a result of the liberalisation. Another complex liberalisation package in another sensitive sector!

46 *Europe*, No. 7139, January 16, 1998; *European Report*, No. 2283, January 17, 1998 and No. 2304, April 1, 1998.
47 [1997] O.J L27/20.
48 1997 EC Commission Competition Report, point 118.
49 Directive 98/30/EC of June 22, 1998, [1998] O.J. L204/1.