Major Events and Policy Issues in E.C. Competition Law, 1999—Part 1

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The object of this article is to outline the major events and policy issues related to what are now Articles 81, 82, and 86 E.C. (leaving aside merger control) in the last year.[1] It is proposed to follow the same pattern as previous years.[2] In other words, the article is divided into three sections: (1) a *general overview* of major events (legislation and notices, European Court cases and European Commission decisions); (2) an outline of current policy issues; and then (3) some comments on *particular areas*, meaning this year sport and books.

In the author's view, the most interesting features of the year are as set out in Box 1.

In view of the large number of decisions this year, the section on joint ventures and other co-operative decisions will be included in Part 2, in next month's journal.

Overview of major events

Legislative developments (adopted and proposed)

Adopted legislation/treaty

In May 1999 the *Amsterdam Treaty* entered into force.[3] The main effect for E.C. competition lawyers was to renumber the Treaty articles. In most cases, the number of the relevant article drops by four. Thus, Article 85 becomes Article 81 E.C., Article 86 becomes Article 82 E.C. and Article 90 becomes Article 86 E.C.[4]

In June 1999 the E.U. Council started the process of *vertical restraints reform* by adopting two regulations, one changing the legislative framework for vertical block exemptions and allowing the European Commission ("the Commission") only to prohibit "black-listed" clauses, the other widening the scope of retroactive exemption under Article 4(2) of Regulation 17/62.

The first regulation, *1215/1999*,[5] provides that the Commission can exempt categories of agreements between two or more undertakings, at different levels of the production or distribution

Box 1: Themes of 1999

- The "White Paper" on modernisation and decentralisation of competition enforcement including:
  - a change to *ex-post* control;
  - Article 81(3) E.C. powers in national competition authorities and courts;
  - proposals for taking *oral* statements
- The proposed vertical restraints block exemption and guidelines (which should be in force in 2000)
- The Commission's developing policy on sports broadcasting, in particular the collective sale of football league rights (in the light of varied national decisions)
- Effect on trade and financial services after *Bagnasco*
- An "economic approach" to insurance pools, taking some outside Article 81(1) E.C.
- An emphasis on the need for a reasonable duration of proceedings (both at Commission and Court level)
- Considerable emphasis on co-operative joint ventures (with a large number of decisions and Article 19(3) notices)

Again, with many thanks to Ingrid Cloosterin and Flavia Distefano for their help in the production of this paper.

1. This is a slightly revised version of a paper given at the IBC E.C. Competition Law Conference in Brussels, November 9, 1999. The reference period is from November 1998 until the end of October 1999.
2. For last year's paper, see [1999] I.C.C.L.R. pages 3 and 64.
3. See, generally, Commission Press Release IP/99/269, April 28, 1999.
4. Art. 3(g) remains the same, Art. 92 becomes Art. 87. Most are now following the practice of quoting the old articles in formal documents as "Article 81 E.C. (*ex* Article 85)", as appropriate to avoid confusion. In general, the system used here is according to when the decision occurred, *i.e. pre*-May Art. 85(1) E.C., *post*-May Art. 81(1) E.C. etc. and to explain as appears necessary.
5. [1999] O.J. L148/1.

Box 2: Legislative Developments (adopted)

- Amsterdam Treaty (May 1999, article renumbering –4)
- New enabling regulation for vertical restraints block exemption (Regulation 1215/1999)
  - market share cap principle accepted
  - broader legislative base
- Extension of retroactive exemption to all vertical agreements and some IP agreements (Regulation 1216/1999)
- E.U./Canada Co-operation Agreement
- New hearings regulation (2842/98)
- Transport notifications alignment (Regulation 2843/98)
- Amended joint co-ordination/joint operations air transport block exemption (Regulation 1083/99)

chain, where the agreements concerned involve the conditions of purchase, sale or resale of goods or services. The Commission can also exempt categories of agreement relating to the acquisition or use of industrial property rights where they are between no more than two undertakings. The Commission can stipulate the conditions in which parallel networks of similar agreements may be excluded from the block exemption, depending on the market coverage rate of such networks. Such exclusion is to be by the regulation and with at least six months' notice. National competition authorities ("NCAs") are also to have the right to withdraw the benefit of the block exemption where agreements have effects incompatible with Article 81(3) E.C. in a "distinct market", being the territory of a Member State or part thereof.

Importantly, the E.U. Council also accepted the principle of *market-share caps* to such a block exemption and the Commission's approach that the coming vertical restraints block exemption:

— should not involve "white" and "grey" lists of exempted clauses;
— will not cover certain severe anti-competitive vertical restraints, like minimum and fixed resale prices and absolute territorial protection;
— will apply to all vertical agreements, including those between more than two undertakings, franchising and selective distribution agreements, agreements concerning services, and agreements for goods or services related to processing or incorporation; and
— that group agreements between small and medium-sized retailers and an association of such retailers, and between such an association and its suppliers can be characterised as vertical agreements.

The second regulation, *1216/1999*,[6] extends the scope of Article 4(2) of Regulation 17/62 to the same categories of vertical and IP agreements. The two regulations entered into force on June 18, 1999.

It was a little surprising that the regulations were adopted when they were (*i.e.* before the draft block exemption and the draft guidelines had been published). It was quick for the extension of retroactive exemption. However, it is clear that the Commission wants to reduce the number of notifications as quickly as possible and also wanted to secure agreement to the core principles of its proposed reform before entering into the final phase.

The key point as regards Regulation 1216/1999 is to remember that it will now not be necessary to notify vertical agreements to ensure enforceability, *provided that the agreements fully comply with Article 81 E.C.* In cases of doubt (*e.g.* where fines are an issue), notification may still be advisable to obtain immunity. On the other hand, the change will prevent technical challenges to an agreement in a national court, when an agreement is caught by Article 81(1) E.C. and, if not notified, is *procedurally* incapable of exemption, because exemption cannot antedate notification, even though *substantively* it may qualify for such exemption.

In April 1999, the E.U. Council and the Commission concluded a *Co-operation Agreement with Canada* in similar terms to that with the United States.[7] The Agreement provides for: notification of enforcement activities which may affect the important interests of the other party; consultations between the parties; co-ordination of enforcement activities (so that the party best placed to act may do so); "positive comity" co-operation (whereby one party may ask the other to intervene in cases where its important interests are affected); and exchange of information and confidentiality.

The text is not identical to the E.U./U.S. Agreement and, in places, there has been an evolution. For example, Article VI on avoidance of conflict in the E.U./Canada Agreement, includes a list of ten elements to which the parties are to have regard

6. [1999] O.J. L148/5.

7. [1999] O.J. L175/49.

in the event of competing interests. In common with the E.U./U.S. Agreement these include the relative significance of the anti-competitive activities in each party's territory and the degree of conflict or consistency between the enforcement activities and the other party's laws or policies, but the E.U./Canada Agreement goes a little further and mentions: where relevant assets are located; whether persons will be placed under conflicting requirements by the parties; and the degree to which a remedy, in order to be effective, must be carried out within the other party's territory.

In December 1998 the Commission adopted a new *hearings regulation* replacing Regulation 99/63 and equivalent legislation in the transport sector so that there is now just one hearings regulation for all cases.[8] The main practical change is that procedural rights are differentiated and structured as between (1) parties to which the Commission has addressed objections, (2) rights of applicants and complainants,[9] and (3) rights of other third parties. The Regulation is seen as one of various steps the Commission is pursuing to streamline the processing of cases.[10] In December 1998 the Commission also adopted a regulation modifying the form and content of *applications/notifications in the transport sector* (essentially aligning these procedures on Regulation 17).[11] The regulations came into force on February 1, 1999.

In May 1999 the Commission adopted a regulation, *1083/1999*, removing agreements on joint *planning and co-ordination of schedules*, and *agreements on joint operations* from the air transport block exemption Regulation 1617/93.[12] The Commission considers that such agreements, "particularly in the case of alliances", involve a wider commercial consultation on tariffs which should be dealt with by individual exemptions. Otherwise, the block exemption is extended until June 2001 for tariff consultations for passengers with baggage and slot allocation at airports while the Commission further reviews their impact.

Proposals

Vertical restraints reform—the final phase

During the year the Commission has been preparing its draft block exemption on vertical restraints and related guidelines ("the Draft Guidelines").

Box 3: Legislative Developments (proposed/coming)

- Draft vertical restraints block exemption
- Draft vertical restraints guidelines
- Insurance block exemption report (aviation pools)
- Liner shipping consortia block exemption report
- Horizontal agreements review (still coming)
- White Paper on modernisation/decentralisation of E.C. competition enforcement

They were published for public comment in September 1999.[13] The draft block exemption opts for a single 30 per cent market share cap (instead of two levels of cap as discussed last year) and restructures last year's discussion draft accordingly. Of particular interest in the Draft Guidelines is the Commission's position on *agency* agreements.

Draft block exemption

The main features of the draft block exemption ("BE") can be summarised as follows: First, the BE follows the expected format of applying to *all vertical agreements, i.e.* between undertakings at different levels of the production or distribution chain for the purchase and resale of goods and services (with certain defined exceptions).[14]

Secondly, the BE reflects the *"graded" approach to competition review, e.g.* that restraints in more competitive markets are not considered serious and can be exempted by category, but where a supplier starts to have significant market share, and therefore may have market power, more individual review is required. Agreements where the market share of the supplier is not more than *30%* are covered by the BE[15]; in the case of exclusive supply obligations, the *buyer's* market share is considered (insofar as the latter may have market power through its own position or the cumulation of several distributorships). Above this, individual review is required.

Thirdly, the BE does *not* apply, if the agreement contains certain severe anti-competitive vertical

8. Reg. 2842/98 [1998] O.J. L354/18.
9. *e.g.* including access to a non-confidential version of the Statement of Objections.
10. The Commission is clearly concerned about the duration of proceedings and noted, for example, in its latest Competition Report that the average length of proceedings for the 11 formal decisions described therein was four years and ten months (ranging from two years and one month to eight years). 1998 E.C. Commission Competition Report at point 32.
11. Reg. 2843/98 [1998] O.J. L354/22.
12. [1999] O.J. L131/27.
13. Draft block exemption, [1999] O.J. C270/7 (Member States were consulted in April); Draft Guidelines, [1999] O.J. C270/12. The Commission's Communication on the Green Paper on Vertical Restraints was published in November 1998, [1998] O.J. C365/3.
14. Art. 1, and see further, the account of Reg. 1215/1999 above.
15. Art. 2.1.

Box 4: Vertical restraints reform—the final phase

- Draft block exemption ("BE")
  - Black-listed clauses
  - Exclusive territories *or customer groups* protected by active sales bans OK
  - No active/passive sales bans in selective distribution (but location clauses)
  - Non-competes for five years or tenure of owned premises (no "specific brand bans")
  - 30% market share cap
  - Withdrawal of cumulative effect (50% threshold)
- Draft guidelines on
  - Agency (focus on risk of goods *and* the outlet)
  - The interpretation of the BE (*e.g.* software distribution, franchising etc.)
  - Market definition in vertical cases
  - Specific cases (with economics and examples)

restraints, *irrespective of market share.*[16] The "black-listed" restraints are:

— *resale price maintenance provisions* (however, maximum prices can be fixed and non-binding price recommendations can be made, provided these do not result in practice in price fixing or resale price maintenance as a result of pressure or incentives by the parties);

— *certain types of territorial protection*
  - restrictions on active resales into the exclusive territory *or exclusive customer group* allocated by the supplier to another buyer, where such restrictions are imposed by the supplier on its direct buyers (this is a *radical* change insofar as it allows more than one exclusive distributor by territory, so that different distributors can be appointed for different sales channels);
  - restrictions on resales to unauthorised distributors by members of a selective distribution system;
  - restrictions on resales of goods or services which are supplied for the purposes of incorporation; (so "field of use" type restrictions are still not exempt in the distribution context, although they may be allowed in transfer of technology);

— *the restriction of active or passive resales to users by members of a selective distribution system* (so selective distribution, combined with territorial restrictions, is not exempt; this is a provision much debated by franchise systems, as discussed further below);

— *the restriction of cross-supplies between distributors within a selective distribution system*;

— *the restriction of sales of spare parts to independent repairers and service providers*, if agreed between a supplier of such parts and a buyer which incorporates and resells those parts.

As the Commission notes in the Draft Guidelines, this "black-listed clause" approach therefore leaves far greater freedom in most cases to determine what contract provisions businessmen wish to include.

Fourthly, the BE does not apply to certain *specific obligations* contained in vertical agreements.[17] Inclusion of such clauses does not take an agreement outside the BE, but the provisions are not exempt. Those obligations include:

— *direct or indirect non-compete obligations* (i.e. *for more than 80 per cent of a buyer's purchases*) *for more than five years*; unless the buyer's premises are owned by or leased from the supplier, in which case the non-compete clause can be for the duration of the buyer's occupancy (so automatic renewal or "tacit reconduction"—as it is often called—is treated as indefinite duration (as was the case with Regulation 1984/83));

— *post-termination non-compete obligations for more than one year*, where such an obligation is indispensable to protect know-how transferred by the supplier to the buyer; or unlimited in time for know-how which has not fallen into the public domain; (this does not reverse the policy in Regulation 1983/83 against such post-termination non-competes, rather this is designed as a solution to cover some franchise systems which need such protection); it is not clear on the text what the position is on geographical scope on

16. Art. 3.

17. Art. 4.

the current wording (*i.e.* whether the non-compete should only be for the buyer's previous territory or any part of the supplier's distribution network, as with Regulation 4087/88);

— *any direct or indirect obligation imposed on the members of a selective distribution system to sell or not to sell specified brands of competing suppliers* (this does not exclude ordinary non-competes from the BE; it appears that the provision is directed at manufacturers "clubbing together" to exclude certain brands (presumably low-cost products)). The drafting is not yet clear and appears to need some refining.

Fifthly, *the Commission may withdraw the benefit of the BE in individual cases.*[18] This is where vertical agreements have effects incompatible with the conditions in Article 81(3) E.C. in particular where access to the relevant market or competition therein is significantly restricted by cumulative effects of parallel networks of similar vertical restraints practised by competing suppliers or buyers.

Sixthly, *a NCA may withdraw the BE if such effects are identified in the territory of a Member State or in a part thereof* which has all the characteristics of a distinct geographic market.[19] In both cases of BE withdrawal a decision is required.

Seventhly, *the Commission may also declare that the BE will not apply to vertical agreements containing specific restraints in a relevant market.*[20] This is where parallel networks of simiilar vertical restraints cover more than 50 per cent of that market. Such a regulation is only to enter into force six months after its adoption.

The BE is to enter into force on June 1, 2000 and to expire on June 1, 2010. Regulations 1983/83, 1984/83 and 4087/88 continue to apply until then. There is a transitional period for agreements which meet the conditions of the new BE until December 31, 2001.

Draft Guidelines

The Draft Guidelines are divided into various sections. Notably, there are sections on:

— agreements falling outside Article 81(1) E.C. (which focuses amongst other things on agents);
— interpretational guidance on the BE (*cf.* the Commission's previous notice on Regulations 1983/83 and 1984/83);
— market definition issues in vertical cases;
— the framework for analysis of vertical restraints, including much of the general economic discussion in the Green Paper, "general rules" for evaluation of vertical restraints, an outline of methodology and focus on specific vertical restraints with examples.

The Draft Guidelines are some 39 pages of the Official Journal, so only some of the main features will be noted here.

(1) *Agency.* The Commission proposes a new text to replace the 1962 Agency Notice.[21] The central idea is not new, that arrangements with agents whose activities are auxiliary to or integrated with a principal fall outside Article 81(1) E.C. However, such agents are defined narrowly. Arrangements with an agent not in that category are considered as being with an independent trader and fall into the general scheme (*i.e.* the BE).

As in the 1962 Notice, the key factor determining whether arrangements with an agent come within Article 81(1) E.C. is who bears the financial and commercial risks of the transactions concerned. If it is the principal, Article 81(1) E.C. does not apply. The Commission lists various activities which the agent must *not* do, if Article 81(1) E.C. is not to apply—notably, contribute to advertising budgets, maintain stocks at his own risk, or organise a distribution network with market-specific investment in equipment, premises or personnel.[22]

The last requirement is important because it narrows the category of "integrated agents" considerably. It is not enough that the principal takes the risk of the *goods* sold, if the agent still takes the business risk of the *outlet* through which it is sold. The Draft Guidelines also confirm that if Article 81(1) E.C. does not apply, this is the case for *all* the pricing and territorial restrictions concerned.[23] This was a matter of debate in the Draft 1990 Agency Notice, where the Commission seemed to suggest that only active sales bans could be imposed on "integrated" agents. The Draft Guidelines emphasise, however, that if non-compete obligations on an agent lead to foreclosure on the market for agency services they fall within Article 81(1) E.C.[24] It would be useful to clarify this further (*i.e.* how much foreclosure?).

(2) *Software distribution.* Obligations not to infringe copyright (on the reseller or end-user) are

18. Art. 5.
19. Art. 6.
20. Art. 7.
21. Paras 12–21.
22. Para. 17.
23. Para. 19.
24. Para. 20.

covered by the BE (when falling under Article 81(1) E.C.). The same is true for "*shrink wrap*" licences for software (restrictions on use accepted by the end-user on opening such a package and obligations not to make copies and resell software/use software with other hardware[25]). These are welcome clarifications in an area where there has been no full decision yet.

(3) *Know-how/franchising.* Restrictions on know-how related to vertical agreements are also discussed, in particular in relation to *franchising.* The Commission indicates that most franchise agreements are necessary for and directly related to the sale of goods or services. The Commission then lists various clauses which it considers to be so covered, to the extent that they fall within Article 81(1) E.C., such as:

— a non-compete obligation on the franchise;
— a know-how confidentiality obligation;
— a non-exclusive know-how grant-back obligation on the franchisee.[26]

(4) *Internet advertising.* The Commission states that advertising through an Internet website is considered to be a passive sale but that unsolicited e-mail to individual customers is considered as active selling.[27]

(5) *Selective distribution.* The Commission states that dealers in a *selective distribution* system cannot be restricted in the users to whom they may sell. In other words, no active or passive sales ban can be imposed. A non-compete obligation on the selected dealer is still block exempt. However, restrictions can be imposed on the *location* of a dealer's premises which, in many cases, will in fact operate to give dealers territorial protection. This has been a source of much debate in the franchising sector where franchisees, as selected dealers, will now have less contractual protection of their territories. Where a dealer's outlet is mobile (*e.g.* a shop on wheels, or English milk round) an area may be defined outside which the mobile outlet cannot be operated. Selective distribution cannot be combined with an exclusive purchasing obligation, insofar as this may prevent cross-supplies within the network.[28]

(6) *One agreement, several products.* The Commission also deals with the practical issue of a single distribution agreement covering several products with different market shares. In this case, the BE applies to the goods and services meeting the market share cap, but not those over the cap.[29]

(7) *Economic assessment.* Up to this point in the Draft Guidelines most is familiar territory to competition lawyers. There are new principles and policy directions, but the style is similar to the previous Commission notices and distribution guidelines which the text will replace. The same cannot be said for the final section of the Draft Guidelines, where the Commission develops a systematisation of the economic principles applicable to vertical restraints above and below the 30 per cent market share cap.

For many lawyers the economic terminology is less familiar, and needs some absorbing, although most of the concepts were explained in the Green Paper. Helpfully, the Commission outlines what it sees as the *negative and positive effects of the main vertical restraints.*[30] There is also a set of *ten general rules* for evaluating vertical restraints such as "the more the vertical restraint is linked to investments which are relation specific and sunk, the more justification there is for certain vertical restraints".[31]

There is a *suggested methodology* for agreement review, and an *outline of relevant factors for assessment of the application of Article 81(1) E.C. and Article 81(3) E.C. clearance.* For example, if effective market entry is likely to occur within one or two years, barriers can be said to be low.[32] If an undertaking would become dominant through a vertical agreement, exemption is, in principle not possible. However, interestingly the Commission points out that an agreement can still fall outside Article 81(1) E.C., for example, when necessary for the protection of client-specific investment or for the transfer of substantial know-how without which the supply or purchase of certain goods or services may not take place. In short, an interesting linkage of the fourth limb of Article 81(3) E.C. and dominance and the "rule of reason" approach.[33]

The Commission also emphasises that speculative claims of economic benefits will not be accepted: "efficiencies have to be substantiated and must produce a net positive effect".[34]

The Commission then works through *different vertical restraints*, discussing how they should be reviewed with principles and examples. In relation to franchising, the Commission notes that the more important the know-how transferred, the

25. Para. 34.
26. Paras 35–37.
27. Para. 42.
28. Paras 43–45.
29. Paras 58–59.
30. Paras 95–110.
31. Para. 111.
32. Para. 118.
33. Para. 128.
34. Para. 129.

more easily the vertical restraints fulfil the conditions for exemption and that a non-compete obligation on the goods or services purchased by the franchisee is likely to fall outside Article 81(1) E.C., when the obligation is necessary to maintain the common identity and reputation of the franchised network and the franchisor does not have a dominant position. In such cases the duration of the non-compete obligation is irrelevant under Article 81(1) E.C. provided it is not longer than the agreement itself.[35]

These examples need careful review. The openly economic way of analysing distribution agreements is, at first, more complex and will require some learning for many. However, it should be more rewarding in competition terms and a welcome departure from the situation that one did not even have to ask for the market shares of the parties and competitors to assess compliance!

The *immediate task*, no longer to be delayed, is to see how existing agreements are affected, with new liberties for those with less than 30 per cent market share and new constraints for those with higher market share. For many, the change will remain a difficult trade-off because the price of the "effect based" appraisal is the consequence that in different national markets in the European Union, different distribution formats may be permissible.

Coming issues

During the year the Commission has also produced two reports on block exemptions, with a view to future review of the regulations concerned. Thus in May 1999 the Commission issued *a report on the application of the rules on competition to insurance.*[36] The report is essential reading for those involved in this sector, mainly for the discussion of market definition issues and various cases in the Commission's practice in the last six years. The Commission deals in turn with the four categories of agreement covered by Regulation 3932/92: agreements on the calculation of premiums, standard policy conditions, common coverage of certain risks, and safety equipment.

A point of particular interest is the Commission's approach to *institutionalised (as opposed to ad hoc) joint co-insurance or co-reinsurance pools*, where the Commission has focused, in cases exceeding the relevant market share thresholds of the block exemption (10 per cent for co-insurance; 15 per cent for co-reinsurance), on whether a pool is *necessary* to allow its members to operate in a specific market. The Commission notes that insurers need a certain *minimum dimension* of activity in order to be present on a market without incurring excessive risks. In the case of certain catastrophic risks, this may mean that no individual insurer can go it alone. In such cases the pooling of capacity is considered not to restrict competition (*i.e.* to fall *outside* Article 81 E.C.), even though there may not be two in the market. The Commission considers that similar principles apply to non-catastrophic risk, where small insurers may need to group together in institutionalised pools in order to attain the necessary minimum dimension.[37] The Commission has applied this new economic approach to *P&I Clubs* and *aviation risk insurance pools* already, and states that it is now investigating environmental and nuclear risk pools.

It is perhaps an important development at a time of horizontal co-operation review, insofar as it broadens the principle in the 1968 Co-operation Notice that an "*ad hoc*" grouping for a particular purpose, beyond the individual capacity of each member of the grouping, fell outside Article 85(1) E.C. It will be interesting to see whether the principle may be applied *outside* the context of insurance pools (alongside the principles on co-operatives in the *Danish Cooperatives* case).

In January 1999 the Competition Directorate also produced a working paper on Regulation 870/95 *for liner shipping consortia.*[38] Again, the report describes the Commission's practice. The Commission advocates renewal of the block exemption, with some possible minor modifications.

One may also mention the Commission's *review of policy on horizontal agreements.* This seems to have been overshadowed by the vertical restraints review and the White Paper (on modernisation and decentralisation). It appears that the Commission is thinking of a set of horizontal guidelines accompanied, if necessary, by revised block exemptions and/or a general block exemption (with a "black-list" approach, conditions for application and market share caps).[39] The *White Paper on modernisation and decentralisation* is discussed below.

European Court Cases (ECJ and CFI)

Dominance and third party access

In November 1998 the European Court of Justice ("ECJ") made an important ruling concerning access to facilities developed by a dominant firm in *Oscar Bronner v. Mediaprint.*[40] In 1994 an Austrian daily newspaper company, Oscar Bronner ("Bronner"), sought an order under Austrian competition law requiring another, larger Austrian daily newspaper company, Mediaprint, to give it access to the

35. Para. 199.
36. Commission Press Release IP/99/360, May 27, 1999; COM (1999) 192 final.
37. Para. 28 of the report.
38. Published on the DG IV Website.
39. See the White Paper at point 71, described in Part 2; 1998 E.C. Commission Competition Report, points 54–55.
40. Case C-7/97, Judgment of November 26, 1998.

Box 5: Main European Court Cases

• *Bronner*	Rival newspaper cannot force its way into dominant rival's home delivery service, unless not *economically viable* to create alternative (*difficult* is not enough)
• *Baustahlgewebe/Irish Sugar/UPS*	CFI and Commission under a duty not to take too long with proceedings (but some cases just take a long time!)
• *Bagnasco*	Foreign participation in national banking conditions is not "effect on trade" by itself—closer, quantitative appraisal required
• *Steel beams, PVC, Polypropylene, Woodpulp*	Cartel appeals generally rejected
• *Eco Swiss China/Benetton*	Courts enforcing arbitration awards should annul for failure to comply with Article 81(1) E.C.
• *Riviera/UPEX*	Commission complaints have to have a *public interest* and need a *Community level* remedy
• *Albany and Others*	Compulsory participation in exclusive sectoral pension funds pursuant to collective bargaining contrary to Articles 86(1) and 82 E.C., but defensible under Article 86(2) E.C.

latter's nationwide early morning home delivery scheme (the only one in Austria) against payment of reasonable remuneration. Mediaprint had 46.8 per cent of circulation and 42 per cent of total advertising revenues through its daily newspapers *Neue Kronen Zeitung* and *Kurier*. Bronner had 3.6 per cent of circulation and some 6 per cent of advertising revenues in the Austrian daily newspaper market through its paper *Der Standard*. Bronner argued that Mediaprint was in a dominant position and therefore *had* to allow access to its delivery scheme to competing products suggesting that such home delivery was a separate market. Bronner argued that postal delivery in the late morning was not equivalent and that, in view of its small number of subscribers, it would be unprofitable for Bronner to organise its own home delivery service.

The Higher Regional Court of Vienna, sitting as *Kartellgericht*, decided that before considering Austrian law, it needed to resolve whether the conduct of Mediaprint infringed (what was then) Article 86 E.C. and asked whether Mediaprint's denial of access to its rival was, in the circumstances, an abuse.

The ECJ found that the conduct was not an abuse. The ECJ first noted that the national court had to decide whether home delivery schemes constituted a separate market, or whether other methods of distributing daily newspapers, such as sale in shops or kiosks or delivery by post were sufficiently interchangeable to have to be taken into account. The possible existence of regional home delivery schemes, also had to be considered. If there was a separate market in home delivery schemes, not substitutable with regional schemes, then Mediaprint would hold a dominant position.

The Court then focused on whether the denial of access deprived Bronner of a means of distribution essential for the sale of its newspaper. The Court defined a high standard for this assessment (applying *Commercial Solvents* and *Magill*):

— the denial of access had to be likely to eliminate all competition in the daily newspaper market from Bronner;
— the denial had to be incapable of being objectively justified; and
— the home delivery service had to be shown to be indispensable to Bronner so that there was no actual or potential substitute.

Holding that this was "certainly not the case", the Court noted that other methods of distribution for daily newspapers existed, even though they might be less advantageous. There were no technical or economic obstacles making it impossible or even unreasonably difficult for another publisher alone, or in co-operation with others, to establish its own nationwide home delivery service. Moreover, in arguing that the creation of an alternative system was not a realistic potential alternative, Bronner had to establish that it was not economically viable to create a second home delivery scheme with a comparable circulation and could not argue that it could not do so just because of its smaller circulation. Not surprisingly, the case has been heralded as encouraging innovation and investment by dominant companies.

Unduly long proceedings

This issue has come up in various cases this year (both at Court and Commission level). In December

1998 the ECJ essentially dismissed the appeal brought by *Baustahlgewebe GmbH* ("BStG") against the Court of First Instance's ("CFI") judgment upholding fines on BStG for its participation in the *Welded Steel Mesh* cartel. However, the ECJ reduced the amount of the fine imposed by ECU 50,000 in view of the excessive duration of the proceedings before the CFI.

The duration of the proceedings before the CFI had been five years and six months. The case had involved 11 appellants and three different languages. The ECJ emphasised that the sort of close examination of complex facts which the CFI had to do took some time. Nevertheless, the ECJ found that the period of 32 months between the end of the written procedure and the decision to open the oral procedure, and the period of 22 months between the close of the oral procedure and the delivery of the CFI's judgment could only be justified by exceptional circumstances which did not exist in the case.[41]

The issue also came up in October 1999, in *Irish Sugar*, when the CFI essentially upheld the Commission's decision but reduced the fine from ECU 8.8 million to 7.8 million.[42] In a judgment of some 72 pages the CFI rejected almost all of the various challenges raised by Irish Sugar, finding only that the Commission had failed to show that Irish Sugar had granted selectively low prices to the customers of an importer of French sugar for two years as the Commission had found in its decision.

In the process, the CFI upheld the Commission's claim that Irish Sugar jointly held a dominant position with Sugar Distributors Ltd, a related company. The CFI rejected Irish Sugar's view that companies in a vertical relationship could not jointly hold a dominant position[43] and the idea that Irish Sugar's inability to afford a general price reduction could justify the selective nature of its border rebates (to do otherwise would have "made a dead letter" of the prohibition in Article 86 E.C.). The CFI also confirmed that the grant of target rebates by a dominant company with the effect of building up stocks with customers amounted to a restriction on the normal development of competition.

The CFI reviewed the overall length of the Commission proceedings, which had occurred in three phases and amounted to some 80 months in total (September 1990 to May 1997), to see if it could be said that there had been a lack of diligence by the Commission in pursuing the case. The CFI found that there had been none. Although the procedure had taken a long time, the Commission had adopted many measures during that period (including three Statements of Objections and dealing with various complaints).

Standard banking conditions and effect on trade

In January 1999 the ECJ made an important ruling concerning the application of E.C. competition law to standard banking conditions in *Carlo Bagnasco v. Banca Popolare di Novara*,[44] concerning both what constitutes a restriction and the appreciability of "effect on trade" in financial services cases.

The case arose in the context of proceedings for the repayment of loans granted by two Italian banks. Bagnasco had defaulted and was being required to repay the debt balance (subject to some 17 per cent interest). Calls were also being made on related guarantees. Bagnasco and his sureties argued that the claims were unenforceable insofar as they were in pursuit of standard conditions agreed by Italian banks, which were, in effect, concerted practices for the determination of interest rates contrary to (what were then) Articles 85 and 86 E.C.

The Genoa District Court referred various questions concerning the standard banking conditions that the Italian Banking Association imposes on its members when contracts are concluded for current account credit facilities and the provision of general guarantees. In particular, the Court wished to know whether a banking rule allowing banks to change the interest rate, could be a restriction on competition effecting trade between Member States.

The Court found that such a rule was *not* an appreciable restriction. The opening of a current account credit facility is a banking transaction which, by its nature, is linked to the right of the bank to change the agreed rate of interest by reference to factors such as the conditions for refinancing of the loans by banks. The right of the bank means that bank interest rates may increase but also decrease. Since, in this case, any variation in interest rate depended on *objective* factors, such as changes occurring in the money market, a concerted practice to exclude the right to adopt a fixed interest rate could not appreciably restrict competition. Standard banking conditions which envisaged that banks would vary interest rates were not restrictions within the meaning of Article 85(1) E.C.

The Court also asked whether standard banking conditions relating to the provision of general guarantees to secure the opening of a current account credit facility were caught by Article 85(1) E.C. It was argued that since these rules are binding on the members of the Italian Banking Association, they prevented banks from offering more favourable conditions for the guarantee contract associated with opening a credit facility.

41. Case C-185/95P *Baustahlgewebe v. Commission*, Judgment of December 17, 1998, [1998] E.C.R. I-8417. See also *UPS*, below.
42. Case T-228/97, Judgment of October 7, 1999.
43. Para. 63.
44. Joined cases, C-215/96 and C-216/96, Judgment of January 21, 1999, [1999] E.C.R. I-0135.

The ECJ focused on whether such conditions appreciably affected trade between Member States, and found that they did not. The Court accepted that the banking conditions might restrict competition insofar as they would apply to the subsidiaries or branches of foreign banks of other Member States, and might restrict consumer choice in Italy insofar as such rules applied to the great majority of banks there.

However, the ECJ noted that the Commission had found (in a parallel procedure) that such credit services had very limited impact on trade between Member States and that the participation of the subsidiaries or branches of non-Italian banks was limited. When notified of the standard banking conditions, the Commission considered that the only agreements falling within its jurisdiction were those for current accounts incorporating a foreign currency credit facility and the conditions governing the collection or acceptance of negotiable instruments or letters of credit payable in Italy or abroad. In response to a question from the Court, the Commission had explained that recourse by the main customers of foreign banks (*i.e.* large undertakings and foreign economic operators) to such credit facilities was not great and that this was not a decisive factor for foreign banks when deciding whether or not to establish in Italy. Such customers rarely used these contracts. There was no other evidence before the Court suggesting that the restriction of customer's choice, because of the standard condition on guarantees, appreciably affected trade between Member States. It followed that the practices concerned "taken as a whole" did not infringe Article 85(1) or 86 E.C.

The case has provoked discussion because the conditions, effectively excluding fixed interest rates, *do* appear to be restrictions on banks as undertakings. Moreover, this appears to have been the position of the Bank of Italy when the Commission declined jurisdiction over the relevant terms. It is argued that the Court has taken a narrow view of "effect on trade". Others argue that, on the contrary, the previous practice was too wide and welcome the detailed assessment here, as a more realistic division of jurisdiction between E.C. and national competition law. The Court's reasoning has been applied by the Commission already, as regards the *Dutch banks acceptance giro system*, described below.

Cartel appeals

In March 1999 the CFI ruled on various appeals against the *steel beams cartel* decision,[45] in which the Commission imposed fines of some ECU 104 million for an exchange of confidential information, price fixing and market sharing through the so-called "*Poutrelles Committee*".[46]

The context was Article 65 of the European Coal and Steel Treaty. Conscious perhaps that it had taken some five years to rule on the case, the Court noted that it had received some 11,000 documents from the Commission. The Court reduced some fines, partly finding that the practices concerned had lesser anti-competitive effects and partly finding that the Commission had incorrectly characterised the conduct of some undertakings as recidivist when the undertakings in question had not been penalised for similar infringements before they acted. The reductions in fines ranged from 9.47 to 37.5 per cent.

A feature of the case was the claim that the Commission had been aware of, and indeed involved in, the infringements. The CFI rejected it, finding instead that the undertakings had set up a screen to protect themselves from the scrutiny of the DG III officials responsible for monitoring the market. In other words, the cartel had submitted relatively general and imprecise information to the Commission, whilst engaging in very precise and detailed discussions, individualised at the level of the undertakings in pursuit of their anti-competitive agreements. The existence and content of these agreements had been hidden from both DG III and DG IV.

As regards recidivism, which was a major feature of the Commission's press announcements when the decision was taken, the CFI noted that this implies that a person commits a fresh infringement after he has been penalised for similar infringements. The only relevant "previous" case was that of a sister company being penalised in the *Stainless Steel* cartel decision. Yet most of the infringement period in question was prior to that decision. That decision could not therefore be a ground for increasing fines on the basis of recidivism.

In April 1999 the CFI considered the second round of appeals in the *PVC cartel* cases.[47] It will be recalled that the Commission's first decision was annulled for procedural errors. The Commission adopted a new decision in 1994 against 12 of the 14 producers concerned by the initial decision, correcting the relevant procedural irregularities in the adoption and authentication of the decision. The 12 undertakings then appealed again arguing, amongst other things: (1) that the Commission was not entitled to adopt a new decision because the issues were *res judicata*; (2) that they were being fined twice for the same offence; and

45. CFI Press Release No. 14/99; representative judgment, Case T-141/94 *Thyssen Stahl v. Commission*, Judgment of March 11, 1999.

46. See [1995] 2 I.C.C.L.R. 60.

47. Joined Cases T-305/94, T-306/94 and Others *Limburgse Vinyl Maatschappij NV and Others v. Commission*; CFI Press Release No. 22/99 of April 20, 1999; Judgment of April 20, 1999.

(3) that the Commission should also have restarted the administrative procedure, not just re-signed its decision properly.

The CFI rejected such claims. On the substantive infringement, the CFI upheld the Commission's decision but reduced fines imposed in three cases. In one case (*Société Artesienne de Vinyle*), the CFI found that participation in the cartel was only proved for a shorter period than the Commission had found. In two other cases (*ICI* and *Elf Alochem*), the CFI found that, in allocating the fine proportionally according to each undertaking's market share, the Commission had attributed too high figures to the companies and therefore imposed fines which were too high. The reductions ranged between ECU 265,000 and 950,000.

In July 1999 the ECJ essentially rejected the appeals of polypropylene producers against the CFI's confirmation of the Commission's decision in the *polypropylene cartel* case (with some reductions of fines).[48] In general, the producers argued that the CFI judgment should be set aside, because the CFI had refused to reopen the oral procedure and institute measures of inquiry to see if the Commission had properly taken its decision. This approach was inspired by a press conference and comments of Commission agents in the hearing in the *PVC* cases.

The ECJ found that the CFI had not erred in rejecting such requests. In some cases, the plea as to a procedural defect in the Commission's decision had not been raised before the CFI. In any event, the CFI was not obliged to act unless there was sufficient factual evidence put before the Court as to the alleged procedural irregularity (which was not the case). The sort of indications raised as to alleged Commission practice could not be regarded as decisive for determination of the case before the CFI.

In September 1999 the ECJ upheld the Commission's appeal against the CFI judgment in the *Assi Domän Kraft* case.[49] Nine of the Swedish addressees of the Commission's *Woodpulp* decision did not appeal that decision. When the ECJ annulled most of the Commission decision, the companies applied to the Commission requesting the refund of the fines which they had paid, even though they were not addressees of the ECJ judgment. When the Commission rejected that request, they appealed to the CFI and succeeded. The CFI ruled that the Commission had a duty, under (what was then) Article 176 E.C. (now Article 233 E.C.) and the principle of good administration, to review the legality of the *Woodpulp* decision insofar as it applied to the Swedish addressees, in order to decide whether it was appropriate to repay the fines.

The Commission appealed arguing, amongst other things, that such an approach made a mockery of the two-month time-limit in (what was) Article 173 E.C. (now Article 230 E.C.). The ECJ agreed, citing various situations in E.C. law where a party has been denied the ability to plead the illegality of a Community measure *after* the expiry of the deadline to challenge it. The ECJ held that the principle of legal certainty underlying those situations meant that the Commission was *not* required to review its decision for those who had not chosen to appeal it. Moreover, judgments had *individual* consequences, "the authority of a ground of a judgement annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgement cannot therefore have decided anything whatever". The ECJ therefore set aside the CFI judgment and gave final judgment in favour of the Commission.

Oligopolistic dominance

In March 1999 the CFI gave judgment in *Gencor/Lonhro*.[50] This was on appeal from a Commission decision which prohibited a merger between Implats (controlled by Gencor) and Lonhro. The Commission found that this merger would have led to a collective dominant position in the world platinum and rhodium market. The judgment is mentioned here since it develops the law on what constitutes "oligopolistic dominance", which may also apply to Article 81 and 82 E.C. cases.[51]

The main point to note is that the CFI rejected the argument that for collective dominance *structural links* had to exist between the market players. *Economic links* could be enough.[52] Notably, anti-competitive market structures could arise where each undertaking might become aware of common interests and cause prices to increase, without having to enter into an agreement or resort to a concerted practice.

Competition and arbitration

In June 1999 the ECJ gave judgment in *Eco Swiss China v. Benetton* on the old issue of the extent to which competition law must be taken into account in arbitration.[53] The case involved an eight-year licensing agreement between Benetton, Eco Swiss and Bulova whereby Eco Swiss was granted the right to manufacture watches and clocks with the words "Benetton by Bulova" for sale by Eco Swiss and Bulova. Dutch law and arbitration was provided for. Three years before expiry of the agreement, Benetton gave notice to

48. Case C-49/92P *Commission v. ANIC*; Case C-51/92P *Hercules v. Commission*, and other judgments of July 8, 1999.
49. Case C-310/97P, Judgment of September 14, 1999.
50. Case T-102/96, Judgment of March 25, 1999.
51. See *e.g.* the *P&O/Stena* case, described in Part 2.
52. Paras 273–277.
53. Case C-126/97, Judgment of June 1, 1999.

terminate. The arbitrators made two awards (a preliminary one, then a final one) requiring Benetton to pay some U.S.$23.7 million to Eco Swiss and U.S.$2.8 million to Bulova. Benetton then applied to the Dutch courts for annulment of the awards on the basis that they were contrary to public policy, *i.e.* the licensing agreement was null and void as contrary to Article 81 E.C. The agreement had not been notified, nor was it covered by a block exemption. Neither the parties nor the arbitrators had raised such an issue before. The Dutch Supreme Court noted that in Dutch law a failure to apply a prohibition laid down in competition law is not generally regarded as contrary to public policy so that an arbitration award had to be denied enforcement, but asked if the same were true in Community law for Article 81 E.C.

The ECJ held that Community law was different. It is in the interest of efficient arbitration to limit review of awards and to annul them only in exceptional circumstances. However, respect for the E.C. competition rules was a fundamental provision in the E.C. Treaty. Where national law provided for a court to annul arbitration awards for failure to comply with national rules of public policy, a court should also annul an award for failure to comply with Article 81(1) E.C. A national court asked to determine the validity of an arbitration award should therefore examine whether such an award complied with Article 81(1) E.C. and, if necessary, refer questions of interpretation to the ECJ. Moreover, the Court held that Article 81 E.C. is a matter of public policy for the purposes of the New York Convention of June 10, 1958 on Recognition and Enforcement of Foreign Arbitral Awards.

The Dutch Supreme Court also asked if domestic rules of procedure on the time-limits for annulment of an arbitration award should not be applied, if to do so would prevent review of the award for compliance with Article 81 E.C. The ECJ found not. The first award could have been appealed within three months, which was not an excessively short period. Domestic procedural rules on appealing arbitration awards are justified by basic principles of legal certainty and *res judicata*. Community law did not therefore require a national court not to apply such procedural rules, even if that were necessary to assess whether an agreement otherwise held to be valid was void under Article 81 E.C.

Treatment of complaints

There have been various European Court cases on the Commission's handling or rejection of complaints. Thus, in January 1999, the CFI rejected an action by *Riviera Auto Service Établissements Dalmasso ("Riviera") and Others* against the Commission's decision to close an investigation into whether VW France's distribution agreement was outside Regulation 123/85 and infringed Article 85(1) E.C.[54] The Commission had originally taken up Riviera's complaint, sent a questionnaire to some 260 dealers, issued a Statement of Objections and held an oral hearing. The Commission then rejected Riviera's complaint considering that some of the provisions concerned did not restrict Article 85(1) E.C. and that it was not in the Community interest to pursue others because the difficulty of proof was disproportionate to the Commission's resources. The Commission added that it was addressing the issues through legislation, the new block exemption, Regulation 1475/95.

The CFI upheld the Commission's view on the compatibility of the distribution agreement with Article 85(1) E.C. The CFI also supported the Commission's rejection of the complaints, confirming that where the Commission shares jurisdiction with national courts, a complainant does not have a right to a decision under (what was then) Article 189 E.C. (now Article 249 E.C.).[55] The Commission was also justified in urging the complainants to seek redress in the national courts where the issues involved still required an assessment under national law (*i.e.* of the conditions of the agreement, the consequences of nullity and the refusal to sell based on an agreement which would be partially void). Nevertheless, in view of the Commission's "radical change" of view, the applicants were not required to pay the Commission's costs.

This is not a happy story. Unfortunately, it is just one of a whole series of court actions in recent years by frustrated garage owners concerning car distribution complaint rejections. Clearly, the Commission *can* change its view of a case (and indeed must do if the evidence shows that is correct). However, one can understand the complainant's dissatisfaction at being told that *legislation for the future* solves the infringement of which he is a victim. It is to be hoped that the Commission's new idea of a *notice on complaints* (setting out more clearly where complainants should go, when) may reduce some of the wasted effort, frustration and delay.[56]

In March 1999 the ECJ upheld an appeal by *l'Union Française de l'Express ("UFEX"), DHL and Others* against the CFI's judgment, upholding the Commission's decision not to investigate an alleged infringement of Article 86 E.C. by the French Post Office, *La Poste*.[57] UFEX had claimed that La Poste had abused its dominant position by allowing its subsidiary SFMI-Chronopost to use its infrastructure on unusually favourable terms, thereby extending its dominant position in the

54. Joined Cases T-185/96, T-189/96 and T-190/96, Judgment of January 21, 1999.
55. Para. 48.
56. See discussion of the White Paper below in Part 2.
57. Case C-111/97P, Judgment of March 4, 1999.

basic postal market to the associated market in international express mail. The Commission argued that the infringements were no longer ongoing, had been addressed by Community Postal Services Guidelines and in the *GDNet* merger control case, and that therefore the complaints were only intended to serve UFEX's individual interests.

The ECJ upheld the CFI's position on most points, but found that the CFI should have examined whether past Article 86 E.C. infringements (concerning cross-subsidisation of Chronopost) had ongoing effects requiring Commission intervention. (UFEX argued that, even if cross-subsidies had ceased, they *had* affected competition and necessarily continued to distort it.) The CFI had also failed to seek production of a key letter from the Commissioner for competition, which allegedly illustrated the Commission's misuse of power (the letter allegedly showed that the Commission was publicly concerned for competition in the postal sector, but in reality yielded to pressure from certain states and postal institutions). The CFI had also incorrectly found that the complaint served essentially to make it easier for the complainants to show fault in order to obtain damages in the national courts. If the anti-competitive effects complained of continued, there might have been a Community interest in the Commission pursuing the case.

Again, this is not a happy story. UFEX's complaint was filed in 1990 and, nearly ten years later, the matter is still not resolved. Proving a case such as this, where the law is relatively new, in national courts would be a daunting task. The idea of seeking parallel remedies, a Commission ruling, followed up by a claim for damages does not, at first sight, seem an unreasonable line for the victim of the alleged practice to take, although it is probably more focused to just go into the national court.

In September 1999 the CFI ruled on the action brought by *UPS* against the Commission's failure to act on a complaint UPS had filed, in 1994, against alleged infringements by *Deutsche Post* of Article 86 E.C.[58]

UPS had been pushing for the Commission to act since 1994 with "Article 175 EC letters" in November 1996 and October 1997. In February 1998, in response to a Commission letter indicating that it was not proposing to pursue the investigation (an "Article 6 letter" under Regulation 99/63), UPS offered its observations. Four months later, UPS sent another Article 175 E.C. letter summoning the Commission to act. A further two months later, UPS filed at court arguing that the Commission had failed to act because it had neither initiated the procedure, nor adopted a definitive decision rejecting the complaint.

58. Case T-127/98, Judgment of September 9, 1999.

The CFI agreed that this was an infringement of Article 175 E.C. In accordance with principles of good administration, the Commission's definitive decision to initiate the procedure or not had to be taken within a reasonable time after receipt of the complainant's observations. Given that the Commission was in the final stage of its procedure, it should have been able to make that decision within the four- and six-month periods concerned here. What the Commission could not do when summoned to act was simply to resume its examination of the complaint (which it had already had some 47 months to do).

Dutch sectoral pension funds

In September 1999 the ECJ ruled in three similar cases that the Dutch system of compulsory affiliation to sectoral pension funds granting supplementary pensions to employees is compatible with E.C. competition law.[59] The context was proceedings brought by three undertakings which challenged orders issued by sectoral pension funds refusing exemption from participation and demanding payment of unpaid statutory contributions.

Under Dutch law, employers, although in principle free to decide whether or not to offer supplementary pensions to their employees, are often in practice obliged to affiliate their employees to a compulsory sectoral pension fund. Those funds are set up by collective agreement between management and labour in a particular sector of industry. The Dutch State then, at the request of a group of employers' associations and trade unions, makes affiliation to the scheme compulsory for all persons belonging to the sector of the economy concerned.

The plaintiffs contended that the Dutch system infringed either Articles 3(g) and 10 E.C. in conjunction with Article 81 E.C., or Article 86(1) E.C. in conjunction with Article 82 E.C. (the former Articles 90 and 86). In particular, it was argued that the collective agreements between management and labour to set up a sectoral pension fund and jointly to apply to the authorities to make affiliation to the fund compulsory for all persons belonging to that sector should be prohibited under Article 81(1) E.C. The Dutch State, in creating the legislative framework for compulsory affiliation and in making affiliation compulsory at the request of the representatives of employees and employers, infringed Articles 3(g), 10 and 81(1) E.C. by encouraging and reinforcing the effects of an agreement contrary to Article 81(1) E.C.

59. Case C-67/96 *Albany International*, Judgment of September 21, 1999; Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelsonderneming BV*, Judgment of September 21, 1999; Case C-219/97 *BV Maatschappij Drijvende Bokken*, Judgment of September 21, 1999.

Moreover, the plaintiffs argued that the Netherlands infringed Articles 86(1) and 82 E.C. in granting the sectoral pension funds an *exclusive* right to operate a supplementary pension scheme. The funds abused their dominant position by providing inadequate services and impeding undertakings to benefit from global pension coverage scheme by an insurance company.

Following preliminary references by three Dutch courts, the ECJ ruled that agreements concluded within formal collective bargaining between employers and workers, which pursue objectives of social policy protected by the Treaty, fall *outside* the scope of Article 81(1) E.C. The Treaty also has specific social provisions. As a result, a Member State does not infringe Articles 3(g), 10 and 81 E.C. in making such an agreement compulsory for all undertakings belonging to that sector. The ECJ then ruled that the funds in question were undertakings and that the grant of an *exclusive* right to operate a supplementary sectoral pension scheme resulted in an abuse of the funds' dominant position (accepting that such funds were not the most efficient). However, the system was justified under Article 86(2) E.C., in consideration of the social mission of general interest carried out by supplementary pension schemes.

Commission decisions

Cartels

Box 6: Cartel

- 15–20 case handlers in revived cartel unit
- *Greek and Italian ferries fines*
  - the "lure of competition" and the "slippery slope"!
  - five versions of fines tables
- *Europe Asia Trades Agreement*
  - "Stability" and shipping
  - effect on trade when exporting
- Various investigations: *bank charges*, *newsprint* etc.
- The international dimension

Revived cartel unit

In December 1998 the Commission revived the idea of a *special cartel unit* in DG IV for the investigation and prosecution of cartels. In its 1998 Competition Report, the Commission indicates it has assigned some 15 case handlers to this unit, which should eventually comprise 20 officials with significant experience in investigations of this type.[60] The initiative appears partly inspired by the Commission's "reorientation" in the White Paper, partly by the large number of recent cases and partly by renewed international focus on challenging cartels (*e.g.* in the OECD and the United States.[61] In October, Maurice Guerrin, Head of the Commission's Cartel Unit, indicated that the Commission was receiving significant assistance from companies involved in cartels. He stated that the Commission had received co-operation offers for "two-thirds of the around 20 cases pending".[62]

Greek and Italian ferries

In December 1998 the Commission imposed fines totalling ECU 9.12 million on six *ferry companies based in Greece and one in Italy* for operating a price-fixing cartel on routes between Greece and Italy.[63]

The case arose from a complaint in 1992 that ferry prices on these routes were very similar. The practices concerned the three main routes between Greece and Italy from 1987 to 1994. The Commission raided the companies concerned and found extensive evidence, mainly messages and telexes between operators seeking to establish agreed price levels. There was fairly explicit wording, including one comment that certain car importers were "endeavouring to lure our companies into tariff competition ... we propose to you that we should stick to a common policy which will keep us off the slippery slope",[64] and that one 15 per cent price increase would give one participant "an immediate yield of new net receipts in the order of GRD 600,000,000 annually".[65]

Meetings and co-ordination were found to have continued *after* a Commission request for information, albeit in modified form. The defendants raised three main arguments:

— the practices had been imposed by the Greek Ministry for the Merchant Navy, "the agreement on prices was a government-led and supervised cartel";
— the parties had, in fact, still competed, through discounts and on-board services not covered by the agreements; and
— prices on Greece–Italy routes were lower than those on other international routes in the Community.

60. 1998 E.C. Commission Competition Report, point 67; Commission Press Release, IP/98/1060 of December 3, 1998.
61. The United States has also suggested that it would be useful to have a focal point in the Competition Directorate for co-ordination purposes.
62. Reuters, October 21, 1999.
63. [1999] O.J. L109/24.
64. Para. 27.
65. Para. 38. Interesting evidence in the event of a damages claim!

The Commission contacted the Greek authorities concerning the first argument. It appears that there *had* been some recommendations concerning Greece–Italy maritime lines, in particular in relation to public service obligations and the transport of fresh agricultural produce. The Greek Government was concerned that the route be viable and wished to avoid any price war which could possibly hinder the smooth promotion of export and import trade. However, the Government only fixed tariffs on *internal* routes, not the international part of maritime lines. The Commission therefore rejected the argument that the companies were *required* to fix prices, but reduced fines on the basis that the companies might have been in some doubt as to their position.

As regards proof of the cartel, the Commission followed its now standard approach of aiming to demonstrate the existence, operation and main features of the collusion and then assessed (1) whether there was credible and persuasive proof to link each company to the common scheme and (2) for what period. The Commission considered the evidence clear for most of the companies concerned, but not strong enough for two companies which were only mentioned once in other companies' documents.

The Commission's assessment of fines reflects the detailed provisions of the Commission's guidelines on fines and notice on co-operation. The Commission took into account the intentional nature of the infringement, its limited actual impact on the market, the low level of fares, the small amount of traffic concerned, the size of the operators,[66] the duration of the infringement, the fact that one company acted as instigator of the cartel and attempted to hide the cartel after the Commission's Article 11 letter, the doubt as to whether the Greek Government's domestic price-fixing practice applied, the "10% of turnover" limit and that one company had provided documents confirming the infringement to a significant extent. In the process, the fines tables went through *five versions*. Fines ranged from ECU 0.26 million to ECU 3.26 million.

Europe Asia Trades Agreement

In April 1999 the Commission took a decision prohibiting the *Europe Asia Trades Agreement* ("EATA").[67] This was an agreement between shipping lines to manage capacity on scheduled maritime transport services for containerised cargo from Northern Europe to the Far East and to improve revenue "to a level consistent with a reasonable rate of return on investment and to maintain the viability of such services in the future". The parties agreed not to use some 17 per cent of the space on their vessels to reduce excess of supply over demand. The Commission objected both to the capacity non-utilisation programme and the related exchange of confidential information, given the high market shares of the participants to the EATA (some 86 per cent of the relevant market in 1991).

The parties terminated the agreement in 1997, but the Commission chose to take a full decision partly to show its reasoning, partly unless similar practices or arguments should be put forward again, and partly for third parties, who might seek redress before a national court (prompting speculation as to whether some of the shippers concerned are suing for damages).

Three particular features of the decision are of particular interest. First, there is an extensive discussion of what sort of "stability" should be accepted in shipping cases.[68] The shipowners argued, amongst other things, that without the agreement there would be a contraction in capacity, which would mean there would be insufficient capacity to deal with any subsequent increase in world trade and that the existence of potential competition guaranteed efficient services at competitive prices.

In a detailed analysis of the claimed "inherent instability" of the shipping industry and "destructive price competition", the Commission rejected the applicability of such arguments to the liner shipping industry, making it clear that agreements to achieve a "stability" beyond that endorsed in Regulation 4056/86 would normally not be accepted and emphasising that such arguments apply equally to other capital intensive industries.

Secondly, the decision appears to be part of a wider policy to increase competition on major world trade routes.[69] The Commission emphasises that it has also taken action against agreements on Trans-Atlantic routes and the American authorities have intervened as regards Trans-Pacific routes.

Thirdly, it may be noted that this was an agreement affecting *exports* from the E.U. ("Eastbound" traffic). The Commission discussion of effect on trade is therefore worth noting, for at first sight the Commission's jurisdiction is not obvious.[70] The Commission does not rely on findings of *actual* effect on trade, but rather *potential* effects. However, as in the *West African Shipping Conference* and *TACA* cases, what the Commission does is to find such effects on the provision of transport and intermediary services within the Community, not the market for exports to third countries.[71] The

66. Although it still fined two SMEs.
67. [1999] O.J. L193/23; Commission Press Release IP/99/313 May 10, 1999.
68. Paras 104–142.
69. Paras 29–33.
70. See paras 157–175.
71. See *e.g. TACA* [1999] O.J. L95/1, at paras 386–396.

EATA agreement is found to have reduced competition between shipping lines in seven Member States, thereby influencing the trade flows *within* the Community, to have affected competition between ports, and to have affected competition in the services ancillary to the supply of maritime transport services (*e.g.* freight forwarding). The EATA also had an indirect effect on the pattern of trade in the Community, since it may have affected the way goods were exported to third countries.

One senses that there may have been wider considerations at stake (such as ensuring the competitivity of European exports to the Far East), and the facility of the E.U. being the enforcer (rather than a series of Far Eastern anti-trust agencies). The Commission also *had* to act because of the parties' notification.

Other cases/investigations

During the reference period, the Commission decisions in the *Pre-insulated Pipe Cartel*,[72] *British Sugar and Others*[73] and *TACA*[74] have been published.

During the year there have also been reports of *various cartel investigations*. Thus, at the end of November 1998 the Commission was reported to have raided companies in Germany, France and the United Kingdom concerning an alleged price-fixing cartel in the *plasterboard* industry.[75] In April 1999 the Commission was reported to have sent Statements of Objections to companies alleged to have participated in a cartel for the supply of *newsprint paper* between 1989 and 1995, after complaints had been made by publishers of collective price increases ranging from 10 to 30 per cent.[76] In May 1999 the Commission was reported to be investigating whether European pharmaceutical companies have been involved in a *vitamin* price-fixing cartel, after BASF, Hoffmann La Roche and others settled with the U.S. authorities, for a fine of U.S.$500 million.[77]

In February 1999 the Commission raided banks in France, Germany, Italy and Spain and, in October 1999, raided banks and an exchange office in the Netherlands, Belgium and Ireland concerning alleged collusion on *bank charges for currency exchange cash conversion and money transfers*.[78] In September 1999 there were also reports that the Commission was pursuing its investigation into *Austrian banks*.[79] The allegations appear to relate to meetings to discuss interest rates, commission charges and banking fees between 1994 and 1998.[80]

A key issue developing again is the extent to which competition authorities can co-ordinate their efforts against *international cartels*. There have been further discussions on the subject at OECD level focusing, amongst other things, on confidentiality and the exchange of information. While such co-operation may be advocated in increasingly global cases, Europeans continue to be concerned that doing so may lead to unfair sanctions where, for example, an executive in an E.U. company acts, thinking that the risk involved is a possible fine and (single) damages suit for his company, and then finds that he is faced with *personal criminal* charges in the United States, and his company may face *treble* damage suits. This is what prompted European blocking statutes some years ago. Certainly, in view of recent U.S. activism in this area, companies should now check very carefully on such exposure if there is any doubt as to whether contemplated activity could be unlawful.

Distribution/licensing

The U.K. beer trade

During the year, the Commission has continued to deal with various notifications and complaints concerning *the U.K. beer trade*. In February 1999 the Commission granted retroactive exemption to *Whitbread's* standard pub leases.[81] In July 1999 the Commission granted retroactive exemption to the standard pub leases of *Bass* and *Scottish and Newcastle* ("S&N").[82]

In all three cases the breweries notified their agreements, since the beer tie commonly used in the United Kingdom (by type of beer) did not meet the requirements of Regulation 1984/83. Notifications were made in the context of litigation by tied house lessees who claimed that they were being charged prices for their beer supplies which were higher than free house owners. The Commission used powers for retroactive exemption based on the national nature of the relevant agreements under Article 4 of Regulation 17/62 (now widened to cover all vertical agreements). The cases are interesting in particular because of the *assessment of network based foreclosure* which, in the circumstances, was significant but not so cumulatively great as to prevent exemptions.

The Commission found that the agreements concerned fell within Article 85/81 E.C. (as

72. [1999] O.J. L24/1.
73. [1999] O.J. L76/1.
74. [1999] O.J. L95/1.
75. *Financial Times*, November 27, 1998.
76. European Report, April 7 and 21, 1999.
77. Reuters, May 20 and 25, 1999.
78. European Report, February 20, 1999; *Wall Street Journal Europe*, February 25, 1999; Reuters, October 20, 1999.
79. European Report, September 18, 1999.
80. Reuters, September 21, 1999.
81. Commission Press Release IP/99/104, February 11, 1999; [1999] O.J. L88/26.
82. Commission Press Release IP/99/457, July 5, 1999; *Bass*, Decision, [1999] O.J. L186/1; July 19, 1999; *Scottish and Newcastle* Decision, O.J. L186/28, July 19, 1999.

appropriate at the time each decision was adopted). The U.K. national "on-trade" beer market (for beer consumed on pub premises) was foreclosed, mainly in view of the totality of on-trade beer throughput covered by the property tied, managed house and loan tie outlets of all brewers in the United Kingdom and the beer which non-brewing pub companies are obliged to buy from local brewers.

The Commission found that the agreements contributed significantly to that foreclosure. *Whitbread's* tied network accounted for 7.6 per cent of on-trade volume throughput in 1990/1 and 6.1 per cent in 1996/7; *Bass's* tied sales accounted for 18 per cent of volume throughput in 1990/1 and 13.7 per cent in 1996/7. *S&N's* tied sales accounted for 6.16 per cent in 1990/1 and 9.44 per cent in 1997/8. On the other hand, the tied houses of small and regional brewers such as *Greene King/Roberts*[83] fell outside the scope of the E.C. rules because they did not significantly contribute to foreclosure of the U.K. on-trade beer market. The same was true for non-brewing pub companies supplied by more than one buyer.

The Commission accepted that, on average, tied house lessees paid more for their beer than free traders. However, the Commission granted Article 85(3)/81(3) E.C. exemption, because in each case it considered that the differential was justified by other countervailing benefits (ranging from lower rents to professional assistance, capital investment and bulk purchasing rebates). The Commission also considered that a specification by *type* of beer facilitated the introduction of foreign or new brewers' brands. For Whitbread, the exemption was for eight years from the introduction of the lease, for Bass 12 years, and for S&N 17 years.[84]

Cars

This year has been a particularly busy year for competition law in the car sector. In April 1999 the Commission raided offices of *Renault* in Paris, its distributor in Ireland and a number of dealers in relation to claimed restrictions on parallel imports from Ireland to the United Kingdom.[85]

Then the Commission sent two Statements of Objections related to earlier investigations on restrictions on parallel imports. One Statement of Objections was to *Daimler/Chrysler*, alleging restrictions on Mercedes' exclusive dealers in Germany, Belgium, the Netherlands and Spain selling to non-residents between 1985 and 1996 and attempts to prevent competition between dealers in Germany for large orders (for corporate car, rental car and taxi fleets). It is reported that there are ten allegations, seven related to company circulars and three to sales. The second Statement of Objections was sent to *General Motors/Opel* concerning restrictions on parallel imports from the Netherlands to the United Kingdom.[86]

In September 1999 the Commission is reported to have sent a Statement of Objections to *Volkswagen* concerning alleged price fixing when VW launched the new Passat model in Germany.[87] In the same month, the Commission sent some 80 detailed *questionnaires* to those involved in the car distribution trade in order to assess the impact of Regulation 1475/95 on price differentials and service to consumers. Under that Regulation the Commission has to complete a report on these issues at the end of year 2000. Amongst other things, the Commission says it is focusing on the relevance of Internet sales, hypermarkets and whether the link between the distribution of new vehicles and the provision of after-sales service still exists.[88] (This was one of the original grounds for Regulation 123/85, the predecessor of Regulation 1475/95.)

Also in September 1999 the Commission raided the offices of *Peugeot* in the Netherlands, France and Germany, it appears in relation to complaints of restrictions on parallel trade between the United Kingdom, Netherlands and Germany.[89]

All of this has continued industry focus on two issues: (1) the problems of tax differentials and currency fluctuations which account for a significant part of the interest in parallel trading (even after the Euro was introduced, since some countries such as the United Kingdom are not in it); and (2) the prospects for renewal of Regulation 1475/95.

Dutch electrical supplies

In October 1999 the Commission fined the *Dutch Association of Electrotechnical Wholesalers* ("FEG") and its largest member, *Techische Unie* ("TU"), ECU 4.4 million and ECU 2.15 million respectively for operating a system of collective dealing and a system of price co-ordination.[90]

The case arose as a result of complaint by a U.K.-based wholesaler and its Dutch subsidiary. The equipment concerned includes products such as cables, plugs, switches and sockets for electrical systems. The Commission found that there

83. Commission Press Release IP/98/967, November 6, 1998.
84. The Commission also appears poised to take a similar decision concerning *Allied Domecq's* standard pub leases, having published an Art. 19(3) notice in March 1999, [1999] O.J. C82/5.
85. Reuters, April 16, 1999.
86. Commission Memo 99/22, April 26, 1999; Reuters, May 14, 1999.
87. Reuters, September 17, 1999.
88. Commission Press Release IP/99/691, September 20, 1999.
89. Reuters, September 22 and 23, 1999.
90. Commission Press Release IP/99/803, October 26, 1999.

was an agreement between FEG, the association of importers of such products ("NAVEG") and individual suppliers, whereby FEG prohibited NAVEG's members from selling to wholesalers which were not members of FEG. This deprived such wholesalers of their sources of supply and delayed market entry for foreign suppliers. The practice had been prohibited by the Dutch competition authorities, but converted into a more covert gentleman's agreement.

The Commission also found that there had been various measures by FEG and its members to reduce price competition including:

- an FEG decision prohibiting advertising using specially reduced or loss leader prices;
- an FEG decision required members to pass on to customers price increases by suppliers after products had been ordered;
- discussions on prices and discounts at FEG meetings;
- FEG price recommendations to members.

Although these practices were in the Netherlands, they were considered to affect trade between Member States because FEG members accounted for 96 per cent of the Dutch wholesale market for such electrotechnical equipment, and some 30–50 per cent of such equipment sold in the Netherlands was imported.

Other

In May 1999 the Commission approved licensing agreements between *Microsoft and several European Internet Service Providers* ("ISPs") after changes. Notably, provisions were deleted which require the ISPs not to promote and advertise browsers other than Microsoft's Internet Explorer and providing for termination of the ISPs' contracts if they failed to attain certain minimum distribution volumes. The approval only covers the agreements concerned, not the issue of a possible abuse of dominant position by Microsoft, currently being considered in the United States.[91]

In July 1999 the Commission also announced that it was launching an investigation into licensing agreements between *Network Solutions Inc.* and registrars of second-level Internet domain names in the .com, .org and .net domains. There are concerns regarding discrimination, conditions for accreditation, barriers to entry (a performance bond of U.S.$100,000) and rules on domain portability.[92]

In July 1999 the Commission sent a Statement of Objections to *Glaxo Wellcome*, challenging its dual pricing system for sales in Spain.[93] Under this system, which was notified in 1998, products for intra-Community export are sold to Spanish wholesalers at a higher price than those for sale in Spain. The system is designed to prevent Glaxo products being parallel imported to other E.U. markets, notably the United Kingdom where prices are higher. The Spanish authorities have already taken provisional measures to suspend the system. Glaxo argues that the price which it determines is the export price, which is modified to the lower level by Spanish law. The Commission considers that national price legislation cannot justify such a restriction on competition.

Abuse of dominant position

Article 82 proceedings

In July 1999 the Commission imposed a fine of ECU 6.8 million on *British Airways* for paying rebates to travel agents contrary to Article 82 E.C. It may be recalled that some time ago, Virgin complained to the Commission about such practices. Press reports suggest that the Commission objects to BA having offered progressive turnover rebates (*i.e.* more rebate for more sales of BA tickets than the previous year) over the last seven years. We are still waiting for the text of the decision to be published.[94]

According to the latest Competition Report, the Commission also intervened last year against exclusive long-term supply agreements by *Nordion*, a Canadian company which produces and sells Molybdenum 99, a base product for radiopharmaceuticals used in nuclear medicine. It was argued that this made it very difficult for *IRE*, a Belgian competitor, to develop and/or maintain its presence on the market. After receiving a Statement of Objections, Nordion undertook to renounce the exclusivity clauses.[95]

In May 1999 the Commission indicated that it had raided the offices of *Danisco* concerning alleged abuses of dominant position in the Danish sugar market. It appears the issues are the alleged imposition of tied sales on customers and charging excessive prices. The Commission also stated that it was investigating *Agrana*, the Austrian unit of the German sugar producer, Südzucker, having carried out raids in April 1997.[96]

91. Commission Press Release IP/99/317, May 10, 1999.
92. Commission Press Release IP/99/596, July 29, 1999. In January 1999 the Commission also published its decision in *Sicasov*: restrictions in certain standard licensing agreements for the production and sale of seeds protected by plant variety rights not covered by Art. 85(1) E.C. or exempted by analogy to the transfer of technology block exemption; [1999] O.J. L4/27. See Menis, 1999 E.C. Commission Competition Policy Newsletter No. 1, February, p. 31.
93. Commission Press Release IP/99/522, July 16, 1999.
94. Agence Europe, July 15, 1999.
95. 1998 E.C. Commission Competition Report, at point 74. The Commission also co-operated with the Japanese Fair Trade Commission which pursued similar proceedings.
96. Reuters, May 28, 1999.

In July 1999 the Commission raided offices of the *Coca-Cola Company and three of its bottlers*, in Germany, Austria, Denmark and the United Kingdom. According to a Commission Press Statement the object is to investigate whether these companies have been offering target/growth rebates, full range/assortment rebates and exclusivity/delisting payments contrary to Article 82 E.C.[97]

Airport landing charges under Articles 82 (and 86 E.C.)[98]

Box 7: Articles 82/86 E.C.
- *BA travel agents rebates*, various enquiries
- *Finnish and Portuguese airport landing charges*
  - discriminatory discount scales and variations between the domestic and international tariff.

In February 1999 the Commission took two decisions on airport landing fees, designed to follow up on the *Zaventem* case. One case concerned *Finnish airports*, the other *Portuguese airports*.[99] The Finnish case is based on (what was then) Article 86 E.C., the Portuguese case on (what was then) Article 90 E.C. insofar as the Finnish Civil Aviation Administration ("the Finnish Authority") set its own landing fees, whereas the Portuguese Authority charges were fixed by law.

In both cases, the Commission focused on similar issues: the Authorities charged international flights more than domestic flights and they operated discount scales based on the number of flights which, in practice, favoured the locally based airline. As in the *Zaventem* case, the Commission found that there were no economies of scale in the provision of landing services, except for a negligible amount in concentrating invoicing on a customer.

The Commission's position as regards *the discount scales* is that the system gives a competitive advantage to the national airlines (which in principle can be passed on either in the price or other business advantages). The Finnish Authority has agreed that such discounts should be terminated. The Portuguese decision requires the Portuguese Authority to do so, and the Commission is pursuing other actions in other Member States with the same target.

The Commission's reasoning on *price discrimination* relies heavily on *Corsica Ferries II*. In both cases, the relevant authority was giving a discount to domestic traffic of at least 50 per cent. The two authorities had different justifications. In the Finnish case, the authority argued that there were different costs related to the two types of service: runways had to be longer and more durable, and airports had to stay open later for connecting flights. The Commission rejected these arguments on the facts, and considered rather that the system recommended by the International Civil Aviation Organisation should apply, namely that landing charges should be based on the maximum take-off weight (MTOW) of an aircraft so that charges vary simply according to aircraft size.

The Portuguese Authority's justifications related more to Portuguese geography. It was argued that domestic flights serve island airports in the Azores for which there is no alternative to air transport and for which therefore prices have to be lower, and other domestic flights are so short and cheap that the full landing charge would be a disproportionate amount of the overall cost. The Commission reserved its position on the first argument, noting that there was no Community traffic with the Azores (other than with Portugal) and that the discrimination was therefore unlikely to affect trade between Member States. The Commission rejected the second argument noting that some international flights were equally short and therefore should qualify for similar discounts.

It is clear that in these cases there *is* differentiation according to the origin of a flight and that therefore what is happening is that, in a sense, the state or company is using foreign-based income to pay for local service (or to save local taxpayers). Few would argue that this is wrong in terms of building a common market. However, looking at the terms of Article 86(c) one may wonder whether the "competitive disadvantage" element is satisfied. Article 86(c) states that there should be the application of "dissimilar conditions for equivalent transactions, placing the parties concerned *at a competitive disadvantage*". How is the international airline disadvantaged *vis-à-vis* the domestic airline? *Unless*, the international airline also competes on domestic services (or something similar). The Commission quotes *Corsica Ferries II*, including Advocate-General van Gerven, which is clear support for its view. However, whilst one can see that the differentiation in charges is offensive, in the author's view, it is not clear that the elements of Article 86(c) are fulfilled.

Finally, mention should be made of the way that the Commission finds that the different airports concerned, which are often small in terms of traffic, together constitute a "substantial part" of the common market. The Commission applies the reasoning in *La Crespelle* and *Almelo* judgments and considers that the Authorities held a

97. Commission Memo 99/42, July 22, 1999.
98. *Ex* Arts 86 and 90 E.C.
99. [1999] O.J. L69/24 and L69/31. Commission Press Release IP/99/101, February 10, 1999.

"contiguous series of monopolies" in each airport which, being controlled by the same undertaking, represented a substantial part of the common market. Perhaps more ports (air and sea) may be open to Article 82 E.C. arguments than thought previously, if this approach is followed!

In the second half of this article, John Ratliff surveys:

- The many European Commission decisions on *joint ventures and co-operation between companies* in 1999, in sectors ranging from insurance to legal services to telecoms, pay-TV and film distribution and a number of important "rule of reason" findings.
- The Commission's proposals to modernise and decentralise the enforcement of E.C. competition law in its recent "*White Paper*".
- Recent developments on the application of competition rules to sport in E.C. and national competition law (notably as regards the *collective sale of broadcasting rights*).

Major Events and Policy Issues in E.C. Competition Law, 1999—Part 2

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This article contains the final part of the "Overview of Major Events in E.C. Competition Law", published in last month's journal. The article is divided into section (1) joint ventures and co-operation decisions of the European Commission; (2) an outline of current policy issues; and (3) some comments on particular areas, meaning this year sport and books.

Overview of major events (continued)

Joint ventures and co-operation[1]

Box 8: Joint Ventures/Co-operation

- Large number of decisions and 19(3) notices
- *UIP* exemption renewed
- *EPI Code of Conduct*: prohibition on advertising by legal representatives contrary to competition rules
  * *Arduino* case, Italian lawyers tariff
- *TPS/Cégétel +4/Télécom Développement*: co-operation and/or vertical restrictions outside Article 85(1) E.C., where J.V. assists effective market entry against strong competition
- *P&O Stena Eurotunnel*: assessment of competition in a duopoly (transparency, capacity constraints, differing cost structures)
- *Dutch acceptance giro system* did not affect trade (after *Bagnasco*)
- *CECED*: minimum environmental standards for washing machines
- An economic approach to insurance pools —*P & O Pooling and Group Agreements*
  * minimum dimension—1 player
  * quotation procedures—"inherent" restriction (but not with retained claims and own costs)
- Co-operation towards cost-based cross-border mail services—*REIMS II*

UIP film distribution clearance

In July 1999 the Commission issued an Article 19(3) notice for the *UIP Cinema film distribution joint venture* between Paramount, Universal and MGM.[2] This has been a controversial issue for many years because European filmmakers say the J.V. results in too many U.S. films in European cinemas, while American filmmakers suggest that politics is interfering with antitrust analysis. The notice was a little surprising because last year the Commission seemed to be suggesting that the J.V.'s exemption would *not* be renewed. In the end what has happened is that further undertakings have been given by UIP in return for a further five-year exemption.

The J.V. was notified to the Commission first in 1982 and exempted in 1989 for five years. Since 1989 UIP's share of the market for distribution of films to cinemas has fluctuated at around 20 per cent in the various national markets concerned, depending on the films released. In 1997 UIP's market share was 13 per cent and in 1998, 17 per cent.

As part of the Commission's 1989 decision, UIP and its parents (called "Partners" in the notice) gave various undertakings which now have been renewed in a revised form. Thus, UIP and the Partners undertake that they will co-finance and distribute films made by third parties in the EEA (rather than just the films which the Partners produce), where in UIP's commercial judgment they are likely to generate reasonable earnings. They also agree to promote and support the development of European filmmakers and film festivals. Further, UIP and the Partners undertake to set the dates for release of their films through UIP individually (rather than to co-ordinate such releases), and not to bundle their films (or "block book" them as it is called in the film business). UIP also undertakes to support an initiative for an arbitration procedure for disputes between exhibitors (cinemas) and distributors. Films supplied to the Partners' own cinemas will be supplied on an arm's length basis.

For the renewed exemption, UIP and the Partners have agreed on two main new undertakings:

(1) Under the UIP agreements, UIP had a right of first refusal to its parents' films. If UIP decides not to distribute a film, then the Partners can use other distributors. However, the whole Community was considered as a single territory. This has been changed so that each *Member State* is considered a single territory, save

Again, with many thanks to Ingrid Cloosterin and Flavia Distefano for their help in the production of this paper.

1. Not covered by the E.C. Merger Control procedure.
2. [1999] O.J. C205/6.

the United Kingdom and Eire, and Belgium and Luxembourg which are both grouped together. In the previous agreement, since UIP had right of first refusal for the Community as a whole, the parents were not able to distribute their films in those Member States where UIP was not present and no other distributor could be appointed.

(2) The Partners have undertaken to delete a provision in the UIP shareholders' agreement under which *UIP* was to maximise gross receipts for each film distributed. It is argued that this created an incentive for the Partners to seek a co-ordination of their releases (so as not to compete with each other for audiences). However, UIP still commits itself *vis-à-vis each Partner* to maximise the gross receipts of each individual Partner's film. It will be interesting to see what difference this makes in practice.

The Commission accepts that the J.V. involves distribution efficiencies for its parents, allowing them to make more films for release in the Community to the advantage of consumers.

In September 1999 the Commission announced that it had sent UIP a comfort letter.[3] The Commission argues that, even if UIP is a joint sales agency, it has only a limited market effect and certainly does not lead to dominance. The Federation of European Film Directors, FERA, has already protested and asked the new Commission to review this decision, arguing that most of the "European" films distributed by UIP were, in fact, American productions, and that there are still too few European produced films being shown in other E.U. countries than where they were made.

Advertising and legal representatives

In April 1999 the Commission took a decision on advertising restrictions in a code of conduct for representatives before the European Patent Office, the *EPI Code of Conduct*.[4] The case may be important not only for similar codes at European level, but as influential reasoning on similar cases under national competition laws.

The case arose as a result of a complaint by a European patent agent working with a firm of English solicitors. Intervention by the Commission resulted in the notification of the Code of Conduct, and then a decision that various provisions of the Code were outside Article 85(1) E.C. An exemption was granted for certain remaining restrictions, including those on advertising, but *only as a transitional measure until April 2000.*

The case relates to the Code of Conduct of the Institute of Professional Representatives (the "EPI") before the European Patent Office. The EPI was set up by the European Patent Organisation which was itself set up by the European Patent Convention.

The EPI has a regulation on discipline for professional representatives which sets out various rules as to what such representatives can and cannot do, and is enforced by a Disciplinary Board from which there is a right of appeal to another "Disciplinary Board of Appeal", but not to the national courts of a Member State. It would appear that the Commission was not entirely happy with this lack of access to the courts (generally it is concerned about association statutes excluding access to the courts), but the Commission found the latter could be "deemed equivalent to a legal body".

Eighty-five per cent of European patent applications are filed by EPI professional representatives. In 1997 there were 5,861 named representatives, of which 5,563 were within the Community. In that year, some 72,904 applications were filed, involving therefore significant levels of turnover. The Commission rejected any idea that the EPI was exercising some form of public power, taking its Code of Conduct outside Article 85 E.C.

Before the Commission's intervention, it appeared that the Code of Conduct prohibited individual advertising and any supply of unsolicited services, and required members to charge fees which were "reasonable but sufficient to maintain their professional independence".[5]

These provision have now been deleted under the amended Code of Conduct which provides for individual advertising (although *comparative* advertising is prohibited) and the offer of unsolicited services (save in respect of cases already in progress or to those who have already been the client of another representative for a specific case). It also includes a recommendation to charge reasonable and justifiable fees (but without any sanction to ensure compliance).

Certain provisions were considered outside Article 85(1) E.C. Thus, the Code of Conduct prevents representatives from paying commission to third parties. The Commission considers this justified (and therefore not a restriction of competition), "given that it would be impossible to impose the rules by which representatives are bound on third parties".

The Code of Conduct also prohibits charging fees related to the outcome of the service provided. The Commission found that "even if in other circumstances it might constitute a restriction of competition to prohibit fees from being determined according to outcome, it is necessary

3. Commission Press Release IP/99/681, September 14, 1999.
4. [1999] O.J. L106/14.
5. Para. 15.

in the economic and legal context specific to the profession in question, in order to guarantee impartiality on the part of the representatives and to ensure the proper functioning of the EPO".[6] This meant in practice a concern that representatives should not just aim for short-term profits rather than cases taking longer, where fees would only come later. The Commission found that a restriction on approaching a client of another representative while he is representing that client "does not set out to restrict competition but contributes to the smooth handling of cases" and also fell outside Article 85(1) E.C.

On the other hand, the restriction on approaching a client *after* another representative had finished a case was caught by Article 85(1) E.C. The prohibition might prevent representatives from approaching the *former* clients of other representatives.

The Commission also found that the provisions prohibiting *comparative advertising* restricted competition. Customers should be able to obtain information on representatives' services, fees and conditions in order to choose whom to engage. The Commission accepted that, under the Misleading Advertising Directive, a Member State could establish derogations concerning comparative advertising within the liberal professions. However, the Commission considered that Article 85 E.C. would still apply because such derogation had to be in compliance with the provisions of the Treaty. According to the Commission, the prohibition of comparative advertising "restricts the ability of more efficient representatives to develop their services to the detriment of less efficient representatives" and "helps to crystallise the clientele of each profession representative within each national market".[7] Such restrictions affected trade because they related to cross-border services, *i.e.* patent applications for all the Contracting States to the Convention.

The Commission's exemption for these restrictions was unusual, because it only gave a period to allow for an "orderly transition" in view of the extent of the change required. The Commission emphasised that, in the meantime, a representative could advertise in the Yellow Pages or the press, indicate the scale of charges for his services and advertise a specialisation or particular professional experience. The exemption ends when the Member States are required to have adopted the (amended) Misleading Advertising Directive.[8]

The position of lawyers has also been raised by a new question for the European Court. In January 1999, in a case called *Manuele Arduino*, the Pretura Circondariale of Pinerolo (Turin) asked the ECJ[9]:

— whether a decision of the Italian National Legal Council approved by a Ministerial Decree, fixing binding tariffs for the professional activity of lawyers, comes within (what was then) Article 85(1) E.C.; and
— if so, does the case correspond to one of the situations envisaged in (what was then) Article 85(3) E.C.?

Restrictions for market entry—TPS pay-TV joint venture

In April 1999 the Commission granted an exemption to the French satellite pay-TV joint venture TPS (*Télévision par Satellite*).[10] TPS is a partnership under French law whose shareholders are now TF1, France Télévision, M6 and Lyonnaise Satellite. Since these companies are also involved in broadcasting, the main issues related to the risk of spillover collusion and vertical supply arrangements in favour of TPS.

The case is primarily of interest to the pay-TV sector. However, the Commission's treatment of these aspects is interesting, above all the way that some restrictions were found to be ancillary to the launch and therefore outside Article 85(1) E.C., while others were cut down in duration, taking into account investments made and the financial risks in the light of forecasts and TPS' performance in the first eight months. As in other cases this year in the telecoms sector (such as *Cégétel +4* discussed below), a theme of the decision was that restrictions in a combination designed to allow effective market entry to compete with an established and strong competitor may fall outside Article 81(1) E.C.

The Commission found that pay-TV constitutes a product market separate from free access television. The pay-TV market includes transmission by terrestrial, satellite and cable means. There are now three main players in the French market, CANAL+, TPS and AB Sat. CANAL+ is the leading channel in terms of subscribers, having been launched first in 1984 and owning an extensive portfolio of rights to broadcast.

As regards scope for *spillover*, the Commission decided that there was no risk of collusion between the parents of TPS, particularly the broadcasters. These were not present in the pay-TV market other than through TPS and they were not competitors in technical services for pay-TV. There was little risk of co-ordination on the acquisition of broadcasting rights, as long as the broadcasters continued to focus the bulk of their

6. Para. 35.
7. Para. 43.
8. The EPI has appealed; [1999] O.J. C281/17. See also Bicho, "Professions libérales: aspects essentiels de l'action de la Commission en matière de l'application de concurrence" (1999) EC Commission Competition Policy Newsletter, June, No. 2, pp. 24–26.
9. [1999] O.J. C100/10.
10. [1999] O.J. L90/6.

activities on unencrypted broadcasting. None of the broadcasters controls movie channels and only TF1 had shares in Eurosport with CANAL+. There was some competition between TPS' shareholders and TPS in special interest channels, but the Commission considered there was little scope for co-ordination.

The Commission then focused on certain *vertical aspects* of the arrangements and cleared them, with some amendments. The Commission argued in part that these arrangements were *outside* Article 85(1) E.C., and in part they were *inside* Article 85(1) E.C., but were exemptable as facilitating the successful launch of a new pay-TV competitor in France.

First, the Commission considered a non-competition clause whereby TPS' parents essentially undertook not to become involved in companies engaged in television programmes broadcast for payment in digital mode by satellite to French-speaking homes in Europe. This was regarded as ancillary to the creation of TPS during its launch phase, which the Commission assessed as three years. For that period the clause was outside Article 85(1) E.C.

Secondly, the Commission considered provisions granting TPS preferential rights to special interest programmes distributed by its shareholders. TPS was given *first refusal* over such products where operated or produced by the shareholders and also a right of *final refusal or acceptance* on the best terms proposed by competitors for programmes which its shareholders offer to third parties. During the procedure, it was clarified that this applied only to programmes produced and operated by the TPS' shareholders, not to all the broadcasting rights held by (*i.e.* acquired by) them. The right of first refusal over the shareholders' programmes was considered as possibly ancillary to the launch of TPS for three years, but clearly within Article 85(1) E.C., since it was for 10 years' duration and limited the supply of such programmes to third parties. The Commission found that TPS needed to have recourse to its parents' offerings to secure a minimum content for its transmissions during its launch period. The Commission considered that such priority access was, however, essential only for three years.

Thirdly, the Commission considered a provision giving TPS the exclusive right to broadcast the general-interest channels (TF1, France 2, France 3 and M6) in encrypted form and digital mode by satellite for 10 years. This right has a particular value in France because reception of such free access channels is occasionally poor or even impossible in certain parts of the country. Access to such rights was not essential for the launch of TPS' digital service, but gave TPS a commercial advantage in those parts of France. The Commission noted that such exclusive access enabled TPS to put together its programme offering and compete with CANAL+'s strong portfolio. Nevertheless, the Commission found that the indispensable nature of the exclusivity would diminish over time and that ten years was an excessive duration for the obligation. The Commission therefore granted exemption for three years only. TPS' arrangements envisaged also the possibility of entrusting exclusive transmission of the Arte and La Cinquième channels to TPS. This was changed by the parties into a *non*-exclusive arrangement.

Fourthly, the Commission considered a provision whereby, as originally notified, the cable operators which hold shares in TPS (France Télécom via France Télévision and Lyonnaise Communications via Suez Lyonnaise des Eaux) undertook to give priority to include TPS programmes on their networks, in particular in pay per view services, and to consult each other on co-ordinating these programmes and services with those already on cable. This was deleted at the Commission's request, insofar as there was concern that the provision would weaken the position of independent channels by restricting their access to these networks, which accounted for some 56 per cent of the French cable network.[11]

Information exchanges

In September 1999 the Commission indicated that it had sent comfort letters to various tractor and agricultural machinery manufacturers and their trade associations, concerning their information exchange systems.[12] The Commission followed principles applied in relation to the U.K. Tractor Exchange, upheld by the ECJ in *John Deere*.

The key principles are:

- individual data may not be exchanged until 12 months after the event concerned;
- aggregate market data which is less than 12 months old may be exchanged if the data are supplied by at least three dealers belonging to different industrial or financial groups. If there are less than three dealers, data may be exchanged only if the figure being exchanged concerns more than 10 tractors.

The principles have been accepted by the European associations of agricultural machinery manufacturers, the four largest manufacturers, and apply equally to importers to the Community.

11. In September 1999 the Commission exempted for seven years a joint venture, originally called *British Interactive Broadcasting*, but now named *Open* to provide new digital interactive television services, such as home banking, shopping, learning online etc., to consumers in the United Kingdom, Commission Press Release, IP/99/686, September 16, 1999.
12. Commission Press Release, IP/99/690, September 20, 1999.

The Commission has suggested that similar principles should be followed by other economic sectors which are as highly concentrated as the market for tractors and agricultural machinery.

Assessment of competition in a duopoly—P&O Stena

In June 1999 the Commission's decision in *P&O Stena* was published.[13] It is an interesting case because of the way in which the Commission assesses in detail whether a duopoly will develop between the J.V. and Eurotunnel, conducive to parallel behaviour between them. The parties operate ferry services, amongst other things, on the "Short French Sea" (otherwise known, to some, as the narrow part of the *English* Channel!). In 1996 they notified their proposal to merge their operations, provoking a complaint from a smaller competitor, Sea France (owned by SNCF), which argued that it would be progressively eliminated from the routes concerned.

The parties' aim was to create cost-savings of some £75 million (in port costs, administration and marketing) and to offer improved frequencies of sailings and continuous loading, essentially giving them a greater ability to match Eurotunnel. The Commission focused on the impact of the J.V. on tourist passengers and freight services, looking first at the issue whether there would be spillover on competition between the two companies on other markets, such as North Sea services and services in the Western part of the Channel. Put broadly, given the number of players in the market and the existence of competition in the Short French Sea market (which was related to the North Sea and Western Channel) markets, the Commission found there was little risk of successful co-ordination. In other words, if P&O and Stena *did* co-ordinate to raise prices on these markets then, they would be likely to lose customers to competitors such as Eurotunnel.

The Commission then focused on the Short French Sea market. At first sight, the J.V. only involved concentration levels moving from six players to five. However, three of those players were much smaller, or niche players, so that, in some ways, the concentration looked more like three players being reduced to two. Eurotunnel had some 36.9 per cent market share in 1997 and P&O/Stena combined had 45.1 per cent in the same year, which meant that, after the J.V. was established, these two companies would have some 82% together, and they would also be far ahead of their nearest competitors (on 9 per cent, 8 per cent and 1 per cent).

The Commission accepted that a J.V. was essential to achieve the desired efficiencies, but focused on whether a duopoly was created in which the players would not compete fully. The Commission first noted the parties positions prior to the J.V. and that there had been instability in market shares in recent years, in part because of Eurotunnel's entry. The Commission then looked at factors affecting competition *between* the J.V. and Eurotunnel:

- the degree of *price transparency* in the market (considered to be high for tourist traffic and therefore conducive to parallel behaviour);
- the extent to which each party was *capacity constrained* (and therefore likely to go for high load factors through price competition), in particular at peak times (found not to be likely); and
- the *different cost structures* of the J.V. and Eurotunnel (which made it less likely they would act in parallel).

On the other hand, the Commission considered that there was not a sufficient probability that the other smaller competitors would constitute an effective competitive restraint. Barriers to entry from outside the ferry industry were also low. The Commission concluded that the J.V. and Eurotunnel could be expected to compete with each other rather than to act in parallel to raise prices.

The Commission was, however, still concerned about the effects of the abolition of duty-free, which was expected to lead to considerably higher prices. In particular, the Commission was uncertain whether Eurotunnel might be capacity constrained in the future and that, if the ferry companies could not replace duty-free income with other revenue sources, they would have more incentives to go for higher prices. There might also be less competition from the small companies. The Commission therefore limited the exemption to three years.

"Effect on trade" and banking—Dutch giro system clearance

In September 1999 the Commission decided that restrictions in the *Dutch giro system* were not caught by Article 81(1) E.C., applying *Bagnasco*.[14] It is an interesting decision because it appears that for most of the procedure the Commission held the view that there was an appreciable effect on trade and changed that view in the light of *Bagnasco*. Otherwise, the Commission examined in detail the multilateral interbank commission concerned and stated that, if it had decided on the system, it would have taken a favourable decision.

The case started in 1991 when the Dutch Association of Banks notified an amendment to its existing procedure for joint payment and acceptance

13. [1999] O.J. L163/61; Commission Press Release IP/99/56, January 28, 1999.

14. [1999] O.J. L271/28.

of giros (called the "GSA" agreement). The amendment concerned the introduction of an interbank commission for processing of acceptance giro forms, to be paid by the collecting party's bank to the purchaser's bank. "Acceptance giro forms" are pre-printed credit transfer orders which a debtor remits to his or her bank, and are in a standard format which can be processed on a largely automated basis. They are used widely by payees for regular bills such as for energy and telephone charges, insurance premiums and subscriptions.

Various organisations which frequently receive payments in this form complained about the new system, arguing that all the cost should be borne by the purchaser, that it was unlawful to fix the price multilaterally and that there was a concerted practice by the banks concerned, by which they systematically passed on the charge.

The Commission analysed the nature of the giro system in detail, noting that the concept was that the purchaser's bank performed certain services which were of value both to itself and the collecting party's bank, and for which the latter should therefore make a contribution (set at half of the relevant costs). The relevant product market was that for acceptance giros and direct debit payments. The relevant geographic market was the Netherlands because the giro system is designed for *domestic* business payments.

In the face of Commission objections, the banks dropped requirements that the collecting party's bank does not offer particular advantages in connection with the holding of a particular credit account and a ban on participants not introducing their own giro procedures.

This left the issue of the restriction resulting from the uniform commission, set multilaterally by the banks, for the services in question in the agreement. In 1992 the banks modified this requirement to allow banks to agree lower charges bilaterally. The banks also specified that the amount of the charge had been set on the basis of the costs associated with the most efficient means of processing giro forms and agreed to review the level of the charge periodically in light of an independent expert's report.

In its decision, the Commission finds that the multilateral interbank charge system is a restrictive agreement caught by Article 81(1) E.C. insofar as it significantly limits the freedom of banks to determine their own charging policy. Interestingly, the Commission also noted that the change in 1992 to a *maximum charge* system had not had practical effect—since none of the banks had chosen to charge a lower rate bilaterally. The Commission found that the collecting party's banks had systematically passed on the interbank commission to their customers as a *minimum* charge, in a "fairly uniform fashion". However, there was no evidence that the banks had *agreed* to do so. In a related Press Release,[15] the Commission emphasised that it was favourable to the giro system because it was convinced that a multilaterally set interbank fee was more efficient than bilaterally set interbank fees, in particular insofar as the charge concerned was based on the costs with the most efficient processing method and the relevant charge was to be periodically reviewed by an independent expert.

The Commission found that there was not an appreciable effect on trade. The Commission took into account that[16]:

- the agreements extended over the whole territory of the Netherlands and therefore had the effect of reinforcing the compartmentalisation of markets. (However, this was not enough in itself to show that there was an appreciable effect on trade between Member States);
- the economic activity concerned (*i.e.* the payments) were essentially domestic in nature;
- although many branches and subsidiaries of non-Dutch banks had participated in the system (11 out of 58 from other Member States), the *amount* of business they did with acceptance giros was limited (less than 1 per cent of acceptance giro contracts concluded, and a small amount of acceptance giros processed—less than 1 per cent of debits and less than 5 per cent of credits); and
- the opportunity to offer the giro system was also found not to be a key competitive factor when foreign banks decided to enter the Dutch market (about one-third of such banks did not even offer the acceptance giro product).

Clearly in future those assessing the effect on trade in (at least) financial services cases should be attempting to *quantify* any claimed effects.[17]

Environmental clearances

Various co-operation agreements for energy saving, environmental efficiency or recycling schemes have been the subject of attention at E.C. level this year. In December 1998 the Commission published an Article 19(3) Notice concerning an agreement committing members of the *CECED* (the European

15. Commission Press Release IP/99/683, September 15, 1999.
16. Paras 57–65.
17. In March 1999 the Commission issued an Article 19(3) Notice indicating its intention to take a favourable view of rules governing access to and operation of the *Système Interbancaire de Télécompensation* by a Groupement of similar name, *GSIT*. SIT is a remote interbank clearing system enabling financial institutions to exchange mass automated payment transactions and to carry out interbank clearing of those transactions, [1999] O.J. C64/5.

Council of Electrical Domestic Construction) to cease production and imports of several models of washing machines which are considered less efficient.[18] The manufacturers concerned account for some 90.5 per cent of the EEA market.

The Commission considers that an agreement of this type (*i.e.* not to produce or import machines that do not meet specific criteria) amounts to the establishment of a private obligatory minimum performance standard as regards energy efficiency. The manufacturers restrict their ability to compete with less energy efficient washing machines. Some 1,718 models out of a total range in 1995 of 2,730 would not be produced or imported. However, the Commission proposes to take a favourable view of the agreement, since the reduced energy consumption planned should reduce CO_2 emissions significantly (an estimated 3.5 Mtons of CO_2, 17 tons of SO_2 and 6 Ktons of NO_x per year in 2010). The Commission has quantified the social benefits as more than sevenfold greater than the increased purchase costs of the machines meeting the more stringent standard, and the Commission assesses that the minimum performance standard provides consumers with a fair rate of return (in terms of financial savings on reduced electricity bills) over a reasonable payback period. Less restrictive alternatives, such as information campaigns and eco-label awards are thought unlikely to deliver the expected benefits.

It is an interesting analysis, different to classic antitrust, yet reflecting a broad economic assessment of welfare gains through the agreement.

In the latest Competition Report,[19] the Commission also discusses:

- an agreement between *European automobile manufacturers (via ACEA) to reduce CO_2 emissions* from cars by 25 per cent by 2008 (a voluntary agreement considered to be outside Article 81(1) E.C.);
- another co-operation agreement between *Europe's leading motor manufacturers to research into environmental issues, notably noise or emission pollution* by motor vehicles (*EUCAR*) (outside Article 81(1) E.C. because the research co-operation is only at a pre-competitive stage) and;
- *a U.K. scheme for packaging waste recovery and recycling (Valpak).* The scheme was found to be within Article 81(1) E.C. because it required businesses joining it to transfer their obligations in *all* packaging materials to the scheme, restricting competition from other schemes operating on a material-specific basis. (In the circumstances, the Commission has exempted the scheme for three years).

An economic approach to insurance pools

In April 1999 the Commission exempted the *P&I Insurance Pooling and Group Agreements.*[20] It is an interesting (if complex) decision, mainly because the Commission holds that a claim sharing agreement between insurance mutuals covering 89 per cent of the world market for certain types of insurance fell *outside* Article 85(1) E.C., because it was necessary to allow its members profitably to insure some very large maritime risks. As explained above, the Commission regards this as an application of its new economic approach to insurance pools whereby "no matter how high the market share is ... [such pools] cannot be considered to be anti-competitive as long as pooling is necessary to allow their members to provide a type of insurance they could not provide alone".[21] The Commission then held that all restrictions indispensable to the proper functioning of the claim sharing were outside Article 85(1) E.C. as ancillary to, or "inherent" in, that functioning (applying the *Danish Cooperatives* case).[22]

P&I clubs are mutual non-profit-making associations which provide protection and indemnity insurance to their members, *i.e.* shipowners. The International Group ("IG") of P&I Clubs is an association of 19 such P&I clubs, spread throughout the world.

The Pooling Agreement is a claim-sharing agreement between mutual associations. Its purpose is to share proportionately among all the P&I clubs the claims made on one club in excess of a certain amount. The claim-sharing arrangements provide for different layers of insurance coverage:

- A first layer (called "retention") up to 4.57 million is borne by the club whose member has incurred the liability. Most claims fall into this layer.
- A second layer between 4.57 million and 27.42 million is shared by the clubs under the Pooling Agreement. This accounts for some 20 claims a year.
- A third layer from 27.42 million up to 1.8 billion is covered by a group reinsurance contract with commercial insurers. Only one or two claims a year reach this layer.
- Any excess over this (called "overspill") up to around 3.9 billion is again shared by the clubs (the exact figure varies, but is based on 2.5 per cent of the maximum liability set by international convention).

18. [1998] O.J. C382/6.
19. 1998 E.C. Commission Competition Report, points 129–134.
20. [1999] O.J. L125/12.
21. 1998 E.C. Commission Competition Report, points 111–119.
22. Paras 65–67.

All members of the P&I clubs are obliged to share claims in this way. As originally notified, the Pooling Agreement provided that the members should share cover up to a higher level, *i.e.* around 16.5 billion (20 per cent of the maximum liability set by international convention). However, the Commission objected to this on the basis of Articles 85(1) and 86 E.C. The Commission considered that the requirement impeded clubs from competing by offering lower levels of cover to 2.5 per cent for which there was substantial demand. The IG therefore agreed to reduce the minimum level of cover and clarified that members were free to offer both higher and lower levels of cover outside the Pooling Agreement.

As notified, the Pooling Agreement also only set out objective conditions for P&I clubs to provide reinsurance to other mutual insurers, but not to commercial insurers. The Commission objected that this could lead to discrimination and that there was also a lack of appropriate procedures to ensure clubs complied with such procedures when providing reinsurance to such commercial insurers. This was considered to be an infringement of Article 86 E.C. The IG accordingly modified its rules, laying down conditions for both types of insurer and established an application procedure, with provision for appeal and arbitration.

The Commission then found that the restrictions in the Pooling Agreement on the minimum level of cover (as amended), common approval of each P&I club's policy conditions and accounting practices, and the joint purchase of reinsurance were ancillary restrictions "inherent" in the Pooling Agreement and therefore outside Article 85(1) E.C.

As regards the *International Group Agreement*, the Commission focused on provisions limiting the freedom of P&I clubs to quote a rate to shipowners for vessels insured by other clubs in order to attract them. In the face of earlier Commission objections, a procedure had been introduced providing that one club could offer a lower rate to shipowners of vessels currently insured by another, if (1) it had a binding agreement with a shipowner before September 30 in a year; (2) it had notified the "holding" club within three days; and (3) provided that the "holding" club could appeal to an expert committee if it considered the new club's rate unreasonably low.

The Commission found that a degree of discipline on rates quoted was "*inherent*" in the claim-sharing arrangement. No club would be ready to share claims with another club that would be offering a lower rate for covering these same claims. However, this was not the case for costs not shared between the clubs, *i.e.* the retention level of cover and the administrative costs of each club.

In 1997 the Commission also objected that the procedure for quoting to other club's clients was little used and ineffective. The IG has now modified these procedures so that they only apply to the costs related to claims and reinsurance, *not* each club's own internal administrative costs. Clubs are free to charge specifically for their internal costs or to finance them out of their investment income. Clubs will also publish a five-year average expense ratio to show what percentage administrative costs represent of premium and investment income.

In the light of these changes, the Commission decided to clear the Agreements. As regards *the Pooling Agreement*, the Commission considered whether claim-sharing with IG was necessary to allow the P&I clubs to provide P&I Insurance up to 3.9 billion. Interestingly, the Commission's inquiries suggested that insurers would need to be insuring 30 per cent of world tonnage in order to offer reinsurance of up to 1.38 billion, 45 per cent up to 1.8 billion and that more than 50 per cent was required for amounts higher than 2.75 billion. As a result, the Commission concluded that the IG's claim-sharing arrangements *were* necessary to offer the present level of cover and, given the minimum dimension of activity required, cleared the arrangement as *outside* Article 85(1) E.C. even *though that meant there would be no second source of supply*. There was only room for one market player at such levels of coverage.

As regards the *International Group Agreement*, the Commission found that the quotation procedures still restricted competition, but exempted them for 10 years, on the basis that it would be very difficult to split the system up to apply only to the claims costs shared and not retention costs. The Commission also considered that the clubs remained able to compete on non-price parameters (such as the level of claims handling service) and their own administrative costs.

The Commission has also explained that it has carried out an investigation of *aviation pools* in Europe.[23] In some cases, it has found that the risks are great and the markets international so that the pools come within the market share limits of the block exemption. In others, where markets are national and the risks are smaller, the pools are not considered necessary and indeed not eligible for exemption. However, in view of the limited turnover concerned, the Commission decided it was not in the Community interest to take further action. The Commission set comfort letters, with a *caveat* as regards such pools, indicating that national authorities could intervene, as appropriate.

23. See the Report on Insurance described in Part 1, para. 30. and the 1998 E.C. Commission Competition Report at points 111–115.

Co-operation towards cost-based cross-border mail services—REIMS II

In September 1999 the Commission granted an exemption to *REIMS II*,[24] an agreement between 16 public postal operators on "terminal dues" (*i.e.* the compensation for delivery of cross-border mail in the country of destination) until the end of 2001. The agreement is intended, amongst other things, to assist postal charges for cross-border mail to move closer to the real costs of delivery.

The *REIMS II* agreement links terminal dues to domestic mail tariffs in the country of destination and to the quality of service provided by the postal operator that delivers the mail. According to the notified agreement, terminal dues were to increase over a transitional period until they reached (subject to quality of standard penalties) a maximum of 80 per cent of domestic tariffs in 2001. It was argued that this figure was a "sufficiently reliable proxy" for the costs actually incurred by postal operators, insofar as the parties currently do not have precise cost-accounting information.

The Commission requires in its decision that the transitional period for the agreement be postponed so that a phased increase in tariffs comes in more slowly to reach 70 per cent in 2001 and that no increases are to occur during the transitional period if the quality of the service of the party concerned goes down. Movement to the 80 per cent rate is to be reviewed in 2001, when the exemption expires, to see if it is justified.

The agreement also introduces a system of quality of service standards, with a penalty system if agreed standards are not met. The standards are defined as a percentage of incoming cross-border mail from another post office delivered within one working day after the day of its arrival with the receiving post office. The parties have also clarified that they are legally bound to give each other access to the "generally available" domestic rates (such as bulk rates for direct mail, periodicals etc.).

Most of the parties have not yet set up proper cost-accounting systems. The Commission has therefore linked further exemption to the introduction of such systems (as required by Article 14 of the Postal Directive) by the end of 1999. The Commission argues that only if there are such procedures, can it assess whether the dues are properly cost-justified (and the Commission promotes the Directive's objects). There are special transitional rules for Greece, Italy, Spain and Portugal, and annual reporting obligations on the parties.

24. [1999] O.J. L275/17.

Telecoms joint ventures—developing infrastructure

In the last year there have also been a number of J.V./co-operation cases involving the development of new telecoms infrastructure, including optic fibre networks in different parts of Europe. In August 1999 the Commission published its decisions clearing the restructuring of *Cégétel*,[25] the new French telecoms operator and *Télécom Développement*,[26] a joint venture between Cégétel and the French railways, SNCF to develop and run a national long-distance telecoms network along the French national railway network. Both cases were treated as pro-competitive, since they are viewed as necessary combinations to allow effective competition to develop in the French market.

The restructuring of *Cégétel* involves Vivendi, BT, Mannesmann and SBC Communications. The idea is to enable Cégétel to become the second full-service telecoms operator in France. Given the considerable barriers to entry, the Commission regarded the fusion of the parties' strengths as creating a more effective competition to France Télécom than the parties could have achieved separately. The restructuring was therefore considered to fall *outside* Article 81(1) E.C. Provisions for preferred-supplier and preferred customer relations with BT and (modified) non-compete provisions on the parents were also considered ancillary to the restructuring and not subject to separate assessment. The appointment of Cégétel as exclusive distributor of Concert services in France was exempted for 10 years to give Cégétel the time necessary to achieve a significant market share and recoup its investments in fixed telecoms services.

The *Télécom Développement* ("TD") decision concerns the framework agreement between Cégétel and SNCF. SNCF has contributed to TD exclusive rights to use surplus capacity on its optical fibre network. Cégétel has placed its long-distance optical fibre network at the disposal of TD. A joint company between Cégétel and TD is to have sole responsibility for marketing TD's long-distance telephony services to the general public.

Cégétel agrees to use TD as sole supplier for its long-distance traffic in France, unless TD's prices at any time prove to be above market price. SNCF, Cégétel and TD are bound by various related non-compete clauses. The agreements also grant TD an exclusive right of access to surplus capacity on SNCF's network, as well as a priority right of access to SNCF's land along the railway lines in order to allow TD to deploy its telecommunications network.

25. [1999] O.J. L218/14.
26. [1999] O.J. L218/24.

Following objections from the Commission, the agreements have been amended to limit the priority right of access. SNCF is now free to use remaining capacity for access rights as it sees fit, in particular, by making capacity available to other operators, provided that it does not unduly affect TD's installation plan. Additionally, the priority right will not apply if installation of cables on the railway-owned land is the only way for a third operator to create a telecommunications network.

The Commission considered that the acquisition of a shareholding by Cégétel in TD fell *outside* the scope of Article 81(1) E.C. SNCF and Cégétel were neither actual nor potential competitors and the establishment of a telecommunications network with national coverage required substantial time and investments which both TD and Cégétel would not have undertaken on an individual basis. Their combination would lead to the entry of a more effective competitor alongside France Télécom. Other contractual provisions were considered ancillary to the activity of TD because they gave TD the necessary conditions for fast entry on the market.[27]

Competition and new transport infrastructure

In January 1999 the Commission issued an Article 19(3) Notice indicating its intent to take a favourable position as regards track access agreements to the *Channel Tunnel rail link* ("CTRL"), related infrastructure and certain stations in the United Kingdom. The agreements are between Railtrack, subsidiaries of London Continental Railways and Eurostar. The agreements allocate amounts of capacity of the CTRL to Eurostar in return for charges calculated by reference to agreed rates of return on the investment made by Railtrack over a 50-year period.

What is of interest is that the notifying parties expressly rely on the Commission's *recommendations on the application of the competition rules to new transport infrastructure projects* to argue that the arrangements fall outside Article 85 E.C.[28] In other words, the parties consider that other transport operators had been given the opportunity to reserve capacity on the relevant infrastructure; the capacity reserved for Eurostar is proportional to the financial commitments by Eurostar and Railtrack and corresponds to the operational requirements for the CTRL; and that there still would be spare capacity at peak hours for international services. In the alternative, the parties seek exemption.

27. In March 1999 the Commission issued an Article 19(3) Notice indicating its intent to take a favourable view of agreements to establish a pan-European telecoms network called the *Farland Network*, involving BT, Sunrise Communications, Telfort, Albacom and Viag Interkom; [1999] O.J. C77/2.

28. [1997] O.J. C295/5.

Current policy issues

White Paper on Modernisation/Decentralisation

Box 9: White Paper on Modernisation/ Decentralisation

- No notifications except for mergers, full-function *and partial* J.V.s
- Move to a "legal exception" regime with *a posteriori* control
- "Precedent clearance" decisions by E.C. Commission
- Article 81(3) E.C. exemption in national competition authorities *and courts*
- Increased co-ordination with national authorities and courts but Commission to have right to overrule a "national" E.C. clearance in some cases and also to remove cases from national competition authorities
- Greater co-ordination amongst E.U. competition authorities and courts (*amicus curiae*?)
- Greater investigation powers for Commission: ability to take oral statements "on the spot" and by witness summons?
- Greater role for (certain types of) complaints: preliminary assessment within four months
- Increased penalties for procedural non-compliance, *e.g.* Euro 50,000 for incorrect information
- Commission "freed-up" to focus on cartels, concentrated and liberalising markets

In April 1999 the Commission adopted what may turn out to be the most important competition policy document for a long time: its so-called *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty ("the White Paper")*.[29] The White Paper envisages far-reaching reforms: the abolition of the general notification and exemption system, decentralised application of Article 81(3) E.C. powers, both to national competition authorities and national courts, and the strengthening of the Commission's enforcement powers, including the right to summon witnesses to be interviewed. In practice, this means a rewriting of Regulation 17/62.

The proposals will take much assimilation because these are *fundamental* changes to how E.C. competition law is enforced. Many areas remain controversial, such as how companies should obtain adequate legal certainty for practices which are not clearly dealt with in the case

29. [1999] O.J. C132/1; Commission Press Release IP/99/275, April 28, 1999. I have updated to Arts 81 and 82 E.C.

law, the co-ordination of Commission and Member State action, and the extent to which company employees can remain silent when faced with alleged infringements.

Outline of Commission proposals

Background

The White Paper starts with the Commission reviewing current enforcement practice. The Commission highlights how it is not able to cope with current workloads,[30] and that this situation will be even worse if the Community is enlarged by a further five Member States (despite the introduction of block exemptions and notices, and the use of comfort letters). A recurrent theme in the White Paper is the Commission's determination not to have a new wave of notifications increase its backlog again if the Community enlarges (as currently envisaged) to 20 Member States.

The Commission stresses that, as a result of the notification system, the bulk of its activity is directed to reviewing agreements which are often not very important, rather than to responding to key complaints or pursuing its own enforcement initiatives. The Commission would like to be focusing more on "the fight against cartels, particularly in concentrated markets and in markets undergoing liberalisation"[31] and wants to be proactive, not reactive.

The Commission notes how the world has changed since 1962 when Regulation 17 was introduced, so that now there is a greater awareness of competition law around the Community and almost every Member State has adopted a law based on E.C. principles. One senses that, as a result, the Commission sees both an *opportunity* to decentralise and share its workload, and *a degree of concern* as Member States increasingly apply *national* rather than E.C. competition laws.[32]

The central theme is clear: the combination of all the Community rules, notices and decisions after some 35 years of enforcement, and new Member State competition laws has created an environment in which decentralised E.C. exemption powers are both possible and advisable.

30. According to the 1998 E.C. Commission Competition Report (at points 14 and 19) the Commission had 509 new cases under Arts 81, 82 or 86 E.C. in 1998, closed 581 cases under Arts 81 and 82 and had 192 new complaints.
31. Fifty-eight per cent of new cases in 1988–98 were notifications; 29 per cent complaints and 13 per cent own-initiative procedures, White Paper, para. 44.
32. The Commission also states that it has only some 153 officials dealing with concentrations, agreements and abuses of dominant position whereas (based on figures collected for the 1998 FIDE Congress) the Member States have some 1,222 officials altogether.

Reform concept

The Commission proposes to end the current system where *prior notification* is required for *authorisation* by the Commission of an agreement or practice (save as regards mergers and joint ventures of a Community dimension) and change to a system where an agreement or practice is *excepted* from the prohibition of Article 81(1) E.C. in defined circumstances. This is to be determined by the companies concerned themselves *or* national courts *or* the Commission *or* national competition authorities. A system of *a posteriori* as opposed to *prior* control.[33]

The Commission also wants to eliminate the difficulties created by a split application of Article 81(1) and (3) E.C. In particular, the situation where national court proceedings can be blocked by a notification to the Commission, as the national court may often then consider that it has to wait until the Commission has decided on the case. A related theme is that it would be more coherent to apply Article 81 *as a whole* so that distinctions as to what is outside Article 81(1) E.C. (on a "flexible approach" or "rule of reason" test) or within Article 81(1) E.C., but capable of exemption under Article 81(3) E.C. have less importance.

A key part of the proposals (going further than many expected) is therefore the idea that *national courts*, as well as national competition authorities would have Article 81(3) E.C. powers.

Key features

More specifically, the Commission suggests:

(1) The Commission should retain the sole right to propose legislative tests, notices, guidelines, etc.[34]
(2) The Commission will continue to take individual prohibition decisions and "positive" decisions (which will not be exemptions as we currently know them, but may be used to establish precedents). Such decisions will have the same legal value as negative clearance decisions. The Commission expects the number of individual prohibition decisions to increase substantially.[35] The Commission will also have power to adopt a decision taking note of commitments entered into by companies and establishing their binding nature (with penalties for non-compliance).[36]
(3) Partial function production joint ventures involving a minimum of assets should also be subject to a prior authorisation regime. It is therefore proposed to extend

33. Para. 69 and, in general, Chap. III of the White Paper.
34. Para. 84.
35. Paras 87–89.
36. Para. 90.

the scope of the E.C. merger control regulation to such joint ventures with the "dual test" of dominance and Article 81 E.C. (Articles 2(3) and 2(4) of Regulation 4064/89).[37]

(4) The Commission envisages that the Commission and national authorities should be allowed to transmit a file and confidential information to another authority for pursuit of infringements of the E.C. competition rules, which authority may then be allowed to make use of such documents as evidence.[38]

(5) In order to achieve a coherent and uniform application of the competition rules, the Commission suggests that:
   (a) if the Commission has initiated a procedure or adopted a decision which has become final, then national competition authorities and courts should be obliged to avoid conflicting decisions, if necessary by suspending their proceedings;
   (b) where a national authority or court has adopted a "positive" decision or judgment which has become final, the Commission "can always intervene and prohibit the agreement subject to the principle of *res judicata* that applies to the dispute between the parties themselves"[39];
   (c) where a national authority or court has adopted a "negative" decision or judgment which has become final, the Commission should not normally intervene, save if there is a reference to the European Court; however, if the decision is not final, the Commission may at any time adopt a contrary decision, which would have to be taken into account by the appeal court, *with* the national decision (as discussed below, this is more controversial).

(6) The Commission should also have "the ability to remove cases from national competition authorities using a mechanism like Article 9(3) of Regulation 17/62".[40]

(7) The Commission proposes to use Article 83 E.C. (the former Article 87 E.C.) to prevent national legislation prohibiting or altering the effects of agreements exempted under a Community regulation.[41]

(8) National competition authorities should also be required to inform the Commission if they are involved in *national* procedures which are likely to have an influence on Community procedures.[42]

(9) The Commission also proposes to enlarge the powers of national competition authorities to disapply a block exemption in a distinct market in their territory in appropriate cases (having advised the Commission of that intent).[43]

(10) The Advisory Committee on Agreements and Dominant Positions would become a "full-scale forum" for discussion of cases, whichever authority is handling them.[44]

(11) National competition authorities should be required to inform the Commission of the *opening* of a procedure in cases involving the application of Articles 81 and 82 E.C. and on *closure* of the procedure.[45]

(12) Similarly, national courts should be required to provide information to the Commission on procedures applying Articles 81 and 82 E.C.

(13) There should be a right for the Commission to intervene as *amicus curiae* subject to the leave of the Court.[46]

Strengthening of investigative powers

The *quid pro quo* for this abolition of the notification and authorisation system in many cases is the reinforcement of *ex post* control. Here also the Commission has radical proposals:

(1) In order to facilitate simultaneous dawn raids in several Member States, the Commission seeks the right to obtain authorisation for such procedures in one go before a Community court (presumably the CFI) rather than various Member State courts (or a procedural harmonisation to speed up the obtaining of such clearances).[47]

(2) The Commission wishes to have clarified that it has the power to put *oral questions* to representatives and employees of an undertaking *during dawn raids*, where these are related to the investigation, and to require answers (with penalties for the provision of incorrect information). This should include questions which are not directly related to documents found on

37. Paras 79–81.
38. Paras 92 and 96–97, potentially resolving the *Spanish Banks* issue.
39. Para. 102.
40. Para. 105.
41. Para. 85.
42. Para. 105.
43. Para. 95.
44. Para. 106.
45. Para. 105.
46. Para. 107.
47. Para. 111.

the premises.[48] To some extent this is happening already, as shown by Commission references in the *British Sugar* case to "transcripts" of answers given at a company. It is, nevertheless, a worrying prospect for many employees, which is why many lawyers counsel their clients to give factual answers (*e.g.* as to what specific references in documents mean), but not to answer more wide-ranging questions, until the company's position has been checked factually and legally. There is also the issue of the privilege against self-incrimination. The Commission's proposal is therefore controversial.

(3) The Commission seeks the right to *summon any person* likely to provide it with information useful to its enquiry *to Commission premises* to "gather that person's statement for the record". This could apply to persons not available on a dawn raid, complainants or third parties.[49] Again, a very controversial proposal, although it appears that comparable powers exist in some Member State laws.

(4) The Commission emphasises that *sectoral enquiries* will take on a new importance under the new system (which follows, if there are to be no notifications).

(5) As regards *Article 11 letters*, the Commission proposes to authorise the frequent practice that these are provided by lawyers on their client's behalf as well as by company representatives.[50]

Complaints

As regards *complaints*, the Commission considers that these will take on a greater importance in the future. It proposes:

(1) To issue an *explanatory notice on complaints* (designed to encourage complaints, but also to explain the Commission's discretion based on *Automec* and what a complainant can expect from the Commission).[51] This is a welcome suggestion. As the court cases have shown recently, complainants need a better idea *at the outset* whether a Commission complaint is the right way to achieve their objectives or whether they should be applying to a national court. They also need a better sense of when to go to national competition authorities. Interestingly, in the latest Competition Report, the Commission noted that 15 of the complaints it had rejected for lack of Community interest were handled by the authority of the Member State most affected by the practice complained of.[52] A sign of the developing system of shared enforcement.

(2) To set a time-limit of *four months at the end of which the Commission will be obliged to inform the complainant whether it intends to take up a complaint* or whether it intends to reject it. The Commission would reply by reasoned letter against which an appeal may be made if it means the Commission proposes no further action.[53] This is most welcome.

(3) To do away *with "Article 6 letters"*, the letter sent to a complainant giving him an opportunity to offer comments on a *proposed* rejection of his complaint) followed by a formal decision to reject a complaint (on the basis that the two phases of rejection of a complaint take up too much time).[54]

(4) To include in Regulation 17 *specific provisions for interim measures*, concerning conditions, the relevant procedure, the period for their validity and the consultation of the Advisory Committee.[55] Again, this is most welcome with, however, the comment that such procedures must be fast—a question of days or weeks not several months, as has happened in some Commission cases. I do not agree with the Commission's view that current practice "has proven to be efficient". Sometimes it has been relatively quick given administrative constraints but, in general, the proceedings are slow. Usually one has to seek parallel interlocutory relief through national court proceedings. With the Commission one has to hope that the *threat* of proceedings will secure compliance. The Commission must also be more open to such applications. At the moment, they appear to be actively discouraged.

Penalties update

Finally, the Commission suggests to modernise the system of penalties, notably in the light of experience with the Merger Control Regulation. Thus:

(1) Immunity from fines on notification would disappear.[56]

48. Paras 112–113.
49. Para. 114.
50. Para. 116.
51. Paras 118–119.
52. 1998 E.C. Commission Competition Report at point 30.
53. Para. 120.
54. Para. 121.
55. Para. 122.
56. Para. 123.

(2) Fines for the provision of incorrect information would be increased to between Euro 1000 and Euro 50,000.
(3) Periodic penalty payments for failure to provide information or refusal to submit to a dawn raid would increase to Euro 25,000 per day.
(4) A new category of periodic penalty payments for failure to comply with commitments given for a positive decision could be created, set at Euro 100,000 per day as in E.C. merger control.
(5) Members of an association of undertakings would be made jointly liable for the payment of a fine imposed on the association.[57]

Transitional arrangements

The Commission also proposes that, on entry into force of the new regulation, all pending notifications would become null and void. A great disincentive on more filings!

First reactions

On the whole, these changes are very welcome although many are apprehensive as to the scale and nature of the change. It has been clear for some years that, even with DG IV's best efforts to become more efficient, 150 officials in Brussels could not keep up with E.C. notifications and exemptions for 15 Member States. It is also clear that the current co-operation systems are not successful substitutes for decentralising Article 81(3) E.C. powers.

However, there are a number of aspects which are difficult and appear to need further work. First, whilst it is clear that many agreements caught by Article 81 E.C. have not been notified for many years (as companies assess the risk of an unenforceability claim or fine against the compliance cost), in some cases it is important to be able to do so. Companies do not like to introduce new business formats for the whole of Europe without being fairly certain that they are legal. Significant investments also require reasonable legal certainty. The Commission should therefore find a place in the new system for some sort of short "*business review*" process, based on a briefing paper, probably followed up by a meeting and some Commission response.

Secondly, there should be greater clarification about the *nature* of the decisions to come, above all their validity over time and the position on undertakings. It appears that all the competition authorities concerned will simply rule on whether there is an infringement or not, *at a given moment*. This may be contrasted with the current exemption decisions which are valid for a certain time and where various (negotiated) conditions and/or undertakings may be attached. Companies should not be at risk of a changed ruling at any time, and how conditions and undertakings are meant to be dealt with, in particular in national courts, needs further explanation.

Thirdly, many lawyers are concerned about how they will be able to prove the many features required for a "positive" decision (to use the White Paper's terminology) before *any* court, at reasonable cost. The prospect of proving most of what is in a Form A/B is a daunting one for many cases and likely to be expensive. This is likely to make Article 81(3) E.C. defences difficult. Similarly, there is concern that proving *complaints* can be very difficult in national courts (if, for example, one is faced with *Delimitis* type appreciability issues or evolving policy, as recently, in the liberalising sectors).

Member States should therefore be encouraged to allocate E.C. competition issues to particular courts (perhaps the current appeals courts for domestic competition law). These courts should have jurisdiction in all E.C. competition matters or be consulted in a national form of Article 234(3) E.C. reference (or "case stated" as English lawyers might call it). This has been mentioned in previous reviews because it happens already in Belgian competition law with the Brussels Court of Appeal. Arguably, such a reference procedure could slow down the legal process a little. However, this is a small price to pay if the benefit is to be heard by experienced competition law judges with, as a result, more scope for predictable and consistent rulings. The creation of such courts would also assist co-ordination issues, as judges could be included in common training or co-ordination seminars (with competition authority officials).

Fourthly, the Commission and/or national competition authorities should also *actively* assist the national courts as *amicus curiae*, more as the rule than the exception, in order to limit the number of cases where the Commission might decide to take a contradictory decision after a national judgment. There are already similar co-operative mechanisms in Germany, France and Belgium. The importance of all this lies in getting the right result *at the outset*. It is unlikely that adequate cohesion will be achieved just through notices and guidelines.

Fifthly, there are still a number of practical concerns about the co-ordination and coherence of decision making. In practice, one would expect the "centre of gravity" principle to be important for the allocation of cases. This may still lead to national competition authorities and courts ruling on cases involving practices which, although mainly in one Member State's territory, also have

57. Paras 123–128.

effects in another. How this is to be dealt with, other than by the Commission taking the case, is not clear.

Sixthly, it is also not clear just how hierarchical a control the Commission should have. Some fear renationalisation of competition law and major divergences in decisions. Others are concerned that, if a decision has been taken by a national authority (perhaps after extensive hearings), the Commission should not be able to override it, save by an appeal in the national proceedings.

Finally, one may reflect a little on how this may change the nature of competition law which is currently mainly administrative. As noted already, at present many Commission exemptions take years, with extensive negotiations, development of position and technical understanding and, in some cases, a degree of broader engineering by the Commission to promote competition. It is an open question how that will fit with national court decisions, where there may be less scope for such development over time and less scope for interaction and solutions, yet the matters could come up in any Article 81(3) E.C. defence for hearing (in some countries) at the parties' "day in court".

A new Commissioner

The appointment of a new Commissioner always prompts speculation as to whether this will lead to a significantly new approach to competition policy and enforcement. It appears that Mr Van Miert recommended Mr Monti as his successor. In the last Commission, Mr Monti was responsible, amongst other things, for financial services and taxation. He has also been involved in controversial areas in his previous mandate—the abolition of duty-free and tax harmonisation. It is a little early to gauge Mr Monti's approach. However, what one can note is that he is already very familiar with competition policy, as one would expect from a Professor of Economics and that his expertise and experience may also be very timely, given the renewed emphasis on economics in competition policy. Amongst other things, he was on the drafting committee for the Italian Competition Act.

Mr Monti has also been involved in various Italian Treasury Committees on banking and financial issues. It will be interesting to see if this leads to a new emphasis on these sectors. He has already been quoted as saying that he felt the financial services sector had "only belatedly, sometimes timidly entered the competitive environment and competition culture".[58]

Clearly, a main agenda item for him will be the White Paper, an aspect he already emphasised in his Written Replies for the European Parliament hearings in August 1999. In those Replies he also stated that: "Competition policy lies at the heart of the European Union's economic and social policy. ... It is ... an essential component of the construction of a modern social market economy in Europe aiming at growth, employment and the safeguard of consumers interests".[59] These are terms highly reminiscent of Mr Van Miert's initial pronouncements as Competition Commissioner. We shall have to see how that mix works out in the next mandate.

Areas of particular interest

Sport

Box 10: Competition and Sport 1999

- General policy formulation
  - * Helsinki report
  - * "Towards Guidelines"
- Collective sales of league broadcasting rights
  - * *DFB, Gandalf, UEFA*
  - * *U.K. Restrictive Practices Court v. Italian Competition Authority*
  - * § 31 German Competition Act
- New clearance for *Eurovision* collective purchasing system
- *Formula One/FIA*
  - * Abuse of regulatory powers by governing body?
- Coming:
  - * World Cup tickets fine? (UEFA Euro 2000 notification)
  - * FIFA agents case?
  - * Amateurs may be caught by competition rules? (*Deliege*)

Competition and Books 1999

- No *Austro-German* book agreement decision yet, but *Dutch books* case closed

Again, this has been an extremely active year for competition and sport. There are little signs of abatement as key notifications on the collective sale of sports rights and the Commission's investigation of Formula One proceed.

First, one may mention progress towards a *general policy* in this area. In February 1999, it appears that the Commission circulated to Member States a document on its developing policy, suggesting the application of Article 81(1)

58. Reuters, October 26, 1999.

59. at 3.

E.C. to sport along lines similar to those discussed last year. In other words, dividing sports rules into those "inherent in sport" or "necessary for the organisation of sport or sporting competitions" and those of a more economic nature.[60] During the year (what was) DG X has also been developing a more general document on the "European Model of Sport", intended as a report to the Council of Ministers in Helsinki in December 1999.

Secondly, the Commission has received three notifications on leagues which mainly focus on the issue of the centralised broadcasting of football competitions. In January 1999 the *German Fussballbund* ("DFB") notified its collective sales arrangements.[61] In March 1999 the Media Partners project for a new European Football League (*Project Gandalf*) was notified.[62] Then in April *UEFA* notified its central marketing arrangements for the new format UEFA Champions League.[63]

These notifications raise fundamental issues. DFB and UEFA argue that they are at least co-owners of the rights in question so that there is no "joint sale" by separate undertakings in the sense of Article 81(1) E.C. They also argue that the collective sale system is key to ensuring a proper competitive balance between clubs in a league, since funds generated are partly redistributed to the weaker clubs. The system also allows for a channelling of funds into youth football, and players' training and education. The DFB argues that other systems, such as each club selling its rights separately with a payment into a "solidarity fund" for smaller clubs[64] are less able to achieve these ends because they create a conflict of interest between clubs.[65] Core questions as to what is the relevant market and/or product are also raised. Are football matches just part of a larger market for "sporting events"? Are matches products or is the product also the "story of the league" as it develops over a season, so that the championship should normally be sold as a whole? Beyond this, for what period can such rights be sold exclusively?

The Commission is understood to be still considering its position on these complex issues. Matters have not been made simpler by national developments. Thus, in *Germany*, an exemption to the German Competition Act has been introduced for the collective sale of sports rights, where revenues are applied, amongst other things, to the promotion of youth and amateur sports activities[66] after the *Bundesgerichtshof* had upheld a *Bundeskartellamt* decision prohibiting collective sales. In the *United Kingdom*, after a lengthy and detailed hearing before the Restrictive Practices Court, the collective sale of rights on an exclusive basis by the Premier League to Sky and the BBC was held to be in the public interest, good for sport and a stimulus to competition amongst broadcasters.[67] In *Italy*, a law has been passed limiting to 60 per cent the amount of football rights to the Italian Serie A which can be sold to one broadcaster. The Italian Competition Authority also ruled that the Serie A and Serie B could *not* sell their rights collectively.[68]

Mr Van Miert has criticised the German exemption. The Commission has also expressed reservations about the English decision, arguing that such collective sales affect trade between Member States, and reopening its own investigation into the case.[69] This has provoked widespread criticism insofar as the centre of gravity of these issues is clearly national, and principles of subsidiarity would seem to suggest that specific *national* solutions should apply, based on the differing economic and legal contexts (both amongst leagues and broadcasters).

Commission criticism of the English decision is particularly controversial at a time of decentralisation because it is hardly acceptable for the Commission to undermine the results of a trial lasting months with a brief Press Statement after the event. All the more so since it is clear from the judgment that there was detailed competition analysis, not just a broad public interest review. In short, it appears that the judgment cannot just be brushed aside as based as a *non*-economic appraisal. What the Court accepted was the notion that periodic competition by tender for exclusive rights was an adequate form of competition in the circumstances, given that there were various broadcasters bidding for such rights. Indeed, such sales were viewed as a *stimulus* to competition between broadcasters.

The *lack* of criticism of the Italian national judgment (based on a law modelled on E.C. principles) has also prompted speculation that the Commission may favour breaking collective sales. That would be a huge change for the leagues concerned, and would be likely to result in appeals to the European Courts.

Thirdly, in September 1999, the Commission published an Article 19(3) notice concerning a revised version of the *Eurovision* rules, after the CFI had annulled the Commission's previous clearance.[70] It will be recalled that Eurovision is a

60. See Commission Press Release IP/99/133, February 4, 1999.
61. [1999] O.J. C6/10.
62. [1999] O.J. C70/5.
63. [1999] O.J. C99/23.
64. A system advocated by the *Bundeskartellamt* and Mr Van Miert.
65. See the *DFB* notice at 11.
66. § 31 GWB.
67. Re: *The Agreement between the Football Association and the Premier League*, Judgment of July 28, 1999.
68. See Italian Competition Authority website, Press Releases No. 33, July 16, 1999 and No. 36, July 28, 1999.
69. Reuters, September 20, 1999.
70. [1999] O.J. C248/4.

system for the exchange of television programmes amongst the members of the European Broadcasting Union ("EBU"). In addition, through Eurovision, EBU members jointly acquire and share sports rights. The EBU has two types of member: "active" members and "associate" members. The EBU system is controversial because its membership rules have the effect of favouring national, public, free to air broadcasters. On the other hand, some argue that the system is the only way for public broadcasters to compete with pay-TV.

Key issues have been the conditions of active membership (giving access to the jointly acquired sports rights) and sub-licensing/third party access rights for non-members. The CFI annulled the Commission's clearance in 1996, mainly on the ground that the Commission had not properly analysed the conditions of membership so as to ensure they were objective and non-discriminatory. The EBU has now complemented its original notification with guidelines on the criteria for active membership, an obligation on the EBU's Council to ensure the rules are respected, a new system of arbitration for applicants, and new rules on the continuing participation of former Eurovision members in existing sports programmes in certain cases. The EBU has also adopted a set of sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels. The Commission proposes to take a favourable view of the revised system.

Fourthly, the Commission has continued its cases against *Formula One* and *the FIA*, prompted in part by their notifications and in part by complaints concerning abuse of dominant position. The focus of the case at present appears to be on the use of regulatory powers by a governing sports body. In June 1999 the Commission announced that it had opened formal proceedings, and issued a Statement of Objections. The Commission is reported to have identified several problems including that:

- the FIA uses its regulatory powers to block series which compete with its own events;
- the FIA used such powers to force the promoter of a Grand Touring championship out of the market and then substituted the championship with its own;
- the FIA used its powers abusively to acquire all the television rights to international motoring sports events; and
- Formula One and the FIA protect the Formula One championship from competition by tying-up everything that is needed to stage a rival championship.[71]

71. Commission Press Release IP/99/564, July 26, 1999; Commission Press Release IP/99/434, June 30, 1999; see also [1999] I.C.C.L.R. 71.

There have also been issues on *ticket sales*, the *FIFA agents system* and *multiple club ownership*. The last point I would emphasise is the opinion of Advocate-General Cosmas in the context of a claim by Ms Deliege, a judoka, that the Belgian judo federation had improperly impeded her career by not permitting her to take part in important competitions (notably the Barcelona and Atlanta Olympics).

He found that:

- "amateur" sport, practised at an advanced level *can be an economic activity*; and
- Community law was not opposed to rules of international federations which impose certain limits on the activity of athletes which are purely related to sport (in this case, the interest of the national teams and the need to ensure the representative character of the competitions).[72]

The impact of competition on sport may be yet wider than previously thought. In the case, the Advocate-General stated that there were insufficient facts to reach a conclusion on the application of competition law, but he likened Ms Deliege's activity to that of a company and the judo federation to an association of companies.

Books

Finally, continuing from last year,[73] one may note that discussions have continued as regards the *Austro-German book pricing* agreement. The Commission is acting in response to a complaint by the Austrian retail book chain, Libro. The Competition Directorate appears resolved to prohibit the agreement considering that the claimed cultural benefits of fixed book prices for the production and distribution of books have not been shown. First signs are that Mr Monti shares Mr Van Miert's opposition to such cross-border book pricing systems.[74] On the other hand, political pressure to retain the system is clearly great, including a Council Resolution in February 1999 calling on the Commission to take account of the cultural implications of (what was then) Article 128(4) E.C.[75]

In September 1999 the Commission announced that it was closing its file on the *Dutch fixed book price system*, after the parties concerned amended

72. European Court Press Release No. 31/99, May 18, 1999.
73. See [1999] I.C.C.L.R. 73–74.
74. Answer of Mr Van Miert to EP Written Question E-0773/98, [1999] O.J. C13/8; Comments by Mr Schaub, Reuters, July 27, 1999; Comments by Mr Monti, Reuters, September 23, 1999.
75. [1999] O.J. C42/3. (Now Article 151 E.C.)

their agreement to abolish resale price maintenance for foreign books.[76] Previously the Commission had issued a Statement of Objections to the Dutch association of publishers and booksellers, the KVB. The Commission states that it has concluded that the amended system no longer has an appreciable effect on trade between Member States, essentially leaving the Dutch authorities to assess whether to intervene further against the restrictions concerned. The Commission has added, however, that it would still take action if it learned that the Dutch fixed book price system *still* restricted imports or created an entry barrier or handicap, in particular to sales of books over the Internet.

76. Commission Press Release IP/99/668, September 9, 1999.