Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 1)

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LT Cartels; Competition law; Dawn raids; EC law; Fines; Legal professional privilege; Leniency programmes; Settlement

This article is designed to offer an overview of the major events and policy issues related to Arts 81, 82 and 86 EC from November 2006 until the end of October 2007. The article is divided into an overview of:

- legislative developments;
- European Court judgments;
- European Commission decisions;
- the Commission's sectoral reviews; and
- current policy issues.

Legislative developments and European Court judgments are included in Part 1. The other sections will be included in Part 2, which will be published in the next issue of I.C.C.L.R.

The main themes of the year are as shown in Box 1.

Box 1

- **Major themes/issues in 2007**
  - — The CFI's ''unlimited jurisdiction'' to review fines (e.g. in *French beef*, *Austrian banks*, *Belgian beer*)
  - — *Akzo*: Legal professional privilege applied strictly
  - — *Alrosa*: Art.9 settlements under judicial review
  - — *Microsoft*: Is that it?! European Court and Commission proceedings appear to end
  - — Huge fines in cartel cases (*before* the new Guidelines)
  - — The Commission's drive into energy, with proposed unbundling, the final sectoral report and several cases coming
  - — Settlements in cartel cases: Commission proposals

These are discussed in the appropriate sections below.

Legislative developments

This year has been a relatively quiet one as regards legislation in EC competition law.

Box 2

- **Legislation/Notices (Overview)**
  - — Leniency Notice adopted
  - — IATA conference block exemption ended for routes between EU/non-EU countries
  - — Draft Guidelines for maritime transport proposed
  - — N.B. Guidance on information exchanges
  - — Settlements rules for cartel cases proposed

Adopted

Leniency Notice

In December 2006, the Commission adopted its revised Leniency Notice.[1] This was described in detail as a proposal last year and is generally the same. The new leniency rules provide, among other things:

- that applicants may qualify for immunity, even if they have to attend a subsequent cartel meeting (in defined circumstances);
- for ''markers'' in the leniency process (in limited circumstances); and
- a general explanation of how the Commission accommodates oral corporate statements to deal with leniency applicants being deterred

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1. [2006] OJ C298/17; IP/06/1705 and MEMO/06/469, December 7, 2006; see also S. Suurnäkki and M. Tieno Centella, (Spring 2007) *EC Competition Policy Newsletter* 7.

from going in by (mainly US) discovery rules on written statements.[2]

IATA Block Exemption ends

In June 2007, the Commission decided not to renew the Block Exemption which exempts IATA passenger tariff conferences on air routes between EU and non-EU countries.[3] This was to occur by October 31, 2007.

Proposed

Draft Guidelines for maritime transport[4]

It may be recalled that in September 2006, the EU Council of Ministers adopted Regulation 1419/2006[5] repealing the Block Exemption for Liner Shipping Conferences and amending Regulation 1/2003 so as to extend its scope to include cabotage and international tramp services.[6] The repeal of the Block Exemption will enter into effect in October 2008.

In September 2007, the Commission published draft Guidelines for maritime transport to assist the maritime transport sector on their self-assessments as to how to apply the competitive rules and invited interested parties to comment by mid-November 2007.[7] Following the public consultation, the Commission will request EU Member States' views, before issuing the final Guidelines in October 2008.

The draft Guidelines are some 12 pages long. They deal first with general rules, such as effect on trade and market definition by reference to the relevant European Court case law and Commission practice. They also offer specific guidance on market definition in the sector, e.g. for liner shipping and for tramp services.

The draft Guidelines then outline the general rules for consideration of certain types of horizontal agreement in the maritime transport sector, together with sector-relevant material (e.g. technical agreements, information exchanges between competitors in liner shipping and pool agreements in tramp shipping). The section on information exchanges is detailed and is likely to be of interest also outside the sector.[8]

Box 3

- **Settlements in cartel cases: proposals**
  - — Core idea: Settle before Statement of Objections in return for opportunity to explain case, discuss fine and obtain a fine reduction, plus cap of two on deterrence multiplier?
  - — N.B. Cumulative with leniency
  - — Need *written* settlement submission
  - — May lead to split proceedings (some settle, some do not)
  - — Offer to Commission, but still has to be accepted by the College of Commissioners
  - — Comments for December 21, 2007
  - — Complainants may not have *right* to non-confidential Statement of Objections

Settlements in cartel cases

In October 2007, the Commission published a draft ''Settlements Notice'' and a draft Commission Regulation amending Regulation 773/2004 and invited comments on the proposed settlements procedure in cartel cases by December 21, 2007.[9]

This proposal has been awaited with considerable interest. In short, what is being proposed is a system in which after the Commission has carried out its investigation, but before the Statement of Objections (SO) is sent out, a company should be able to discuss its case with the Commission, learn what the Commission sees as the likely infringement and fine and then, if it wishes to do so, propose to settle the case.

In return for the procedural economies which the Commission will have as a result (mainly as regards access to file, less detailed SO, no hearings), the Commission proposes to offer a fine reduction of a given percentage, which will be the same for all parties in a case. The Commission has not yet indicated what percentage it has in mind. However, judging by the leniency practice, one may think that a fine of 10–20 per cent is contemplated (perhaps more if the Commission really wants to encourage settlements).

2. See further, John Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2005–2006 (Part 1)'' [2007] I.C.C.L.R 27, 32–33.
3. IP/07/973, June 29, 2007. See further, Ratliff, ''Major Events and Policy Issues, 2005–2006'' [2007] I.C.C.L.R 27, 27–28.
4. With thanks to Katrin Guéna for her assistance with this section.
5. Regulation 1419/2006 repealing Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation 1/2003 as regards the extension of its scope to include cabotage and international tramp services [2006] OJ L269/1.
6. Cabotage relates to the transport of cargo between ports in one Member State. Tramp services are non-regular, maritime transport of bulk cargo which is not containerized, unlike liner shipping services. See also Benini and Bermig, (Spring 2007) *EC Competition Policy Newsletter* 20 and Ratliff, ''Major Events and Policy Issues, 2005–2006'' [2007] I.C.C.L.R 27, 28–29.
7. IP/07/1325 and MEMO/07/355, September 13, 2007; [2007] OJ C215/3.
8. IP/07/1325 and MEMO/07/355, pp.9–12.
9. IP/07/1608 and MEMO/07/433, October 26, 2007; [2007] OJ C255/48 and 51.

Although not stated by the Commission, it appears also to be hoped that companies will not be interested to appeal (although they will retain the right to do so), saving further resources for the Commission to do other cases.

Importantly, this reduction is cumulative with leniency, so it may be of considerable interest for companies. There is also a new opportunity to gain insight into the Commission's views at an early stage and influence them before the SO, with a corresponding possible impact on fines.

The proposed procedure involves a number of complex issues, notably in terms of preserving the rights of the defence and catering for possible scenarios (e.g. as some companies may settle and others not).

In first reactions, one major issue raised is that companies are meant to offer a ''written settlement submission'' (WSS). This is meant to set out the core elements of the settlement offer (and appears intended therefore to be similar to a ''plea agreement'' in the United States). However, those concerned about plaintiff discovery are already suggesting that the WSS should be oral.

Another first reaction is that this does not provide companies with what many would really like, namely an ability to settle a cartel infringement within a year. However, the problem here appears to lie in the Commission's perceived need to carry out at least a thorough investigation before turning to settlement discussions (a position likely reinforced by the *Alrosa* judgment this year on Art.9 settlement procedures: see below).

Turning to the proposed system in more detail, the key points are as follows:

1. The Commission will retain a *broad discretion as to whether to accept settlements in a case*, depending on its view as to:

   > ''. . . [t]he probability of reaching a common understanding with the parties involved within a reasonable time frame; the number of parties involved; conflicting positions on liability; contestation of the facts and the setting of a possible precedent.''[10]

2. Although settlement procedures are to be *bilateral and confidential*, at least as to their content, it appears that, where the Commission is willing to consider settlement it will write to *all* parties, giving them the opportunity to do so.[11]
3. The Commission appears to be contemplating settlement *up until the SO* (although a party willing to settle can indicate that earlier).
4. The Commission also notes that leniency applications cannot be made once the settlement phase has started.
5. When the Commission sends a letter inviting settlements, the parties will have a given time to respond declaring their interest to enter into settlement discussion (which should be not less than two weeks).
6. If several undertakings in the same group envisage seeking a settlement, they are obliged to appoint a joint representative[12]; it being stated that this is *not* evidence as to joint and several liability within the group.[13]
7. Importantly therefore it appears possible for *some companies to settle, while others do not*.[14]
8. The Commission will retain discretion to organise the settlement discussions, as well as the timing of disclosure of information.
9. The Commission plans to inform the parties:

   > ''. . . of the essential elements taken into account so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, *an estimation of the range of likely fines*, as well as the evidence used to establish potential objections'' [emphasis added].[15]

10. On reasoned request, at this stage a party may seek access to non-confidential versions of documents which it thinks necessary to assess its position.[16]
11. A party will then be able to make its views known on the potential objections. Importantly, it appears this could be more than one round of discussion (although the Commission avoids all reference to negotiations or plea-bargaining), in which the Commission will give a party seeking to settle *an estimate of its potential fine*.[17]
12. When a ''common understanding'' has been reached on the scope of the potential objections and the likely fines, the Commission will give the parties time to provide a *written settlement submission*. Such a document involves:
    - An acknowledgement ''in unequivocal terms'' of liability for the infringement described, as regards the main facts, their legal qualification and the duration of participation in the infringement.
    - An indication of the maximum fine the parties accept in settlement.

10. Proposed Notice para.5.
11. Proposed Notice paras 6 and 7.
12. Proposed Notice para.12.
13. MEMO/07/433.
14. Proposed Notice para.14.
15. Proposed Notice para.16.
16. Proposed Notice para.17.
17. Proposed Notice paras 15, 16 and fn.10.

- The parties' confirmation that they have been sufficiently informed of the objections raised and have been given sufficient opportunity to be heard thereon.
- The parties' confirmation that they do not envisage requesting access to the file, or to be heard again in an oral hearing.
- The parties' agreement to receive the SO and final decision in a given official EC language.[18]

13. It is understood that this settlement is *conditional*, i.e. if not reflected in the SO and ultimately accepted by the Commission in a decision, the acknowledgements and confirmations made *are withdrawn*. Moreover, if withdrawn, the WSS cannot be used as evidence *against* the party.[19]
14. However, the Commission states that a party offering a WSS cannot otherwise revoke the settlement after giving it, unless the Commission does not meet the settlement request.[20]
15. The Commission will then issue an SO which, it is understood, is likely to be a shorter one than in a contested case. The SO may reflect the points clarified in the settlement discussions and, where appropriate, the amount of potential fine could be reviewed *downwards*.[21]
16. A party settling would be asked to confirm that the SO reflected the settlement discussion and that it still wished to follow the settlement procedure within not less than one week.[22]
17. If the settlement is *not* pursued by the Commission in its SO, or because of arguments of the Advisory Committee, or because the College of Commissioners decides otherwise, then the settlement is deemed withdrawn. *A new SO would then be issued and the party concerned would have a new opportunity to submit its defence, with access to file and right to a hearing*.[23]
18. A party would be entitled to call upon the Hearing Officer during the settlement procedure.[24]
19. *In addition to a fine reduction the Commission also proposes to limit any specific increase for deterrence to a multiplier of 2* (200 per cent).[25]
20. The Commission confirms that statements in these procedures should not be subject to access under Regulation 1049/2001.[26]
21. Finally, the Commission notes that any sanction can be reviewed by the European Court in its unlimited jurisdiction.[27]

As regards proposed amendments to Regulation 773/2004, which are essentially designed to provide a legal basis for these new procedures, one other important point should be noted. The Commission plans a discretion not to give a complainant a non-confidential copy of the SO. The Commission notes that this may have negative consequences on the willingness of parties to co-operate with the Commission.[28]

European Court judgments

Box 4

• Main European Court cases: General issues—I

— *Asnef-Equifax*—Credit risk information:
  * Exchange not restrictive by object, may be restrictive by effect, but may qualify for Art.81(3) EC
  * Improvement to supply of credit
  * Overall benefit > individual issue
— *Wanadoo/France Télécom*—Predatory pricing:
  * No absolute right for a dominant company to align on competitors' prices (if below cost)
— *BA/Virgin*—Art.82 EC and rebates:
  * Likely effect on competitive relationship required for discrimination
— *Der Grüne Punkt/DSD*—German recycling cases:
  * An exclusive ''Green Dot'' system not essential; appeals rejected
— *Alrosa*—Art.9 settlements procedure:
  * Commission must review proportionality of commitments offered
  * De Beers could not be totally prohibited from buying from Alrosa
— *France Télécom*—Inspections:
  * Commission not prevented from carrying out dawn raid by parallel French proceedings

The year has been an important one in terms of European Court judgments on general competition

18. Proposed Notice para.20.
19. Proposed Notice para.27.
20. Proposed Notice para.22.
21. Proposed Notice para.25.
22. Proposed Notice para.26.
23. Proposed Notice para.29.
24. Proposed Notice para.18.
25. Proposed Notice para.32.
26. Proposed Notice para.35.
27. Proposed Notice para.36.
28. See Proposed Amending Regulation Preamble para.5 and Art.1.

law issues and again there have been many cartel appeal cases.

General

Information exchange on credit risk—Asnef-Equifax[29]

In November 2006, the European Court of Justice (ECJ) ruled on a request for a preliminary ruling from the *Tribunal Supremo* of Spain concerning the applicability of Art.81 EC to a register of information between financial institutions on the solvency of customers.[30] The purpose of the register is to provide solvency and credit information through the computerised processing of data relating to the risks undertaken by participating organisations engaged in lending and credit activities.

The questions arose in proceedings between Asnef-Equifax, a Spanish entity which includes the national association of financial institutions and Ausbanc, an association of bank users. Asnef-Equifax had submitted a request for clearance of the register, which it was to administer, to the Spanish competition law authorities as regards Spanish competition law. The Spanish Competition Authority had authorised the register for five years under Spanish competition law on the condition that it be accessible to all financial establishments on a non-discriminatory basis and that it would not disclose information on lenders. Ausbanc had then sought annulment of that decision before the *Audiencia Nacional* and succeeded. Asnef-Equifax appealed. In that context the *Tribunal Supremo* referred questions on the applicability of Art.81(1) and (3) EC to the ECJ.

The first issue considered was whether the referring court could seek a ruling on EC competition law when the decision before it concerned national competition law. The ECJ said yes. The ruling on Art.81 EC might have a bearing on the dispute before the national court (if trade might be affected) and the *Tribunal Supremo* had overtly stated that it sought to avoid contradictory or divergent interpretations of the two sets of competition rules, to ensure the primacy of Community law.

Turning to the substance, the ECJ found that the *Tribunal Supremo* asked whether a credit information exchange system like the register is caught by the prohibition of Art.81(1) EC and, if so, whether such a system may benefit from the exemption of Art.81(3) EC.

In an interesting and important judgment, the Court essentially held that by its nature such a system fell outside Art.81(1) EC, but it was for the national court to consider whether it had anti-competitive effects caught by that Article and was or not to be cleared under Art.81(3) EC.

First, the ECJ noted that, insofar as the register involved co-operation between competitors through the indirect exchange of credit information, Art.81(1) EC might apply to ''the conception and the implementation'' of the register.[31]

Secondly, the ECJ noted that whether the register at issue could have an appreciable effect on trade between EU Member States was for the national court to determine. However, according to the ECJ, the national court should consider the probability that the register could have a not-insignificant influence, direct or indirect, actual or potential, on the supply of credit in Spain by operators from other EU Member States. The ECJ appeared to consider that the register might have such an effect, especially since there were no minimum thresholds for access and the information concerned was transferred electronically. Moreover, access to the register and its conditions might affect the decisions of companies in Member States other than Spain as to whether or not to do business in Spain.[32]

Thirdly, as to the existence of a restriction of competition within the meaning of Art.81(1) EC, the ECJ noted that the object of such credit information exchange systems is to give credit providers relevant information about how borrowers had previously honoured their debts. Such registers could therefore reduce the rate of borrower default and, importantly, improve the functioning of the supply of credit. Therefore, such registers did not restrict competition by their very nature.[33]

Fourthly, the ECJ noted that information exchanges could have the effect of reducing or removing the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.[34] The compatibility of such an information exchange system therefore could not be assessed in the abstract. It depends on the economic conditions on the relevant markets and on the specific characteristics of the system in question. The ECJ noted that if the market was highly concentrated, the exchange might distort competition and facilitate collusion. On the other hand, if supply was fragmented, such

29. With thanks to Natalie McNelis for her assistance with this section.
30. *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (C-238/05) [2006] E.C.R. I-11125.
31. *Asnef-Equifax* [2006] E.C.R. I-11125 at [30]–[31].
32. *Asnef-Equifax* [2006] E.C.R. I-11125 at [41]–[42].
33. *Asnef-Equifax* [2006] E.C.R. I-11125 at [46]–[48].
34. *Asnef-Equifax* [2006] E.C.R. I-11125 at [51].

information exchanges could be neutral or even positive for competition.[35] Here the ECJ noted that the *Tribunal Supremo* had found the market fragmentary.

Fifthly, the Court agreed with the approach taken by the Spanish Competition Authority, in finding that it is important that that the system does not permit lenders to be identified and allows for non-discriminatory access.

The Court concluded that, if those criteria were met, an information exchange system such as the register is not, in principle, liable to have the effect of restricting competition within the meaning of Art.81(1) EC[36]:

> ''While in those conditions such systems are capable of reducing uncertainty as to the risk that applicants for credit will default, they are not, however, liable to reduce uncertainty as to the risks of competition. Thus each operator could be expected to act independently and autonomously when adapting a given course of conduct, regard being had to the risks presented by applicants.''[37]

Sixthly, the Court addressed the question of the applicability of Art.81(3) EC, in the event that the national court considered that the information exchange system had the effect of restricting competition. The ECJ recalled that it was for the national court to determine whether those conditions are satisfied and then focused on the national court's apparent concern as to whether consumers would have a fair share of the profit resulting from the agreement.

Interestingly, the Court focused on the way that the system could have overall beneficial effects on the provision of credit. It had noted that, through helping to identify the borrowers more likely to default, the register in fact might reduce the cost of credit, because lenders would not have to factor that risk into their prices. Such registers could also increase the mobility of consumers of credit and make it easier for new competitors to enter the market.[38] The Court also suggested that such systems could prevent consumers from over-indebtedness and, in principle, lead to greater overall availability of credit.[39] In short, there were possible consumer benefits.

Ausbanc had argued before the national court that certain credit applicants would face higher interest rates because of the register, or even face refusal of credit. However, the ECJ considered that it was the overall beneficial nature of the effect on *all* consumers in the relevant markets that had to be taken into consideration, not the effect on each member of that category of consumers.[40]

35. *Asnef-Equifax* [2006] E.C.R. I-11125 at [58].
36. *Asnef-Equifax* [2006] E.C.R. I-11125 at [61].
37. *Asnef-Equifax* [2006] E.C.R. I-11125 at [62].
38. *Asnef-Equifax* [2006] E.C.R. I-11125 at [55]–[56].
39. *Asnef-Equifax* [2006] E.C.R. I-11125 at [67] and [71].
40. *Asnef-Equifax* [2006] E.C.R. I-11125 at [70] and [72].

Minimum lawyers fees—Cipolla, Macrino, Capoparte

In December 2006, the ECJ ruled on two cases in which parties claimed that the Italian system for fixing lawyers' fees, with minimum and maximum levels, was contrary to EC Competition law (Arts 10, 81 and 82 EC). There was also a claim that the minimum fee rule was contrary to the EC right of freedom to provide services (Art.49 EC).[41]

The Court found no competition issue, since the scale in question was an Italian state rule. It may be recalled that Italian rules like this have been considered before in *Arduino*.[42] The key point was (again) that a draft scale prepared by lawyers, which was reviewed by at least two public bodies before being made law, was considered an Italian act of state. There had been no delegation of sovereign powers, nor was there an unlawful strengthening of an unlawful private agreement.[43] Moreover, the ''rule'' was also not without limits: a court could depart from the minimum or maximum limits by reasoned decision.

However, the Court found a restriction of the freedom to provide services. Although on the facts this was not a trans-border case, the Court noted that the minimum scale could make it more difficult for foreign-based lawyers to compete with locally established lawyers on price and therefore restricted their ability to offer services. The ECJ left it to the national court to assess if the restriction was nevertheless justified by overriding public interest, suitable for the objectives to be achieved and not going beyond what is necessary to attain them.[44]

The Court added that, among other things, it was conceivable, given the large number of lawyers in Italy, that competition through services offered at a discount, could entail a risk of harm to the quality of the services provided. (This part of the ruling concerned minimum legal fees for court services reserved to lawyers.)

Spanish petrol stations—CEEES/CEPSA[45]

In December 2006, the ECJ ruled on another request for a preliminary ruling from the *Tribunal Supremo* in Spain[46] concerning prices in petrol stations and (the former) Art.85 EC. The

41. *Cipolla v Fazari, née Portolese*; *Macrino/Capoparte v Meloni* (C-94/04 and C-202/4) [2006] E.C.R. I-11421.
42. Case C-35/99 [2002] E.C.R. I-1529.
43. *Cipolla/Macrino* (C-94/04 and C-202/4) [2006] E.C.R. I-11421 at [45]–[54].
44. *Cipolla/Macrino* (C-94/04 and C-202/4) [2006] E.C.R. I-11421 at [59]–[61], [65]–[69].
45. With thanks to Lisa Arsenidou for her assistance with this section.
46. *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* (C-217/05) [2006] E.C.R. I-11987.

reference this time was in the context of proceedings brought before the Spanish courts by the Spanish Confederation of Service Station Operators (*Confederación Española de Empresarios de Estaciones de Servicio*) (the Confederation) against CEPSA, a Spanish petroleum company.

In the national proceedings, the Confederation claimed that agreements concluded between CEPSA and 95 per cent of its service station operators at the end of 1992 restricted competition because they provided, among other things, that the service station operator undertook to charge the retail price stipulated by CEPSA.

It appears that the Confederation had filed a complaint with the Spanish Competition Authority, which had been rejected on the basis that the relationship between CEPSA and its station operators was an agency one, not therefore *between* independent undertakings for the purposes of competition law.

The issue in the national proceedings concerned Spanish competition law and only indirectly EC law, insofar as Spanish law referred to Regulation 1984/83, the predecessor of the current Vertical Restraints Block Exemption.

Similar to the *Asnef-Equifax* case, the ECJ considered the related issues of admissibility and decided that, in such circumstances, it should give a ruling to avoid divergence between the national and the EC rules. The Court also noted that it had jurisdiction to do so where an act of Community law was explicitly referred to in national law.[47]

Turning to the substance, the questions raised by the *Tribunal Supremo* essentially concerned whether exclusive fuel distribution agreements with a certain allocation of risks and obligations fall within the scope of Art.85(1) EC (now Art.81(1) EC) and, if so, were incompatible with Regulation 1984/83.

The Court emphasised first that such an assessment depended not on the formal separation of the undertakings in question, but on the unity of their conduct on the market. Agents were only auxiliary organs to a principal if they did not bear any of the financial and commercial risks resulting from the contracts negotiated. On the other hand, if intermediaries bore risks linked to sales or performance of contracts with third parties, they were not auxiliary organs of the principal's undertaking. As a result, the decisive issue was the risk allocation in the service station operators' agreements linked to sales of goods to third parties. This was a question of the real economic situation, not the legal classification of the contractual relationship in national law.[48]

Focusing on that issue, the Court found as follows:

First, the Court noted that Art.85(1) EC would continue to be applicable to the residual parts of the station operator agreement with CEPSA, not related to fuel sales, such as exclusivity and non-competition clauses, which could entail locking up of the market.

If the station operators took risks related to fuel sales, Art.85(1) EC would also apply and, since retail price fixing clauses were not compatible with Regulation 1984/83, that block exemption could not be applicable to the agreements concerned, given that they stipulated final retail prices.

Secondly, the ECJ considered that in the reference from the national court it did not have all the information it needed to assess this question. However, the Court set out what it considered to be the relevant criteria. The Court stated that the national court should take account of the risks linked to the sales of the goods, such as the financing of fuel stocks and the risks linked to investments specific to the market, i.e. those required to enable the service station operator to negotiate or conclude contracts with third parties.

According to the ECJ, the following are indications that a service station operator assumes risks linked to the sale of goods:

- The operator takes possession of the fuel prior to selling it to a third party.
- The operator assumes the costs linked to the fuel distribution, particularly the transport costs.
- The operator maintains fuel stocks at his own expense.
- The operator assumes responsibility for damage caused to the fuel or damage caused by the fuel sold to third parties.
- The operator assumes the financial risk for the fuel should he not find a purchaser, or where payment is deferred as a result of payment by credit card.[49]

In that connection, interestingly, the Court noted that the operator had to pay for the fuel supplied nine days after receiving it, receiving a corresponding commission at the same time. It was therefore for the national court to determine whether such payment for fuel depended on the quantity actually sold by that date and whether such fuel would always be sold within nine days. If yes, the risk was borne by the supplier.[50]

Thirdly, as regards the risks linked to investments specific to the market, the Court considered

47. *Confederación Española de Empresarios de Estaciones de Servicio* [2006] E.C.R. I-11987 at [20]–[22].
48. *Confederación Española de Empresarios de Estaciones de Servicio* [2006] E.C.R. I-11987 at [41]–[46].
49. *Confederación Española de Empresarios de Estaciones de Servicio* [2006] E.C.R. I-11987 at [51]–[56].
50. *Confederación Española de Empresarios de Estaciones de Servicio* [2006] E.C.R. I-11987 at [57]–[58].

the following as indicative that the station operator was taking a risk: where the operator made investments specifically linked to the sale of fuels, such as investments in premises or in equipment, such as here a fuel tank, or commits himself to invest in advertising campaigns.

Fourthly, the Court concluded that to decide if Art.85 EC applied, it was necessary to look at the allocation of the financial and commercial risks between the station operator and the supplier of fuel on the basis of criteria such as:

> ''. . . the ownership of the goods, the contribution to the costs linked to their distribution, their safekeeping, liability for any damage caused to the goods or by the goods to third parties and the making of investments specific to the sale of those goods.''[51]

The Court added that Art.85(1) EC would only apply if such restrictions were non-negligible.[52]

Predatory pricing—Wanadoo/France Télécom

In January 2007, the Court of First Instance (CFI) upheld the Commission's Art.82 EC decision concerning predatory pricing by Wanadoo on the French high-speed internet access market, designed to ''pre-empt'' that market (i.e. secure a dominant position for Wanadoo).[53]

It may be recalled that the Commission's decision had been detailed and complex, with a number of issues. Notably, given that the market was fast-developing, the Commission had lengthened the reference period which it took into account in order to see if Wanadoo had been recovering its costs. The Commission had also indicated that a dominant competitor could not align itself on its competitor's prices, even promotional prices, if that meant that the dominant company was selling below cost.[54] The Commission also took the position that legally it did not need to show that Wanadoo could expect to recoup its costs (although in fact the Commission then went to suggest that Wanadoo might do so).

The Commission also noted that Wanadoo's position could not be abstracted from that of its parent France Télécom, which the Commission found to have benefited from upstream wholesale supply, even if downstream Wanadoo was making losses in ADSL to secure its desired market position.

Finally, it may be recalled that, although generally confidential and therefore not included in the Commission's decision, the Commission had stated that Wanadoo's internal documents clearly showed an intention to pre-empt the market, so that, on the case law, pricing below average total costs, but above average variable costs was deemed predatory.

This decision was therefore an important one, applying *Akzo* and *Tetrapak* principles to a fast-developing market.[55]

Wanadoo, which since has been merged into France Télecém, appealed.

The main points in the CFI's judgment are as follows:

First, there was discussion as to whether a ''letter on the facts'' sent by the Commission, correcting its position on two previous Statements of Objections, should have been sent as a third Statement of Objections. The CFI found not. It appears that in the letter the Commission shortened the period in which it stated that variable costs were not recovered and lengthened that in which it stated that full costs were not recovered. It also corrected a mistake in the Commission's calculations which Wanadoo had pointed out. The CFI found that the changes concerned did not amount to new complaints as compared to the Statements of Objections sent and, in any event, that Wanadoo had been offered the opportunity to comment on the letter, with access to file (which it had taken). Wanadoo's rights of the defence were therefore not infringed.[56]

Secondly, the CFI upheld the Commission's view that Wanadoo was dominant on the market for high-speed internet access for residential customers. (High-speed and low-speed internet access were found not to be substitutable.)

Although the CFI agreed that the relevant market was fast-growing, it held that that did not preclude application of Art.82 EC. The Court noted that the market did not show signs of ''marked instability'' in the period at issue. On the contrary, a ''rather stable hierarchy was established with (Wanadoo) at its head''.[57]

The CFI also noted that the fact that there may be competition on the market is relevant to assessing dominance, but not decisive. Wanadoo had stressed that its market share had fluctuated from 50 per cent to 72 per cent to 63 per cent in

51. *Confederación Española de Empresarios de Estaciones de Servicio* [2006] E.C.R. I-11987 at [60].
52. *Confederación Española de Empresarios de Estaciones de Servicio* [2006] E.C.R. I-11987 at [65].
53. *France Télécom SA v Commission of the European Communities* (T-340/03), unreported, January 30, 2007.
54. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [59] and see, John Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2004–2005 (Part 2)'' [2006] I.C.C.L.R 83, 88–90.
55. *AKZO Chemie BV v Commission of the European Communities* (C-62/86) [1991] E.C.R. I-3359; and *Tetra Pak International SA v Commission of the European Communities* (T-83/91) [1994] E.C.R. II-755; *Tetra Pak International SA v Commission of the European Communities* (C-333/94 P*)* [1996] E.C.R. I-5951 respectively.
56. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [37]–[51].
57. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [107]–[108].

the 2001–2002 period. However, the Court stated that a decline in market shares which are still very large could not, in itself, prove the absence of a dominant position.[58] Rather, the CFI noted various factors indicative of Wanadoo's strength, such as that Wanadoo always had eight times more subscribers than its nearest competitor and commercial and technical advantages from its links to France Télécom.

Thirdly, Wanadoo challenged the way in which the Commission addressed the rate of recovery of costs. Here the CFI noted that since such an issue entailed a complex economic assessment, the Commission had a broad discretion and the Court's review was more limited, essentially here checking for manifest error.[59]

The CFI found no such error. Notably, the Commission had spread the costs of acquiring customers over 48 months, so that it was more in line with Wanadoo's strategy. The CFI noted that some of Wanadoo's competitors spread comparable costs over a shorter period of time, so it did not appear that the Commission's approach to recovery of costs was unlawful (or unfavourable to Wanadoo).[60]

Fourthly, Wanadoo argued that it had a fundamental right to align its prices on those of its competitors, even if that meant selling below cost, arguing that this flowed from *Akzo*.

The CFI disagreed, stating that the case law did not go so far. There was no such ''absolute'' right for a dominant company.[61] On the contrary, the principles set out in the case law reflect inferences of certain anti-competitive intentions on a dominant company when it sells below cost. Thus, a dominant company selling below average variable costs is deemed to be intending to eliminate competition, rather than to be competing. Where a dominant company sells below average total costs, but above average variable costs, that is considered less clear and is only found abusive, if there is clear (''sound and consistent'') evidence of anti-competitive intent.[62] The CFI held that here such an intent was shown by the documents indicating Wanadoo's plan to pre-empt the market.[63]

Fifthly, Wanadoo argued that the Commission should have shown that Wanadoo would have had a realistic chance of recouping its losses after the ''below cost'' sales period. Wanadoo argued that it could not do so. This was a competitive market, where market entry was easy. In such circumstances, it was not clear that Wanadoo would be able to raise its prices in the future and a strategy of predation was therefore not economically rational.[64]

The CFI disagreed, noting again that the case law did not go so far. The CFI quoted *Tetrapak*, which specifically stated that a realistic chance of recoupment did not have to be shown and that, ''[i]t must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated''.[65]

Article 9 settlements—Alrosa[66]

This is one of the most interesting developments of the year, because the judgment makes a number of rulings on the Art.9 settlement procedure of Regulation 1/2003.[67]

The case itself is rather complex, essentially because there were two cases in one.

The Commission proceedings were as follows: Alrosa and De Beers are respectively the No.2 and the No.1 producers of ''rough'' diamonds in the world, Alrosa based in Russia, De Beers in Luxembourg and Southern Africa. For many years they have had a supply relationship, in which the Commission found that De Beers had effectively purchased Alrosa's rough diamonds for the world market.

Alrosa and De Beers notified their agreement, seeking confirmation that there was no infringement of Arts 81 and 82 EC. The Commission then opened two proceedings, one with both companies for Art.81 EC and another with just De Beers for Art.82 EC. The Commission sent two separate Statements of Objections to the proposed agreement, since it considered that the supply relationship kept Alrosa out of the world market (including the European Union) and contributed to reinforcing De Beers' dominant position on that market.

It appears that there were then essentially three rounds of negotiations and commitments.[68]

First, Alrosa offered a ''phase out'' progressive reduction of supply to a point where it would cease supplying De Beers in 2013. However, Alrosa later withdrew that commitment.

Then, Alrosa and De Beers offered joint commitments with another progressive reduction

58. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [101]–[104].
59. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [129].
60. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [137] and [153]–[154].
61. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [182]–[187].
62. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [197].
63. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [199]–[200].
64. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [219].
65. *France Télécom SA* (T-340/03), unreported, January 30, 2007, at [226].
66. With thanks to Anne Vallery for her assistance with this section.
67. *Alrosa Company Ltd v Commission of the European Communities* (T-170/06), unreported, July 11, 2007.
68. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [18]–[25].

schedule to a capped supply of US $275 million in 2010 and thereafter. These were considered favourably by the Commission and an Art.27(4) Notice was published in June 2005. However, this resulted in some 21 third party comments. These appear to have included comments suggesting that the supply relationship was, in effect, a form of cartel and calling for its outright end soon. The Commission then appears to have reacted to that and indicated to the parties that the supply relationship would have to end for the Commission to accept any commitment.

Then De Beers alone offered such a commitment, with another (shorter) phase out progressive reduction schedule, resulting in no purchases with effect from 2009. It appears that Alrosa was given the opportunity to comment on those proposed commitments and on a non-confidential summary of the 21 third party comments to the joint comments. The Commission then accepted De Beers' commitments and took a decision making them binding.

It is important to note that the De Beers commitments ended the Art.82 EC case brought against it. Technically, Alrosa was not the alleged infringer in that case, albeit clearly affected by the commitments, which in practice also ended the Art.81 EC proceedings against Alrosa and De Beers.

It is also important to note that under the accepted commitments De Beers could not buy from Alrosa at all after 2008.

Alrosa then appealed, mainly arguing that the outright prohibition on supplies to De Beers was disproportionate. Alrosa also argued that, even in the Art.82 EC case, it was an undertaking concerned, given the particular circumstances.

The Commission's main position was that under an Art.9 procedure it was not required to do the same type of detailed review of a case, or proposed comments, as it would if it was taking a decision under Art.7 of Regulation 1/2003, requiring parties to bring an infringement to an end. As a result, the Commission could legitimately accept the proposed commitments ''at face value''.[69]

Alrosa, on the other hand, argued that an Art.9 settlement could not go further than the Commission could itself have ruled in an Art.7 decision and that the outright cessation of the supply relationship went beyond what the Commission could have ordered.[70]

With this rich backcloth, the Court gave an equally rich judgment.

In short, the CFI agreed with Alrosa and annulled the Commission's decision making De Beers' commitments binding. The Court therefore requires that the Commission look at proportionality of proposed commitments in an Art.9 settlement, even if that involves a more detailed review.

These are the main points in the Court's judgment:

First, in the circumstances, Alrosa was directly and individually concerned by the Commission's decision accepting the De Beers commitments.[71]

Secondly, it is the Commission's decision which has legal effect for the undertakings concerned, not the commitments themselves. Such a decision is not just the mere acceptance of commitments. Through its decision, the Court emphasises that the Commission takes responsibility for them.[72]

Thirdly, the party responsible for the conduct in question and offering the commitment is the undertaking concerned in the Art.9 procedure. In an Art.82 EC case, that means the party allegedly abusing a dominant position, not all the undertakings liable to be affected by the behavioural commitments. However, in this case, notably because of the parallel Art.81 and 82 EC proceedings, the impact on Alrosa and its general involvement, Alrosa should have been treated as an undertaking concerned.[73]

Fourthly, commitments may be accepted for an indefinite period where appropriate.

Fifthly, even though Art.7 and Art.9 procedures under Regulation 1/2003 are different and the Commission has a margin of discretion as to whether to pursue an Art.7 or Art.9 procedure, the Commission has to check the proportionality of the measure which makes it binding through its decision.[74]

The Commission must:

> ''. . . establish the reality of the competition concerns which justified its envisaging the adoption of a decision under Articles 81 EC and 82 EC and which allow it to require the undertaking concerned to comply with certain commitments. This presupposes an analysis of the market and an identification of the infringement envisaged which are less definitive than those which are required for the application of Article 7(1) of Regulation No.1/2003 although they should be sufficient to allow a review of the appropriateness of the commitment.''[75]

Sixthly, the Commission cannot take a decision under either Arts 7 or 9 of Regulation 1/2003

69. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [72], [77]–[78].
70. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [58]–[60].
71. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [39]–[40].
72. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [86]–[88].
73. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [90] and [186]–[187].
74. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [92] and [97].
75. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [100].

prohibiting absolutely any future trading relations between two undertakings, unless such a decision is necessary to re-establish the situation prior to the infringement. The Commission still has to check proportionality, again because the Commission is taking a decision accepting the commitments.[76]

Seventhly, the Court's review of a case like this is not limited to checking for manifest errors since the Commission had not done a complex economic assessment.[77] The Court therefore reviewed the proportionality of the measure adopted and found the Commission's assessment to be manifestly wrong.[78] The Court considered that if the joint commitment had been accepted that would have been enough and more proportionate because only part of Alrosa's sales would have been affected and, with the rough diamonds it retained, Alrosa would have been able to become a second source of supply. Interestingly, therefore, the Court appears to be accepting that a dominant company may purchase some of its competitor's production in these circumstances.

Eighthly, the Court suggests that even if the Commission could not substitute itself for the parties to amend the commitments, it could have decided to make the proposed commitments binding only in part, or to a particular extent.[79] (This is not entirely clear. It may be argued that this should mean that the commitments would have to be rejected and re-submitted if the undertaking concerned agrees to a modified format.)

Finally, as regards the comments of third parties to an Art.27(4) Notice, the Court found that an undertaking concerned (in this case, Alrosa) was entitled to be heard on those comments, notably insofar as they affected the Commission's assessment, which the Court found to be the case here.

Clearly many important findings which will structure Art.9 procedures in future.

Discrimination—British Airways/Virgin

In March 2007, the ECJ upheld the CFI's judgment rejecting BA's appeal against the Commission's Art.82 EC rebate decision.[80] The interest in the judgment is mainly in the fact that the ECJ is once again affirming classic notions of Art.82 EC. Various claims were ruled inadmissible (i.e. when a plea raised questions of fact which the ECJ cannot review). Others were held to be unfounded.

In general, BA sought to argue that the Commission had not shown sufficient restrictive effect for an abuse (in terms of discrimination or foreclosure) and the CFI had erred in finding that it had.

The ECJ disagreed, noting that *actual* effect did not have to be shown and generally approving the CFI's approach as in line with existing case law.

For those following the debate as to whether competition law is about protecting competitors or consumers or both, one may note that the Court stated:

> ''Article 82 is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC.''[81]

One may also note what the Court says about discrimination (which the Advocate General had discussed in detail in her Opinion). The Court emphasised that for an infringement of Art.82(c) EC there must be a finding of discrimination *and* that such discrimination tends to distort a competitive position of business partners of the dominant undertaking. That is to be assessed in light of all the circumstances (and proof of an actual quantified deterioration in the position of these partners is not required).[82]

This appears to be a strengthening of the way the discrimination rules are viewed, since in the past, in some cases, the ''likely effect on customers'' aspects appear not to have been applied strictly.

France Télécom inspection cases[83]

In March 2007, the CFI rejected two appeals by Wanadoo (now France Télécom) and France Télécom against dawn raids decisions[84] related to possible further predatory pricing practices as regards high-speed internet in France.

It may be recalled that the Commission's *Wanadoo* decision in 2003 required Wanadoo to refrain from any conduct which could have a similar object or effect to that condemned by the Commission's decision.

Broadly, what appears to have happened here is that France Télécom was allowed to lower its wholesale prices for ADSL access in December 2003 and then Wanadoo announced several offers

76. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [103]–[106].
77. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [123]–[125].
78. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [126]–[137].
79. *Alrosa Company Ltd* (T-170/06), unreported, July 11, 2007, at [139].
80. For Advocate General Kokott's Opinion, see Ratliff, ''Major Events and Policy Issues, 2005–2006'' [2007] I.C.C.L.R 27, 34–35.
81. Advocate General Kokott's Opinion at [106].
82. Advocate General Kokott's Opinion at [142]–[145].
83. With thanks to Daria Izmailova for her assistance with this section.
84. *France Télécom SA v Commission of the European Communities* (T-339/04 & T-340/04), unreported, March 8, 2007.

with new, lower retail prices for high-speed access in December 2003 and January 2004.

AOL then brought an action before the French *Conseil de la concurrence* against Wanadoo's offers, alleging predatory pricing contrary to Art.82 EC (and seeking interim measures) and T-Online France sought suspension of the French regulatory authorities' approval of the wholesale price.

In March 2004, the Commission and the relevant official in the *Conseil de la concurrence* met and it appeared that, on a preliminary assessment, using essentially the methodology of the Commission in its previous decision, some of Wanadoo's new prices would be predatory, notably if there was evidence of an intent to exclude competitors.[85]

AOL and other competitors of Wanadoo met with the Commission, which also had further contacts with the French authorities.

In May 2004, the *Conseil de la concurrence* rejected AOL's request for interim measures.

Then, a week later, the Commission took a decision ordering inspections at the premises of Wanadoo and France Télécom as regards possible predatory pricing and margin squeezing, seeking in particular material going to the issues of cost recovery and the companies' intent with these offers.

The Commission then informed and co-operated with the French competition authorities which applied to a French judge to carry out the inspections and held the inspections in June 2004.

France Télécom co-operated, while reserving its position as to the legality of the inspections and then appealed to the CFI against the decisions authorising the inspections.

All grounds put forward were rejected by the Court. It may be of interest, however, to note two aspects:

First, it appears that France Télécom objected to the inspection of its parent company, rather than Wanadoo, amongst other reasons, because the parent company had not been an addressee of the Commission's *Wanadoo* decision. The CFI rejected this, noting, among other things, that some of the documents sought might have been on the parent's premises and the strategy in question might be related to the parent company's strategy.[86]

Secondly, it appears that France Télécom objected to the Commission carrying out an investigation while the issues were being investigated before the French *Conseil de la concurrence* (the French authorities had only dealt with interim measures in March 2004 and were still otherwise investigating). The CFI again rejected this, making it clear that the co-operative enforcement system in Art.11 of Regulation 1/2003 did not prevent the Commission from investigating in this way.

In particular, the Commission and national competition authorities could investigate in parallel, at least in the preliminary stages of a case, such as an investigation like this. Moreover, Art.11(6) of Regulation 1/2003 specifically allows the Commission to take over the investigation of an EC case from a national authority in defined circumstances, which showed that the Commission retained the right to pursue parallel investigations. The French authorities had also been informed of the inspections.[87]

German recycling—Der Grüne Punkt

In May 2007, the CFI ruled on two appeals by the German ''Green Dot'' system (DSD—*Der Grüne Punkt*) against two Commission decisions in 2001.[88] The CFI rejected the appeals.

It may be recalled[89] that the first decision, which was based on Art.82 EC, found that DSD had abused its dominant position in the market for systems for the collection and recycling of packaging waste, by requiring that manufacturers pay a full fee for use of its ''Green Dot'' trade mark on their packaging, even where packaging is, in fact, recovered by competitors or through self-management of the company itself. In other words, linking the fee to use of the trade mark, not the actual service.

The Commission considered that this requirement meant that customers could not be expected to contract with competitors of DSD. To do so, either customers would have to pay two fees, or they would have to organise separate packaging, distribution and merchandising lines (with and without the ''Green Dot''), which was considered not economically realistic, or even feasible given that it is not clear what customers will do with packaging disposal (i.e. where and when they will dispose of it). This was considered unfair, excessive pricing and a deterrent on competition.[90]

The Commission therefore required DSD not to charge *any* licence fee for packaging with the Green Dot trade mark for which its recycling

85. *France Télécom SA* (T-340/04), unreported, March 8, 2007, at [17].
86. *France Télécom SA* (T-340/04), unreported, March 8, 2007, at [59]–[60].
87. *France Télécom SA* (T-340/04), unreported, March 8, 2007, at [128]–[131].
88. *Der Grüne Punkt - Duales System Deutschland GmbH v Commission of the European Communities* (T-151/01 & T-289/01), unreported, May 24, 2007.
89. John Ratliff, ''Major Events and Policy Issues in E.C. Competition Law, 2001—Part 1'' [2002] I.C.C.L.R 6, 27 and 65.
90. *Der Grüne Punkt - Duales System Deutschland GmbH* (T-151/01), unreported, May 24, 2007, at [58].

service had not been used, where this was shown with appropriate evidence.[91]

Then, in a second decision, the Commission granted negative clearance from Art.81 EC for the remaining parts of the system (the Statutes of DSD and guarantee agreements), except the service agreement between DSD and its waste collectors, which was exempted under Art.81(3) EC, but only with two conditions.

DSD appealed both decisions.

In the Art.82 EC case, DSD argued (broadly) that:

- It was effectively having to grant a compulsory, free licence, without the criteria for such an exceptional requirement being met.
- Selective labelling (i.e. requiring manufacturers to label packaging differently according to who was to recycle it) worked in some contexts.
- Self-management was growing (so DSD's system was not preventing market entry or expansion).
- Labelling with the Green Dot trade mark was necessary for it to carry out its recovery tasks under the appropriate German law.
- The free licence system would undermine the Green Dot trade mark, because its function was to indicate that DSD was handling the packaging recovery.

The Commission contested all these points and argued notably that the essence of the Green Dot trade mark was to indicate that it was *possible* to dispose the packaging with DSD, relying on a German judgment which had also found that. The Commission also stated that the conditions imposed were necessary to prevent DSD's system involving payment for services not provided and foreclosing alternative competitors.

The Court found for the Commission. Above all, the Court repeatedly accepted the Commission's position that DSD's position would result in the Commission's two findings of abuse: that manufacturers were being charged for services not had; and alternative solutions such as selective labelling raised costs and would dissuade manufacturers from using alternative systems.[92] Exclusive marking with the ''Green Dot'' was also found not to be essential for the German recovery system. The Court accepted that the function of the trade mark was to identify the possibility of disposal through DSD.

The Court reviewed in detail all of DSD's claims and also focused on whether the German recycling system depended on a manufacturer fixing the Green Dot trade mark to packaging which it entrusted to one recycler, or rather on the quantity of material recovered. The Court found the latter and therefore considered that exclusive use of the Green Dot trade mark by DSD was not essential.[93]

However, on one point the Court agreed with DSD. Notably, the Court considered there was some value in the simple use of the Green Dot trade mark for which a fee could be charged, albeit not the full fee for the DSD service. The Court therefore interpreted the decision as allowing DSD to charge ''an adequate fee'' for merely using the trade mark, where it was shown that packaging with the trade mark had been recovered by another system.[94]

In the Art.81 EC case, the CFI focused on the Commission's clearance of DSD's service agreement with collection undertakings, which had been conditional, among other things, on DSD allowing competitors to use the collection undertakings' facilities.[95]

The Commission proceedings were as follows:

The DSD service agreement was notified to the Commission in 1992. The Commission published a notice envisaging clearance of the arrangement in 1997, which included proposed commitments that DSD would not oblige collection undertakings to work exclusively with DSD and would not oblige those undertakings to use their collection facilities exclusively for the DSD service agreement. However, the latter was qualified with the proviso that such a commitment was compatible with permission from the public authorities, or where German law required otherwise.

Third parties then commented that, in practice, DSD did *not* allow them unimpeded access to collection facilities used by DSD's contractual partners. Rather, it appeared that DSD insisted on authorising such usage of facilities. As a result, the Commission indicated to DSD that such behaviour could be contrary to Art.82 EC and could also be incompatible with Art.81(3) EC clearance.

DSD then undertook not to require that it authorise third party usage of such facilities and to refrain from restricting use of collection facilities, albeit that it might seek information and (financial) settlement from contractual partners about such usage (i.e. that DSD pay less).

Originally the DSD service agreements were exclusive and of long duration (some 15 years). However, insofar as this was considered to prevent

91. *Der Grüne Punkt - Duales System Deutschland GmbH* (T-151/01), unreported, May 24, 2007, at [60]–[62].
92. *Der Grüne Punkt - Duales System Deutschland GmbH* (T-151/01), unreported, May 24, 2007, e.g. at [143], [161]–[162], [170]–[174].
93. *Der Grüne Punkt - Duales System Deutschland GmbH* (T-151/01), unreported, May 24, 2007, at [129]–[139].
94. *Der Grüne Punkt - Duales System Deutschland GmbH* (T-151/01), unreported, May 24, 2007, at [191]–[196].
95. *Der Grüne Punkt - Duales System Deutschland GmbH* (T-289/01), unreported, May 24, 2007.

other collection undertakings from offering their services to DSD, the Commission required that the initial duration of the exclusivity be reduced to the end of 2003 (the exemption running from 1996 to 2003). It appears that this was considered enough time for the collection undertakings to recoup their investments.

The Commission also considered that local collection and sorting facilities were in practice ''bottlenecks''. It was economically difficult to duplicate such facilities given space constraints, collection logistics and the way consumers handle waste (all the more so as DSD accounted for the vast majority of such waste collection).

In order to give Art.81(3) EC clearance for DSD's collection system, the Commission therefore attached two obligations to its decision: that DSD not impede collectors from concluding agreements with DSD's competitors for the joint use of their collection and sorting facilities; and that, in case of joint usage, DSD could not require that collectors inform it of volumes of packaging not collected for the DSD system.[96]

DSD appealed, again raising various arguments.

As regards the shared use of collection facilities, DSD argued, for example, that it had financed the collection facilities through its payments to collection undertakings; that the Commission had not shown that such shared use was indispensable for DSD's competitors' activities; that the competition issue raised was ''purely speculative''; and that the remedy of requiring shared use of collection facilities was disproportionate.

The CFI found for the Commission on these issues. One senses here the underlying view that, even if it is more expensive and burdensome for DSD and its business partners to sort all the relevant packaging through shared collection facilities, both the Commission and the CFI consider that such sorting is possible and does not fundamentally undermine DSD's position in the German recycling system. Moreover, but for such sharing of facilities third parties cannot effectively compete.

The CFI also stressed that the Commission's clearance had been given on the basis of commitments offered. If those commitments had *not* been offered, the Commission would have taken a different decision under Arts 81 and 82 EC (the implication being that challenging the conditions was, in a sense, counterproductive in terms of obtaining clearance).

However, the CFI pointed out that DSD's ''competitors'' for the purposes of the Commission's decision should be construed as other undertakings offering waste recovery services like DSD, not self-management solutions of companies.

As in the Art.82 EC case, DSD also claimed that the obligations imposed (here to allow sharing of a collection facility) were contrary to Art.86(2) EC. The CFI disagreed, stating that, even if DSD was an entrusted undertaking, it had not shown that the obligations had put in question the task with which it had been entrusted.

As regards the information obligation, it appeared, on clarification, that there was ultimately little dispute: the Commission did not object to DSD knowing the total amount of packaging collected by collection undertakings and the part of that packaging attributable to DSD. The Commission's point being that DSD could not require collection undertakings to attribute to DSD quantities of packaging collected for a competitor's collection system.

Finally, DSD raised arguments about the need for an exclusive system to comply with German law and protect its Green Dot trade mark. As in the Art.82 EC case, these were rejected by the Court.

Groupement de Carte Bancaires—inspection

In July 2007, the CFI dismissed the appeal lodged by *Groupement des cartes bancaires* (CB) (GCB) against the Commission's decision requiring the group to submit to an on-site investigation.[97]

GCB raised various arguments against the Commission's decision (e.g. the duty to state reasons), all of which were rejected.

However, one aspect which is of particular interest is GCB's argument that, at the time of the investigative order, it was engaged in talks with the Commission about the legality of the new arrangements for charges payable by banks to GCB for issuing CB cards, having notified them to the Commission.

GCB claimed therefore that, in ordering an on-site investigation, the Commission breached the principle of proportionality.[98] Notably, there was no indication that there was a risk of documents being concealed or destroyed and therefore no need for such an inspection. The Commission's position was that it wished to check on a possible secret unlawful agreement, for which it considered that it needed such an inspection.

The CFI rejected GCB's argument, noting that the Commission's choice as to how to obtain information depended on the need for an appropriate inquiry, having regard to the special

96. *Der Grüne Punkt - Duales System Deutschland GmbH* (T-289/01), unreported, May 24, 2007, at [51]–[52].

97. *Groupement des cartes bancaires (CB) v Commission of the European Communities* (T-266/03), unreported, July 12, 2007. With thanks to Vivien Terrien for his assistances with this section.

98. *Groupement des cartes bancaires* (T-266/03), unreported, July 12, 2007, at [55]–[57].

features of the case. The Court then ruled that, considering the type of information sought and the role of the concerned banks in the structure of the group, the Commission's decision to order a dawn raid was appropriate in this context.[99]

The Microsoft appeal

Box 5

• Main European Court cases: General issues—II

— *Microsoft*:
  * 155-page judgment upholding Commission decision, save as regards trustee powers
  * Whether separate products to be assessed at time of challenged conduct
  * Unparalleled presence of Windows Media Player on PCs key to foreclosure
  * Orthodox, fact-specific approach

— *Akzo*:
  * CFI strict on everything as regards legal professional privilege
  * Commission cannot take a ''cursory look'' at a disputed document, if to do so might disclose its contents and company offers appropriate reasons—*but* onus on company to show documents covered by legal professional privilege
  * Only documents prepared exclusively for outside counsel privileged
  * Employed in-house counsel, even if member of a Bar, was not independent for EC concept of legal professional privilege

In September 2007, the CFI (sitting as court of 13 judges) dismissed most of Microsoft's appeal against the Commission's 2004 decision finding that Microsoft had infringed Art.82 EC.[100]

It may be recalled that in 2004, the Commission found that Microsoft had infringed Art.82 EC in two ways:

- First, the Commission decided that Microsoft had abused its dominant position on the client (PC) operating system market and the Work Group Server (WGS) operating system market (i.e. file, print, group and user administration services) by refusing to supply indispensable interoperability information to competitors, foreclosing them from the market. The interoperability information consisted of protocols or specifications necessary for communications between servers and between servers and PCs.
- Secondly, the Commission found that Microsoft had infringed Art.82 EC by bundling its Windows Media Player (WMP) with its dominant Windows PC operating system, again foreclosing competitors.

The CFI's judgment, which is 155 pages, is very fact-specific and generally does not appear to make new law.

Interoperability

On the refusal to supply interoperability information, the CFI notes that the Commission assumed that the alleged refusal concerned intellectual property.[101] This meant that the *Magill*[102] and *IMS*[103] case law was relevant. *Magill* and *IMS* require that ''exceptional circumstances'' exist for a refusal to license intellectual property to be an abuse under Art.82 EC. This was therefore the most favourable position possible for Microsoft.

The CFI lists the cumulative conditions under which exceptional circumstances were found to exist in *Magill* and *IMS*, i.e. indispensability, exclusion of competition on a secondary market, preventing the emergence of a new product and absence of objective justification. The CFI then clarifies the meaning of these conditions.

First, on exclusion of competition, the CFI states that the refusal must ''risk'' or be ''likely to'' eliminate competition. The Commission does not have to wait until competitors are eliminated, as Art.82 EC aims to safeguard the competition that still exists on the relevant market. Further, the CFI explains that not *all* competition must risk being eliminated; it is sufficient that ''all effective competition'' is threatened. The continued existence of competitors with ''marginal presence in certain niches'' is irrelevant in this context.[104]

Secondly, as regards the secondary market, the CFI repeats the ECJ's formulation in *IMS*, i.e. that it is necessary to distinguish two markets but the upstream product does not need to be marketed separately. It may be a hypothetical market

99. *Groupement des cartes bancaires* (T-266/03), unreported, July 12, 2007, at [63]–[65].
100. *Microsoft Corp v Commission of the European Communities* (T-201/04), unreported, September 17, 2007; European Court Press Release 63/07. With thanks to Cormac O'Daly for his considerable assistance with this section.
101. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [284] *et seq*.
102. *Radio Telefis Eireann v Commission of the European Communities* (C-241/91 P & C-242/91 P) [1995] E.C.R. I-743.
103. *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C-418/01) [2004] E.C.R. I-5039.
104. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [561]–[563].

as long as two different stages of production can be identified and the upstream product is indispensable for supply of the downstream product.[105] The CFI also clarifies that for conduct to be abusive under Art.82 EC, it is sufficient that the company be dominant on the hypothetical or upstream market. The Commission need not also show that the company was dominant on the second downstream market.[106]

Thirdly, the CFI clarifies the condition that the refusal to supply must ''prevent the appearance of a new product for which there is potential consumer demand''. Microsoft had claimed that both it and other companies already marketed WGS operating systems, so its refusal to supply interoperability information was not impeding a ''new'' product from being marketed.

The CFI, however, interprets ''new product'' as being only an example of ''limiting production, markets or technical developments to the . . . prejudice of consumers'' under Art.82(b) EC.[107] New products were not the only parameter of possible consumer harm. Limiting technical development could also qualify.[108]

The CFI also emphasised that competitors had introduced WGS operating system products with novel features before interoperability became a problem, that there was evidence of their ability to do so again if they had access to the interoperability information and that, in order to be profitable on the market, they could not just copy Microsoft's products.

Fourthly, Microsoft had argued that because the interoperability information contained trade secrets and/or was secret, its refusal to supply was objectively justified. The CFI rejected this.

Finally, it will be remembered that the Commission had argued that the conditions in *Magill* and *IMS* were not the only ''exceptional circumstances'' in which a dominant company refusing to license could infringe Art.82 EC. The Commission reasoned that there should not be an exhaustive checklist of exceptional circumstances and that all circumstances surrounding the refusal to license should be taken into account. The CFI appears to accept this view in principle, as it prefaces its examination of the *Magill* and *IMS* conditions by saying that if one of these was not present, it would then look at the other circumstances invoked by the Commission.

105. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [335].
106. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [559].
107. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [643] *et seq.*
108. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [647].

Tying

Turning to the second alleged abuse, the bundling of WMP, the CFI adopts an orthodox approach, explaining that, in the absence of objective justification, the Commission must demonstrate four facts: that the tying and tied product are separate products; dominance in the market for the tying product[109]; that the dominant company does not give customers a choice to obtain the tying product without the tied; and that the tying forecloses competition.[110]

Before examining whether these four facts were demonstrated, the CFI recalls that the list of abuses in the second paragraph of Art.82 EC is not exhaustive.[111] Thus a tie may infringe Art.82 EC as a whole even if the exact circumstances in Art.82(d) EC are not all present. In any event, the CFI considers that the Commission had demonstrated that the tie fell under Art.82(d) EC.

First, beginning with the requirement that the tying and tied products are separate products, the CFI observes that this must be judged at the time of the impugned conduct. This is important because the IT industry evolves quickly and:

> ''. . . [W]hat initially appear to be separate products may subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of the competition rules.''[112]

The CFI then finds that WMP is a separate product because there was sufficient independent consumer demand for streaming media players.[113]

Secondly, the CFI accepts the Commission's argument that consumers were forced, contractually and technically, to acquire Windows PC operating system with WMP.[114] In particular, Microsoft's behaviour constituted tying, even if consumers paid nothing extra for WMP.[115]

Thirdly, the CFI agrees that Microsoft's bundling of WMP with the PC operating system necessarily foreclosed competition by giving WMP unparalleled presence on PCs, without it having to compete against competing products on the merits.[116] The CFI considers that this finding alone would have been sufficient to prove the requisite degree of foreclosure. Thus, it was

109. Microsoft's dominance on the market for client PC operating system was not disputed.
110. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [842] and [869].
111. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [860]–[862].
112. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [913]–[914].
113. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [925]–[932].
114. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [961]–[963].
115. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [967]–[969].
116. See, in particular, *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [1036]–[1046].

not necessary for the Commission to go further and investigate the actual effects of the bundling. Nonetheless the CFI examines and upholds the two extra stages in the Commission's foreclosure reasoning: the indirect network effects, i.e. the inevitable writing and encoding of applications exclusively for WMP; and the market's evolution since the decision.

Finally, the CFI rejects Microsoft's arguments that the tying was objectively justified, either because it was part of Microsoft's legitimate business model[117] or because of efficiencies.[118]

Trustee remedy

As regards the trustee remedy imposed by the Commission, the CFI finds that two elements thereof infringed Art.3 of Regulation 17 and it therefore annulled that part of the Commission's decision. First, the Commission did not have competence to compel Microsoft to grant the trustee powers of inspection and access, which the Commission was not authorised to confer on a third party expert.[119] The decision had authorised the trustee to act on his own initiative and upon the application of third parties. He was in this sense independent of the Commission. The CFI found that this lacked legal basis.[120] Secondly, the Commission was not entitled to require that Microsoft be responsible for the trustee's remuneration and expenses. It would, in the CFI's view, be disproportionate for the Commission to require that an undertaking bear the costs associated with the Commission's monitoring of a remedy.

Fine

As regards the €497 million fine imposed on Microsoft, the CFI upheld the Commission's reasoning in full. In particular, the Commission was entitled to sanction the two separate abuses with one fine. The CFI explains that, while the Commission recognised two abuses, it considered they constituted a single infringement, namely an attempt to leverage dominance from the client PC operating system market into other markets.[121]

In addition, the CFI agreed with the Commission's assessment of the gravity and duration of the infringement. In this context the CFI noted internal Microsoft documents detailing its strategic reasons for seeking to leverage dominance.[122]

It appears that Microsoft will not appeal (as discussed in Part 2 in the next issue of I.C.C.L.R).

Finally, one may note that this is yet another orthodox judgment from the CFI on Art.82 EC, referring to the ''special responsibility'' of a dominant company and direct and indirect harm to consumers through ''impairing an effective competitive structure''.[123]

Legal professional privilege—Akzo[124]

In September 2007, the CFI gave its much-awaited judgment concerning legal professional privilege (LPP).[125]

The CFI's ruling has greatly clarified the procedures concerned when LPP is at issue in a dawn raid. It has also clarified which documents qualify for LPP, taking the strict approach that internal documents are only covered if prepared specifically or exclusively for the purpose of seeking outside counsel advice. The CFI has also maintained the strict approach of the European courts that only communications with outside counsel are privileged and not extended that privilege to employed lawyers, whether or not they are also a member of a Member State Bar.

As a result, companies are already reviewing their competition compliance practices to ensure that they are respecting these rules, where they wish to ensure privilege for the assessment of an issue.

It may be useful first to recall the context of the ruling[126]: in February 2003, the Commission carried out an on-site inspection of Akzo near Manchester in England.

Certain documents were found, which the Commission wanted to put in its investigation file, but for which Akzo asserted LPP. Notably, there were two documents from the general manager of an Akzo subsidiary to one of his superiors, which Akzo said contained information gathered for the purpose of obtaining outside legal advice in a competition law compliance programme. One contained a handwritten reference to a call with outside counsel. Those documents were called ''Set A''. There were also some handwritten notes made by the general manager said to have been made for the preparation of the Set A documents

117. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [1150].
118. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [1152]–[1161].
119. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [1271].
120. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [1269].
121. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [1327].
122. *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [1347]–[1352].
123. See *Microsoft Corp* (T-201/04), unreported, September 17, 2007, at [229], [664] and [1054].
124. With thanks to Anne Vallery for her assistance with this section.
125. *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* (T-125/03 & T-253/03), unreported, September 17, 2007.
126. John Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 2)'' [2005] I.C.C.L.R 109, 122–123.

and two emails between the general manager and Akzo's co-ordinator for competition law, who was employed in Akzo's legal department and also a member of the Dutch Bar. These documents were called ''Set B''.

When Akzo asserted that LPP applied to the documents there was much discussion. Akzo objected to the Commission looking at the documents, even taking a ''cursory look'', because it argued that would inevitably mean that the Commission would become aware of their content.

In the end, after being told that not allowing such a cursory look could amount to a criminal offence under UK law, Akzo gave way. After the cursory look, the Commission decided that the ''Set B'' documents were not privileged and put them in its file. As regards the ''Set A'' documents, the Commission put them in a sealed envelope and took them back to Brussels. Then it took a decision rejecting the claim for LPP, but indicated that it would not open the sealed envelope until Akzo had had time to appeal to the CFI and seek interim relief against its decision.

Akzo then brought its appeal and application for interim relief and various Bar and in-house counsel associations intervened.

It is important to appreciate that it appears that the ''Set A'' and first ''Set B'' documents may not have been prepared *only* to go to external counsel. Rather, it appears here that there was some sort of internal filtering process, whereby the general manager was informed of the issues and then, it appears that the company decided whether to approach outside counsel (which it appears to have done, as reflected in the manuscript note on a ''Set A'' document).

It will be clear that this case therefore raises a host of practical compliance issues which come up frequently.

The CFI was strict on everything.

As regards the Commission's approach to determining whether documents were covered by LPP, the CFI essentially found for Akzo.

The CFI found that in the circumstances the Commission should not have had a ''cursory look'' at the disputed documents, but should have put them in a sealed envelope to await a formal decision and Akzo's applications to the CFI. Akzo's LPP would be irreversibly infringed if it could read privileged documents and, contrary to the Commission's view, it was not enough to say that if privilege was later found to be correctly asserted then the Commission simply could not rely on the documents as evidence, or that such matters could be dealt with in an appeal against a final decision in the matter concerned.[127]

Nevertheless, the Court emphasised that the onus is on the company asserting LPP to show clearly that a document is privileged, without disclosing its contents, which the Court suggested could be done by showing to the Commission the circumstances of the document which would confirm its privileged nature[128] (e.g. who wrote to whom and in what context).

The CFI notes that it may be that a mere cursory look at a document by the Commission may disclose that it is covered by LPP (e.g. looking at the layout, heading, title and other superficial features of the document).

However, if, as here, a company considers that even such a cursory look will disclose its contents, then it should say so with the appropriate reasons and the Commission should not look at it, but put the document in a sealed envelope and take it for further process. To be clear, because it is a key point:

> ''The Court concludes that an undertaking . . . is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by LPP, provided that the undertaking considers that such a cursory look is impossible without revealing the context of those documents and that it gives the Commission officials appropriate reasons for its review.''[129]

The CFI also emphasises that the company has reason to be careful with such claims because, if such privilege was asserted abusively, that conduct could be penalised by the Commission under Regulation 17/62, now Regulation 1/2003, or be taken into account as an aggravating circumstance going to the overall fine, if any, on the company for an infringement.[130]

As regards whether the documents were in law covered by LPP, the CFI found for the Commission.

The Court stressed that just because documents were prepared in the context of a competition compliance programme, or were discussed with a lawyer, they were not covered by LPP.[131] In particular, to be so covered documents had to be drawn up solely and exclusively to seek legal advice from outside counsel.[132]

In this case, the problem was therefore that the ''Set A'' documents and first document in ''Set B'' appear to have been drafted for business people to decide whether to take action with outside

127. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [47] and [86]–[87].

128. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [79]–[80].

129. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [82].

130. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [89].

131. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [127].

132. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [123]–[125].

counsel, not exclusively to be passed on to outside counsel for legal advice.

Clearly these are fine distinctions in practice, as companies try to organise compliance cost-effectively. However, the CFI is strict, emphasising that if a company wants LPP, it has to respect those rules and that it should be ''unambiguously clear'' from the documents or contents that they are prepared for seeking legal advice from outside counsel. As regards the last two documents in ''Set B'', the CFI also found these not to be covered by LPP since they were internal communications with in-house rather than outside counsel.

As regards whether in-house counsel should be treated as outside counsel for purposes of LPP, the CFI's answer was a clear ''no''.

The facts of this case and the interventions of the various Bar and lawyers' associations ensured that the current debates on this issue were all before the Court.

Notably, Akzo's in-house co-ordinator for competition compliance, while employed, was also a member of the Dutch Bar, and it appears that his contract explicitly required Akzo to respect his ethical obligations in that respect. In other words, it was argued that even if he was employed, he was ''independent''.

The CFI found that was not enough. The Court stressed that in *AM&S* the ECJ had taken a conscious decision (contrary to the Advocate General's Opinion) *not* to allow LPP for employed lawyers, even if they were still members of a Bar.[133] ''Full independence'' is required for LPP, which means that the lawyer giving the privileged advice must be ''structurally, hierarchically and functionally'' a third party to the undertaking receiving that advice (and therefore not employed).[134]

It also did not matter if the position on privilege was different at Member State level so that under national law, an employed member of the Bar could give privileged advice. The Court emphasised that the European courts had been ''at pains'' to develop a Community concept of LPP, precisely because there were so many variations in national practice and there could be considerable uncertainty and divergence if national rules applied.[135]

Finally, the author would stress three practical points from all this:

1. Companies will have to be correspondingly stricter about these rules, including labelling documents so that Commission inspectors can see easily that they are covered by LPP.
2. The CFI found that the Commission's rejection of LPP for the ''Set B'' documents on site was a ''tacit decision'' (which was itself open to challenge by action for annulment).[136] Time may run from that date and appeals and applications, if required, should be organised accordingly.
3. Otherwise the CFI has confirmed the rulings in *AM&S* and *Hilti*, notably that communications with outside counsel who are members of an EU Member State Bar are privileged, as are internal summaries thereof.[137]

Selex—Eurocontrol

In December 2006, the CFI rejected an application by Selex to annul the Commission's decision rejecting its complaint against Eurocontrol, the international organisation responsible for strengthening co-operation in air navigation and creating a uniform system of air-traffic management.

The main interest of this case is the discussion as to whether Eurocontrol constitutes an undertaking for the purposes of Art.82 EC.

It may be recalled that the ECJ had already concluded that Eurocontrol's activities in creating and collecting route charges on behalf of the states which had established Eurocontrol were not an economic activity and Eurocontrol was therefore not an undertaking under Arts 82 and 86 EC[138] on that account.

In this case the CFI considered whether the three Eurocontrol activities concerned by Selex's complaint were economic activities so that Eurocontrol could be considered to be acting as an undertaking under Art.82 EC.[139]

The CFI ruled that Eurocontrol's production and adoption of technical standardisation was not an economic activity and that Eurocontrol's research and development activities, in particular the acquisition of prototypes and management of intellectual property rights, were also not an economic activity.

However, the CFI concluded that Eurocontrol's provision of technical advice to national administrations on contracts for public tenders and selection procedures *was* an economic activity, as

133. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [167].
134. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [168].
135. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [176].
136. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [49] and [52].
137. *Akzo Nobel Chemicals Ltd* (T-125/03 & T-253/03), unreported, September 17, 2007, at [117].
138. *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)* (C-364/92) [1994] E.C.R. I-43. With thanks to Cormac O'Daly for his assistance with this section.
139. *SAT Fluggesellschaft mbH* [1994] E.C.R. I-43 at [54].

private undertakings could also offer their services on this market.[140]

The CFI recalled that the fact that a private undertaking may carry out an activity could indicate that it is an economic activity. The fact that no private undertaking currently carried out that activity did not change that conclusion.[141] The CFI noted that national administrations did not pay Eurocontrol for its advice and that the advice was given in pursuit of a public service objective, but neither of these facts were decisive.[142] The CFI also found that the purchase of goods cannot be dissociated from the subsequent use to which the goods are put. Thus, contrary to the conclusion reached by the Commission, the CFI ruled that Eurocontrol *was* acting as an undertaking under Art.82 EC when it provided this technical assistance.

However, the CFI went on to rule that Selex had not shown that Eurocontrol's conduct in this respect constituted an abuse under Art.82 EC. The applicant had not expressed a view on the relevant market for offering technical assistance relating to tendering procedures and had failed to show, in particular, how Eurocontrol could derive any competitive advantage from advising national administrations.[143]

Other

In the course of the year there were also two references on the Motor Vehicle Block Exemption (MVBE). In *Brünsteiner v BMW*[144] the ECJ had to consider, among other things, whether the change to the new MVBE, Regulation 1400/2002, could amount to a sufficiently substantial change to a network as to justify termination of contracts on one year's notice. Referring to *Vulkan Silkeborg*,[145] the Court held it could do so, but such a reorganisation was not *required* by the change from one block exemption to the other.

In *City Motors v Citröen*,[146] the ECJ was asked to rule whether a termination clause in a dealer agreement providing for *immediate* termination without formal notice, in the event of a dealer selling new cars to a reseller outside the Citroën network, was such as to take the dealer agreement outside the new MVBE. The ECJ ruled that it did not.

Finally, there have been a number of judgments on complaint rejections this year, which are not covered here: *Annemans v Commission*[147]; *AEPI Elliniki Etaireia v Commission*[148]; *Au Lys de France v Commission*[149]; *Ufex v Commission*.[150]

Cartel appeals

Box 6

- **Main European Court cases: Cartel appeals—I**
  - — *French beef*:
    - * CFI adjusts fine downwards in its ''unlimited jurisdiction''
    - * Fine calculated on association members' turnover lawful
  - — *Austrian banks*:
    - * Commission could fine ''lead institutions'' more for that role
    - * CFI considered Austrian judgment as part of its ''unlimited jurisdiction'' review
    - * Official knowledge of practices not mitigation
  - — *Industrial and medical gases*:
    - * CFI appraisal of (strict) ''distancing from a cartel'' rules

Organic peroxides

In November 2006, the CFI dismissed Peróxidos Orgánicos' appeal seeking the annulment of the Commission's *Organic Peroxides* cartel decision, on the basis that the Commission's case against Peróxidos Orgánicos was time-barred.[151]

140. *SAT Fluggesellschaft mbH* [1994] E.C.R. I-43 at [87].
141. *SAT Fluggesellschaft mbH* [1994] E.C.R. I-43 at [88] and [89].
142. *SAT Fluggesellschaft mbH* [1994] E.C.R. I-43 at [90] and [91].
143. *SAT Fluggesellschaft mbH* [1994] E.C.R. I-43 at [106] to [109].
144. *A. Brünsteiner GmbH and Autohaus Hilgert GmbH v Bayerische Motorenwerke AG (BMW)* (C-376/05 & C-377/05) [2006] E.C.R. I-11383. With thanks to Olga Ruppert for her assistance.
145. *VW-Audi Forhandlerforeningen, acting on behalf of Vulcan Silkeborg A/S v Skandinavisk Motor Co A/S* (C-125/05) [2006] E.C.R. I-7637. See also Ratliff, ''Major Events and Policy Issues, 2005–2006'' [2007] I.C.C.L.R 27, 40.
146. *City Motors Groep NV v Citroën Belux NV* (C-421/05) [2007] E.C.R. I-659.
147. *Annemans v Commission of the European Communities* (T-411/05), unreported, July 12, 2007 (complaint concerning Belgacom and Telenet in Belgium).
148. *AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE v Commission of the European Communities* (T-229/05), unreported, July 12, 2007 (complaint concerning collective management societies for copyright in Greece).
149. *Lys de France SA v Commission of the European Communities* (T-458/04), unreported, July 3, 2007 (access to concessions at Roissy Airport, Paris).
150. *Union française de l'express (UFEX) v Commission of the European Communities* (T-60/05), unreported, September 12, 2007 (complaint concerning alleged French subsidies of international express courier services).
151. *Peróxidos Orgánicos SA v Commission of the European Communities* (T-120/04), unreported, November 16, 2006. With thanks to Gabriele Accardo for his help with this section.

It may be recalled that this case involved a European cartel implemented in Spain in a sub-arrangement, which involved Peróxidos Orgánicos and others.

Peróxidos Orgánicos claimed that a period longer than five years had elapsed between January 14, 1997, the date of the last meeting it attended, and November 29, 2002, the date of the Commission's first request for information to it in the case. As a result it was argued that there was a time-bar under Regulation 2988/74.

The CFI disagreed. The Court held first that the Commission had sufficient indicia to support its assessment in the contested decision that the Spanish sub-arrangement operated, in any event, until the end of March 1997, and did so with the participation, at least indirectly, of Peróxidos Orgánicos. The CFI also stated that Peróxidos Orgánicos had been unable to dispute specifically, with supporting evidence, those indicia, such as to cast doubt on their probative value, or to provide an alternative convincing explanation as to why such indicia existed.

As a result, to be in time, the Commission had to bring proceedings within five years of that date, i.e. by the end of March 2002.

The CFI then noted that there had been investigations, requests for information to *other* undertakings which had participated in the Spanish sub-arrangement in early 2002, which had stopped the running of time for limitation purposes.

In such circumstances, the Commission's proceedings against Peróxidos Orgánicos were not time-barred.

French beef

In December 2006, the CFI reduced the fines imposed by the Commission on the main French federations in the beef sector, for arrangements designed to set a minimum purchase price for certain categories of beef and to suspend beef imports into France. The overall fines concerned were reduced from €15.96 to €11.97 million.[152]

In general, the CFI upheld the Commission's decision, which was summarised in a previous review.[153] It may be recalled that, in the face of hugely deflated prices for beef in France as a result of the ''mad cow'' disease crisis, French farmers represented by various federations had taken measures to stabilise and maintain beef prices. The Commission found such activities contrary to Art.81 EC, despite a large degree of governmental intervention and then fined the federations based on the revenues of their members. However, the Commission reduced the fines by 60 per cent given the exceptional circumstances.

The various federations appealed, raising a variety of arguments which were rejected by the CFI, such as that the federations were not involved in economic activities, there was no effect on trade, that the Commission's decision restricted them in their ''trade union'' activity and that the competition rules did not apply to such agricultural issues.

However, on two points the CFI ruled for the applicants.

First, the Court found that, while the Commission could impose fines on an association based not on its own revenues but those of its members in appropriate circumstances, and could have regard in assessing the 10 per cent maximum level of fine to those members' revenues and not just the revenues of the association, the Commission had to mention this expressly in its decision and justify that position in its decision. This the Commission had not done in its decision so it was found not to have given adequate reasons.[154]

Nevertheless, this was not found to be a defect justifying annulment of the Commission's decision, since that would only lead to a new, corrected decision with no modification to the fines themselves.[155]

In the circumstances, the CFI agreed that the Commission had been right to fine on the basis of member revenues (at least those members involved in the beef and slaughterhouse businesses concerned).[156] If not, the economic importance of the unlawful action taken would not be fairly reflected by the fine and it would be too easy to avoid the appropriate sanctions.

The ability to fine association members was also not limited to cases where the association was specifically empowered to represent its members' interests (i.e. in its statutes). Members' turnover could also be considered when an association acted as regards its members' activities and where the anti-competitive practices are carried out by the association directly for the benefit of its members and in co-operation with them. It was also reasonable to sanction anti-competitive behaviour through a fine on the association where it was particularly difficult or even impossible to sanction a very high number of members

152. *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) v Commission of the European Communities* (T-217/03 & T-245/03), unreported, December 13, 2006.

153. See John Ratliff, ''Major Events and Policy Issues in EC Competition Law, 2002–03 (Part 2)'' [2004] I.C.C.L.R 55, 57–58.

154. *Fédération nationale de la coopération bétail et viande* (T-217/03), unreported, December 13, 2006, at [239]–[245].

155. *Fédération nationale de la coopération bétail et viande* (T-217/03), unreported, December 13, 2006, at [363].

156. *Fédération nationale de la coopération bétail et viande* (T-217/03), unreported, December 13, 2006, at [325].

individually.[157] This was found to be the case here.

On an indirect assessment (since the members' figures were not available), the Court was also satisfied that the 10 per cent maximum fine level had not been exceeded.

Secondly, the CFI found that the Commission's reduction of the fine by 60 per cent for exceptional circumstances was not enough. In a passage where the CFI first notes the Commission's discretion to set fines, the Court then emphasises its unlimited jurisdiction under Art.229 EC and Art.17 of Regulation 17/62. Then the Court reduces the fine by 70 per cent for ''very exceptional'' circumstances,[158] which it found to be the particular characteristics of the applicants and of their missions and respective sectors of activity and, more particularly, the circumstances of the specific economic context in the case.

Austrian banks

In December 2006, the CFI gave judgment on the Commission's decision concerning the Austrian banking cartel.[159] The judgment is extensive, some 83 pages, covering seven appeals. Overall, after a detailed review, the Court upheld the Commission's decision, save that it considered that the Commission had made a mistake in assessing the market share for the fine on the *Österreichische Postsparkasse* and reduced its fines by half to €3,795 million.[160]

It will be recalled that this case concerned longstanding practices in Austria involving widespread meetings and information exchanges, which were continued after Austria's accession to the EEA and the European Union. It appears that, to some extent, the authorities attended such meetings. Given the context, the Commission's intervention was highly controversial.[161]

Another particular feature of the Commission's decision was the way that the Commission fined certain banks as so-called ''lead institutions'', which had acted for banks in certain groupings/sectors.

The main points of interest are as follows:

First, the judgment notes the unusual nature of the banking context in Austria, where banks are structured in tiers and there are particular groups for savings banks, credit unions and agricultural credit co-operatives. These structures are governed to some extent by law.

The CFI upholds the Commission's view that, in such circumstances, it could fine the banks, which operated as co-ordinators of information flow in and representatives of their sectors, more than if the Commission had just looked at the lead banks' market shares alone.[162] The Court held:

> ''. . . [A]n undertaking's power in the market and its capacity to cause damage to competition may be greater than the power and capacity in those respects which it derives directly from its individual market share, by reason of the informal links that it maintains with other operators, even if those links do not give it complete control of the latter's conduct in the market.''[163]

Secondly, there is much argument about whether it was correct for the Commission to find one overall cartel or whether it should have broken up the assessment of the infringement according to committees dealing with particular issues. The CFI upheld the view that it was correct to find one single cartel.

Thirdly, there is also argument about whether the infringement should have been classified as ''very serious'', or only ''serious'' given its context, national nature and alleged effect. The CFI upheld the view that such an extensive horizontal pricing agreement as here, relating to an important economic sector, could not normally escape the classification of ''very serious'' infringement ''whatever its context''.[164]

Fourthly, the Court confirmed that the FPÖ, an Austrian political party, could complain as a customer and be legitimately interested, so that it could receive a copy of the non-confidential version of the SO.[165]

Fifthly, the CFI noted that the cartel members could not argue, based on cases like *Bagnasco*, that effect on trade had to be assessed narrowly by reference to particular practices, rather than on the basis of an overall examination of the agreements in question, to affect trade between Member States.[166]

157. *Fédération nationale de la coopération bétail et viande* (T-217/03), unreported, December 13, 2006, at [316]–[319].
158. *Fédération nationale de la coopération bétail et viande* (T-217/03), unreported, December 13, 2006, at [358]–[361].
159. *Raiffeisen Zentralbank Österreich v Commission* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006.
160. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [445]–[454] and [571].
161. Ratliff, ''Major Events and Policy Issues, 2003–2004'' [2005] I.C.C.L.R 109, 112–113.
162. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [355]–[409].
163. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [377].
164. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [254].
165. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [97]–[99] and [102].
166. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [171]. *Carlo*

Sixthly, the historical context of the cartel and the state's apparent attendance at meetings is not treated as a defence, or even mitigation.[167] The CFI finds that the banks could not have been unaware that the practices concerned infringed the EU/EEA competition rules.

Seventhly, while noting that the Commission had extensive discretion under its fining guidelines, the CFI undertakes a detailed review of the Commission's approach and further, in exercise of its unlimited jurisdiction, assesses various issues. One notable point is that, in assessing the role of the ''lead institutions'' as regards other banks in their sectors, the CFI looked at and took into consideration an Austrian Constitutional Court judgment on the issue.[168]

Finally, the CFI confirms the modern ''hard times'' on a number of issues, which are often raised as mitigation. Notably:

- Non-implementation of a cartel is not necessarily mitigation.[169]
- Termination of an infringement as soon as the Commission intervenes may also not be mitigation.[170]
- While in some circumstances a national legal framework or conduct could constitute mitigation (see, e.g., *CIF* case),[171] that did not apply here since the banks had the resources available to obtain legal information as to the lawfulness of the practices concerned.[172]
- The crisis in the banking sector was not mitigation.[173]

Industrial and medical gases[174]

In December 2006 the CFI gave its judgment in Westfalen Gassen Nederland BV's (Westfalen) appeal against a fine of €0.43 million in the industrial and medical gases cartel.[175]

It may be recalled that the Commission found that Westfalen had participated in agreements/concerted practices to fix price increases, moratorium periods on competition and minimum prices in this sector in the Netherlands from March 1994 until December 1995. After the appeal was brought, the Commission accepted that Westfalen had only started to participate in the infringement in October 1994 and reduced the fine to €0.41 million.

Westfalen's main claims centred on the idea that it had ''distanced'' itself from the infringement and otherwise that the fine was disproportionate to its size. Westfalen produced witness statements in support of its case. The Commission's main position was that, even if Westfalen had objected to the price increase in a first meeting in October 1994, it had not done enough to distance itself from the cartel. Notably, it had attended another meeting shortly afterwards.

The CFI agreed with the Commission. The main points of interest are as follows:

First, the CFI recaps the law on ''distancing'' from a cartel. Thus, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel.

Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention, by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.

The reason underlying the above principle is that, having participated in meetings without having sufficiently distanced itself from what was discussed publicly, Westfalen made the other participants believe that it subscribed to what was decided there and would comply with it.[176]

The CFI then found, reviewing the evidence, that Westfalen had not provided clear concrete, objective evidence that it distanced itself publicly from the manifestly anti-competitive content of the first meeting.

The Court also stressed that the notion of public distancing as a means of excluding liability was to be interpreted narrowly. If the applicant had wanted to disassociate itself from the collusive discussions, it could easily have written to its

Bagnasco v Banca Popolare di Novara soc. coop. arl. (BNP) and Cassa di Risparmio di Genova e Imperia SpA (Carige) (C-215/96 & C-216/96) [1999] E.C.R. I-135.

167. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [255]–[260] and [504]–[505].

168. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [391] *et seq.*

169. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [491].

170. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [497].

171. *Consorzio Industrie Fiammiferi (CIF) v Autorita Garante della Concorrenza e del Mercato* (C-198/01) [2003] E.C.R. I-8055.

172. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [505].

173. *Raiffeisen Zentralbank Österreich* (T-259/02, T-260/02, T-261/02, T-262/02, T-263/02, T-264/02 & T-271/02), unreported, December 14, 2006, at [510].

174. With thanks to Gabriele Accardo for his assistance with this section.

175. *Westfalen Gassen Nederland v Commission of the European Communities* (T-303/02), unreported, December 5, 2006.

176. *Westfalen Gassen Nederland* (T-303/02), unreported, December 5, 2006, at [76]–[77].

competitors and to the secretary of the association grouping the producers of industrial gases after the first meeting of October 14, 1994 to say that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a professional association which served as a cover for unlawful concerted actions. Westfalen did not do so and, in fact, still attended the second meeting.[177]

The CFI found therefore, even on Westfalen's own account, that Westfalen had been vague and holding back as to whether it would follow the suggested price increase, rather than stating clear opposition to the increase. As the Court noted:

> ''Silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval.''[178]

Secondly, the CFI rejected the argument by Westfalen that it had no interest in the cartel as a dynamic operator which had recently entered the market. The Court agreed with the Commission that Westfalen could have participated in meetings, giving the impression of agreement with the cartel, while in fact charging prices lower than those agreed, so as to increase its margins and market share. However, that amounted to participating in the cartel because such conduct would have induced others to continue.[179]

Thirdly, the CFI rejected claims by Westfalen that certain facts did not prove anything. Evidence in cartel cases was, the CFI noted, often ''only fragmentary and sparse'', so that the existence of unlawful practices or agreements had to be inferred from a ''number of coincidences and indicia'' which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement.

Thus, handwritten notes in summary form were part of the evidence which the Commission could consider. The fact that Westfalen had kept a minimum price list which had been distributed at a meeting was also not irrelevant, as to do so was ''hardly consistent'' with its claim to have publicly distanced itself from the cartel.[180]

Fourthly, Westfalen argued that the fine was disproportionately high for its small turnover, given the fines on larger companies. The CFI checked this but rejected the argument, comparing the starting points for the fines imposed, rather than the final amounts concerned. The Court emphasised that there was no rule that the fines imposed on smaller companies could not be greater than those imposed on larger companies as a percentage of turnover.[181] Moreover, the minor role of Westfalen in the infringement had been taken into account already by the Commission as an attenuating circumstance.

Seamless steel tubes

In January 2007, the ECJ upheld the CFI's judgments in the *Seamless steel tubes* case.[182] It will be recalled that the case related to an unlawful market-sharing arrangement called the ''Europe-Japan'' Club. The CFI had reduced fines in the case because it found that the Commission had not proved the claimed duration.

On appeal, among other things, it was argued that the CFI erred because it should have taken into account that the Japanese producers had no commercial interest in the cartel. Equally, that the CFI had not fully taken into account certain inconsistencies between two witnesses' statements in the case. The ECJ rejected both claims. It did not matter what a cartel participant's interests were, if there was evidence that it had participated in an anti-competitive agreement and the CFI had taken into account such witness issues.

The applicants also argued that an anonymous document could not be admissible as its authenticity could not be verified. The ECJ rejected the claim, noting that in competition law cases documents are often redacted to protect business secrets or the author's identity. Moreover, the CFI had, in any case, taken due account of the document's limited credibility and probative value.[183]

Box 7

• Main European Court cases: Cartel appeals—II

— *Belgian beer*:
  * CFI could correct Commission's fine and then (re)set it in its ''unlimited jurisdiction''
  * Recidivist increase lawful even if no limitation period

177. *Westfalen Gassen Nederland* (T-303/02), unreported, December 5, 2006, at [101]–[103].
178. *Westfalen Gassen Nederland* (T-303/02), unreported, December 5, 2006, at [124].
179. *Westfalen Gassen Nederland* (T-303/02), unreported, December 5, 2006, at [96]–[97].
180. *Westfalen Gassen Nederland* (T-303/02), unreported, December 5, 2006, at [129].
181. *Westfalen Gassen Nederland* (T-303/02), unreported, December 5, 2006, at [174].
182. *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission of the European Communities* (C-403/04 P and C-405/04 P) [2007] E.C.R. I-735; *Dalmine SpA v Commission of the European Communities* (C-407/04 P) [2007] E.C.R. I-835 and *Salzgitter Mannesmann GmbH v Commission of the European Communities* (C-411/04 P) [2007] E.C.R. I-965.
183. With thanks to Cormac O'Daly for his assistance.

— *Carbonless paper*:
  * To find that a parent had infringed *directly* in a decision, without stating that in the SO unlawful, but no annulment because indirectly responsible anyway
  * Indicia that parent responsible for subsidiary's acts
— *Pergan*:
  * The alleged role of a company in a cartel should not be described in a Commission's decision, if the company is not the subject thereof (contrary to the presumption of innocence and the duty of professional secrecy)

Belgian beer

In February 2007, the ECJ ruled on Group Danone's appeal against the CFI's judgment in the *Belgian beer* cartel case.[184] It may be recalled that in this case Group Danone had been fined some €44 million for its own role and for the participation of its subsidiary Alken-Maes in that cartel.

On appeal, the CFI generally had upheld the Commission's decision, but revised the fine. Notably, the CFI had reduced the fine increase for aggravating circumstances from 50 per cent to 40 per cent. However, in setting the fine, the CFI had also corrected the Commission's calculation, insofar as the reduction had been applied to an already increased amount, not the basic amount. Ultimately therefore, the CFI set the fine, in its unlimited jurisdiction, at some €42.4 million.

Group Danone appealed against this correction and also against the way the CFI had upheld the Commission's findings that Group Danone was a ''repeat offender''. Notably, Group Danone argued that recidivism was only referred to in the Commission's Fining Guidelines and did not therefore have a proper legal basis in Regulation 17/62. It also argued that to be liable for a repeat offence, without any limitation period on consideration of the earlier infringement, was contrary to legal certainty.

The ECJ disagreed.

As regards the CFI's correction of the Commission's fine calculation, the Court emphasised that the CFI had unlimited jurisdiction under Art.229 EC and Art.17 of Regulation 17/62 to substitute its own appraisal for the Commission's and to cancel or reduce or increase a fine accordingly. In setting the fine it was not restricted to the grounds of review raised by a party in its action for annulment.[185] However, in doing so, the CFI was entitled to rely on the Commission's Guidelines.[186]

Moreover, the Court held that Group Danone had had adequate opportunity to express its views as regards the setting of the fine before the CFI (even though it appears that Group Danone had not been asked specifically for its comments on the CFI correcting the Commission's calculation).[187]

As regards recidivism, the Court held that the basis for fining was Art.15(2) of Regulation 17, which included consideration of the gravity of an infringement. Recidivism was part of that assessment of gravity. Nor could the Commission be bound by any limitation period when making a finding of a repeat infringement.[188] In any event the ECJ noted that less than 10 years had elapsed between infringements, which it considered a ''relatively short time''.[189]

Carbonless paper cartel

In April 2007, the CFI gave its judgment in the *Carbonless paper* cartel case.[190] It may be recalled that 10 undertakings had been fined some €313 million for their involvement in a European-wide price-fixing cartel, which was also found to have involved some allocation of quotas and market sharing.[191]

The 10 undertakings appealed, although one subsequently went into liquidation. As regards the remaining nine, the CFI generally upheld the Commission's decision, save that it reduced fines on a Spanish company, Zicunaga and Arjo Wiggins Appleton.

The judgment is extensive, some 92 pages, and covers a full range of appeal grounds. The main points of interest are as follows:

First, as so often now (and perhaps because of the joinder of so many pleas) the judgment is very detailed and comprehensive, notably on procedural points, issues going to the infringement itself and the Commission's fining decisions.

Secondly, there is an interesting examination as to whether Bolloré should have been found to have infringed. It appears that in the SO the Commission did not indicate that it considered

184. *Groupe Danone v Commission of the European Communities* (C-3/06 P), unreported, February 8, 2007.

185. *Groupe Danone* (C-3/06 P), unreported, February 8, 2007, at [60]–[63].
186. *Groupe Danone* (C-3/06 P), unreported, February 8, 2007, at [82].
187. *Groupe Danone* (C-3/06 P), unreported, February 8, 2007, at [70].
188. *Groupe Danone* (C-3/06 P), unreported, February 8, 2007, at [38].
189. *Groupe Danone* (C-3/06 P), unreported, February 8, 2007, at [40].
190. *Bolloré v Commission of the European Communities* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007.
191. See John Ratliff, ''Major Events and Policy Issues in EC Competition Law 2001–2002—Part 1'' [2003] I.C.C.L.R 39, 61–62.

Bolloré to have been directly involved in the infringement. Rather, the Commission suggested in the SO that Bolloré was implicated as parent of another company, Copigraph.

In its decision, the Commission found Bolloré to have directly participated in the infringement. This was found to be an infringement of the rights of the defence. However, the CFI did not annul the decision as regards Bolloré, because the Commission also implicated Bolloré as parent of Copigraph and the Commission found ample evidence in its decision justifying that.

Interestingly, the CFI confirmed that for a parent to be liable it was not enough just to show that it held 100 per cent of the shares in another company. The Commission had to offer other ''indicia'' that the subsidiary did not act independently of its parent.[192] This had been done here in various ways, notably, insofar as the management of Copigraph were also staff of Bolloré and Copigraph was a vertically integrated part of Bolloré's special papers division.[193]

Thirdly, a number of pleas are rejected on the basis that they should have been raised in the administrative procedure and had not been.

Fourthly, there is some interesting discussion as to whether participation in a related national cartel meant that a company should be found not to have participated in the overarching European cartel, in all or part. Notably two Spanish companies argued that they had only taken part in Spanish meetings. The CFI found that they had been implicated in Spanish meetings which were part of the European scheme to raise prices (and, on one occasion, quotas had been fixed). Further, they must have known this and their behaviour contributed to the overall cartel.[194]

However, as regards Zicunaga, the CFI accepted that the Commission had not shown that it had been aware of the market-sharing aspect of the cartel, which had centred on French meetings.[195] As a result, the CFI considered that Zicunaga's fine should be reduced by 15 per cent (from €1.54 million to €1.309 million).

Fifthly, arguments that the SO was not precise enough as to the Commission's planned fines were rejected. This is not new, but mentioned here because the issue comes up frequently. Often the Commission may mention shortly that it may take increase fines for ''deterrence'' or ''recidivism'' in the SO. Companies may consider that is not enough to exercise their defence rights. Here the CFI confirms that the Commission is entitled to follow its current approach, considering that to say more would prejudice what the defence may say in the response to the SO.[196] However, this remains controversial and, as here, a reason why companies may appeal.

Sixthly, the CFI reduced the fine on Arjo Wiggins Appelton (AWA) from €184.27 million to €141.75 million since it found that AWA's co-operation had been of similar quality to that of Mougeot and AWA had only been given a 35 per cent fine reduction, while Mougeot had had 50 per cent. This was contrary to the principle of equal treatment.[197]

Finally, one may recall the Commission's emphasis on ''unequivocal admissions'' in the draft settlements package. The CFI's judgment here may have inspired this in part, since in this case it stated:

> ''Admissions made subject to reservations or equivocal statements do not . . . convey real cooperation and are not capable of facilitating the Commission's task, since they require investigation.''[198]

Speciality graphites

In May 2007, the ECJ rejected an appeal by SGL Carbon against the CFI's judgment, which generally had upheld the Commission's decision in the 2002 *Speciality graphites* cartel case, while reducing the fine for SG Carbon on the basis that the Commission had included turnover for products not covered by the cartel for fining purposes.[199]

SGL Carbon raised various arguments on its further appeal which were rejected (e.g. *ne bis in idem*—that the Commission should have taken into account other fines imposed on the cartel members worldwide).

One aspect of particular interest is that SGL Carbon had also appealed the increase in fine imposed on it because the Commission found it to be the ringleader in the cartel.

It is apparent that SGL Carbon still objected to the fact that in the SO it had been identified as one of two ringleaders in the cartel, but in the final

192. *Bolloré* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007, at [132].
193. *Bolloré* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007, at [64]–[81] and [123]–[150].
194. *Bolloré* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007, at [205]–[217].
195. *Bolloré* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007, at [238]–[241] and [429].
196. *Bolloré* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007, at [401]–[403].
197. *Bolloré* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007, at [694]–[707].
198. *Bolloré* (T-109/02, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 & T-136/02), unreported, April 26, 2007, at [717].
199. *SGL Carbon AG v Commission of the European Communities* (C-328/05 P), unreported, May 10, 2007.

decision it was found to be the sole ringleader and instigator of the cartel.

The ECJ rejected this argument, agreeing with the CFI's ruling on the issue. Notably, the CFI had found that it was enough for SGL Carbon to be given the opportunity to comment on the gravity and nature of the infringement and the Commission was not required to explain in the SO the way in which it might use those elements to determine the fine.

The CFI had also found that the Commission had indicated that SGL Carbon had played the role of leader and instigator of the infringement, so had been informed of the issue. Moreover, the CFI had found nothing to suggest that SGL Carbon had been fined more because other undertakings had no longer been attributed the same role.[200]

This is noted here because, even if legally correct, again this reflects a somewhat hard approach. One may well think that if the Commission had offered SGL Carbon the opportunity to comment on the Commission's revised finding on this issue, SGL Carbon would have felt less aggrieved and might not have felt the need to pursue two rounds of appeal.

Zinc phosphate

In June 2006, the ECJ dismissed Britannia Alloys' appeal of the Commission's 2001 *zinc phosphate* cartel decision.[201] It may be recalled that this was an unusual case where the Commission had fined Britannia Alloys based on its turnover in its last full year of economic activity, rather than the preceding business year to the decision, for which Britannia Alloys had zero turnover.

Britannia noted that in *Greek Ferries*, in similar circumstances, the Commission had limited itself to a €1 million fine and considered that the Commission had to take into account the preceding business year to the decision. The CFI agreed with the Commission in the circumstances, noting that the Commission was not bound by what it had done in *Greek Ferries*.[202]

As regards the Commission's selection of the reference year to determine the maximum fine which could be imposed under Art.15(2) of Regulation 17/62, the Court found that the Commission had to assess the intended impact on the undertaking in question:

> ''. . . taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed.''

If turnover in the year preceding the infringement did not provide a useful indication of that economic situation, then the Commission could take another year, as it had done in this case.

Needles[203]

In September 2007, the CFI ruled on an appeal brought by two companies, William Prym GmbH and Coats Holdings Ltd against a Commission decision fining both companies for their participation in the ''needles cartel''.[204] The CFI upheld the Commission's decision but reduced the amount of the fines imposed on each applicant.

The Commission had found that three companies, Prym, Coats and Entaco, had entered into a series of bilateral written agreements amounting, in practice, to a tripartite agreement to share product and geographic markets for needles and hard haberdashery products in Europe between 1994 and 1999. Entaco obtained 100 per cent immunity from fines under the 1996 Leniency Notice. Prym and Coats were fined €30 million each.

Coats sought annulment of the decision on the basis that the Commission had failed to demonstrate to the requisite legal standard that Coats was a party to an unlawful agreement during the relevant period.

The CFI found, on the basis of prior case law, that where the evidence on which the Commission relies is not unambiguous documentary evidence, it is open to the applicant to prove circumstances which allow a plausible explanation of the facts to be substituted for the explanation adopted by the Commission.

The CFI examined the evidence relied on by the Commission and found that the bilateral agreements between Coats and Entaco were not, on the wording of the clauses relied on, interconditional with or intended to implement the market-sharing agreements entered into between Prym and Entaco. Equally, the Commission had not proved that meetings which Coats attended were anti-competitive, so that its participation in those meetings could not render it liable for the cartel.

However, the CFI found that Coats had ''facilitated'' the establishment of the cartel because the heads of agreement between Prym and Entaco could not have entered into force without Coats' involvement and the Commission

200. *SGL Carbon AG* (C-328/05 P), unreported, May 10, 2007, at [55]–[63].

201. *Britannia Alloys & Chemicals Ltd v Commission of the European Communities* (C-76/06 P), unreported, June 7, 2007. With thanks to Natalie McNelis for her assistance with this section.

202. *Britannia Alloys & Chemicals Ltd* (C-76/06 P), unreported, June 7, 2007, at [25], [29] and [51]; [1999] OJ L109/24.

203. With thanks to Deirdre Waters for her assistance with this section.

204. *William Prym GmbH & Co KG and Prym Consumer GmbH & Co KG v Commission of the European Communities* (T-30/05); *Coats Holdings Ltd and J & P Coats Ltd v Commission of the European Communities* (T-36/05), unreported, September 12, 2007.

had sufficiently demonstrated Coats' intention and knowing contribution.

Coats' liability was therefore limited to the time period for which this agreement was in operation (i.e. until March 1997). In particular, after April 1997, Coats did not take part in any tripartite meetings and took no steps to implement the market sharing arrangements or have them implemented.

The CFI therefore reduced the fine imposed on Coats by €10 million. A reduction of €5 million (25 per cent) was made because the duration of Coats' liability for the cartel was equivalent to only approximately half of the duration determined by the Commission in the decision. A further reduction of €5 million was made because Coats' role was more akin to that of a mediator than a full member of the cartel. The total fine imposed on Coats was therefore reduced to €20 million.

As regards Prym, the CFI generally upheld the Commission's decision, although it found the Commission's reasoning defective on various points.

The CFI also found that under the 1996 Leniency Notice, a company could benefit from a reduction of between 10 per cent and 50 per cent if it did not contest the facts relied on by the Commission as the basis of its objections. Since Prym had not contested the facts, the Commission should have granted it such a reduction. Accordingly, the CFI reduced the fine by 10 per cent, resulting in a total fine of €27 million.

Confidentiality—Pergan[205]

In October 2007 the CFI annulled a Commission decision, taken by the Hearing Officer, refusing confidential treatment of references to a non-addressee, Pergan GmbH, in the published version of its 2003 *Organic Peroxides* cartel decision.[206]

Pergan was one of the undertakings originally investigated by the Commission and had been named as a party to the alleged cartel in the SO. It contested both the scope and duration of its participation, arguing in particular that since it had had no contact with any other relevant party since 1996, proceedings against it were time-barred in accordance with the five-year limitation period set out in Regulation 2988/74. The Commission accepted this argument and closed the proceedings against Pergan.

As a consequence, Pergan was not named as an infringing party in the operative sections of the decision (which imposed fines on five other undertakings) and was not an addressee of the decision. The recitals, however, still contained a detailed description of Pergan's alleged role in the cartel.

Pergan requested the removal of all references to it and its alleged offending conduct in the published version of the decision, on the grounds that no finding of infringement had been made against it and that it was not an addressee of the decision. The Hearing Officer rejected the request, on the basis that the references in question were not business secrets whose publication would cause serious and unjust harm to Pergan's interests. Pergan challenged that rejection.

The CFI upheld Pergan's appeal and annulled the Commission's decision.

The Court held that the Hearing Officer had applied the obligation to protect professional secrecy based on Art.287 EC too narrowly. The Court observed that the protection of professional secrecy encompasses not only business secrets and other confidential information, but must also be interpreted in the light of general principles and fundamental rights, most notably in this context, the principle of the presumption of innocence. This presumption precludes any formal finding against and even any allusion to the liability of an accused person, unless they have had the opportunity to exercise their full rights of defence in the usual way.[207]

In this case, Pergan had not had such an opportunity. In particular, despite disputing the accuracy of some of the passages in which it was named, Pergan had no standing to bring an action against the Commission's cartel decision, as the relevant passages were not contained in the operative sections. The Court concluded that this situation was contrary to the principle of the presumption of innocence and that the information in question must therefore be covered by the Art.287 EC obligation.

Italian concrete reinforcing bars

In October 2007, the CFI annulled the Commission's decision in the *Italian concrete reinforcing bars* cartel case,[208] which is described in Part 2 in the next issue of I.C.C.L.R.

It will be recalled that in 2002 the Commission adopted a decision finding that 11 undertakings had operated a cartel for concrete reinforcing bars and coils between 1989 and 2000, with an overall fine of €85 million. A particular feature of the case was the fact that it was based on Art.65 of the ECSC Treaty, which had expired by the time of the

205. With thanks to Karman Gordon for her assistance with this section.

206. *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission of the European Communities* (T-474/04), unreported, October 12, 2007.

207. *Pergan Hilfsstoffe für industrielle Prozesse GmbH* (T-474/04), unreported, October 12, 2007, at [76]–[78].

208. *SP SpA v Commission of the European Communities* (T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 & T-98/03), unreported, October 25, 2007.

decision in July 2002. As a result, the Commission said that it applied Regulation 17/62 as procedural framework.

The companies appealed, arguing that the Commission could not fine them on the basis of an expired treaty. The CFI agreed and annulled the decision.

The Commission's essential position was stated in the Communication on Competition cases resulting from the expiry of the ECSC Treaty,[209] namely that the substantive law applicable was that in force at the time when the facts constituting the infringement occurred, here Art.65 ECSC. The Commission considered that, as regards procedure, the law applicable after expiry of the ECSC Treaty was EC law (i.e. here Regulation 17/62). Among other grounds the Commission also argued that the ECSC Treaty was *lex specialis* to the EC Treaty and therefore after its expiry, EC law was the automatic legal basis for its decision.

The Court noted first that, given the nature of the EC legal order taking powers from the Member States, the Commission only had the powers legally conferred on it.[210]

Secondly, the CFI noted that the Commission had based its competence to take the contested decision and impose fines exclusively on Art.65 ECSC, when at the time of its decision that treaty had expired.[211] At the time of taking its decision therefore the Commission should have based its decision on Arts 3 and 15(2) of Regulation 17/62, which it did not. (The Commission argued this was implied from various aspects, but these arguments were rejected by the Court.)

Thirdly, the Court found that the Commission had confused Art.65(1) ECSC, which was the substantive law addressed to undertakings, with the legal basis for Commission action which was Art.65(4) as regards Commission rulings on the compatibility of agreements with that law and Art.65(5), as regards the Commission's ability to impose fines.[212]

The Commission could not derive competence from these treaty articles after their expiry and in December 2002 had to rely on Regulation 17/62 instead. Not having done so, the Commission's decision was annulled.

In Part 2, to be published in the next issue, John Ratliff will outline:

- the Commission's recent decisions on cartels, horizontal co-operation, vertical restraints and Art.82 EC;
- the Commission's sectoral reviews in energy and financial services (payments cards, retail banking and business insurance); and
- other current policy issues, notably the Commission's promotion of private actions in competition infringement cases and the Commission's review of Art.82 EC enforcement.

209. [2002] OJ C152/5.

210. *SP SpA* (T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 & T-98/03), unreported, October 25, 2007, at [71].

211. *SP SpA* (T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 & T-98/03), unreported, October 25, 2007, at [101].

212. *SP SpA* (T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 & T-98/03), unreported, October 25, 2007, at [119].