Major Themes of EEC Competition Law in 1992

JOHN RATLIFF

John Ratliff, Stanbrook and Hooper, Brussels

The object of this article is to give an outline of the major themes in EEC competition law in 1992. It is proposed first to highlight what has been going on using a few tables, which list the main legislation and Commission notices which have been adopted or proposed, the main Commission decisions and informal clearances, and the main European Court cases. The main themes of the emerging case law and practice during the year are then outlined.

Overview of Main Developments

Legislation and Commission notices

Main EC legislation and Commission notices

Distribution
Intermediaries Clarification
Revised version of agency notice?
Notice on beer supply agreements of minor importance
Joint ventures
Proposed JV Guidelines
Proposed amendments to Regulations 417/85, 418/85, 2934/84 and 559/89
Proposed block exemption for certain categories of insurance agreement
Transport
Maritime transport – Consortia block exemption
Air transport – Third liberalisation package
Decentralisation
Proposed notice on co-ordination with national courts

For present purposes specific mention should be made of four items. First, the Commission's joint venture (JV) Guidelines. These are the long-awaited, consolidatory guidelines, which were postponed by the debate over merger control. They are far more detailed than the drafts of the mid-80s. The guidelines aim to reflect a 'realistic' economic approach to potential competition, a flexible approach to ancillary restraints when the JV itself is not caught by Article 85(1) EEC, and set out the principles that production JVs affecting 20 per cent of the market and production and marketing JVs affecting 10 per cent of the market should normally be eligible for clearance by comfort letter. Interestingly, the draft circulated at the beginning of the year also put much emphasis on the possible anti-competitive effects of minority stakes used to underpin co-operative links between firms.[1] A revised version of the guidelines is expected to be released for discussion shortly.

Second, as a related development, the Commission has proposed amendments to the specialisation, R&D, patent and know-how block exemptions, which the Commission considers could be widened slightly.[2] Regulations 417/85 and 418/85 would therefore apply to agreements providing for joint distribution, provided that the firms participating in the agreements do not have a market share exceeding 10 per cent for the products concerned. Regulations 2349/84 and 556/89 would also apply to licence agreements concluded between the founders of a JV and the JV, even if the founders are competitors.

Third, the Commission has now published its proposed block exemption for certain categories of insurance agreement,[3] and a revised draft is now being released for discussion. Initial feedback from industry members is that there are still problems, in particular with the provisions on models for standard policy conditions.[4] In other words, many existing standard models would not comply, and therefore the Commission could be about to receive many individual notifications, if the block exemption is adopted as currently drafted.

Finally, the proposed revision of the Agency notice is still delayed. The Commission is now talking of 1993, but can only be speculated that there are still major problems in formulating practical rules in this area of law.[5]

Commission decisions and informal clearances

Main Commission fines and prohibitions

	ECU
Distribution	
UK Agricultural Tractor Exchange	
Peugeot/Ecosystem	740,000
Dunlop Slazenger/All Weather Sports	5,150,000
Cartels	
Dutch building and construction industry	22,500,000
French Cartes Bancaires/Eurocheques	6,000,000
French-West African shipowners' committees	15,300,000
Article 85 EEC	
Scottish Salmon Board	
Quantel	
Article 86 EEC	
Tetra Pak II	75,000,000
British Midland/Aer Lingus	750,000

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1 See *BAT Reynolds v Commission*, Cases 142 and 156/84 [1987] ECR 4487.
2 OJ C207/11, 14 August 1992.
3 OJ C207/2, 14 August 1992.
4 Articles 5 to 9.
5 The notice on beer supply agreements of minor importance is discussed below in 'Article 85 EEC and Distribution', and the proposed notice on the application of Articles 85 and 86 EEC by national courts is outlined in 'Subsidiarity' below.

Main EC Commission exemptions and informal clearances

Selective distribution – Perfumes/TVs and VCRs
Yves St Laurent/Parfums Givenchy
Grundig
Co-operation/JVs
P&G/Finaf
Ladbroke/Deutschland/PMU-PMI-DSV
Bayer/BP
Fiat/Deere III
Infonet
Encompass/ELTS
UTC (Pratt & Whitney)/MTM
Financial services
Association of International Bond Dealers
Assurpol
Joint Hull Understandings and Respect of Lead Agreements
Halifax Building Society and Standard Life Assurance Company
Energy
NI Electricity
Independent Power Generators
Twinning Programme Engineering Group (EEIG)
German Coal and Electricity Producers Agreement

As usual there have been a good number of decisions this year in various sectors. Probably those of most general importance have been the cartel cases, imposing heavy fines in three areas for the first time: construction, shipping and banking.

In February 1992, the Commission imposed fines totalling some ECU 22.5 million on the 28 construction associations which are members of the Dutch Construction Federation ('the SPO').[6] The Commission found that these associations had operated an open cartel for the last 12 years involving, in particular, price-fixing and the selection of candidates for contract tendering. One hundred and fifty members of the cartel were also based in other Member States.

At first the SPO refused to dismantle the cartel, despite the Commission's decision, and the Commission's threat of periodic penalty payments to enforce its position. However, the SPO then applied to the Court of First Instance, and obtained a partial suspension of the Commission's decision. Pending the Court's decision in the main proceedings, the SPO still has to suspend exchanges of information and consultations between contractors to decide who should reply to calls for bids and at what price level. The SPO must also refrain from increasing prices to offset expenses incurred by the SPO in making and 'calculating' bids.[7]

In April 1992, the Commission followed this up with large fines on members of the French–West African shipowners' committees.[8] The Commission found that the shipowners' committees, which operated on trade routes between France and 11 West and Central African states reflected agreements, which were contrary to Articles 85 and 86 EEC. The Commission is still reviewing other cases involving four maritime conferences.

The Commission considered that the shipowners' committees concerned were designed to organise the sharing out of all the cargoes transported by the various shipping lines on a monthly basis. Competition was therefore limited, resulting in excessively high prices. In addition, the Commission found that members of the shipowners' committees had obtained the adoption by the African authorities concerned of measures designed to reserve all of the trade to them, and knowingly applied those measures, in order to prevent other shipping lines, not in their committees, from obtaining access to such trade.

The infringement was considered 'important and serious'. The Commission therefore fined Delmas, the Société Navale de l'Ouest, the Société Navale Caennaise, and the Hoegh-Swal group a total of ECU 15 million. In doing so, the Commission took account of the fact that the Bolloré group, who owned Delmas and another firm involved – Joint Service Africa, gave various undertakings as to future conduct. The Commission also fined 13 other traders from non-EC countries, which were members of the shipowners' committees, amounts ranging from ECU2,400 to ECU56,400. Interestingly, even these fines were considered low in the circumstances, because it was reported at the Advisory Committee stage that far larger amounts had been proposed.

Last, but certainly not least in importance, are the fines imposed on the French Groupement des Cartes Bancaires and Eurocheque International for the so-called 'Helsinki agreement'.[9] The Groupement was fined ECU 5 million and Eurocheque ECU 1 million for agreements allowing retailers to be charged fees, in addition to the charges to the cheque user. The Commission found this totally at odds with its exemption of the basic Eurocheques Agreement, and that the practice had restricted use of the Eurocheque system in France, to the benefit of card transactions (for which retailers were charged fees). The debate as to whether this is correct continues on appeal.

Main European Court cases

Main European Court cases
(Court of First Instance/European Court of Justice)

Cartels
PVC
Polypropylene (various appeals)
Italian Flat Glass
Article 85
Danish Fur Traders Auction
Net Book Agreement
Article 86
Hilti
Italian Flat Glass
Article 90
Dutch Express Delivery Services
Port of Genoa reference
Procedure
Spanish Competition Authority reference

6 OJ L92/1, 7 April 1992.
7 Case T-29/92R, *SPO v Commission*, Order of the President, 16 July 1992.
8 OJ L134/1, 18 May 1992.
9 OJ L95/50, 9 April 1992.

If this has been an active year for the Commission on cartel assessment, the same is also true for the Court of First Instance and the European Court. Notably, there have been various judgments on concerted practices and evidentiary issues in the *Polypropylene* case,[10] and a partial cancellation of the Commission's *Italian Flat Glass* decision.[11]

In July 1992, the Advocate General also delivered his Opinion in *Wood Pulp*, and suggested that the European Court may not be outdone in its severe analysis of the Commission's decisions by the Court of First Instance![12] He has recommended that the bulk of the Commission's decision imposing fines of between ECU50,000 and ECU500,000 be annulled, in particular in the light of a series of procedural irregularities, such as the failure of the Statement of Objections to set out clearly the Commission's case on an alleged concerted practice for transaction as well as announced prices.[13]

Article 86 EEC: Duties to Competitors

1992 has not been a particularly active year for Article 86 EEC decisions. The Commission's decision in *Tetrapak II* was finally published, offering important material on market foreclosing practices, price discrimination, abusive contractual clauses, and the buying-up of competitors to appropriate actual or potentially competing technologies.[14] The European Court also decided that the Commission had not made out its case for joint dominance in the *Italian Flat Glass* case.

The theme which is chosen here is that of duties to competitors, because this has been central to three cases this year: *British Midland–Aer Lingus*, *B&I Sealink–Interim Measures*, and the Irish *Mars* case, *Mars Ireland v HB Ice Cream*.

In February 1992, the Commission fined Aer Lingus ECU750,000 for abusing its dominant position on the London-Dublin route, by terminating its interlining agreement with British Midland.[15] This termination was after British Midland announced that it was to start its own service on that route in competition with Aer Lingus.

The Commission found that the withdrawal of interlining facilities made British Midland's flights less attractive to travellers (especially business travellers paying for the higher priced and fully flexible tickets), and to travel agents. By terminating its interlining relationship, Aer Lingus made it more difficult for British Midland to compete, because British Midland was deprived of significant revenue and forced to incur higher costs.

However, in an interesting ruling, the Commission accepted that new entrants should not be able to rely indefinitely on frequencies and services provided by their competitors, but should be encouraged to develop their own frequencies and services. As a result, the duration of the duty to interline was limited to the time period, objectively necessary for a competitor to become established on the market. Since British Midland had been operating its new services for three years, the Commission's decision required Aer Lingus to interline for a further two years (albeit subject to further review then).

In June 1992, the issue of a dominant firm's duty to its competitors arose in a port/ferry case. In *Sealink/B&I*,[16] the Commission granted interim measures against Sealink, which was found to have abused its dominant position in the Port of Holyhead, where it was both the port authority, and a ferry service operator. As port authority, Sealink permitted changes to its own ferry sailing times, which meant that two ships moved past B&I's vessel while it was in its berth, changing the water level in the port. This disrupted loading and unloading because the ramp to the vessel had to be removed.

The Commission stated that a company which owns and uses an 'essential facility', in this case a port, should not grant its competitors access on terms less favourable than those which it gives to its own services. This ruling based on an 'essential facility' concept is now being heralded as a hallmark for the public sector (all the more so as a similar concept has already been extensively applied in US anti-trust law).

In the course of the year there has been a major struggle going on between Mars and other ice-cream manufacturers, over access to freezers and for the resale of ice cream. This 'cold war' (as the press has put it), has involved a variety of Article 85 and 86 EEC issues, and led to cases before the Commission and the Court of First Instance and in Ireland.

By way of background, it is proposed briefly to outline the Commission/Court proceedings (which are centred on Article 85 EEC) and then to consider the Irish case. This led to a judgment in the High Court in May, which raises interesting points both as regards the dominant firm's duty to its competitors, and also insofar as Keane J links up the 'rule of reason' and 'abuse' concepts in his analysis.

The *Mars–Langnese/Schöller* proceedings resulted from a complaint by Mars that certain exclusivity agreements entered into by these two German ice-cream manufacturers were unlawfully restricting market access contrary to Article 85 EEC.[17] There were two types of exclusivity in issue: exclusive purchasing agreements for the *outlet* in question ('outlet exclusivity'), and provisions requiring retailers not to use freezers supplied by Langnese and Schöller to stock other manufacturers' products ('freezer exclusivity').

In March 1992, the Commission took interim measures prohibiting Langnese and Schöller from asserting their outlet exclusivity rights, pending full investigation, but took no action on the freezer exclusivity issue. The Commission reasoned that there was a danger that a substantial part of Langnese and Schöller's large investment in establishing the existing stock of freezer cabinets would be economically destroyed if Mars were to be allowed to use them.

10 OJ L230/1, 18 August 1986. There have now been various appeals against the Commission's decision in this case, see, for example, Case T-8/89, *Hüls*, judgment of 10 March 1992.
11 Judgment of 10 March 1992.
12 Cases 89/85 and others, Opinion of AG Darmon, 7 July 1992.
13 Other cases are considered below, for example, the *Port of Genoa* reference in 'Article 90 EEC', and the *Spanish Competition Authority* reference in 'Procedural Issues'.
14 OJ L72/1, 18 March 1992.
15 OJ L96/34, 10 April 1992.
16 *Europe* 5748, 11 June 1992.
17 See OJ C121/17, 13 May 1992; and Cases T-24/92R and T-28/92R, *Langnese-Iglo and Schöller v Commission*, Order of the President, 16 June 1992.

In April 1992, Langnese and Schöller appealed against the Commission's decision, and applied to the Court of First Instance for an order suspending the operation of the decision. Langnese and Schöller argued, among other things, that the agreements in question were at least *prima facie* compatible with Articles 85(1) EEC and, in any event, covered by Regulation 1984/83. The President of the Court of First Instance agreed with Langnese and Schöller in part. In June 1992, he suspended the operation of the Commission's decision, except with regard to retail outlets in petrol stations, which are tied to Langnese and Schöller by exclusive dealing agreements, until the Commission's investigation is concluded, or judgment is given in the main proceedings. This then is a fairly classic exclusive purchasing case, where the main issue appears to be a *Delimitis* style market analysis to see if Article 85(1) EEC applies and, if so, whether the benefits of block exemption should be denied to the agreements in question. (There are also issues such as the fact that Unilever appears to have had a Commission 'comfort letter' for its exclusive purchasing agreements.)

The Irish case *Mars/HB Ice Cream* is a little different, because Article 86 EEC issues are raised.[18] HB Ice Cream (HB) is the leading manufacturer of ice cream on the Irish market, and a member of the Unilever group. HB had for many years supplied freezer cabinets to retailers for the storage and display of its products. The relevant agreements prohibited the retailer from stocking any products other than those of HB in the freezer supplied.

In 1990 HB obtained an interlocutory injunction restraining Mars from inducing retailers to breach this provision. Mars countered that such freezer exclusivity was an unfair competitive practice contrary to Article 85 and Article 86 EEC and Irish competition law, because it limited or restricted Mars's entry to trade in ice-cream products in Ireland. On 28 May 1992, Keane J found for HB Ice Cream on all three issues. He held that HB's share of the ice-cream market in Ireland was in excess of 70 per cent. He found that the relevant product market was 'the market in impulse ice-cream products', and was satisfied that HB was dominant on that market.

However, in the circumstances, Keane J found that HB's freezer exclusivity requirement did not have the object of restricting competition. Rather, the term was designed to prevent HB's competitors from taking a free ride on HB's investment. He noted, moreover, that such exclusivity was the generally accepted practice of the industry in various European countries and the prevailing approach in the United States. HB could not therefore be said to have adopted the strategy to keep competitors out of the market, even if there was only room for one freezer in an outlet. He also noted that HB had no exclusive purchasing agreements requiring retailers to buy all or a certain percentage of their requirements from HB, and that the freezer agreements were terminable on two months' notice, so that a retailer could switch to other arrangements if he wished. In short, he considered that HB's freezer exclusivity agreements were not an unreasonable barrier to market access. Even though HB enjoyed a dominant position in the ice-cream market, Keane J considered that an infringement of Article 85(1) EEC had not been established. Applying a 'rule of reason' approach, Keane J also held that Irish competition law did not prohibit the freezer exclusivity.

Mr Justice Keane went on to say that HB's dominant position in the market would continue to present a crucial difficulty for new entrants, at least in the short term.

> But it did not follow from this fact that they were required to act in a way which made no economic sense and was against their legitimate interest, i.e. by abandoning their (freezer) exclusivity term and giving free access to competitors to the cabinets in which they have made huge investment.

Lastly, the right claimed by Mars to store its products in HB's freezers constituted a violation of Article 222 of the EEC Treaty.

Article 85 EEC and Distribution: Parallel Imports, Beer and Motor Vehicle Supply

There has been no major theme in the Commission's approach to distribution this year. However, there are three aspects worthy of special mention.

First, the Commission has continued its policy of imposing heavy fines for the blocking of parallel imports. In *Parket Pen/Herlitz*[19] the Commission fined this producer of writing instruments and its German distributor ECU700,000 and ECU40,000 respectively. The Commission reiterated that 'export bans are always restrictions of competition', and was not impressed with the argument that the relevant clause had been inserted in the distribution agreement by a marketing director, who did not have authority to do so. The Commission reasoned that Parker Pen was responsible either for having appointed the director to act on its behalf or for failing to supervise him to stop him acting outside its corporate policy and the EEC rules!

In *Dunlop Slazenger*,[20] the Commission imposed a fine of ECU 5 million on this sports goods manufacturer, and ECU150,000 on its exclusive distributor for the Dunlop brand in Belgium and Luxembourg. The Commission found that, since 1977 at least, Dunlop had pursued a commercial policy which, in general, prohibited *all* exports, and that since 1985 Dunlop had concerted with its distributors to prevent such exports to other Member States, particularly for tennis balls and tennis rackets.

The Commission found evidence of:

> (1) A specific ban on exporting without Dunlop's written consent;
> (2) Dunlop refusing to supply large orders by a UK wholesaler, Newitt, for tennis balls intended for dispatch to France, and also stopping supplies to Newitt through its US subsidiary;
> (3) Dunlop refusing to continue its supplies to Newitt in the UK at export prices, so that prices charged Newitt rose from being up to 10 per cent higher than Dunlop's exclusive distributors in other Member States to being 25 to 40 per cent higher;
> (4) Dunlop compensating its Belgian distributor All Weather Sports (AWS) for the cost of buying back parallel imports of tennis rackets;

18 *Masterfoods Ltd Trading as Mars Ireland v HB Ice Cream Ltd*, judgment of Keane J, 28 May 1992.

19 OJ L233/27, 15 August 1992.
20 OJ L131/32, 16 May 1992.

(5) Dunlop putting identification codes and marks on products; and
(6) Dunlop restricting the supply of approved, marked tennis federation labels to exclusive distributors in the Netherlands and Belgium.

AWS was found to have taken an active role in support of Dunlop's export prevention measures, and to have sought prices from Dunlop enabling it to sell in the Netherlands at a price equal to the net purchase price of the UK parallel exporters. Dunlop did not in fact agree to do this, but modified its prices and discounts 'to make parallel imports impossible'. The Commission found that Dunlop's exclusive distribution system contained an 'unwritten clause' prohibiting exports to territories of other distributors. Such a policy allowed Dunlop to operate a differential pricing policy, and was allied with a concerted practice between Dunlop and AWS with the same object.

The Commission also went into detailed and interesting discussion as to whether an exclusive distributor was entitled to better prices than Newitt, as a wholesaler. On the facts the Commission found that the price differential was discriminatory, considerably higher than might be justified by advertising and promotional expenditure for the brand. In any event, the Commission questioned whether Dunlop's dual pricing system in the United Kingdom did not amount to an indirect export barrier and/or price discrimination. This case is interesting, above all because of the review of the mechanisms of price and discounts which the Commission condemned if designed to block parallel imports, and the further condemnation of buying back practices.

Second, the Commission has now published an amendment to its notice on Regulation 1984/83 as regards beer supply agreements, to take account of the principles in *Delimitis*.[21] The amendment focuses on the fact that, since markets for beer are frequently characterised by the cumulative effects of parallel networks of similar agreements, the agreements concerned may not be covered by the Commission's Notice on Agreements of Minor Importance. The Commission therefore clarifies which beer supply agreements can, in its view, nevertheless be considered *de minimis*.

The EC Commission states that an exclusive beer supply agreement does not in general fall within Article 85(1) EEC if,

- it is concluded by a brewery, and
- the market share of that brewery is not higher than 1 per cent of the national market for the resale of beer in premises used for the sale and consumption of drinks, and
- that brewery does not produce more than 200,000 hectolitres of beer *per annum*, and
- the agreement in question is not concluded for more than seven and a half years, if it covers beer and other drinks, or 15 years if it covers beer only.

The same principles apply to beer supply agreements concluded by wholesalers, taking account of the position of the brewery, whose beer is the main subject of the agreement in question.

21 OJ C121/2, 13 May 1992; Case C–234/89 *Delimitis v Henniger Brau*, judgment of 27 February 1991.

The Commission has indicated that agreements not meeting these criteria could still be outside Article 85(1) EEC, in particular where the number of outlets tied to a brewery or wholesaler is limited as compared to the number of outlets existing on the market. The Commission also emphasised that its notice is without prejudice to national law (cf. the UK Beer Supply Orders etc.).

A question which is of some interest now is whether there may be a rerun of these developments in the case of service stations. In March 1992, there was a reference from a Portuguese court, asking whether, where such a petrol supply agreement was for an indefinite duration rather than the ten years permitted by Regulation 1984/83, the agreement is void in its entirety or just abridged to the permitted duration.[22]

Third, the Commission has continued its campaign on intra-EC price differentials in the motor vehicle sector. The Commission concluded after a special study into such differentials that it was *not* established that substantial price differences between Member States were chiefly due to obligations exempted by Regulation 123/85, and therefore decided *not* to propose the withdrawal or amendment of that Regulation.[23] However, the Commission has been quick to observe that Regulation 123/85 expires in 1995 in any event, and to make an extensive list of demands directed to reducing price differentials between Member States. With more than a broad hint that action must be taken on this issue if Regulation 123/85 is to be renewed, the Commission has made six basic requests.

The Commission has asked car manufacturers to confirm to all their dealers in the Community:

(1) that they will meet orders for cars, even for models, specifications and options normally only demanded in other Member States, within a reasonable time;
(2) that such cars will be supplied at the same basic price as is customary for regular supplies in the Member States concerned (with extra costs incurred to fulfil the order, if appropriate); and
(3) to remind dealers that they can sell to authorised dealers in other Member States, and to intermediaries who comply with the requirements of Regulation 123/85, as clarified in the Commission's Notice on such intermediaries.

The Commission has also asked car manufacturers to review their wholesale pricing policies, and increase price transparency by:

(1) establishing and making freely available to the specialised motor press, one EC-wide price list, covering their entire product range, once every three months;
(2) establishing and making freely available the prices recommended to authorised dealers in each Member State for their five top selling cars, and similar information for all other Member States, once every three months;
(3) completing a six-monthly analysis of prices recommended to dealers for selected cars in various

22 See *Petrogal v Correia Sousa e Crisostamo*, Case C-39/92, OJ C69/7, 18 March 1992.
23 See Article 10(3) of Regulation 123/85.

market segments, to ensure that price differentials are within the range permitted by Regulation 123/85.

While some manufacturers have already expressed a willingness to comply, it is understood that there are still discussions going on, especially on pricing details.

In the background, there is also still the *Peugeot* case.[24] In December 1991, the Commission took a full decision prohibiting Peugeot from issuing its circular asking Belgian and Luxembourg dealers not to sell to the French intermediaries company – Ecosystem. In addition, the Commission threatened to withdraw the benefit of Regulation 123/85 from Peugeot's distribution network in Belgium and Luxembourg, if its decision is not complied with. Peugeot has appealed arguing that Ecosystem's activities are equivalent to resale, and indirectly challenging the Commission's Clarification on Intermediaries.[25]

Procedural Issues: Commission Procedures, Commission Investigations, Use of Information by National Authorities

Probably the most dramatic procedural event of the year was the Court of First Instance's judgment in the *PVC* case, *BASF and others v Commission*.[26] The court ruled that the Commission's decision in this cartel case was in fact non-existent, insofar as it infringed fundamental principles of Community law (notably the 'inalterability of the adopted act', lack of competence, and the requirement that decisions be properly authenticated).

In particular, the court noted that there had been material changes to the text of the decision *after* it was adopted (the addition of a whole paragraph), that the decision had not been adopted by the President of the Commission as required under the Commission's rules, that the Commission's delegation of signature to the Competition Commissioner was not correct in such a case, and that the decision had been sent to the companies concerned under cover of a letter with the Competition Commissioner's signature, but only in fact came into existence *after* the expiry of his term as Commissioner. In general, the court was scathing in its condemnation of the Commission's approach and procedures.

Inevitably the Commission has appealed. A similar decision may also be taken in the similar *LdPE* case, *BASF and others v Commission*,[27] because this 'decision' involves almost identical facts to the *PVC* case, and was considered at the same Commission meeting. It will be interesting to see what happens, because clearly the ruling has major consequences for the Commission's practices. However, the court's approach is not really that surprising. When a company is fined millions of ECU, it must be entitled to trust that the full procedural safeguards applicable to Commission decision-making are applied.

One immediate result of the court's ruling is that addressees of Commission decisions are now carefully vetting the document received for appropriate authentication, and pleading its non-existence in case of doubt![28]

Another important and controversial procedural case this year is *Procter & Gamble/Finaf*.[29] The case concerned a proposed joint venture between the parties for baby nappies, adult incontinence products and female hygiene products. The essential problem has been a change in position by the Commission after a 19(3) notice attracted widespread objections from national competition authorities, competitors and BEUC. The parties thought that, before the notice was issued, they had already negotiated a solution acceptable to the Commission. They were not amused to find that, in the light of objections received, in particular evidence of high market share on the nappies market, the Commission took a different view, and required modifications to the JV.

What the case underlined is, perhaps, three things: first, that companies cannot rely on informal settlements with the Commission, at least until after the receipt of a comfort letter or full decision (even if that is slow). Second, that the 19(3) notice procedure is often used incorrectly. It appears often to be regarded as a mere formality, to be completed before a case is wrapped up, whereas it should be regarded as an essential facet of fact-finding to be done much earlier in the procedure (as in merger control cases).[30] Third, it is very important that the Commission establish a fast decision-making procedure for JV clearance. It is true that the Commission is currently considering a self-imposed five-month rule with this in mind. The problem is that many consider that is not enough, and would prefer to see an 'opposition procedure' type of system, whereby clearance is deemed to be given if the Commission does not object within five months.

In July 1992, the European Court also made an important ruling in response to an Article 177 reference from the Spanish Direccion de la Competencia (DGDC) on the use of information obtained in EEC Competition proceedings for other purposes.[31] The dispute arose because the DGDC brought an action based on information gathered by the Commission pursuant to Regulation 17, against the Association Espanola de Banco Privada and other banks for infringing the provisions of Spanish Law 110/1963, with regard to certain banking services and commissions. The AEB and the banks maintained that such information could not be used by the national authorities in order to establish that a procedure designed to punish infringements of the national rules on competition was well founded.

24 OJ L66/1, 11 March 1992.
25 OJ C69/8, 18 March 1992.
26 Cases T-79/89 onward, judgment of 27 Feburary 1992.
27 Cases T-80/89 onward.

28 See, for example, Langnese's application in Case T-24/92, cited above, Note 13.
29 See OJ C3/2, 7 January 1992; *Wall Street Journal Europe* 21 April 1992.
30 This is suggested in particular by (a) the timing of such notices which is generally a long time after notification/investigation, and (b) the format of the notice itself, where the Commission often finishes with an indication that it already proposes to take a favourable view of the case (a formula which also may deter third parties from commenting). The point is, should there not be two notices? One early on, to gather comments and information to cross-check what the parties have said, and the Commission thinks; and another, if a comfort letter is envisaged, briefly indicating what the Commission's final position is.
31 Case 67/91, judgment of 16 July 1992.

The court stated, with regard to the use by the national authorities of information obtained pursuant to Article 11 letters, that the purpose of such a request for information was to provide the Commission with the elements of fact or of law necessary for it to exercise its *own* powers. The probative value of the information so communicated, and the conditions under which that information could be relied on against the undertakings were, consequently, defined by Community law and limited solely to the procedure concerned. The rights of the defence and the obligation of professional secrecy would not be observed if an authority other than the Commission could use that information as evidence in the context of other procedures.

The court also stated that national authorities could not use information contained in requests and notifications provided for under Articles 2, 4 and 5 of Regulation 17. Although such information was not subject to any express rule analogous to Article 20(1) of Regulation 17 limiting the conditions under which that information could be used, due account had to be taken of the legal context of the procedure under which the information was gathered.

Finally, there have also been further procedural battles in Commission investigations, and the Commission has imposed fines on associations and companies for refusals to supply information.[32]

Subsidiarity, Actions for Damages and Co-ordination with National Courts

Perhaps the most topical theme of the year has been, and still is the principle of 'subsidiarity' or, put shortly, the principle that decisions should be taken at the level most appropriate to the task in hand. So what does subsidiarity mean in the context of EEC competition law? Will subsidiarity change how competition is enforced?

Subsidiarity is the principle that:

> the Community shall take action . . . only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community.[33]

Clearly, in practice, this is a difficult and controversial notion to apply because the net result of the analysis will be to define whether the relevant action should be taken by the Commission or the Council, or by national governments/authorities. Federalisation and/or decentralisation will probably follow. As a result, there has been much debate about what subsidiarity means and equally as to who may invoke the principle. Will it be only Member States, or will the principle have direct effect? Before such issues are upon us, Maastricht will have to be accepted, but several comments can already be made at this stage.

First, for some years now the Commission has advocated decentralised enforcement of the competition rules in clear cases. Thus when *Camera Care* was decided in 1980, the Commission was quick to suggest that in some cases a more effective remedy may be available in the national courts, and that an approach to the Commission for interim measures should only be made if national remedies are inadequate.[34]

Similar propositions are now also set out in the Commission's proposed notice on co-ordination with national courts. The Commission has stated that it intends to focus in its decisions on notifications, complaints and own-initiative proceedings having particular political, economic or legal significance for the Community. The Commission would prefer that less significant cases be dealt with by comfort letters, or complaints to national courts or authorities (although it is still much debated as to when the Commission can *insist* on such an approach consistent with Article 155 EEC).[35]

Second, such decentralisation does not deal with one key problem, the point that only the Commission can grant Article 85(3) EEC exemption. The Commission is not keen to see a change on this, but there has been some debate this year, suggesting that this power might be shared with national competition authorities (with some appropriate control or co-ordination system involving the Commission). This would be decentralisation indeed. The Commission does not, it appears, want to go so far.

Third, the Commission has made it clear that it does not propose to relinquish its powers over important state aid cases, in effect to let Member States rule on their own acts. Nor does it intend to give up its aim to have the EC merger control thresholds lowered. The Commission considers that the Merger Control Regulation, with its Community dimension thresholds and 'distinct market' provisions, already represents 'subsidiarity in action'.[36]

Fourth, it should be stressed that there are now an increasing number of Member States whose national competition law is based on EC law principles. Although there has been no specific harmonisation directive for national competition laws, in practice there has been a 'soft harmonisation', including, most recently, laws in Spain, Italy, Ireland and Belgium. The more this continues, the more credible subsidiarity in competition might be, allowing for more selective action by the Commission, with actions in the national courts and under national laws to complete competition enforcement.

Nevertheless, this is not a development which is likely to make matters simpler for companies or practitioners, at least for a while as the principles of co-ordination are more fully worked out. For example, take the current variations in block exemption practices in national competition law: an exclusive distribution agreement drafted in line with Regulation 1983/83 may be exempt from notification to the competition authorities in Spain, registrable in the United Kingdom, and notifiable in Ireland because of variations in the provisions concerned.[37]

Actions for damages are a related aspect of the subsidiarity theme. The right to sue for damages for infringement of Articles 85 and/or 86 EEC has been recognised for many years. However, we still await a full judgment. There are various hesitations and national procedural

32 See, for example, *UKwal* – ECU5,000, CSM – ECU3,000, OJ L121/45, 6 May 1992; OJ L305/16, 21 October 1992.

33 Article 3(b) of the draft Maastricht Treaty.

34 Case 792/79R. See [1980] ECR 119, and the *Commission Notice on Interim Measures* [1980] 2 CMLR 369.

35 See, for example, *Automec*, Case T-24/90, judgment of 18 September 1992.

36 See the speech by Sir Leon Brittan in Florence, June 1992, 'Subsidiarity in the Constitution of the EC', *Europe*, 18 June 1992.

37 However, in cases of substantive conflict, see *Walt Wilhelm*, Case 14/68 [1969] ECR 1.

hurdles which appear to have held back the floodgates. The issue has been a topical theme again this year for several reasons. First, in a number of recent Commission decisions there have been clear victims suffering loss. Consider, for example, the position of Newitt whose parallel export sales were found to have fallen significantly in the *Dunlop Slazenger* case.[38]

Second, the Commission's proposed notice on co-ordination with the national courts has returned to the theme. In the proposed notice, the Commission emphasises that full and effective legal protection means that national courts must award damages for economic loss suffered as a result of infringements of Community competition rules, in all cases where such remedies are available in similar proceedings under national law.

Third, there has been an Article 177 EEC reference to the European Court on the question of damages, which is particularly interesting because it raises questions of both ECSC and EEC law, and focuses on the relevance/evidential weight to be attached to prior Commission proceedings.

Thus in *H.J. Banks & Co. Ltd v British Coal*, the Commercial Court of the English High Court, Queen's Bench Division has asked the following questions:[39]

> 1. Do Articles 4(d), 60, 65 and/or 66(7) of the ECSC Treaty apply to licences to extract unworked coal and to the royalty and payment terms therein?
> 2. If the answer to Question 1 is that such provisions do not apply:
>
> (i) Do Articles 85 and 86 of the EEC Treaty apply to the circumstances set out in Question 1;
> (ii) is the answer to (i) affected by Article 232(1) of the EEC Treaty?
>
> 3. Are Articles 4(d), 60, 65 and/or 66(7) of the ECSC Treaty directly effective and such as to give rise to rights enforceable by private parties which must be protected by national courts?
> 4. Does the national court have the power and/or the obligation under Community law to award damages in respect of breach of the said Articles of the ECSC and EEC Treaties for loss sustained as a result of such breach?
> 5. To what extent (if at all) do the answers to Questions 3 and 4 depend upon:
>
> (i) A prior determination by the Commission; and/or
> (ii) the exhaustion of remedies (if any) in relation thereto available under the ECSC Treaty; and/or
> (iii) the completion of the steps or procedures indicated in the relevant provisions?
>
> 6. If the Commission has taken a Decision pursuant to a complaint, as it did in the Decision of 23 May 1991, to what extent is a national court bound by that Decision:
>
> (i) With regard to the issue of fact decided by the Commission; and
> (ii) with regard to the Commission's construction of Articles of the ECSC Treaty?

Last, one may also note that a Dutch court has made an Article 177 EEC reference on the privilege against self-incrimination in the context of competition rules. For some time there have been procedural problems in obtaining evidence on 'discovery' in national competition cases. A defendant would refuse on the ground that the revelation of such evidence might make it liable to other sanctions. Debate has focused, at least in the United Kingdom, on whether such principles apply to Commission proceedings which may lead to fines, but which are not characterised as penal, and equally on whether the claimed privilege applies only to individuals, or also to companies.

The Arrondissementsrechtsbank Amsterdam has now asked the following question to the European Court, in a case called *Otto BV v Postbank NV*:[40]

> Is the national court, when assessing an application which seeks an order for a provisional examination of witnesses pending the initiation of civil proceedings pursuant to Article 5 of the EEC Treaty, bound to apply to the principle that an undertaking is not obliged to answer certain questions, if the answer thereto constitutes an admission that the rules of competition have been infringed?

It should be interesting and important to see what the European Court has to say about both of these references.

During the course of the year the Commission has circulated its proposed notice on the application of Articles 85 and 86 of the EEC Treaty by national courts. This notice is something that has been in the pipeline for some time, and appears to be largely indebted to the European Court's judgment in *Delimitis* in some parts. For present purposes it is proposed to mention just a few points.

The proposed notice specifically aims to promote reliance on decentralised decision-making machinery, taking into account that Articles 85(1) and 86 EEC have direct effect, yet only the Commission can grant individual exemption pursuant to Article 85(3) EEC. Like *Delimitis* the proposed notice addresses the difficult issue as to what a court should do if there is a risk of a different ruling by the Commission on the application of Articles 85(1), 85(2) and/or 86 EEC, or the likelihood of exemption pursuant to Article 85(3) EEC. The proposed notice sets out the advantages of proceedings in national courts (notably the possibility for awards of damages and costs, and the speed with which interlocutory relief may be available). The Commission has indicated that it is willing to give 'interpretative guidance' to national courts on the application of Articles 85(1) and 86 EEC (although there is much debate at the moment, as to what this may mean in practice).

The Commission also plans to publish an explanatory booklet on the application of the Community competition rules at national level (a project which has been in the offing for some years now).

Article 90 EEC Issues: Ports, Post and Telephones

This area of law remains as important as ever for telecommunications, energy and other public sector activities. However, during the course of the year, there have been some indications that the Commission's initiatives might be slowed down by the Commission's concern to see the Maastricht treaty voted through. In this paper, focus is on three relatively new areas for the application of Article 90 EEC: ports, post and telephones.

38 Cited above, Note 20, at point 46.
39 OJ C142/20, 4 June 1992.
40 Case C-60/92, OJ C90/8, 10 April 1992.

In December 1991, the European Court gave its ruling in the *Port of Genoa* case.[41] The court ruled that an Italian law which granted exclusive concessions to private companies to operate at the port was contrary to Article 90(1) EEC and unlawful insofar as it required those companies only to use Italian workers drawn from a local group. The dispute arose between an Italian steel firm Siderurgica Gabrielli (Gabrielli), and a firm entrusted with operation of port activities in Genoa called Merci Converzionali Porto di Genoa (Merci). Gabrielli sought to import steel from Germany, using a ship which was equipped to unload the steel on its own. Permission to do so was refused on the basis that this would have been a use of foreign labour contrary to the Italian law. After some delay and strikes, Gabrielli sought an injunction ordering Merci to deliver the steel, and followed this up with a claim for damages. The Genoa court asked the European Court whether the Italian law was compatible with Article 90(1) EEC, or exempted under Article 90(2) EEC.

The European Court ruled that under Article 90(1) EEC a Member State cannot enact or maintain measures which are contrary to Article 86, or which reflect discrimination in the choice of workers based on nationality, contrary to Articles 7 and 48 EEC. The court found on the facts that the Port of Genoa amounted to a substantial part of the Community, and that Merci had a dominant position thereon. Merci had abused that dominant position by demanding payment for services which were not requested, charging prices disproportionate to services offered, and granting special reductions to certain clients (which were passed on to its remaining customers). It was held that the case for exemption under Article 90(2) EEC had not been made out.

The case now appears to have prompted two sequels: Sir Leon Brittan (the competition Commissioner) is reported to have written to the Italian authorities indicating that they will now have to adopt measures modifying the Italian law in other Italian ports.[42] There have also been proceedings under the Italian anti-trust law against port monopolies.

As regards the post, two points should be made. First, the Commission has now produced its Green Paper on the *Development of the Single Market for Postal Services*.[43] This is a discussion document designed to establish what services should be part of reserved public administration, and what should be liberalised for private operators, consistent with the provision of a 'universal service'. At the moment, it is being suggested by some that express services and publications should be liberalised, and there is much debate about direct mail, intra-Community mail and international mail. In the background, there are the suggestions that, if necessary, the Commission might take a further Article 90(3) EEC directive to push through its views.[44] Second, in February 1992, the Commission's decision in the *Dutch Express Delivery Services* case was annulled. The judgment recognised the Commission's power to take decisions under Article 90(3) EEC in such a case, but found that the Commission had not given the Netherlands or the Dutch PTT a fair hearing.[45]

Finally, it should be mentioned that the Commission has also now ventured into *voice telephony*. The Commission has been pursuing an investigation into this area, partly because of complaints about high intra-EC telephone charges, and partly because of comparisons with US charges. For example, in a speech in February, Sir Leon Brittan noted that a three-minute call from Boston to Washington, a distance of 650 km, costs one third of the equivalent call in Europe, from Paris to Milan. Phoning Milan from Brussels, again the same distance, costs four times as much!

Globalisation of Competition Law

This is one of the major themes of competition law in 1992. It is something which is not just politics, but a movement taking shape with ever increasing speed, which has practical consequences for companies. Several points may be emphasised: first, as mentioned above, there is a process of soft harmonisation of the competition laws of the EC Member States in line with the principles of EEC competition law, which has been quietly developing for some time. This has the result that there is an increasing use of common concepts, and that 'abuse control' systems, which condone cartels and restrictive practices in order to face (larger) international competition are steadily disappearing (at least in Europe). Note, the new Belgian law which marks the advent of free market principles in domestic law. Note also that there have now also been suggestions that Dutch competition law is about to change, partly as a result of the *SPO* case.[46]

Second, EEC competition law principles are now also being 'exported'. The agreement for the European Economic Area, if adopted, will introduce them to the seven EFTA countries. In any event, changes are being proposed to some of these countries' domestic competition laws, notably in Sweden and Finland. In December 1991, the European Community also entered into Associations Agreements with Hungary, Poland and the Czech and Slovak Republic. Each agreement includes competition provisions covering not only cartels, abuses of dominant positions and state aids, but also state monopolies of a commercial character and companies to which special or exclusive rights have been granted. Implementing provisions are to be adopted within three years after entry into force of the agreements.

Third, during the course of the year, Sir Leon Brittan and Dr Ehlermann (the Director-General for Competition) have made speeches emphasising that greater competition and market access should be allowed in Japan. US officials have spoken of simply applying US anti-trust laws to anti-competitive practices in Japan. The Commission has not put it so strongly. Instead, the Commission has called for more use of certain procedures for international co-operation in competition matters. Specifically, in the 21st Competition Report, the Commission has

41 Case C-179/90, judgment of 10 December 1991.
42 *Europe*, 14 August 1992.
43 COM (91) 476 Final, 11 June 1992.
44 See Written Questions 2142/92 and 2185/91, *Verbeek/Mottola*, OJ C162/13, 26 June 1992.
45 Joined Cases C-48/90 and 66/90, judgment of 12 February 1992.
46 *Financial Times*, 28 September 1992.

stated that, in appropriate cases, it intends to use a procedure set out in an OECD recommendation of 1986.[47]

This procedure allows countries which consider that business practices carried out in another OECD country substantially and adversely affect its interests to request consultations with that other country to remedy such barriers to trade. The concept is therefore similar to that of 'positive comity' in the EC–US Competition Co-operation Pact. The Commission has invited companies which have experienced problems because of such restrictive practices, in particular in Japan, to provide information thereon, and said that where the information is sufficiently detailed to warrant action under the OECD procedure, the Commission would be 'most interested' to do so. It remains to be seen what practical results the OECD procedure will achieve, but this is clearly a development worth watching, and for some companies an invitation to accept!

Fourth, Sir Leon Brittan has now also raised the issue of competition in GATT. In February 1992, he said to the World Economic Forum that

> Unfair trade is a cancer. Anti-dumping might be compared to chemotherapy – a desperate and damaging remedy. Our aim, through competition policy, must be to cure the cancer itself before it takes hold.

He then suggested that cartels and restrictive practices should at least be defined as unenforceable at law (in member countries' laws); that there should be common rules for the appraisal of mergers; and that there should be international panels, to provide a forum for discussion of merger cases which involve several jurisdictions, and an impartial analysis of the merits of a particular case and which authority is best placed to deal with it.

These ideas met with immediate support in some business circles and from the Secretary-General of GATT, Mr Arthur Dunkel. Some have pointed out that, in a sense, Sir Leon Brittan is asking for a return to the idea of an International Trade Organisation, first proposed in 1947. In June 1992 Sir Leon Brittan returned to his theme, stressing that, in his view, anti-competitive mergers with an effect on the world market should be covered by GATT. He said:

> Just as a single Member State may not always be able to deal effectively with competition distorting practices, the Community itself is sometimes too small to do so.

47 Point B.4 of the Revised Recommendation of the OECD Council concerning co-operation between Member Countries on Restrictive Business Practice Affecting International Trade, 21 May 1986.

Clearly, however, all this depends on successful resolution of the current GATT impasse on oilseed and other cereals. As a leading article in the *Financial Times* stated:

> . . . all depends on a successful conclusion to the Uruguay Round itself. This is not merely because new structures cannot be added to a collapsed building. It is also that liberal trade is the foundation for effective competition.[48]

Fifth, the global nature of the world market place is now a pressing reality for many companies. Take, for example, the position of Gillette/Wilkinson Sword this year, where divestiture orders as regards the wet shaving market have been in issue in the United States, the United Kingdom, France, Germany, Spain and at Community level. Or take the daily problem of parallel imports to the Community from Far Eastern or American markets, where different conditions and historical pricing levels apply. It should be noted, for example, that in *Dunlop/Slazenger*, Newitt, faced with high prices in the United Kingdom started to buy from Dunlop in the United States.[49] Some parallel importers in the Community now have purchasing offices in the Far East.

Finally, to complete this theme, mention should be made of the internationalisation of competition law and transport. To cite just a few examples of developments in this area in 1992, one may refer again to the *French–West African Shipowners Committee* decision, and note how the air transport market is changing as, for example, BA, which already has holdings in a Russian and German airline, now seeks to team up with USAir, to secure even more London routes with Dan Air, and to buy a 49 per cent stake in a French airline. The Commission is also known to be considering further proposals for implementing regulations for Articles 85 and 86 EEC and international transport. The global reach of EEC competition law appears to be spreading!

48 *Financial Times*, 4 February 1992.

49 See above, Note 20, at points 21 and 51 to 53.