Outline of Important Developments in EEC Competition Law in 1993

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The object of this article is to outline the main developments in EEC Competition law in 1993, focusing on Articles 85, 86 and 90 of the EEC Treaty, but leaving aside EC Merger Control. As last year,[1] it is proposed first to highlight what has been going on using a few tables, and then to address the main issues of the year.

Overview of Main Developments

Main EC legislation and Commission notices

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Joint ventures/Co-operation agreements
- Joint Venture Guidelines
- Regulation 153/93, amending Regulations 417/85, 418/85, 2934/84 and 559/89
- Block exemption for insurance agreements, Regulation 3932/92
- First steps to revision of the patent licensing block exemption
- New EC Merger Control Guidelines (on concentrative and co-operative JVs)?

Distribution
- Revised Agency Notice (still delayed)

Transport
- Air transport block exemptions
- Article 90 Directive for airport services?

Administration
- Notice on co-ordination with national courts
- Revised Form A/B?

State Aids
- Maastricht Treaty

The main 'legislative' events of the year are carry-overs from proposals made last year. The new issues raised are: renewal of the patent licensing block exemption at the end of 1994, the impact of the Maastricht Treaty (which entered into force on 1 November 1993) and a possible Article 90 EEC Directive on airport services. Ratification of the European Economic Area agreement is expected within a few months, and the EFTA Surveillance Authority is apparently ready (with notices, staff, and so on).

The Joint Venture (JV) Guidelines[2] are essentially consolidatory with few surprises. They provide a useful summary of the Commission's approach, albeit that they are necessarily general in their explanations. Of particular interest are the Commission's statements as to when JVs are unlikely to raise appreciable problems of competition. For production JVs this is where the market share concerned is less than 20 per cent. For full function JVs, involving production and sales/distribution, the 'threshold' is 10 per cent.

Through Regulation 153/93,[3] the Commission has amended the specialisation and R & D block exemptions in a similar way. Regulation 153/93 also broadens the scope of the patent and know-how licensing block exemptions so as to allow parents which license a JV to use these block exemptions, provided again that the 20 per cent and 10 per cent market share thresholds are met.

The insurance block exemption, Regulation 3932/92[4] was adopted in December 1992. It does not deal with all of the subjects provided for in the Council's enabling regulation, because the Commission considered that it lacked experience in some sectors. Nevertheless, the block exemption covers co-operation between insurance undertakings in respect of:

- the establishment of common risk premium tariffs;
- the establishment of standard policy conditions and illustrative common profit models;
- the common coverage of certain types of risks: co-insurance and co-reinsurance pools; and
- the establishment of common technical specifications for security devices, and for approving installation or maintenance undertakings.

The block exemption is detailed with many provisos. For example, co-insurance groups may not have more than 10 per cent market share to benefit from the regulation. The block exemption entered into force in April 1993, and will apply until March 2003.

There are also new regulations for air transport concerned with joint planning, co-ordination of schedules, consultations on tariffs for scheduled services, slot allocation, and extending the CRS block exemption until the end of the year.[5]

In February, the Commission published its 'Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 EEC'.[6] This is highly

1 See Ratliff, 'Major Themes of EEC Competition Law in 1992', [1993] 2 ICCLR 56. This text is a revised version of a presentation given at the 16th Annual Advanced EEC Competition Law Conference in Brussels, 8–9 November 1993. The reference period covered is from November 1992 (the previous conference) until November 1993.

2 Commission Notice concerning the assessment of co-operative joint ventures pursuant to Article 85 of the EEC Treaty, OJ C43/2, 16 February 1993.

3 Commission Regulation (EEC) 153/93, OJ L21/8, 29 January 1993.

4 Commission Regulation (EEC) 3932/92, OJ L398/7, 31 December 1992.

5 Commission Regulations (EEC) 1617/93 and 1618/93, OJ L155/18 and 23, 26 June 1993.

6 OJ C39/6, 13 February 1993.

important in practice because, together with the *Delimitis* and *Automec* judgments,[7] it is an integral part of the Commission's drive to decentralise competition enforcement.

The key points to note are:

- that the Commission will not pursue complaints unless they have particular 'political, economic or legal significance for the Community', or if the complainant can secure adequate protection of his rights before national courts;
- the description of the extent to which national courts can rule on Articles 85(1) and 86 EEC; and
- the suggested solution to the difficult practical issue of co-ordinating national court and Commission procedures, given that Article 85(3) EEC exemption can only be granted by the Commission.

The Commission asks national courts to 'take account' of comfort letters as 'factual elements',[8] and is offering various types of assistance to courts (that is, information on whether there has been a notification, how long it may be before a ruling on exemption, an interim opinion on the likelihood of such exemption, the Commission's customary practice on a point of law, and non-confidential factual data and studies).

This notice has its pros and cons. One can understand the Commission's concern to decentralise competition enforcement, especially with an austerity programme and only some 180 staff allocated to work on Article 85 and 86 cases (national experts included).[9] The Commission is also right that *in clear cases* faster relief (and damages) may be available in the national courts. On the other hand, what about the more complex litigation, and how should a national judge react to the informal responses of the Commission (or indeed to comfort letters)? For example, in *Inntrepreneur Estates v Mason*, an English judge, Mr Barnes QC was not prepared to rely on a Commission letter written before an Article 19(3) notice as showing a 'real prospect' of a forthcoming exemption or comfort letter, because he did not know what observations third parties might have.[10]

So, what is coming? The issue concerning us most is the expiry of the patent licensing block exemption at the end of 1994. In the Spring, Mr Guttoso started to explain his concerns. He explained that there would be an internal report in July 1993, and consultations early next year. There is still much speculation as to what may happen and various ideas have been thrown out: that there should be one regulation for patent and know-how licensing instead of two; that the little-used opposition procedure should be reviewed and widened; and that there should be looser territorial restrictions in the Single Market.

Upon us now is also the Maastricht Treaty[11] (although you may not have realised it!). From a competition viewpoint, the Treaty does not have a great impact. It did not rewrite Articles 85 to 90 EEC, nor Articles 92 to 94 EEC! However, it may be of interest that Article 171 of the revised EC Treaty will now provide that where a Member State fails to comply with a judgment of the European Court, it may be liable to payment of a lump sum or penalty payment. According to suggestions last year, this dramatic power, which would be exercised on application to the European Court by the Commission, might be used to fine EC Member States which ignore their EC obligations relating to state aids!

Finally, the proposed notice on agency appears to have been put back again to 1994. There have been some cases this year which may help, dealing notably with the issue of agents rebating their commissions.[12] However, one suspects that the key problem is still the dividing line between integrated and non-integrated agents, and issues going to the 'risk of a transaction'.[13]

Main Commission decisions: prohibitions and fines, exemptions and informal clearances

There have been a considerable number of Commission cases this year, but few fines. Major fines were imposed on members of the CEWAL shipping conference, the largest being a fine of 9.6 million ECU on Compagnie Maritime Belge.[14] A fine of 1 million ECU was imposed on the Union Internationale des Chemins de Fer.[15]

On the other hand, there have been three important orders to 'cease and desist'. In *Gillette/Wilkinson Sword*,[16] in an interesting application of *Philip Morris*,[17] the Commission ordered Gillette, the US razor group, to dispose of its interest in Eemland, the parent company of Wilkinson Sword and its main competitor in the market for wetshaving products. Gillette was also required to reassign to Eemland various non-EC businesses (in EFTA and Eastern European countries). In *Astra*,[18] the Commission in effect prohibited a satellite joint venture (although this had already been terminated in the course of the proceedings). In *Langnese* and *Schöller*, the Commission

7 *Delimitis v Henninger Bräu*, Case C-234/89 [1991] ECR 1-935; *Automec v Commission*, Case T-24/90, judgment of 18 September 1992.

8 See point 25(a).

9 See 1992 Commission Competition Report at point 125.

10 [1993] CMLR 293 at 306 to 307. Another reason for early notices (see last year's article, cited above at footnote 1, 61). In September 1992, the Commission advised the Tribunal de Commerce de Bruxelles on how an exclusive distribution agreement for services could be assessed under the EEC Competition rules (see Jones, van der Woude, Pathak, 'Competition Law Checklist 1992', [1993] European Law Review 123).

11 A consolidation version of the EC Treaty, with Maastricht amendments is available as a Common Market Law Reports Reprint.

12 See below *UIC* OJ L366/47, 15 December 1992 (UIC has appealed); and *Center Parcs*, 1992 Commission Competition Report, point 581.

13 The idea of a new notice on the distinction between concentrative and co-operative joint ventures in EC Merger Control comes from comments made by Commission officials in recent weeks. The possibility of a revised Form A/B is discussed further in 'Procedural Issues' below. The proposed Airport Services Directive is discussed in the Article 90 section below.

14 OJ L34/20, 10 February 1993; CMB and the other firms concerned are appealing.

15 See above, footnote 12.

16 OJ L116/21, 12 May 1993.

17 Joined Cases, 142 and 156/84, *BAT and Reynolds* [1987] ECR 4487. Influence here was based mainly on ownership of a large shareholding and the existence of heavy debt obligations to that shareholder (without board representation or other voting rights).

18 OJ L20/23, 28 January 1993.

Main Commission fines and prohibitions

CEWAL, COWAC, UKWAL
10.1 ECU million fines (Compagnie Maritime Belge 9.6 ECU million)

Distribution of World Cup Package Tours
Worldwide distribution rights for sports event unlawful

Union Internationale des Chemins de Fer
1 ECU million fine – Restrictions on travel agents selling railway tickets

Langnese-Iglo, and Schöller-Lebensmittel
outlet exclusivity prohibited for 5 years
barriers to entry and duopoly issues

Gillette Wilkinson Sword
divestiture order, *Philip Morris*, outside EC also

Astra
Satellite broadcasting JV 'prohibited' (although already terminated)

CNSD
Italian customs agents tariff prohibited, despite active role of State

Hinkens/Stähler; Zera/Montedison
absolute territorial protection by product differentiation unlawful

Main Commission exemptions and informal clearances (2) (Specialised areas)

Energy

Electricidad de Portugal/Pego –	coal power station JV
Jahrhundertvertrag –	German coal
ENAC –	European Nuclear Assistance Consortium (Eastern Europe)

Financial Services

Lloyds –	Joint Hulls Understandings and Respect of Lead Agreement

Transport related

Global Logistics System –	computerised air cargo information system
Galileo and Covia –	CRS system
Europe Asia trades agreement –	capacity crisis
European Night Services –	channel tunnel JV
Irish Club rules –	cargo shipping
Combined transport –	tariff structures

Media cases

Eurosport Mark III –	operation of Eurosport channel
ITVA, BBC, BSB and Football Association –	TV rights to football matches
BBC Enterprises and others –	copyright licence for retransmission of TV programmes
EBU/Eurovision system –	TV rights to sport events
UIP (renewal) –	cinema distribution
Polygram-Sony-Warner –	audio and video clubs
Intrax –	satellite news gathering service

Main Commission exemptions and informal clearances (1) (General)

Distribution

Schott Cristal –	glass products
Kenwood Electronics –	car audio/amateur radio/hi-fi
Ivoclar (renewal) –	dental supplies
Sony Espana –	professional electronics
Inntrepreneur/GM/Courage –	pub tenancy agreement

Joint ventures/Strategic alliances

STET/Italtel/AT&T –	switching transmission systems
Philips Matsushita –	digital compact cassette/player
Fiat Hitachi –	hydraulic excavators
Ford Volkswagen –	minivans
Exxon Shell –	LLDPE
Saint Gobain Asahi –	bilayer products
Papeteries de Golbey –	newsprint papermill
Electrolux AEG –	domestic appliances
Phillips/Thomson/Sagem –	liquid crystal displays
Acriss –	CRS systems and car rental
BP Enichem –	polyethylene
Olivetti Digital –	computer systems

(plus short notices/accelerated procedure)

Article 86 clearance?

British Gypsum –	rebate schemes

prohibited a network of exclusive purchasing agreements for ice cream sales for five years.[19]

There have been a large number of joint venture (JV) clearances, particularly in the media area. There have also been a large number of proceedings related to transport. Probably the most interesting JV decision is the exemption of the *Ford/Volkswagen*[20] JV for production of multi-purpose vans. The Commission was concerned about such an alliance between powerful car manufacturers but cleared the deal with various conditions, since there would be clear differences in each parent's resulting range, and it was thought that the JV would create a more 'balanced (market) segment' as against the leader – the Matra/Renault Espace. Interestingly one factor in exemption was also the creation of infrastructure and employment in Portugal[21] (a point discussed further below in 'Pragmatic Competition').

19 OJ L183/19, 26 July 1993; OJ L183/1, 26 July 1993.

20 OJ L20/14, 28 January 1993. *Electrolux/AEG* is also of particular interest because, before proposing clearance of co-operation agreements between these companies for the production of domestic appliances, the Commission challenged reciprocal representation by the parties on each other's boards. This was found to give too great a scope for influencing competitive behaviour (OJ C269/4, 5 October 1993).

21 Not surprisingly, Matra has challenged both this decision, and approval of a grant of state aid to the JV. Matra argues that the Commission underestimates the risk of overcapacity in the market, that 750 ECU million aid is unfair competition, and that there is a lack of consistency in the separate State aid and Article 85(3) decisions.

Main European Court Cases (Court of First Instance/European Court)

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

Wood Pulp
annulment of virtually all of Commission cartel decision issues on timescale, concerted practices, experts, undertakings

Peugeot/Eco-system
Commission decision on professional car intermediaries upheld

British Plasterboard
Commission decision on market foreclosing practices upheld

Corbeau
postal monopoly and private services

Asia Motor
failure to investigate complaint

Cement Cartel
procedural challenge on S/O and file access rejected

The principal judgments of the year on Articles 85 and 86 EEC are *British Plasterboard*,[22] and *Wood Pulp*.[23]

The *British Plasterboard* case was an appeal against the Commission's decision in 1988 to fine BPB Industries and its subsidiary British Gypsum (hereinafter collectively 'BPB') 3 million ECU and 150,000 ECU respectively for certain practices which the Commission found were designed to prevent Spanish and French imports. The Commission's decision was that the following were contrary to Article 86 EEC:

- a system of loyalty payments to individually selected merchants if they bought plasterboard only from BPB;
- a scheme whereby customers who did not handle imported plasterboard had access to priority supplies of plaster;
- applying pressure on a group of plasterboard importers to stop imports of plasterboard in Northern Ireland.

BPB argued on appeal, among other things, that it had been denied adequate access to the relevant documents, that there was no abuse of a dominant position, and that BPB Industries should not be held responsible for the acts of its subsidiary. The Court of First Instance rejected almost all aspects of these pleas.

The main interest of the case lies in the treatment of some of the abuses found. The Court confirmed that the making of promotional payments to distributors, in return for exclusive purchasing commitments by the recipient were not, as a matter of principle, prohibited. However, in the case of dominant undertakings such arguments did not apply 'unreservedly' because competition is already restricted by the presence of a dominant undertaking. The conclusion of exclusive supply contracts in respect of a substantial proportion of purchases amounted to an unacceptable obstacle to entry to the market – even if the payments were a response to requests and the buying power of customers.

The Court also agreed that it is open to an undertaking in a dominant position in times of shortage to lay down criteria for according priority in meeting orders. However, such criteria had to be objective, non-discriminatory, justified and respect the rules governing fair competition between economic operators. Such was not the case if the determining criterion for priority supply was whether a customer bought products from a competitor.

BPB and British Gypsum have since appealed[24] to the European Court arguing, notably, that the promotion payments fulfilled the requirements of exemption under Article 85(3) EEC, and that BPB should not be responsible for British Gypsum because all it had done as regards its subsidiary was to approve its financial objectives.

There have also now been four Article 19(3) notices[25] related to British Gypsum's rebate schemes. It appears that these schemes were notified in October 1988, and have been accepted by the Commission only with some amendment.

In the *Wood Pulp* case,[26] the European Court has quashed the bulk of the Commission's cartel decision. The case involves a number of interesting aspects. *First*, the timescale for this judgment represents the unacceptable face of complex cartel litigation. The Statement of Objections was sent in November 1981, the Commission's decision was just over three years later in December 1984, and the Court's substantive judgment just under twelve and a half years later in March 1993![27] There were 43 addresses of the Commission's decision, so this was a heavy burden for Commission and Court, but this is still an unreasonable period for such proceedings.

Second, there are interesting findings on the concerted practices issues involved. For example, the Court found that a system of quarterly price announcements by producers in the industry did not amount to concertation, but constituted 'market behaviour'. The Court also accepted that such a system of quarterly price announcements was not evidence of earlier concertation between producers, because it had evolved in the circumstances of a long-term market, where both buyers and sellers felt the need to limit commercial risks.

Third, the Commission lost on many points for procedural reasons, such as reliance on evidence obtained after the Statement of Objections was sent, and a failure to explain adequately allegations in the Statement of Objections. It is also clear that in future the Commission will have to show, as the Court put it, a 'firm, precise and consistent body of evidence' of concertation if it is to succeed, which means *specific* evidence implicating the companies at the various times concerned.

22 Case T-65/89, *BPB Industries and British Gypsum v Commission*, judgment of 1 April 1993. (The Commission's decision was annulled in part.)
23 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, and C-125/85 to C-129/85, *Ahlström Osakeyhtio v Commission*, judgment of 31 March 1993.
24 OJ C204/7, 28 July 1993.
25 OJ C321/9–12, 8 December 1992.
26 See above, footnote 23.
27 There was a ruling on jurisdiction in 1988 (see Case 89/85 *Ahlström and Others* [1988] ECR 5193). The European Court also rejected an interim application to have Commission claims struck out on procedural grounds.

Fourth, the Court chose to rely heavily on expert evidence for a number of key issues (such as whether the natural operation of the wood pulp market should lead to a differential price structure, or to a uniform price structure).

Fifth, the Court ruled that undertakings given by various companies to the Commission in return for a reduction in fines were comparable to Commission orders to cease an infringement, and were therefore annulled to the extent that the corresponding infringements were annulled.

Sixth and last, but not least from the Commission's viewpoint, the Commission was ordered to pay the bulk of the costs including the experts' reports. Commission officials are reported to have said that the bill is 'quite phenomenal'!

Pragmatic Competition; Consultation, Industrial Policy and Jobs?

The first questions asked at the beginning of this year were about the approach of the new Commissioner for competition. Many viewed Sir Leon Brittan as 'ultra-liberal', a defender of ruthless competitive logic, and Mr Karel van Miert as a likely proponent of the opposite extreme – a socialist industrial policy vision of competition. So what have we learned about the Commission's current approach? It is proposed to look in part at what Mr van Miert has said, and in part at what the Commission has done.

In the first half of 1993, Mr van Miert made various speeches emphasising that he regards competition as just one instrument towards achievement of the various fundamental goals of the EEC Treaty. Competition was to be applied 'pragmatically, rather than dogmatically', through consultation and consensus, and with due regard for other policies. For example, in May he said:

> An important part of the current context within which competition policy must operate is composed of the internal market, the globalisation of markets, the current economic downturn, the rate of technological change, and the combined impact of these factors. The process of ratifying Maastricht and the debate over subsidiarity, democracy and transparency have added a further dimension that also needs consideration. There are, of course, other aspects which need to be taken into account such as enlargement, EMU or the environment.[28]

In mid-1993, Mr van Miert was challenged to provide some concrete examples of his approach. As a result, the Commission produced a report on its activities in the competition field in the first six months of 1993.

The report was interesting partly for what it included and partly for what it left out. The report offered evidence of no relaxation on enforcement (notably, as regards transport, sugar and carton board cartel cases and state aids). The report also offered some evidence of a wider 'industrial policy' approach. For example, the report refers to Commission approval of collaboration between *Phillips, Thomson and Sagem*[29] in a joint venture to develop, design, manufacture and sell 'active matrix liquid crystal displays'. What is interesting is that this involved the creation of a virtual monopoly in these products in the European Community – a fact which conventionally puts a JV beyond the bounds of Article 85(3) exemption. Nevertheless, the Commission cleared the JV stating that 'this investment represents a strategic element for the Community in the context of worldwide competition'. It was, however, slightly surprising that the Commission did *not* refer to a proposed clearance for the restructuring of the Dutch brick industry announced in February 1993: *Stichting Baksteen*.[30]

What happened in this case is that in 1991, an association of seven Dutch brick manufacturers notified a scheme providing, among other things, for brick production quotas and the acquisition and elimination of third party producers. The Commission objected and the 'crisis' plan was withdrawn. However, in 1992 a revised scheme was notified, which aimed at a co-ordinated reduction in brick production capacity. There was, at the end of 1991, a very high level of brick stocks in the Netherlands. Capacity utilisation and the price of bricks had also fallen significantly. The association therefore sought approval for a scheme whereby four brick producers would irreversibly close down seven production units, spread the cost of those closures between sixteen firms, and the introduction of new capacity was prohibited. The Commission appears prepared to clear this scheme – a highly pragmatic and topical result when so many industries are facing overcapacity and falling margins.

Similar issues also appear to underlie the *Europe-Asia trades agreement* case.[31] Here the Commission is considering an application of the Far Eastern Freight Conference to operate a 'maximum allowed capacity' system in order to maintain freight rates in the face of a 'large degree of overcapacity' on eastbound services. Again, if clearance is granted, that would appear to be a fairly 'pragmatic' approach.

More recently, Mr van Miert has spoken again of the need for 'consultation and consensus' in changing sectors such as aviation and telecoms. At the International Bar Association in October he also stressed that job creation could be a relevant factor to Article 85(3) exemption, referring to the *VW/Ford* minivans case.[32] He noted that one of the factors taken into account had been that a substantial number of jobs would be created in one of the most defavoured regions of the Community. Such considerations could not save cases which did not meet the criteria of Article 85(3) EEC, but the Commission had a margin of discretion in grey areas and employment considerations might swing the balance.[33]

All of this is a long way from the strident competition drive of Peter Sutherland and Sir Leon Brittan. However, Mr van Miert's approach is probably not out of tune with the times. This was a year when the Commission went out of its way not to antagonise in order to get Maastricht

28 See Speech at the Royal Institute of International Affairs, Chatham House, Agence Europe, No. 1834, 15 May 1993, Documents, p. 3.

29 'Competition Policy – Six Months of Commission Activities', Memo 28/93; and Commission Press Release IP(93) 322.

30 OJ C34/11, 6 February 1993.

31 OJ C97/2, 6 April 1993.

32 See above, footnote 20.

33 Commission Press Release IP(93) 860, 11 October 1993.

through.[34] Most of the continent is in recession. A Commission theme of 'consultation, industrial policy and jobs' is not unpopular just now.

Decentralisation, Automec Implementation, and French Discothèques

This is the major theme of the year. There are two aspects to the Commission's current enforcement strategy: first, the Commission's notice encouraging complainants to seek relief in the national courts (discussed above); second, the Commission's right to pick the cases which it will pursue, based on the Court of First Instance's *Automec* judgment. The Commission is aiming to clear its backlog of cases, and in that respect has indicated that it had 30 per cent less cases pending at the end of 1992 than in 1991.[35]

However, there is much debate about which cases the Commission should *not* pursue, and many dissatisfied complainants. This will continue until either national court cases are easier, or national competition authorities take a fuller role in applying Articles 85 and 86 EEC. Underlying the debate, the issue persists as to whether Regulation 17/62 should be amended to allow national competition authorities to grant Article 85(3) EEC clearance, if necessary under the co-ordination and control of the Commission.

It may be useful to recap briefly on *Automec*.[36] An Italian dealer in BMW cars was given notice that his dealership was being terminated. The dealer then took action on all fronts to try and continue the dealership, or at least to preserve a supply of BMW cars – bringing the matter before the Italian courts, and making a complaint to the Commission. The Commission decided not to pursue the case and took a decision rejecting Automec's complaint. The Commission's position was *inter alia* that the matter could be better dealt with in front of the national courts because they were already aware of the relevant contractual relations, and could order the payment of damages. In any event, the Commission stated that it was entitled to decide whether a case was a matter of priority which it should pursue.

The Court of First Instance agreed that the Commission could set its priorities but made it clear that the Commission's decision still had to respect certain principles. In particular, the Commission is obliged to examine closely the factual and legal elements brought to its attention by a complainant. If rejecting a complaint, the Commission must explain why the case does not disclose sufficient Community interest to be pursued. The Commission must weigh up the importance of the infringement alleged for the functioning of the common market, the probability of being able to establish the infringement, and the extent of investigative measures which may be necessary. The Commission can take into account the existence of national court proceedings, whether they are likely to lead to an effective remedy, and the existence of a block exemption.

However, the implementation of this 'priorities' policy is not without some difficulty in practice. *First*, now more than ever it may be advisable to come for an informal discussion with the Commission before taking *any* action. If you issue a writ or seek an interlocutory injunction in the national courts, you may give the Commission grounds for saying you have an adequate remedy there. *Second*, as things currently are, a complainant may have to contemplate withdrawal to avoid a rejection which might be prejudicial to subsequent national action. *Third*, now more than ever the possibility of alternative remedies with national competition laws and agencies needs exploring, especially with those small and medium sized companies (SMEs) unable to take the financial risk of national court litigation.

In this respect there are cases going on at the moment which need watching because they may shed further light on the Commission's discretion. There have now been various references from French courts and appeals challenging the Commission's decision to reject complaints against collecting societies for charging excessive royalties of French discothèques.[37]

The French courts are complaining that the Commission has 'supposedly been investigating' these cases for some 14 years; that the Commission has better investigative resources; that the Commission has already undertaken much investigative work on comparative pricing for such royalties in other Member States; and that, on that evidence, a *prima facie* case of abusive pricing has been made out! This seems far less clear cut than *Automec*. It will be interesting to see what the European courts reply.

In *Asia Motor France*,[38] the Court of First Instance has also underlined that it will review carefully the Commission's decisions to reject complaints. The complainants claimed that there was a cartel among French importers of Japanese cars and with the French administration whereby they agreed to limit their combined market share to 3 per cent of the French market, in return for an undertaking that the total number of Japanese cars would be reserved to them. This in effect prevented imports from other Member States. The Commission rejected the complaints on the basis that the arrangements were an integral part of the policy of the French authorities.

The Court annulled the Commission's decision emphasising that the Commission is required to take due 'care, seriousness and diligence' when deciding whether to open an inquiry. The complainants had provided documents which represented strong *prima facie* evidence of collusion between the importers' agents, whilst the claim of the French authorities of public policy intervention was unsupported by documentary proof. The Commission had therefore made a manifest error in its appreciation of the facts.

There are also signs of a closer co-operation between EEC and national competition authorities. For example, the Commission recently assisted the Danish competition authority with an investigation into audiovisual product prices.[39]

34 See, for example, the Commission's report on revision of the EC Merger Control thresholds COM(93) 385 Final, which recommends that the matter be put back to 1996.

35 See 1992 Commission Competition Report, point 126.

36 See above, footnote 7.

37 See for example *Sarl Bab Le 7*, Case C-54/93, OJ C-88/10, 30 March 1993; and *Bemim v Commission*, Case T-114/92, C43/25, 16 February 1993.

38 Case T-27/92, judgment of 29 June 1993.

39 See 1992 Commission Competition Report, point 548.

Earlier this year the Bundeskartellamt was also poised to apply Article 85(1) to certain exclusive electricity supply provisions in concession contracts between RWE and the city of Kleve, in order to allow Kleve to buy from the Netherlands. The Commission had originally indicated that it would not be pursuing the matter, then the Bundeskartellamt became involved (even though such exclusivity might otherwise be allowed in German law). The matter was then suspended because RWE indicated that it was notifying the agreements concerned to the Commission.

Distribution: Coherent Selective Systems and the 'Cold War'

This has been a busy year for the Commission in distribution – although not usual: thus far there have been no fines for parallel imports![40] The focus here is on two issues: selective distribution and exclusive purchasing.

An important issue in selective distribution this year has been the *coherence* of the system – the principle that a supplier cannot say that a certain type of outlet is required for a 'proper' sale, if it in fact also sells the goods in question through other channels. This has arisen in two ways. *First*, the Commission has approved Kenwood's hi-fi selective distribution system despite the fact that Kenwood sells by mail order.[41] Often it is argued that mail order sales are inconsistent with selective distribution, because of the need to offer advice at point of sale. In Kenwood, the Commission allowed a selective distribution system which provided for mail order, where the product was picked up by the customer from a local collection point, which was able to provide such advisory services. *Second*, there has been a reference to the European Court on *Cartier watches*,[42] asking whether a European selective distribution system should be treated as within Article 85(1) EEC where the same goods can be obtained in other parts of the world *outside* the selective dealership system and lawfully brought into the EEC.

Exclusive purchasing has again been an important issue this year because of the 'ice-cream war' prompted by Mars's market entry. In December 1992, the Commission adopted full decisions involving *Langnese and Schöller*[43] in Germany. Last year there was a ruling in Ireland that HB Icecream was entitled to maintain its policy that retailers could not use freezers supplied by HB Icecream to stock other manufacturers' products (so-called 'freezer exclusivity'). The Commission had also taken interim measures prohibiting Langnese and Schöller from asserting outlet exclusivity, an order which was suspended by the President of the Court of First Instance, save with regard to retail outlets in petrol stations.

The Commission has now ruled that all of both Langnese and Schöller's outlet exclusivity agreements in Germany are void, and prohibited the two companies from entering into similar agreements until the end of 1997. Langnese and Schöller have appealed, and also obtained an interim order that they may continue to rely *at least as against each other* on the exclusivity of their sales outlets, pending judgment in the main action.[44]

The Commission's decisions are interesting, above all for their analysis of appreciable market effect and barriers to entry justifying a withdrawal of the benefit of Regulation 1984/83, and review of a comfort letter which had been given previously.

In *Langnese*,[45] the Commission found that Langnese had more than 45 per cent of the relevant market, and that Langnese's exclusivity agreements accounted for some 15 per cent of sales outlets and volume on that market. Langnese's agreements provided for freezer exclusivity, outlet exclusivity, and an obligation not to buy Langnese products indirectly from third parties. Agreements varied in duration with fixed terms from two to five years, although some were held to be of indefinite duration, because they were automatically renewable.

The Commission held that Langnese's network of supply agreements appreciably restricted the scope for domestic and foreign competitors to establish themselves on the relevent market, or to increase their market share.

The Commission ruled that Langnese could not take advantage of Regulation 1984/83 for two reasons. First, some supply agreements were of indefinite duration. Second, even if Regulation 1984/83 applied to some of the agreements, the Commission withdrew the benefit of the Regulation on the basis that access to the retail level of the relevant market was very difficult. In so doing, the Commission was clearly influenced by the duopolistic market structure in which Langnese and Schöller together accounted for more than two-thirds of sales volume through traditional grocery outlets and had similar outlet exclusivity networks.

In *Schöller*,[46] the Commission took a very similar decision. The main differences lay in the fact that Schöller's market shares and exclusive network were somewhat smaller, and Schöller had also notified its outlet exclusivity arrangements and received clearance for them by comfort letter.

The most practical consequence of these cases appears to be that firms with significant market share (20 per cent to 45 per cent) cannot safely rely on Regulation 1984/83 if there are significant barriers to entry and the market is concentrated. The justification for the Commission changing its mind and reviewing its comfort letter will also worry many. The Commission is critical of freezer exclusivity on the facts although its ruling only prohibited outlet exclusivity.

It will be interesting to see whether the Irish and Commission approaches will be reconciled. It may also be of interest to note that to some of the new EEA members this must all be rather a case of *déjà vu*! In Sweden in 1977, the Marketing Court ruled that while freezer exclusivity did make establishment by third parties difficult, such exclusivity was not unlawful even for a dominant company. In the circumstances, retailers could renounce such agreements without notice, obtain a freezer from another manufacturer, and in fact many customers could take more than one freezer.[47]

40 But see *Zera Montedison/Hinkens/Stähler*, OJ L272/28, 4 November 1993.
41 OJ C67/9, 10 March 1993.
42 OJ C303/5, 20 November 1992.
43 See above, footnote 19.
44 See last year's article, cited above footnote 1, at 58 to 59; Joined Cases T-7/93R and T-9/93R, Order of 19 February 1993.
45 See above, footnote 19.
46 See above, footnote 19.
47 *NO v Glace-Bolaget*, judgment of 4 August 1977 [1980] European Commercial Cases 60, at 81.

Further Developments on Motor Vehicle Distribution, Regulation 123/85

There have been a number of significant rulings and Article 177 references this year which are relevant to Regulation 123/85 and its potential renewal in 1995.

In *Ford Agricultural* the Commission found that Regulation 123/85 does not apply to tractors sold for agricultural use.[48] In April, the Court of First Instance confirmed the Commission's decision in *Peugeot/Ecosystem*.[49] The Court did not regard professional intermediaries as assuming a legal or economic risk characteristic to purchase and resale. Although Peugeot have appealed again, this is still significant because it may encourage parallel trading through use of the Ecosystem concept. One would also expect a corresponding revision of Regulation 123/85, when it is renewed.

New questions are being referred to the European Court on car leasing. These questions come from proceedings in Germany involving BMW and Volkswagen. In the *BMW* case,[50] the Bundesgerichtshof is asking whether it is contrary to Article 85 for a car manufacturer to request its selected dealers not to supply leasing firms with cars, where those cars are to be leased to persons residing outside the dealer's contract territory. If not, would Regulation 123/85 preclude national courts from treating such a request as prohibited under national competition law? The *Volkswagen* question is similar.[51]

Spare parts are also topical again because of recent (highly controversial) Commission proposals for a Community industrial design right.[52] These provide for an exception to the normal protection for registered designs (five years renewable up to twenty-five years) where access to a design is required to repair 'complex' products. In such cases a third party can make parts for such repairs after only three years.

Finally, further to the Commission's campaign to increase price transparency and reduce differentials between EC Member States, in June 1993 the Commission published comparative tables on European car prices.[53]

Procedural Issues: Accelerated JV Clearance, Access to the File and Dawn Raids

At the beginning of 1993, the Commission introduced its new 'accelerated procedure for co-operative joint ventures in structural cases'. 'Structural co-operative JVs' are described by the Commission as

> all forms of cooperation entailing major changes in the structures of the parties to the agreement. These are joint ventures pooling a significant number of assets, particularly in the production field and in connection with the manufacture and marketing of contract goods.[54]

The accelerated procedure is modelled on experience with the EC Merger Control Regulation. The Commission has set itself a first period of two months in which to indicate whether it has serious doubts about the compatibility of an agreement with the competition rules. If there are such doubts there may then be a second phase of review.

Several points on the procedure may be noted. *First*, it does not involve a binding tacit clearance deadline but a 'system . . . based entirely on the principle of self-discipline by the relevant Commission departments'.

Second, the two-month review period does not start until the Commission considers it has all the information required. Commission officials have stressed that often delays result from the need for further requests for information. Such considerations have also prompted the Commission to think about revising Form A/B. The idea is that if it were more demanding, like Form CO, then the subsequent procedure could be quicker.

Third, the procedure may not be available in all cases. Again, Commission officials have emphasised that the procedure cannot reasonably be expected to apply to very large, technically difficult and political cases. *Fourth*, at the outset of the procedure, the Commission usually puts out a short notice, similar to that in EC Merger Control, inviting comments from third parties within ten days.

Fifth, during the procedure, if the Commission needs to seek further information it contacts the parties by fax asking for responses within a few days, as opposed to weeks.

Sixth, at the end of the two-month period there are essentially three options:

- a comfort letter confirming compatibility with Article 85(1) or 85(3) (in cases not posing any problems);
- a response indicating that the Commission has decided to deal with the matter by formal decision;
- a 'warning letter', in which the Commission indicates that it has serious doubts about the compatibility of the agreement with the competition rules, so that it envisages an in-depth examination leading to a decision. In cases where a formal decision is envisaged, the EC Commission proposes to inform the parties of the proposed date for adoption of the final decision.

The procedure has been applied in a number of cases this year. The Commission has said that if successful, it hopes to extend the procedure to other types of agreement. All of this is most welcome.

There is a hot debate about access to the file at the moment. In the *Cimenteries* case[55] the Court of First Instance rejected various challenges relating to the

48 *Ford Agricultural*, OJ L20/1, 28 January 1993.
49 *Peugeot v Commission*, Case T-9/92, judgment of 22 April 1993.
50 *Bayerische Motorenwerke v ALD Auto-Leasing D. GmbH*, Case C-70/93, OJ C112/7, 22 April 1993.
51 *Bundeskartellamt v Volkswagen and VAG Leasing*, OJ Case C-266/93, C160/7, 12 June 1993.
52 See Faircliffe, 'EC's Adoption of Proposals for Industrial Design Legislation', [1993] Vol. 7 World Intellectual Property Report 244. See also *SIVA v Ministeria Publico*, Case C127/93, OJ C124/11, 6 May 1993.
53 European Report, No. 1872, 3 July 1993 at 4. In January, there were also reports that Rover had contracted the Commission, explaining that it had found unlawful practices by its UK regional distributors, designed to limit rebates offered by dealers. The Commission is understood to be insisting on the payment of compensation to those injured by such practices.
54 See 1992 Commission Competition Report, point 124; and Commission Press Release IP(92) 1111, 23 December 1992, [1993] CMLR 238.
55 Joined Cases, T-10/92 and others, *Cimenteries*, judgment of 18 December 1992.

Statement of Objections and access to the file. Although the Statement of Objections in the case was a single document, the full text was not served on each of the 76 parties concerned. They received the international part, but only the national part which referred to them and a list of supporting documents. The Commission refused the parties' request to give them the complete Statement of Objections, including the other national parts, and access to the complete file on the case (save internal and confidential documents).

The parties challenged the decisions contained in these letters of refusal. The Court rejected their applications on the basis that the refusals were preparatory measures, not acts susceptible to challenge under Article 173 EEC. The refusal of access was also limited to a preparatory step in the context of administrative proceedings. If such refusal infringed the rights of the defence, it could ultimately be a ground for annulment of any final decision taken.

In September, the Commission also organised a seminar on its procedures, where it was clear that there is still a wide divergence of views on these issues. Many defence counsels still argue that a ground for annulment ten years later is not adequate respect for the rights of the defence. There is also much controversy over the balancing of a company's interest in business secrecy, with the defence desire to see as much of the prosecutor's file as possible.

There have been two cases on Commission dawn raids this year. *First*, in December 1992, the Commission fined MEWAC,[56] a liner conference, 4,000 ECU, when its Secretary General refused to allow an investigation to proceed in his office in Marseilles while he was absent, and was not prepared to return to his office from Paris by plane or train until the next day. Seals were placed on the premises in the meantime, but the Commission still ruled that this amounted to a refusal to co-operate.

Second, in recent weeks, it appears that AKZO Chemicals[57] refused to allow Commission inspectors access to the offices of AKZO's Director in Arnhem. Access was granted after a daily fine was imposed. AKZO claims that on the original visit, the Commission's mandate appeared not to be in order.

An interesting development is that the Commission has also asked a national competition authority, the Office of Fair Trading, to conduct a dawn raid. This has occurred twice – once in PVC investigations and once under the Maritime Transport Regulation.[58] The development of co-ordinated competition enforcement goes one step further.[59]

Intellectual Property Issues: Standards and ETSI

In the field of intellectual property, there are two aspects which should be mentioned. *First*, we are still waiting for the European Court to rule on *Magill – TV Guides*,[60] the case having been appealed from the Court of First Instance.

Second, last October the Commission issued a 'Communication on Intellectual Property Rights (IPR) and Standardisation'.[61] This dealt with a number of aspects of competition and, in particular, emphasised that access to a standard should be fair, reasonable and non-discriminatory. The licensing of IPR for use in a standard should also be voluntary.

Interestingly, the Communication noted that a standards body could be in a collective dominant position. If therefore such a body were to impose unfairly low levels of royalty on rightholders whose IP was to be used in a standard, or to set excessively high prices for use of standards, or other unfair terms, there could be an abuse.

In parallel to this, there have been a number of complaints concerning ETSI, the European Telecoms Standards Institute. These have focused on the fact that to join ETSI, there was a requirement that a would-be member give an 'IPR undertaking' to license his IPR for use in ETSI standards in the EEC on fair and non-discriminatory terms. Some argue that this amounts to a form of 'back-door compulsory licensing'. There are also complaints that the ETSI is dominated by European PTTs, which therefore fix the standards so as to foreclose competition from third parties.

Article 90 EEC: Ports, Post and Airport Services

This year has been a relatively quiet one for Article 90 issues. However, there has been one judgment concerning Article 90 and postal services which is of major significance, two further references from the Port of Genoa, and the Commission is now contemplating a further directive based on Article 90(3), this time for airport services.

In May 1993 the European Court gave a ruling in *Procureur du Roi v Corbeau*[62] concerning Article 90 and postal services – a timely issue given the Commission's Green Paper last year. The case arose as an Article 177 reference from the Tribunal Correctionnel of Liège. Criminal proceedings had been brought against a businessman Mr Corbeau, for allegedly infringing the Belgian postal monopoly.

Mr Corbeau offered an accelerated mail service in and around Liège, which consisted in collecting mail from senders' premises and distributing that mail before midday the following day, provided that the addresses were in the geographical area concerned. Mail addressed outside the area was collected by Mr Corbeau, and sent to the addresses by post. The referring court asked whether the Belgian legislation establishing the postal monopoly infringed Articles 86 and 90 EEC.

The Court assumed postal services were of general economic interest, and focused on whether it was necessary, for the operation of the postal service, to restrict or

56 OJ L20/6, 28 January 1993.

57 See for example Agency Europe No. 6090, 21 October 1993. There has since been speculation that the investigations may relate to AKZO's salt business.

58 See Inglese, 'EC Competition Law Procedure: Role of the Competent Authority', [1993] 5 ECLR 197, at 202.

59 It may also be noted that Advocate-General Gulmann has recommended in *Otto v Postbank*, Case C-60/92 that there should be no privilege against self-incrimination for companies faced with the possible admission of an infringement of the competition rules (Opinion of 15 June 1993); see last year's article, cited above, footnote 1 at 63).

60 See, further, 1991 Commission Competition Report, point 146. The Commission had ordered UK and Irish TV companies to supply weekly programme listings for comprehensive TV Guides. The CFI upheld what was in fact a form of compulsory copyright licensing, on the basis that copyright was being used to foreclose competition in the derivative market for such guides. The European Court hearing was set for 1 December 1993.

61 COM(92) 445 Final.

62 Case C-320/91, judgment of 19 May 1993.

exclude competition by other economic operators. Was it only in this way that the Belgian Post Office could enjoy economically acceptable conditions?

The Court found that the duty of the holder of the exclusive right to provide its services in 'balanced economic conditions' presupposed a subsidy of the less profitable sectors by the profitable business sectors and justified a limit being placed on competition by private operators in those sectors which were economically viable.

However, such an exclusion was not justified (that is, was contrary to Article 90(1) EEC) where the specific services concerned:

- were dissociable from the service operated in the general interest;
- fulfilled economic operators' specific needs;
- offered additional benefits not available from the conventional postal service; and
- did not jeopardise the economic stability of the service operated in the general economic interest. (This difficult appreciation was for the national court!)

Further to the first *Port of Genoa* case,[63] Italy has now passed a decree repealing the Italian port labour monopoly and the requirement that concessionary companies use a port company employing exclusively workers of Italian nationality for performing port operations.[64] There have now been two follow-up references from Genoan courts. In the first, a ferry company which regularly uses the port is challenging Italian legislation which requires vessels flying a flag other than the Italian to use the services of certified pilots for the port of Genoa, and the related tariff.[65] In the second the Magistrates Court of Genoa has asked similar questions to those in the first *Port of Genoa* case, but also asks whether social policy aims may be considered as grounds for exemption under Article 90(2) EEC.[66]

The proposed airport services directive appears to be prompted by some ten complaints from airlines using airports in Italy, Germany and Spain that they are required to make use of the services of specific providers, and have to pay 33 per cent to 50 per cent more for those services than they do in airports where such practices do not exist. Mr van Miert favours an Article 90 directive because it could tackle the key issue of the grant of exclusive or special rights to operators more quickly.[67]

The Commission's Drive into Transport

This year has been an extremely busy one for transport decisions.[68] There have been significant decisions as regards shipping, air and rail transport,[69] and also related sectors such as customs agents. For present purposes it is proposed to highlight just three cases.

63 See last year's article cited above, footnote 1, at 64.
64 Written Question 1392/92, *Bonetti*, OJ C61/16, 3 March 1993.
65 *Corsica Ferreis Italia v Corporazione Piloti del Porto di Genova*, Case C-18/93, OJ C52/7, 23 February 1993.
66 *Voltri Terminal Europa v G. Donalti and Others*, Case C-397/93, OJ C277/16, 15 October 1993.
67 Agence Europe No. 6048, 23/24 August 1993; No. 6050, 26 August 1993; European Report No. 1881, 1 September 1993.
68 See, further, the Commission's report on its activities in the first six months of 1993.
69 See for example *Tariff Structures in Combined Transport of Goods*, OJ L73/38, 26 March 1993.

The *CEWAL, CEWAC* and *UKWAL* case[70] concerned liner conferences operating between various European ports and Zaire. The Commission found that there were various trade-sharing agreements between the conferences, which had the effect of partitioning markets contrary to Article 85(1) EEC. The Commission also held that the members of one conference, CEWAL, had abused a dominant position which they jointly held on shipping routes between Northern Europe and Zaire.

The joint dominant position was evidenced by the way the members of CEWAL are closely linked together economically in the shipping conference offering, notably, a common scale of freight rates. CEWAL was held to have abused that dominant position by various practices designed to prevent competition from a joint independent service offered by Italian/Belgian shipowners. CEWAL was found:

- to have actively participated in an agreement with the Zairian Maritime Freight Administration, in order to keep *all* trade within CEWAL;
- to have operated so-called 'fighting ships' (jointly financed ships which would sail on or about the time that a liner conference's competitor would sail, offering deliberately low prices so as to take customers from the competitor); and
- to have established loyalty arrangements giving a 12.5 per cent rebate provided all of a shipper's business on the routes concerned stayed within the conference.

One company was fined 9.6 million ECU, and three others between 100,000 ECU and 200,000 ECU. This is the first fine on a liner conference. The decision is interesting in part for the normative use of OECD materials indicating what is abusive/anti-competitive, and in part because joint dominance is involved again.

In the *UIC* case,[71] the Commission fined the International Union of Railways 1 ECU million for various practices which restricted the distribution of railway tickets by travel agencies. The railways agreed, among other things, on: common conditions for the appointment of travel agencies by the local railway company (which could therefore control the number of its competitors for ticket sales), a single rate of commission and uniform conditions of payment for the commission. The Union also prohibited travel agents from rebating their commissions to customers.

The Commission is also moving into other aspects of transport services. For example, in *CNSD*, the Commission took an interesting decision prohibiting a national tariff agreement for customs agents.[72] In Italy there has for many years been a system for the authorisation of customs agents, with a related network of departmental councils, leading to a national council of customs agents (CNSD). These councils prepare a national agents' tariff, which is then approved by a ministerial decree. Both the departmental and national councils are chaired by customs officials from the Italian Ministry of Finance.

From 1970 to 1988 the CNSD operated a tariff with a number of steps based on the value of the goods in

70 OJ L34/20, 10 February 1993.
71 See above, footnote 12.
72 *CNSD*, OJ L203/27, 13 August 1993 (CNSD has appealed).

question. Forwarding undertakings and couriers were granted a 35 per cent reduction in the minimum rate. In 1988, however, a new tariff was established and approved by ministerial decree. The new tariff involved a change in the steps concerned increasing the rate to be paid at the lowest goods value by 400 per cent on imports and 533 per cent on exports. In these cases, customs duties are usually borne by the transporting courier, rather than invoiced to the customer. There was also a new obligation to invoice both the sender and consignee of goods separately for customers' clearance.

Various couriers complained, and as a result a derogation was granted by the CNSD to members of the Italian Couriers Association. Nevertheless, the system as a whole was retained. The Commission has now prohibited it. Quoting the *BNIC v Clair* case,[73] the Commission found that there was here a decision of an association of economic undertakings. Approval by ministerial decree did not alter that status, and in any event:

> . . . national law cannot prevail over the Community competition rules and, in particular, cannot impede or prevent their application. The existence of national laws requiring firms to act in a certain manner, or . . . giving an association of the undertakings the task of deciding certain matters cannot . . . prevent the Commission (from applying Article 85(1) EEC).

The Commission found that the tariff restricted not only customs agents' freedom to set their prices, but also their internal organisation, as it prevented them grouping their operations to reduce costs and imposed standard individual invoicing for operations. The Commission also noted that prices were not linked to the quality and type of service, but set by reference to the value or weight of goods. A new derogation for the Italian Couriers Association mitigated the infringement, but did not eliminate it. No fine was imposed.[74] This is yet another example of how far-reaching the impact of the EEC Competition rules can be on national rules and practices.

Priority on Payment Cards

Finally, those interested in payment cards should be aware of a brief passage in the 1992 Competition Report, where the Commission states that its 'current priority in the banking sector is the question of payment cards'.[75]

The main point to note is that the Commission has already been developing competition principles on payment cards for some years now. Notably, in March 1991, a Communication of Commissioners Brittan and van Miert, 'Making Payments in the Internal Market', stated that:[76]

> – agreements between institutions of different countries, and agreements opening existing multilateral systems to each other could be viewed as enhancing cross-border payments, and as therefore outside Article 85(1) EEC;
> – a payment system set up between a large number or between the largest credit institutions of a given country could place those institutions in a dominant position;
> – co-operation agreements involving the majority of credit institutions in a country are considered to provide an 'essential facility', and should therefore be open for access on the basis of objective criteria (for example related to financial standing, orderly management and technical capacities of participants);
> – the Commission would like the parties concerned to notify co-operation agreements designed to promote the interoperability of such services, and has said that in general it will apply principles comparable to those applied to interbank agreements (although after the *Eurocheques: Helsinki Agreement* case[77] last year what that means may not be so clear).

The Commission has also noted that there are 'strongly divergent solutions' to such payment cards among the competition authorities of different Member States (which would appear to be a reference to approaches in the United Kingdom and France). In part this appears to be prompting the Commission's initiative.[78]

73 Case 123/83, 1985 ECR 402.
74 See point 44.
75 1992 Commission Competition Report, points 44 to 45.
76 This Communication is from these Commissioners; it is not a formal Commission Communication, but an internal working document of the Commission, 'Making Payments in the Internal Market', XV/31/91, 19 March 1991 Section D.VI. at 63–72, and Annex 4 'Principles on Competition'.
77 OJ L95/50, 9 April 1992.
78 See 1989 UK Monopolies and Mergers Commission Report on 'Credit Card Services'; and in France, *Groupement des Cartes Bancaires*, Decisions No. 88-D-37, and No. 89-D-15 of the Conseil de la Concurrence.