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EC Competition Law – Reflections on Major Events in 1994

JOHN RATLIFF

John Ratliff, Barrister, 2 Harcourt Buildings, London, Stanbrook & Hooper, Brussels

The object of this article is twofold. First, to survey the main developments in EC competition law in 1994, focusing on Articles 85, 86 and 90 of the EC Treaty including EEA aspects, but not dealing with merger control or intellectual property cases.[1] Particular emphasis is given to proposed new legislation and important Court judgments. Second, to offer some comments on certain major events and policy developments.

OVERVIEW OF MAIN DEVELOPMENTS

Main EC legislation and Commission notices

There was an extraordinary amount of legislative activity in 1994 (see Box 1). This included EEA-related material, three proposed block exemptions, some seven texts circulating concerning merger control, a new Form A/B and some proposed notices on procedure.[2]

Box 1: Summary of Legislative Developments

- *EEA aspects*
  EEA Agreement; Regulation 3666/93; ESA notices; new Accession Treaty
- *Proposed block exemptions*
  technology transfer; motor vehicle distribution; shipping/consortia
- *Merger control clarifications and improvements*
  Batch 1: co-operative/concentrative JV notice; Regulation 2367/90; Form CO; guidance notes on turnover
  Batch 2: notion of a concentration (sole and joint control); calculation of turnover (including specific sectors, financial services, airlines, telecoms); notion of undertakings concerned
- *Procedural documents*
  revision of Form A/B, notice on access to the file, revised mandate of hearing officer

EEA aspects

The EEA Agreement entered into force in 1994. Old agreements infringing Article 53 and following had to be filed by the end of June 1994. Several Commission decisions have now been taken 'with EEA relevance' (as it is called). It will be interesting to see how the authorities will treat these cases, often involving small, concentrated, yet geographically large, markets.

In December 1993 the Commission adopted Regulation 3666/93 amending its notification regulations to require information concerning the whole EEA.[3] There were not only changes to Forms A/B and CO, but also a reissue of the complaints form, Form C.

The EFTA Surveillance Authority ('ESA') has issued two groups of notices. First, on 12 January 1994, there were various ESA notices and guidelines on: concentrations (ancillary restrictions/co-operative and concentrative joint ventures ('JVs'); the block exemptions for exclusive distribution, exclusive purchasing, car distribution; agents;[4] co-operation between enterprises; imports from third countries; subcontracting; agreements of minor importance; and telecoms. Then, in April 1994, there were further notices on co-operative JVs, motor vehicle intermediaries and breweries. These basically extend the existing EC rules to the EEA.

It appears that the EEA provisions may be overtaken by the accession of some EFTA countries in early 1995. Austria and Finland have already ratified the Accession Treaty.[5] The Swedish and Norwegian referenda are taking place shortly. For those that enter, the main change is that the common market and the EC competition rules will apply to *all* sectors (subject to the existing qualifications and exemptions concerned), not just to industrial goods,[6] and be enforced only by the European Commission, rather than the ESA and the Commission. In the case of Austria, there will also be a progressive dismantling of the tobacco monopoly over three years.[7]

1 This is a revised version of a presentation given at the IBC Competition Conference in Brussels, 8–9 November 1994. The reference period covered is November 1993 to November 1994. For previous annual reviews, see Ratliff, 'An Outline of Important Developments in EEC Competition Law in 1993', [1994] 2 ICCLR 55, and 'Major Themes of EEC Competition Law in 1992', [1993] 2 ICCLR 56.

2 There are also proposals for Article 90 directives in ground handling services and satellite communication services; new state aid guidelines for aids for environmental protection (OJ 1994 C72/3) and fisheries and aquaculture (OJ 1994 C260/3); a draft guide to state aid procedures which the Commission proposes to publish in its Compendium of Competition Law materials; and a new proposed revision of the notice on minor agreements (see now OJ 1994 C312/5).

3 OJ 1993 L336/1.

4 Prompting some to think that the revised notice may have been dropped. It has also been suggested that the Commission may be planning to include provisions for 'independent agents' in the next version of the exclusive distribution block exemption.

5 OJ 1994 C241.

6 Article 8(3) EEA Agreement essentially states that the Agreement applies to goods in Chapters 25 to 97 of the Harmonised Customs Code.

7 Accession Treaty, Article 71 and Annex IX.

Proposed block exemptions

The block exemption proposals concern technology transfers, motor vehicle distribution and shipping consortia. The technology transfer block exemption has gone through two main drafts and has been published for comment in the Official Journal.[8] It aims to merge the patent licensing and know-how block exemptions into a single block exemption. It involves a shorter black-list, no opposition procedure, controversial provisions making it inapplicable if certain market share criteria are met[9] and an emphasis on second sources of supply.[10] It appears unlikely to be adopted by December 1994 and there has been discussion about extending Regulation 2394/84 for six months to give more time to finalise the new text.

The motor vehicle block exemption has gone through three main DG IV drafts which have varied considerably. A Commission draft was adopted on 5 October 1994. The text is overtly a compromise between industry, consumer and trade issues. Exclusive dealerships are still exempt (a point at one stage in doubt), certain supplier–dealer issues are subject to arbitration and advertising outside a dealer's territory is permitted.[11] There are increased rights of access to the network for independent spare parts producers and new disqualification rules whereby, if the parties include further (listed) restrictions, the relevant clauses are void as against the party which instigated them in the individual dealership agreement concerned, and if competition is distorted in a larger geographic area, the exemption is no longer applicable to clauses in all distributor contracts concluded for that area.[12]

Finally, there is a proposal for a block exemption for shipping consortia agreements,[13] which would apply to the joint operation of liner shipping transport services and ports, to participation in tonnage or revenue pools, to joint marketing and to the issue of joint bills of lading. The draft regulation also provides for certain limits on the share of trade held by a consortium.

Merger control

The merger control texts propose various clarifications and improvements which the Commission has planned since its 1993 review. Some changes, if finally adopted, will be highly significant.

In the first batch, there is a new notice on co-operative and concentrative JVs which states, among other things, that for the purpose of determining whether a JV is concentrative or not, the Commission no longer looks at the relationship between the parents and the JV, but focuses on the likelihood of the JV leading to co-ordination *between* the parents caught by Article 85(1).

This may widen the scope of the concentrative JV. It should be emphasised that this new approach is intended for *jurisdictional* purposes alone. The approach is also still somewhat complex and confusing, since there is already clear European Court case law that *substantively* co-ordination between a parent or minority shareholder and a JV may be caught by Articles 85 and 86 EC Treaty.[14]

The new draft Regulation 2367/90 introduces:

- An obligation on the parties to advise the Commission of material changes in the facts related to a notification (both in the market and as regards the transaction).[15] There is much debate about this, especially if it means that the notifying parties may incur delays because of other transactions beyond their control. In such cases, the Commission may rule that the relevant review periods will start again.
- An obligation on the parties to advise the Commission of any changes in the 'concentration plan' within three months of the beginning of the second phase review procedure.[16] The idea is to ensure that the Commission has proper time to review any undertaking offered. This is thought to be a result of experience with late offers.
- Provisions whereby 'involved parties', meaning, for example, the seller and target in a concentration, may have greater procedural rights, receiving, for example, a copy of the Commission Statement of Objections sent to the notifying parties (without business secrets).
- Documents involving the parties' assessment of the concentration must also be included *even* if not used in completing Form CO.

Form CO is also completely redrafted. A special short form notification is introduced for concentrations having little impact in the EEA.[17] A new definition of 'affected markets' is introduced in the case of horizontal relationships between the parties, where they have at least 15 per cent market share, and in the case of vertical relationships at least 25 per cent market share. The previous threshold in both cases was 10 per cent.

The information required is also changed. More precise information must now be provided on affected markets, and the relevant questions have a greater economic leaning (for example, asking about the minimum efficiency scale for the market and the phase of the market in terms of new, developing, mature, declining and so on). The result is a shift in focus to the most relevant markets.

A second batch of notices was released in the middle of October 1994 which should be equally important. There is:

- a draft notice on the notion of a concentration, including sole and joint control and veto rights;
- a draft notice on turnover, dealing not only with general rules, but also with more complex issues in specialised sectors, such as financial services, air transport and telecoms; and
- a draft notice on 'undertakings concerned', explaining who they are in a merger or acquisition of sole or joint control. The seller is usually excluded.

Procedural documents

The proposals for another revised Form A/B are summarised under 'Procedures' below. It is also reported that the

8 OJ 1994 C178.
9 Article 1.5.
10 Article 2.1(14).
11 Article 3.8.
12 Article 6(2)(3).
13 OJ 1994 C63/8.
14 Points 8 and 18; *BAT Reynolds v Commission*, Cases 142 and 156/84, [1987] ECR 4487.
15 Article 4(3).
16 Article 16.
17 Section C.

Box 2: European Court Cases

- *BEUC* – Commission's refusal to intervene against car imports agreements
- *Almelo* – Article 90(2) and public service obligations
- *Tetra Pak* – ECU75 million fine confirmed
  – narrow market definitions
  – abusive behaviour on interlinked non-dominant markets
- *Parker Pen* – the 'visual and psychological effect' of export bans
- *Metro Cartier* – holes in a selective distribution system?
  – restricting guarantees to dealers
- *Ohra/Meng* (and others) – national laws distorting competition lawful: *Leclerc, BNIC v Clair* doctrines
- pattern of CFI reducing fines for lack of proof

Commission has adopted new measures concerning the rights of parties and third persons to be heard in Article 85 and 86 proceedings. Two measures are involved: one explaining administrative practice on access to the file and confidentiality, the other on the mandate of hearing officers.[18]

Main European Court cases

There were also an extraordinary number of important Court judgments in 1994 (see Box 2). Some will be described here and others will be described in later sections.

In May 1994, in *BEUC*,[19] the Court of First Instance ('CFI') made an important ruling concerning the Commission's refusal to intervene against certain aspects of EC–Japan trade understandings on car imports. The matter arose as a result of complaints to the Commission by BEUC (and others), about an agreement between the British and Japanese car manufacturers' associations to restrict Japanese exports to the United Kingdom to 11 per cent of annual sales there. The Commission refused to intervene on the basis that such bilateral agreements were to be replaced by a common Community policy. It stated that there was no Community interest in investigating the arrangement between the two associations under competition law.

The CFI flatly disagreed and annulled the Commission's decision rejecting the complaint. The CFI noted that, if the Commission is entitled to determine the relative priority with which it will pursue cases, such determinations must still be capable of judicial review and therefore be fully reasoned with the relevant factual and legal considerations. The Commission could not 'confine itself to defining in the abstract that interest'.

Then, having emphasised that the arrangements concerned were caught by Article 85, the CFI rejected arguments that they should not be investigated because they had been permitted by the UK authorities for reasons of commercial policy. The arrangements were neither a national measure nor had they been overtaken by Community policy. The 'commercial consensus' between the Community and Japan was an 'unwritten commitment, purely political in import', not made within the context of the common commercial policy. Such a consensus did not entitle the Commission to argue that the commitment put an end to the agreement concerned.[20] This follows on from a similarly critical approach in *Asia Motor* in 1993.[21] The CFI appears to be emphasising that if the key decision is political, then at least it must be sufficiently transparent to be capable of appropriate judicial review.

In April 1994, in a case called *Almelo*, the European Court of Justice ('ECJ') made an important ruling concerning Article 90(2) EC Treaty and public service obligations in the context of electricity supply. The case arose as a challenge to lawfulness of a contractual ban on imports imposed by a regional distributor on a local distributor.[22]

The ECJ noted that the regional distributor had been entrusted with the public service task of ensuring the supply of electricity in part of the Netherlands. This meant that the regional distributor had to ensure that end-users received uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time at uniform tariff rates and on non-discriminatory terms. The ECJ held that, in such circumstances, an exclusive purchasing clause which would normally be caught by Articles 85 and 86 EC Treaty was exempt under Article 90(2), insofar as the restriction was necessary in order to enable the regional distributor to perform its public tasks. In that regard it was necessary to take into account the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.

This is an interesting follow-up to *Corbeau*.[23] Again, the national court is left with the difficult task of deciding whether the relevant conditions apply, the case being an Article 177 reference. Again, the case is already being widely cited in other deregulating sectors on the issue of competition and public service obligations. One may also note the emphasis given to the environmental aspect of public service duties.

In October 1994, the CFI confirmed the Commission's decision imposing a fine of ECU75 million on Tetra Pak.[24] Several aspects are of general interest. First, on product market definition, Tetra Pak argued that the relevant market was the general market for the packaging of 'liquid food' products, taking into account not only its special aseptically filled carton packages, but also competition from glass and plastic packages. The CFI disagreed and found that the Commission had been right to focus on the interchangeability of the packaging systems concerned and not on the finished products made with such systems. It was also correct

18 *Agence Europe* No. 6340, 20 October 1994; see 1993 Competition Report, points 199 and following and 203 and following.
19 *BEUC v Commission*, Case T–37/92, judgment of 18 May 1994.
20 See now, however, the Commission's overt reference to the trade relationship with Japan to justify its approach in the new motor vehicle block exemption.
21 See also the *Tractor Exchange* case, upheld by the CFI in October 1994, insofar as that prohibited an exchange of confidential information (albeit in a narrow oligopolistic market) (Cases T–34 and T–35/92, *Fiatagri, Ford New Holland and John Deere v Commission*, judgment of 27 October 1994).
22 *Almelo*, Case C–393/92, judgment of 27 April 1994.
23 Case C–320/91, judgment of 19 May 1993.
24 *Tetra Pak*, Case T–83/91, judgment of 6 October 1994.

to distinguish markets for aseptic and non-aseptic machines and for aseptic and non-aseptic cartons from other types of food packaging, because of the degree of sterility required and the sophistication of the relevant equipment. All this emphasises the narrow markets which may be applied to systems of interlinked products.[25]

Second, it is interesting to see the CFI's findings on the correlation of the aseptic and non-aseptic markets. The Commission had found that Tetra Pak had not only abused its position in aseptic markets, but *also* in the neighbouring markets of non-aseptic products, in which it was not dominant. The CFI confirmed this view on the specific facts. In other words, it found that, in this case, both aseptic and non-aseptic products were used for packaging the *same* liquid products, that a substantial proportion of Tetra Pak's customers operated in *both* areas, and that Tetra Pak was so dominant in aseptic markets that it could behave independently on the neighbouring non-aseptic market without fear of retaliation. Other firms in both markets did not have that ability.

The Commission had therefore been entitled to find that the links between the aseptic and non-aseptic markets reinforced the applicant's economic power over those non-aseptic markets, *without* having to establish that Tetra Pak was dominant on the non-aseptic markets. For customers producing fresh and long conservation products, Tetra Pak was an obligatory supplier of aseptic systems and a 'privileged' supplier of non-aseptic systems.

Third, the CFI found abusive practices, among other things, in the way that Tetra Pak

- tied machine users to use of its cartons, which was not technically justified;
- had set its prices at times below direct variable cost, which was evidence of predatory pricing *vis-à-vis* Tetra Pak's rival Elopak;
- had discriminated in its prices for its machines as between Member States (with in one case a differential of some 400 per cent); and
- had pursued other exclusive practices, such as buying exclusive advertising space in the leading specialist review for the milk industry in Italy.

The CFI also rejected arguments that the level of the fine was excessive. It was 2.2 per cent of Tetra Pak's turnover in 1990. Tetra Pak is understood to be considering a further appeal.

In *Parker Pen*,[26] the CFI reduced the Commission's fine from ECU700,000 to ECU400,000. The CFI held first that 'by its very nature' a clause prohibiting exports constitutes a restriction on competition. However, even an agreement according absolute territorial protection fell outside Article 85(1) EC Treaty where it only affected the market insignificantly, regard being had to the weak position of those concerned on the relevant market. Such effect was shown if at least one of the parties had 'a not inconsiderable proportion' of the market. The CFI held that it did not matter if the export ban concerned had not been implemented. Such a clause could create a 'visual and psychological' effect contributing to division of the market and be caught by Article 85(1) EC Treaty. The Commission reduced the fine in view of the low turnover to which the infringement related.

Judgment is still awaited in Viho's appeal.[27] It may be recalled that Viho, a specialist parallel trader, challenged Parker Pen's policy of referring orders from customers in a Member State to its local subsidiary based in that Member State, arguing that the Parker Pen group should not be treated as a single economic unit. The Commission rejected this part of the complaint, but Viho is saying that the Commission did not look at the issue properly.

In *Metro Cartier*,[28] the ECJ had to consider the issue as to how coherent a selective distribution system had to be. The matter arose from a challenge to Cartier's luxury watch distribution system in Germany. Metro pointed out that, in some non-EU countries such as Switzerland, it was possible to buy such watches outside the Cartier system and that these could be lawfully brought into the common market. Metro argued therefore that the EC system was not coherent or 'impervious' (*lückenlos*) as required in German law and should therefore also come within Article 85(1) EC Treaty.

The ECJ made two important rulings: First, that the German concept of 'imperviousness' had a specific context and did not apply in EC law. The ECJ noted that such a requirement might even restrict competition, rather than assist it, because the principle would favour the most inflexible and highly selective systems over the more flexible and open ones. However, one would think that consistency in the way that a manufacturer sells goods is likely still to be relevant to the underlying justification for a selective distribution. Second, that a manufacturer using a selective distribution system in line with Article 85(1) could restrict its guarantee to products sold through authorised dealers.[29]

In four judgments in 1994 the ECJ has held that national laws distorting competition are lawful. In *Ohra* and *Meng*[30] the ECJ ruled that Dutch and German laws prohibiting insurance agents from rebating commissions or offering other financial incentives to sell policies were not contrary to the so-called '*Leclerc* doctrine' of Articles 3(f), 5(2) and 85 EC Treaty, provided that they did not encourage, consolidate or otherwise reflect a pre-existing private agreement or understanding. In *Delta and Rieff*,[31] the ECJ held that tariff-fixing systems for inland waterways and long-distance road transport, set out in German laws, did not infringe Articles 3(f), 5 and 85 EC Treaty, applying '*BNIC*' arguments.[32]

It has again been a year when many appeals paid off in reduced fines. In February 1994 the CFI reduced a fine on the Groupement des Cartes Bancaires concerning the Eurocheques/Helsinki Agreement from ECU5 million to ECU2 million.[33] In May 1994, the CFI cancelled a fine of ECU150,000 imposed on All Weather Sports Benelux for

25 See also the ECJ's confirmation of the *Hilti* decision, Case C–53/92, judgment of 2 March 1994. The bulk of Hilti's appeal was directed at challenging the CFI's and the Commission's narrow definition of the relevant market, as 'the market for nails designed for Hilti nail guns', arguing that the substitutability of other products and fastening systems had been wrongly assessed.

26 Case T–77/92, judgment of 14 July 1994.

27 Case T–102/92, OJ 1993 C1/10.

28 Case C–376/92, judgment of 13 January 1994.

29 This prompted the Commission to note that this was not the case in respect to cars under Regulation 123/85.

30 *Wolf Meng*, Case C–2/91 and *Ohra*, Case C–245/91, judgments of 17 November 1993.

31 *Delta v Rieff*, Case C–153/93, judgment of 9 June 1994; and *Reiff*, Case C–185/91, judgment of 17 November 1993.

32 For example, *BNIC v Clair*, Case 123/83, [1985] ECR 391.

33 Joined Cases T–39/92, T–40/92, judgment of 23 February 1994. The Groupement has since refused to pay the relevant interest, see *Agence Europe* No. 6328, 3 to 4 October 1994.

concertation in export bans with Dunlop Slazenger, on the basis that the Commission had not properly defined who was the relevant party responsible for the infringement.[34] In July 1994, Dunlop Slazenger[35] also had partial success in challenging the Commission's decision against it for restricting parallel exports between Member States in tennis racquets and tennis and squash balls. The CFI reduced the fine imposed from ECU5 million to ECU3 million, ruling that the relevant general export ban had only been proved to have operated from 1985 to 1989, not from 1977 as the Commission had found.

Some argue as a result that DG IV would be well served to establish an additional separate 'evidential review' in order to take a further look at whether the relevant case is sufficiently proved, if only to stop the developing pattern.[36]

Main European Commission decisions and notices

Cartels and other prohibitions

There have been three main cartel cases in 1994.[37] There was the ECSC case on *steel beams*,[38] where the Commission fined the major European producers concerned amounts ranging from ECU32 million (on British Steel) to ECU600,000. The relevant practices included price-fixing, the allocation of quotas and an extensive exchange of confidential information, dating from 1984.

A major point of contention appears to have been the extent to which the cartel had been endorsed by the Commission (DG I and DG III) as part of trade/industrial policy. The level of fines also provoked strong criticism among industry and MEPs, given restructuring difficulties and controversy over state aids in the steel sector. Mr van Miert responded by emphasising the seriousness and textbook character of the cartel, which involved meetings almost every month and infringements over a long period. Recidivists such as British Steel had also been fined more. It is also interesting because, while publicly refusing a trade-off between competition and other Community policies, the Commission does appear to have mitigated the severity of its approach. In view of the difficult situation of the industry the Commission excluded the 'manifest crisis' period of 1980 to 1988 in determining the duration of the infringements. The firms are also being allowed to pay the fines in instalments over several years. Most have appealed.

There was secondly the readoption of the *PVC* decision[39] imposing fines on 12 chemical producers ranging from ECU2.5 million to ECU400,000. This decision follows the ECJ's ruling in the *BASF* case (see below). In general, the decision is similar to the previous one taken by the Commission in December 1988. However, it is again likely to be a source of procedural debate. First, the Commission has chosen just to adopt its decision without more, taking up the procedure again at the stage of its previous errors. Some argue that this is incorrect and that there should at least have been a consultation of the Advisory Committee (and a new hearing) on whether the decision should be readopted after such a passage of time. Second, in its decision[40] the Commission goes to some lengths to deny arguments based on limitation, referring to its own explanations of Regulation 2988/74 in the 1975 Competition Report.[41] There it is suggested that limitation should be suspended if an appeal is made, so that the parties do not benefit from prescription rules, where the Commission cannot act 'for justifiable reasons and on grounds beyond its control'. Some argue that precisely in the circumstances this is *not* a claim the Commission should be able to make! New appeals are expected.

Box 3: Cartels and Other Prohibitions

- Steel beams – recidivism
  – mitigation for manifest crisis
- PVC – readoption but consultation and limitation issues
- Cartonboard – Stora's confession and reduced fine (ECU11.25 million)
- Dutch cranes – 15(6) removal of immunity

In *Cartonboard*,[42] the third cartel decision mentioned here, the Commission imposed fines totalling some ECU132 million on some 19 European cartonboard manufacturers. The companies concerned were found to have engaged in price-fixing, measures to control supplies and the exchange of commercial information from 1986 to 1991. An interesting part of the case is the fact that Stora admitted the infringement and subsequently provided detailed statements on the relevant activities. Stora was still fined ECU11.25 million, but was said to be given credit for its co-operation.[43]

Finally, in a different sort of prohibition, in April 1994 the Commission took a decision removing immunity from fines from notified trade association agreements relating to the certification of *Dutch mobile crane* hire businesses,[44] making it clear that it considered the relevant agreements, which involved market-sharing, were incapable of exemption.

Joint ventures

There have also been numerous JV decisions and notices in 1994. Apart from *BT/MCI*, which is discussed below, mention here is made of only two: *Pasteur-Mérieux/Merck* and *Philips/Osram*.

The former is a proposed full-function/R&D JV between Pasteur-Mérieux ('PM') and Merck for human vaccines.[45] It was originally filed as a concentrative JV. In March 1994 the Commission published a detailed 19(3) notice envisaging a

34 Case T–38/92, judgment of 23 February 1994. There is a legal succession issue: the infringing party's assets having been taken over, but that party still continuing as an entity. There was no evidence that the new owners continued the infringement.
35 Case T–43/92, judgment of 7 July 1994.
36 Assuming that the Legal Service is already hard-pressed and that the case team may benefit from a second view.
37 Recently, the Commission has also prohibited the TransAtlantic Shipping Agreement.
38 Decision of 16 February 1994.
39 OJ 1994 L239/14.
40 Points 47 and 55 to 59.
41 Points 48 to 50, especially point 49.4.
42 OJ 1994 L243/1.
43 See points 34, 171.
44 *SCK/FNK*, OJ 1994 L117/30. One party claimed that there was no effect on trade between Member States because 'mobile cranes are by their nature not meant to be transported'.
45 OJ 1994 C94/15.

Box 4: Joint Ventures

- Pasteur-Mérieux/Merck – forced second source of supply
- Philips/Osram – lead-glass tubing JV; environmental theme

favourable clearance under both the EC and the EEA rules on certain conditions.

The Commission found that the market structures varied according to vaccine and country. The parties actually competed on four EC markets – two in Germany, one in Portugal and one in Greece. In the German monovalent Hib market PM had directly or indirectly 75 per cent market share in 1992, and Merck, through a distributor, Behring, 10 per cent, a third firm having 15 per cent. However, in Sweden and Norway in 1992 PM's Hib vaccines accounted for some 90 per cent of monovalent Hib vaccine sales and Merck accounted for the rest. In 1992 there were almost no sales of the Merck vaccine in these countries.

What is interesting is that the parties were obliged to create a second source of supply in several markets. In Germany and France, they were obliged to grant third parties exclusive licences to manufacture and distribute the Merck vaccine for sale in the countries concerned. The parties also undertook to try to submit to the Commission a letter of intent for negotiations to grant a third party an exclusive licence to manufacture the Merck vaccine for sale in the Scandinavian EFTA countries.

In *Philips/Osram*, the Commission considered a JV designed to regroup and enhance the existing European activities of these companies in the lead-glass tubing field. The JV company is to be based in Philips' existing facilities in Belgium, which the Commission noted were equipped with the necessary equipment to reduce emission problems. Osram was to close its facilities in Berlin which have reached the end of their economic life. The Commission issued a first notice on this in January 1994, indicating its intent to take a favourable decision and this was followed up by a further notice in September, indicating a similar position as regards the EEA rules. What is interesting here is the underlying theme of environmental protection.[46]

Distribution

In the distribution area, the most notable Commission decision is probably the renewal of *Grundig*'s distribution system because, in a sense, it is a useful consolidatory text as to the developed practice.[47] Only two points will be emphasised here. The first concerns what was held to be within Article 85(1) (and exempted). These were requirements that dealers carry as complete a selection of the relevant Grundig range as is necessary for the specialised shop or department; and keep adequate stocks of a representative selection of the relevant range. There was also a requirement that wholesalers carry and stock as far as possible the whole Grundig range. Such requirements were found 'to mean that dealers must take sales-promoting measures that restrict their commercial independence'.

46 OJ 1994 C22/4, OJ 1994 C267/3.
47 OJ 1994 L20/15.

Box 5: Distribution

- *Grundig dealers*
  - classic consolidatory text
  - ranging requirements in Article 85(1)
  - guarantee offer at level of country of purchase pending new contractual warranty
- *Sony dealers*
  - no wholesalers?
- *Interbrew – Carlsberg, Tuborg*
  - non-exclusive distribution rights
  - second source of supply
- *Schöller*
  - penalty payment for further exclusive agreements
  - the dilemma for Schöller (which has appealed)
- *Rover*
  - £1 million scheme for consumers, reimbursement of dealer margin for unlawful price pressure

Second, Grundig has undertaken to introduce a 'uniform, Europe-wide, contractual comprehensive' warranty system. In the meantime, Grundig has undertaken to ensure that consumers can benefit from a level of warranty comparable to what is available in the country of purchase.[48]

Another distribution case which deserves special mention is that involving *Sony*.[49] In late November 1993, the Commission published a notice concerning its proposed pan-European dealer agreement for consumer electronics, seeking third party comment. The main point of interest was that, in introducing this agreement, Sony planned to sell *only* direct to authorised dealers and therefore would not sell to authorised *wholesalers*.

In April 1994, the Commission announced that Interbrew had given up its exclusive right to distribute Carlsberg and Tuborg beer in Belgium in the face of proceedings.[50] The Commission had objected to reinforcement of Interbrew's already dominant position in Belgium and insisted either that a new distributor be found or that the agreement become non-exclusive. The Danish brewery also organised a second source of supply for the products concerned with another Belgian distributor.

In May 1994, the Commission imposed an ECU1,000-a-day penalty on Schöller, for allegedly continuing to make exclusive purchase agreements with retailers contrary to the Commission's ice-cream decision in 1993. Schöller argues that the agreements were not covered by the Commission ban and has appealed.[51] Schöller's essential dilemma is that it considers it should still be entitled to a less restrictive system of agreements or it would be denied the normal competitive methods available to its rivals.

At the end of 1993, there were reports that Rover had contacted the Commission, explaining that it had found

48 The more usual Commission practice has been to insist on the level of guarantee in the place the product is used (which may be limited by the support services available for the range sold there). There is also currently a separate Commission initiative to establish a 'European-wide guarantee' system, harmonising national law requirements.
49 OJ 1993 C321/11.
50 *Agence Europe*, No. 6221, 29 April 1994; Press Release IP/94/345.
51 *European Report*, No. 1947, 4 May 1994; OJ 1994 C188/17.

unlawful practices by its UK regional distributors, designed to limit rebates offered by dealers, and had settled the case in part by offering to contribute a £1 million to two schemes for consumer projects to benefit UK purchasers of motor vehicles.[52] In January 1994 these reports were confirmed, it being stressed that these payments were without prejudice to the rights of consumers to claim compensation.

Articles 86 and 90 EC Treaty and the essential facility doctrine

In April 1994, a fine of ECU11 million was imposed on the *Deutsche Bahn* for discriminatory rail transport tariffs for the inland carriage of sea containers.[53] The Commission objected to two things. First, a joint sales agency for the marketing and sale of the carriage of seaborne containers, called the 'Maritime Container Network'. Second, that the Deutsche Bahn had forced other railway undertakings and combined transport sellers to buy at discriminatory prices which favoured the use of its own services from Hamburg, over the use of Belgian or Dutch railways, in order to transport such containers to and from Germany.

In various ways, the case is a test one. It arose as a result of a complaint by an association of undertakings operating in the port of Rotterdam, claiming that the rail tariffs applied by the Deutsche Bahn for carrying seaborne containers between Germany and Belgium were abusively high in relation to the prices charged for carrying such containers from the German ports. There is also an important section on the Deutsche Bahn as an essential rail service provider in Germany and a careful treatment of discriminatory pricing.[54]

The Commission has also challenged Denmark's refusal to allow a new ferry service to be established in or near the port of *Rødby* under Article 90 EC Treaty.[55] In this case the Commission considered the refusal of the Danish Transport Minister to allow the Swedish Group Stena either to use existing facilities at the port of Rødby for ferry services, or to build a new private commercial port in the immediate vicinity of Rødby. The Commission found, among other things, that the port of Rødby constituted a substantial part of the common market in itself and that, by virtue of the exclusive rights granted to it by the Danish State, the Danish Railway Company DSB was in a dominant position as port authority. The Commission noted 'that an undertaking that owns or manages and uses itself an essential facility, i.e. a facility or infrastructure without which its competitors are unable to offer their services to customers and refuses to grant them access to such a facility is abusing its dominant position'. The Commission went on to find that where a Member State refused such access and strengthened the effect of that refusal by also refusing to authorise the construction of a new port, that constituted a state measure in breach of Article 90, read in conjunction with Article 86. The Commission ordered Denmark to bring these infringements to an end within two months.[56]

52 *European Report*, No. 1902, 17 November 1993; see now 1993 Competition Report, point 228.
53 OJ 1994 L104/34. Deutsche Bahn has appealed.
54 Compare 1993 Competition Report, point 142, linking the essential facility doctrine and rail infrastructure access.
55 OJ 1994 L55/52.
56 See also *Sea Containers, Stena-Sealink* (Holyhead 2) OJ 1994 L15/8.

Box 6: Articles 86 and 90 EC Treaty and the Essential Facility Doctrine

• Deutsche Bahn and others	– Discriminatory rail pricing on international routes to favour domestic traffic/use
• Rødby	– Denmark must allow further port access, Article 90 EC Treaty
• essential facility doctrine	– now referred to for collection and retrieval systems and rail infrastructure

In the review of 1993,[57] it was mentioned that the Commission was considering applying the essential facility doctrine to payment card systems. It may be of interest to note that the Commission is also now referring to the relevance of the doctrine to collection and retrieval systems for environmental protection.[58] The Commission has been considering systems such as Grüne Punkt, IFCO fruit crates and standardised water bottles, emphasising that, if such co-operation is private, it is subject to Articles 85 and 86 EC Treaty; if it is public, it may be caught by the '*Leclerc* doctrine'.

DECENTRALISATION, EFFICIENCY ISSUES AND REFORM OF REGULATION 17/62

For the third year in a row, this is the major theme of the year and it appears that it is likely to remain so until the proposed Intergovernmental Conference in 1996.

There are huge and pressing issues at stake, concerned with basic efficiencies in competition enforcement and the whole shape of competition administration in the coming years. Despite radical and significant efforts by the Commission to become more efficient (through accelerated procedures, short form decisions and clearances), it seems not unthinkable that enforcement will become more delegated to national competition authorities (with perhaps exemption powers) and that national competition rules will play a greater, if still a complimentary, role. Certainly, this will be a central issue in the Competition Agenda for 1996.

There is already detailed discussion of amending Regulation 17/62. It should also not be forgotten when spreading the enforcement burden among the competition authorities concerned that 1996 is the time when lowering the EC merger control thresholds is again due for review.

It may be useful to mention some of the leading arguments and factors:

First, some would argue that the Commission's very marked efficiency drive has been successful. Already, in the 1993 Competition Report, the Commission is saying that its 'back-log clearing exercise is more or less complete'.[59] If so, no radical readjustment of roles need be required. On

57 See article on 1993 cited above, Note 1.
58 See 1993 Commission Competition Report, points 162 to 171, especially at point 170.
59 Point 208.

Box 7: Enforcement Policy Issues

- the Commission's efficiency drive and reduced backlog
- short decisions to confirm comfort letters?
- organising cohesion
  * parallel powers (*HB Ice-cream*)
  * Article 85(3) to the Bundeskartellamt?
  * close contacts and co-operation?
- private actions to take up enforcement burdens? (*but* experience 1966 to 1994)
- *Automec 2* difficulties for the small or medium-sized enterprise complainant, which cannot realistically bring court proceedings
- refocusing the EC competition rules?
  * economically
  * between national and EC law, compare merger control?
  * 'hard core' restrictions and others
  * Dr Ehlermann's 'useful vision'
- two priorities
  * clear cases, a European *per se* rule
  * encourage national authorities to apply at least Articles 85(1) and 86 EC Treaty

1 January 1994, 1,231 cases were pending, 300 fewer than on 1 January 1993. Others would say that the Commission has kept figures low, particularly by its unwelcoming stance to complaints, with many *Automec 2*-style rejections of cases.

Second, Dr Ehlermann (Director-General for Competition) has indicated that the Commission is examining with Member States whether it is possible to follow each comfort letter with a very short confirming decision, similar to an Article 6(1)(b) decision under the Merger Regulation. This would require, he said, among other things, the revision of Regulation 17, but he was confident that 'in the medium term' this modification would become law.[60] The idea is to give a quicker better back-up to comfort letters where necessary, presumably rather than devolving Article 85(3) powers to Member States. Member States are concerned about less consultation.

Third, some would emphasise that co-ordination in the application of Articles 85 and 86 EC Treaty is no easy matter. Should the Commission be permitted to intervene with cases before other authorities (in Article 85(1), 86 and perhaps later 85(3) cases) in the name of ensuring EU-wide cohesion? If so, on what basis – parallel powers or supervisory ones? Many would argue that it is not viable for the Commission to be required to delegate some of its jurisdiction with only Article 169 EC Treaty proceedings to ensure cohesion among national competition administrations and courts. Such proceedings can be very political and might lead to serious gaps in enforcement, precisely because the Commission–Member State relationship is not comparable to domestic administrative or federal models.

There is also evidence of co-operation and complimentary work in some sectors (notably recent UK Monopolies and Mergers Commission inquiries into cars and perfumes), and some apparent conflict in parallel jurisdictions. Thus, it is reported that the Commission sent a Statement of Objections to HB Ice-cream after Keane J's judgment in the *Masterfoods/HB Ice-cream* case[61] (which covered both EC and Irish competition law). In May 1992 Keane J ruled in the Irish High Court that HB Ice-cream's freezer exclusivity did not infringe the EC competition rules. It is understood that Masterfoods has since appealed. However, in the meantime, the Commission, which was critical of freezer exclusivity in its *Langnese* and *Schöller* decisions, appears to have intervened. This provoked a highly critical response in the Irish journal *Competition*, where the editor Andrew Whittaker complained of people being tried twice for the same offence and likened the Commission to a 'relieving column of the Foreign Legion in "Beau Geste"!'.[62] Colourful language, but Mr Whittaker may have a point.

There is also a more classic debate going on, with national competition authorities such as the *Bundeskartellamt* campaigning for the right to give Article 85(3) EC Treaty exemption,[63] while the Commission emphasises the practical advantages of 'one-stop-shopping', the need for a wider European view in some cases and the efficiencies of a central investigation and review of deals whose effects are in more than one Member State. Article 85(3) powers in national authorities would involve amending Article 9 of Regulation 17/62.

There is also concern about other issues of cohesion where an Article 85(3) decision may be taken by a national competition authority: Will local industrial policy have an undue influence? National authority advocates tend to riposte that it is the Commission which is too political. And what effect would the decision of a national competition authority have for another national competition authority, the European Commission and another court?

Fourth, can one reasonably expect national court actions to take over enforcement burdens? This is another old issue. There was a Commission study on the subject in 1966[64] and since then there have been numerous articles,[65] but as yet few cases. Some still argue that in the face of the known difficulties of bringing such claims, it is more realistic to leave enforcement in the hands of public administrations. It is interesting to note in this context that the Irish Competition Act has now been amended to give the authorities greater powers of enforcement. Previously, the Act relied on private claims for enforcement, but it has now been recognised that this has not been working.

As regards damages, the most one can probably expect at the moment is for some to 'piggy-back' on Commission decisions, and even then there are problems of evidential weight. Nevertheless there are clear candidates every year. Actions for injunctive relief may often be precluded by the fear of having to provide cross-undertakings in

60 'A view from the Commission' at the CBI–Nabarro Nathanson Conference on Competition Policy, 1 February 1993.

61 See the UK Monopolies and Mergers Commission report on ice-cream, at 134 to 135.

62 *Competition*, Vol. 3/1, 1993–94, at 4.

63 See Wolf 'Zum Verhältnis von europäischen und deutschen Wettbewerbsrecht', EuZW Heft/8 1994, at 233 and UK House of Lords Select Committee, 1994, 'The Enforcement of Community Competition Rules', especially the memoranda therein by the German Bundeskartellamt and the Federal Ministry of Economics at 197 to 202.

64 *La Reparation des consequences dammageables d'une violation des Articles 85 et 86 du traité instituant la CEE* (CEC Série Concurrence 1).

65 See, for example, Temple Lang, 'Community Anti-trust Law – Compliance and Enforcement', (1981) 18 CML Rev., at 335.

damages. Nevertheless, the injunction is often the victim's best remedy.

Fifth, when considering *Automec 2*, it is interesting that earlier in 1994, in the oral proceedings on the *Benim* and *Tremblay* cases, Barrington J emphasised that the ECJ's previous statements in the 1989 collecting society cases that issues of fact were for national courts were normal for an Article 177 EC Treaty context, *not* a blanket licence for the Commission to push *all* cases back to national courts.

At the risk of repetition, mention should be made of the practical dilemma of *Automec 2* for the smaller victims of competition infringements: A would-be complainant finds that the Commission will not pursue a case because it is deemed to have an effective remedy in the national courts, or because the Commission wishes to take on cases of major economic impact – the big pan-European cartels, cases involving big firms and important precedents – but not the smaller cases involving small and medium-sized firms. Technically, the complainant can issue a writ but, in practice, it is often too frightened to go it alone, with realistic fears about being unable to obtain adequate discovery and the cost of proving complex economic evidence in court making the action an unacceptable business risk. The net result is that claims are not pursued, *unless* a national administrative authority can be persuaded to apply Article 85(1) or 86 EC Treaty, or a similar claim can be formulated under national competition law. At the moment, therefore, the smaller complainants and victims of anti-competitive practices do not have the same quality of protection as large firms, whose cases more easily catch Commission attention and which can often afford to go into the courts.

Sixth, one should note the renewed calls for a more 'economically based' application of the competition rules. Commission officials have referred to it (mainly in the context of the revision of the patent licensing block exemption). So has the UK Confederation of British Industry in its February 1994 paper 'Refocusing the Competition Rules'. The CBI argues that the Commission should change the EC rules so that they only apply to the more appreciable restrictions (and should not, in particular, apply to vertical restraints unless there is market power). It is argued that this would swiftly reduce the enforcement burden.

Interestingly the Commission (and to some extent the courts) appear to be thinking of a similar twofold approach to refocus EC competition enforcement. On the one hand, this could be done by emphasising the distinction between agreements whose impact is geographically limited (which the Commission argues are matters for national competition law), and those which affect trade between several Member States (which are in the domain of EC competition law). Perhaps, this needs developing further to assist in decentralisation, EC merger control being one possible model.

On the other hand, it could be done by distinguishing between certain 'hard core' restrictions, which are particularly anti-competitive and will be treated severely, and other restrictions which may be considered more favourably. The Commission and the courts have suggested that some agreements 'by their very nature' are restrictive of competition, such clauses being incapable of exemption under Article 85(3). The Commission defines the most harmful agreements as

> – in respect of horizontal agreements: those for price-fixing, quotas and market-sharing, collective boycotts and the imposition of linked sales;
>
> – in respect of vertical agreements: agreements for price maintenance, exclusivity with absolute territorial protection and export bans.

While questioning whether his propositions are too federal and too early, Dr Ehlermann has also put forward a 'useful vision' of future competition administration in the February 1994 Confederation of British Industry paper:

> (1) *Efficient* competition authorities in *all* Member States and EEA countries.
> (2) Will apply the *same* set of rules according to the *same* policy guidelines throughout EC/EEA to agreements and behaviour *affecting* intra-EC/EEA trade.
> (3) Introduction of *one stop-shop principle*: agreement/behaviour falls under only one jurisdiction which deals with it *for whole of* EC/EEA.
> (4) *Commission* deals *only* with cases which have to be judged at the centre within strict deadlines. Co-ordinating action of Member States'/EEA countries' competition authorities.

At present, there appear to be at least two priorities in this complex picture. First, to continue to define a number of clear cases – the European equivalent of the American *per se* rule – so that the victims of anti-competitive conduct can more easily obtain effective relief in national courts. This the Commission and the courts are already doing, with references to 'hard core' restrictions and agreements/practices which 'by their very nature' restrict competition, subject to proof of appreciable market and interstate trade impact. Second, to encourage national competition administrations to apply Articles 85(1) and 86 EC Treaty. Some already do so, others are more reluctant, and certainly this alone cannot be a perfect solution if, in practice, the national administrations cannot consider Article 85(3) exemption issues and can be blocked by a defensive notification to the Commission in Brussels.

PROCEDURES

The main event here is revision of Form A/B, although again there have been a number of important judgments. The EEA notification amendments to Form A/B have already been mentioned.

In January 1994, the Commission requested comments on a new revised and expanded Form A/B, inspired by EC merger control. Overall, the initiative was welcomed, with some reservations because, to gain time at the Commission's end, more is required of the notifying parties, which is not always appropriate. The text has now been revised. The main points to note are:

> (1) The new form contains four parts.[66] Parts 1 (Introductory) and 4 (Reasons for clearance) must be completed for *all* notifications. Part 2 must be filled in by companies notifying all types of agreement not covered by the accelerated procedure. Part 3 must be filled in only by companies notifying a co-operative JV of a structural character which wish to benefit from the two-month accelerated clearance procedure. Part 3 contains a series of detailed questions in order to enable

66 Revised Form A/B, Part D.

Box 8: Procedural Developments

- revised Form A/B
  - * for EEA
  - * for accelerated JV clearance procedure and other notifications
- no right to silence for individuals/undertakings in national court actions relating to Articles 85/86 EC Treaty – *Otto v Postbank*
- Commission duty not to transfer confidential information to national authorities without opportunity for judicial review – *SEP*
- letter closing file actionable (even if polite and encouraging) if does not seek further submission from complainant – *SFEI*
- Commissioners must decide on text of Commission decisions, not just on the idea, but usual remedy for procedural breach is annulment, not non-existence of decision – *BASF*
- notice on access to the file
- new mandate for hearing officers

the Commission to assess the relevant market(s) and the parties' positions thereon. Part 2 is more limited but is enough for the Commission to start its investigation.
(2) As in EC merger control regulation cases, the Commission is to have the right to waive the provision of certain information. No pre-filing informal meeting with the Commission is planned (as usually occurs in EC merger control cases), rather material may be left out, with an explanation and a request for a ruling on whether it is required or not.[67]
(3) The Commission undertakes to indicate within *one month* from receipt of the notification whether it considers the notification is complete and, if not, it undertakes to indicate the nature of the missing information. Notification is effective from the date on which the complete information is received.
(4) In the January version of Form A/B the Commission required a fairly long summary of the notification, covering some 12 questions, to facilitate the preparation of third party notices. In the revised text it is stated that the summary should include the names of the parties and should be short, not exceeding 100 words and with an indication as to the product sectors affected (and no business secrets or other confidential information). The Commission will opt for a short notice at the beginning of the procedure.[68]
(5) Notifying parties are now being asked, among other things:
– to provide estimates on trade flows between Member States; and
– to explain market conditions in detail (for example, what is the current rate of capacity utilisation of the parties and the industry in general in the relevant market).[69]
(6) As in the case of Form CO, there are also questions on: group members operating on the same or neighbouring markets, the position of competitors and customers on the market (for example, which are the parties' five largest competitors and customers – together with contact names and numbers), market entry and potential competition.

The result is that a far more detailed factual market picture must be provided than in the current Form A/B.

In *Otto v Postbank*,[70] the ECJ made an important ruling concerning national court actions involving Articles 85 and 86 EC Treaty. The case arose on a reference from an Amsterdam court. A mail order firm challenged a price increase by Postbank in relation to Giro transfer slips. The firm took interlocutory proceedings to hear certain employees of the bank as witnesses, prior to bringing an action based on EC competition law. The issue was therefore whether those witnesses called could claim a privilege against self-incrimination to avoid giving testimony.

The ECJ noted that the Commission could not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement. However, the ECJ took the view that in this case it was a question of procedure relating to individuals, which could not directly or indirectly lead to the imposition of a penalty by the Commission. The information obtained in the context of such national proceedings might well be brought to the knowledge of the Commission. However, the Commission could not use such information as a means of evidence of an infringement in the context of proceedings which might lead to penalties, or as evidence justifying the initiation of an inquiry. The result was that the witnesses/the defendant bank were not prevented from answering questions by Community law. Clearly this is a major step for jurisdictions such as the United Kingdom where the privilege against self-incrimination has often been invoked by defendant companies.

In May 1994, the ECJ made an important ruling concerning the right of a company to prevent information disclosed to the Commission from being transmitted to national authorities. The point arose in a case involving *SEP*,[71] a company representing four Dutch electricity utilities which had entered into a supply contract with the Norwegian firm Statoil, instead of Gasunie, the Dutch monopoly. Afterwards, SEP entered into a 'Code of Cooperation' with Gasunie to provide against any unforeseen consequences of SEP's supply to third parties. The Commission learned of this and requested SEP to produce the Code and the Statoil contract.

SEP objected to disclosing the contract, arguing that if it did, the relevant document would be passed to the Dutch competition authorities, which in the particular circumstances here meant those responsible for the commercial policy of Gasunie. The CFI had ruled that the contract had to be disclosed because Article 20 of Regulation 17/62 required the relevant national authorities not to disclose such information or to use it other than for the purpose of the relevant investigation. This the CFI considered to be an effective safeguard against misuse of the information.

67 Revised Form A/B, Section E. An amendment to the relevant procedural regulation appears to be planned.
68 Revised Form A/B, Part 1, Section 5.
69 Revised Form A/B, Part 3, Section 13.

70 Case C–60/92, judgment of 10 November 1993.
71 Case C–36/92P, judgment of 19 May 1994.

The ECJ disagreed, noting that such disclosure could not *guarantee* that the relevant authorities would not take such information into account. Instead, the ECJ emphasised that the Commission only has to transmit to the national authorities the 'most important documents' filed with it, and that such a duty had to be read subject to the right of undertakings to protect their business secrets. If, as here, the Commission wished to disclose documents claimed to be business secrets, it was required, before implementing its decision, to adopt a properly reasoned decision and give the undertaking an opportunity to seek judicial review. As a result, if SEP was obliged to disclose the Statoil contract to the Commission by its decision that did not mean that the contract could 'necessarily' be given to the Dutch authorities.

The case turns on unusual facts. First, enforcement of the Dutch competition law is by the 'relevant ministers', supported by the Dutch Economic Surveillance Department. Second, staff may be rotated between ministries so that someone who read the Statoil contract in the context of the EC procedure could become later responsible for Gasunie's commercial policy. It will be interesting to see if this induces the Dutch authorities to establish a more separate competition authority, Dutch competition law already being in a phase of reform.[72]

In June 1994, the ECJ ruled on Commission letters which reject complaints in the context of a courier/postal case. In *SFEI v Commission*,[73] the Commission indicated to the complainant in relation to certain Article 86 issues that an investigation had been carried out under the Merger Regulation, that such investigation had covered the most important points raised by the complainant in relation to Article 86 EC Treaty and that: 'While we do not propose to pursue enquiries under Article 86 in these circumstances, I can assure you that we shall maintain a close watch on developments in the market.' The ECJ ruled that this was an actionable decision, overturning the CFI's view that the letter merely expressed an initial reaction by the Commission's services, having no legal effect. The ECJ found that a letter closing the file on a complaint could only be analysed as a preliminary or preparatory measure if it clearly indicated that its conclusion was valid only subject to the submission by the parties of supplementary observations, which was not the case here.

In June 1994, the ECJ reviewed the CFI's ruling in the PVC cartel case, *BASF*.[74] It will be recalled that the CFI had held that the Commission's decision was non-existent because it reflected 'particularly serious and manifest defects' (for example, amendment after the decision was taken, no properly authenticated text, signature by a Commissioner whose mandate had expired). The ECJ ruled that such irregularities were *not* of such obvious gravity that the Commission's decision must be treated as legally non-existent. The ECJ set aside the CFI's ruling but replaced it with its own, annulling the Commission's decision for breach of the essential procedural requirement that Commission acts be duly authenticated in accordance with its own procedural rules. It also specified that the operative part of the reasons for a decision had to be adopted by the College of Commissioners. The Commissioners could not just make clear their intention to take certain action without being involved in its drafting and realisation: 'Since the intellectual component and the formal component form an inseparable whole, reducing the act to writing is the necessary expression of the intention of the adopting authority.' The CFI is now expected to annul the Commission's *LdPE* decision shortly.

Other procedural notices on access to the file and the hearing officers' mandate are referred to above in 'Main EC legislation and Commission notices', under the subheading 'Procedural documents'.

GLOBAL MARKETS AND EXTRA-TERRITORIALITY

In recent years, the Commission seems more frequently to refer to global markets and worldwide competition. There are two aspects to this issue, an external one and an internal one.

The Commission's external approach has been: First, to export the competition law model of the EC Treaty (through the EEA and the Europe Agreements) and to encourage a soft harmonisation process for national competition laws both in the EU and in central and eastern Europe (with Phare programme sponsorship). Second, to push for the development of international structures and principles to open up foreign markets, such as the revival of the 'positive comity' principle based on a 1986 OECD recommendation. This rule provides that a party whose important interests are affected by anti-competitive practices in another party's territory may ask the latter to examine those practices. The Commission argues for its use generally and also builds it into structures like the US–EC Competition Co-operation Pact.[75] Once this is readopted by the EU Council, the Commission hopes to extend the concept to Canada and Japan. The Commission also supports the introduction of cartel rules in the GATT World Trade Organisation, albeit fearing that their implementation may take time.[76]

There are, however, now signs of a resolve to go further and push enforcement rules through extensive claims of jurisdiction. The Commission appears to be thinking of distinguishing the *Wood Pulp* 'EU implementation' approach, and giving more weight to the old case law on the structural impact of non-EU restrictions in the European Union. It may be useful to remember the principle set out in *Commercial Solvents*:[77]

> When an undertaking in a dominant position within the Common Market abuses its position in such a way that a competitor in the Common Market is likely to be eliminated, *it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established*

72 The case may also be invoked by companies concerned about confidentiality in international co-operation such as the US–EC Competition Co-operation Pact. Confidentiality is meant to be respected but, in practice, the relevant authorities usually request the parties to waive it, a cause of concern to some members of European industry.

73 Case C–39/93P, judgment of 16 June 1994.

74 *Commission v BASF and Others*, Case C–137/92P, judgment of 15 June 1994.

75 France has successfully challenged the Commission's right to sign the US–EC Competition Co-operation Pact, *France v Commission*, Case C–359/92, judgment of 9 August 1994. The Commission has now proposed that the Council adopt a new version, giving a greater role to Member State national authorities.

76 See the Commission's White Paper 'Growth, Competitiveness, Employment', at 132 to 133.

77 Cases 6/73 and 7/73, [1974] ECR 223, at 252 to 253, paragraph 33 (*emphasis added*).

Box 9: Global Markets and Extraterritoriality

External aspects of Commission approach – promoting competition law enforcement to help EU firms

- export EC competition model: EEA, Europe Agreements
- encourage soft/harmonisation in EU and central and eastern Europe
  - Phare sponsorship
- develop international structures and principles to open up markets
  - positive comity (OECD and Co-operation Pacts, EU/US, Canada, Japan)
  - GATT/WTO
- Push direct enforcement of EC rules
  - contain/distinguish *Woodpulp* 'implementation approach'
  - more weight to 'structural impact' doctrine (*Commercial Solvents* and so on)
  - BT/MCI review of BJ's investment in US company
  - compare Austrian state aid cases pre-EEA

Internal aspects of Commission approach – taking account of competitiveness of EU firms in the light of international competition

- lenient view of EU restrictions? Heresy or policy?
- delicate balance of 'Growth, Competitiveness, Employment'
- White Paper priorities assisted by 'effective' competition policy
- vigorous yet case-by-case approach to restructuring
- individual-case emphasis on the wider global market context, general effect on appreciability thresholds?

that this elimination will have repercussions on the competitive structure within the Common Market.

As recent evidence of this one may note the Commission's review in the BT/MCI case of BT's investment in the US company MCI from a *Philip Morris* perspective.[78] Equally, it is interesting to see the Commission's action under the 1972 Free Trade Agreement against state aid granted to firms in Austria (General Motors, Steyr Nutzfahrzeuge, Grundig) for products intended (in all or in part) for the Community market. As a result the Commission proposed withdrawal of tariff concessions on the relevant products. Negotiations led to results, save in the case of General Motors where a 4.9 per cent duty was imposed.[79]

The internal side of the global markets issue is how to take into account non-EU competition in assessing restrictions in the common market. In other words, whether to accept a high degree of market concentration, or even cartels, to provide a greater 'home' base for international competition. Traditionally this is heresy, at least to some (usually large) Member States. But that view has not been shared by some smaller Member States and one wonders at times what is the Community policy, for example, in the light of cases such as *Philips Sagem* noted in the review of 1993, and the Commission's approach to competition policy in Japanese car imports.

The question also appears finely balanced in the Commission's White Paper 'Growth, Competitiveness, Employment'. The underlying debate is old. A pure application of the competition rules might lead to an optimal reallocation of resources fast, but might also lead to even more loss of jobs. The White Paper sets out a policy priority for the European Union of the *creation* of 15 million new jobs.

The Commission's answer to this question of balance so far is again 'pragmatic competition'. For example, in the 1994 Competition Report, the Commission emphasises that the link between Community objectives and competition policy is a two-way process: 'It is inconceivable that competition policy could be applied without reference to the priorities fixed by the Community. But it is also important to realise how an effective competition policy will help to attain these goals.'[80]

The Report also stresses the need for a vigorous application of competition policy, as the European economy goes through fundamental restructuring. This was echoed by Mr van Miert when announcing the Commission's decision in *Stichting Baksteen*,[81] the Dutch crisis cartel case in the brick industry: 'Cartels do nothing to improve structures or production capacities. On the contrary, they help perpetuate their unsuitability compared with demand.' On the other hand, the Commission notes that many markets are expanding as liberalisation occurs. The Commission stresses that the conduct of firms needs to be placed in this wider context, in order for the Commission to judge whether agreements can be accepted as allowing Community industry to improve its competitiveness.[82]

Thus an *individual* case-by-case approach will continue to apply. However, one may also note that the globalisation of markets is one of the reasons being put forward for a *general* revision of the appreciability thresholds in the notice on agreements of minor importance.

BLOCK EXEMPTION REFORM: ARBITRATION, LOOSER TERRITORIAL RESTRICTIONS AND MARKET SHARE CAPS

There is at the moment considerable flux in the block exemption field which needs careful watching. It would appear that some of the innovations currently being proposed could be more generally applied. The standard features of block exemptions for some time may be changing.

Consider the motor vehicle block exemption. The first DG IV draft (which was leaked to the trade press) envisaged the *compulsory arbitration* of a whole series of issues. This was not altogether surprising. Arbitration of dealer disputes

78 See below, under 'New Areas'.

79 All of this was pre-entry into force of the EEA. General Motors has appealed against the relevant regulation.

80 OJ 1994 L131/15.

81 The facts of the case are summarised in the article on 1993 referred to at Note 1 above.

82 1993 Competition Report, point 79. A similar principle is often found in many national merger control laws: see, for example, section 41 of the French Ordonnance 86-1243 of 1 December 1986 on freedom of prices and competition.

Box 10: Block Exemption Reform

Motor vehicle block exemption
- compulsory arbitration?
- advertising outside a dealer's territory?
- greater sanctions, 'loss of block exemption' ideas. BMW Belgium revisited
- lack of block exemption compliance, Irish experience

Technology transfer block exemption
- market share cap of 40 per cent?
- oligopoly ceiling?
- a general approach? Swedish law
- no opposition procedure, 'shopping list' v 'stencil' approach

Horizontal/vertical market share threshold distinction
- discussion paper on agreements of minor importance
- merger control proposals on 'affected markets'
- a general framework block exemption?

Some or all of this in the next Regulation 1983/83?

has been suggested by the UK Monopolies and Mergers Commission both in the case of petrol stations and in the case of car dealerships. It is also clear that, over the years, DG IV has been receiving many 'last resort' complaints by dealers, who regard recourse to the Commission as the only viable remedy. DG IV has an interest in stemming that tide.

On the other hand, one might be forgiven for being surprised at DG IV's new enthusiasm for arbitration, which traditionally it has viewed with some apprehension, fearing that the arbitrator, who is often also *amiable compositeur*, may not apply the competition rules to the letter.[83] The current Commission draft has reduced considerably the scope for such arbitration, but still makes it mandatory in some cases, such as the determination of sales targets and the grounds for termination.

Second, the motor vehicle block exemption now allows for *advertising outside a dealer's territory* (although not direct mail shots), in principle watering down the territorial exclusivity of the dealer and promoting intra-brand competition. This is probably a solution wedded to the particular circumstances: such as the Commission's desire to reduce price differentials between Member States, BEUC's challenge to exclusive dealerships, the promotion of multiple dealerships, the UK Monopolies and Mergers Commission's findings on the issue and, last but not least, the fact that many dealers argue that they have to advertise in national magazines like *L'Argus* and *Exchange & Mart* even to fully exploit their own territory. However, could such arguments not apply in other sectors? It is an old problem which concerns not only specialist magazines, but also representation at national and international trade fairs. Practicably, the weakening of the active sales rule may also have uncertain effects – perhaps favouring the larger city dealer with greater volume discounts or perhaps the smaller country dealer with lower overheads.

Again, the technology transfer block exemption refers to a restriction on a licensee pursuing 'advertising *specifically aimed at* other licensees' territories.[84] Is some international advertising therefore to be allowed? Will we have to obtain information on the geographical circulation of the relevant trade magazines?

Third, there are greater sanctions – *'loss of block exemption'* provisions. The early drafts stated that if there were blacklisted infringements by dealers in one Member State, the benefit of block exemption would be lost for all agreements in that Member State. If such infringements occurred in more than one Member State, the whole EU network of agreement would lose block exemption. These ideas have now been toned down. The aim is to penalise the instigator of the infringement and withdraw block exemption for the relevant clauses in the area affected.[85]

It may be interesting to revisit the old BMW dealers case,[86] where BMW Belgium and its dealers were fined for practices including a circular designed to stop re-exportation of BMW cars into Germany. Would the position now be that BMW would lose the benefit of some or all of the block exemption in Belgium and Germany for a period?

In the background, one can sense a gathering frustration on the part of the Commission at the low level of compliance with block exemptions. Interestingly, the Irish Competition Authority has indicated that of the 250 exclusive distribution agreements notified to it under the Irish Competition Act in 1993 (before its category licence), some 94 did *not* comply, mainly because they contained features not allowed by Regulation 1983/83 (pricing provisions, export bans and post-termination restrictions). Virtually all of the agreements concerned were with overseas suppliers (that is, came within Article 85(1)).[87]

Turning to the proposed technology transfer block exemption, other points which could have a wider general application arise. First, the draft envisages a complex *market share cap*. Companies will not be able to rely on the block exemption if they produce 40 per cent of the goods concerned on the relevant EC market. Moreover, the draft envisages an oligopoly ceiling, whereby if three or less companies have more than 50 per cent of the relevant market, or five or less companies have more than two-thirds of that market *and* the licensee is in that group with at least 10 per cent market share, then the licensor may not agree not to license other parties in the relevant territory.[88] This controversial idea may catch on. For example, it may be noted that in Swedish competition law there is a 35 per cent market share limit for exclusive distribution and purchasing block exemptions. The oligopoly provisions would also seem to be yet more evidence of a general DG IV approach to develop oligopoly controls. While these proposals may reflect greater economic emphasis to the relevant assessments, they may not assist many companies to achieve legal certainty as to where they stand.

83 See Ratliff, 'Provisional Remedies in International Arbitration and EC Competition Law' in *Handbook on Provisional Remedies in International Commercial Arbitration*, ed. by A. Bösch.

84 Article 1.1(5).

85 Articles 6(2)(3).

86 OJ 1978 L46/33.

87 P. Massey, 'The Exclusive Distribution Category Licence', speech to University College, Dublin, at pages 13 to 14, at the First Annual Survey of Irish and European Competition Law 1994. The Competition Authority 'raised this with the EU and with relevant authorities in other member states' and suggested that it was highly likely that these were standard distribution agreements, replicated in all of the other Member States of the EU.

88 Article 1.5.

Second, there is *no opposition procedure*, but a 'shopping list' exemption approach.[89] In other words, if there are (non-black-listed) restrictive provisions caught by Article 85 in a licence otherwise covered by the block exemption, the licence is still 'block exempt', but the other provisions will need individual notification. This change appears to reflect the little use that has been made of the opposition procedure and the complexity of licensing provisions. It does not seem to be evidence of a general approach. For example, in block exemptions such as that for exclusive distribution, there is a 'stencil approach': if there are *any* restrictions other than those provided for in the block exemption, then the block exemption does not apply at all and individual notification/exemption is required.

Finally, mention must be made of DG IV ideas on differentiating between horizontal and vertical agreements. Such an idea is present in both a recent discussion paper on agreements of minor importance and the merger control proposals on the 'affected markets'. There is also talk of a 'general framework block exemption' on the issue.[90]

All of this could add up to quite a fundamental rethinking of current 'block exemption' concepts. Imagine for a moment that some or all of it came together in, for example, the next version of Regulation 1983/83!

NEW AREAS: MEDIA, TELECOMS, TRANSPORT AND SPORT

Media is an area where the impact of competition rules is complex and huge. For present purposes three aspects can be flagged. First, the European Broadcasting Union's exemption for joint purchasing and exchange of sports programmes is now being challenged at the CFI by smaller private television channels. It is argued that the arrangement gives unfair market power to its (large) participants.[91] The exemption decision also includes the interesting suggestion that exclusive broadcasting rights for TV sports coverage may not infringe Article 85(1) EC Treaty. Second, there is still much controversy over the renewal of UIP's exemption for the distribution of US films in cinemas. It is argued that the JV has too much market power. GATT-style politics is also a feature, with recent calls for the formation of a European distribution JV as a counterbalance. Third, the Commission has refused an exemption to provisions whereby Italian TV channels and advertising companies agreed to use exclusively the TV audience ratings figures of their own company – Auditel.[92] The case was prompted by complaints from other market research companies such as Nielsen.

Telecoms operators have been organising for some time to do business in the liberalised sectors. The leading case is *BT/MCI*, the first formal decision on a global strategic alliance, involving a JV to provide global enhanced and value added services (such as video conferencing) to multinational or large regional companies and a parallel investment by BT in this US long distance telecoms operator.

Box 11: Media, Telecoms, Transport and Sport

- *Media*
  - *EBU* – appeals by private TV channels
  - *UIP* – clearance still pending
  - *Auditel* – exclusive use of TV ratings JV by parents unlawful
- *Telecoms*
  - global markets and strategic alliances
  - *BT/MCI* – 'Concert'
- *Transport*
  - growth of rail cases
  - Article 90 and pilots' fees – *Corsica Ferries/Genoa*
  - *Rødby, Holyhead 2* and essential facilities
  - *Orly*/Ground handling services
  - *TAA*, and consortia block exemption proposal
- *Sport*
  - *UEFA* cross-border broadcasting and other sports rules
  - *Bosman* and the football transfer fee system

This JV is being heralded as a major 'pro-competitive event' insofar as the whole idea is that the new JV (called 'Concert') will provide services outside the parties' home countries (the United Kingdom and the United States) and therefore compete with local telecoms operators. The case may serve as an industry model.[93] It is certainly the first of its kind. However, the Commission has emphasised that the decision was complex and that each case turns on 'its own merits'.[94]

The Commission cleared BT's investment in MCI (on a *Philip Morris* analysis). It found that BT and MCI were potential competitors in the telecoms market segment addressed by Concert, yet exempted such co-operation. The Commission cleared the appointment of BT as Concert's exclusive distributor in the EEA, and a provision described by the Commission as 'intended to dissuade MCI from entering some sectors of the telecoms market in the EEA', on the basis that these provisions were necessary to protect the parties' software in the circumstances. The Commission noted that such provisions were analogous to the territorial licensor protection permitted under the patent and know-how block exemptions and indispensable to permit the necessary technology transfer to Concert.

The year 1994 has seen considerable developments in the application of the competition rules to transport, above all to rail. The Commission has promised an active policy in this area following up on the Railway Infrastructure Directive which entered into force in January 1993.[95] Thus, in addition to the *Deutsche Bahn* case, there has been a decision exempting a co-operative JV for the combined transport of goods in the context of the Channel Tunnel[96] and a clearance of an amended co-operative agreement for the rail

89 Article 4.

90 Perhaps another idea might be to develop a wider 'Appreciability Notice' pulling together both Court and Commission 'rule of reason/flexible approach' cases on the application of Article 85(1) and 86 EC Treaty, the standard notice of minor agreements and such ideas.

91 OJ 1993 L179/23; *European Report*, No. 1908, 8 December 1993; for example, Case T-546/93, *Antena 3*, OJ 1993 C325/11; Case T-542/93, *Reti Televisie Italiane*, OJ 1993 C328/6.

92 OJ 1993 L306/50.

93 OJ 1994 L223/36. This decision is also one of the Commission's first EEA clearances.

94 See Commissioner van Miert's Memo 94/56, 28 July 1994, 'Commission approach to strategic alliances in the telecommunication sector' and Press Release IP/94/767 of the same date.

95 1993 Competition Report, point 142.

96 *Allied Continental International Services Ltd – ACI*, OJ 1994 L224/28.

transport of new motor vehicles.[97] Interestingly in clearing this latter agreement, the Commission has emphasised policy factors (that is, that rail transport constitutes a particularly appropriate form of transport for new ex-factory car distribution). There has also been an exemption of a co-operative JV for night services through the Channel Tunnel.[98]

Air transport, ports, ferries and shipping also remain active areas. The highest profile air cases are probably the Commission and Court cases relating to access to Orly airport by operators such as TAT and Air Liberté wishing to offer services on French domestic routes. The French Government stands accused of deliberate delaying tactics to protect Air Liberté.[99] But ports have also been important again. In *Corsica Ferries*[100] the ECJ ruled that Articles 90(1) and 86 EC Treaty precluded a national authority from adopting a differential tariff structure for compulsory pilot services in the port of Genoa, depending on whether the maritime companies concerned were offering international or national services. The case involving Rødby has also been mentioned above.

Finally, there should be a mention of sport. This has been another growth area for the last few years, partly because of its media aspects and partly because of the potential impact of the competition rules on traditional sports clubs and association rules. As to the former, there have been various cases focusing, for example, on the UEFA rules on the cross-border broadcasting of football matches (Article 14), and potential abuses of dominant position by sports organisers and associations.[101] As to the latter, there have been Commission challenges to association rules which limit the number of foreign players a team may have, from the viewpoint of general Community law and EC competition law.[102]

The key point this year is that a Commission–UEFA settlement reportedly reached in 1991 may soon be brought into question again, because the UEFA rules on football transfer fees are now under review in a reference from the Court of Appeal in Liège in a case called *Bosman*.[103] Clearly, it is a case being closely watched by the whole sports industry. The Court has asked:

> Must Articles 48, 85 and 86 of the Treaty of Rome of 25 March 1957 be interpreted as
>
> (i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club;
> (ii) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organise?

97 *Communauté d'Intérêts Automobiles – CIA*, OJ 1993 C177/8; OJ 1994 C175/4; *European Report*, No. 1974, 10 September 1994.
98 ENS, OJ 1994 L259/20.
99 The other area of particular interest is the Commission's ground handling services consultation paper, OJ 1994 C41/2.
100 Case C–18/93, judgment of 17 May 1994. The Commission has also produced a report on how it proposes to apply EC competition law to liner agreements for the land part of multimodal transport, 94/508.
101 See, for example, *ITVA/Football Authorities, BBC BSB and Football Association*, OJ 1993 C94/6.
102 See, for example, *European Report*, No. 1838, 24 February 1993, concerning Hans Gellhaus (and Mini-foot).
103 Case C–415/93, OJ 1993 C312/5.