Major Events and Policy Issues in E.C. Competition Law, 2000—Part 1

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

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

Box 1: Themes of 2000

- *The new "Regulation 17"*:
  - self-assessment;
  - competition networks and co-ordination;
  - home investigations and oral statements;
  - debate about Article 81(3) E.C. in the national courts;
- *Draft horizontal guidelines*:
  - from R&D to environmental co-operation:
  - the (approximate) "15–40% market share bracket" within which exemption may be possible;
- *Postal services*: liberalisation, remail and the *Deutsche Post*;
- *Environmental clearances*: "collective environmental benefits" and national collection services systems;
- *Market definition*: *BiB/Open*, *Football World Cup tickets*, *Eurovision II*;
- *Sport*: wider *Bosman*, developing sporting rules;
- *Professional services*: after *CNSD*, before *Arduino* and *Wouters*?

Overview of major events

Legislative Developments (adopted and proposed)

Box 2: Legislative Developments (adopted/proposed)

- Vertical restraints block exemption;
- Guidelines on vertical restraints;
- Revised liner shipping (consortia) block exemption;
- "Communication on Services of General Interest in Europe";
- Draft horizontal guidelines;
- Draft R&D/specialisation block exemptions;
- New draft "Regulation 17".

Adopted

In December 1999, the Commission adopted the *new block exemption on vertical restraints*,[4] Regulation 2790/99, which applies as of June 1, 2000. This was essentially described last year as a draft.[5] The block exemption covers all forms of vertical restraints for products (including own label/OEM products) and services and replaces the block exemptions for exclusive distribution, exclusive purchasing and franchising agreements. It also establishes a block exemption for selective distribution for the first time.

In considering whether the block exemption applies, in general, the first check required is whether the supplier's market share is below 30 per cent.[6] If not, the block exemption does not apply. The second check required is to see whether blacklisted clauses such as resale price maintenance provisions, export bans and prohibitions on cross-supplies in selective distribution have been included. Again such clauses prevent the application of the block exemption.

If the block exemption applies, companies should be considering whether the broader format offered gives them the opportunity to enter into different and better distribution strategies. In particular, some customer restrictions are allowed which may facilitate sales channelling. If the block exemption does not apply, a more detailed self-assessment is required to see whether and to what extent the E.C. rules apply and, if so, whether distribution formats have to be modified. Such self-assessment should be carried out having regard to the "*Guidelines on Vertical Restraints*"[7] which were

1. With many thanks to Ingrid Cloosterin, Flavia Distefano and Andrea De Matteis for their help in the production of this paper.
2. The reference period is from November 1999 until the end of October 2000.
3. For last year's article, see [2000] I.C.C.L.R. at pp. 54 and 96.
4. Regulation 2790/99 [1999] O.J. L336/21.
5. [2000] I.C.C.L.R. at pp. 56–58.
6. In the case of exclusive supply agreements, meaning agreements requiring the supplier to sell goods or services to *only one buyer inside the Community*, the *buyer's* market share is considered.
7. [2000] O.J. C291/1.

adopted in May 2000. Again, they were essentially described last year as a draft.[8]

Above the 30 per cent threshold, it is necessary to make a more detailed review of the market conditions, focusing on market shares, the amount of market opening available (for example what percentage of the market is tied?), supplier and buyer concentration ratios, how static the market is, and barriers to entry. The positive rationales of the chosen distribution system will also need further review (to assess the efficiencies, in terms of investment encouragement and economies of scale, etc.).

The Guidelines explain the Commission's approach by type of restriction with reference in each case to the market context. Thus, the Commission outlines rules for "single branding" provisions (for example non-compete restrictions), exclusive distribution, exclusive customer allocation (for example where a supplier undertakes to sell to a distributor for resale to a given sales channel only and the distributor agrees not actively to sell to end-customers outside the channel), selective distribution, franchising, exclusive supply (to only one buyer in the Community) and tying provisions. In line with the increased emphasis on an economic approach, not surprisingly the degree of concern rises according to the market power involved and the less competitive the market is.

Above the 30 per cent threshold, the main competition issues will probably be the degree of *foreclosure* and *cumulative effects* of parallel distribution networks. One may, therefore, expect that the main "self-help" remedies required in order to achieve compliance are likely to be in the form of contracts of shorter duration or without exclusivity. In the event of cumulative effects, the issues will be more complex, because the remedies may have to be sector-wide. The main practical issue is likely to be *system management* if, as often still, sales are EEA-wide, yet markets are national with very different conditions.

In April 2000, the Commission renewed the *liner shipping (consortia) block exemption* for five years.[9] The block exemption applies to agreements between shipping companies on technical, operational and/or commercial arrangements for cargo: issues such as co-ordination of sailing timetables, the exchange of space on vessels, the pooling of vessels or port installations, and joint marketing, but *not* joint-fixing of freight prices.[10] Such co-operation is allowed because it leads to rationalisation and economies of scale in the use of vessels and port facilities. This is, however, provided that a consortium faces effective competition. As a result, such agreements are only exempt up to a 30 per cent market share ceiling when within a linear conference, and up to 35 per cent when outside a conference. There must also be effective competition between parties to the agreement on prices and services offered, and there must be no agreement on non-utilisation of existing capacity.

There are three main points to note on the Regulation: First, the "ceilings" for the exemption are now determined by reference to *market* share, rather than "*trade* share"—on the basis that this involves a more relevant competition law assessment.[11] Secondly, exclusivity obligations in favour of the consortium are treated as "ancillary" and block exempt. Such obligations require members to use consortium vessels in the trade or trades in question, and not to assign or charter space to other carriers, except with the consent of the consortium. Thirdly, it appears that some 11 consortia had benefited from block exemption through opposition procedure under Regulation 870/95. This was possible where agreements exceeded 30–35 per cent of trade share, yet did not reach 50 per cent trade share (when only full individual application for exemption is possible). These consortia continue to be exempt under the new Regulation.

In September 2000, the Commission adopted a new "*Communication on Services of General Interest in Europe*".[12] This communication follows the insertion in the Amsterdam Treaty of a specific article, recognising that services of general interest belong to the "shared values" of the E.U. and are seen as "promoting economic and social cohesion" (Article 16 E.C.). The communication was requested by the European Council, following a similar communication in 1996.

Those concerned with Article 86 (ex Article 90) E.C. issues should be aware that the text, which shows the sensitivity of this area of law, sets out generally applicable principles and surveys specific liberalising areas such as telecommunications, transport, postal services, energy, radio and television. Amongst other things, the Commission makes it clear that Article 86 E.C. only applies to the extent that activities are economic and appreciable in effect. The Commission also emphasises three points. First, that the application of Article 86 E.C. is *neutral* as between public and private ownership. Secondly, that it is for Member States to define and organise services of general economic interest, albeit "subject to the Commission's control for *manifest*

8. [2000] I.C.C.L.R. at pp. 58–60.
9. [2000] O.J. L100/24. The new Regulation, 823/2000, replaces Regulation 870/95.
10. Fixing of maritime transport rates may, however, be possible under Regulation 4056/86 in certain circumstances.
11. "Trade share" meant share of direct trade assessed on a port pairs basis.
12. COM(2000) 580 final, September 20, 2000.

error".[13] Thirdly, the requirement that where Article 86(2) E.C. applies, any restrictions of competition must be strictly *proportionate* to the public service mission to be achieved.[14]

Proposed

Draft horizontal guidelines

Box 3: Draft Horizontal Guidelines

- — Useful framework for review;
- — R&D, production (specialisation), purchasing, commercialisation, standards, environmental agreements;
- — Not strategic alliances, exchange of information or minority shareholdings;
- — Assessment of nature of agreement, market power and concentration NBs:
  - "Efficiency claims must be substantiated";
  - HHIs a factor;
  - Limit for exemption is elimination of effective competition (even if considerable efficiency gains);
- — Innovation market assessments to preserve at least two existing poles of research;
- — R&D block exemption ceiling up to 25%;
- — Specialisation block exemption ceiling up to 20% (but no turnover limit);
- — In purchasing agreements, may be market power if >15% on both purchasing and selling markets;
- — Systematising new section on environmental co-operation.

In April 2000, the Commission published its draft "*Guidelines on the Applicability of Article 81 EC to horizontal co-operation*" ("the Draft Guidelines") together with new draft *block exemptions for R&D and specialisation agreements.*[15]

The Draft Guidelines are intended to replace the Commission's 1993 Joint Venture Notice and the 1968 Notice on Co-operation. They are broader in scope, covering R&D and production agreements (including specialisation), agreements on purchasing, agreements on the selling, distribution or promotion of products (called "commercialisation agreements"), agreements on standards, and environmental agreements (between actual or potential competitors). Other types of horizontal agreement between competitors are to be addressed separately by the Commission, for example on the exchange of information or minority shareholdings. More complex arrangements, such as strategic alliances which involve various types of co-operation are also not covered, since the Commission considers that they should be reviewed in their totality.

The structure of the guidelines is to set out general principles and then work through the treatment of the different types of agreement, section by section. Where agreements reflect different types of co-operation, the suggested framework for review is to consider what is the "*centre of gravity*" of the co-operation. To do so, it is suggested to focus on what is the starting point of the co-operation (for example R&D or production) and the degree of integration involved in each activity (for example if only partial on R&D, yet full in production the centre of gravity is the latter). These ideas are designed to offer a framework for analysis and one expects that they should not be taken too rigidly. Distribution arrangements between competitors would fall to be considered under *both* the horizontal and vertical guidelines.

Generally, the Draft Guidelines emphasise that the assessment of the competitive effect of an agreement involves consideration of the nature of the agreement and the parties' combined market power.

Some agreements generally do not fall within Article 81(1) E.C., for example co-operation between non-competitors, or between competitors for an activity which they each cannot do on their own, or co-operation far removed from marketing. Others, such as agreements on price-fixing or market sharing almost always fall under Article 81(1) E.C., *unless* such agreements are necessary for the functioning of an otherwise non-restrictive or exemptible agreement (for example a production joint venture which also manufactures the jointly manufactured goods).

Between these extremes, when considering whether an agreement *may* fall under Article 81(1) E.C., regard should be had to the structure of the market concerned and the position of the parties therein. The object is to see if they have sufficient market power to cause negative market effects in terms of prices, output, innovation or the variety of goods or services. If the parties together have a weak market position, a restrictive effect arising from the co-operation is unlikely. If there is a high combined market share, the Commission also emphasises that there may still be little restrictive effect *through the co-operation*, if only *one* party has insignificant share.

The Commission notes that the degree of market concentration may be important, and interestingly suggests that changes to the

13. Paras 20–23.
14. In October 2000, the EFTA Surveillance Authority's *Notice on Cooperation between National Competition authorities and the ESA* was published, [2000] O.J. C307/6. This is essentially modelled on the Commission's current notice on co-operation with national competition authorities, which was published in 1997.
15. O.J. C118/13; [2000] see also Lücking, "Horizontal Co-operation Agreements—Ensuring a modern policy", EC Commission Competition Policy Newsletter 2000, No. 2, June pp. 41–44. DG Competition had previously commissioned a "Study of the Policy of Member State Competition Authorities towards Horizontal Cooperation Agreements between Undertakings" from Sauter and Pérez van Kappel at the Academy of European Law, Trier in 1998, updated in 1999.

Herfindahl-Hirschmann Index ("HHI") for the market concerned may be an indicator.[16]

In considering the elements of Article 81(3) E.C., the Commission emphasises that "[e]fficiency claims must be substantiated. Speculations or general statements on cost savings are not sufficient". The Commission also stresses that if there are significant efficiencies which outweigh the negative effects of an agreement, a higher degree of market power is permitted. However, the limit is the elimination of effective competition, which is the point at which the parties are, or would be likely to become dominant.[17]

After these general principles, there are some 33 pages dealing with the six types of agreement covered. Each section deals with a different type of agreement. In each case, there is a common format: the definition of the type of agreements treated, including a general introduction to competition issues raised; an outline of relevant markets; assessment under Article 81(1) E.C.; assessment under Article 81(3) E.C.; and then some examples. The approach is detailed, systematic and useful, giving a helpful framework for review. A fair amount is not new, insofar as similar ideas have been set out before in previous notices, regulations, or decisions whether under Article 81 E.C. or merger control (for example as regards innovation markets in R&D). However, the Draft Guidelines usefully pull these elements together, with more emphasis on market context and market power.

The Draft Guidelines were also accompanied by draft revised block exemptions, designed to replace Regulations 417/85 and 418/85. The Draft Guidelines are meant to be complementary to those block exemptions, outlining where there is no competitive concern and what the Commission's approach is above the respective market share "ceilings" of those block exemptions. (The block exemptions are outlined below.)

As regards *R&D agreements*, I would stress three points. First, there is a useful discussion about "*R&D poles*" (meaning the different R&D efforts directed towards a certain new product or technology and the substitutes for that R&D), and the competition concern to ensure that there will be a sufficient number of poles left.[18] Normally, if an agreement combines the only two existing poles of research, it will not be capable of exemption, although in some cases a solution may be found through licensing to third parties on reasonable terms. Secondly, the revised block exemption exempts various forms of R&D agreement which do not include black-listed restrictions, provided that the combined market share of the parties in the affected existing market(s) *does not exceed 25 per cent* (an increase of 5 per cent over Regulation 418/85). Thirdly, the Commission usefully highlights that a strong market position due to the "first mover advantage" of creating a new product/technology will not normally be interpreted as eliminating competition.[19]

As regards *production agreements* (including *specialisation agreements*), fairly standard principles are set out, covering the need to assess the risk of "spillover" co-ordination into related markets, whether the co-operation is the only commercially justifiable way to enter a new market, the degree of commonality in costs between the parties and the likely effects thereof.

I would mention three points. First, when looking at agreements where the parties' combined market share is above the block exemption ceiling, the Commission will look at market concentration and has again said that it will look at HHIs.[20] Secondly, sub-contracting agreements between competitors are covered by the Draft Guidelines. Sub-contracting agreements between *non*-competitors, involving the transfer of know-how, continue to be covered by the Notice on Sub-contracting. Other sub-contracting arrangements fall under the vertical guidelines and block exemption on vertical restraints. Thirdly, agreements for specialisation (whether unilateral[21] or reciprocal) as well as for joint production are covered by the revised block exemption, provided that they do not contain black-listed restrictions and that they are concluded between parties with a combined market share *not exceeding 20 per cent* in the relevant market. The block exemption also applies to related purchasing and distribution agreements.

As regards *purchasing* agreements, again some of the discussion is fairly well-known. Notably, the need to balance the degree of supply-side concentration to that on the purchasing side and concerns as to competitors having a significant amount of their total costs in common.

However, much of the section is new and appears to draw on recent studies on buyer power for the Office of Fair Trading and the Commission. I would note four points: First, the Commission usefully recalls that joint purchasing may involve horizontal *and vertical* agreements. Thus, even if the *horizontal* aspects of a co-operation are acceptable, it will still be necessary to examine the *vertical* aspects of restraints in an agreement with suppliers or retail members of a co-operation

16. *i.e.* where the sum of the squares of the individual market shares of all competitors is assessed before and after a co-operation agreement, treating the parties as one if they enter into the agreement (at para. 30).
17. Para. 37.
18. Paras 50–51 and 67.
19. Para 69.
20. Para 90.
21. *i.e.* where only one company gives up production in favour of another.

under the vertical guidelines and block exemption on vertical restraints.

Secondly, in terms of market definition, the Commission notes that *two* markets may be affected by joint purchasing: the *purchasing* market to which the co-operation will apply and the *selling* market on which the participants in the co-operation will sell the relevant products. As regards purchasing markets, the Commission notes that substitutability has to be defined from the viewpoint of *supply*, not demand. In other words, it is necessary to look at the *supplier's* alternatives in identifying the competitive constraints on purchasers. The Commission suggests that these constraints could be assessed by examining the supplier's reaction to a small but lasting price *decrease*.[22]

Thirdly, in deciding whether the agreement may fall under Article 81(1) E.C., the Commission emphasises that this involves an appreciation of the parties' positions on the purchasing *and* selling markets concerned and the "interdependencies" between the two. The core idea is that buyer power may have negative effects if lower prices are not passed on to customers downstream and such power causes cost increases for the competitors of the purchasing co-operation on selling markets. Although concerned not to establish a hard and fast rule, the Commission states that, in most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15 per cent on both the purchasing market(s) *and* also the selling market(s).[23]

Fourthly, the Commission notes that an obligation to buy exclusively through a co-operation can be indispensable to achieve the necessary volume for the realisation of economies of scale.

As regards *commercialisation agreements*, the Commission states that such agreements between competitors may restrict competition unless they are objectively necessary (for example to enter a market). If they involve price-fixing, they almost *always* fall within Article 81(1) E.C., even if they are non-exclusive, but may be exemptible. Commercialisation agreements which fall short of joint selling may also be subject to Article 81(1) E.C., if the parties exchange sensitive commercial information or if they influence a significant part of the parties' final costs. Distribution agreements between competitors in different geographic markets will generally fall under Article 81(1) E.C., unless such an agreement is objectively necessary. Commercialisation agreements between competitors, without price-fixing, are generally not subject to Article 81(1) E.C. unless the parties have market power, which is unlikely if the parties' combined market share is less than 15 per cent.

I would mention three other points: First, distribution agreements between competitors which are not exempt under the vertical restraints block exemption fall within the Draft Guidelines, in particular, where such agreements are reciprocal, or non-reciprocal but the competitors are larger than the levels accepted under the block exemption. In such cases, the agreements have *first* to be reviewed under the horizontal guidelines and *then*, if acceptable, under the principles set out in the vertical restraints guidelines.

Secondly, considering Article 81(3) E.C., the Commission states that any claimed efficiencies must not just result from the "elimination of costs which are inherently part of competition", but must result from the integration of economic activities, contributions of capital, technology or other assets. If not, the arrangements may just be a joint sales agency incapable of exemption under Article 81(3) E.C.[24]

Thirdly, arrangements between competitors which have a market share equivalent to dominance will not normally fulfil the conditions of Article 81(3) E.C.

As regards *agreements on standards*, the Commission outlines the classic considerations. Participation in standard-setting which is unrestricted and transparent, with no obligation to follow the standard, is not a competitive concern. On the other hand, standard-setting designed to keep actual or potential competitors out of the market will almost always be caught by Article 81(1) E.C. Participation in standard setting should be open to all competitors in the affected markets. In general, there should also be a clear distinction between the setting of a standard, the related R&D and the commercial exploitation of the standard.

The Commission also notes that the existence of a restriction of competition in standardisation agreements depends on the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. High market shares are in themselves not a concern. However, discrimination or foreclosure of markets through inability to access such standards is a concern. If a standard becomes a *de facto* industry standard, access thereto must be as open as possible and applied in a non-discriminatory manner.

Finally, there is a section on *environmental co-operation*, which reflects the specific line of case law which has been developing in recent years

22. Para. 111.
23. Para. 122.
24. Paras 144–145.

but is still new and important. The proposed analytical framework is as follows:

(1) Environmental agreements are defined as those by which the parties undertake to achieve pollution abatement or environmental objectives, whether standardisation agreements, agreements on environmental targets or recycling schemes.
(2) The markets concerned will be those for the products concerned, products in which a pollutant is incorporated and, in the case of recycling, also the market for collecting services.
(3) Agreements with no precise individual obligation, loose commitments or limited effects fall outside Article 81(1) E.C.
(4) Agreements that appreciably affect the parties' ability to devise their own product characteristics or the way in which they produce and concern a major share of an industry may, however, come within Article 81(1) E.C.
(5) The same is true where parties with important market shares appoint an exclusive provider of recycling or collecting services for their products, foreclosing other potential providers.
(6) The Draft Guidelines also state that the "economic" benefits, may be assessed either individually *or collectively*. Where consumers *individually* have a positive rate of return from an agreement under reasonable payback periods, there is no need for aggregate environmental benefits to be objectively established. However, if this is not the case, a cost-benefit analysis may be necessary to assess whether net benefits for consumers *in general* are likely under reasonable assumptions, and that there will be no elimination of competition.

Draft for revised R&D block exemption

The first point to note here is increased market share ceilings. The block exemption will apply provided that, if the parties are competitors, the parties' combined market share does not exceed *25 per cent* of the relevant market (previously 20 per cent). If there is joint distribution of the products which were jointly developed, the block exemption applies provided that the market share does not exceed *25 per cent* (previously 10 per cent).

The main black-list of clauses which are prohibited and not block exempt is as follows: restrictions on the freedom of parties to carry out R&D in a field unconnected to the agreements; the fixing of prices; limitations on output or sales; allocation of markets or customers; and limitations on a party making passive sales for the contract products in territories reserved for other parties.[25]

Consistent with the vertical restraints block exemption, there is now no white-list of permitted clauses. Nor will there be a requirement to draw up a framework programme any more. There is also no opposition procedure. The benefit of the block exemption can now be withdrawn in the event that an agreement would eliminate effective competition in R&D on a particular market.

Draft for revised specialisation block exemption

As noted above, this applies to reciprocal and unilateral specialisation between competitors and agreements for joint production. The block exemption applies provided that the parties have a combined market share which does not exceed 20 per cent of the relevant market. Related purchasing or marketing agreements are now also exempt up to this ceiling. There is no longer a turnover "ceiling".

The black-list is somewhat simpler than Regulation 417/85 and includes: restrictions on the fixing of prices; limitations of output or sales; and agreements which have the object of allocating markets or customers. Again, there is no white-list of permitted clauses. The opposition procedure has also been removed.

Both block exemptions are intended to enter into force in January 2001, as Regulations 417/85 and 418/85 expire, and would apply for 10 years.

E.U./Japan co-operation

In July 2000, the E.U. and Japan announced that they had reached a "mutual understanding" on the substantive elements of an *E.C./Japanese bilateral co-operation agreement* regarding the application of competition laws.[26] It is understood that the agreement will be closely modelled on similar agreements between the E.U. and the United States and Canada. The Commission is to forward a draft proposal to the European Council and the European Parliament this Autumn.

The new "Regulation 17"

This follow-up to the Commission's White Paper on Decentralisation and Co-operation was published in September 2000 and is described below.[27]

25. Art. 5 (there are 10 items listed in the Article).
26. Commission Press Release IP/00/739, July 18, 2000.
27. In the 1999 E.C. Commission Competition Report, the Commission indicated that it was planning to revise the 1997 *de minimis* notice again in 2000, in the light of changes of policy for vertical restraints and horizontal co-operation (point 369, p. 99). In July 2000, the Commission adopted a draft Directive consolidating existing *directives on competition in telecoms markets*. Commission Press Release IP/00/766, July 12, 2000.

European Court cases (ECJ and CFI)

Box 4: Main European Court Cases

— *Micro Leader Business*:	Article 82 E.C. can override copyright protection;
— *Cement (CFI)*:	3000 page electronic judgment! Fines reduced by some Euro 140 million; Access to the file and what constitutes participation; Need to distance oneself from anti-competitive proposals.
— *Deutsche Post remail*:	Surcharge for cross-border remail justified if undermines domestic universal postal service.
— *Compagnie Maritime Belge*:	Including an agreement in assessment of collective dominance is not recycling Article 81 E.C. issues into Article 82 E.C.; Predation is about selective acts to eliminate competitors by the dominant.
— *CNSD*:	Price-fixing by professional association not required by delegation of state power leaving discretion.
— *Bayer Adalat*:	Continuous commercial relations and unilateral measures to prevent parallel imports—a limit?

Competition and copyright—Article 82 EC

In December 1999, the Court of First Instance ("CFI") ruled on whether the Commission had lawfully rejected a complaint by a French software wholesaler, Micro Leader Business against Microsoft. The CFI ruled against the Commission and, in doing so, confirmed that Article 82 (ex 86) E.C. may limit copyright protection.

Micro Leader Business ("MLB") had been importing into France Microsoft French language software which had been put on the market in Canada. There were significant price differences between France and Canada so such imports were sold at markedly lower prices than French prices. Microsoft France issued a "Bulletin" to its dealers informing them that "measures had been taken to reinforce the ban on marketing Canadian products outside Canada". MLB complained to the Commission that, as a result, it had lost significant orders and that such action was contrary to what are now Articles 81 and 82 E.C.

The Commission rejected the Article 81 E.C. complaint, on the basis that the measures concerned were the lawful exercise of Microsoft's copyright in the goods. The goods had been put on the market in Canada and therefore Microsoft had not "exhausted" its rights in the Community, and could rely on Article 4(c) of Directive 91/250 to oppose such imports. On the evidence supplied (meaning, it appears, only the Bulletin) and in these circumstances Microsoft's actions were construed as unilateral, not pursuant to an agreement with its Canadian and/or French dealers. The CFI upheld this approach.

As regards Article 82 E.C., however, the CFI would not accept a similar logic. MLB argued that Microsoft was unlawfully maintaining prices at a higher level on the EEA market than in Canada. The CFI noted that the evidence supplied by MLB constituted at the least an indication that, for equivalent transactions, Microsoft applied lower prices on the Canadian market than on the Community market and that the Community prices were excessive. Notably, the resale price of Canadian sourced products was significantly lower than French prices, despite the expense of importing such products from a third country.

Referring to *Magill*, the CFI then held: "Whilst, as a rule, the enforcement of copyright by its holder, as in the case of the prohibition of importing certain products from outside the Community into a Member State of the Community, is not itself a breach of Article 86 [now Article 82] of the Treaty, such enforcement may, in exceptional circumstances, involve abusive conduct".[28]

As a result, the Commission could not just rely on Microsoft's copyright defence and was bound to investigate further what were the reasons for such price differences and whether the information it had did not constitute evidence of abusive conduct by Microsoft. The Commission's decision rejecting MLB's complaint was annulled. The Commission has indicated that it is now reviewing the matter further.

Complaint rejections and commission priorities

In December 1999, the CFI ruled on another set of rejections by the Commission of *complaints in the car sector*.[29] The rulings repeat that the Commission has a defined discretion to assess which cases it will take up as being in the Community interest, having considered the seriousness of the infringement, and can validly reject a case, *inter alia* when a remedy is available before the national courts.

28. Points 54 and 55.
29. *SGA v. Commission*, Joined Cases T-189/95, T-39/96 and T-123/96; *Sodina v. Commission*, Joined Cases T-190/95 and T-45/96; *Européenne automobile*, Joined Cases T-9/96 and T-211/96. Judgments of December 13, 1999.

Two points are of interest: First, the CFI emphasises that mere silence on the part of the Commission when it has received a complaint cannot be characterised as an *implied decision* not to act, in the absence of an express provision to that effect in the specific Community framework, which is not the case in Regulations 17/62 and 99/63. Secondly, the CFI ruled that when the Commission is faced with a situation where the suspicion of anti-competitive behaviour by several large undertakings in the same economic sector is raised, the Commission is entitled to concentrate its efforts on one of the undertakings concerned, while indicating to economic operators which may have suffered damage as a result of the conduct of the other parties concerned that it is open to them to bring an action in the national courts.[30] Notably, the Commission was entitled to focus its resources on taking action against apparently similar conduct by *Volkswagen*, rather than against Peugeot and Citroën ("PSA").

In February 2000, the CFI issued its judgment in another case involving a Commission rejection of a complaint, *Stork Amsterdam*.[31] The case is of interest because the Commission, having taken a decision closing a file, sought to reactivate the procedure, apparently fearing legal challenge that it had not seriously reviewed the complaint. Instead, the CFI held that the Commission had no grounds for reopening the file.

Stork Amsterdam is a company which produces machines for manufacturing plastic bottles. In August 1987 Stork entered into a co-operation agreement with a French company Serac, which makes machines for aseptically filling plastic bottles, so as to market complete production lines covering the two activities. The two companies undertook to purchase from each other the machines which they produced, to exchange relevant know-how and to sell them under their joint names. The co-operation agreement also contained a restrictive covenant against selling competing machines during the co-operation agreement and for four years after termination.

In 1989 Stork sought to terminate the agreement, and threatened to file a complaint alleging infringement of (what was then) Article 85 E.C. if Serac refused. Serac did not agree, so Stork filed and Serac responded by notifying the agreement. In 1991, the Commission responded to Serac with, in effect, a discomfort letter stating that the agreement could not come within the specialisation block exemption as it stood because of the non-competition provisions. The Commission suggested that the agreement be amended to come within Regulation 417/85. The Commission also said that it did not propose to open a formal procedure because of the limited economic importance of the case. If the parties did not amend, the Commission suggested that the matter should be brought before the national courts or competition authorities. The Commission sent a similar letter to Stork, also indicating that if Stork did not respond within four weeks, the Commission would "close the file".

The agreement was then terminated without amendment (*i.e.* with the issue of the post-termination non-competition clause unresolved). In 1992 Serac asked the Commission to review its analysis on the basis that the Commission had a poor understanding of the market and the effects of the agreement. In 1993 the Commission rejected Serac's arguments and ended the relevant letter with a statement that "the matter should be considered closed" (and copied the letter to Stork). In May 1993 Serac sought to annul that decision, but withdrew its action when the Commission argued that its letter had only reflected a provisional view and offered to pursue its analysis further. The Commission then sent both parties requests for information and reviewed the matter further with them, ultimately rejecting the complaint in 1996 on the basis that the conditions of Article 85(3) E.C. were satisfied. Stork then sought annulment of that decision, amongst other things, questioning whether the Commission was entitled to conduct a fresh analysis of the matter after its earlier letters in 1991 and 1993.

The CFI found for Stork, on the basis that the Commission's letters in 1991 and 1993 were not merely preliminary observations made informally by Commission officials, but recorded a decision to take no further action on the complaint. The Commission was not entitled to reopen the procedure since such a decision was not based on new points of law or fact warranting re-examination of the matter. In particular, the Commission had not explained in its reasons rejecting Stork's complaint why the case was subsequently viewed as having sufficient economic importance to justify a fuller investigation.

Overall, a long and not very satisfactory story which is clear support for the Commission's view that private disputes like this should be in the national courts, not before competition authorities.[32]

30. *SGA v. Commission*, point 59.
31. Case T-241/97, Judgment of February 17, 2000.

32. In March 2000, the ECJ also ruled on two appeals against the CFI's decision in the *Aalsmeer Dutch Flower Auctions* case. The ECJ upheld the CFI's decision annulling the Commission's rejection of the relevant complaint for inadequate reasoning, and allowed the complainant to appeal even though it had reacted late to a letter of the Commission proposing to close the relevant procedure. *VBA v. Commission*, Case C-265/97P and C-266–97P, Judgments of March 30, 2000.

Cement appeals (CFI)

In March 2000, the CFI issued its judgment in the *Cement Cartel* appeals.[33] The CFI reduced the amount of the fines imposed by some Euro 140 million from Euro 248 million. This is the largest competition case dealt with by the CFI with some 42 undertakings or associations involved. The judgment is huge. As a result only a summary will be published in the European Court Reports. However, the full text can be accessed on the European Court's website.

It may be useful to recall the main elements of the *Cement* decision. The Commission had found that there was a series of agreements and concerted practices designed to share the European markets for grey and white cement.[34] The Commission found that some 42 companies and associations had been involved in an agreement or concerted practices starting in 1983, based on the principle that members of the European Cement Association ("Cembureau") should not export cement into the domestic markets of other Cembureau members and that, where exports occurred, prices for such exports should be aligned with the prices charged in the destination market. The Commission also found that various parties had been involved in concerted practices regarding their export of cement to third countries. In respect of white cement, the Commission found that the producers had also reached an agreement designed to channel surplus production into export markets in order to prevent disruption of markets within the Community.

The Commission fixed the starting date of the cartel as January 14, 1983, the date of a meeting at which senior representatives of the European cement industry agreed on a rule of "non-transhipment to home markets", which prohibited any export of cement within Europe which might destabilise neighbouring markets. When the Commission adopted its decision, the Commission was not certain that the infringement had ceased. The Commission imposed fines on Cembureau, eight national associations, and 33 cement producers for infringement of Article 81 E.C. It imposed fines of some Euro 32.5 million on the producers involved and fines of Euro 100,000 on each of the trade associations.

Before the CFI, the main defence pleas were that the Commission:

(1) had incorrectly found that several applicants attended the January 1983 meeting and had therefore participated in the cartel from that date;

(2) had failed to inform various associations of undertakings that it intended to impose a fine on them, infringing their rights of defence.

(3) did not give sufficient access to the investigation file during the administrative procedure to the addressees of the decision; and

(4) had infringed various essential procedural requirements.[35]

In general, the CFI upheld the Commission's decision that there was an agreement between the applicants which was designed to ensure non-transhipment to home markets. However, it held that the Commission had not adequately proved the participation of some undertakings in that agreement. In the case of the other addressees of the decision, the Court held that the duration of their participation in the infringement was shorter than the Commission had found in its decision. Notably, the Court found that the Commission should have stated its intention to adopt 14, January 1983 as the starting date of the infringement with regard to all the addressees of its decision. Since it had not done so, the Court determined for each individual undertaking the starting date of its participation in the infringement, without taking account of the Commission's test of representation at that meeting.

The CFI accepted the plea that the Commission had not announced its intention to impose a fine on the associations in the Statement of Objections and therefore annulled the fines imposed on them. Almost all the addressees of the decision complained that the Commission did not give them sufficient access to the investigation file during the administrative procedure. The Court required the Commission to send that file to the Court, so that the file might be inspected by the Court and, as appropriate, by the parties. Two of the applicants were able to prove that insufficient access to the file during the administrative procedure had deprived them of evidence that might have been useful to their defence. The decision was therefore annulled with regard to them. As a result certain fines were annulled and others reduced, by in total some Euro 140 million.

The main points of principle set out in the Court's judgment are as follows: First, the Court held that the Commission must give the parties

33. Joined Cases T-25/95, *Cimentières CBR and others v. Commission*, Judgment of March 15, 2000.

34. [1994] O.J. L343/1.

35. *e.g.* the whole of the Statement of Objections and the documents relating thereto were not accessible during the administrative procedure; there had been failures to translate certain documents; undertakings had had an inadequate period to reply to the Statement of Objections; the proceedings had been excessively long; Article 6 of the European Convention of Human Rights had been infringed because the Commission was both prosecutor and judge; and the Advisory Committee had not been properly consulted.

access to the entire investigation file, except for documents containing business secrets of other undertakings, other confidential information and internal documents of the Commission. If documents are confidential, either non-confidential versions must be provided, or the Commission must send to the parties concerned a sufficiently precise list of the documents posing problems, so as to enable them to decide whether the documents described are likely to be relevant for their defence. Such a list must include a *description* of the content of the documents listed (so a list with blanks appears not to be enough).[36]

Secondly, the Court ruled that the finding that the Commission did not give the applicants proper access to the investigation file cannot, by itself, lead to annulment of the contested decision. For annulment it must be found that the lack of proper access to the investigation file prevented the parties from perusing documents which were likely to be of use in their defence. The Court held that there would be an infringement of the rights of the defence if there was:

> "even a small chance that the outcome of the administrative procedure might have been different if the applicant could have relied on those documents during that procedure".[37]

The parties only have the right to express their views on documents used to prove an infringement against them, not those used against *another* party. If documents which were not available to the defence were used as evidence of an infringement, then they must be excluded. This does not, however, mean annulment of the decision as a whole. It means only that the Commission could not have relied on such evidence to prove an objection.[38] Nor can they insist on seeing internal documents of the Commission in the administrative proceedings.[39] Exceptionally this might be allowed in proceedings before the European Courts, however.

Thirdly, the CFI stated that if the Commission intends to fine a party it must inform that party. In the present case what this meant was that the Commission had to make clear that it intended to fine both an association of undertakings *and* the members of that association for an infringement, on the basis that the association *also* participated therein.[40] In such a case, the Commission also had to prove the association's participation, establishing conduct on the part of the association which is separate from that of its members.[41]

Fourthly, the Court rejected one applicant's plea that its rights of defence were infringed because of the *excessive length of the administrative procedure*. The Court recalled that the administrative procedure lasted five years and eight months, from the initial investigations in April 1989 to the adoption of the contested decision on November 30, 1994. The Court considered that the duration of each of the stages of that procedure was reasonable, and the fact that it took the Commission 20 months after the end of the hearings to adopt the contested decision was not unreasonable, since the decision had to be sent to 42 undertakings and associations of undertakings, concerned 24 separate infringements, and had to be drawn up in the nine official Community languages.[42]

Fifthly, the CFI also made a number of interesting rulings on what constitutes evidence of *participation in an unlawful agreement or concerted practice*. Thus, the CFI ruled that, where an undertaking or association has participated, even without playing an active role, in one or more meetings:

> "at which a concurrence of wills emerged or was confirmed relating to anti-competitive conduct and by virtue of its presence has subscribed to or at least given the impression to the other participants that it was subscribing to the subject-matter of the anti-competitive agreement concluded and subsequently confirmed at those meetings, it must be considered to have participated in that agreement".

To show otherwise, the Court held that the undertaking or association had to *prove that it openly distanced itself* from the unlawful collusion or informed the other participants that it intended to take part in those meetings with different objects in mind. In the absence of proof that it distanced itself, the fact that the undertaking or association does not abide by the outcome of those meetings is not sufficient to relieve it of full responsibility for the fact that it participated in the agreement or concerted practice.[43] *The theme is clear, sitting in meetings and not objecting will be treated as participation.*

Sixthly, the Court stressed as regards the *concept of concerted practice*, that this implies the existence of *reciprocal* contacts. However, "that condition of reciprocity is satisfied where the disclosure by one competitor to another of future intentions or conduct on the market *has been sought or, at the very least, accepted* by the other competitor" (emphasis added). It is the same where a meeting, in the course of which a party has been informed by its competitor of its intentions or future conduct, was initiated by that party and it is apparent from the record of that meeting that no reservations or objections were expressed when the competitor informed it of its

36. Paras 142–144; 147–148.
37. Paras 156, 240–241.
38. Paras 323 and 364.
39. Paras 284, 318 and 420.
40. Paras 480–481 and 483–485.
41. Para. 1325.
42. Paras 706–711.
43. Paras 1353, 1389, 3199.

intentions. In those circumstances, the attitude of that party at the meeting cannot be reduced to the purely passive role of a recipient of the information, which its competitor unilaterally decided to pass on to it, without any request by it. *Again, the message is clear, setting up a meeting in which a competitor indicates its future competitive intentions may well be construed as participation in unlawful conduct.*[44]

Seventhly, the fact that a producer in a Member State knew that other European producers purchased from it to reduce its direct sales on Western European markets, does not mean in itself that the producer was party to an agreement or concerted practice contrary to (what is now) Article 81(1) E.C. Such knowledge "can be deemed to reveal unlawful conduct only if it is established that it was accompanied by the adherence" of the producer to the object pursued by those European producers through the purchases concerned. Since such an object is against the producer's interest, it would be necessary to provide evidence of a *commitment* by that producer that, in return for such purchases, it would reduce its direct sales to the European market concerned.[45]

Collective dominance

In March 2000, the European Court of Justice ("ECJ") ruled on the appeals of *Compagnie Maritime Belge and Others* against the CFI judgment which confirmed the Commission's *CEWAL* decision.[46] The ECJ rejected various arguments of the companies related to findings of collective dominance and the abuses concerned, but overturned the CFI's judgment and therefore annulled the Commission's decision on one issue. The companies concerned had pleaded that in the Statement of Objections the Commission had only threatened to impose fines on CEWAL, not its members, whereas the Commission had ultimately imposed fines on member undertakings. The CFI had rejected the claim on the basis that CEWAL did not have legal personality. The ECJ found that this was a breach of fundamental procedural rights and annulled the fines on the companies concerned (some Euro 98 million).

The main substantive issues arising in the case were the use of agreements or concerted practices as proof of a finding of collective dominance, predatory behaviour and the relevance of an exemption to findings of abusive conduct.

As regards collective dominance, members of CEWAL argued that the CFI had incorrectly recycled agreements or concerted practices between them to establish the economic links required for collective dominance. The ECJ disagreed. First, the Court emphasised that simultaneous application of (what were then) Articles 85 and 86 E.C. could not be ruled out *a priori*. Each article focused on different issues. Article 85 E.C. concerned anti-competitive practices which may appreciably affect trade between Member States irrespective of the market position of the undertakings concerned. Article 86 E.C., on the other hand, was concerned with the abusive exercise of economic strength by one or more undertakings.[47]

Secondly, the fact that two or more undertakings are linked by an agreement within the meaning of Article 85(1) E.C. was not, in itself, sufficient or indispensable for a finding of collective dominance. However, such an agreement might result in undertakings being so linked as to present themselves on the market as a collective entity. The Court held:

> "The existence of a collective dominant position may ... flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between the undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question".[48]

As regards the predatory behaviour, it may be recalled that the case concerned so-called "fighting ships", the practice of conference members using a ship to match or undercut the prices of a competitor while sharing the losses incurred between them, in order to eliminate the competitor. Much of the debate in the case focused on whether the conference members were alleged to have priced their "fighting ships' " services at or below cost. The ECJ avoided this and focused instead on the selective nature of the acts concerned by a dominant party eliminating competition. First, the Court noted that the liner conference reaped a dual benefit from selectively cutting its prices in order to deliberately match those of a competitor. It eliminated the principal, if not the only means of competition open to the competing undertaking. It could also continue to require that users pay higher prices for the services not threatened by the competition. Secondly, the ECJ noted that the conference had over 90 per cent of the market and only one competitor.[49]

Finally, members of CEWAL argued that they could not be criticised for loyalty practices which

44. Para. 1849.
45. Paras 3443–3444. Some have now appealed to the ECJ.
46. Joined Cases C-395/99P and C-396/96P, Judgment of March 16, 2000.
47. Paras 33–34.
48. Paras 43–45.
49. Paras 117–119.

were exempt under Regulation 4056/86. The ECJ again disagreed. The grant of an exemption under Article 85(3) E.C. did not prevent the application of Article 86 E.C. The fact that operators subject to effective competition have a practice which is authorised does not mean that adoption of that same practice by an undertaking in a dominant position can never constitute an abuse of that position. Moreover, Regulation 4056/86 expressly provides that abuse of a dominant position is prohibited, no prior decision to that effect being required. Finally, this was consistent with the settled case law that there can be no exemption of any kind for an abuse of dominant position.[50]

A "relative" power to set a compulsory tariff

In March 2000, the CFI ruled on the appeal of Italian customs agents, upholding the Commission's *CNSD* decision.[51] This is an important judgment given the Commission's current emphasis on competition and professional services. It will be recalled that the CNSD (the Italian National Council of Customs Agents), had power under Italian law to set the tariffs for customs agents services in Italy and had done so by a decision in 1988 which had fixed minimum and maximum rates for such services and certain mandatory invoicing arrangements. After a complaint, the Commission investigated and found that although the National Council operated pursuant to national law, it retained discretion to determine what tariffs would be applied. Further, the Commission found that the agents were undertakings and the National Council was an association of undertakings. Accordingly, in 1993, the Commission found that the decision was contrary to (what was then) Article 85(1) E.C. Then, in 1996 the Commission brought proceedings against the Italian Republic for setting a compulsory tariff for all customs agents, contrary to (what was then) Articles 5 and 85 E.C. Proceedings were stayed pending the ECJ's ruling, which upheld the Commission's action in 1998. The ECJ found that the Italian Republic had only granted the CNSD a *"relative" decision-making power* to CNSD to adopt a decision, setting a compulsory tariff for all customs agents in Italy.

The main issue before the CFI therefore, in considering the validity of the Commission decision, was whether the National Council had been required to set the tariff in question and should therefore not be held to have taken a decision caught by Article 85(1) E.C.

In a useful survey of the relevant cases, the CFI held that the public law status of the CNSD did not preclude application of Article 85(1) E.C. The members of the CNSD, and its related Departmental Councils could not be characterised as independent experts, obliged to take into account public interest criteria. As a result, their decisions could not be characterised as state decisions and Article 85(1) E.C. could apply. Nor was the anti-competitive conduct required by national legislation or the result of national legislation which left no possibility of competitive activity.[52] On the facts, the CNSD had a considerable margin of discretion to take decisions which it had exercised to make price increases, to control methods of invoicing and to allow derogations from the minimum tariff set. Even though Italian law imposed limitations on competition and made real competition difficult in practice, it did not preclude the continued existence of some competition which could be restricted by the activities of the customs agents. Further, within the room for manœuvre which CNSD had to perform the obligations imposed on it, the CFI found that the CNSD ought to have acted so as not to restrict the existing level of competition.[53]

Exclusive rights for waste recycling

In May 2000, the ECJ ruled on an interesting case concerning Article 90 (now Article 86) in the context of building waste recycling: *Sydhavnens Sten & Grus v. Kobenhavens Kommune.*[54]

Sydhavnens Sten & Grus ("SS&G") is a company involved, amongst other things, in the recycling of environmentally non-hazardous building waste in the form of concrete, brick and asphalt. In 1993, SS&G obtained approval from the Municipality of Copenhagen ("Copenhagen") to recycle building waste within the boundaries of Copenhagen. SS&G then concluded a contract with the Port of Copenhagen to set up a plant for the sorting and crushing of building waste. However SS&G did not have the right to process building waste *produced* within Copenhagen. When SS&G sought that right, Copenhagen rejected the request, on the basis that the processing of building waste produced within its boundaries should primarily take place in another processing station, and that it had granted the rights concerned to three other undertakings.

The result was that SS&G could process building waste from *outside* Copenhagen, but could not access waste created in Copenhagen, despite the fact that its plant was situated there.

What had happened is that Copenhagen had established a system by municipal regulation authorising a limited number of undertakings to collect and process building waste within its boundaries, after a regional plan had determined that such a limit was essential to establish a

50. Paras 130–135.
51. Case T-513/93, Judgment of March 30, 2000.
52. Paras 54–60.
53. Paras 71–72.
54. Case C-209/98, Judgment of May 23, 2000.

processing plant which would be sufficiently large to give the best quality of recycled product. SS&G challenged this limitation, arguing that the regulations concerned were contrary to Article 90 (now 86) E.C. with Article 34 (now 29) E.C. and/or Article 86 (now 82) E.C. The *Ostre Landsret* (Eastern Regional Court) then referred the related questions to the European Court.

On the competition arguments, the Court held that the three undertakings authorised to collect waste in Copenhagen had been granted exclusive rights by the Danish State within the meaning of Article 90(1) (now Article 86(1)) E.C. The national court had therefore to determine whether they had a dominant position and would, merely by exercising the exclusive rights, be led to abuse that dominant position, or if such exclusive rights were liable to create a situation in which they would commit such an abuse.

The ECJ suggested, as regards the assessment of dominance and market definition, that the Court should consider whether the processing of environmentally non-hazardous building waste is a distinct market from other types of waste and whether the exclusive right restricted competition not only in the municipality of Copenhagen, but also in a wider area. Then the national court should consider whether such an area was a substantial part of the common market. The ECJ noted that Copenhagen's building waste was in itself one third of that of Denmark.

As regards the "Article 86 abuse", the ECJ noted first that the grant of the exclusive rights did not infringe Article 86 E.C. The Court also noted that, according to Copenhagen, each undertaking was free to determine its own prices and that if Copenhagen considered them excessive it could request the Danish competition authorities to intervene. Nor was there any allegation of abusive conduct in relation to other terms of business. The Court also found that Copenhagen had entrusted a task of general economic interest to the three undertakings.

Copenhagen had therefore chosen to resolve a serious environmental problem, the burial of building waste in the ground instead of recycling. In order to establish a system of recycling, which would be to a high standard, Copenhagen had considered it necessary to set up a high-quality centre. To make that centre viable, Copenhagen had considered it necessary to ensure that the centre was guaranteed a significant flow of waste by granting an exclusive processing right, limited in time to a period in which the investments could be written off, and in space to the boundaries of the Municipality. Even if the grant of exclusive rights restricted competition, that grant could be regarded as necessary for the performance of a task serving the general economic interest. Nothing before the Court therefore suggested that the exclusive rights granted would lead the undertakings to abuse their dominant position.[55]

Terminal dues, postal remail and Articles 86 and 82 E.C.

The year has been an important year for postal competition, both at the level of the European courts and the Commission (as discussed below under Article 82 E.C. issues). In February 2000, the ECJ had to rule on two references from the *Oberlandesgericht* (Regional Appeals Court), Frankfurt in two claims by Deutsche Post that it could charge its internal postal rates to cross-border remail, rather than just "terminal dues"—the lower rate for handling the final stage of international post. Interestingly, the ECJ said *yes* in the present circumstances.

The first case involved Citibank which centralised the data processing of its credit card operations (drawing up account statements and confirmations, detailed statements of account, and payment and settlement requests). Prior to July 1995, the data processing was carried out in Germany with printing and despatch in the Netherlands. After July 1995, the data processing was centralised in the United States with European printing and despatching in the Netherlands. In each case, therefore, Citibank's Dutch subsidiary printed out the relevant letters and dispatched them. In practice, that means that in Citibank's system letter-post items to addressees resident in Germany are given to the Dutch Post Office which charges the normal rate for international mail, some DM 0.55 and remits between DM 0.37 and 0.40 to Deutsche Post as terminal dues. Deutsche Post objected to this, and claimed that it was entitled to charge its full internal rate for such mail, namely DM 1 per letter. This was because under the Universal Postal Convention, a post office can do so with respect to international mail where senders resident in its territory post letters or cause them to be posted in a foreign country, with the object of profiting from lower charges there or simply if such items are posted in large quantities (Article 25(1)). Deutsche Post, therefore, claimed DM 3,668,916 from Citibank in Germany, arguing that it was the German sender and within this rule.

The second case involved Gesellschaft für Zahlungssysteme ("GZS"), whose members are credit institutions which issue the *Eurocard* credit card. GZS is the largest operator in respect of transactions carried out using Eurocard credit

55. In June 2000, the ECJ gave a further ruling on the application of Articles 86 and 90(1) (now Articles 82 and 86(1)) E.C. to *national monopolies on employment agencies/services*, applying the *Job Centre* case law. *Giovanni Carra*, Case C-258/98, Judgment of June 8, 2000; see [1999] I.C.C.L.R. p. 7.

cards in Germany. Since the summer of 1995, GZS prepared monthly statements for cardholders and then transmitted the data to its Danish contractual partner for it to draw up and post the statements. The latter gave them to the Danish Post Office, paying the international rate there. The Danish Post Office then paid some DM 0.36 to the Deutsche Post in terminal dues. Deutsche Post again objected and sought DM 623,984 from GZS, applying its internal rate.

The Frankfurt Court referred a series of questions to the ECJ, based mainly on Articles 5 (now Article 10), 90 together with Articles 86 (now Articles 86 and 82) and Article 59 (now Article 49) E.C. Essentially the Court asked whether the Deutsche Post claims, if based on the fact that large quantities of mail were in question, were unacceptable.

At first sight, one might expect the Court to answer a clear yes to this question, since in principle banks and other large mail users should be allowed to use services available anywhere in the European Union at the applicable rate. However, the issue is more complex than that for two reasons, which the ECJ noted. First, it is clear that the relevant provision of the Universal Postal Convention was introduced because the international flows of mail do not balance out and can lead to a situation where the terminal dues do not cover the costs of the postal services in the country to which the mail is sent. Secondly, it was clear that huge amounts of mail were in issue. Notably, Citibank's Dutch subsidiary prints out and sends from the Netherlands to addressees in other Member States some 42 million items of mail per year, which are drawn up on the basis of data processed by Citibank in Germany and transmitted by electronic transfer. GZS transmitted data relating to some seven million credit card holders in order for that data to be sent by the Danish Post office.

The ECJ first confirmed that Deutsche Post was an undertaking entrusted with exclusive rights under Article 90(1) (now 86(1)) E.C. and in a dominant position on the collection, carriage and delivery of mail in Germany. After outlining the provisions of Article 86(1) and (2) E.C., the Court held that if the Deutsche Post were obliged to forward and deliver to addressees resident in Germany mail posted in large quantities by senders resident in Germany using postal service of other Member States, without any provision allowing it to be financially compensated for all the costs occasioned by that obligation, the performance in economically balanced conditions of its task of general interest would be jeopardised. The German Post Office could not be expected to bear the costs entailed in its public services of forwarding and delivering international items of mail *and* the loss of income resulting from the fact that bulk mailings are posted to German addresses from abroad.[56] In such circumstances, the Court considered that Deutsche Post was entitled to treat cross-border mail as internal mail, and consequently to charge internal postage.

However, the Court added two qualifications. First, it would be otherwise if terminal dues for incoming cross-border mail within the Community were fixed in relation to the actual costs of processing and delivering it by agreements between the postal services (as provided for in Directive 97/67 on postal services). Secondly, Deutsche Post had to offset the terminal dues paid by the other postal services of other Member States and could only charge the balance up to the full internal rate—not the full internal rate in addition thereto. To do otherwise would be an abuse within Article 86 (now 82) E.C.

Continuous commercial relations and unilateral measures to stop parallel imports

On October 26, 2000, the CFI annulled the Commission's decision in *Bayer Adalat* in an important ruling.[57] The Commission's decision concerned Bayer's policy to limit supplies of its product *Adalat* to wholesalers in France and Spain, since the products were being exported in large amounts to the United Kingdom, undermining the viability of sales by Bayer's U.K. subsidiary and leading to supply shortages in Spain also. The Commission intervened and ruled that the relevant events amounted to an agreement caught by what was then Article 85(1) (now Article 81(1)) E.C. Bayer argued that its policy was unilateral.

One of the features of the Commission's decision was an extensive review of various contacts between Bayer and its wholesalers which the Commission held to indicate continuous commercial relations between these parties, involving the acceptance of an obligation not to export the relevant products and/or an acquiescence in Bayer's policy to restrict such exports. On its face, the relevant account was less than convincing, in particular in so far as wholesalers which had switched the pattern of their ordering to try and circumvent Bayer's policy were deemed thereby to have adapted their commercial policy to meet Bayer's objectives. Bayer was fined Euro 3 million.

Beyond the particular facts there were also major concerns at two levels. First, the resulting notion of "agreement" in Article 81(1) E.C. appeared so broad that multi-national companies were concerned what they could do without risk of being caught by that prohibition. Secondly, the Commission appeared to be using Article 81 E.C. infringement proceedings against undertakings as

56. Points 50–51.
57. *Bayer v. Commission*, Case T-41/96, Judgment of October 26, 2000.

an instrument to force harmonisation of differing price regulations for pharmaceutical products in the different Member States.

On the Commission's side, the argument appears rather to have been that if it could not do this sort of case, then some indirect restrictions on parallel imports have to be accepted, which is a dangerous precedent for the pharmaceutical industry and others.

The CFI's judgment is essentially in three parts. First, there is a detailed review of the facts and circumstances relied on by the Commission to show an infringement of Article 81(1) E.C. The CFI found a clear policy on the part of Bayer to restrict exports by supplying French and Spanish wholesalers only at the level of their habitual needs. However, the Court did *not* find a term communicated to and accepted by wholesalers that they would not export the products in question, and therefore did not find an agreement to limit parallel exports of Adalat to the United Kingdom. Nor had the Commission proved the existence of acquiescence by the wholesalers, whether express or implied, in the attitude adopted by the manufacturer (*i.e.* the policy of preventing parallel exports). On the contrary, it found extensive evidence of wholesalers ordering whatever they could, with the intent to export.

Secondly, the CFI focuses on what type of conduct should be caught by Article 81(1) E.C. and emphasises that there are limits thereto, which include unilateral action of the type concerned here, even if that has external effects (following the *Viho* judgment). The CFI ruled that for an agreement in the sense of Article 81(1) E.C., the Commission had to show a "concurrence of wills between economic operators and the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market". Such a concurrence of wills did not exist where wholesalers continued commercial relations with a manufacturer when it adopted a new policy, which it implemented unilaterally, and the wholesalers' conduct was *contrary* to the policy. The position might be different under Article 86 E.C.[58] The CFI concluded:

> "... provided he does so without abusing a dominant position, and there is no concurrence of wills between him and his wholesalers, a manufacturer may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example to hinder parallel imports, the implementation of that policy may entail restrictions on competition and trade between Member States."[59]

Thirdly, the CFI makes it clear that the Commission should not be using the rules in the E.C. Treaty addressed to undertakings to achieve the task of harmonised price regulation in the pharmaceutical sector.[60]

From a practitioner's perspective there remain difficult issues, which are well set out in the judgment. First, the CFI helpfully distinguishes other parallel import case judgments (such as *Sandoz*, *Tipp-Ex* and *AEG*) on the facts.[61] The process serves to highlight just how careful Bayer must have been in pursuing its unilateral policy to make sure that no one communicated to a wholesaler the message: "we will only supply you on condition that you do not export". On the contrary, Bayer repeatedly appears to have talked of supply shortages and focused on a close appraisal of the wholesaler's needs to supply its territory. One may also compare here the position in the *Volkswagen* case, where there was, it appears, a policy to reduce supplies to Italy to stop parallel imports, but that was held to be all part of agreements with dealers to stop such exports.[62]

Secondly, one reads with interest that there were apparently "bad" internal documents in the case, a slide presentation on the parallel imports, instrumental in forming Bayer's policy to restrict them unilaterally if it could.[63] Yet in this case, these documents did not affect the CFI's assessment against Bayer, precisely because they did not go so far as to indicate an intention by Bayer to prohibit or to monitor the quantities actually exported by each of the wholesalers under examination and to react in consequence. The documents did *not* show a strategy of monitoring the final destination of the products delivered and the penalisation of the wholesalers.

Pension funds for medical specialists

In September 2000 the ECJ ruled that a Member State does not infringe Articles 81 and 10 E.C. by making membership of an occupational pension fund compulsory at the request of a profession's representative body.[64] Nor does a Member State violate Articles 86 and 82 E.C. by conferring on a pension fund the exclusive right to manage a supplementary pension scheme for the members of a

58. Paras 173–175.
59. Para. 176.
60. Paras 179, 181.
61. Paras 158–171.
62. In July 2000, the CFI mainly upheld the Commission's decision fining Volkswagen for various measures designed to prevent parallel imports from Italy to Germany and Austria. However, the Court reduced the fine from Euro 102 million to Euro 90 million on two grounds. First, the Court held that the Commission had not established that a split margin system (which involved paying a percentage of discount only on proof of registration in Italy) and termination of certain dealer contracts were measures adopted to hinder exports to final consumers and authorised dealers in other Member States. Secondly, the Commission had not proved that the infringement lasted as long as claimed (*i.e.* after 1996). Case T-62/98, *Volkswagen v. Commission*, Judgment of July 6, 2000.
63. Paras 82–89.
64. Joined Cases C-180/98–C-184/98, *P. Pavlov and O. v. Stichting Pensioenfonds Medische Specialisten*, Judgment of September 12, 2000.

profession, when there is no evidence that the fund is not in a position to satisfy the members' demand and, therefore, is led to abuse its dominant position.

The context was proceedings brought by five medical specialists practising in the Netherlands who challenged orders issued by the Dutch Pension Fund for Medical Specialists refusing them exemption from participation and demanding payment of unpaid contributions. The specialists preferred to pay to a different fund for the health sector as a whole.

The Court made it clear that an agreement between the members of a liberal profession to guarantee a certain level of pension to all members does not fall outside the scope of Article 81(1) E.C., by reason of its nature or purpose, unlike agreements concluded in the context of collective bargaining between employers and employees.[65] The Court held on the facts that medical specialists and the Dutch Pension Fund were "undertakings" in E.C. competition law and concluded that the agreement did not infringe Article 81(1) E.C. Although the agreement has a restrictive effect because it standardises part of the costs of medical practitioners, the Court held that this was not appreciable as the cost was insignificant in comparison to others, such as costs for medical equipment. The cost of the pension scheme also had only a marginal and indirect influence on the final costs of such specialists' services.[66]

Commission decisions

Cartels

Box 5: Cartels

— *Seamless steel tubes*:	"Europe Japan Club".
— *FETTSCA*:	Agreement not to discount from published tariffs.
— *Lysine settlement*:	Euro 110 million fine (in the U.S., executives were fined and sent to jail).
— *Eurozone exchange investigation*:	SOs to 120 parties.
— Small reductions for length of proceedings:	Euro 100,000 (*e.g.* in FETTSCA).
— Need for harmonised leniency programmes?	

This year has seen various European cartel investigations and also parallel investigations to American cartel cases, where European executives have had to accept jail terms as part of settlements with the U.S. authorities.

In December 1999, the Commission imposed fines totalling some Euro 99 million on eight producers of *seamless steel tubes*, including four individual fines of Euro 13.5 million.[67] The Commission found that the companies had established a cartel called the "Europe Japan Club", under which they "respected" each others' domestic markets for standard steel borehole pipes and project transportation pipes used in the exploration and transport of oil and gas. The cartel was found to have operated from 1990 to 1995 (except as regards British Steel which ceased producing such pipes in 1994). In setting the fines, the Commission took into account the limited impact of the cartel, the fact that the sector was in long-term crisis and that its position had deteriorated since 1991. Two firms, Vallourec and Dalmine also had their fines reduced because they co-operated with the Commission in establishing the facts.

In May 2000 the Commission imposed fines on 15 *liner shipping* companies for agreeing not to offer discounts from their published tariffs.[68] The companies were members of the Far East Trade Tariff Charges and Surcharges Agreement ("FETTCSA"). The Commission was concerned that the agreement extended activities of the FEFC liner conference to non-conference shipping lines, reducing competition from such companies to the conference. The parties to the agreement argued that it was just a technical agreement, permitted under the liner shipping block exemption, Regulation 4056/86, and designed to standardise their offers to customers.

The fines were only Euro 7 million in total, because the Commission considered that an agreement not to discount was not as serious as actual price-fixing. The Commission also had no evidence as to the effects of the infringement on actual price levels; the effects appear to have been short-lived, the parties ceased their activities after the Commission intervened and the Commission received some co-operation. The Commission reduced fines on each party by Euro 100,000 on account of the considerable duration of the proceedings (April 1994 to May 2000).

65. As the Court established in *Albany* last year and confirmed this year in Case C-222/98 *Van der Woude v. Stichting Beatrixoord*, Judgment of September 21, 2000. In *Van der Woude*, the ECJ ruled that a collective labour agreement establishing a health care insurance scheme falls outside the scope of Art. 81(1) E.C. even if the insurer managing the scheme subcontracts the insurance business to another company.

66. In March 2000, the CFI upheld the Commission's decision rejecting a complaint by *Kish Glass* that Pilkington United Kingdom had abused a dominant position on the Irish market for 4 mm float glass. Pilkington had countered that the relevant product market was float glass of all thicknesses and the relevant geographic market was Community wide. In such circumstances it was not dominant. After a detailed investigation, the Commission agreed. The CFI noted that its review of complex economic appraisals by the Commission was essentially limited to determining if there had been a manifest error. The CFI reviewed the steps followed by the Commission and found no such error. Case T-65-96, Judgment of March 30, 2000.

67. Commission Press Release IP/99/957, December 8, 1999.

68. [2000] O.J. L268/1.

In June 2000 the Commission fined Archer Daniels Midland ("ADM"), Ajinomoto and three other companies a total of almost Euro 110 million for operating a global price-fixing cartel for *lysine*.[69] Lysine is the most important amino acid used to make animal foodstuffs for nutritional purposes. The five companies produce synthetic amino acids. The Commission found that the companies had fixed lysine prices worldwide, including in the EEA. They had also fixed sales quotas for the EEA and operated an information exchange to support those quotas from June 1990 to June 1995. ADM was fined Euro 47.3 million, Ajinomoto Euro 28.3 million.

The case started in July 1996, shortly before several of the companies were charged by the U.S. authorities with illegal conspiracy, when Ajinomoto decided to inform the Commission about the existence of the cartel which had been in operation since June 1992 (when ADM entered the EEA lysine market) until June 1995. One company, Savon, also disclosed that there had been an earlier cartel involving Ajinomoto, Kyowa and Savon (dating back to 1990). Ajinomoto and Savon were granted 50 per cent reductions in fines because of their co-operation.

The cartel has been heavily condemned in the United States. Some executives were convicted at trial and sentenced to fines of US$350,000 and lengthy prison sentences ranging from 24 to 30 months.[70]

In July 2000, the Commission announced that it had sent or was about to send Statements of Objections to nearly 120 banks, exchange bureaux and banking associations in Belgium, Finland, Portugal and Ireland. It is suggested that there have been agreements to increase the charges for exchanging *eurozone currencies*, or control their decrease, which was to be expected after the currencies were locked together and the related risks eliminated.[71] On the other hand, in December 1999 the Commission indicated in a letter to a British MEP that there was no evidence that major banks had been colluding to keep fees high for sterling/euro foreign exchange deals or that recent rises in sterling/euro dealing costs resulted from a dominant position.[72]

In July 2000, the Commission is also reported to have sent Statements of Objections to 13 bulk *vitamin* producers, including Roche, BASF and other European and Japanese companies relating to a suspected price-fixing cartel.[73] Again, there has already been an investigation on similar issues in the United States.

In October 2000, it was reported that the Commission had sent Statements of Objections to several Belgian and Luxembourg brewers. Interbrew and Alken Maes are alleged to have been involved in market sharing, price-fixing and information exchange between 1993 and 1998. Haacht and Martens are said to have been involved as regards beer sold under supermarket own labels. Luxembourg brewers were reported to have agreed illegally to maintain their market shares in the Luxembourg hospitality and catering trade and to restrict entry by foreign brewers until at least 1998.[74] Interbrew was reported as admitting its participation in concerted practices. The Commission stated that it was also investigating similar practices in France, the Netherlands, Italy and Denmark.

There is talk of how quickly companies are now seeking to co-operate with the Commission, in an effort to obtain maximum reductions in fines, with many European cases apparently following similar efforts to obtain leniency in the United States. There is also discussion on the need to better harmonise the developing leniency practices of the United States, the Commission and some Member States.

Joint ventures and other forms of horizontal co-operation

Box 6: JVs

— *BiB/Open*
- JV for digital interactive television services infrastructure;
- Narrow market definitions:
  - customer access infrastructure market including only traditional copper and cable networks;
  - digital television services not interchangeable with Internet/PC based services;
- >20% stake in competitor creates too great an incentive to share strategic information;
- <20% investments are a boost to competition in an emerging market.

— *Environmental clearances*
- Electrical appliances, washing machines and "collective environmental benefits";
- A national collection and recovery service, with publicly approved uniform price scales for participating producers and local authorities?

— *Visa International*
- No discrimination rule (preventing additional merchant charge) to be allowed;
- Cross-border issuing modified;
- No merchant acquiring without issuing (with quantitative restrictions)?

BUT no interchange fee putting cost of system on merchants?

69. Commission Press Release, IP/00/589, June 7, 2000.
70. See, generally, James Griffin, Deputy-Assistant Attorney General, Anti-trust Division, U.S. Department of Justice, "An inside look at a cartel at work: common characteristics of international cartels", address to the American Bar Association, April 6, 2000.
71. Commission Press Releases, IP/00/704, July 4, 2000 and IP/00/784, July 14, 2000. It appears that further proceedings involving other banks may follow.
72. *The Financial Times*, December 20, 1999.
73. Reuters, July 12, 2000.
74. Reuters, October 2, 2000.

Infrastructure co-operation

In December 1999, the Commission published its decision in the "*British Interactive Broadcasting*" case ("BiB", the company is now called "Open").[75] This is a joint venture involving BT, BSkyB, Midland Bank and Matsushita (Panasonic) designed to provide digital interactive television services to consumers in the United Kingdom via satellite. The idea is to put in place the infrastructure necessary to allow interactive trading, via television sets, such as home banking and shopping. The infrastructure includes the subsidised supply of a digital set top box by Open.

The Commission's approach is favourable to the joint venture, as furthering the development and introduction of such interactive services. However, the Commission also expressed concern that the players concerned, notably BT and BSkyB, are potential competitors in the digital interactive television services market, have strong positions in related markets and should not therefore be allowed to create a permanent dominant position. The Commission noted, in particular, that the joint venture brought together BSkyB's broadcast technology and BT's telecommunications access infrastructure, capable of two-way communication with customers. Until recently such services had only been available via the internet using personal computers ("PCs") as the display screen. Together BT and BskyB could also provide a better service more quickly. Midland Bank brought expertise in merchant acquiring and transaction management (and will therefore have a 10-year exclusivity in the provision of such services), and Panasonic had technical expertise, in particular in the area of set top box design.

Exemption is granted for seven years, but the Commission insisted on various undertakings. Amongst other things, the Commission required that:

(1) BT should not increase its existing cable television interests in the United Kingdom. (In fact, BT has further agreed to sell off its existing holdings in cable networks). This is designed to allow development of independent broadband infrastructure to counterbalance the strength of BT and BSkyB in Open.
(2) Third parties could obtain sufficient access to Open's set top boxes. This is mainly because the boxes are also to be used to supply BSkyB's pay-TV services, and it was considered unlikely that consumers would acquire more than one set-top box.
(3) Cable and digital competitors of BSkyB should be able to obtain access to BSkyB's films and sport channels with or without interactive applications at the choice of the purchaser. The Commission's objective here is to prevent bundling of such content materials and interactive services.

There are several important points to note. First, the Commission made a number of rulings on relevant product markets. In particular:

(1) the Commission held that there is a digital interactive television services market, distinct to those for pay-TV, high street retailing, and digital interactive services available via PCs. Services via PCs were excluded because they were not considered to be a likely price constraint on television services. There are not many U.K. households with PCs and modems and the switching costs to such services are relatively high. The Commission considered that the demand for pay-TV is essentially different, being directed at entertainment services as opposed to the business services targeted by Open via television.
(2) The Commission also found that there is a market for customers access infrastructure for telecommunications and related services, bringing data services such as the internet into the home. The Commission found that the relevant infrastructure market *only includes the traditional copper network of BT and the cable networks of the cable operators.* Clearly this is highly relevant to the whole "local loop" access issue.

Secondly, the Commission objected to a restriction on the parents' ability to invest in other competing undertakings, but exempted such a provision. In so doing the Commission clarified its policy on such minority stakes. On the facts, the shareholders with joint control were allowed to have up to a 20 per cent stake in a competitor in digital television interactive services in the United Kingdom.

The Commission's position is, it appears, that in such circumstances to deny such minority investments in an emerging market would be to *restrict* the development of competition within Article 81(1) E.C. The Commission notes that this restriction is not limited to the acquisition of material influence but also includes the purchase of shares for investment purposes. Such a restriction was therefore not directly related and ancillary to the joint venture. However, a stake of *more than 20 per cent* would give a company too

75. See also the note by Font Galarza, E.C. Commission Competition Newsletter, 1999, No 3, October, pp. 7–15.

much of an economic *incentive* to transfer to a competitor confidential strategic information, which it learned in Open.[76]

Environmental clearances

In May 2000, the Commission announced that it had cleared an agreement between the principal European manufacturers of standard low voltage electric motors to reduce their sales of motors with low energy efficiency.[77] The parties to the agreement are some 20 manufacturers which are members of the European Committee of Manufacturers of Electrical Machines and Power Electronics (CEMEP). They account for some 80 per cent of E.U. sales in this sector.

The agreement provides for the establishment of a classification and labelling system for these motors, which are used in industrial pumps, ventilators and compressors, dividing them into three categories according to their energy efficiency. The parties also commit themselves to reduce their joint sales of the least efficient motors by at least 50 per cent by December 31, 2003. This class accounts for 70 per cent of standard low voltage motors produced today and 30 per cent of total sales in the E.U. In the process, CEMEP will publish reports concerning the participants' aggregated sales, but will not provide individual data to competitors.

In its assessment, the Commission noted that the energy efficiency of low voltage motors is not, at present, a significant criterion for users in deciding which motor to buy. The Commission also noted that the agreement sets an *overall* reduction target, not individual targets, leaving each participant considerable scope to decide how to contribute to the common objective. In the circumstances, the agreement was therefore viewed as *outside* Article 81(1) E.C.[78]

In July 2000, the Commission published its decision exempting co-operation between European washing machine manufacturers, which are members of CECED, the manufacturers trade association. The co-operation is designed to eliminate certain energy inefficient models and reduce related potential energy consumption by 15 to 20 per cent.[79] The related Article 19(3) Notice was already described in last year's paper.[80] What is interesting about the decision is that it shows more of the "collective environmental benefit" approach to exemption, which is now also explained in the Draft Horizontal Guidelines.[81]

The core idea is that members of CECED each agree not to produce or import certain less energy efficient (and, in principle, cheaper) types of domestic washing machine. In doing so, the parties agree to achieve a weighted average efficiency of 0.24 KWh/kg for all the machines produced by a specified date. The manufacturers concerned account for some 95 per cent of European sales. Information on annual sales is exchanged through an independent notary on an aggregated basis.

As regards the anticipated effects of the agreement, the Commission noted that it would reduce competition between producers in energy efficiency, which is an important product characteristic for consumers. Elimination of competition in the less efficient models of machines is also important in a market such as this, which is stagnant. Moreover, there would be an impact on electricity producers in so far as consumption of electricity in the Community was expected to fall by 7.5 Twh by 2015.

However, the Commission then considered the benefits resulting from the agreement from an "*individual economic perspective*" and from a broader collective environmental benefit perspective and found that these benefits outweighed the negative effects. From an individual economic perspective, the Commission found that the minimum performance standard still offered a fair return with reasonable payback periods. The initial purchase costs are higher, but savings on electricity bills may compensate.

At a collective environmental benefit level, reduced electricity use by consumers would lead to reduced pollution from electricity generation, reducing damage from avoided carbon dioxide emissions and from avoided sulphur dioxide and nitrous oxide by significant amounts (*e.g.* 3.5 million tons of carbon dioxide per year in 2010). The Commission then estimated the collective environmental benefit in Euro, reaching the conclusion that:

> "[o]n the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines".[82]

The Commission found that the choice of an individual minimum performance standard was an indispensable restriction. Other solutions, such as setting an industry-wide target, or information campaigns, or reliance on the Community eco-label system were likely to be less effective than the minimum performance system. Finally, competition was not eliminated because the Commission considered that the manufacturers could still compete on technology, including means of improving energy efficiency in the

76. Paras 160 and 164.
77. Commission Press Release, IP/00/58, May 23, 2000.
78. See also the note by Martinez-Lopez in E.C. Commission Competition Newsletter, 2000, No. 2, June, pp. 24–25.
79. [2000] O.J. L187/47.
80. [2000] I.C.C.L.R. at pp. 101–102.
81. See, Draft Guidelines, point 186.
82. Para. 56.

machines which could be sold and, in principle, third parties could still manufacture and import other machines. Exemption was granted for four years from notification until 2001.

In August 2000, the Commission published an Article 19(3) Notice in relation to Eco-Emballages, a French company offering collection and recovery services.[83] It is an important case because it deals with another facet of environmental co-operation, namely the large scale organisation of such services in order for producers to meet their obligations under French and E.C. rules on packaging waste. The Commission's assessment appears to focus on three aspects: the public authorities' role in organising and approving the relevant price mechanisms; reducing barriers to competition in such services from third parties; and ensuring that licensing with the "green dot" environmental mark does not lead to foreclosure and/or barriers to parallel trade between Member States.

Eco-Emballages is a company specifically set up to organise a system of selective collection and recovery of household packaging designed to meet the requirements of the French packaging decree. Its (direct or indirect) shareholders are producers of the materials concerned, five undertakings involved in related sectors and offering recovery services (for steel, aluminium, paperboard/paper, plastic and glass), distribution firms and related trade associations. Its activities are subject to French governmental approval, given for periods of some six years. Such approval includes the calculation methods used to determine how much producers must pay for such services and how much Eco-Emballages will pay to local authorities which carry out services for Eco-Emballages in sorting the relevant waste.

In 1998 Eco-Emballages had a significant position in the market. It had some 9,311 affiliated producers and was contractually bound to some 533 local authorities in France (out of more than 2000), representing some 13,862 municipalities (out of more than 36,000 in France). In 1997, some 3,3 million tonnes of domestic packaging put on the market in France came from members of the Eco-Emballages system (out of some 4.6 million tonnes in total).

It appears from the Notice that Eco-Emballages has no competitor of comparable size, albeit that there is another company, Adelphe, offering similar services in relation to the wine and spirits sector and another Cyclamed focused on medicinal products. It appears also that in the past there was contractual specialisation between Eco-Emballages and Adelphe but that this has been discontinued so that, in principle, Adelphe can offer wider services.

Eco-Emballages is entitled to use the "green dot" environmental mark in France and grant producers the right to mark their products accordingly. Since 1996, the green dot is on more than 90 per cent of products consumed by households in France. Use of the "green dot" outside France is subject to authorisation by the relevant licenceholder in the country concerned. Eco-Emballages grants sub-licences to others for use of the "green dot" in France, notably to regional systems and systems dealing with specific materials. Thus, Adelphe has been granted a non-exclusive sub-licence. It is not entirely clear how this fits with the end of the contractual specialisation referred to above, since Adelphe's sub-licence is apparently related to tripartite agreements with local authorities under which Adelphe is responsible for collection and recovery of glass and Eco-Emballages is responsible for these services in relation to other services.

Otherwise, there are various sets of agreements involved in the Eco-Emballages system. The main ones are: contracts between producers and Eco-Emballages related to producers "financial contributions" to Eco-Emballages (which vary according to the material); contracts between local authorities and Eco-Emballages concerning the amount of "financial support" which Eco-Emballages pays to them for their collecting and sorting services (which initially could be for one, three or five materials, but appears more recently to have been only for three or five materials); sectoral and operational/take-back contracts for the recycling and recovery of packaging by the five companies (one each for steel, aluminium, paperboard/paper, plastic and glass, although Eco-Emballages states that it could enter into contracts with others for the same material). Finally there is provision for R&D contracts related to relevant processes.

The main features of the producer and local authority contracts are three. First, the relevant prices are set after extensive industry consultation and are approved by the French authorities. Secondly, the contracts are for some six years—apparently on the basis that local authorities need that long because of the investments involved and there is a relationship between the producer and local authority contracts. Thirdly, there are issues of product/service market foreclosure, in so far as the Eco-Emballages contracts provide for collection of all or several of the selected materials.

The Commission indicates that the French authorities favour a standardisation of prices for producer contributions and local authority payments. The authorities consider that if companies offering such collecting services could compete on price, producers would deal with those offering the lowest price. Similarly, if there were variations in the payments to local authorities,

83. [2000] O.J. C227/6.

they would move towards the highest prices. Such differences in price scale would be harmful to the system's "economic and financial balance, proper implementation and durability".[84] Even if the bodies concerned would have uniform price scales, the authorities suggest that there is still residual competition in factors such as the quality of service, back-up to local authorities, and competition in efficiency or innovation when approvals are renegotiated.

The Commission appears to have obtained various undertakings from Eco-Emballages directed mainly to reducing restrictions on third parties offering collection services. Thus, producers are to include only certain types of material in their contracts with Eco-Emballages (not all), and can terminate their contracts each year, without payment of compensation. Local authority material contracts can also be met by materials covered by another approved body (which appears to mean that a local authority can be in more than one approved collection and recovery system). Again, local authorities can terminate their six-year contracts at any time. Eco-Emballages also agrees to sub-license any body approved for collection and recovery services in France to use the "green dot" mark, to extend the right to use the "green dot" mark to all products declared, including imported products, and to refund a producer's contribution where declared products have been exported.

This is difficult to assess on the basis of an Article 19(3) Notice alone. In part, the Commission appears to be deferring to the French authorities on how such a large scale environmental scheme should be organised. We do not know what concerns the Commission may have voiced. It is also not clear from the Notice how the Commission is defining the various markets concerned. On the figures noted above, in 1998, Eco-Emballages appears to have won a significant amount of the producers and the local authorities' business, and its "shares" appeared to be growing fast. I hope the Commission plans a full decision. We may also learn more because there has been a reference to the European Court questioning the legality of the French law authorising Eco-Emballages.[85]

84. Para. 91.
85. See, *Ministère Public v. Claude Laguillaumie*, Case C-116/00, [2000] O.J. C163/13.

Payment cards

In October 2000, the Commission issued an Article 19(3) Notice concerning the *Visa International payment card system*, in general envisaging a favourable position for the system as recently amended. In particular, the Commission has accepted the so-called "no discrimination rule" which prohibits merchants from adding charges to cardholders who pay with Visa, or discounts to those that use other means of payment. Although the rule has been abolished by national competition authorities in the United Kingdom, Sweden and the Netherlands, it appears that the Commission considers that this change has not substantially increased competition.

Visa has also amended its rules on cross-border licensing to allow Visa members to issue cards and acquire merchants in other Member States, without the need for a branch or subsidiary in that other Member State.

It appears that the Commission will also accept a rule that a bank cannot *acquire* merchants for card acceptance unless it has *issued* a reasonable number of cards. A target is set according to the number of cards issued at the time in the country in question, taking into account the market potential and the size and potential of the applicant. Such rules would also apply to cross-border acquiring. The Commission's reasoning for acceptance of such restraints is not yet explained.

However, in parallel it appears that, following complaints by retail organisations, the Commission has sent Visa a Statement of Objections concerning the interchange fee paid by the bank of the merchant to the bank of the cardholder for each card transaction. The Commission considers that a requirement that the merchant pay *all* of these inter-bank costs may not be indispensable, and that the cardholder's bank could also have to pay for some of the services concerned. The fee is also set jointly by the member banks through Visa.[86] A full decision is planned for later this year.[87]

86. [2000] O.J. C293/18; Commission Press Release, IP/00/1164, October 16, 2000.
87. In August 2000, the Commission published an Article 19(3) Notice concerning *Eurex*, a cross-border exchange for electronic trading in financial derivatives formed as a joint venture by Deutsche Börse and the SWX Swiss Exchange, O.J. C231/2, August 11, 2000. In August 2000, the Commission published an Article 19(3) Notice concerning the establishment of a network of financial institutions called "*Identrus*", which will operate as certificate authorities for secure electronic commerce transactions, initially only in the business to business (B2B) context. O.J. C231/5, August 11, 2000.

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

- European Commission decisions on *distribution, abuse of dominant position* and *procedure* including cases on loyalty bonuses for travel agents, various proceedings in the postal sector and decisions on discrimination by nationality and in the provision of intra-Community transport services.
- The Commission's draft regulation to replace "*Regulation 17*", further to the "*White Paper*" on modernisation and decentralisation of competition enforcement in 1999.
- Recent developments on the application of competition rules to sport in E.C. competition law (notably as regards *transfer fees, sporting rules not caught by E.C. competition law* and *broadcasting issues*).
- Finally, further Commission action in relation to cross-border retail price maintenance agreements in the book sector and developing themes in relation to professional services and E.C. competition law.

Major Events and Policy Issues in E.C. Competition Law, 2000—Part 2

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This article contains the final part of the "Overview of Major Events and Policy issues in E.C. Competition Law", published in last month's journal ([2001] I.C.C.L.R. 5). The article is divided into three sections: (1) issues of distribution, abuse of dominant position and procedure; (2) an outline of current policy issues; and (3) some comments on particular areas, meaning sport, books and professional services.

Overview of major events (continued)

Distribution

In August 2000, the Commission published a further decision related to *U.K. beer supply agreements.*[1] This time, however, the decision relates not to brewers contracts but to the ties in the contracts of a pub company which operates, in effect, as a wholesaler in the market. The assessment is therefore somewhat different from brewery cases and interesting on that account. The case concerned the *Inntrepreneur* and *Spring* standard form tenancy agreements. These had been cleared by comfort letter in relation to the period before March 28, 1998. However, for the period *after* March 28, 1998, the notifying parties requested a formal decision.[2] It appears that the security of a decision was sought because The Grand Pub Company Ltd (owned by the Japanese investment bank, Nomura) exercised an option to buy the share capital of Inntrepreneur and Spring on March 27, 1998.

The Commission's assessment is similar to other beer cases but with several differences because of the different circumstances. Thus, the Commission defined the relevant market as that for the distribution of beer in premises for the sale and consumption of drinks in the United Kingdom (the "U.K. on-trade" market). The Commission then examined the nature of the beer tie in the leased premises and whether it was appreciable.

The Commission then focused on the fact that the ties in this case were to a *free-standing* company, which is not vertically integrated with any United Kingdom brewers. Here, supply was characterised by multi-sourcing and periodic tendering.[3] The duration of the contracts with supplying brewers is also typically only two to five years, with part of the business re-tendered at intervals. Between 1998 and 2003, some 98 per cent of the beer throughput would be subject to third party tendering opportunities. The notifying parties also did not have a single volume commitment to any of the current 18 brewers which they currently listed.

The Commission concluded that the notifying parties offered a "gateway" for the already substantial number of brewers in the market and for other national or foreign brewers to the U.K. on-trade market. Moreover, the Commission found that it was easier for a brewer to conclude an agreement with one wholesaler, than many agreements with many individual retail outlets. Interestingly, the Commission therefore concluded that the effect of the pub company's tied system was to "mitigate" rather than reinforce any network effect of brewers' agreements in the United Kingdom beer on-trade market.[4] Rather than specifically contributing to market foreclosure, the tied-leases of a non-tied pub company were more likely to enhance the competitive structure of the market. The Commission's conclusion was that the network of agreements fell outside Article 81(1) E.C.[5]

Finally, in a year when HHIs have been given more prominence than before, one may also mention that the Commission considered such index results in its assessment of concentration in the U.K. beer supply market.[6]

In January 2000, the Commission indicated that it had approved new agreements involving the *Association of Belgian Pharmacists ("APB")* quality mark—the APB label.[7] It may be recalled that some years ago APB introduced a system whereby para-pharmaceutical products like toothpaste, shampoos and baby food could be submitted to

* With many thanks to Ingrid Cloosterin, Flavia Distefano and Andrea De Matteis for their help in the production of this article.

1. [2000] O.J. L195/49.
2. The Commission published an Article 19(3) Notice in April 1998: [1998] O.J. C133/23.
3. Para. 60.
4. Para. 61.
5. The Commission also found that a clause requiring the lessee not to advertise goods supplied by other undertakings in a higher proportion than the share of these goods in the total turnover realised in the premises was, in the circumstances, outside Article 81(1) E.C.
6. Para. 16.
7. Commission Press Release IP/00/16, January 11, 2000.

the APB for quality control testing. If they passed, manufacturers could place an APB label on the product packaging concerned. Initially products bearing such a label could only be sold in pharmacies, prompting objections from the Commission. It was then agreed that products could be sold in other channels, provided that the label was covered with a sticker and the Commission approved the system. Then in 1996 a para-pharmaceutical retail chain complained that APB continued to reserve sales of its approved products to pharmacies, even if the label was made invisible. The APB Agreement now specifically provides that para-pharmaceutical products bearing the APB label can be sold through other distribution channels than pharmacies.

In July 2000, the Commission announced that it had fined *Editions Nathan* ("Nathan") the French publisher of educational material and school textbooks, some Euro 60,000. The Belgian distributor of Nathan, Bricolux was also fined Euro 1,000.[8] It appears that Nathan prevented three of its exclusive distributors for educational material for pre-school children in Italy, Sweden and French-speaking parts of Belgium from marketing Nathan products outside their exclusive territories and restricted their freedom to set prices and commercial conditions of sale. The French authorities alerted the Commission, since this practice also affected customers in France. The fines were reduced to this low level after Nathan and Bricolux co-operated actively with the Commission.[9]

In September 2000, the Commission fined *Opel Nederland B.V.* Euro 42 million for obstructing exports of new cars from the Netherlands.[10] Cars in the Netherlands are cheaper before tax than in other Member States, such as Germany, France and the United Kingdom. In December 1996, the Commission carried out dawn raids at Opel Netherlands's premises and one of its Dutch Opel dealers. These investigations revealed that Opel had implemented three measures from September 1996 designed to deter or prevent customers from selling to customers abroad. First, district managers of Opel Nederland gave direct instructions to dealers not to export, receiving commitments to that effect in return. Secondly, dealers were told that the cars they were expected to sell on the basis of their dealer contract should be sold above all in the Netherlands. Finally, from October 1996 to January 1998, Opel Nederland operated a number of sales campaigns, which each contained a provision that bonus payments would be refused if dealers carried out sales to end consumers from abroad.[11]

In *September 2000*, the Commission decided to end its proceedings against *Triumph*, the motorcycle manufacturer, after the company agreed to stop prohibiting its Benelux dealers from selling to U.K. customers.[12] Various British consumers had complained that they could not buy Triumph motorcycles in the Netherlands and Belgium. The Commission carried out dawn raids in April 1999 at Triumph, its Benelux importer's premises and a number of dealers in Belgium and the Netherlands and found evidence of an export ban.

Three months after the inspections, Triumph admitted that it had imposed an export ban, via its importer, on Benelux dealers from April 1997 until March 1998, and co-operated with the Commission, informing its importers and dealers that they were free to sell motorcycles to any customer irrespective of that customer's country of origin or where the motorcycle was to be used. Interestingly, in view of this and the limited impact and duration of the infringement, Triumph avoided a fine. Triumph pleaded that its action had been prompted by currency fluctuations resulting in price differences of some 30 per cent for certain models at the time.

In February 2000, the Commission published its decision in the *Association of Dutch Electrotechnical Wholesalers* case.[13] This involved a system of collective dealing and price co-ordination, and was described last year.[14] For present purposes, it may be of interest to note two procedural aspects. First, that the Commission decided not to rely on evidence and transcripts of telephone conversations on the basis that the tapes and transcriptions had been made secretly and without the agreement of the firms concerned.[15] The Commission acknowledged that it should have returned such material to the complainant immediately and stressed that it did not rely on the material in its decision. Secondly, the Commission also noted that the proceedings had lasted for a long time (from 1991 until 1999) and reduced the fines concerned by Euro 100,000 each. It is interesting to see the effect of recent European Court judgments on this point.

8. Commission Press Release, IP/00/713, July 5, 2000.
9. In April 2000, the Commission sent Statements of Objections to *Nintendo* and seven of its distributors: Commission Press Release IP/00/419, April 28, 2000. Nintendo and its distributors are alleged to have colluded to partition markets, with export bans and other measures to prevent parallel trade. In June 2000, the Commission closed proceedings against *Saeco*, an Italian coffee machine manufacturer after Saeco agreed to amend its guarantee scheme removing territorial restrictions to create a Community-wide system. Commission Press Release IP/00/684, June 29, 2000.
10. Commission Press Release IP/00/1028, September 20, 2000.
11. Other investigations into Daimler, Chrysler, Peugeot and Renault are understood to be still pending.
12. Commission Press Release, IP/00/1014, September 15, 2000.
13. [2000] O.J. L39/1.
14. [2000] I.C.C.L.R. at pp. 70–71.
15. Point 32.

Finally, there is much speculation as to the Commission's coming report on the car distribution block exemption. The report's publication is now imminent and it is understood that drafts have already been discussed with Member States. For present purposes, I would make two points: First, the likelihood of renewal of a similar regulation to Regulation 1475/95 appears not to be great. For example, in a speech in May 2000, Mr Monti made it clear that the fundamental logic of such a specialised sectoral regulation is now questioned.[16] A good question, however, is whether there might be some adjustments to the general "Guidelines on Vertical Restraints", as those interested focus on how well those rules fit their particular circumstances or whether a different sectoral regulation might be adopted. Secondly, it appears that many manufacturers have *already* started the restructuring of their distribution systems.

Abuse of dominant position

Box 7: Articles 82/86 E.C.

- Growth bonuses and *Virgin/BA*: loyalty bonuses criticised for exclusionary and discriminatory effects
- *Postal Services Directive*—notifications being reviewed
- Various cases involving *Deutsche Post*
- Discrimination:
  - — direct to consumer and by nationality: *Football World Cup tickets* case
  - — as an obstacle to intra-Community transport services: *Spanish airports*

Loyalty bonuses

In February 2000, the Commission published its decision in the Virgin/British Airways case.[17] It may be recalled that in July 1999 the Commission fined British Airways Euro 6.8 million for operating various systems of commission and other incentives with travel agents which the Commission considered contrary to Article 82 E.C.

The Commission condemned as illegal various bonus schemes based on the travel agent achieving increased growth in sales by reference to the previous year (so-called "growth bonuses"). In doing so, the Commission emphasised that its objections were based on two types of anti-competitive effect: the *exclusionary* effect on other airlines of what it considers to be "loyalty" practices, and the *discriminatory* effect on travel agent customers, which are not given equal treatment and therefore find that their competitive position as regards other travel agents is distorted.[18]

The Commission noted that meeting the targets for sales growth led to an increase in the commission paid on *all* tickets sold by the agent, not just on the tickets sold after the target is reached. Competitors would therefore have to offer a much higher rate of commission than BA on all of the tickets sold to balance and overcome the related loyalty effect. The Commission also noted that the bonuses were not based on the size or efficiency of the travel agent or the different services provided to BA in its dealing with travel agents.

The Commission also rejected an argument by BA that to prohibit BA from using such practices, while allowing others to do so, was discriminatory. BA argued that all cases should be dealt with together, for example by general legislation.[19] It appears that BA has now itself filed complaints about similar practices by other European airlines, whilst appealing against the Commission's decision.

Postal services

In 1999 the time limit for implementation of the Postal Services Directive expired.[20] This Directive establishes maximum limits for postal services which may be reserved with a view to ensuring the maintenance of a universal postal service. Member States have been required to notify their measures, transforming the Directive into national law, to the Commission. It appears that the Commission is now reviewing such measures to see if they comply with Articles 86 and 82 E.C. The Commission has also received complaints that some Member States' implementing legislation effectively extends the scope of the existing national postal monopolies. For example, that certain postal services which are separate and distinct from the general letter mail service, and were previously provided by private operators in competition with the incumbent postal operator, would be included within the scope of the reserved area for the first time.[21]

In May 2000, the Commission indicated that it was sending a Statement of Objections to *Deutsche Post*, concerning its *treatment of incoming cross-border mail*.[22] The original complaint in the case was filed by the British Post Office in

16. Monti, "Who will be in the driver's seat?", Forum Europe Conference, Brussels, May 11, 2000, DG Competition website, SPEECH/00/177.
17. [2000] O.J. L30/1. See also the Commission's Press Release last year IP/99/504, where the Commission set out principles on what were acceptable travel agents commissions. Notably, the Commission stressed that differences in commissions could be justified by efficiencies realised, *i.e.* variations in the cost of distribution or differences in *value of the services* offered to BA by travel agents. Reference periods also should not exceed six months.
18. Paras 96–111.
19. Paras 51 and 65–66.
20. Directive 97/67, [1998] O.J. L15/14.
21. 1999 E.C. Commission Competition Report, points 77–79. See also European Voice, February 3–9, 2000 referring to Italian postal laws.
22. Commission Press Release, IP/00/562, May 31, 2000.

1998 and has been followed by five further complaints alleging the same infringements, that Deutsche Post was infringing the E.C. Competition rules by intercepting, surcharging and delaying normal cross-border mail. Deutsche Post has repeatedly refused to deliver to German addressees bulk mailings coming in from the United Kingdom, unless the British Post Office agrees to pay the full domestic tariff applicable in Germany. Deutsche Post considers that mail containing any reference to Germany (for example including a German reply address in the contents of the mail) to have a German sender and charges the full domestic tariff for such mail as opposed to the agreed fee for handling cross-border mail ("the terminal due"), currently set under the REIMS II Agreement at 65 per cent of the domestic tariff.

The Commission's position is that the mailings in question did *not* have German senders. The mailings were produced and posted in the United Kingdom. The Commission therefore considers that Deutsche Post abused its dominant position on the German market for the delivery of cross-border mail, discriminating between customers and effectively refusing to supply its delivery service. Moreover, the Commission considers that the surcharge exceeds the average cost by at least 25 per cent (*i.e.* has no relation to the real cost of the service) and harms the commercial activities of the senders and the sending operator.

In August 2000, the Commission initiated proceedings against Deutsche Post for three other issues: the grant of *large discounts to mail-order customers* if they undertake to sell all their parcels through Deutsche Post, *pricing its mail-order parcel services at a predatory level* (below cost); and finally *the level of postage charged* by Deutsche Post for the letters it delivers under its monopoly right.[23]

In October 2000, the Commission announced that it was sending a further Statement of Objections to *Deutsche Post* concerning its contracts with major mail-order customers. An examination of Deutsche Post's contracts had revealed two alleged abuses. First, since 1974, it had concluded contracts making discounts conditional on the customer shipping all its parcel through Deutsche Post. Secondly, as of November 1997, Deutsche Post had concluded new parcel delivery contracts with large mail-order customers which contained a scheme of *combined fidelity and annual target rebates* (*i.e.* the customer had to agree on annual minimum volume targets). In the Commission's view, both are contrary to Article 82 E.C. as market foreclosing. As a result, the Commission stated that no private provider of parcel services to mail-order firms has been able to establish itself in Germany.

According to press reports in October 2000, Deutsche Post has settled its dispute with the British Post Office but details were not disclosed. Deutsche Post was also reported to have cancelled all loyalty and target rebate agreements with mail-order customers.[24] It appears hearings in the Commission cases were scheduled for November 2000.

All of this is against the background that Deutsche Post has been planning to make an initial public offering (IPO) on November 20, 2000!

Discrimination cases

In January 2000, the Commission published its decision in the *Football World Cup tickets* case.[25] It may be recalled that the Commission had intervened during the run-up to the 1998 World Cup after complaints that ticket sales had been organised so as to favour French spectators because, amongst other things, a French address had to be provided. The French Organising Committee for the World Cup had taken some measures to address the Commission's concerns (for example selling tickets to anyone with an address in the EEA), but the Commission still found that the Committee had abused its dominant position and ultimately fined the Committee the "symbolic amount" of Euro 1,000.

The decision is interesting for two main reasons. First, there is a detailed analysis of the market which showed that different types of ticket were in different markets.[26] Notably, certain types of ticket which the Organising Committee sold in advance only to purchasers able to provide an address in France were in distinct product markets. In the process, the Commission held, relying on the SSNIPS test[27] and related considerations, that tickets for other international sports events were not substitutable for Football World Cup finals matches, and distinguished the Football World Cup from the European Football Championship because there was a two-year time difference between the two. Attendance at one was therefore not a substitute for attendance at the other. The geographic market was EEA wide.

Secondly, having found that the French Organising Committee was dominant in the sale of the relevant advance tickets EEA-wide, the Commission decided that the Committee had abused its dominant position by imposing unfair trading conditions on residents outside France "which indirectly amounted to a discrimination against those consumers on grounds of nationality,

23. Commission Press Release IP/00/919, August 8, 2000. This was partly in response to the CFI's ruling last year that the Commission had wrongly failed to act against Deutsche Post.

24. Reuters, October 19, 2000.
25. [2000] O.J. L5/55.
26. Paras 66–74.
27. If a small but significant increase in the price of certain products does not lead to a change in consumer demand to substitutable products, those products constitute a market.

contrary to fundamental Community principles".[28] The Committee was also found to have limited markets contrary to Article 82(b) E.C.

Interestingly, the Committee argued that there had to be at least some impact on the structure of competition (see the second part of Article 82(c) E.C. requiring that the discrimination place competitors at a disadvantage). The Commission rejected that argument, referring amongst other things to *GVL*[29] where a German collecting society's refusal to manage the rights of foreign artists from other E.C. Member States having no residence in Germany was regarded as an abuse of a dominant position. All of this serves to show how the second part of Article 82(c) E.C. appears to have little importance in practice. Mere discrimination within a European market by a dominant undertaking is enough to constitute the infringement. All the more so, if the discrimination is by nationality or residence. A direct consumer effect appears to be enough.[30]

In July 2000, the Commission took a further decision under Article 86(3) E.C. against discounts on landing fees, this time at *Spanish airports*.[31] The decision follows a similar pattern to the decisions taken in previous years in relation to Finnish and Portuguese airports and Brussels airport.[32] The Commission was concerned that the system of discounts and differentiation of landing fees between domestic, intra-EEA flights and extra-Community flights discriminated in favour of Spanish national airlines. There were negotiations with the Spanish authorities for change, but when these changes did not materialise the Commission adopted its decision.

The Commission's approach again confirms how wide the discrimination prohibition in Article 82 E.C. can be interpreted. The Commission defined the relevant market as "the market in [landing and take-off] services linked to access in airport infrastructures for which a fee is payable". The markets for passenger and freight transport on short and medium-haul routes within the EEA constituted distinct, but neighbouring, markets which would be affected by an abuse of the market for landing and take-off services.[33] Forty-one airports were in question and each was regarded as a distinct geographic market.

The Commission found that airlines operating domestic or intra-EEA flights had no option but to use the airports in question and each of the airports was in a dominant position.

The Commission held that the system of landing fees and discounts applied dissimilar conditions to airlines for equivalent transactions "thereby placing them at a competitive disadvantage", again quoting Advocate-General van Gerven in *Corsica Ferries*.[34] He had noted that the type of services in a "port" case are the same for all users, and that the differentiation between domestic and intra-Community services constituted on obstacle to intra-Community services, placing persons providing such services at a disadvantageous competitive position. As regards the discount scale applied, the Commission held that it favoured national airlines which were the larger users, although there were no economies of scale in the case of landing and take-off services. This amounted to discrimination caught by Article 82(c) E.C.

As regards the differentiation in fees between domestic and intra-EEA flights, the Commission notes the European Court's ruling in *Corsica Ferries* that (what is now) Article 86(1) and 82 E.C., prohibit an undertaking with exclusive rights from applying different tariffs to maritime transport undertakings, depending on whether they operate transport services between Member States or between ports in the same territory. The Commission then notes that the effect is to "place airlines operating *EEA services* at a competitive disadvantage in comparison to airlines, providing *domestic services*" (emphasis added).[35] This was held to be caught by Article 82(c) E.C.

As last year, I still question this reasoning, again without questioning the Commission's right to rely on the relevant court authorities. The point is that if this is right it appears that one does not have to prove competitive disadvantage in a case like this. As I understand it, we are talking here about two different transport services which are *not* in competition being charged different prices. The airline advantaged in domestic services may well not be in any competitive relationship to an airline offering an EEA service. The position would be different if different airlines, offering the same EEA services, were charged different prices for the airport services, because they are clearly in a competitive relationship, or if the Commission could show that domestic savings are used to bolster the position of a carrier on the intra-EEA service market, if it *also* offers such services. This is, however, not the Commission's stated reasoning.

28. Para. 102.
29. Commission Decision, [1981] O.J. L370/49, upheld by the ECJ, Judgment of March 2, 1983. Case 7/82, [1983] E.C.R. 483.
30. In June 2000, the Commission indicated that it had approved UEFA's ticketing arrangements for the European Football Championships after these had been notified. Commission Press Release IP/00/591, June 8, 2000.
31. [2000] O.J. L208/36.
32. See, *e.g.* [2000] I.C.C.L.R. 72–73.
33. Paras 33–34.
34. Para. 46.
35. Para. 56.

As noted in relation to the *World Cup tickets* case, the net result is that it appears Article 86(c) E.C. is interpreted broadly, at times openly to support other Community goals such as eliminating direct consumer discrimination on the basis of nationality and the freedom to provide intra-Community services.

Other

In August 2000, the Commission sent a Statement of Objections to *Microsoft* for allegedly abusing its dominant position in the market for personal computer operating systems software, by leveraging this power into related markets for server software and other products which enhance the performance of PC/server operating systems (so-called "middleware").[36] The Commission stresses that these proceedings are different to those in the United States, where Microsoft is alleged to have protected its dominance in PC operating systems through measures aimed at weakening Netscape's Internet browser and Sun's Java system, thereby monopolising the Internet Browser market.

The core idea in the E.C. proceedings is that personal computers running on Windows operating systems are *de facto* obliged to use Windows server software and other "middleware" if they want to achieve full interoperability. It appears that Sun Microsystems had filed a complaint in December 1998 alleging that Microsoft had engaged in discriminatory licensing to competitors and had refused to supply essential information on its Windows operating systems to Sun Microsystems.

In October 2000, the Commission sent a Statement of Objections to *Intercontinental Marketing Services* ("IMS"), a company specialising in collecting data on prescriptions and sales of pharmaceutical products, alleging that it had abused its dominant position. It appears that IMS made the sale of certain services subject to the prior purchase of other services, either in a single geographic market or in different geographic markets. In addition, it is alleged that IMS grants certain pharmaceutical laboratories loyalty discounts and global or international discounts not based on objective and transparent criteria, as well as free products going beyond simple trials of a new service.[37]

Procedure

This year the Commission has taken various decisions imposing fines for supplying incorrect or misleading information or failure to co-operate with the Commission. Most concerned merger control, but one involving *Anheuser-Busch and Scottish & Newcastle*[38] came under Regulation 17.

In 1992 Anheuser-Busch and Courage had notified agreements for the marketing of Budweiser in the United Kingdom. After Scottish & Newcastle purchased Courage in 1995, the Commission sent a request for information and was told that Anheuser-Busch had entered into revised arrangements. In 1997, the Commission formally asked if any further agreements had been entered into and was told no. The Commission then issued a warning letter concerning the agreements, including the provisions on the marketing and positioning of Budweiser. In 1998, the parties gave a joint reply and provided copies of the revised arrangements which included a document called "Budweiser marketing guidelines" which had not been previously disclosed. This had been sent by Anheuser-Busch but was countersigned by Scottish & Newcastle. The Commission considered that this was an agreement which should have been supplied in response to its request for information in 1997 and fined the parties Euro 3,000, considering the infringement negligent rather than intentional.[39]

Current Policy Issues

The new "Regulation 17"

Box 8: The new "Regulation 17"

- A "competition network"
- All pending notifications lapse
- All existing exemptions cease to be valid
- Widening of E.C. MCR to partial function production JVs or cases with large sunk investments?
- A new "registration" system?
- Commission ability to pull in a case from a national competition authority
- National court co-ordination via *amicus curiae* and "best efforts obligation" to avoid conflicts with Commission decisions
- Full exchange of information in the competition network, but "only financial penalties may be imposed"
- Opinions/business letters only exceptionally
- Powers to search homes and take oral statements (subject to *Orkem* privilege against self-incrimination)
- BUT the German Monopolies Commission objections

36. Commission Press Release IP/00/906, August 3, 2000. See also Commission Press Release IP/00/141, February 10, 2000.
37. Commission Press Release, IP/00/1207, October 24, 2000.
38. [2000] O.J. L49/37.
39. For details of the merger cases, see Commission Press Releases IP/99/985 of December 14, 1999 *Deutsche Post and KLM* and IP/00/764 of July 12, 2000 *Mitsubishi.*

In September 2000, the Commission published its proposal to replace Regulation 17.[40] As one would expect, it is a far-reaching document.

The core concept of the reform is threefold. First, the sharing of E.C. competition enforcement with national competition authorities and courts, including the assessment of Article 81(3) E.C. criteria, with the Commission still "governing" the system. Secondly the refocusing of enforcement resources so that notification and authorisation will, in general, no longer occur. Notification for exemption with immunity from fines will no longer be available. Rather companies will be left to assess for themselves whether their agreements are valid, enforceable and unlikely to attract a fine, if scrutinised. Thirdly investigatory and enforcement powers of the Commission will be strengthened so that when the Commission investigates a sector or an alleged infringement, it can do so more effectively.

The proposals are controversial in various respects and will be supplemented with more measures. Notably, there are further measures to come on: a new registration system; complaints; co-operation between the Commission and Member States in the coming "competition network" system; reasoned opinions to provide guidance to companies; and the training of judges.[41] The question of extending the E.C. Merger Regulation to partial function production JVs, raised in the White Paper, is to be further examined in the next review of that Regulation.[42] Some argue that all agreements involving large sunk investments should be covered.

The general system

(1) Articles 81(1), (2) *and* (3) E.C. will be directly applicable so that national competition authorities *and courts* will be able to deal with grounds for clearance as well as the grounds for prohibition at the same time, without waiting for the Commission to decide on any eventual notification (Articles 1, 5 and 6).

(2) Where an alleged competition infringement affects trade between Member States, E.C. competition law is to apply to the exclusion of national competition law (Article 3).

(3) All notifications made under Regulation 17/62 and the road, rail, sea and air transport regulations will lapse as from the date of application of the Regulation and Article 81(3) E.C. exemptions will cease to be valid. From that moment, the related agreements will no longer be protected by immunity from fines or by such decisions (Article 35(1)).[43]

(4) On the other hand, the Commission proposes to introduce a *new registration* system, which will provide information to the Commission but not confer rights (such as immunity, or the right to a ruling) on the party registering (Article 34).

(5) Member State competition authorities will have the right to apply Articles 81 and 82 E.C. in full, taking all relevant measures to prohibit an agreement or decide that no infringement has occurred (Article 5). However, their decisions will only have effect in their territory. Moreover, they will not be able to take "constitutive" exemption decisions[44] (which appears to mean decisions to establish a general precedent in a new area or on a new point of law), unlike the Commission, which will have such a power (Article 10).

(6) The Commission has chosen to emphasise that, in order to bring an infringement to an end, it may impose any obligations necessary, "including remedies of a structural nature", (Article 7.1).

(7) The Regulation introduces a statutory basis for the Commission to grant interim measures and indicates that a decision imposing such measures can apply for up to one year, although this may be renewable (Article 8). The Regulation itself does not provide for further measures (see Article 34). It is hoped that the Commission will adopt a specific notice on such measures, since often this is the most important type of relief and the procedures need to be clear and fast.

(8) Where the Commission is offered commitments by a company to bring an infringement to an end and accepts them, it may make those commitments binding by decision, for a specified period (Article 9.1).

(9) The Commission is to have a general power to adopt block exemptions without

40. COM (2000) 582 final, September 27, 2000. The Commission's document includes an Explanatory Memorandum, the Proposed Regulation and an SME Impact Assessment, with consecutive page numbering which is followed here. On February 29, 2000, the Commission also published a summary of the observations which it had received on the White Paper on its website. The White Paper was described last year [2000] I.C.C.L.R. pp. 105–110.

41. 1999 E.C. Commission Competition Report, point 36, p. 21.

42. Explanatory Memorandum, p. 3.

43. In 1999, the Commission stated that it had 1,013 cases pending/in stock: 1999 E.C. Commission Competition Report, p. 47.

44. Explanatory Memorandum, p. 12.

the need for specific enabling regulations (Article 28).

(10) The Regulation consolidates comparable rules in relation to transport, but will *not* apply to international sea transport of the tramp type, sea transport between ports in the same Member State and air transport between the E.U. and third countries (Article 33).

(11) Finally, those Member States which have not given their competition authorities the power to apply Articles 81 and 82 E.C. will be required to do so by a defined date (Article 36).

Decentralisation and co-operation

Member State competition authorities

(1) This reflects a co-operative "competition network" system, with the Commission essentially controlling who decides what (with some limits). The Commission emphasises that the "network" should (a) work closely together in enforcing Articles 81 and 82 E.C.; (b) provide an infrastructure for mutual exchange of information and assistance; and (c) that cases should be dealt with by the best placed authority.[45]

(2) If either the Commission or national competition authorities start proceedings, they are to inform the other of this at the outset (Article 11.2 and 11.3).[46]

(3) If the Member State competition authorities intend to take a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption, they are *required to consult* the Commission, providing a summary, the most important documents drawn up in the proceedings and, if requested, any other document related to the case (Article 11.4).

(4) The Commission may then raise the issue in the Advisory Committee on Restrictive Practices and Dominant Positions ("the Advisory Committee") and, ultimately, can *take over a procedure* by initiating proceedings itself (Articles 11.6 and 14.6). The Member State competition authority cannot then go further. In the Explanatory Memorandum, the Commission states that it proposes to use the power where there is "substantial disagreement within the network".[47] The Commission regards this provision as crucial to ensure effective case allocation and consistent application of the rules. In its SME Impact Assessment, the Commission states: "The Commission maintains the right to withdraw a case from a national competition authority if it considers that the case would be better dealt with by itself or that the direction taken in the case deviates from its own policy".[48]

(5) In a sweeping and important provision, the Commission also provides that: "Notwithstanding any national provision to the contrary", the Commission and Member State competition authorities may provide one another and use in evidence any matter of fact or law, including confidential information (Article 12.1). However "only financial penalties may be imposed on the basis of information provided" (Article 12.2).[49] Such exchange remains subject to the customary rules on confidentiality.

(6) Where one authority (the Commission or a Member State authority) in the competition network is already dealing with a case, another authority will be entitled to suspend or terminate action against that case on that ground (Article 13.1). According to the Explanatory Memorandum, this provision is partly intended to deal with the fact that, in several Member States, a competition authority, once seized of a case, is *obliged* to come to a formal decision. As regards E.C. competition law this will not be the case—the matter can be passed to another authority, as appropriate.

(7) The Advisory Committee is to be consulted on Commission decisions (save those for interim measures) and may discuss a case being dealt with by a Member State competition authority, on the initiative of the Commission or at the request of a Member State (Article 14.6).

(8) The Advisory Committee will also have the right to deliver an opinion on the Commission's preliminary draft decisions and recommend publication thereof.

(9) The existing limitation rules are consolidated into the new Regulation and adjusted to allow for the interruption of the running of time, in the event of *either*

45. Explanatory Memorandum, p. 6 There have now been some 50 cases of co-operation between the Commission and national co-operation authorities or courts (further details are set out in the 1999 E.C. Commission Competition Report, Box 2, p. 23).

46. It is not clear whether national courts are to be under a similar duty, although there has been discussion about such a requirement. At present, it is not provided for in Article 15, the Article on co-ordination with courts.

47. p. 10.

48. p. 58.

49. Also an interesting model for "second generation" international co-operation agreements, if accepted.

Commission or Member State competition authority intervention (Articles 24 and 25).

National courts

(1) National courts will be able to ask the Commission for information in its possession, or for opinions on questions concerning the application of E.C. competition law (Article 15.1).
(2) The Commission may also offer written or oral observations in national court proceedings involving Articles 81 and 82 E.C., whether itself or through Member State competition authorities (which will also have such a right). To this end, such authorities will be able to request any documents necessary from the national courts (Article 15.3).
(3) National courts will be required to send copies of any judgments applying Articles 81 or 82 E.C. to the Commission within one month of the judgment (Article 15.2).
(4) The Regulation also requires Member States to take "every effort" to avoid any decision which conflicts with decisions adopted by the Commission (Article 16).

Investigatory/enforcement powers

(1) This is perhaps the most controversial section, since the Commission proposes new powers to inspect private homes and to take oral testimony from legal persons.
(2) The Regulation specifies the Commission's right to undertake "own initiative" sectoral inquiries "if, in any sector of the economy, the trend of trade between Member States, the rigidity of prices or other circumstances" suggest that competition is being restricted (Article 17.1).[50]
(3) The Regulation provides that the Commission "may interview" any natural or legal person that may be in possession of useful information in order to ask questions relating to the subject-matter of an investigation and record the answers (Article 19). One would hope that it is intended to set out further implementing rules for such "depositions" (although there is no reference to this in the Commission's proposal (Article 34)). There has been some debate as to whether the Commission can summon witnesses to the Commission for such purposes.
(4) The Regulation provides that Commission officials should be authorised (in addition to existing powers) to enter "the homes of directors, managers and other members of staff" in so far as it may be suspected that business records are being kept there (Article 20.2(b)). In such cases, authorisation from the relevant judicial authority must be obtained beforehand (Article 20.7).
(5) The Regulation also expressly provides that during an inspection the Commission may ask a representative or member of staff of a company or trade association for information "relating to the subject-matter and purpose of the inspection" (*i.e. not* just oral explanations relating to documents (Article 20.2(f)).
(6) The Commission can also examine records "irrespective of the medium on which they are stored" (presumably meaning computer diskettes and hard discs) and would have new powers to seal any premises or business records during inspection (Article 20.2(c) and (e)).
(7) The Regulation also confirms that the lawfulness of the Commission's decision to carry out an inspection is only to be subject to review by the European Court of Justice (Article 20.8).[51]
(8) Where a Member State carries out an investigation in relation to Articles 81 or 82 E.C., it is to do so under its own national procedural rules (Article 21.1).
(9) Fines for "procedural" infringements (failure to supply correct information, or a refusal to answer a question during an inspection, etc.) are to be raised to fines *not exceeding one per cent* of the total turnover of the company in the preceding year[52] (Article 22.1).
(10) Periodic penalty payments for "procedural" infringements are also to be *increased to five per cent* of the average daily turnover in the preceding business year per day, calculated from the date set by Commission decision[53] (Article 23.1).

First reactions

These changes are generally most welcome but they involve new uncertainties.

The loss of the *notification* mechanism with immunity from fines will be a major concern for

50. Interestingly, in the 1999 Annual Report, the Commission speaks of "impact assessment studies" to measure the effect of the Commission's interventions on markets and to identify sectors where competition needs to be spurred (point 371, p. 99). A sign of the future after the White Paper reform is implemented?

51. See, *Hoechst*, Joined Cases 46/87 and others [1989] E.C.R. 2859.
52. This approach is modelled on the comparable rules in the ECSC Treaty.
53. *ibid.*

many. It will make E.C. competition law assessments tougher, since there will not be a "safety valve" of notification in difficult cases. Many have asked the Commission at least to establish some mechanism for "informal guidance" or "business review letters". However, concerned that this could lead to a form of alternative notification, the Commission has indicated that it will issue reasoned opinions in response to applications for guidance by companies only in very limited circumstances that raise an "unresolved, genuinely new question of interpretation",[54] that is:

> "[T]he rare cases presenting a genuine predictability problem because they raise new or unresolved questions".[55]

A related issue is whether notifications at national level will be retained. If they are, many may seek new safe harbours by re-notifying at national level. However, it may be expected that national competition laws may also remodel on the E.C. system to avoid this.

Many will also be concerned to see hard earned exemptions lost, albeit that one would still expect such decisions to be persuasive that Article 81(1) E.C. is not infringed, if the matter were reopened. Pending notifications whose clearance is difficult or unlikely are another matter. In such cases, the parties may have to adjust their arrangements straight away.

The *"centralisation rules" for the competition network* involve considerable changes to the architecture of E.C. competition law enforcement, and this will also raise new issues on consistency.

The new "Regulation 17" clearly goes a long way towards setting up structures to achieve cohesion in the system. However, there is major debate concerning Article 81(3) E.C. in the national courts. Thus, there are concerns that it may be difficult to prove competition law at reasonable cost in national courts. Some therefore favour specialised competition courts in each Member State. Some argue that Article 81(3) E.C. is so uncertain as to be incapable of direct effect[56] and that it should be applied only by administrative authorities who can take into account the broader non-competition policy considerations. They argue that competition law is political by its very nature and the scope for diverging judicial interpretations of Articles 81(3) E.C. in different national courts is just too great. The Commission argues that Article 81(3) E.C. does not imply discretionary powers that can only be exercised by an administrative body.[57] Others note that there have been exemption decisions which have taken into account broader non-competition policy issues.[58] For many, the possibility of eliminating the politics of an administrative clearance through decentralisation to the courts is very attractive.

Cohesion with the national courts may not be as straightforward as with national competition authorities. The Commission has proposed a "best efforts obligation" on a national court to follow Commission decisions (Article 16). This underlines the point that Commission decisions are not *binding* on national courts, albeit that the European Court has said national courts are obliged to take into account Commission decisions, guidelines and notices.[59] In its Explanatory Memorandum, the Commission effectively asks national courts:

- to see if the principles they are adopting are consistent with European Court judgments and Commission decisions;
- to seek information from the Commission and/or its opinion on the application of the E.C. competition rules if potential conflicts appears;
- to consult the European Court in cases of doubt under Article 234 E.C.; and
- to suspend their proceedings where a relevant Commission decision is pending before the Community courts.[60]

One would hope that this will go a long way to achieving sufficient cohesion, but clearly there will be more scope for divergence than now, if only because interpretation of Article 81 E.C. as a whole (including Article 81(3)) will be the domain of a wider group of "regulators".

The alternative would appear to be that national courts would continue to suspend proceedings pending decisions by one of 16 E.C. competition authorities. Perhaps an acceptable proposition. However, it would still be at odds with the Commission objective to change the role of the competition authorities to one of handling important priority enforcement, rather than reacting to cases where competition law is invoked in private disputes. It will be interesting to see how this debate evolves.

Finally, many will be concerned at the prospect of the proposed *investigatory* powers, notably executives and staff being interviewed by the Commission.[61] We need more detailed clarification

54. Explanatory Memorandum, p. 11.
55. SME Impact Assessment, Proposed Regulation, p. 59.
56. This is notably the view of the German Monopolies Commission, according to the summary of observations published in February 2000 at pp. 6–7.
57. Explanatory Memorandum, pp. 4–5.
58. See, *e.g.* Whish in "The Modernisation of European Competition Law: The next ten years" (University of Cambridge Occasional Paper, June 2000) at pp. 74–78.
59. Joined Cases C-319/93, C-40/94 and C-224/94, *Dijkstra and Others* [1995] E.C.R. I–4471.
60. Explanatory Memorandum, p. 24.
61. In-house lawyers have also expressed concern that they can be interviewed in the absence of legal professional privilege.

concerning the rights of the defence when oral testimony is to be taken or questions asked in an inspection. The Commission has said that the new power to ask questions would be subject to the privilege against self-incrimination as defined by the Community courts.[62] This would appear to be a reference to the *Orkem* case.[63] In *Orkem*, it was held that respect for the rights of the defence precluded the Commission from compelling an undertaking, by decision requesting information, to provide it with (*written*) answers which might involve an admission on its part of the existence of an infringement which it is for the Commission to prove. However, in practice this will be very different as *oral* statements are taken. No doubt company staff and their lawyers will be careful to ensure that no questions which invite such an admission are asked. Some should be straightforward (for example "Did you participate in a cartel!?"). Others more difficult ("What was the purpose of the meeting held on date x?" or "Please tell me when, where and why you met any of your competitors in period y"?). Some may also think that such questions should be put before a judge.

Other policy issues

Damages

On more than one occasion this year Mr Monti has spoken of the need to help consumers to obtain redress for the damage caused through cartels. It appears that the Commission is keen to see Member States making such private actions easier, revisiting national laws if required, a logical next step of further decentralisation into national courts.

Energy

Two points should be mentioned here. First, in April 2000, the Commission published on the DG Competition website a useful survey of E.C. competition policy in the liberalisation of E.U. energy markets by Mr Tradecete, dealing with issues such as network access, transmission pricing, interconnector capacity allocation and co-operation between suppliers. Secondly, in the light of the recent oil price increases, the Commission has reiterated that it is keeping the oil sector under close scrutiny to ensure that no anti-competitive practices are keeping up prices.[64]

Postal services

In May 2000, the Commission adopted a proposal for a directive amending the 1997 Postal Services Directive[65] with a further opening of Community postal services to competition, to be implemented in two stages, in 2003 and 2007.[66]

The Commission proposes to increase, with effect from January 1, 2003, the range of services that Member States must open to competition. These include: ordinary domestic and incoming cross-border letters and direct mail weighing more than 50 grams (the current weight limit is 350 grams); all outgoing mail to other Member States, (which is already open *de facto* in 10 Member States); and all express mail. This means an additional 20 per cent market-opening in total.

The proposal also defines "special services" which cannot be reserved to universal service providers, including delivery on appointment, guaranteed time of delivery and more than one attempt at delivery.

Opponents are arguing for a next phase of liberalisation to 150 grams only, not 350 grams and stricter limits on special services so as not to undermine universal service.

Areas of Particular Interest

Sport

Box 9: Sport 2000

- Transfer fees
  - * Illegal *during* the life of a contract as well as on termination? *Bosman* read broadly)
- *Sporting rules*
  - * Prohibition on multiple club ownership outside Article 81(1) E.C.
  - * *Mouscron/UEFA*
    - — issue avoided through *Automec*
    - — "national leagues not called into question by EC law"
- Broadcasting
  - * UEFA's broadcasting block to protect game attendance cleared
  - * *Telefonica Media Sogecable*: immunity of fines removed for pooling of broadcasting rights
  - * *Eurovision II*: sub-licensing for pay-TV, changing market structure
  - * Market definition
    - — Wimbledon = a separate market?
    - — Demand elasticity between events assessed (*Eurovision II*)
    - — Football World Cup tickets—distinct market on SSNIPS test

62. *e.g.* Speech of Mr Monti, "Fighting Cartels Why and How?" 3rd Nordic Competition Policy Conference, September 11–12, 2000, Commission Website, Speech/00/2951, September 11, 2000.
63. *Orkem v. Commission*, Case 374/87 [1989] E.C.R. 3283.
64. See, *e.g.* Commission Memo/00/55, September 20, 2000, "EC Competition policy and the motor fuel sector".
65. Directive 97/67 [1997] O.J. L15/14.
66. COM(2000) 319 final, May 30, 2000.

Transfer fees

The issue which has attracted most headlines this year in sport has been *transfer fees*. It will be recalled that *Bosman* already made it unlawful to require payment of a transfer fee on the movement of a player to another Member State as his contract expired. That ruling was based on Article 39 (ex 48) E.C. protecting the free movement of workers. There was no ruling on whether the transfer fee system infringed the competition rules, although Advocate-General Lenz considered that it did, save for a system requiring compensation for the specific training costs of young players. Since then, there has been a steady flow of competition based complaints at E.C. level concerning, amongst other issues, whether a transfer fee can be required for a non-E.U. player moving into the E.U. and what is the position of transfer during the life of a contract as opposed to on its expiry (for example, when Ronaldo moved from Barcelona to Inter Milan).

These issues have now come to a head. The Commission explained in April 2000 that it had sent a Statement of Objections to FIFA in December 1998, taking the view that its transfer fee rules violated E.C. competition law. Mr Monti said that the "international transfer system based on arbitrarily calculated fees that bear no relation to training costs should be prohibited, regardless of the nationality of the player and whether the transfer takes place *during* or at the end of the contractual period" (Emphasis added).[67] Clearly an important statement, because it involves a wide reading of the principles in the *Bosman* case.

It appears that FIFA undertook to provide proposals for a new system by September 20, 2000. The Commission set out this year to make clear that it expected this deadline to be respected. Mr Monti underlined that, if proposals did not materialise, he would prepare a negative ruling that the restrictions concerned were contrary to Article 81 E.C. Over the summer and in early autumn, the tension rose with extensive media coverage and political interventions. In late October 2000 it is understood that FIFA and UEFA presented proposals but, from press reports, it is by no means certain that they are enough for the Commission. FIFA and UEFA are understood to have proposed a ban on international transfers under the age of 18, that clubs be compensated for training young players up to the age of 23 and two transfer windows per season, with a player allowed to move only once a season. They also suggest that contracts should last up to five years, with players able to move in year four and five by paying compensation to their club.[68]

The Commission's position appears to reflect the following elements[69]:

- A club is entitled to be reimbursed for specific training costs when a player moves from club to club with some form of "standard compensation".
- A club is *not* entitled to charge an additional fee based on the market value of a player. This appears to reflect the idea that such a system is contrary to Article 39 (ex 48) E.C. *and* distorts competition between clubs.
- A club could, however, charge a "severance fee" where a player leaves during the life of his contract, in effect a form of indemnity payment, provided that this is in line with relevant national labour laws (applicable in all sectors) and that those laws are themselves consistent with E.C. law. There have been statements by the Commission that such payments would have to be agreed between the player and the club and "transparent", in the sense of being written into players contracts at the time they are entered into. This appears to mean, for example, that the Euro 1.8 million "transfer fee", which Inter Milan had to pay Barcelona for Ronaldo in 1997, would be illegal, but not the severance fee he had agreed with the club (Euro 24 million—paid by Inter Milan on his behalf).
- The Commission has indicated that it objects to transfer fees both where the payment results from unilateral termination by the player of his contract or international transfers following termination by mutual consent.
- A system of "transfer windows" (for example periods outside the (main) season when transfers could occur) would be lawful provided that it is limited to what is reasonable to protect team stability for particular league/championship competitions.[70]
- The Commission considers that these principles also apply to transfers involving *non-E.U.* players. In so far as transfers are from Member States to non-Member countries, the Commission considers that

67. Speech by Mr Monti, April 17, 2000, DG Comp Website, Speech/00/152.
68. *The Daily Telegraph*, November 1, 2000.
69. See, *e.g.* Speech by Mr Pons, Deputy Director General DG Competition, October 14–15, 1999, Fordham Conference, pp. 11–12.
70. See, also *Lehtonen*, Case C-179/96, Judgment of April 13, 2000, in which the ECJ found that basketball rules which prevented a Belgian club from fielding players from other Member States where they had been transferred after a specified date constitute an obstacle to the free movement of workers, but may be justified on non-economic grounds related to sport, if they do not go beyond what is required to achieve that sporting aim.

Article 81 E.C. is infringed "only where the club in question plays on a regular basis in competitions involving the participation of clubs from Member States".[71]

- The Commission has also indicated that, in order to give smaller clubs alternative revenue sources to transfers, it might consider favourably the creation of a common solidarity pool which would allow for redistribution between clubs in an objective manner of a share of revenues from sporting competitions.

The Commission appears to be focusing from a competition perspective not on the freedom of the player as an economic operator, but rather on the way that the *clubs* have restricted competition between them. The Commission's view is that, through the transfer fee rules, clubs have agreed to restrict their freedom to take on players who have unilaterally terminated their contracts, agreed not to recruit players without payment of a fee and decided who should be responsible for fixing and paying the fee. These are considered to be appreciable restrictions.

Clearly, the Commission does not regard the transfer fee rules as "purely sporting" by nature (and therefore outside Article 81 E.C.). Equally, the continued emphasis on solidarity funds suggests that the Commission is not accepting the idea that transfer fee remuneration is indispensable to small club survival. In any event, the Commission argues that it cannot accept as a ground for exemption a restriction which infringes another provision of the E.C. Treaty, here Article 39 (ex Article 48) E.C.

Sporting rules

In December 1999 the Commission indicated that it was not planning to take further action on *Mouscron's complaint against UEFA*. It may be recalled that Excelsior Mouscron, a Belgian club, wanted to play its UEFA cup match against F.C. Metz in a larger stadium just across the border in Lille. UEFA refused, saying that such matches had to be played at home and that if Mouscron did play in Lille, the "home match" against a French club would still be played in France. Mouscron argued that this was contrary to the E.C. rules on freedom to provide services and the E.C. competition rules.

The Commission decided that the UEFA rule that home matches should be played at home is essentially a sporting rule "needed to ensure equality between clubs". The Commission noted that UEFA has added an additional condition that a club cannot play its home match in its opponent's country. However, the Commission considered that there was "no Community interest" in doing a closer investigation into whether that condition and UEFA's related decision stopping Mouscron playing in Lille was an abuse of dominant position in the circumstances. Interestingly, one ground invoked was that "the case must be assessed within the context of the national geographical organisation of football in Europe, which is not called into question by Community law".[72] One senses that the Commission does not want to push further, for fear of a ruling which could make it difficult in other cases to defend national leagues being composed of clubs in the same country.

Similarly, in December 1999 the Commission issued an Article 19(3) Notice on the *UEFA, rule prohibiting multiple club ownership* in UEFA club competitions.[73] This case relates to the UEFA rule which does not allow more than one club under common control to take part in its competition. The Commission considers that the rule may fall outside Article 81(1) E.C. but is seeking to check whether there are not less restrictive means of ensuring the integrity of competitions where more than one club belongs to the same owner. UEFA accepts that the rule places some limitations on mergers between European football clubs and investments in clubs, but argues that these *enhance* sporting competition, rather than diminishing it.[74]

Broadcasting

In April 2000, the Commission published an Article 19(3) Notice concerning *UEFA's broadcasting rules*,[75] which restrict the broadcasting of football matches at times when domestic football fixtures are being played. These rules have been the subject of a long-running debate, with a first notification in 1992, several complaints by broadcasters, an attempt to resolve the issues through a mediator and, ultimately, the notification of amended rules by UEFA in 1999, which the Commission now proposes to clear.

The Commission has required UEFA to limit the broadcasting restrictions to when football is *actually* being played in a given territory. UEFA

71. See, speech by Mr Pons, cited above.

72. Commission Press Release IP/99/965, December 9, 1999.

73. [1999] O.J. C363/2.

74. In April 2000, the European Court confirmed the position of Advocate-General Cosmas in *Deliège*. Amateur judokas taking part in a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors, may provide the basis for services of an economic nature. Whether this was so on the facts was, however, a question for the national court. On the other hand, selection rules which limit the number of participants in a tournament do not in themselves represent restrictions on the freedom to provide services, being inherent to the organisation of an international high-level sports event: Joined Cases C-51/96 and C-191/97, *Deliège* Judgment of April 11, 2000.

75. [2000] O.J. C121/14.

can block the televising of football for two and one-half hours to cover the *main* domestic football schedule, but on only one day of the weekend. UEFA cannot block the televising of football at other times, for example during winter breaks. There is an exception for recorded excerpts in news programmes and another exception for certain special events (national team matches, matches which have to be broadcast live according to national legislation and any other match of national importance). Interestingly, if a match *is* broadcast under the terms of this last exception, then the football association concerned has to allow the transmission of any other match in its territory during the same period. It would appear that this is to create some degree of competition at that time and prevent undue distortion of competition on related television markets.

In April 2000, the Commission also announced that it had sent a Statement of Objections to *Telefonica Media and Sogecable* concerning the pooling of their broadcasting rights to the Spanish League and Cup matches during the 1998/99 to 2002/03 seasons.[76] The Commission proposed to remove their immunity from fines. The case relates to these companies' notification of the *Audiovisual Sport II* Agreement in 1999, under which the parties commit themselves to exploit their broadcasting rights to these competitions via a joint venture company, Audiovisual Sport. The parties also agree to assign to Audiovisual Sport any contracts with the football clubs which may be concluded for the 2003/04 to 2008/09 seasons. Audiovisual Sport is also granted related pay-per-view broadcasting rights.

The Commission considers that the notified agreement involves a joint buying system for the rights to broadcast football events and joint selling and price-fixing on the wholesale market for such rights, when they are licensed to other broadcasters. These could be serious restrictions given the strong position of the parties on all relevant markets, with serious effects on the downstream market for pay-TV and pay-per-view. It appears that the parties have already responded, amongst other things, agreeing to license their pay-per-view football rights to competitors.[77]

In June 2000, the Commission published its decision in the *Eurovision* case.[78] Again, this has been a long-running debate with a first decision in 1993, which was annulled by the CFI in 1996 and then appealed to the ECJ. However, in May 2000 the EBU withdrew that appeal. This decision therefore aims to set matters right and update the previous context. The decision starts with the original notification in 1989, takes into account a supplementary notification in 1996 and further amendments and additions in 1998 and 1999. It is an interesting decision, because of the approach taken to product market definition, new solutions to cover pay-TV developments and the changed market circumstances.

The Commission's related Article 19(3) Notice was summarised in last year's paper.[79] The core idea is that European broadcasters which offer a service of national character and importance combine to purchase and exchange sports rights. Related thereto are rules for access by non-EBU members to Eurovision sports rights which have been acquired on an exclusive basis through collective negotiations and for sub-licensing of such rights to pay-TV channels. Such access rights are intended to alleviate foreclosure issues and counterbalance the restrictive effects of the joint acquisition of sports rights for third parties, which might otherwise have no access to such events.

As regards the product market definition, the Commission did not accept the EBU's view that the relevant market was that for "the acquisition of television rights to important sporting events in all disciplines of sport, irrespective of the national or international character of the event". The Commission considered that narrower definitions could apply according to the type of sport and type of event. Mass sports such as football, tennis or motor racing might be distinguished from others because they attract large audiences, with preferences varying from country to country.

However, according to research carried out for the Commission, some *major sporting events* could be distinguished. Notably, viewing figures for events such as the Olympics, Wimbledon and the Football World Cup did not appear to be influenced by the existence of other events broadcast at or about the same time. The offer of such events might, therefore, influence the broadcaster to pay higher prices. The Commission again followed its merger control practice and decided that it did not have to rule on the point, but concluded: "there is a strong likelihood that there are separate markets for the acquisition of some major sporting events, most of them international".[80]

In finding that there was sufficient residual competition, the Commission also noted that the EBU in principle only acquires international events and not *national* events which are the majority of sports events shown on television. An interesting comment, because it suggests that the Commission

76. Commission Press Release IP/00/372, April 12, 2000.
77. *European Voice*, October 19, 2000.
78. [2000] O.J. L151/18. See also the note by Font Galarza in [2000] E.C. Commission Competition Policy Newsletter, June, pp. 28–33.
79. [2000] I.C.C.L.R. at pp. 111–112.
80. Paras 38–45. The Commission also found that such major sporting events had such widespread appeal and economic importance that any restrictions related thereto were appreciable for the purposes of Article 81(1) E.C., at paras 82–83.

sees such events as part of the relevant market in appropriate cases.[81]

As regards pay-TV, the Commission's concern was that EBU members had entered the market for thematic channels and/or pay-TV services. As a result, new sub-licensing rules have been adopted which require that when an EBU member transmits part of a sports event on its national general programme channel and part on its pay-TV channel:

- a non-EBU member has the access rights under the general scheme established in 1993 (for example to make live transmissions of unused rights and deferred transmissions); *and*
- a non-EBU member has the right to transmit on its pay-TV channel identical or comparable competitions to those presented on the EBU member's pay-TV channel.[82]

The logic appears to be to prevent the acquisition of exclusive TV rights to certain major sporting events from unduly restricting competition in the downstream television markets in which the sporting events are broadcast.[83]

It appears that the market structure has changed radically since 1993. Capacity devoted to sports broadcasters has increased dramatically in recent years, principally from non-EBU broadcasters. Thus, in 1990 EBU members offered 23,344 hours of sports broadcasting in Europe out of 33,947 hours, but in 1997 EBU members offered only 40,994 hours out of 91,621 hours. EBU rivals (both media groups and rights brokers) are also found to have effectively attacked its previous strong position, winning the rights to many major sporting events (save for certain events where the organiser favoured very wide broadcasting of an event on free-to-air TV). The EBU is, however, still found to have a unique, "one-stop-shop" position to reach the widest possible audience in Europe.

In relation to the CFI's criticisms of the 1993 decision, the Commission considers that the EBU's rules are objective and sufficiently determinate to be applied uniformly and without discrimination. However, the Commission does so noting the further amendments and clarifications which it received from the EBU in 1996 and 1998. Interestingly, the Commission also considers that the membership rules of professional associations of broadcasters do not *in themselves* restrict competition with Article 81(1) E.C. In the absence of dominance, the Commission finds that there is no obligation to admit other members. On the other hand, Article 81(1) E.C. may apply to restrictions agreed within such an association.[84]

81. Para. 101.
82. Paras 35–37.
83. Paras 41 and 45.
84. Paras 66–70.

The Commission has granted exemption until December 2005 so that it can review its position shortly before the next award of the rights for the Olympic Games. Exemption is granted from February 1993 (*i.e.* from when the EBU submitted its access scheme for non-EBU members to Eurovision sports rights).

Books

In the last year, the Commission has continued its intervention into the *Austro-German book pricing agreement.* In February 2000 there were signs that the Commission was planning to accept proposals to split the agreement into two national agreements. Remaining Commission concerns focused on a "re-importation clause", which would allow publishers to block sales of books exported and re-imported to avoid national price-fixing rules, and fears that this would be abused. In June 2000, this was confirmed. The Commission published an Article 19(3) Notice concerning revised notifications of the relevant agreements.[85]

It may be recalled that in 1993 German and Austrian publishers had notified a system called the "*Sammelrevers*" system. This was a retail price maintenance system between German and Austrian publishers and booksellers, operating across E.U. Member State borders. The Commission had clear objections to such a system, although there was significant lobbying to retain it. Certain Member States also emphasised that *purely national* resale price maintenance systems should not be challenged under the E.C. competition rules.

The Article 19(3) Notice shows how this has been translated into a practical solution. As suggested in the February reports, what happened is that the publishers changed the *Sammelrevers* system so that, from June 2000, the *cross-border* agreements between German and Austrian publishers and booksellers were annulled. The result is that the revised system is now restricted within the E.U. to agreements between German publishers and booksellers.[86] However, what the Notice also shows is how difficult it is to achieve a national retail price maintenance system. Thus, the Notice states that, under the revised system there is a provision whereby if a wholesaler sells to retailers outside Germany, he must "ensure that such retailers undertake to abide by the price maintenance arrangements in the event that they re-import the books into Germany". It is then explained that German books re-imported into Germany are in principle *not* subject to retail

85. [2000] O.J. C162/25.
86. In the process, another retail price maintenance system which had been operated by seven German publishers since 1994, called the *Einzelreverse*, has been terminated, the publishers coming into the *Sammelrevers* system.

price maintenance. The *Sammelrevers* system only applies if it is clear that the books were exported *solely* for the purpose of being re-imported in order to avoid the system. A difficult line in practice! The *Sammelrevers* system also does not apply to sales across E.U. borders to final consumers (for example via the Internet) or direct cross-border sales to final consumers. Further, the system does not apply to agreements with publishers outside the E.U., including in Switzerland and the Czech Republic. It is not, however, explained how that is reconciled with the relevant trade/Europe agreements.

While indicating that it planned to treat the *Sammelrevers* system as outside Article 81(1) E.C., on the basis that it would not appreciably affect trade between E.U. Member States, the Commission appears not to be comfortable with the re-importation rule, which it said it would monitor closely. In August 2000, the Commission is understood to have carried out dawn raids to check on allegations that German booksellers were refusing to supply Libro, an Austrian company, offering books for sale on the Internet.[87] It will be interesting to see if the Notice is the end of the matter or not!

Professional services

Box 10: Professional Services

- Restrictions on multi-disciplinary practices "may not be acceptable"
- The difference between purely ethical rules and those with undue competitive impact
- Excessive professional restrictions and the national laws which endorse or underpin them are under challenge (*cf. CNSD*)

This year the theme of competition and professional services has been a continuing priority for the Commission. There was a section in the 1999 Annual Report and a specific speech on the subject at the Commission's competition day in Lisbon in June 2000. There are three main points to note: First, there is now a reference to the ECJ concerning multi-disciplinary partnerships.[88] This is an issue which is the subject of widespread debate internationally at the moment. In Lisbon, the Commission suggested that: "it is probable that a total prohibition on the collaboration of one profession with another is not, in principle, acceptable". (My translation)

Secondly, the Commission has confirmed that it is "developing an approach towards the issues involved in applying the competition rules to the professions". The Commission states that as regards several professions the condition of effect on trade between Member States is not often met, because the services offered are national or local. The Commission is, however, looking at cases with a "Community dimension", *i.e.* an impact in all or several Member States.[89] The Commission is trying to draw the dividing line between purely ethical rules (not caught by the competition rules) and rules or practices contrary to Article 81 E.C. In this context, the Commission accepts that many *professional rules* are acceptable, for example on professional secrecy or conflicts of interest. However, the Commission considers that various rules are not. Notably the collective fixing of prices and the prohibition of certain forms of advertising may be caught by Article 81(1) E.C.[90] The Commission is also concerned about excessive restrictions on members of a profession seeking clients and on entry to a profession.

The Commission stresses that the legal framework in which an agreement is made in national law does not prevent the application of the E.C. competition rules. Nor does the (unlawful) delegation by the state of a power to fix the prices charged amount to a sufficient defence to exercise of that power. Many *national rules* are acceptable (for example on professional qualifications to ensure appropriate quality of services). However, the Commission considers that national legislation which delegates to professional associations the power to adopt unacceptable restrictive practices, or which approves such restrictive practices, should be abrogated.

The Commission has also indicated that the Draft Horizontal Guidelines do *not* apply to the standards related to the provision of professional services, such as rules of admission to a liberal profession.[91] Clearly these are considered to be a special case.

Finally, it will be seen from the European Court cases this year that competition law does apply to various aspects of professional activity. In addition to the *CNSD* ruling, medical specialists were also held to be undertakings in the *Pavlov* case.

87. Reuters, August 2, 2000.
88. *J.C.J. Wouters v. Netherlands Bar Council*, Case C-309/99, [1999] O.J. C299/15.
89. 1999 E.C. Commission Competition Report, point 138, p. 42.
90. See, further, 1999 E.C. Commission Competition Report, Box 5, pp. 43–4; *Italian National Bar tariff*, annulled by the Turin Court of Appeal even though approved by Ministerial decree, on the ground that it was contrary to Articles 10 and 81(1) E.C.: Judgment No. 791 of July 11, 1998; 1998 E.C. Commission Competition Report, p. 354 and the *Manuele Arduino* reference, mentioned last year [2000] I.C.C.L.R. p. 98.
91. Draft Guidelines, point 152.