Major Events and Policy Issues in E.C. Competition Law, 2001—Part 1

JOHN RATLIFF[1]

Wilmer, Cutler & Pickering, Brussels

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. in the last year.[2] The article is divided into three sections:

— A *general overview* of major events (legislation and notices, European Court cases and European Commission decisions).
— An outline of *current policy issues*.
— Comments on *particular areas*, meaning this year, pipeline/interconnector competition, competition and legal services and sport.

The first section is covered in this part, save for distribution and Article 82 and 86 E.C. decisions which will be outlined in Part 2 to be published in next month's ICCLR.

Table 1

- **Major Themes in 2001**
— Internet and distribution: loudspeakers, perfumes, books and cars.
— Compulsory licensing revisited? *IMS Health* (copyright); *DSD* (trademarks).
— Structural remedies? *Deutsche Post*, *Formula One* and airport slots.
— Pipeline/interconnector competition: investment protection and competitive change.
— Major liberalisation drive into energy, post, rail and ports: various cases on universal and competitive services (for example, *Deutsche Post*; *Ambulanz Glöckner*).
— Environmental collection system cases: *Eco-Emballages*, *DSD*.
— Dominance assessments: barriers to entry and nationwide networks (for post and environmental collection); collective dominance; market share stability.

Overview of major events

Legislative developments (adopted and proposed)

Table 2

- **New Legislation/Notices (Adopted)**
— R&D and specialisation block exemptions.
— Horizontal guidelines.
— Terms of reference for hearing officers: (short) reports to be published.
- **New Legislation/Notices (Proposed)**
— Draft *de minimis* notice.
  - vertical 15 per cent; horizontal 10 per cent; parallel networks 5 per cent.
— Draft notice on immunity/reduction of fines:
  - 1st in, no fine? Then "added value".
— Questionnaire on transfer of technology block exemption:
  - Copyright and market share ceilings next time?
— Proposed liberalising directives on port services, postal services and energy.
— Consultation on IATA passenger tariff conference.
— Draft guidelines on "Significant Market Power".

Adopted

Horizontal restraints

In November 2000, the Commission adopted new *block exemptions for specialisation and R&D agreements* (Regulations 2658/2000 and 2659/2000 respectively) and the related "*Guidelines on Horizontal Cooperation Agreements*".[3] The drafts were summarised in detail last year.[4]

In the new block exemptions, the Commission has dropped various features of the old block exemption: the "white lists" of permitted clauses (retaining only (revised) black lists of restrictions not capable of exemption); the opposition procedure; the turnover threshold in the specialisation block exemption; and the requirement in the R&D block exemption that a framework programme for the joint R&D be established.

Ceilings have also been raised. Thus, the R&D block exemption applies provided that the parties do not together hold more than 25 per cent market share (previously 20 per cent). The specialisation block exemption applies, provided that the combined market share of the parties is not more than 20 per cent (irrespective of whether the agreement is only for joint production, or also includes distribution).

The "black lists" for both block exemptions have been revised. Thus, for R&D agreements, the

1. With many thanks to Ingrid Cloosterin and Flavia Distefano for their help in the production of this article.
2. The reference period is from November 2000 until the end of October 2001. This is a slightly revised version of a paper given at the IBC Competition Conference in Brussels, November 15, 2001.
3. [2000] O.J. L304/3; [2001] O.J. C3/2. See also Lücking and Woods, EC Competition Policy Newsletter, February 2001, pp. 8–10.
4. 2001 ICCLR, pp. 7–10.

following provisions are now not allowed: restrictions on carrying out independent R&D in fields unconnected with the R&D; prohibitions on challenging IP rights; limitations on output or sales; price-fixing; customer or active sales restrictions after seven years from when the product is put on the market in the E.U.; prohibitions of passive sales in territories reserved for other parties. For specialisation agreements, the black list is shorter: price-fixing; limitations of output or sales; and allocation of markets or customers.

The specialisation block exemption also now applies to *unilateral* specialisation agreements between competitors (where *one* party gives up production and agrees to buy from a competitor).

R&D and specialisation agreements already in force on December 31, 2000, which complied with the old block exemptions continue to be exempt until June 30, 2002. New agreements must comply with the new rules as of January 1, 2001, if they are to be block exempt. Both block exemptions are to last until December 2010.

The main changes from the draft block exemptions are in the case of R&D. Notably:

— The minimum duration when an agreement provides for joint exploitation has been increased from *five* to *seven* years from the date the goods are first put on the market in the E.U.,[5] even if territorial or customer restrictions are included. (Such agreements can be extended beyond seven years, provided that there are no territorial or customer restrictions and the market share ceiling of 25 per cent is not reached.)
— Companies which supply R&D as a service can also benefit from the block exemption where they have access to the results of the R&D for further research (in addition to academic bodies or research institutes).[6]
— Technical field of use restrictions between non-competitors are permitted when the agreement does not provide for joint exploitation.[7]

In the case of specialisation, parties to a joint production agreement can now agree on sales targets, as part of an exception to the black-listed provisions.[8]

Other

In May 2001, the Commission adopted a decision revising the *Terms of Reference for Hearing Officers in Competition Proceedings*.[9] The role of the hearing officer has become a somewhat controversial issue in recent times, mainly because of increased focus on evidentiary issues and private parties' concern that the office play an effective role since judicial review can take at least two years. While not resolving all the current issues, the decision provides that the report of the hearing officer on a draft decision will be *published* with the decision and communicated to the parties, the Member States and the full College of Commissioners.[10] We have already seen examples, usually a short statement of a few lines attached to a decision. There is also the suggestion that hearing officers may be recruited from outside the Commission in the future.[11]

In June 2001, the Commission extended the block exemptions for IATA passenger tariff consultations and for consultations on airport slots to June 2002 and June 2004 respectively, pending further review.[12]

Proposed

Draft de minimis *notice*

In May 2001, the Commission adopted a new *Draft Notice on Agreements of Minor Importance*. The main changes are as follows: First, the draft notice draws a distinction between appreciable "effect on competition" and appreciable "effect on trade". The draft focuses only on effect on *competition*, suggesting that there may be a separate notice on what "appreciable effect on trade" means. This clarification is linked to the decentralisation debate, where effect on trade is the key boundary between E.C. and national competition rules.

Secondly, the draft notice envisages raising the market share thresholds. Thus, Article 81(1) E.C. would not apply to agreements between competitors (*i.e.* horizontal agreements), where the aggregate market share held by *all* the parties to the agreement on the relevant market is 10 per cent (previously 5 per cent). For agreements between non-competitors (*i.e.* generally vertical agreements), Article 81(1) E.C. would not apply if the market share held by *each* of the parties to the agreement does not exceed 15 per cent on any of the relevant markets concerned (previously 10 per cent).[13]

Thirdly, the draft notice introduces a threshold for situations of cumulative effect. Article 81(1) E.C. would not apply where the market share of such parallel networks is less than 5 per cent.[14] As a concept this is a helpful improvement, since previously there was no attempt to set a quantitative threshold. It is, however, a very low figure.

5. Art. 4.1.
6. Art. 3.2.
7. Art. 3.3.
8. Art. 5.2(b).
9. [2001] O.J. L162/21.
10. Art. 16.3.
11. See Recitals, point 7.
12. Regulation 1324/2001, [2001] O.J. L177/56.
13. See draft, para. 8.
14. See draft, para. 9.

Fourthly, the draft notice aligns the list of "hard-core" restrictions (which are *not* to be covered by the notice) on the new versions in the new vertical and horizontal block exemptions (Regulations 2790/1999 and 2658/2000). However, the Commission has not gone as far as the E.U. Council requested in expressly allowing restrictions on active selling by dealers within a selective distribution or franchise system. The Commission considers that the 15 per cent threshold is too high for such cases and that if a lower market share threshold were created that would lead to endless "market definition battles". It appears that the Member States generally accept this approach.[15] Rather than creating a special category for such cases the Commission refers to the European Court's case law suggesting that hard-core restrictions can still fall outside Article 81(1) E.C. if the parties have very weak positions on the markets in question.

Draft notice on immunity/reduction of fines

In July 2001, the Commission published a *Draft Notice on the Non-imposition or Reduction of Fines in Cartel Cases.*[16] The draft notice focuses on "secret cartels", holding out the prospect of no fine for the first to confess and provide "added value". However, to obtain immunity and/or reductions of fines is a demanding exercise.

In order to obtain *immunity* eight conditions have to be met. The company must:

— Inform the Commission of an alleged cartel of which the Commission is not aware.
— Provide enough evidence and information for the Commission to adopt a decision authorising a "dawn raid".
— Be the first company to disclose the alleged cartel's existence.
— Provide the Commission with all evidence and information available to the company relating to the alleged infringement.
— Co-operate fully, on a continuous basis and expeditiously with the Commission, remaining available to answer questions on the facts swiftly.
— Not misrepresent material facts.
— End its involvement in the alleged infringement, at the latest as the infringement is disclosed.
— Not have coerced other companies to participate in the alleged infringement.

Immunity is to be obtained in stages with first an offer conditional on meeting these requirements and then the final assessment at the end of the administrative procedure.

Companies would also be able to approach the Commission with information in "hypothetical terms" to clarify whether the Commission knows of the alleged cartel from someone else. It is, however, not yet clear how this will work since, to obtain an answer, enough may have to be disclosed to enable the relevant market and therefore companies to be determined. If a company has to go that far, the information is not very "hypothetical". It appears that if a company provides "hypothetical information" in this way and wishes to claim the immunity, the Commission requires that full information be provided "within five working days". Perhaps this is to stop companies trying to *claim* immunity, without actually providing the information, but as an initial reaction the deadline is rather short.

In order to obtain a *reduction* of a fine, a company must provide evidence of "significant added value" to the Commission's case *and* terminate its involvement in the suspected illegal activity.

What constitutes such "added value" will depend on what the Commission has already but the idea is that the evidence should "strengthen, by its very nature and/or its level of detail" the Commission's ability to establish the facts. This appears close to current practice on what amounts to "decisive evidence" in the current rules, although some are questioning this.

The first company to provide evidence representing "significant added value" is to obtain a reduction of between 50 per cent and 30 per cent. The second would obtain a reduction between 30 per cent and 20 per cent. Subsequent companies would obtain 20 per cent or less. These rankings would follow any company's disclosure leading to immunity (if appropriate). Evidence which a company provides and which the Commission did not have, with a direct bearing on the gravity or duration of an infringement, or constituting aggravating circumstances, will not be taken into account in setting the fine to be imposed on that company.

The reduction is again to be indicated in stages. Notably, the Commission will provide the companies concerned with an indication as to which "band" of reduction it intends to apply at the latest when sending a statement of objections. Again, the final assessment is at the end of the administrative procedure.

The Commission notes that this immunity or reduction in fine is without prejudice to civil claims and also emphasises that the part played in an infringement by a company benefiting therefrom will still be fully described in the Commission's decision.

15. Luc Peeperkorn, E.C. Competition Policy Newsletter, February 2001, pp. 4–6. For a summary of practice under the current notice, see Peña Castellot, E.C. Competition Policy Newsletter, February 2001, pp. 11–15.
16. [2001] O.J. C205/18.

There is much discussion about the draft notice at the moment. Some argue changes are necessary because the E.C. rules are not transparent enough and, in any event, "piggy-back" on U.S. procedures. The Commission also appears keen to offer a "zero fine" to encourage more confessions, having so far only offered 70 to 80 per cent as a maximum.

It is not really surprising that more companies go to the U.S. authorities first. This is unlikely to change, given that American cases concern *individual*, *criminal* sanctions, whereas the E.C. cases concern only corporate, civil sanctions. This is one of the reasons why new criminal sanctions are being proposed in the E.U., as will be discussed in Part 2. The Commission's practice, based on the current notice is also steadily clarifying, as more decisions are published, increasing predictability. Again, arguably little change is required.

However, what the proposed rules appear to do is to make clearer that the first company which goes into the Commission *can obtain full immunity* from fines. We shall have to wait and see if this new approach is retained and works better.

Other

In March 2001, the Commission issued a *letter and questionnaire* to obtain preliminary information for an evaluation report on the operation of the *transfer of technology block exemption*, Regulation 240/96.[17] Even though that Regulation does not expire until 2006, this has already prompted speculation that the Commission might modernise its approach in line with other recent changes to block exemptions, dropping the "white list" of permitted clauses and perhaps trying again to have a market share ceiling for the block exemption. This was very controversial in 1996 and resulted only in the right for the Commission to *withdraw* the benefit of the block exemption where the licensee's market share is 40 per cent or more.[18] Other ideas being floated include the idea that there should be a more general IP block exemption (including copyright), with related guidelines and that non-compete clauses should be allowed.

In February 2001, the Commission submitted a *Proposed Directive on Market Access to Port Services.*[19] The core idea is that Member States may only limit the number of providers of port services on the basis of space or capacity constraints, or for reasons of maritime-related safety. If they do so, there should be a transparent and open selection procedure for authorising such providers, with limits on the duration of such authorisation based on the amount of related investments made. In the case of cargo handling, the draft Directive provides that at least two independent service providers for each category of cargo should be authorised. Self-handling by port users is to be allowed and, if port managers are also service providers, they are required to have separate accounts for their management and competitive service activities. Transitional measures would involve review of existing authorisations according to whether the conditions of the Directive were complied with and what investments have been made by the service provider.[20]

In March 2001, the Commission submitted *an amended proposal for a further opening to competition of Community postal services.*[21] The degree of further liberalisation was debated through the year and, in October 2001, the E.U. Council reached a political agreement, whereby Member States would have to open up to competition:

- From 2003, letters weighing more than 100 grams (or costing more than three times the price of a standard letter).
- From 2006, letters weighing more than 50 grams (or costing more than two and a half times the cost of standard letter).
- From 2003, all outgoing cross-border mail (unless Member States need to reserve this market segment to provide their universal service).[22]

In 2006, the Commission would assess the impact on universal service of full liberalisation of the postal market in 2009, and, if appropriate, propose that liberalisation or other steps.

Finally, the Commission is also trying to *accelerate the liberalisation of energy markets* with new proposals for further liberalisation of the electricity and gas markets[23] and suggestions that if the progress cannot be made, the Commission may turn to Article 86 E.C. Directives or Decisions (as occurred in the case of telecoms).[24] The Commission proposes on a "quantitative" basis that all E.U. *companies* be free to choose their electricity supplier by 2003 and their gas supplier by 2004; while all E.U. consumers should be free to choose their electricity and gas suppliers by 2005. On a "qualitative" basis, the Commission is looking, amongst other things, for independent

17. Under Art. 12 of Regulation 240/96, the Commission is to draw up an interim report on the operation of the block exemption four years after its entry into force.
18. See Art. 7.
19. Commission Press Release IP/01/203, January 24, 2001.
20. Art. 16.
21. IP/00/541, May 30, 2000; COM(2001) 109 final, March 21, 2001; [2001] O.J. C180/291.
22. IP/01/1420, October 16, 2001; see also MEMO/01/3, December 22, 2000.
23. IP/01/356, March 13, 2001.
24. IP/01/872, June 20, 2001.

regulators, more unbundling, and regulated third party access.

In February 2001, the Commission issued a *Consultation Paper on the IATA Passenger Tariff Conference Block Exemption*. This block exemption relates to tariff discussions for interlining between airlines. The Commission proposed to extend the current block exemption (Regulation 1617/93) until June 2002 while reviewing it further, which it has now done. The Commission does not object to interlining as such, but questions whether there are less restrictive ways of achieving the same benefits. The Commission also has concerns that on some routes no airline offers a ticket other than the IATA norm, that the tariff consultations have spill-over effects onto other fares and that there are "country-by-country" bilateral exchanges of information which are anti-competitive.[25]

In March 2001, the Commission adopted *Draft Guidelines on market analysis and the calculation of "Significant Market Power"* ("SMP") in relation to the proposed Framework Directive for Electronic Communications Networks and Services.[26] The determination of SMP may trigger obligations under other telecoms Directives.

The draft guidelines include a number of elements of general importance. First, a new definition of SMP, aligned on the concept of dominant position in Article 82 E.C. (rather than the current 25 per cent presumption). Secondly, general guidelines on market definition[27] and collective dominance[28] with summaries of relevant principles in telecoms cases. Thirdly, the draft guidelines propose that the Commission should have the power to block proposed measures of national regulatory authorities ("NRAs").[29] It appears, however, that the Member States have not accepted this system, preferring that the Commission should merely issue reasoned opinions on the measures proposed by NRAs.[30] This is interesting material given the Commission's current, broader decentralisation proposals. It is also interesting (and controversial) to see how fast notions of "collective dominance" are spreading through the Commission's enforcement practice.

25. See Commission website and Reuters, November 29, 2000. A proposal for an amending regulation on slots allocation was also adopted, COM(2001) 335, June 20, 2001.
26. IP/01/456, March 28, 2001; COM(2001) 175, March 28, 2001.
27. See paras 24–61.
28. See paras 77–93.
29. See para. 125: "The Commission's final decision can require the NRA to amend or withdraw the draft measure."
30. European Report, No. 2583, April 7, 2001.

European Court cases (and new procedure) (ECJ and CFI)

Table 3

- **Main European Court Cases/Procedure**
— *Neste Markkinointi*:
Petrol station networks can be divided by type of contract for cumulative effect assessment.
— *Masterfoods/HB Icecream*:
National courts must not take decisions in conflict with existing Commission decisions.
— *Weyl Beef*:
Arrangements to restructure Dutch slaughterhouse market, cleared under state aid review, cannot be attacked later under Article 81 E.C. No matter if private or public initiative first.
— *Mannesmannröhren-Werke*:
Orkem applied to requests for information. Duty to give factual answers and existing documents; no duty to give admissions.
— *Professional Representatives at EPO*:
Member States cannot derogate from the competition rules when allowing limits to comparative advertising rules. Commission decision generally upheld.
— *Courage*:
National rules on damages may be modified in E.C. damages claims, depending on circumstances.
— *Metropole*:
No "rule of reason" in Article 81(1) E.C. Agreements must not be looked at in the abstract, but in their full factual and legal context.
— *Ambulanz Glöckner*:
Reservation of patient transport service to provider of emergency services can be justified under Article 86(2) E.C., if required for that provider to be economically viable.

NB. New expedited "fast-track" procedure

Article 81 E.C.

Cartonboard appeals

In November 2000, the European Court of Justice ("ECJ") ruled on appeals brought by companies against the judgments of the European Court of First Instance ("CFI") in the *Cartonboard Cartel* case. The Commission had found that from mid-1986 until at least April 1991, 19 producers of cartonboard had participated in an agreement and concerted practice to fix prices, share markets and control supply in the E.U. Seventeen companies and four members of the Finnish trade association, Finnboard, then challenged that decision before the CFI, resulting in various reductions of fines. Thirteen companies then appealed further to the ECJ.

In general, the ECJ upheld the CFI's judgments, confirming the fines imposed on seven companies.

In the case of two appeals,[31] the ECJ referred the case back to the CFI for reassessment, finding in each case that the company in question had been held incorrectly responsible for the unlawful conduct of a subsidiary, prior to its acquisition. Thus, *Cascades* (from France) had purchased two companies in 1989 and *Stora* (from Sweden) acquired two companies (including Feldmühle) in September 1990. The acquired companies (but not the acquirors) were found to have participated in the infringements from mid-1986.

In a further case, the ECJ reduced the fine on *Koninklijke KNP* ("KNP") by ECU 100,000 for a similar error.[32] KNP had been held responsible for the activities of a company from mid-1986, when KNP had only acquired it in January 1987. Another fine[33] (on *Moritz J. Weig* from Germany) was reduced by ECU 600,000 on the basis that the CFI had not calculated the fine in the same way as other fines on companies which had co-operated with the Commission. Another fine[34] (on *Sarrio* from Spain) was reduced by ECU 250,000, in so far as the CFI had not followed the same approach when calculating the fine as it had used with all other companies.

Otherwise, the ECJ stated that the Commission does not *have* to indicate the figures related to the method of calculating fines in its decision, even if that would make the administrative act more transparent and easier for the CFI to review. (In practice, however, the Commission appears to have decided to reveal the figures at each stage of the calculation, when applying the new guidelines on fines.) The CFI could, however, seek production of the Commission's detailed figures and take into account additional information, if necessary, for the purpose of its review assessment.[35]

Cumulative effects—network division and insignificant contributions

In December 2000, the ECJ made an interesting ruling on Article 81(1) E.C., in the context of exclusive purchasing agreements for petrol stations in Finland, in a case called *Neste Markkinointi v. Yötuuli*.[36]

In 1986, a Finnish oil company, Kesoil, entered into a co-operation and marketing agreement with another Finnish company, Yötuuli, for the distribution of petrol and other motor fuels in Finland. The agreement was for a 10-year period. The agreement was then to continue, with a right for Yötuuli to terminate on one-year's notice. In 1995 Kesoil was taken over and merged into Neste. In June 1998 Yötuuli gave Neste notice of its decision to cease purchasing motor fuels with effect from July 1, 1998 (*one week's* notice as opposed to *one year*). Yötuuli then switched to selling a competing company's products. Neste recovered its property in the station and then sought compensation from Yötuuli for damage suffered as a result of the agreement not being terminated on one-year's notice.

Yötuuli pleaded in defence, amongst other things, that the agreement was caught by Article 85(1) E.C. (now Article 81(1) E.C.). The Tampere District Court then referred the issue to the ECJ, focusing in particular on whether the network of Neste's agreements for petrol supply in Finland should be assessed as a whole, or whether contracts similar to that entered into with Yötuuli should be assessed separately. There were only a few agreements similar to that entered into with Yötuuli (27 out of a total of the 573 stations comprising Neste's network). These represented less than 5 per cent of Neste's network and only 1.5 per cent of the 1799 stations in Finland. The ECJ held that Neste's network could be divided in this way and that the agreement was *not* caught by Article 85(1) E.C.

The Court's approach was based on *Delimitis*. In other words, the Court focused on whether all the similar agreements entered into by the supplier cumulatively made access to the relevant market difficult. The Court then went on to examine whether the *agreements in question* in the dispute significantly contributed to that restriction of market access, or "cumulative sealed off" the market. The Court held that they did not, whilst noting the District Court's finding that Neste's network *as a whole* closed off the larger part of the market in motor fuels.[37]

For the ECJ, the key factor in the case was the duration of the clause in question rather than the exclusivity involved since, in practice, stations only sell one brand of petrol, whether or not they are subject to an exclusive purchasing obligation. The Court recalled the *Delimitis* ruling that if the duration of a restrictive agreement is manifestly excessive in relation to the average duration of

31. Case C-279/98, *Cascades* and Case C-286/98P, *Stora Kopparbergs*, judgments of November 16, 2000.

32. Case C-248/98P, *NV Koninklijke KNP BT v. Commission*, judgment of November 16, 2000.

33. Case C-280/98P, *Moritz J. Weig*, judgment of November 16, 2000.

34. Case C-291/98P, *Sarrio*, judgment of November 16, 2000.

35. In July 2001, the CFI considered three appeals against the Commission's decision in the *Sugar Cartel* case. The CFI rejected all arguments raised save one. The Court accepted that, on the facts, Tate & Lyle had provided "continuous and complete" co-operation to the Commission (in the sense of the Leniency Notice) and therefore reduced the fine on Tate & Lyle by 60 per cent (instead of 50 per cent as the Commission had done). A greater reduction was not possible since Tate & Lyle had still played a significant role in the cartel. Tate & Lyle's fine was therefore set at EUR 5.6 million, instead of EUR 7 million. Joined Cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle, British Sugar and Napier Brown*, judgment of July 12, 2001.

36. Case C-214/99, *Neste Markkinointi v. Yötuuli*, judgment of December 7, 2000.

37. See para. 33.

contracts in the market, the individual contract falls within Article 85(1) E.C.

Further, noting that a supplier's obligations in this context were onerous in terms of investment, requiring that the sales point be adapted to the image of the brand sold, the Court found that a period of one-year's notice gave reasonable protection to the economic interests of both parties and limited the restrictive effect of the contract on competition.[38] In such circumstances, the agreements in question did not significantly contribute to the restrictive cumulative effects of Neste's network and were not caught by Article 81(1) E.C.

This is an important ruling showing once again the factual complexity of exclusive purchasing contract networks. Overall, it is not a surprising result, since the equity of the case appeared to lean strongly in favour of enforcing the notice period. It is also interesting to see the ECJ reminder that the function of the rule of "significant contribution to sealing off the market" is to *limit* the number of cases in which contracts are declared void on competition grounds. There are limits to Eurodefences!

In July 2001, the CFI also upheld the Commission's decision rejecting a complaint by two pub tenants, Mr and Mrs Roberts, concerning the *Greene King* pub licence.[39] Mr and Mrs Roberts operate a pub in Bedfordshire in the United Kingdom. As tenants of the English regional brewery, Greene King, they are under an obligation to obtain beer from that brewery. In 1997 they filed a complaint to the Commission alleging that the beer purchasing obligation in their pub lease infringed Article 85(1) E.C. (as it then was). In 1998 the Commission rejected the complaint on the ground that Greene King's standard lease did not fall within the scope of Article 85(1) E.C. The Commission considered, notably, that the Greene King lease did not significantly contribute to foreclosure of the relevant market.

Mr and Mrs Roberts appealed. Amongst other things, they argued that the Greene King lease made a significant contribution to foreclosure of the market, focusing on the fact that the lease was for nine years. The CFI restated (as it had in *Delimitis* and *Neste Markkinointi*) that if an agreement is manifestly excessive in duration in comparison to other agreements concluded on the market, then it may come within Article 85(1) E.C. The Court accepted that a brewery with a relatively small share of the market, which ties its sales outlets to it for many years, may contribute to foreclosure of the market as significantly as a brewery with a comparatively strong position in the market which regularly frees its outlets at frequent intervals. However, on the facts other larger breweries had leases which were longer than those of Greene King, extending even to 20 years. Greene King's tied market share was also less than 1 per cent, whether in terms of outlets or volume of beer sold. This did not amount to a significant contribution to market foreclosure.

Mr and Mrs Roberts also argued that the Greene King lease should be attributed to the supply agreements of the national breweries in the United Kingdom and, in that sense, contributed significantly to foreclosure. The CFI again disagreed. On the facts, Greene King had concluded supply agreements with all the national breweries in the United Kingdom and with several regional breweries. However these only contained limited purchasing and stocking obligations, which did not seriously restrict access to Greene King's network. Nor, in such circumstances, could Greene King's network of supply agreements be attributed to the national breweries which dealt with Greene King. In a sense Greene King's "downstream" pub network could even assist market entry.

State aid decisions and Article 81 E.C.

In January 2001, the CFI gave judgment in *Weyl Beef Products and Others v. Commission*, a case concerning the relationship of Article 85 E.C. (now Article 81 E.C.) assessments and the state aid rules.[40] The context was measures designed to restructure the Dutch slaughterhouse industry. In 1992, an organisation called the Livestock and Meat Board (abbreviated here to "the PVV", from the Dutch) opened consultations with representatives of the sector, at the end of which it was agreed that certain slaughterhouses should be repurchased with a view to withdrawing them from the market.

To that end, the PVV, which was set up according to Dutch law, adopted two regulations, one setting up a fund for cattle slaughtering and one making provision for financing of that fund. Both regulations were approved by the Dutch Ministry of Agriculture. On the basis of these two regulations, the costs of restructuring are financed by means of a levy. In 1993 and 1995, the Commission authorised the aid provided for by those regulations. In 1994, 13 slaughterhouses set up a foundation to improve the structure of the cattle slaughterhouse system (the "SSR") and in 1995 the SSR notified its constitution to the Commission.

Weyl Beef Products BV ("Weyl Beef") and two other slaughterhouses in the Netherlands objected to the system. In 1995 they applied to the Commission for rulings that the provisions and agreements

38. See paras 34 and 35.

39. Case T-25/99, *Colin Arthur Roberts v. Commission*, judgment of July 5, 2001.

40. Joined Cases T-197/97 and T-198/97, judgment of January 31, 2001.

relating to the restructuring of the cattle slaughterhouse sector in the Netherlands infringed Article 85(1) E.C. and that the PVV levy to finance the restructuring was contrary to Articles 3(g), 5, 85, 92 and 93 E.C. (as they then were). Subsequently, the Commission advised Weyl Beef and the other companies that there were insufficient grounds for granting their applications and, in 1997, that it planned to take no further action.

Weyl Beef and the other companies then challenged the Commission's decision, two companies relying solely on an infringement of Article 85(1) E.C., one also on the basis of Articles 92 and 93 E.C. (now Articles 81(1), 87 and 88 E.C. respectively). This last claim was inadmissible.

The Commission's reasoning in rejecting the complaints was that, although the restructuring was initiated by the private sector, the programme was to be regarded as having been established by decision of the public authorities. The participation of the companies concerned in the drafting of the related decisions was therefore simply a "preparatory step" in the adoption of public measures. The PVV regulations themselves could also not be challenged on the basis of competition law, since they were legally binding measures. Similarly, the sums of money paid for the closure of slaughterhouses were to be classified as state aid, authorised by the Commission. Finally, according to the Commission the effects on the relevant markets were negligible, or at least positive.

In its ruling the Court focused on whether the restructuring measures were aspects or elements of aid authorised by the Commission and, if so, whether they entailed restrictive effects *going beyond* what is necessary if an aid is to meet objectives permissible under the E.C. Treaty. On the facts the Court found that, even if some of the measures could come within Articles 85(1) E.C. (such as the constitution of the SSR and agreements to pay companies for closing slaughterhouse capacity), they were so indissolubly linked to the purpose of the aid that they could not be separately evaluated.[41] The anti-competitive effects of the scheme were all therefore attributable to the aid and necessary to implement and achieve its purpose. In particular, the Court accepted the Commission's position that the scheme of "restructuring arrangements" was to be viewed as a single package. In clearing the financial aspects of the scheme as state aid, the Commission had therefore *also* cleared the implementing aspects which were of a private law nature, such as agreements to repurchase the slaughterhouses. The Commission had also acted properly in rejecting the applications as giving rise to no appreciable effects beyond those already considered in clearing the scheme under the state aid rules.

41. See paras 76–83.

This is an interesting ruling for two main reasons. First, it underlines the importance of making appropriate and timely competition submissions in state aid cases. Subsequent claims through Regulation 17 may not work. The CFI rejected one company's claim that it should be allowed to bring an action for infringement of the state aid rules because the information in the E.C. Official Journal concerning the Commission's state aid decisions was insufficient for it to evaluate whether to lodge an appeal.[42]

Secondly, it is interesting to see the way that the CFI did not get caught up with the idea that private action may have preceded the public measures. This has long been an area of uncertainty for companies, which are concerned that, on the case law, their efforts will be viewed as private agreements, "extended or reinforced" by public measures, leading to findings that *both* the private and public measures are unlawful. For the ECJ, it did not matter whether the restructuring initiative came from the undertakings or the public authorities. The key point was that the measures were "intended to reduce capacity in the sector, with financial assistance from the State".[43]

Lawyers and comparative advertising

In March 2001, the CFI made an important ruling concerning lawyers and comparative advertising in an appeal against the Commission's decision exempting the Code of Conduct of the Institute of Professional Representatives before the European Patent Office[44] ("the Code of Conduct").

In its decision the Commission had generally cleared this Code of Conduct.[45] More specifically, the Commission considered that most of its provisions fell outside Article 81(1) E.C., but took a different view of three provisions, which the Commission considered to prevent comparative advertising and to make it more difficult for such a representative to supply services to users which had already been clients of another representative. For these provisions, the Commission granted a short exemption until April 2000, designed to give time to adjust the relevant rules. April 2000 was chosen because Member States had until then to comply with the E.C. Directive on Misleading Advertising, as amended, to include comparative advertising.

The representatives appealed, arguing first that the Commission could not apply Article 81(1) E.C. to comparative advertising rules for lawyers,

42. See para. 49.
43. See para. 80.
44. Case T-144/99, *Institute of Professional Representatives before the European Patent Office v. Commission*, judgment of March 28, 2001.
45. 2000 ICCLR, pp. 97–98.

since the Directive contained a derogation allowing Member States to *limit* comparative advertising in professional services. The CFI rejected this, noting that a Directive could not derogate from a Treaty rule, given the principle of the hierarchy of norms.[46]

The representatives also argued that, as a matter of principle, since professional codes of conduct pursue an aim in the general interest, they should fall outside Article 81(1) E.C. The Court disagreed, considering rather that a case-by-case examination was required to see if restrictions on members of a profession came within Article 81(1) E.C.[47]

Applying that approach, the CFI agreed with the Commission's view that an outright prohibition on comparative advertising is caught by Article 85(1) E.C. (as it then was).[48] The Commission's treatment of the relevant provision in the Code of Conduct was therefore upheld.

However, the Court disagreed with the Commission's interpretation of the other two provisions. One provision stated that a representative could not mention the name of another professional entity in advertising "unless there was a written co-operation agreement between the member and that entity". The CFI found this not to be a restriction on comparative advertising, but rather a provision which "seeks to ensure that a professional representative does not rely unduly on professional relationships".[49] The other provision stated that a member could not exchange views about a case which has been handled by another representative with the client in the case, unless the client declared his wish to have an independent view or to change his representative. The Commission considered this to be a barrier to representatives approaching potential clients to offer their services to handle new cases. The CFI again disagreed, considering that the provision was designed to prevent a representative, when offering his service to a client, from discrediting a fellow professional by questioning his conduct of a case which has been terminated.[50]

No "rule of reason" in Article 81(1) E.C.

In September 2001, the CFI made an interesting ruling on the relevance of a "rule of reason" in E.C. competition law and the interpretation of the concept of ancillary restraints in the *Métropole (pay-TV)* case.[51] This concerned an action for partial annulment of the Commission's decision exempting the French satellite pay-TV joint venture TPS.[52]

In its decision, the Commission had concluded that certain vertical aspects of the agreements were inside Article 85(1) E.C. (now Article 81(1) E.C.) but might be exempted as facilitating the successful launch of a new pay-TV competitor in France. These included two clauses granting TPS the exclusive right to broadcast the general interest channels (TF1, France 2, France 3 and M6) and preferential rights to special interest programmes distributed by its shareholders, respectively. The Commission exempted those clauses, which originally covered a ten-year period, for three years. The Commission also concluded that a non-competition clause was ancillary to the joint venture for a duration not exceeding three years. Under this clause, TPS' parents undertook not to become involved in companies engaged in pay-TV programmes in digital mode, by satellite to French-speaking homes in Europe.

The applicants sought annulment of those parts of the decision on the ground that these exclusivity and non-compete clauses were not restrictions of competition within Article 85(1) E.C. or, alternatively, would qualify as ancillary restraints.

As to the first plea, the parties argued that the Commission failed to apply Article 85(1) E.C. in the light of a "rule of reason", which would require that an anti-competitive clause is not prohibited if positive effects on competition prevail over negative effects. The Court ruled that the existence of a "rule of reason" in this sense is doubtful in E.C. competition law. The pro- and anti-competitive aspects of a restriction may only be weighed in the context of Article 85(3) EC, not also within Article 85(1) E.C.[53] On the other hand, the Court emphasised that the relevant case law reflected a broader trend to look at agreements in their full factual and economic context, rather than abstractly.[54]

The Court also rejected the ancillary restraints claim on the basis that these clauses, even if directly related to the creation of the joint venture, were not necessary. The Court stated that in order for a restriction to be "necessary" two conditions must be met. The restriction must be *objectively necessary* (in duration and scope) to the activity in question meaning that, without such restriction, the implementation of that activity (not its commercial success) would be difficult or even impossible to achieve. The restriction had also to be *proportionate* to the object desired. In the absence of a rule of reason, such assessment does not also include a balance of the pro- and anti-competitive effects on the relevant market, which

46. See paras 50 and 54.
47. See paras 63–65.
48. See paras 71–79.
49. See para. 70.
50. See para. 98.
51. Case T-112/99, *Métropole Télévision (M6) v. Commission*, judgment of September 18, 2001. With thanks to Flavia Distefano for her assistance.
52. *Télévision par Satellite*, see 2000 ICCLR, pp. 98–99.
53. See paras 74 and 77.
54. See paras 76 and 79.

assessment is relevant only to whether the restriction can be exempted under Article 85(3) E.C. The Court concluded that both clauses were not objectively necessary to the creation of TPS and, in any event, disproportionate in duration and substance (ten-year clauses with wide exclusivities) for the objective of establishing TPS on the market.

Articles 82/86 E.C.

Seeking anti-dumping measures is not an abuse

In November 2000, the CFI upheld a Commission decision rejecting a complaint by *Industrie des Produits Sphériques* ("IPS").[55] IPS is a producer of broken calcium metal. Since 1991 IPS has been trying to obtain non-distilled primary calcium metal with low oxygen content from a company in the Pechiney group, PEM, which is the only producer of such calcium metal in the E.U. PEM was not able to make such a product until 1995 after research, technical updating of its factory and trials.

IPS then rejected the product as too expensive and complained to the Commission. IPS alleged that PEM had abused its dominant position by lobbying for anti-dumping proceedings against Chinese imports of primary calcium metal, leading to a Council Regulation imposing anti-dumping duties on such imports. IPS also alleged that PEM had sought to drive IPS from the downstream broken calcium metal market, where PEM was also a producer, by price squeezing and delaying supply of the upstream product required. The Commission rejected IPS' allegations, finding no proof of the price squeezing and holding that to seek to promote an anti-dumping procedure could not be an abuse in itself.[56]

The CFI rejected IPS' appeal, finding that the high price which PEM was asking for the primary calcium metal was justified by the particular technical demands made by IPS. Nor had IPS proved that the prices asked for by PEM were such as to eliminate an efficient competitor from the market for the downstream product.[57] As regards the anti-dumping claim, the CFI upheld the Commission's position. If recourse to an anti-dumping procedure were to be considered an abuse of Article 82 E.C. by itself, that would deny companies rights established to further the Community interest.[58]

Airport landing charges

In March 2001, the ECJ upheld the Commission's decision in the *Portuguese airport landing charges* case.[59] It may be recalled that the Commission had taken a decision under Article 90(3) E.C. (now Article 86(3) E.C.), requiring Portugal to cease operating a discriminatory landing charge system which favoured the large users (TAP and Portugalia) and gave a 50 per cent discount to domestic flights in Portugal.[60] Portugal challenged the Commission's right to take such a decision rather than pursuing a Council Directive which would be applicable to all, or taking infringement proceedings under Article 169 E.C. (now Article 226 E.C.).

The ECJ rejected those arguments, emphasising the Commission's discretion to decide on what measures are required to bring to an end a breach of Article 90 E.C.[61] The ECJ also confirmed that, in the absence of objective justification, having a high threshold in the landing charge system, which could only be met by a few particularly large partners of the undertaking in a dominant position, or the absence of a linear progression in the increase of quantity discounts, could constitute evidence of discriminatory treatment caught by Article 86 E.C. (now Article 82 E.C.).[62] Dominant companies may offer volume discounts, but they must be equally open to all commercial partners and justified by the volumes and economies of scale concerned.[63] For an infringement under Article 90(1) E.C. read with Article 86 E.C. (as they were) it was, moreover, not necessary to show discrimination based on nationality.

The Court considered that the 50 per cent domestic flight reduction was also contrary to the freedom to provide services, because it secured a special advantage for the domestic market. Such a measure conferred an advantage on carriers which operated more than others on domestic rather than international routes, leading to dissimilar treatment and affecting free competition.[64] Finally, the ECJ noted that Portugal did not rely on Article 90(2) E.C. (now Article 86(2) E.C.) to justify its preferential treatment of domestic flights.

Postal services

In May 2001, the ECJ answered a request for a preliminary ruling concerning Articles 86 and 90 E.C. (now Articles 82 and 86 E.C.) from the Civil District Court in Genoa, in relation to postal services in a case called *TNT Traco v. Poste Italiane*.[65] The case concerned activities before Directive 97/67 (on the development of Community postal services) entered into force, providing for accounting separation to avoid cross-subsidisation of competitive services from universal services.

TNT Traco is a private express mail service provider operating throughout Italy. In 1997 Poste

55. Case T-5/97, *Industrie des Produits Sphériques v. Commission*, judgment of November 30, 2000.
56. See 1998 ICCLR, p. 13.
57. See para. 180.
58. See para. 213.
59. Case C-163/99, March 29, 2001.
60. 2000 ICCLR, pp. 72–73.
61. See para. 20.
62. See para. 53.
63. See para. 52.
64. See para. 66.
65. Case C-340/99, judgment of May 17, 2001.

Italiane (the Italian Post Office) inspected TNT Traco and fined it some Lira 46.3 million for collecting, carrying and delivering mail for express delivery contrary to Article 39 of the Italian Postal Code. TNT Traco then brought an action before the District Court in Genoa against Poste Italiane, alleging that the exclusive rights of Poste Italiane and its conduct were contrary to (what was then) Articles 86 and 90 E.C. TNT Traco argued that the rules of free competition should apply to the express mail service which it provides and sought damages for its losses as a result of the fine being unlawfully levied.

In 1999, the District Court gave judgment in part, ordering Poste Italiane to repay the Lira 46.3 million fine. The Court found that it had been unlawful for Poste Italiane to levy the fine, since the supervisory, regulatory and disciplinary powers which it held previously had now been transferred to the Ministry for Post and Telecommunications. Nevertheless, the Court still decided to refer a question to the ECJ on the relevant E.C. rules before giving final judgment.

Although there was argument about admissibility, the ECJ decided that it was necessary for the Court to reply. The District Court's question was precise, focusing on whether Articles 86 and 90 E.C. (as they then were) precluded Italy from maintaining in force postal legislation,

— which distinguished between universal services (for which exclusive rights had been given to Poste Italiane) and non-universal services (subject to open competition);
— but which required companies offering non-universal services (other than Poste Italiane) to pay postal dues for the basic ordinary postal services, even where that service was not, in fact, provided by Poste Italiane; *and*
— allocated those dues to Poste Italiane, as the undertaking entrusted with the universal services, without there being any mechanism to ensure that there was no allocation of cross-subsidies to non-universal services.

The ECJ noted that Poste Italiane was a public undertaking, which had also been entrusted with special or exclusive rights to handle mail in Italy, without being required to pay postal dues equivalent to the normal postal charges, as all others providing such services had to do.

The Court held also that, under the relevant legislation, Poste Italiane could not avoid abusing its dominant position, since it was to be paid for services which it had not itself supplied.[66] The Italian legislation therefore infringed Articles 86 and 90 E.C., in so far as trade between Member States was affected.

The ECJ then considered whether the obligation to pay the postal dues could be justified under Article 90(2) E.C. The Court noted that Article 90(2) E.C. could be relied on to justify the grant of special or exclusive rights to Poste Italiane. Poste Italiane was entrusted with the operation of services of general economic interest and the maintenance of those rights was necessary for it to provide such services under economically acceptable conditions. To that end, it might prove necessary for suppliers of non-universal, competitive services to have to pay postal dues, such as those in question, in order to finance the universal service.

However, the total amount of such postal dues could not exceed the amount necessary to offset any losses incurred in providing the universal service. Moreover, the Court held that Poste Italiane (as universal service provider) must *also* pay the postal dues when supplying express mail services. Poste Italiane had also to ensure that the costs of its express mail service were not subsidised by the universal service, lest the charges and the potential losses of that service should be improperly increased.[67] It was for the District Court to ascertain whether those conditions were fulfilled, the burden of proof being on Italy and Poste Italiane.

Finally, the ECJ noted that the absence of a mechanism designed to ensure that the universal service provider did not allocate cross-subsidies to its non-universal activities did not "necessarily" mean that the conditions of Article 90(2) E.C. were not met.[68]

Ambulance services

In October 2001, the ECJ made an interesting ruling concerning the application of Articles 86 and 90 E.C. (now Articles 82 and 86 E.C.) to the allocation of exclusive rights for ambulance services in *Ambulanz Glöckner v. Landkreis Südwestpfalz.*[69]

In 1990 Ambulanz Glöckner obtained authorisation to offer a patient transport service until October 1994. In July 1994, when Glöckner applied for renewal of that authorisation from the relevant local authority, the "*Landkreis*" for Südwestpfalz, the latter consulted two medical organisations which operated the public ambulance service and the patient transport service in the area, the German Red Cross and the Workers' Samaritan Federation. These organisations objected to the renewal on the basis that their emergency

66. See paras 46–47.

67. See paras 52–58.

68. In May 2001 the ECJ dismissed two appeals brought by the *International Express Carriers Conference* ("IECC") against two judgments of the CFI relating to remailing. Cases C-449/98P and C-450/98P, judgments of May 17, 2001.

69. Case C-475/99, judgment of October 25, 2001.

facilities were not fully used and were operating at a loss, so that the arrival of a new service provider would oblige them either to increase the price of their services or to reduce them.

Under a 1991 German law, the *Landkreis* could refuse authorisation if its use might have an adverse effect on the public ambulance service which had been entrusted to medical aid organisations. In such circumstances, the *Landkreis* refused to grant the renewal on the basis that the emergency transport service had only operated at 26 per cent of its capacity in 1993. When Glöckner appealed, the local administrative court found for Glöckner. On further appeal by the *Landkreis*, the Higher Administrative Court for Rheinland Pfalz asked the ECJ whether the grant of a monopoly over the transport of patients in a limited geographic area was compatible with the E.C. rules on competition.

The ECJ noted that medical aid organisations offered two types of service: the emergency transport services and the non-urgent patient transport services. The organisations responsible were undertakings subject to E.C. competition law. They enjoyed special or exclusive rights as regards the patient transport services in so far as the number of companies entitled to offer such services was limited.

The ECJ found no infringement of Article 85 E.C., in conjunction with Article 90 E.C., in so far as there was no evidence that there was any unlawful agreement between the medical aid organisations concerned. As regards the claim that there was an infringement of Article 86 E.C., in conjunction with Article 90 E.C., the ECJ agreed with the Commission's view that there were two relevant markets: the market for emergency services and that for the transport of patients. The ECJ noted that it was for the national court to assess what was the geographic scope of each market. (The Commission suggested the relevant *Land*; Glöckner suggested all of Germany.) The Court noted that if an abuse were to be found, it appeared that this affected a substantial part of the common market given the size of the *Land* (some 20,000 km^2) and the high level of population there (some 4 million inhabitants), larger than that in some Member States.

Focusing then on whether there was an abuse, the Court noted that the 1991 law favoured the medical aid organisations, which were already holders of exclusive rights for emergency services, allowing them *also* to have exclusive rights to offer patient transport services. Since this involved a reservation of an auxiliary activity, which could be provided by an independent company, there was an infringement of Article 86 E.C.

The Court then considered whether such an abuse could be justified under (what was then) Article 90(2) E.C. The ECJ held that it could, in principle, although it was for the national court to assess whether the necessary conditions were met on the facts. The key question was whether the restriction was necessary for the organisations to provide the service of general economic interest, on uniform rates and similar conditions, without regard to particular situations or the degree of economic profitability of each individual operation.

The Court also recognised, applying *Corbeau*, that there might be a need to offset the costs of providing the non-profit making *emergency* transport services, with revenue from non-emergency patient transport, which was more profitable, even if that restricted competition on the latter market. The national court had therefore to determine whether the restriction on competition on non-emergency patient transport was necessary to enable the medical aid organisations to offer its emergency services (in all situations, 24 hours a day) in economically acceptable conditions.

Further, the national court had to determine whether the medical aid organisations were able to provide the two services—the public emergency ambulance service and the non-emergency patient transport service in an effective manner. If not, other independent operators should be allowed to operate.[70]

Decentralisation/Damages

The relationship of Commission decisions to national court judgments

In December 2000, in *Masterfoods v. HB Icecream*, the ECJ made an important ruling for the Commission's decentralisation drive, as it considered the next phase in the *Irish Ice-cream* litigation.[71] In 1992 the Irish High Court granted *HB/Icecream* ("HB") an injunction restraining Masterfoods from inducing retailers to store its products in HB's freezers. In doing so, the Court favoured protection of HB's property rights, noting also that the freezer agreements were terminable on short notice (two months).[72] Masterfoods then appealed to the Irish Supreme Court. In 1998 the Commission adopted a decision finding that the freezer exclusivity agreements and practices of HB (now Van den Bergh Foods) restricted competition, infringing both Articles 85 and 86 E.C. (as they then were). The Commission considered that HB's exercise of its property rights had to give way in view of the foreclosure effects in the circumstances. The Commission specifically ordered HB not to continue to induce retailers in Ireland to enter

70. In July 2001, the ECJ dismissed an appeal by *Irish Sugar* against the CFI's judgment, in general, upholding the Commission's Irish Sugar decision. The ECJ found that Irish Sugar's appeal was partly clearly inadmissible and partly clearly unfounded. Case C-497/99P, *Irish Sugar v. Commission*, order of July 10, 2001.
71. Case C-344/98, judgment of December 14, 2000.
72. 1993 ICCLR, pp. 58–59.

into freezer-exclusivity agreements. HB then appealed this decision to the CFI and obtained a temporary suspension thereof.[73]

In these circumstances, the Irish Supreme Court asked whether a national court's duty of "sincere co-operation" with the Commission meant that it was bound to stay the Irish appeal proceedings pending the resolution of the appeal before the CFI and the ECJ, against the Commission's decision.

The ECJ's answer was yes. The Court noted first that the Commission "is responsible for defining and implementing the orientation of Community competition policy". Although the Commission shared powers with national courts to apply Articles 85(1) and 86 E.C., "in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court applying those Articles". The Commission is "entitled to adopt at any time" individual decisions under Articles 85 and 86 E.C., even where the agreement or practice has already been the subject of a decision of a national court and the Commission's decision conflicts with the national court's decision.[74]

Member State national authorities, including courts, were also bound to follow Commission decisions in the sense that they had a duty under what was then Article 5 E.C. (now Article 10 E.C.) not to take measures which would jeopardise the attainment of the objectives of the E.C. Treaty. The ECJ had already held in *Delimitis* that national courts had a duty to avoid taking decisions which would conflict with a decision *contemplated* by the Commission, applying Articles 85(1), 86 and 85(3) E.C. It was even more important that national courts did not take rulings which conflicted with *existing* decisions of the Commission, even if the latter's decision conflicted with a ruling of a national court of first instance.[75] In the circumstances, the ECJ considered that the Irish Supreme Court should stay proceedings pending final judgment in the action for annulment before the European courts (unless the Supreme Court itself considered that a reference for a preliminary ruling was justified).

This is proving to be a *very* long case. Eleven years so far. However, the property rights issues are delicate and relevant to controversial debate in various areas (this year from copyright to pipelines). The "decentralisation conflict" is also ground-breaking. It is interesting to see the ECJ giving such weight to Commission decisions. This is important, because there are those who, despite cases like *Delimitis* and *Dijkstra*, continue to argue that national courts are only *bound* to take into account European Court judgments.[76]

E.C. damages claims and national rules

In September 2001, the ECJ ruled on a preliminary ruling relating to the *Courage* pub system in another U.K. pub lease case.[77] On this occasion, however, the issue was not the significance of the lease to market foreclosure. The issue was whether one contractual partner can sue the other for damages for breach of Article 85(1) E.C., something thought illegal in English law, in so far as one party cannot usually sue another for damages resulting from a shared illegality. However, the ECJ held that in E.C. law such an action *may* be available.

The case arose as a reference from the English Court of Appeal. Courage, a large U.K. brewer with 19 per cent market share in 1990, sued Mr Crehan, a tenant of Inntrepreneur Estates, for £15,266 for unpaid delivery of beer. Mr Crehan raised a defence that the beer was purchased under an exclusive purchasing obligation which was contrary to Article 85(1) E.C. He also counter-claimed for damages.

The root of Mr Crehan's complaint was that beer supplied to independent pubs was sold by Courage at substantially lower prices than those offered to tenants of Inntrepreneur, pursuant to the agreement between Inntreprenneur and Courage tying Inntrepreneur tenants to buy their beer exclusively from Courage.[78]

The first issue was the general English rule that a party to an illegal agreement could not claim damages from the other party. If that applied, even if Mr Crehan's defence were upheld, he would not be able to sue for damages. Noting that American law allowed a party to an anti-competitive agreement to sue the other contracting party if he is in an economically weaker position, the Court of Appeal asked whether the English rule should give way to another E.C. rule?

The ECJ emphasised the primacy of E.C. law, the direct effect of Articles 85(1) and 86 E.C. (as they were) and held that any individual can rely on a breach of Article 85(1) E.C. before a national court, even where he is a party to a contract that is liable to restrict competition within the meaning of that provision. The ECJ then emphasised the importance of giving full effect to Article 85(1) E.C., which would be at risk if an individual could not claim damages for loss caused to him by a contract or by conduct liable

73. Case T-65/98.
74. See para. 48.
75. See para. 60.
76. In December 2000 the CFI also upheld the Commission's decision in the *Aéroports de Paris* ground handling services case, Case T-128/98, *Aéroports de Paris v. Commission*, December 12, 2000. It will be recalled that this case concerned discrimination by the operator of Orly and Charles de Gaulle airports in the fees charged to third party ground handling service providers as compared to airlines organising such activities themselves, see 1999 ICCLR, p. 18. The CFI upheld the Commission's decision in its entirety. See Dussart-Lefret, EC Competition Policy Newsletter, June 2001, pp. 25–26.
77. Case C-453/99, judgment of September 20, 2001.
78. The case concerned Courage's old lease, notified to the Commission in 1992 but which has now been modified and was renotified in 1997.

to restrict competition. It was for national procedural rules to govern such damages actions, subject to the usual principles that such rules could not be less favourable than those governing similar domestic actions ("the principle of equivalence") *and* must not render practically impossible or excessively difficult the exercise of rights conferred by E.C. law ("the principle of effectiveness").

However, the Court held that E.C. law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by E.C. law does not entail unjust enrichment of those who enjoy them.[79] Similarly, provided that the principles of equivalence and effectiveness are respected, E.C. law does not preclude national law from denying a party, who is found to bear a significant responsibility for a restriction of competition, the right to obtain damages from the other contracting party. It was therefore for the national court to consider whether Mr Crehan was in a markedly weaker position than Courage/Inntrepreneur at the moment of contracting.

The ECJ also noted that if the contract proved to be contrary to Article 85(1) E.C. because of the cumulative effect of a network of similar restrictive contracts, the party contracting with the person controlling the network could not bear significant responsibility for the infringement particularly where in practice the contract was imposed on him by the party controlling the network.

Procedure

Orkem and requests for information

In February 2001 the CFI made an important ruling concerning the rights of the defence in an appeal by *Mannesmannröhren-Werke*, against a Commission decision requiring certain information.[80] The context was the Commission's investigation into an alleged cartel relating to steel tubes. In 1997, after carrying out "dawn raids", the Commission sent Mannesmannröhren-Werke ("MW") a request for information concerning various alleged meetings. The Commission asked for certain factual information such as dates, places and names of firms participating in such meetings and copies of all related documents. However, the Commission also asked, in the case of meetings for which MW was unable to find documents, that MW "describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting". The Commission also asked MW to describe the relationship between certain quota and price agreements for two types of pipe and some of the meetings held in the alleged cartel.

MW declined to reply to these questions, asserting that they infringed the rights of the defence. When the Commission then took a decision ordering MW to comply or pay a periodic penalty, MW appealed to the CFI.

The CFI held that MW had to reply to those questions which were purely factual and produce the pre-existing documents and materials sought. However, MW did not have to reply to those questions which involved an admission on its part of the existence of an infringement, applying the principles in *Orkem.*[81] In practice, therefore, MW did not have to provide the description of the meetings for which it had no documents. Nor did it have to comment on any relationship between the agreements and the meetings to which the Commission referred.

The Court stated that a company which receives a request for information has a duty of "active co-operation" with the Commission. Although a company has defence rights, they do not involve an "absolute" right to silence, because that would constitute an unjustified hindrance to the Commission's performance of its duties. However, Community law recognised as fundamental principles both the rights of the defence and the right to fair legal process. The application of those principles amounted to protection equivalent to that guaranteed by Article 6 of the European Convention of Human Rights. As a result, MW was entitled to confine itself to answering questions of a purely factual nature and the production of pre-existing documents and materials. Moreover, MW was so entitled as from the very first stage of an investigation initiated by the Commission.[82]

This is important because the CFI clearly states that the Commission cannot engage in such broadly based inquiries as appears to have incurred here. It is also timely because the ruling lends support to the view taken by many practitioners that when the Commission *asks questions* during dawn raids, it must *also* limit itself to purely factual issues and not seek statements and comments which may amount to admissions of an infringement. This is highly relevant to the Commission's desire to be able to ask questions and take statements in the proposed "new Regulation 17", both during dawn raids and, more generally, in the procedure.

Commission duty to justify change in position

In March 2001, the CFI annulled a Commission decision rejecting a complaint by *Metropole SA* against the EBU's Eurovision system.[83] It may be recalled that, following a complaint by Screensport in 1987, the Commission sent the European Broadcasting Union ("EBU") a statement of objections concerning the acquisition and use of television rights to sports events within the Eurovision

79. See para. 30.
80. Case T-112/98, *Mannesmannröhren-Werke AG v. Commission*, judgment of February 20, 2001.
81. Case 374/87, *Orkem* [1989] E.C.R. 3283, para. 35.
82. See para. 77.
83. Case T-206/99, judgment of March 21, 2001.

system. The Commission stated that it was willing to envisage exemption for these rules on condition that the EBU was willing to grant sub-licences for a substantial part of the rights in question and on reasonable terms. The EBU then amended and notified its system and the Commission granted an exemption decision in 1993. In each case the Commission took the position that the Eurovision rules were *inside* Article 85(1) E.C. (now Article 81(1) E.C.). In 1996, the CFI annulled the Commission's decision, without ruling on whether the Eurovision rules were caught by Article 81 E.C.

Since 1987 the French television company Metropole Télévision, which operates M6 ("Metropole"), has applied to join the EBU on six occasions. Each time its application was refused. In 1999, Metropole made a complaint to the Commission, arguing that the EBU was denying its membership on the basis of the criteria annulled by the ECJ's decision and that the EBU was discriminating against it, because the EBU was continuing to give Canal+ access to its programme rights, even though Canal+ was no longer an active member, while rejecting Metropole's application for similar rights.

In 1999 the Commission rejected Metropole's complaint, stating that it did not have the legal powers to force the EBU to admit M6, because the relevant membership rules of the EBU *did not fall within* the scope of Article 81 E.C. As regards the discrimination claim, the Commission stated merely that Canal+ no longer formed part of the Eurovision system.

The CFI annulled the Commission decision on both points. The Court found that, although the Commission might be entitled to change its position and find that the new EBU rules were outside Article 81(1) E.C., that was a substantial change in position, which the Commission had a duty to justify, so as to allow Metropole to ascertain the grounds on which its complaint had been dismissed. The CFI also considered that the Commission had a duty to assess the gravity and duration of the alleged infringement which meant, in particular, that the Commission had to assess whether the alleged discrimination had anti-competitive effects.

Expedited, "fast-track" procedure

Finally, it should be noted that in December 2000 the CFI and ECJ adopted *various amendments to their Rules of Procedure* with a view to expediting proceedings in particularly urgent cases. These entered into force on February 1, 2001.[84] Before the CFI, they include:

- An *expedited ("fast track") procedure*, favouring the oral rather than the written procedure.
- The ability of the Court to decide that the second round of pleadings is not necessary.
- Reduction in the time allowed for applications to intervene to six weeks.
- Communication of procedural documents by fax or scanned email (with delivery of the signed original within 10 days).
- Establishment of a single, uniform extension of the time limit for bringing actions on account of distance to 10 days.

Similar changes have also been introduced in the ECJ's Rules of Procedure, as regards direct actions.

Commission decisions

Cartels

Table 4

- **Cartels**
- — *Lysine* decision:
  Credit for co-operating first limited, if co-operation not full and ring-leader.
- — *Euro-zone Exchange Charges*:
  Progressive settlements through year.
- — *SAS-Maersk Air*:
  Market-sharing agreement on routes.
- — *Graphic Electrodes*:
  EUR 218.8 million fine!
  70 per cent reduction for first to provide decisive evidence.
- — *Sodium Gluconate*:
  80 per cent reduction (first to provide decisive evidence, but after request, otherwise 100 per cent?)

Lysine

In June 2001, the Commission published its decision in the *Amino Acids/Lysine cartel* case.[85] The Commission fined five producers of synthetic lysine amounts ranging from EUR 47.3 million to EUR 8.9 million for unlawful agreements on prices, restrictions on allocation of supply and the exchange of information related thereto.

The decision is interesting mainly for the account of what happened and the way many of the parties co-operated, yet still objected extensively to the Commission's views on the *effects* of the cartel and their respective *roles* therein.

There were five companies involved: Archer Daniels Midland ("ADM") (from the United States), Ajinomoto and Kyowa (from Japan) and Sewon (now Daesang) and Cheil (from Korea). The product concerned is a synthetic amino acid used to

84. [2000] O.J. L322/1 and 4.

85. *Amino Acids*, [2001] O.J. L152/24.

supplement feedstuffs for animals, such as cereals, which do not contain enough lysine naturally. Prices for such lysine are therefore linked to the cost of the feedstuffs to which lysine is added (cereals) and competing feedstuffs with *natural* lysine, such as soybean. The market for such products has been expanding in recent times.

Before 1991 there were only three synthetic lysine producers, Ajinomoto (with a joint venture facility in Europe called Eurolysine), Kyowa and Sewon. In 1991, ADM entered the market with a new and large plant. Cheil also entered the market in 1991, with a further expansion of its facilities in 1993.

The Commission found that in the 1970s and 1980s Ajinomoto, Kyowa and Sewon had co-operated with the aim of fixing prices and volumes in Europe. The Commission had evidence of contacts between 1990 and 1992. Then, in 1991–1992, ADM entered the market and effectively threatened the other producers that if ADM could not achieve the market share it sought by co-operation, then it would flood the market with cheap product. The Commission found evidence of follow-up implementation after meetings. A trade association for animal feed additive manufacturers was also used for meetings, sometimes simply with a fake agenda and sometimes with unofficial meetings of the cartel participants around official meetings.

In November 1992, the FBI searched ADM's offices in the United States, leading to one of the firm's executives co-operating in the U.S. lysine investigation.

Meetings continued and an information exchange on lysine sales was established with Ajinomoto as the co-ordinator/secretary. There were tensions in the cartel group, since ADM was seeking to expand its share of the market and threatened action on prices if required to force its way. Sewon also sought more volume because of increased production capacity. The Commission found that on various occasions specific target prices were agreed and acted upon.

In June 1995, the FBI searched the offices of ADM, Ajinomoto and Sewon in the United States and the Commission concluded that the cartel activity ended.

In 1996 Ajinomoto started to co-operate with the Commission. In 1997 the Commission carried out dawn raids on ADM and Kyowa in Europe. Kyowa then gave an oral chronology of meetings. After receiving a request for information, Sewon and Cheil started to co-operate with the Commission, giving details of meetings for which the Commission had made no request. In 1996 ADM paid a fine of some USD 70 million for participation in the U.S. lysine cartel (and a citric acid conspiracy). Ajinomoto and Kyowa paid fines of USD 10 million and Cheil USD 1.25 million. The ADM executive who co-operated was not prosecuted for his role, having obtained immunity from the U.S. authorities. Other ADM executives were, however, sent to prison and ordered to pay individual fines. In 1998, ADM, Ajinomoto and Sewon were also fined for related cartel activities in Canada.

The Commission found that there had been a series of specific agreements to fix European *prices* between 1990 and 1995. The Commission characterised this as *one continuing infringement* which started with Ajinomoto, Kyowa and Sewon and was joined by ADM and Cheil in 1992, rather than as two separate cartel infringements with different parties.[86] Some of the participants contested this arguing, amongst other things, that the period during which the cartel worked systematically was quite brief and that there were various (interrupting) periods of price war and competition. The Commission also found that there was a series of agreements controlling the *supply* of lysine to Europe, allocating sales volumes there between 1991 and 1995. (Some of the participants contested this.) As regards the *exchange of information*, the Commission found that this lasted from 1993 to 1995 (emphasising that the exchange was unlawful because it appreciably reduced the decision-making independence of the participating producers and operated as an "adjunct" to the cartel).[87]

The Commission considered the infringements to be "very serious", finding that the cartel had had *the effect* of raising prices and restricting sales quantities. Some parties contested this, arguing that the infringement should only be considered "serious" (as in the *Greek Ferries* case). They also offered economic evidence on how prices operated and suggested that prices reflected Cournot (oligopoly) equilibrium prices.[88] Otherwise, it was argued that the effects of the meetings and communications between the parties was "statistically insignificant", save for a period in 1993–1994. The Commission rejected these claims, amongst other things, because the cartel participants had themselves noted the success of their actions and on the basis that the participants would not have continued their activities for so long if they had had no impact on the market. The Commission concluded that, on the evidence, the parties had not rebutted the Commission's finding of actual impact on the market.

The Commission then differentiated between the cartel participants on the basis of their size,

86. See paras 236 *et seq.*
87. See para. 229.
88. See paras 279–281. Broadly this is the price reflecting the balance between a few sellers' individual decisions as to how much to produce, given the desire to maximise profit, the output and respective capacities of competitors and consumer demand.

focusing on the worldwide turnover of each in the last year of the infringement. The basic amounts of fine were set at EUR 30 million for Ajinomoto and ADM, and EUR 15 million for Kyowa, Cheil and Sewon. The Commission rejected the view that fines imposed or damages paid in relation to U.S. or other proceedings should be taken into account in assessing the public law sanctions for illegal behaviour in the E.U.[89]

The infringements were found to be "of medium duration", resulting in increases of 10 per cent per year (*i.e.* by 30 per cent for ADM and Cheil and 40 per cent for Ajinomoto, Kyowa and Sewon).

Some participants contested these levels of fines, arguing that their activities predated the Commission's recently published methodologies and that they had legitimate expectations that any fine would be dealt with on the Commission's previous approach. In particular, focusing on the turnover affected by the infringement.[90] The Commission rejected such arguments, considering that it was entitled to apply its new guidelines on fines for decisions taken after their publication.

ADM and Ajinomoto were found to be the leaders of the infringement. Again this was contested. ADM argued that there was already a cartel in existence when it entered the market, and that its price cutting strategies were consistent with market entry, not forcing the other companies to agree to collusive behaviour.[91] The Commission disagreed, finding that ADM's actions were consistent with a tactic of forcing quantity agreements to achieve its goal of 50 per cent market share. Ajinomoto also argued that from its market entry, ADM was the sole leader of the cartel. The Commission disagreed noting, amongst other things, that Ajinomoto had organised some of the fake trade association meetings and provided the cartel secretariat. The Commission treated such leadership as an aggravating circumstance and increased the fines on ADM and Ajinomoto by 50 per cent each.

As regards attenuating circumstances, Sewon was found to have changed its participation in the agreement on sales quantities from an active role to a passive one in early 1995. As a result, the Commission reduced the increase in Sewon's fine on account of duration by 20 per cent. The participants' fines were also decreased by 10 per cent since they ended their (E.C.) infringement after the U.S. authorities' parallel intervention.

As regards co-operation under the leniency notice, the Commission took the view that ADM had refused to co-operate, in so far as it had not given full information on meetings which had been formally requested by the Commission (although it had given such information to the U.S. authorities).

89. See para. 311.
90. See para. 315.
91. See para. 335.

The Commission appears also to have considered *not* fining Ajinomoto, in so far as it was the first company to give the Commission decisive evidence on the cartel as from ADM's market entry and approached the Commission before it had undertaken an investigation. However, the Commission decided not to do so on the basis that Ajinomoto had not fully co-operated. In particular, the Commission considered that Ajinomoto had more information, which it had not disclosed (concerning the cartel *before* ADM's market entry) and noted that Ajinomoto had destroyed all documents concerned in the cartel in Europe after the FBI's search in 1995. The Commission was also of the view that such leniency should not be available for cartel members which played a determining role in an infringement.[92]

Nevertheless, the Commission granted Ajinomoto and Sewon a 50 per cent fine reduction. (Sewon had given complete and decisive evidence of the infringement, but at a time when the Commission already had some of it.) The final fines were: ADM EUR 47.3 million, Ajinomoto EUR 28.3 million, Kyowa EUR 13.2 million, Sewon (Daesang) EUR 8.9 million and Cheil EUR 12.2 million.[93]

Euro-zone exchange charges

During the year there have been various developments related to the *Euro-zone Exchange Charge* inquiry.[94] In November 2000 the Commission decided to open proceedings against the *Austrian banks* in the so-called "Lombard Club", taking the view that there was evidence that these banks had also unlawfully co-operated on exchange commission prices in that club. As a result, a supplementary statement of objections was sent.[95]

In April 2001 the Commission decided to terminate proceedings against the *Dutch bank SNS* after the latter changed its tariffs for exchanging euro-zone currencies.[96] The alleged issue against the banks in this case is that they colluded on certain high rates of commission for exchanging euro-zone currencies when, after January 1, 1999, they lost the revenue which they derived previously from variations in bilateral exchange rates, giving them a "spread" of prices on buying and selling the currencies involved. To settle the case, SNS offered no longer to charge a minimum fee of 7.50 guilders per exchange transaction (which it was accused of having agreed with other Dutch banks). Instead, SNS undertook to apply a 2.5 per cent fee on *all* transactions from May 1, 2001 and, from October 1, 2001, to offer the exchange service

92. See paras 407–419.
93. All of these companies, save Ajinomoto, have appealed the decision.
94. See last year's paper at 2001 ICCLR, p. 21.
95. IP/00/1358, November 24, 2000.
96. IP/01/554, April 11, 2001.

free to its account holders for amounts up to 3000 guilders. The Commission treated this as showing independent conduct ending the alleged collusion. One suspects that the Commission also aimed to tempt the other banks into a similar, pragmatic and timely settlement with the euro coming in January 2002.

This is what appears to have happened. Shortly afterwards, there was a similar settlement with a German bank, the *Westdeutsche Landesbank Girozentrale* ("WestLB") and the Belgian bank, *Bank J. Van Breda & Co.* ("Breda").[97] *WestLB* undertook to decrease its percentage charge from 3.5 per cent to 1.5 per cent for all customers with immediate effect. Its service was also to be free for account holders wishing to sell euro-zone bank notes. Both buying and selling of bank notes was to be free for account holders from October 1, 2001. *Breda* decided to abolish a 100 BF minimum charge for all customers for all transactions, from June 1, 2001, retaining only a percentage fee of 1.25 per cent and undertook to buy euro-zone banknotes for free from its account holders from October 1, 2001. At this stage, the Commission indicated that these two banks were the 12th and 13th to have ended the suspected cartel behaviour.

Then in July 2001, the Commission decided to end proceedings against the *Finnish, Irish, Belgian, Dutch and Portuguese banks* after they decided to set prices independently and to provide cheaper and more competitive services for customers. The Commission indicated then that since April 2001 some 50 banks had unilaterally decided to significantly reduce charges for euro-zone banknote exchanges. Proceedings continued for Austrian banks and for certain other banks in Germany.[98]

Route sharing/trading

In July 2001, the Commission imposed a fine of some EUR 39.4 million on *SAS* and some EUR 13.1 million on *Maersk Air* ("Maersk") for various market-sharing agreements going beyond their notified co-operation.[99] The case has attracted much media attention, in part because of the nature of the infringement and in part because of the embarrassing fact that Sweden, Denmark and Norway are leading shareholders. As a result, there have been various resignations at senior level, including the entire SAS board of directors.

In early 1999, SAS and Maersk notified a co-operation agreement to the Commission concerning code-sharing on a number of Maersk routes and frequent flyer exchanges. Shortly before Sun-Air, a small Danish rival airline, had complained to the Commission that SAS and Maersk's co-operation went much further than publicly announced. It then appeared from the Commission's inquiries that, as the co-operation between the two airlines started, there had also been some changes to their routes: Maersk had withdrawn from the Copenhagen–Stockholm route; SAS had stopped flying Copenhagen–Venice and Maersk had started on that route; and SAS had withdrawn from the Billund–Frankfurt route leaving Maersk as the only carrier. The Commission carried out "dawn raids". Afterwards both SAS and Maersk provided more files. In October 2000, SAS and Maersk made a supplementary notification concerning their co-operation on other routes and on technical information related thereto.

The Commission found that the route changes resulted from broader discussions and agreement between SAS and Maersk, having found detailed documents on the negotiations concerned. The Commission found that, in fact, there had been an overall market-sharing arrangement between the two airlines, according to which SAS would not operate on Maersk's routes out of Jutland in West Denmark and Maersk would not launch services on routes from Copenhagen which SAS operated or wished to operate. There was also an agreement to respect the share out of the domestic routes. Further, specific route changes were agreed to provide Maersk with compensation for giving up the Copenhagen–Stockholm route. In some cases, Maersk's withdrawal from a route resulted in the end of code-sharing with other airlines (such as Finnair).[1]

The Commission considered the infringement to be intentional and "very serious". (A position contested by SAS, based partly on the *Greek Ferries* case.) There were references in documents to the need to take material home or to put it "in escrow in the offices of lawyers".[2] SAS is the largest airline in the Nordic countries and Maersk is its main Danish competitor.

The Commission also looked at the actual impact of the infringement in terms of market share and prices, in so far as this was estimated to allow the organisation of suitable compensation by SAS to Maersk for withdrawing from the (busy) Copenhagen–Stockholm route.

The Commission distinguished between SAS and Maersk on the basis of size and in so far as the Commission found that the agreements extended the market power of SAS. The basic amounts of the fines were therefore EUR 35 million for SAS and EUR 14 million for Maersk, increased by 25 per cent for medium duration (two years), with then "leniency reductions" of 25 per cent and 10 per cent respectively for the information provided by Maersk (a meeting with a former employee and production of detailed files which had been kept

97. IP/01/690, May 14, 2001.
98. IP/01/1159, July 31, 2001.
99. [2001] O.J. L265/15.

1. See paras 61–63.
2. See para. 89.

at home) and since neither SAS nor Maersk contested the facts in the statement of objections.[3]

Other

In July 2001, the Commission fined eight companies a total of EUR 218.8 million for price-fixing and market-sharing in relation to *graphite electrodes*.[4] These are ceramic-moulded columns of graphite used primarily in the recycling of scrap steel into new steel in electric arc furnaces known as "mini-mills". It appears that graphic electrodes are used to make some 35 per cent of European steel. The companies involved were: SGL Carbon (from Germany), UCAR International (from the United States), Tokai Carbon and Shava Denko (from Japan), VAW Aluminium (from Germany), SEC Corporation and Nippon Carbon (from Japan), and The Carbide Graphite Group (from the United States).

First contacts to initiate the worldwide cartel were in 1991, resulting in a meeting in May 1992 at which SGL and UCAR took the lead. These two companies account for some two-thirds of European demand. It appears that the companies held regular meetings until 1998, despite the fact that competition authorities in the United States, Canada and the E.U. had begun investigations, including dawn raids in the E.U. in 1997. The Commission found that meetings were held at chief executive level to agree concerted price increases, usually triggered by the home producer or market leader. Hotel and travel expense claims were paid in cash with no explicit reference to the meetings. Mobile phones and home faxes were used. Code names were also used in the documents concerned to refer to cartel participants: "BMW" for SGL, "Pinot" for UCAR and "Cold" for the group of Japanese companies. The Commission found that prices had risen in the period in which the cartel operated by 50 per cent.

The Commission considered the infringement to be "very serious" and, for most members of the cartel, of long duration (more than five years). The size of the E.U. market, plus Norway, was some EUR 420 million in 1998. The Commission found various aggravating circumstances, including SGL and UCAR's role as "driving forces" in the cartel and continuation of the infringement after the Commission started its investigation.

One company Showa Denko, was given a *70 per cent reduction* under the leniency notice, having been the first company to co-operate and provide decisive evidence of the cartel to the Commission. UCAR was given a 40 per cent reduction for co-operation with the Commission at an early stage of the investigation. Most of the other companies also had their fines reduced to some extent (30 per cent to 10 per cent).[5]

The companies' individual fines were therefore: SGL Carbon: EUR 80.2 million; UCAR International: EUR 30.4 million; Tokai Carbon: EUR 24.5 million; Showa Denko: EUR 17.4 million. Others were fined between EUR 10 and 12 million.

In October 2001, the Commission fined six companies a total of EUR 57.3 million for fixing the price and sharing the market for *sodium gluconate*, a chemical mainly used to clean metal and glass with applications such as bottle washing, utensil cleaning and paint removal. The companies concerned were Archer Daniels Midland (from the United States), Akzo Nobel and Avebe (from the Netherlands), Fujisawa Pharmaceutical Company (from Japan), Jungbunzlauer (from Switzerland) and Roquette Frères (from France).[6]

The Commission's investigation started in 1997, when it learned that some of these companies had been charged by the U.S. authorities with international conspiracy in the United States and elsewhere. The Commission found that the companies had participated in a worldwide cartel from 1987 until June 1995. They had held regular meetings, where they agreed on individual sales quotas, fixed "minimum" and target prices and shared out specific customers. Compliance with agreed quotas was also monitored, with downward adjustments for overselling. The Commission has evidence of 25 cartel meetings spread throughout the world.

The infringement was considered to be "very serious" and of long duration (for most participants more than five years). Account was taken of the small size of the EEA market, some EUR 18 million.

Fujisawa was given an *80 per cent reduction* in its fine, for being the first to supply decisive evidence on the cartel after a request for information. Jungbunzlauer was considered to be the driving force behind the cartel, justifying a 50 per cent increase in its fine. ADM and Roquette were given 40 per cent reductions in view of the value added by their co-operation. Akzo Nobel, Avebe and Jungbunzlauer were given 20 per cent reductions for co-operation which corroborated some of the information in the Commission's possession before the statement of objections.

3. It appears that the Swedish Competition Authority is now also investigating suspected price-fixing on domestic Swedish flights between SAS and the largest regional carrier in Sweden, Skyways, in which SAS has a 25 per cent stake. Reuters, August 1, 2001.

4. IP/01/1010, July 18, 2001; Reuters, July 18, 2001.

5. Breit, EC Competition Policy Newsletter, October 2001, pp. 34–35.

6. IP/01/1355, October 2, 2001.

Joint ventures/horizontal cooperation

Table 5

- **Joint Ventures/Horizontal Co-operation**

— *Transport*
  - Structural concerns/remedies as Airline Alliance develops.
  - *IATA* Passenger Tariff Conference for interlining may not be indispensable?
  - Cross-channel ferry co-operation renewed —price increases not due to "duopoly".

— *Environmental clearances*
  - *Eco-Emballages* collection and recovery system.
    - — Green Dot sub-licensing in France to competitors.
    - — Prices set by authorities after consultation.
    - — No specialisation with competitors.
    - — "Sectoral" recycling contracts outside Article 81(1) E.C. on the facts.
  - *DSD*: Green Dot system in Germany cleared (save for fee structure)
    NB. In both cases, amendments to open up market structure.
  - *CECED* machine upgrading schemes.

— *B2B Exchange cleared* (*Covisint*)
  - Open system.
  - Horizontal (industry)/vertical (cross-industry)/ overlaps not a concern.

— *Other*
  - *Visa*: Interchange fee system to be cleared after modifications.
  - *Identrus*: certification system for electronic signatures cleared (open shareholding, structure and market).
  - *IFPI Simulcasting*: "experimental" reciprocal agreement; multi-territorial licensing required.

Transport

In May 2001, the Commission sent a statement of objections to *Austrian Airlines and Lufthansa* concerning their partnership.[7] The companies had notified a co-operation agreement bringing Austrian Airlines into the Star Alliance and providing for a joint venture relating to bilateral traffic between Austria and Germany. The Commission's concerns related to the high market shares of the two companies on direct routes between Austria and Germany and perceived high barriers to entry because of the shortage of slots, the parties' high number of frequencies and their pooling of frequent flyer programmes.

In June 2001, the Commission approved the *partnership between British Midland Lufthansa and SAS*, granting a six-year exemption.[8] The arrangement consists of a tripartite JV agreement, which enables British Midland to reorganise and extend its network services out of London and Manchester to new routes in the E.U., in particular from London to Madrid, Barcelona, Milan and Rome. The agreement will also allow the STAR alliance to develop Heathrow as a second hub, fostering competition between the STAR Alliance and the OneWorld alliances of BA. The co-operation agreement is therefore considered pro-competitive.[9]

However, the Commission was concerned that the agreement also caused British Midland to withdraw from the London Heathrow–Frankfurt route, reducing competition on one of the busier routes in the E.U. Following discussions, the airlines agreed to make available British Midland's slots at Frankfurt airport for the route to a new entrant, giving the possibility of four return flights a day. In allocating the slots, priority was to be given to newcomers and, if the slots are not taken up, they are to be returned to the slot pool at Frankfurt. The parties also offered that the entrant could participate in their frequent flyer programme and that they would enter into an interlining agreement.[10]

In May 2001 the Commission also sent a statement of objections to IATA (the International Air Transport Association) concerning its notification of the *IATA cargo tariff consultation system.*[11] Until 1997 this system had benefited from a block exemption. When this was withdrawn, IATA notified its system for individual exemption, arguing that the system facilitated cargo interlining. The Commission indicated that its preliminary view is that the system restricts price competition and is not indispensable. In particular, Community airlines are currently in the process of building global networks and they also often interline on the basis of bilateral agreements.

During the year the Commission has also granted a six-year exemption to the *P&O/Stena ferry co-operation* on the English Channel. In March 2001 the Commission issued a notice concerning P&O/Stena's application to have its previous three-year exemption renewed.[12] This set out the parties' arguments for a 20-year exemption, based on their plans to reinvest in suitable ships. The parties also submitted that their co-operation had led to a better service, able to compete with Eurotunnel and that there were no grounds for concern about duopolistic conduct. They noted that prices had increased significantly, but argued that this had been caused by the loss of duty-free revenues.

7. IP/01/696, May 15, 2001.
8. IP/01/831, June 13, 2001.
9. Stehmann, EC Competition Policy Newsletter, October 2001, pp. 44–46.
10. The Commission also intervened in 2000 as regards co-ordination of fare prices by members of the *Qualiflyer* Alliance, EC Commission Competition Report 2000, point 180.
11. IP/01/694, May 15, 2001.
12. [2001] O.J. C76/2.

They also noted that Eurotunnel's market position had increased and Norfolkline had introduced a new service on the Dover/Dunkirk route.

Then, in June 2001, the Commission decided to grant an exemption for *six years* (through not opposing the co-operation under Regulation 4056/86).[13] The shorter exemption appears partly to reflect the Commission's continuing desire to monitor the situation in view of consumer complaints about the increase of prices. In granting exemption, the Commission indicated that the market structure was, in some respects, better than at the time of its previous decision and that the increase in prices related to four main factors: a return to more normal market conditions after the loss of duty-free revenues and the absorption of the new capacity created when Eurotunnel started its services in 1995, higher fuel prices and P&O Stena's introduction of a yield management system (whereby ticket prices are set according to demand as in the airline sector).[14]

The Commission has also cleared two individual notifications of consortia of liner shipping companies, the *Grand Alliance-America Consortium* and the *Europe to Caribbean Consortium*. Both consortia have a market share between 30 per cent and 40 per cent, but otherwise fulfil all the conditions of Regulation 823/2000. Both are also exposed to a considerable degree of competition.[15]

Environmental clearances

In June 2001, the Commission granted *negative clearance* to the French *Eco-Emballages* system for the collection and recovery of household packaging waste.[16] The Commission's Article 19(3) notice in this case was summarised last year.[17] The Eco-Emballages system involves agreements with producers to take over their obligations to collect and recover household packaging under French packaging law . There are also agreements with local authorities (which actually collect the waste) and certain firms (which carry out the recycling in the steel, aluminium, paper/paperboard, plastic and glass sectors). In the Article 19(3) notice, the Commission indicated that various measures had been accepted by Eco-Emballages to prevent foreclosure of the markets concerned. Notably, producers could leave the system each year and also contract for all or only some of their packaging. Local authorities could also terminate their contracts at any time and undertake to be in the Eco-Emballages system for all or part of the packaging they collect.

There were, however, issues outstanding related to the pricing of producer contributions to the system and payments to local authorities for the collections, in so far as these are uniform (but appeared to be controlled by French law). There were also issues on the relationship of Eco-Emballages to its rival Adelphe, a firm specialised in wine and spirit sector packaging recovery. Finally there were issues on the use of the "Green Dot" trademark, which Eco-Emballages uses in France to identify packaging covered by its system.

The decision confirms that the Commission has not intervened further concerning the "uniform price" issue because that position is governed by French law.[18] Adelphe is now also free to offer its services for *all* types of packaging in *any* sector.[19]

The position on "Green Dot" licensing has also been clarified. The position is complex and relates also to the *DSD* cases discussed below and in the section on Article 82 E.C. Importantly, Eco-Emballages states that it considers itself under an obligation to grant any competing system, where appropriate, a sub-licence with the same scope as its own licence.[20] In the event that a producer only uses Eco-Emballages for *part* of its packaging, that producer can still affix the Green Dot trademark if *most* of the packaging is dealt with by Eco-Emballages. If the producer mainly uses *another* system, the producer is normally to limit its use of the Green Dot trademark to not more than the quantity covered by the Eco-Emballages system, "except where it does not consider this to be adequate or rational".[21] In that case, the producer can still use the mark, provided that the other system can be shown to achieve recycling and recovery results equivalent to those of Eco-Emballages. In the event of use of the Green Dot mark and another system, the producer is to produce an auditor's certificate at Eco-Emballages' request ("not systematically") as to the quantities of packaging covered by the other system. Packaging from other Member States which bears the Green Dot mark, but which is not handled by Eco-Emballages in France, is to be marked with an additional indication, making it clear that the packaging "has not contributed to the French collective system".[22]

Unlike the DSD system in Germany, the remuneration system here is based not on the use of the Green Dot mark but on an assessment of

13. IP/01/806, June 7, 2001; Jaspers, EC Competition Policy Newsletter, October 2001, pp. 47–8.
14. In April 2001, the Commission issued an Article 19(3) notice proposing to take a favourable position as regards a speciality chemicals joint venture between Stockhausen and Rohm and Haas (called the *"StoHaas" Joint Venture*). The JV will produce crude acrylic acid, a base product for manufacturing butyl acrylate and glacial acrylic acid. [2001] O.J. C117/3.
15. See Baker, Mayer, Tomboy, EC Competition Newsletter, October 2001, pp. 49–51.
16. [2001] O.J. L233/37; IP/01/850, June 15, 2001.
17. See 2001 ICCLR, pp. 24–25.
18. See paras 10 and 69.
19. See para. 58.
20. See para. 61(g).
21. See para. 61(j).
22. See para. 61(k).

the system's financial needs, which cost is then divided up amongst producers. The funds raised are designed not to create operating surpluses. Contributions by producers vary according to the materials concerned and also include an element for non-attributable costs.[23] Prices are subject to broad consultation of those concerned and approved by the French authorities. The Commission found that these arrangements did not infringe Article 81(1) E.C.

Finally, the decision discusses the position of the "sectoral" contracts for recycling of the various materials. Eco-Emballages has only entered into *one contract* for each material. Each company chosen can, however, work for competing systems. On the specific facts, the Commission considered that these arrangements did not constitute appreciable restrictions on competition (for example, in the case of aluminium and steel there is only one manufacturer on the French market).[24]

In September 2001, the Commission also indicated that it had cleared the statutes, guarantee and service agreements of the *Duales System Deutschland* ("DSD"), the "Green Dot" system for collection and recovery of sales packaging in Germany.[25] The main features of the system have been described previously.[26] Certain aspects of the fee system have also been dealt with this year in separate proceedings under Article 82 E.C., which will be described in Part 2.

DSD is the only company operating a country-wide system for the collection and recycling of sales packaging in Germany. DSD does not itself collect the waste concerned, but has service agreements with local collecting companies. Under these service agreements, one collector has exclusive rights to operate the DSD system in each of the 546 collection districts in Germany. Most of the service agreements were to run until the end of 2007, involving overall contractual duration times of up to 15 years.

In view of the market position of DSD, the Commission considered that these arrangements were caught by Article 81(1) E.C. The Commission reviewed whether such long-term exclusive agreements were necessary, concluding that this was not the case. The relevant investments could be recovered in an "economically satisfactory" way if the agreements ran only until the end of 2003. DSD agreed to amend its service agreements and the Commission has therefore granted exemption until December 2003. Thereafter, the agreements have to be put out to tender according to German packaging law.

DSD gave commitments making it clear that third parties are entitled to share the facilities of the collecting companies. However, concerned to safeguard market access, the Commission has attached obligations to this effect to its decision.

The service agreement originally provided that collectors were not entitled to market the collected materials themselves. They were to pass them on, free of charge, to "guarantors" designated by DSD (which companies have given DSD an assurance that they will recycle the used packaging). The Commission objected to this arrangement, considering that collectors should be able to exploit these "secondary materials", which can be re-used as raw material for various new products. The Commission found that the arrangements allowed DSD and the guarantee companies to establish themselves as a strong, if not dominant, supplier of such material and prevented collectors from marketing such materials in competition with each other. DSD therefore terminated the system (save in relation to plastics, where there are special considerations).

As regards the statutes and guarantee agreements, the Commission found no restriction within Article 81(1) E.C. and granted negative clearance.

In September 2001, the Commission published two Article 19(3) notices, proposing to take a favourable position as regards agreements notified by *CECED* to improve the energy efficiency of *household dishwashers and water heaters*.[27]

These follow a similar pattern to previous CECED agreements.[28] In the case of *dishwashers*, the main objective is to reduce European energy consumption through such machines by 20 per cent by the year 2002. The agreements envisage that the participating European manufacturers would undertake to cease producing and importing into the E.U. some of the (cheaper and) less efficient categories of dishwasher.

Even though the agreement may restrict competition, CECED submits that it will contribute to technological progress, in so far as electricity consumption from dishwashers in the E.U. should be reduced by 3,2 TWh per year and individual purchasers will obtain savings from reduced electricity bills, allowing them to recoup higher purchase costs. Manufacturers also remain free to use whatever methods they wish to meet their obligations to improve energy efficiency and will continue to compete on price, brand image and technical performance.

As regards *water heaters*, the position is similar. An agreement among the leading European manufacturers and importers of domestic electric storage water heaters ("DESWH") was notified in 1999. The agreement envisages that each party will stop producing (and importing into the E.U.) DESWH with "standing losses" exceeding certain

23. See paras 22–26 and 68.
24. See paras 79–80.
25. IP/01/1279, September 17, 2001.
26. 1998 ICCLR, p. 9.
27. [2001] O.J. C250/2 and 4.
28. 2001 ICCLR, pp. 23–24.

maximum allowable values. Each party will also reduce the weighted average standing losses of its production to certain thresholds. CECED submits that the agreement will improve the efficiency of DESWH sold in the E.U. by 29.1 per cent when fully implemented. Reduced stand-by losses should reduce electricity consumption through such water heaters by 9,8 TWh per year.

B2B exchanges

In July 2001, the Commission granted *negative clearance* to the *Covisint* B2B joint venture involving Ford, DaimlerChrysler, General Motors, Renault, Nissan, Oracle and i2.[29]

The Commission noted that the B2B was primarily designed to serve the needs of major car manufacturers and suppliers, providing procurement, collaborative product development and supply chain management tools. The Commission recognised that such B2Bs increased transparency and market efficiencies by reducing search and information costs and improving inventory management. The Commission noted that such co-operation could come within Article 81(1) E.C., where discrimination against certain classes of user led to foreclosure, where it is possible for users to exchange or have access to market-sensitive information, or where buyers or sellers club together to bundle their purchase or sales.

However, in the case of Covisint, the Commission concluded that the notified agreements contained adequate provisions to deal with such concerns. Notably, Covisint is open to all firms in the industry on a non-discriminatory basis, is based on open standards, allows both shareholders and other users to participate in other B2B exchanges, does not allow joint purchasing between car manufacturers for automotive-specific products and provides for data protection through Chinese walls and security rules.

Other

In August 2001 the Commission granted *negative clearance* to the *Identrus* global network for the authentication of electronic signatures in relation to financial and electronic commercial transactions.[30] The agreements enable the participating financial institutions to operate as individual and competing certification authorities for services to secure e-commerce transactions. These include authentication of the identity of transaction partners and electronic messages, as well as a contractual remedy against signature repudiation.

Identrus is a company incorporated under U.S. law, set up originally as a joint venture between eight parties but now with some 21 shareholders. No single company has control. Participation in Identrus is to be open to qualified financial institutions around the world ("Participants"), provided that they meet certain objective capital requirements and comply with certain financial rating requirements. Each Participant can offer its own independently created applications built on the Identrus infrastructure. Each Participant is also free to set its prices to customers for authentication services. End-users are free to choose any Participant, not just their usual bank.

The Commission considers that these arrangements fall outside Article 81(1) E.C. Notably, Identrus entails no risk of foreclosure because it is open to all those meeting the objective criteria defined. Identrus is also expected to face competition from other systems being developed by the financial industry, postal authorities and telecoms carriers. Participants are also free to join other such systems.

In August 2001, the Commission published an Article 19(3) notice indicating that it intended to adopt a favourable position on the amended interchange fee of Visa International Service Association ("Visa").[31] This was the second part of the Commission's review of Visa's international payment card scheme. In October 2000 the Commission had published a notice indicating its approval of other aspects, which was described in last year's article.[32]

Under Visa's rules as originally notified, the acquiring bank had to pay the issuing bank an interchange fee for each Visa card transaction, where the issuer and acquirer were different. In the absence of multilateral or bilateral agreements for domestic interchange fees, this interchange fee was set by the Visa EU Regional Board. At the time of notification, the interchange fee was used in Greece, Ireland, Italy, the Netherlands and Sweden. The multilateral interchange fee ("MIF") was a percentage of net sales and the exact fee level varied according to the type of Visa card used.

Visa considers that the MIF is necessary as a financial adjustment to the imbalance between the costs associated with issuing and acquiring. The revenues from cardholders are materially lower than the costs incurred by the issuing bank and the acquiring banks' revenues from merchants are materially in excess of the costs incurred by them on behalf of the payment system as a whole. Visa argued therefore that the interchange fee served

29. IP/01/1155, July 31, 2001; [2001] O.J. C49/4. See also Lücking, EC Competition Policy Newsletter, October 2001, pp. 14–16.
30. IP/01/1165, August 1, 2001; [2001] O.J. L249/12.
31. [2001] O.J. C226/21. With thanks to Arun Rattan for his assistance.
32. See 2001 ICCLR, p. 25. These other aspects, on the "non-discrimination rule" and cross-border services rules, were cleared in August 2001. IP/01/1198, August 10, 2001.

to adjust these imbalances by increasing demand for, and use of, the Visa payment service.

To meet concerns raised by the Commission, Visa's EU Regional Board has notified three modifications to the interchange fee. First, Visa will reduce the overall level of the intra-regional MIF applicable to its consumer card products in the E.U. region. It will introduce a MIF, reflecting a *fixed rate* per transaction for direct debit cards and gradually reduce the level of the MIF applicable per transaction to certain types of credit and deferred debit cards. Visa has suggested that the effect of these modifications on all credit cards would be a 20 per cent reduction on MIF revenues for issuing banks.

Secondly, Visa has proposed that three categories of costs involved in supplying Visa payment services would be used as an objective benchmark against which to assess the Visa MIF currently paid by acquirers to issuers. These three cost categories were: the cost of processing transactions; the cost of free funding for cardholders ("the float"); and the cost of providing payment guarantee. A study would determine the cost elements comprised within each of the three cost categories. The effective level of the MIFs would not exceed the sum of these three categories, unless there were exceptional circumstances and in prior consultation with the Commission. Below this sum, Visa would have discretion to determine the commercially appropriate level of the MIF.

Thirdly, Visa would submit to the Commission, shortly after the completion of the cost studies, the calculations based on the three cost categories. The cost studies would be carried out by Visa and audited by an independent firm of accountants. In addition, Visa also proposed to amend its rules to allow member banks to disclose to merchants both the level of the Visa MIF in force and the relative percentages of the three cost categories. Merchants would be made aware of the possibility of requesting this information from their acquiring banks.[33]

In August 2001, the Commission published an Article 19(3) notice indicating that it proposed to take a favourable position to a one-year experimental agreement for a model reciprocal agreement between 40 collecting societies to license international *simulcasting*, the simultaneous internet broadcasting of radio and/or TV broadcasts. The notification was submitted by the International Federation of the Phonographic Industry ("IFPI") on behalf of the collecting societies. After the experimental year, the agreement is to be reviewed.[34] The Commission asked the IFPI to amend the agreement so that broadcasters whose signals originate in the EEA will be able to approach *any* EEA collecting society in order to seek and obtain a *multi-territorial* simulcasting licence. (As originally notified collecting societies could only grant international simulcasting licences to broadcasters whose signals originated in their territory.)

Developments related to joint gas sales, pipelines and connectors are discussed in Part 2.[35]

33. The Commission also sent the *Groupement des Cartes Bancaires* a comfort letter in October 2000 concerning rules and decisions adopted between 1988 and 1998 and notified to the Commission: EC Commission Competition Report 2000, point 205.
34. [2001] O.J. C231/18.
35. In January 2001, the Commission released *Unisource* from its reporting obligations following the Commission's exemption decision in 1997. Unisource's activity is now only providing value-added services to multi-national companies in which market Unisource submits that it has some 4–11 per cent, depending on the precise market definition. The non-competition clauses on the parent companies and the exclusive dealing arrangements have also been repealed. The Commission therefore considers that the co-operation no longer appreciably restricts competition. IP/01/1, January 3, 2001.

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

- *The Commission's decisions on distribution and Articles 82/86 E.C.* Topical areas include the *Volkswagen* decision on resale price maintenance; compulsory licensing measures for copyright and trademarks; and various liberalisation cases concerning rail and postal services.
- *Current policy discussions*, such as on criminal sanctions for cartels, book pricing and motor fuel.
- *Areas of special interest*: The recent wave of cases concerning access to pipelines and interconnectors, two Advocate-General opinions on competition and legal services and Commission cases on sport and broadcasting.

Major Events and Policy Issues in E.C. Competition Law, 2001—Part 2

JOHN RATLIFF[1]

Wilmer, Cutler & Pickering, Belgium

This article is the second and final part of the "Overview of Major Events and Policy Issues in E.C. Competition Law" following from last month's journal ([2002] I.C.C.L.R. 6).

This part of the article is divided into three sections: (1) the European Commission's decisions on distribution, abuse of dominant position and state measures (caught by Article 86 E.C.); (2) an outline of current policy discussions including, notably, the criminalisation of cartel sanctions, German book-pricing systems and inquiries into motor fuels; (3) a survey of areas of particular interest: this year, pipeline/interconnector competition, competition and legal services and sport and broadcasting.

Overview of major events (continued)

European Commission decisions

Distribution

Table 6

- **Distribution**
  - — Classic cases: export bans, rpm ("no damage to the brand"), bonuses limited to territorial performance, supply restrictions to exporters.
  - — Opening up selective distribution to the internet (*Yves Saint Laurent*).
  - — More car cases: *Opel*, *Volkswagen* (rpm with effect on *pattern* of trade), *DaimlerChrysler*.
  - — *Glaxo's* dual pricing system for pharmaceuticals in Spain prohibited.

Cars

In February 2001, the Commission published its decision fining *Opel* EUR 43 million for blocking parallel exports from the Netherlands.[2] The Commission's case focused on three types of activity. First, Opel's policy of restricting the supply of cars to dealers who were exporting, based on a dealer's agreed sales target for his territory. Secondly, making dealers' bonuses conditional on a sales target in which only car registrations in the Netherlands were included, in particular, in two promotional campaigns for the Opel Astra and Corsa. Thirdly, specific interventions with dealers to stop them exporting.

Prices for cars in the Netherlands were significantly cheaper than in other parts of the Community. In 1996, the price differential between the Netherlands and other Member States was some 20 to 24 per cent, making parallel exporting viable. Many dealers, particularly those in border areas, therefore found themselves receiving large numbers of orders from end-consumers, Opel dealers in other Member States and unauthorised resellers. In the middle of 1996 Opel Nederland decided to take a variety of measures to close down such trade. From August 1996, audits of sales were carried out and some dealers were "instructed" not to carry out export orders.

It appears that *some* intervention by Opel was justified, because *some* of the sales were to unauthorised resellers outside Opel's selective system. However, the measures concerned did not clarify this and targeted *all* exports in general, including exports to other Opel dealers and foreign-based consumers.

The Commission carried out dawn raids in 1996 and found detailed evidence as to Opel's policy, Opel's activities implementing that policy with dealers (including various notes and emails), and of dealer compliance with the policy. Opel reacted quickly to rectify its position in most respects, but the restriction of bonuses in promotional campaigns only to Dutch registrations was not removed until 1998. The Commission found that the infringement was "very serious", justifying a basic fine of EUR 40 million. The fine was increased by 7.5 per cent for an infringement of medium duration (17 months) to EUR 43 million.

Three particular points may be noted. First, the case highlights once again the difficulty of reconciling local performance targets with price differentials between Member States. Secondly, the Commission rejected a claim by Opel to have "retroactively" removed restrictions in 1996, noting that this was not possible, the earlier restrictive communications having already had an effect. Thirdly, the Commission rejected a claim by Opel to legal professional privilege for a note which summarised the advice of external counsel. The Commission considered that the document concerned was *not* only confined to reporting

1. With many thanks to Ingrid Cloosterin and Flavia Distefano for their help in the production of this article.

2. [2001] O.J. L591/1.

legal counsel's advice. However, the legal considerations contained therein were not used as evidence.[3]

In June 2001, the Commission imposed a fine of EUR 30.96 million on *Volkswagen* for resale price maintenance ("rpm").[4] The decision is interesting for two main reasons. First, rpm issues are not frequently raised at E.C. level because the behaviour in question is usually local or national and it has been thought difficult to show an effect on trade between E.U. Member States. There are signs this year that this is changing. Secondly, this is another difficult case for the car industry, since rpm is clearly not allowed under the current car block exemption and the elimination of price differentials between E.U. Member States is also a high priority for the Commission.

The case concerns the new VW Passat model introduced in Germany in 1997. It appears that Volkswagen gave specific warnings to dealers and issued related circulars making it clear that it would not accept large discounts (of the order of 10 per cent) on its recommended prices for this car. Dealers were told that such discounts were "extremely damaging to the brand" and threatened with termination of their dealerships. They were asked to report any examples of advertising by other dealers which reflected large discounts. A dealer was also criticised for selling too many cars outside his territory as a result of advertising substantial discounts in the press.

The Commission found that Volkswagen's actions were "part and parcel" of its continuous business relations with its dealers based on an existing general agreement and, in effect, made its price recommendations binding.

As regards effect on trade, the Commission's position was that it only had to show that an agreement was *capable* of an effect, either positive or negative, on the pattern of trade. Here, the Commission found such an effect in so far as the high price of the VW Passat in Germany *increased* the incentive to import goods *into* Germany (from cheaper markets, such as Denmark or the Netherlands and Belgium) and also *decreased* the incentive to export cars from Germany to the United Kingdom, where prices were higher. The Commission rejected Volkswagen's argument that the measures concerned must result in a compartmentalisation of markets in order to affect trade between Member States. The Commission's view was therefore that Volkswagen's actions restricted intra-brand competition between dealers in Germany *and* between German dealers and those in other Member States.[5]

As regards fines, the Commission considered the infringement "very serious", justifying a basic fine of EUR 20 million, increased by 29 per cent for its medium duration (three years) and by 20 per cent for aggravating factors (action to enforce price discipline was threatened and Volkswagen had asked the whole network of dealers to police each other, increasing the price discipline).

This is not the first case of rpm in the car sector. It may be recalled that Rover admitted such infringements a few years ago (and set up a fund offering some financial payments as a result).[6] This is also not the first time that manufacturers have argued that "discounting damages the brand" and been required to remove such provisions.[7] (A similar issue has come up this year in relation to *Nathan* books, see below.)

In October 2001, the Commission imposed a fine of EUR 71.8 million on *DaimlerChrysler* for various measures restricting parallel trade in cars and competition in the leasing and sale of motor vehicles.[8] We have not yet seen the decision, which should be of interest, because Article 81 E.C. was held to apply to relations between DaimlerChrysler and its agents, in so far as these bear a considerable risk linked to their activity.

The Commission identified three infringements: First, DaimlerChrysler had instructed its Mercedes car dealers and agents in Germany not to sell outside their territory through circulars. In addition, DaimlerChrysler instructed its distributors to oblige foreign consumers to pay a deposit of 15 per cent when ordering a car in Germany, a requirement not applied to German consumers. Such measures restricted sales between Member States.

Secondly, DaimlerChrysler limited the sale of Mercedes cars by its agents or distributors in Germany and Spain to independent leasing companies, until these companies had found customers ("lessees") for the cars concerned. This limited competition between DaimlerChrysler's own leasing companies and independent leasing companies, which could not hold cars in stock or benefit from rebates granted to fleet owners and therefore could not pass on such favourable conditions on the availability of cars or prices to their customers. The system under Regulation 1475/95 is that leasing companies have to be treated in

3. Note 18, p. 31. In September 2001, Commissioner Monti is reported to have stated that in future, legal opinions given by a company's in-house lawyer would no longer be taken into account as proof that an infringement was intentional, an aggravating factor in the Commission's determination of fines. Such opinions can still be used by the Commission as evidence for the existence of the infringement itself, not being protected by legal professional privilege. Stanbrook and Hooper's "Brussels Brief", September 7, 2001.
4. [2001] O.J. L262/14.

5. See paras 81–91.
6. 1993 Commission Competition Report at pp. 147–8; IP/93/993, November 16, 1993.
7. See *Pronuptia*, [1987] O.J. L13/39.
8. IP/01/1394, October 10, 2001.

the same way as final consumers, so long as the lessee has no right to purchase the leased car before the end of the leasing contract. In principle therefore, DaimlerChrysler's special practices for leasing companies were not block exempt.

Thirdly, DaimlerChrysler was found to have agreed to enforce *resale price maintenance* in Belgium, limiting the rebates offered by its subsidiary and other dealers there. It appears there was a system with a "ghost shopper" who investigated the sales policies of dealers. DaimlerChrysler also agreed to reduce supplies to dealers which granted rebates higher than an agreed three per cent.

The first (parallel trade) infringement was considered "very serious" and of long duration. The 15 per cent deposit obligation had been in force since 1983 and the instruction not to sell outside territories was applied from 1996–1999. The second (leasing) infringement was considered "serious" and of medium duration (five years). The third (rpm) infringement was considered "serious" and of medium duration (four years).

Selective distribution and the internet

In May 2001, the Commission issued an interesting Press Release related to the *Yves Saint Laurent selective distribution system*.[9] It will be recalled that this system was exempted by decision until 1997. After an appeal to the CFI by the Leclerc supermarket group, Yves Saint Laurent ("YSL") modified its system to allow sales through outlets offering various different products. What is interesting here is that, on renewing the exemption, the Commission required YSL to open up its system to internet sales. YSL has done so by providing that authorised resellers which already have a (physical) sales outlet can *also* sell their products via the internet. Sales *only* by the internet appear, however, not to be allowed. The Commission's clearance is stated to cover the period from expiry of the previous exemption until the entry into force of the vertical restraints block exemption, which now applies to the YSL system.

Pharmaceuticals and dual pricing

In May 2001, the Commission prohibited *Glaxo Wellcome's dual pricing system for its pharmaceutical products in Spain*.[10] Glaxo Wellcome ("GW") had notified the system to the Commission in 1998. Under the dual pricing system, GW established sales conditions, which the large majority of Spanish wholesalers signed, providing that Spanish wholesalers had to pay a higher price for products exported to other Member States. After the notification the Commission received four complaints from wholesalers and associations of wholesalers involved in parallel trade.

What is interesting about the case is that, amongst other things, it involves a challenge to the Commission's application of the parallel rules in the pharmaceutical sector on *economic* grounds. GW argues that the system does not restrict *competition* because prices in the E.U. Member States result from national governments' regulatory action. In other words, Glaxo does not set the prices for products sold in Spain, subject to Spanish social security. It only sets the prices for products to be sold outside the Spanish system. Moreover, it is argued that the only parties benefiting from the parallel trade are the traders themselves, because prices to end consumers are not affected.[11] GW also argues that the losses which it incurs due to parallel trade affect its R&D budget and that the parallel trade leads to a shortage of supply in Spain.

The Commission's position is that the existence of divergent national price legislation does not exclude the principle of free movement of goods, nor the application of the E.C. competition rules. Moreover, the Commission argues that the Spanish authorities do not fully control prices. There are regulatory maximum price caps, but the level of these can be negotiated. In the case of four products which are candidates for parallel trade, GW has negotiated price increases with the Spanish authorities. Parallel trade is also affected by other non-regulatory factors such as currency fluctuations. Further, the system in the United Kingdom provides that pharmaceutical companies profits are capped, but in principle companies can set their prices freely. In short, the nature of the forces creating the parallel trade are not such as to deviate from the normal E.C. rules.

As regards revenues for R&D, the Commission considers that there is no causal link between the losses incurred and GW's R&D spending. Further, that the losses concerned are too insignificant and that a pharmaceutical company's R&D expenditure is only some 15 per cent of its budget.

Glaxo has appealed, also arguing that its conditions of sale do not constitute an agreement.[12]

The Commission has also appealed the CFI's judgment in *Bayer-Adalat*. The Commission is concerned that the CFI's ruling (that it had not proved an agreement between Bayer and its distributors) leaves a gap in which it will be unable to challenge arrangements between manufacturers

9. IP/01/713, May 17, 2001.
10. IP/01/661, May 8, 2001. See also Kliemann, E.C. Competition Policy Newsletter, June 2001, pp. 30–32.
11. Similar arguments were made in *Organon*, 1997 I.C.C.L.R. pp. 44–45.
12. [2001] O.J. C275/17.

and distributors, in particular supply quota arrangements. There are hints that the Commission might also be considering other similar cases in relation to pharmaceuticals and cars.[13] In October 2001, the Commission indicated that it is investigating a complaint by the Spanish confederation of pharmaceutical wholesalers, Fedifar, that *Pfizer* operates a dual pricing system in Spain, with higher prices for pharmaceuticals for export.[14]

Other

In December 2000, the Commission sent a Statement of Objections to *B&W Loudspeakers*, a U.K. based company which makes high quality loudspeakers for hi-fi and home cinema.[15] B&W notified its selective distribution system to the Commission in January 2000. The Commission estimated B&W's share of the market for top-range loudspeakers as less than 30 per cent of the "EU plus Norway" market so, to this extent, the arrangements could come within the block exemption on vertical restraints. However, the Commission objected to certain restrictions which were considered "hard-core", taking the system outside the block exemption. Notably, the distribution system is reported to contain minimum retail prices and margins, a prohibition on cross-supplies to wholesalers and a prohibition on distance sales, including through the internet.

In December 2000, the Commission also imposed a fine of EUR 39.6 million on *J.C. Bamford* ("JCB"), a leading manufacturer of construction, farm and industrial handling equipment.[16] The Commission stated that JCB had put into place various restrictions at least in the United Kingdom, France, Italy and Ireland. These agreements and other measures restricted sales of JCB products outside of a distributor's allocated territory and restricted cross-sales between authorised distributors in the E.U.

The proceedings were prompted by a complaint from a French distributor in 1996. The Commission carried out dawn raids and found evidence of unlawful agreements or practices which had been implemented between 1988 and 1998. JCB's sales account for some 13 per cent of the European market for construction and earth-moving machines. However, in relation to its "flagship product", the back-hoe loader, JCB's market share has been some 45 per cent for the last 25 years. The Commission considered the infringements to be "very serious" and of long duration. It appears that there were also aggravating circumstances: financial penalties imposed on a distributor who did not comply with the restrictive agreements.

13. MEMO/01/4, January 10, 2001.
14. Reuters, October 11, 2001.
15. IP/00/1418, December 6, 2000.
16. IP/00/1526, December 21, 2000.

In February 2001, the Commission terminated proceedings involving *production and sales licence agreements between Philip Morris and Altadis*.[17] In 1999 Philip Morris entered into such agreements with Tabacalera in Spain, further to a long-standing relationship between the two companies. The agreements gave Tabacalera the right to manufacture and sell "authorised volumes" of Marlboro and L&M cigarettes for sale in the Spanish market through Logista, an independent wholesaler in the Altadis Group. For Marlboro, the authorised volume represented some 60 per cent of Spanish demand. For L&M the volume was enough to satisfy all local demand.

The Commission objected to these arrangements, considering that they restricted Philip Morris' ability to manufacture the cigarettes outside Spain (which it could do itself profitably) and, in view of the parties' high market shares (together Philip Morris and Altadis held some 75 per cent of the Spanish market). In response to the Commission's objections, the parties reduced the duration of the licence agreements by one year (to five years for Marlboro and four years for L&M) and agreed progressively to "adapt" (presumably reduce) the authorised production volumes each year.

In February 2001, the Commission published its decision in the *Nathan-Bricolux* book case.[18] The Commission imposed a fine of EUR 60,000 on Editions Nathan for a system of absolute territorial protection involving its exclusive distributors for educational material for young children. Nathan had also been involved in resale price maintenance in so far as, in two of its distribution contracts, it required its contracting partner not to engage in commercial conduct (special offers, discounts, etc.) "liable to damage the Nathan brand". This was considered a restriction on the distributor's freedom to set his prices as he saw fit.[19]

In August 2001, the Commission indicated that it was closing its inquiry into *CD prices*. The Commission opened its inquiry in January. This involved five separate investigations into whether the major record companies (Bertelsman, EMI, Sony Music, Universal Music and Warner Music) had been subsidising advertising by retailers in return for minimum advertised prices. The Commission found that three companies had pursued such practices in Germany but that they had now ceased to do so. The Commission also found a practice in Italy which could have the effect of maintaining retail prices.

The Commission's view is that, since such issues are essentially confined to the territory of individual E.U. Member States, any further action would more appropriately come from national competition authorities. It appears that there have

17. IP/01/249, February 23, 2001.
18. [2001] O.J. L54/1.
19. See para. 86.

been similar issues in the United States where there was concern that CDs were being used as "loss-leaders" by some retail chains. There is a separate U.K. inquiry into whether the main record companies have restricted parallel imports of CDs into the United Kingdom to maintain high retail prices.[20]

The Commission is also investigating whether a worldwide system of regional coding for *DVD* (digital versatile discs) is compatible with the E.C. rules. The issue is whether someone who buys a DVD in one region, such as the United States, should be prevented by mechanical differences from playing that DVD in Europe or other regions. It is argued that this prevents E.U. consumers from benefiting from a broader choice of DVD titles and potentially cheaper prices. It appears that the world has been divided into six regions with different security codes.[21]

Articles 82/86 EC

Table 7

- **Articles 82/86 E.C.**
- — *Competition and IP*
  - Compulsory licensing of "brick" data structure? (*IMS*).
  - Green Dot trademark to be available for all packaging (even if not via *DSD*).
- — *Rebates and bonuses*
  - *Michelin II*:
    - — Yearly rebate on total turnover gave more than "fair marginal compensation" for each additional purchase.
    - — Three month reference period as the norm?
- — *New rail liberalisation cases* (Italy/Germany)
- — *Many postal liberalisation cases*
  - *Italy*: "hybrid" (electronic/letter) mail reservation illegal.
  - *Belgium*: linkage of classic and new business mail services in the insurance sector.
  - *Germany*:
    - — Fidelity rebate for use of *Deutsche Post's* mail order parcel services.
    - — Predatory pricing by cross-subsidising from reserved sector.
    - — Commercial service to be based on additional cost of network *usage*, with network *capacity* cost distinguished.
    - — Structural separation agreed.
    - — ABA remail: Commission decision overrules German finding on "circumvented domestic mail".

Competition and intellectual property

In March 2001, the Commission sent a Statement of Objections to *IMS HEALTH*, the world leader in data collection on pharmaceutical sales and prescriptions, with a view to imposing interim measures, which would require IMS to license its regional sales data method in Germany to competitors.[22]

It appears that in the early 1970s IMS developed a system for dividing up Germany into 1,860 zones (known as "bricks") for data purposes, in collaboration with the pharmaceutical companies there. Zones were established so as to ensure that sales to individual pharmacies could not be ascertained. This system was then taken up by the industry, developed by correlation to doctors' locations and used to establish sales territories.

In 1999 two other data collection companies attempted to enter the German market, NDC (of the United States) and AzyX Geopharma (of Belgium). Initially, they tried to collect their sales data based on other subdivisions of the German territory. However, discussions with potential customers suggested that the data would not be marketable because it did not correspond to the existing 1,860 "brick" structure (for example, because it could not be compared with historical data).

In 2000, IMS filed actions in the Frankfurt District Court against the two new competitors, alleging that they had infringed IMS's copyright in the 1,860 brick structure. IMS obtained a ruling prohibiting them from doing so. While contesting that the structure was, in fact, copyright, the companies then sought licences to use it, which were refused.

NDC then complained to the Commission, arguing that, in the absence of a licence, it would be prevented from entering the market. The Commission carried out preliminary investigations which showed that there was no real and practical possibility for the companies to employ another structure which would not infringe any copyright IMS might have. The Commission's investigations also showed that the refusal of access to the brick structure would be likely to eliminate *all* competition in the relevant market.

The Commission then issued the Statement of Objections for what it considered a prima facie infringement of Article 82 E.C. and in July 2001, imposed interim measures on IMS Health.[23] In doing so, the Commission emphasised three points. First, that in the circumstances, IMS's brick structure had become a *national standard* to which the pharmaceutical industry had contributed. In practice, the pharmaceutical industry in Germany was "economically locked-in" to that structure. Secondly, that IMS's refusal was likely to eliminate

20. IP/01/1212, August 17, 2001.
21. Bloomberg, June 11, 2001; IP/01/1212, August 17, 2001.
22. IP/01/365, March 14, 2001. See also IP/00/120, October 2000 where the Commission alleged that some of IMS' sales practices might constitute an abuse of dominant position (issues of tying, loyalty discounts and free product supply).
23. IP/01/941, July 3, 2001.

all prospect of competition in Germany in the services concerned. Thirdly, referring to *Magill*, that a refusal to license an intellectual property right is not normally considered an abuse of Article 82 E.C. However, these were exceptional circumstances justifying such action.

IMS appealed and applied for suspension of the interim measures order arguing, amongst other things, that a refusal to license cannot be contrary to Article 82 E.C., unless it is accompanied by additional conduct, that its competitors can enter the market using their own structures and that IMS would suffer irreparable harm if it had to license its copyright.[24] It was also suggested that the Commission cannot apply essential facilities doctrine unless a dominant position on one market is used to foreclose competition in *another* market. IMS's appeal against the interim measures was successful, based on the balance of interests, resulting in a suspension of the Commission's interim measures order.[25]

In April 2001, the Commission took another important decision concerning the licensing of the Green Dot trademark for collection and recovery systems for sales packaging.

The Commission found that *Duales System Deutschland* ("DSD"), which operates the Green Dot system in Germany, held a dominant position on the market for systems which exempt companies from their duties to take back and recover sales packaging under German packaging law.[26] The Commission found that if the type of services DSD offered were considered to be a separate market, DSD would have 100 per cent of the market. If a broader market definition were taken, (including services helping companies to fulfil their take back obligations themselves), DSD's market share in 1998 was still some 70 per cent of all sales packaging. DSD's market share had also been extremely stable since 1995.[27]

The Commission found that DSD abused its dominant position in so far as it financed itself through fees under a trademark agreement for use of the Green Dot mark on sales packaging, *not* for use of DSD's services in Germany. According to the Commission, in such a system an abuse always occurred when a company uses DSD's exemption services only for some of its sales packaging or dispenses with DSD's services in Germany (for example through self-management or through using a competitor, for example in a given region of Germany).[28] Abuse also occurred when a company used the Green Dot system abroad and then chose to use an alternative system in Germany.[29]

More specifically, the Commission found that:

— DSD imposed *unreasonable prices*. In particular, DSD's licence fee was excessive and disproportionate to the cost of the trademark usage, being in fact a charge for the exemption services.[30]
— It was also not economically realistic to require manufacturers and distributors *not* to mark with the Green Dot mark packaging which was not to be covered by the DSD system. In practice, this would lead to additional manufacturing costs and a need to organise separate distribution arrangements for the differently marked products.[31] Forcing companies to choose between those additional costs and paying an unreasonable licence fee was therefore an *imposition of unfair commercial terms*.[32]
— DSD's requirements were also considered very close in effect to an *exclusivity requirement*,[33] making it much more difficult for competitors to enter the market.

The Commission ordered DSD not to require payment of a licence fee on *all* sales of packaging carrying the Green Dot trademark, where companies only used DSD's exemption service for *part* of their sales packaging. The same applied if companies put products into circulation in other Member States with the Green Dot trademark and proved that they had fulfilled their recovery obligations under German law through competing exemption systems or self-management solutions. DSD was also required not to charge a licence fee where packaging was put into circulation in Germany with the Green Dot trademark, but DSD's exemption service was not used, the relevant company's obligations in German law having been demonstrably fulfilled in another way.

DSD could, however, require in the case of packaging which had been moved from another Member State to Germany that it be made clear to final consumers "in words or other suitable form placed close to the Green Dot trademark", that the packaging did not participate in the DSD system.

In the case of partial or complete participation in a competing system, DSD was entitled to require that the obligations under German law were met. However, this could be by the operator's confirmation for the relevant quantity. In such cases, or self-management solutions, an independent

24. [2001] O.J. C303/19.
25. Case T-184/01, Order of October 26, 2001; Reuters, October 29, 2001.
26. [2001] O.J. L166/1. See also the note on the Commission's clearance decision for other aspects of DSD's activities in the section on horizontal co-operation, described in Part 1.
27. See para. 95.
28. See paras 117 *et seq.*
29. See para. 101.
30. See para. 111.
31. See paras 103–108.
32. See para. 112.
33. See para. 115.

expert's certificate on compliance for the relevant amount of packaging is considered sufficient. Both the operator's confirmation and the expert's certificate can also be replaced by an accountant's certificate.

The requirement that all packaging could continue to have the Green Dot mark, even though it may not be serviced by DSD, was clearly controversial. DSD objected on the basis that it undermined its trademark rights, would reduce the identifying power of DSD's trademark and mislead consumers.[34] The Commission decided, however, following a German court judgment, that the essential function of the Green Dot trademark was fulfilled when it signalled to the consumer that he had the *option* of having the packaging collected by DSD. It was not essential that DSD actually perform the service. Nor was it essential that where only part of a company's packaging came into the DSB system, only part of the packaging should carry the mark.[35] DSB has filed an appeal. The additional labelling requirement for exported packaging (which is also in the French *Eco-Emballages* case) is not entirely clear, since it will add to supply costs and may deter such trade. It seems to be the *quid pro quo* for what is essentially a compulsory trademark licensing requirement here.

Rebates and bonuses

In June 2001, the Commission fined *Michelin* EUR 19.76 million for fidelity rebates, bonuses and other commercial practices which foreclosed the French market for replacement tyres for heavy vehicles.[36] The decision has not yet been published, but is described in a recent article in the latest E.C. Competition Newsletter.[37]

The Commission found that the relevant product markets were those for new replacement tyres for heavy vehicles (distinct from originally mounted new tyres on new vehicles) and the market for retread tyres (tyres which are reworked with the addition of a new layer to prolong the life of the tyre). Both markets were considered national in geographic scope. Michelin described the retread market as a *service* market, which involved the supplier being close to the customer.

Michelin was considered dominant for various reasons. Notably, Michelin's market share was high (more than 50 per cent) and had been so for more than 20 years, with competitors far behind. Michelin was also considered to be very strong in related markets, such as that for new tyres and to be an "unavoidable trading partner" for resellers, given consumer recognition of the brand. Michelin had also been able to maintain price differentials *vis-à-vis* competitors, even though its radial tyre patent had expired and had the leading sales force and the largest commercial network of outlets in France.

Michelin was found to have pursued a variety of abusive practices, which tied its dealers to Michelin and foreclosed the market. First, Michelin offered *yearly quantitative rebates* based on achieving defined levels of *total* turnover with Michelin France (tyres for heavy vehicles, cars and vans). The Commission held that for a small additional purchase a reseller was given a rebate worth more than the "fair marginal compensation" ("*juste retribution marginale*") for each additional purchase. As a result the rebate did not just involve passing on economies of scale realised by Michelin from the additional purchases and amounted to a loyalty rebate.[38]

Secondly, Michelin offered *a service rebate* based on various elements to which the Commission objected. The Commission considered that the assessment of the service quality was too subjective, leaving a margin for discretion. The Commission also objected that precise strategy information on the market had to be given to Michelin, that resellers were required to purchase minimum quantities of Michelin products and that credit was given if resellers undertook systematically to have Michelin tyres casings "retreaded" by Michelin.

Thirdly, Michelin offered *individualised progressive or target rebates* based on achieving the same amount of Michelin sales as in previous years, or the average of the two to three previous years.

Fourthly, Michelin entered into commercial agreements with the largest resellers which were considered to be just an extension of the quantitative and service rebates described above, offering a further percentage if the reseller achieved a high minimum turnover target.

Fifthly, in one type of commercial agreement, Michelin offered a rebate if a reseller undertook to have Michelin tyre casings "retreaded" *exclusively* with Michelin. Finally, the Commission found that one condition of co-operation with the largest resellers was, in practice, that they achieve certain market shares with Michelin.

As regards the fine, the Commission considered the infringement to be "serious" and of long duration. The basic amount of the fine was set at EUR 8 million, increased by 10 per cent per year for a nine-year infringement (*i.e.* EUR 7.2 million) making a total of EUR 15.2 million. This was then

34. See the discussion in paras 143 to 153.
35. See para. 145.
36. IP/01/873, June 20, 2001.
37. Roques, "*Décision Michelin: la Commission condamne l'entreprise Michelin pour un abus de position dominante portant sur les pratiques de rabais fidelisants*", E.C. Competition Policy Newsletter, October 2001, pp. 36–39.
38. *ibid.*, p. 38.

increased by 50 per cent for recidivism (*i.e.* by EUR 7.6 million), in so far as the individualised progressive rebates had been the subject of the previous Michelin proceedings related to the Netherlands. The fine was, however, reduced by 20 per cent for Michelin's unilateral termination of the infringement before the issue of the Statement of Objections, giving the overall amount of EUR 19.76 million.

The Commission's Press Release in the case is also noteworthy because it includes the statement that "the Court of Justice has ruled in the first *Michelin* decision and consistently in more recently cases that quantity rebates with exclusionary effects are illegal when granted by a company in a dominant position *for more than three months*" (emphasis added). While such a rule has been inferred by some from some settlements (such as the old (1989) *Coca-Cola* case[39]), the rule is not thought to be that clear. Many argue that *six month* switching opportunities may be reasonable depending on the circumstances.

Rail liberalisation

This year has seen new Commission activity in relation to *rail liberalisation*, provided for by Directive 91/440.[40] The Commission appears to be concerned that not enough has changed since that Directive was adopted and has recently made it a priority to ensure compliance with the related competition rules. The Commission has therefore issued two Statements of Objections for alleged abuses of dominant position by the Italian and German railways, preventing development of competitive railway services.

Thus, in June 2001, the Commission sent a Statement of Objections to the Italian state-owned railway company, *Ferrovie dello Stato* ("FS"), for refusing to provide a German railway operator, *Georg Verkehrsorganisation* ("GVG") with elements necessary for GVG to offer a rail service from various points in Germany, via Basle to Milan.[41] GVG has been trying for some years to organise a so-called "Sprinter" rail link, which would operate twice a day via Domodossola, a small city on the Swiss-Italian border. GVG claimed its service would offer more comfort and be quicker than the existing rail services. GVG's proposed service would, however, compete with another offered on the same route by "Cisalpino", a joint venture between FS and Swiss railway operators. FS and the Swiss railway company (SBB) also co-operate on services between Basle and Milan via Chiasso and Domodossola.

In 1996, GVG obtained the necessary "train path" authorisation in Switzerland, from Basle to Domodossola. However, in spite of numerous requests, FS has not provided a suitable train path from Domodossola to Milan, nor has it informed GVG about the price for renting such a train path. In order to provide the service, GVG also needs FS to enter into an international partnership (or "grouping") pursuant to Directive 91/440, which FS has also not been willing to do. The Commission alleges that FS's refusals are an abuse of dominant position, in so far as FS is the infrastructure manager for access to the Italian railway network and thus far the only railway company in Italy able to enter into such a partnership.

In October 2001, the Commission also sent a Statement of Objections to *Deutsche Bahn* ("DB") in relation to another case involving GVG.[42] GVG and its partner, the Swedish state railway company, *Statens Järnvgär* ("SJ") have been operating a passenger night train service between Berlin and Malmö, via Sassnitz since September 2000. In order to operate the service in Germany, GVG needs a particular type of locomotive, namely one which can operate on the former East German system at a speed of at least 120 km/hour and which can provide electricity for heating. GVG also needs access to related back-up services, for when the locomotive needs maintenance or repair.

DB has a pool of some 1,000 such locomotives, representing 99 per cent of all locomotives which are suitable for such a service. The Commission therefore alleges that DB is the only company which could provide such traction services on a regular basis and emphasises that access to DB's locomotive pool is particularly important, because it significantly reduces the overall cost of operation and the time where locomotives remain idle. While DB has provided such traction services to GVG in the past, the Commission alleges that DB has now abused its dominant position by setting the price for such services considerably higher than what DB charges another operator, Private Wagon Owners (price discrimination), refusing to provide traction to GVG altogether and requiring GVG to provide its own staff, thereby inflating GVG's costs. GVG has found a temporary solution by renting a locomotive from a manufacturer, but without comparable back-up services.

Postal liberalisation

This has been an active year for postal liberalisation cases. The Commission has so far taken action against Italy, Belgium, Germany and France.

Thus, in December 2000 the Commission adopted a decision under Article 86(3) E.C., against Italy, ruling that an Italian Decree contravened Article 86(1) E.C., in conjunction with Article 82 E.C., in so far as it reserved the day or time certain

39. IP/90/7, January 9, 1990.
40. [1991] O.J. L237/25.
41. IP/01/1962, June 5, 2001.
42. IP/01/1415, October 15, 2001.

delivery phase of new "hybrid" electronic mail services to the incumbent postal operator, Poste Italiane.[43] "Hybrid mail" involves the delivery of mail generated electronically and is not considered part of the basic universal service because of the value added element of the time guarantee. Poste Italiane did not offer such a service at the time, whereas certain small private firms were preparing to do so and had sought legal confirmation that they would be able to operate.

In July 2001, the Commission indicated that the Italian Government had complied with this decision by adopting a ministerial circular.[44] Under the circular, all operators offering day or time certain deliveries as part of "hybrid mail" are to be granted a general authorisation to provide such services in Italy. However, the Commission also emphasised that its Article 86(3) E.C. decision has direct effect, so that it could be invoked in national proceedings if required. Italy is to consolidate this change into Italian postal law when the new Postal Directive is adopted to replace Directive 67/97.

In May 2001, the Commission sent a Statement of Objections to the *Belgian postal operator*, *La Poste*, concerning alleged tying of its traditional mail service (on which it has a monopoly) and a new business mail service.[45] The case arose as a result of a complaint by Hays Management Services SA, which operates a document exchange service in Belgium and with the United Kingdom, Ireland and France. La Poste is alleged to have withdrawn preferential tariffs on its ordinary mail service which it had granted to insurance companies when they did not take La Poste's new business mail service. In subsequent negotiations, La Poste then made it clear that the preferential tariff was linked to subscribing to the new business mail service. A similar position was taken in negotiations with insurance brokers.

In March 2001 the Commission adopted an important decision, concerning *Deutsche Post's* commercial position in parcel services.[46] There are three main aspects: First, the Commission fined Deutsche Post EUR 24 million for *fidelity rebates* in mail-order parcel deliveries. Between 1974 and 2000 Deutsche Post gave substantial discounts to its large mail-order customers on condition that the customer sent all or a sizeable proportion of its mail-order business via Deutsche Post. Secondly, the Commission found that Deutsche Post had engaged in *predatory pricing practices* in the market for business parcel services and set out principles as to what constitutes predatory pricing in the postal sector. Thirdly, Deutsche Post agreed to a *structural separation* of its "commercial" parcel services from its reserved services, designed to eliminate the risks of cross-subsidisation.

In 1994, United Parcel Service ("UPS"), the American parcel delivery firm, filed a complaint with the Commission alleging that Deutsche Post was using revenues from its letter monopoly to finance and cross-subsidise below-cost sales of business parcel services. UPS sought a structural separation of Deutsche Post's reserved and commercial parcel services.

The Commission considered that Deutsche Post was dominant in mail-order parcel services in Germany. In particular, Deutsche Post was the only significant provider of nationwide parcel and catalogue delivery services which met the specific requirements of the mail-order trade. Deutsche Post's market share had also remained stable at over 85 per cent for nine years. Barriers to entry were high, because the creation of an alternative infrastructure required considerable sunk costs and the development of a critical mass of some 100 million parcel deliveries a year.

The Commission's case on *fidelity rebates* was based on *Hoffmann La Roche* and specific contractual examples. Deutsche Post undertook to terminate all such rebates after receiving the Commission's Statement of Objections. An interesting aspect is the way that the Commission emphasised that the effect of the fidelity rebates was to prevent competitors reaching the critical mass required to operate in the mail-order parcel services market.[47]

As regards *predatory pricing*, the Commission's core idea is that all the additional costs of a monopoly postal operator branching out into a commercial sector (the costs of *network usage*) must be covered by the service in question. The Commission states that a distinction must be made between "common fixed costs" which Deutsche Post incurs to provide its *network capacity*, (and which is also used for its universal service) and those costs attributable to *network usage* for the specific commercial service of mail-order parcel delivery. The Commission then reviewed the various elements of mail-order parcel services to determine whether and to what extent the related costs were to be treated as "service-specific" costs or part of the "common fixed" costs of Deutsche Post.[48] The Commission also held that the cost to Deutsche Post of maintaining *reserve capacity* for its public service obligations should be treated as part of its common fixed costs, rather than as variable, service-specific cost.[49]

There may be room for discussion about this approach and the specific decisions on allocation which the Commission reached, but the main

43. IP/00/1522, December 21, 2000; [2001] O.J. L63/59.
44. IP/01/1057, July 24, 2001.
45. IP/01/740, May 23, 2001.
46. [2001] O.J. L125/27.
47. See point 37.
48. See paras 11–16.
49. See paras 8–10.

point is to see this sort of detailed analysis. One would think that we will see it again in other liberalising sectors with shared infrastructure for universal and commercial services.

Applying this approach, the Commission found that Deutsche Post did not cover the additional costs related to its mail-order delivery service for a period of five years (1990–1995). However, the Commission did not impose a fine on the basis that the relevant measure of cost that a "multi-product" or "multi-service" postal operator benefiting from a reserved area has to meet in competitive activities had not been clarified previously. The Commission also took into account that Deutsche Post agreed to resolve the issue by introducing full transparency on the financial relationship between the reserved area and the parcel services subject to competition.

The third aspect of interest in the case was *structural separation*. This was not a formal condition or obligation of the decision (although it is termed a "commitment" by the Commission).[50] It was offered by Deutsche Post to resolve the issue that it was cross-subsidising its commercial services from its reserved services.

Deutsche Post undertook to transfer all of its commercial parcel activities, including the delivery of catalogues, to a legally separate company. Thereafter Deutsche Post would no longer offer any commercial parcel services. Further, the new company would be free to produce or provide the goods or services required to run its business, or to procure them from third parties or Deutsche Post. If, however, Deutsche Post were to provide goods or services, they were to be paid for at market prices. Deutsche Post also agreed that it would have separate statements of its transfer prices to the new company for each of the main processing stages (for example collection, sorting, transport, etc.). If the new company were to procure one or more of the services, Deutsche Post undertook to make the same service available to competitors at the same prices and on the same conditions within the framework of available capacity.

All of this is clearly interesting and timely given the Commission's proposal in the new Regulation 17 that it should have general powers to order structural remedies.

Deutsche Post's fidelity rebate system was considered to be a "serious" infringement, justifying a basic fine of EUR 12 million. This was increased in two ways for duration: 70 per cent for the years 1974–1997 (some three per cent a year) and 30 per cent (10 per cent a year) for the years 1997–2000 (when the infringement was found to have intensified) giving an overall amount of EUR 24 million.[51]

In July 2001 the Commission also adopted a formal decision finding that *Deutsche Post* had abused its dominant position in the German letter market by intercepting, surcharging and delaying incoming international mail which it had erroneously classified as circumvented domestic mail (so-called "A-B-A remail"). In view of legal uncertainty at the time of the infringement only a symbolic fine of EUR 1,000 was imposed.[52]

This case was discussed already last year. It relates to a complaint in 1998 from the *British Post Office* (now renamed Consignia) that Deutsche Post had intercepted international mail from the United Kingdom to Germany, on the basis that it was, in fact, domestic German mail, circumventing the full domestic tariff.[53] Deutsche Post argued that where international mail contained a reply address to a German sender, then it should be treated as originating in Germany. Deutsche Post therefore intercepted such mail and required that the Post Office pay a surcharge for its delivery (usually after long delay). This position had also been consistently upheld by the German courts.

However, the Commission disagreed, noting that the mailings were produced and posted in the United Kingdom, or produced in Sweden or the Netherlands and posted via the United Kingdom. In the Commission's view therefore, the mail was international, not "circumvented domestic mail" and Deutsche Post's actions were contrary to Article 82 E.C. According to the Commission, there were four abuses: discriminatory treatment of international mail (with different prices for the same service); a "constructive refusal to supply" (in so far as Deutsche Post refused to deliver the mail unless the sender paid the claimed surcharges); excessive pricing (on the basis that the price charged by Deutsche Post for delivery of the disputed mail bore no reasonable relationship to real costs or the real value of the service provided). Deutsche Post's actions also limited development of markets, here production in the United Kingdom for outgoing international mail bound for Germany.

Beyond the liberalisation issues, this appears to be an important decentralisation case. As in the *Irish Ice-cream* situation, the Commission's decision should now override contrary findings in the German courts and give a general rule for the E.U. as a whole. It is an interesting case because the decision is not straightforward. In a sense there *was* circumvention of the German domestic tariff, but that process reflected core E.C. freedoms and principles, as to how companies can centralise and reduce their costs by placing their activities where they wish in the E.U.

50. See paras 18–22.
51. See paras 50–52.
52. IP/01/1068, July 25, 2001.
53. [2001] I.C.C.L.R., pp. 64–65.

In October 2001, the Commission took a decision pursuant to Articles 86(1) E.C. and 82 E.C. "on the monitoring of relations" between the *French Post Office*, *La Poste* and firms specialising in the making-up and preparation of mail.[54] The Commission is concerned that La Poste is both a competitor of such specialised firms and their unavoidable trading partner, and considers that such a conflict of interests may encourage La Poste to abuse its dominant position.

The case is a result of complaint by SNELPD, a trade association representing the majority of French mail-preparation firms. Its members offer services ranging from the making-up of mail on behalf of large mail originators to the delivery of mail in pre-sorted bags to certain offices of La Poste.

The Commission notes that La Poste offers competing services and is also inevitably the business partner of such firms. The Commission considers that this may give La Poste incentives to discriminate against competitors, in terms of setting tariffs or defining and applying technical standards. Moreover, there is only limited monitoring of La Poste's conditions through the French Ministry of Finance, which itself has a conflict, because it is responsible for safeguarding the state's financial interests in La Poste. The French authorities have announced their intention to create an ombudsman to address these issues.

Other

In November 2000, the Commission closed an investigation in relation to *COBAT*,[55] the Italian consortium which co-ordinates the collection and recycling of used lead batteries in Italy. The case was opened in 1998 when Saraceno Demetrio, an Italian firm engaged in the collection of batteries and other waste in north-west Italy, filed a complaint alleging that COBAT had abused its dominant position.

Saraceno alleged that COBAT had opposed Saraceno's exports to a recycling firm in France, penalised firms such as Saraceno which had not been granted an exclusive collection area and paid much lower prices for recycling than were applied in other European countries.

The Commission appears to have found that COBAT operates an environmental service of general economic interest. However, the Commission also found that COBAT discriminated between waste collectors by only remunerating firms to which an exclusive area had been assigned for the collection service. COBAT also favoured national recycling firms and was opposed to exports. COBAT has now agreed that any firm with the necessary authorisation will be able to collect and recycle batteries without territorial restrictions or exclusivity conditions. The batteries can be passed on to the consortium or exported. Sales by COBAT to recycling firms in Italy and abroad will also be made according to the best market price.[56]

In April 2001, the Commission closed an investigation into *Microsoft's holdings in the European digital cable television industry* (UPC in the Netherlands and NTL in the United Kingdom). The Commission was concerned about related co-operation which influenced the selection of set-top box technology to be used by these companies. Microsoft has now agreed with one cable operator to abolish a "joint technology board", which made recommendations on technology decisions for the company and in the other company to turn the joint technology board into an "industry technology forum" open to competing suppliers.[57]

In June 2001, the Commission emphasised that its *investigations of Microsoft* were factually and legally separate from the current U.S. case. The U.S. case focuses on practices related to the browser market, whereas the Commission's investigation relates to claims that Microsoft may have leveraged from a dominant position in PC operating systems to server markets.

In August 2001, the Commission announced that it was initiating *additional proceedings against Microsoft*.[58] It appears that there are two new issues: whether Microsoft has used unlawful practices to extend its dominant position in PC operating systems into the market for "low-end server systems", and whether Microsoft is unlawfully tying its "media player" to its Windows 2000 operating system. A Statement of Objections, supplementary to that sent last year, has been sent.[59] As regards the low-end server issue, it is alleged that Microsoft may have withheld from vendors of alternative server software key interoperability information which they need to "talk" with Microsoft's PC and server software products. As regards the media player product, the issue is that the product is already pre-loaded with no ready technical means to remove or uninstall it. It is alleged that this puts rivals, such as Real Networks "real player" or Apple's "quick time" at a disadvantage.

54. IP/01/1476, October 23, 2001.

55. IP/00/1351, November 23, 2000. See also, Baccaro E.C. Competition Policy Newsletter, February 2001, pp. 39–41.

56. In December 2000, the Commission readopted its decisions imposing fines on *Solvay* and *ICI* for so-called "top slice" loyalty rebates in the *Soda Ash* market. It will be recalled that the decisions were annulled by the CFI in April 2000 for procedural defects. IP/00/1449, December 13, 2000.

57. IP/01/569, April 18, 2001; Tech Europe, April 30, 2001, No. 186.

58. IP/01/1232, August 30, 2001.

59. See IP/00/906, August 3, 2000 and [2001] I.C.C.L.R., p. 67.

In April 2001, the Commission confirmed that it had asked *Intel* to react to allegations that it had abused its dominant position in the market for Windows-capable microprocessors by engaging in abusive marketing practices.[60] According to reports there have been two complaints. The issues concern the way Intel designs the "bus" connections which link chips with other computer components and advertising contributions to PC manufacturers and retailers, allegedly made conditional on them not purchasing other products from rivals.[61]

In March 2001, Commissioner Monti also indicated that the Commission was considering allegations that pharmaceutical companies may be abusing their dominant position by pursuing intellectual property rights in order to prevent *generic competition*. For example, by artificially extending patent protection through "supplementary protection certificates", or withdrawing and deregistering a particular formulation of their drug and replacing it by another in order to delay market entry of equivalent generic drugs.[62]

Current policy issues

Table 8

- **Current Policy Issues**

— *Decentralisation*
- Intensive debate over Article 3; discussions about courts; EP in favour.

— *Criminal sanctions for cartels*
- A deterrent, but at what price to the system?

— *Sectoral inquiries*: into leased lines, mobile roaming (and financial clearing systems?)

— *German books* reopened
- Can the internet be reconciled with national rpm systems?

— *Car block exemption*:
- An end to the sales *and* servicing requirement for exemption?
- Accommodating the internet?

— *Motor fuel*
- Competition authorities looking at various issues, including agency relationships and market access.
- New co-ordinated pattern for enforcement? (*cf.* telecoms and gas liberalisation).

Decentralisation

During the year debate on the decentralisation proposals has continued.[63] As regards the Member States, the focus appears to be Article 3 in the Proposed "new Regulation 17". The key issue is to what extent E.C. competition law will substitute for national law, effectively reducing the scope for national policy variations *and* limiting the extent to which national authorities have the final say.

There has also been extensive debate concerning the national courts. Commissioner Monti has argued that judges in the United States appear quite able to deal with economic law and that, whilst some features of Article 81(3) E.C. are not an exact science, they are no more complex than other judicial assessments. In one conference he also offered a crash course in the basic economic principles, emphasising that the complexity of basic anti-trust economics should not be exaggerated![64] Some have also queried whether arbitrators should also have powers to apply Article 81(3) E.C.

In September 2001, the European Parliament voted in favour of the Commission's proposals with a substantial majority.[65] Several further notices are planned, including on co-operation between national authorities and the Commission and the interpretation of Article 81(3) E.C.

Criminal sanctions for cartels

An issue which has gained prominence this year is whether there should be criminal sanctions for hard-core cartels: price-fixing, market-sharing and bid-rigging. It is argued that cartels are a drain on the economy and only some are detected. By creating criminal sanctions applicable to *individuals*, not just companies, there would be a real deterrent effect against such behaviour.[66]

Clearly, this would be a dramatic change in the law for most of Europe. It appears that there are already criminal sanctions covering some types of cartel behaviour in Austria, France, Norway and Ireland. In Germany bid-rigging is an offence. The change has also been proposed in the United Kingdom, the idea being that the sanction should be imprisonment, to avoid companies reimbursing executives for individual fines.[67]

60. MEMO/01/129, April 6, 2001.
61. Reuters, April 6, 2001.
62. "EC Antitrust Policy in the Pharmaceutical sector", Alliance Unichem Conference, March 26, 2001, and SPEECH/01/450, October 11, 2001.
63. In terms of statistics, in the year 2000 the Commission had 297 new competition cases (Arts 81, 82 and 86 E.C.), with 112 new complaints. Thirty per cent of new cases opened were of the Commission's own initiative. The Commission closed 379 cases, giving an overall "backlog" of 931 (see E.C. Commission Competition Report, 2000, pp. 9–10 and Annex D).
64. SPEECH/00/466, "The application of Community competition law by the national courts"; *Europäische Rechtsakademie*, Trier, November 27, 2000.
65. Reuters, September 6, 2001.
66. See, *e.g.* Wils, "Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings, but also individual penalties, in particular imprisonment?", Paper to the Sixth E.C. Competition Law and Policy Workshop, European University Institute, Florence, June 2001.
67. See the U.K. Department of Trade and Industry Paper "Productivity and Enterprise—A World Class Competition Regime", July 2001, Cm. 5233.

However, there is much debate. For example, one issue is how to define the offence in such a way that complex economic assessments are not involved, either in prosecution or defence. Most would not want to address a jury on such issues.

There are also issues on the interplay of different standards in national and E.C. law. For example, if a case were brought under national criminal competition law (for example in Ireland) and there were an effect on trade between Member States, it may be that a defence based on the exemption criteria of Article 81(3) E.C. would be available, either through notification (under the current rules) or in national courts (under the decentralisation proposals). Some may argue that this is a ground for creating a limited category of *per se* rules to which exemption would not apply. Others would argue that such a rigid system is not advisable. The divergence in national and E.C. standard may also be grounds for "*upward harmonisation*", bringing E.C. law in line with the prevailing approach at national level, if that should come to reflect criminal standards.

It is not yet clear that criminal sanctions for E.C. competition law are an idea which will take hold. Notably, Commissioner Monti has expressed reservations, preferring instead to emphasise improvement of existing enforcement and decentralisation.[68] One key issue would be the consequences for the current procedural process. The European Courts have often found that E.C. competition law is *not* penal (even though many companies consider the administrative fines amount to just that). Enforcement procedures might have to change radically if E.C. competition law were to involve penal sanctions on individuals, with probably new calls for a split of the Commission's current functions, so that it would only be a prosecutor in such cases, with the European Court of First Instance as "the Competition Court".

Telecoms

Since July 1999 the Commission has been carrying out *sectoral inquiries into leased lines and mobile roaming*. In each case there is concern about high prices. As regards the former, the Commission is mainly focusing on short distance leased lines or terminating circuits for international and long-distance leased infrastructure. As regards the latter, the Commission appears concerned that markets are oligopolistic and conducive to tacit or active collusion. There were dawn raids on German and United Kingdom mobile network operators in July 2001 focusing on three issues: whether there is evidence of collective fixing of retail prices by mobile operators in both countries, whether German operators have fixed the wholesale prices they charge to other operators and whether these prices are excessive or discriminatory.[69]

There is also an ongoing *sectoral inquiry on the "local loop"*, focusing on the progress of unbundling. At present, it appears that the Commission is concerned that the rate of delivery of unbundled lines is too slow and/or that they are proposed with non-competitive access conditions and procedures, while at the same time incumbents are introducing *their* new ADSL services.

Financial services

In February 2001, the Commission indicated that it may launch a *sectoral inquiry into financial clearing and settlement organisations in Europe*, in so far as many of these organisations have exclusive relationships with national markets. There have been criticisms in an E.U. Finance Minister Group report of the high cost of processing equity and brand trades in Europe.[70]

Books

In the course of the year, the *German book pricing* case was reopened.[71] It will be recalled that in July 2000 the Commission settled its action against the German *Sammelrevers* book price-fixing system, after amendments designed to allow cross-border trade to end-consumers and wholesalers without such price restrictions. However, the revised system allowed booksellers to refuse supply if exports and re-imports were a *deliberate circumvention* of the German national book pricing system. It was said that such a system would not appreciably restrict trade between Member States.

The settlement appeared to be a political compromise, given the desire of some E.U. Member States to continue such national systems. On its face, the settlement also appeared difficult to apply in practice, above all because of the development of internet book sales, allowing the resale of German books back into Germany.

What appears to have happened since is that the Austrian and Belgian internet booksellers, Libro and Proxis, were refused supplies of German

68. SPEECH/01/258; Sixth E.U. Competition Law and Policy Workshop, Florence, June 1–2, 2001.

69. MEMO/01/262, July 11, 2001. See further, Sauter, "The Sector Inquiries into Leased Lines and Mobile Roaming", E.C. Commission Website; Monti, "Defining the Boundaries of Competition Policy in High Tech sectors", UBS Warburg Conference, Barcelona, September 2001, SPEECH/01/375.

70. Reuters, February 20, 2001; see also SPEECH/01/340, Monti, "The Future for Competition Policy in the European Union", Merchant Taylor's Hall, July 9, 2001.

71. Reuters, July 19, 2001; IP/01/1035, July 19, 2001; See [2001] I.C.C.L.R., pp. 76–77.

books after they each started sales of such books at reduced prices. It also appears that, after talks with the German publisher, Bertelsmann, Libro announced that it was ending discounts (which had been as much as 20 per cent below the German fixed price). In August 2000, the Commission carried out dawn raids on the German association for the book trade and the premises of various publishers and book wholesalers.

The Commission has now sent a Statement of Objections to the publishers participating in the *Sammelrevers*, the German association, Verlagsgruppe Random House GmbH (the publishing branch of Bertelsmann) and Koch, Neff and Oetinger & Co., as the biggest German book wholesaler. The Commission claims that, contrary to the agreed settlement, direct cross-border sales of books to final consumers via the internet, at prices below the fixed price for Germany, have been *systematically* regarded as a circumvention of the system. Further, that the refusals to supply internet booksellers established outside Germany were based on illegal collusion.

Cars

During the course of the year, the Commission's review of the car block exemption has continued, together with discussions as to whether there should be a further specific block exemption for this sector.

In November 2000, the Commission issued a critical evaluation report.[72] This focused on the changing face of distribution, with cars produced and delivered to order rather than stocked and sold (so-called "lean distribution"), the tendency to fewer, larger distribution outlets and the arrival of internet sales (currently via dealer supplies). The report fundamentally challenged the link between sales and servicing, suggesting that it may not be justified to limit sales to dealers which also provide service operations,[73] while recognising that, as matters stand, many dealers *need* after-sales revenues to be viable. The report also criticised the lack of intra-brand competition in dealer networks and ongoing price differentials between Member States. The Commission appeared to have been influenced by recent infringement procedures.

In February 2001, the Commission held hearings on the evaluation report. Again, there was much discussion about the link between sales and servicing. Many also advocated retention of a specific block exemption, rather than allowing the car sector to fall under the general rules on vertical restraints. Some expressed concern that increased access to computer diagnostic systems is required for independent repair and service centres. The general impression was that radical change was in the air. More recently, the Commission is understood to have sought a further report concerning possible options, having said that it would propose a draft car block exemption for consideration before the year end. Regulation 1479/95 expires in September 2002.

Motor fuel

Last year, the Commission made various press statements when oil prices increased. In particular, Commissioner Monti suggested that both the Commission and national competition authorities should remain "vigilant" as regards the application of competition law to the sector. In practice, it appears that the Commission is considering whether claimed "agency relationships" are, in fact, with independent traders (so that resale prices cannot be agreed) and also considering the position of non-integrated, independent operators in various Member States, in terms of barriers to entry and expansion.[74] There have been cases in this field recently in Germany, Sweden and Italy.

Areas of particular interest

Table 9

- **Areas of Particular Interest**

— *Pipeline/interconnector competition*
  - Various challenges to joint sales arrangements, "congestion" issues and long-term reservations of capacity (where Article 82 E.C. issues are involved).
  - Sensitive because investments were not made to create E.U. "energy bridges".

— *Competition and legal services*
  - Advocate-General Léger against partnership of lawyers and accountants, but has reservations about national tariff rules in a Ministerial Decree.

— *Sport and broadcasting*
  - Commission moves on joint sale of TV rights for leading leagues.
  - Political compromise on FIFA transfer fees?
  - UEFA protection for fixture programme not caught by Article 81(1) E.C.
  - FIA/Formula One settlement:
    - — splitting up regulatory and commercial functions of FIA;
    - — opening up of broadcasting and other structures to allow more competition.

72. IP/00/1306, November 15, 2000; COM(2000) 743 final.
73. *cf.* Art. 5(1)(1)a of Regulation 1475/95.
74. IP/00/1391, November 30, 2000.

Pipeline/interconnector competition

During the last year there has been considerable focus on opening up pipelines and interconnectors to allow more flow of energy across borders. This is controversial because generally such investments were not made in order to create "energy bridges" between Member States, charging a "toll fee" for use. Rather they were built as a means of securing supply sources, if required, or as part of broader investments, such as to bring gas or oil to customers from jointly developed offshore fields. Liberalisation and challenges based mainly on single and collective dominance are therefore radically changing the economics and usage principles of these investments.[75] There have been various important developments this year, both as regards electricity and gas.

Electricity

First, in March 2001, the operators of the *UK/France interconnector*, an electricity submarine cable between the United Kingdom and France, agreed to open up access to their cable which is used for imports and exports between the two countries.[76]

The interconnector is jointly owned by the English and French transmission system operators, the English National Grid and the *Réseau de Transmission d'Electricité* ("RTE"), legally part of EdF. The interconnector has been operated on a fully commercial basis since 1986, its operational costs being covered by transmission charges and usage fees.

The connector was used exclusively by EdF, the French electricity operator, under an agreement which expired in March 2001. The owners then consulted the Commission before entering into a new agreement. The Commission indicated that any restrictions on the attribution of transmission rights or discriminatory treatment (for example a priority right for a particular company such as EdF) could amount to an infringement of Article 82 E.C. The Commission's view was that the owners held a dominant position in the transmission of electricity between the Continent and the United Kingdom and that this was a substantial part of the Common Market. A priority right for EdF would have put other operators at a competitive disadvantage.

The owners therefore decided to tender the interconnector's capacity (2000 Megawatts—("MW") in either direction). 1,500 MW would be tendered in 50 MW blocks for three years; 350 MW would be auctioned annually in 1 MW blocks and 150 MW daily in 1 MW blocks. In addition, RTE also reviewed transit systems for electricity in France to make them compatible with such transmission rights, allowing operators in other Continental countries to use the interconnector. RTE also undertook that transit rights from Spain would match capacity allocated by auction on the Spain/France interconnector.

Secondly, the Commission is *monitoring and/or investigating interconnector arrangements between other countries where there are "congestion" issues*, such as Germany and the Netherlands, the Netherlands and Belgium, France and Spain and France and Italy. Thus, on March 15, 2001, the Commission indicated that it was investigating *high electricity prices in the Netherlands* and the methods of allocating import capacity on the high-voltage power grid.[77] It appears that the Netherlands imports some 3,500 MW of electricity per day, with access to the five international connections auctioned by the Dutch grid operator TenneT. There have been complaints that the auction system favours E.ON, RWE and Electrabel, which companies control grids bordering the Netherlands and have also moved into the Dutch market. Half of the interconnector capacity also goes to the four largest Dutch electricity producers, which receive revenues from the auctions. Third parties claim that these revenues are used to subsidise their bids in the auction process.

Thirdly, in January 2001, the Commission indicated that it had obtained openings of the *Skagerrak electricity cable* between Norway and Western Denmark and the *Danish/German interconnector*.[78] Previously, 60 per cent of the total capacity on the Skagerrak cable had been reserved for the benefit of the Norwegian electricity producer Statkraft and Elsam, the dominant electricity producer in Western Denmark, under a 20-year arrangement. The remaining 40 per cent of the cable's capacity was reserved to Statkraft and E.ON, in an agreement providing for transit capacity through the Western Danish network and 34 per cent reserved capacity on the Danish/German interconnector towards Germany. E.ON and Elsam, the two purchasing parties, were also considered to have very strong positions in their respective markets. This agreement was for 25 years from 1998.

The Commission expressed doubts about the lawfulness of these reservation agreements, in response to a notification and also in the context of the *VEBA/VIAG* merger. As a result, the whole capacity of the Skagerrak cable was opened from January 1, 2001 and the E.ON reservation on the Danish German interconnector was dropped from the same date.

75. There are also parallel regulatory initiatives, *e.g.* for a Regulation on cross-border exchanges of electricity and funding of new infrastructure.
76. IP/01/341, March 12, 2001 and the related Commission MEMO/01/76, of the same date.
77. Reuters, March 15, 2001.
78. IP/01/30, January 11, 2001.

Fourthly, there has also been *further action through merger control*, this time on the *France/Spain electricity interconnector*. Thus, in September 2001 the Commission cleared the acquisition of joint control of *Hidroeléctrica del Cantábrico* by Grupo Villar Mir and EnBW, only after EdF (which jointly controls EnBW) agreed to increase capacity on the interconnector.

The Commission considered that the acquisition would lead to the strengthening of the existing collective dominant position on the Spanish wholesale market for electricity, held by two *other* companies, Endesa and Iberdrola. The Commission was concerned that the acquisition would reduce any incentive for EdF to increase capacity in the France/Spain interconnector, which is already congested, after it had acquired more Spanish generation capacity. To meet the Commission's concerns, EdF and RTE (the French grid operator) undertook to increase the commercial capacity on the interconnector to some 4,000 MW from the existing 1,100 MW over a short to mid-term period.

Fifthly, in September 2001, the Commission showed that, in appropriate cases, it will allow long-term exclusivity in order to recoup investments, in proposing clearance of exclusive rights to use a new electricity interconnector, the *Viking cable* between Norway and Germany.[79] The case is the subject of a recent Article 19(3) Notice. The parties are E.ON, Statkraft and Statnett, the Norwegian grid operator. The idea is that the cable will be owned through a joint venture between Statnett and E.ON. The new cable will have a transmission capacity of 600 MW and is intended to provide E.ON with a "firm power" delivery of Norwegian electricity, avoiding the need for E.ON to build a new power plant in Germany. E.ON is to have exclusive rights for use of the cable for 25 years, but where short-term volumes become available, these will be offered on the NordPool spot exchange in Norway. The 25-year duration appears long, but may be justified as comparable to the lifespan of a normal power plant. Interestingly, perhaps influenced to promote new capacity construction, the Commission's view is that these arrangements do not fall within either Articles 81 or 82 E.C.

Gas

On the gas side, the main developments this year relate to the *Italian Gazprom* arrangements and the *Corrib* and *Norwegian GFU joint sales systems*.

As regards the *Gazprom* arrangements, in March 2001 the Commission was reported to be objecting to clauses in supply contracts between the Russian gas producer Gazprom and the Italian companies, Snam, Enel and Edison. These clauses prevent the resale of gas to other countries in the European Union and provide for exclusivity preventing Gazprom from selling other than to these companies in Italy.[80]

In April 2001, the Commission announced that it had closed its investigation into a proposed joint sales and marketing arrangement between Enterprise Oil, Statoil and Marathon for the supply of gas from the *Corrib gas field*, off southern Ireland.[81] The parties had notified their proposed arrangements, arguing that joint sales were justified for the first five years of production to balance the countervailing buyer power of their main customers, the state-owned Irish gas and electricity companies (the latter using gas for electricity production). The Commission recognised the buying power of these companies but did not accept the argument that joint marketing would bring about the economic benefits required for exemption. Instead the Commission noted that the Irish market was in the process of liberalising, which would give increasing numbers of new "eligible" customers for the three gas producers to supply individually.

As regards the politically sensitive issue of the "*GFU*" (the Norwegian Gas Negotiation Committee), in June 2001 the Commission objected to joint sales of Norwegian gas on behalf of some 30 producers through this Committee and sent Statements of Objections to its members.[82] The Norwegian Government announced that it would "temporarily discontinue" the arrangement from June 1, 2001. The Commission is continuing its proceedings, however, because it considers that the long-term supply agreements entered into under joint sales terms should be reviewed. If not, the Commission considers that the adverse effects of the joint selling scheme will be perpetuated for many years.

In August 2001, the Commission then called on national gas regulators and competition authorities to ensure that there would be effective and fair access for Norwegian gas to the Continent and the United Kingdom.[83] It is reported that Norway is still defending the GFU sales, arguing that national resources are outside the scope of the EEA agreement and, more specifically, that the firms involved in setting prices through the GFU were *compelled* to do so by the Norwegian Government.[84]

It may also be recalled that the Commission intervened last year to open up a long-term gas supply agreement between *ENDESA and GAS NATURAL* on the basis that this would infringe Article 82 E.C.[85] The Commission's concern was

79. [2001] O.J. C247/11.

80. Reuters, March 22, 2001; *The Financial Times*, March 26, 2001.
81. IP/01/578, April 21, 2001
82. IP/01/830, June 13, 2001.
83. IP/01/1170, August 2, 2001.
84. "The Economist", October 31, 2001.
85. IP/00/297, March 27, 2000.

that GAS NATURAL's dominant position on the Spanish gas market would be reinforced by an agreement whereby ENDESA, the market leader in electricity supply in Spain, agreed to purchase all its gas requirements from GAS NATURAL. The parties agreed to various measures: to reduce the gas volumes concerned, freeing up part of ENDESA's purchases; to reduce the duration of the agreement to 12 years; to remove a requirement that ENDESA use the gas supplied for its own use, preventing resale; and to modify terms discriminating in favour of ENDESA as compared to other gas customers.

Competition and legal services

The application of competition law to legal services has also been a growing area in recent years, prompted in part by the Commission's decision in the case involving *Representatives at the European Patent Office*. (The CFI's judgment was described in Part 1.) In July 2001, Advocate-General Léger gave his opinions in two important cases, one concerning multi-professional partnerships, the other related to national fee tariffs.[86]

In *Wouters*,[87] the issue is whether a Dutch Bar rule preventing collaboration between lawyers and accountants infringed the E.C. Treaty. Advocate-General Léger has found that such a rule may restrict competition, by denying consumers the opportunity to use integrated services.

However, the Advocate-General considers that the rule may be justified because lawyers are entrusted with the operation of services of general economic interest. They perform tasks which are essential in a state governed by the rule of law and are given particular tasks by act of the public powers in the Netherlands. He also considers that applying the competition rules to authorise multi-disciplinary proceedings would compromise obligations particular to the legal profession, namely independence, respect for professional secrecy and the need to avoid conflicts of interest.[88] He considers that there is a certain incompatibility between those advisory activities and the supervisory activities of an accountant. The very essence of the legal profession may therefore preclude the establishment of a community of financial interests with accountants. He noted also that other forms of co-operation between the two professions were possible.

86. Advocate-General Léger has also given his opinion in a case before the Court on the application of the competition rules to professional tariff scales for services provided by architects: Case C-221/99, *Conte*, Opinion of July 12, 2001.
87. Case C-309/99, *J.C. Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten*, Opinion of July 10, 2001.
88. See paras 179–187.

As a result, the Dutch Bar rule is, in his view, lawful. It will be interesting to see what the ECJ decides. It is also noteworthy that precise distinctions may apply. The Dutch Bar allows, for example, multi-professional associations between lawyers and patent agents and notaries.

In *Manuele Arduino*,[89] the issue is whether a ministerial decree approving a draft scale of fees for Italian lawyers, proposed by the "Italian National Council of the Association of Lawyers" ("CNF") infringes (what was) Articles 5 and 85 of the E.C. Treaty (now Articles 10 and 81 E.C.). The Advocate-General found that the proposal of the CNF was a decision of an association of undertakings. In particular, when fixing the fee scale, the CNF, composed exclusively of lawyers, is not required to take its decisions in the public interest.

However, its proposal was only *a preparatory act*, which the CNF was entitled to prepare for submission to the government or legislature.[90] In doing so, he suggested that the approach in the *BNIC* cases was too strict. Price agreements submitted for official approval should not be treated as *intended* to distort competition on the market.[91] If there is a distortion of competition, it is in the government measure itself. Turning to the ministerial decree, the Advocate-General considered that it appreciably restricted competition. Italy had therefore to justify its conduct under community law. On this issue, the Advocate-General suggested that the national court which referred the issue should ascertain whether there is effective control by public authorities over the *content* of the CNF decision, whether the decree pursues an aim in the public interest; and whether the decree is proportionate to the aim pursued. (He doubted the latter.)

Sport and broadcasting

Once again competition and sport has been an active area this year. The focus has been on football and motor racing.

Joint sales and purchasing

In November 2000 the Commission announced that it was withdrawing its threat to impose fines on *Telefonica* and *Sogecable* in relation to their joint venture *Audiovisual Sport*.[92] This company is owned by Telefonica, Sogecable (itself owned by Canal+ and Prisa, a Spanish media group) and TV3, the Catalan public broadcaster. The parties had notified to the Commission an agreement

89. Case C35-99, *Manuele Arduino*, Opinion of July 10, 2001.
90. See paras 69 and 72.
91. See paras 77–80.
92. IP/00/1352, November 23, 2000.

whereby they committed jointly to acquire and exploit the broadcasting rights to Spanish First League football matches for 11 seasons until 2009.

The Commission was concerned that this would foreclose the Spanish pay-TV market. In April 2000, the Commission therefore sent a Statement of Objections envisaging removal of immunity from fines. In June 2000, it appears that the parties granted access to the broadcasting rights to new cable and digital terrestrial television entrants in Spain. They also formally guaranteed that competitors were free to set their prices for pay-per-view football matches. The Commission is still examining the notification, focusing on whether the joint buying arrangement has an anti-competitive impact on the price paid to football clubs and on the duration of the agreements.[93]

In July 2001, the Commission sent a Statement of Objections to *UEFA concerning its sale of TV rights to the UEFA Champions League*.[94] The Commission is concerned that the sale of all the free and pay-TV rights on an exclusive basis to a single broadcaster for territory for a period lasting several years is incompatible with the E.C. rules. The Commission argues that only the larger media groups can then afford to acquire and exploit the rights. Sub-licensing is also not a sufficient solution because under UEFA's rules only one other broadcaster can be licensed and then can only show the matches which the main broadcaster is not showing. The Commission also considers that the joint sales of the rights is not indispensable to guarantee solidarity among the clubs participating in the tournament.[95]

In October 2001, the Commission also confirmed that it had started an investigation into how the *English Premier League's* broadcasting rights are sold.[96]

Transfer fees

There have been two important developments concerning the application of Article 81 E.C. to football transfer fees this year. First, after very public negotiations in the Spring, on March 6, 2001 the Commission announced that agreement had been reached with FIFA and UEFA on FIFA Regulations on international football transfers.[97] If the agreed principles were reflected in new amended FIFA Regulations, then the Commission proposed to take a favourable position in its proceedings against FIFA on the issue. The main points were that: in the case of players aged under 23, a system of "training compensation" could be retained in order to reward the training effort of clubs; and solidarity mechanisms would be created to redistribute income to clubs involved in training. There were also rules on the contracts concerned, detailing durations, "windows" for moves and penalties for unilateral breach.

The football players association was, however, not satisfied. It is reported that they have introduced a legal challenge already through the Brussels courts. The rules are also subject to the application of national labour laws. Overall, the important point appears to be that the Commission is willing to accept a limited form of transfer fee system, albeit based on training compensation and the solidarity mechanisms referred to.

Secondly, also in March 2001, the case of *Tibor Balog* was withdrawn after a settlement, but not before the Opinion of Advocate-General Stix-Hackl had been published.[98] The case concerned the legality of a transfer fee claimed on the movement of a Hungarian player (*i.e.* non-Community national) who had reached the end of his contract to a new employer. The Advocate-General considered that such a restriction was incompatible within Article 85(1) E.C. (as it then was).

UEFA's broadcasting restrictions

In June 2001, the Commission published a decision finding that UEFA's revised rules on the broadcasting of football matches fell outside the scope of Article 81(1) E.C., in so far as they did not constitute an appreciable restriction of competition.[99] The decision marks the resolution of a long-standing debate between UEFA and commercial broadcasters and includes a number of indications as to the Commission's approach to market definition.

In 1988, UEFA introduced broadcasting rules restricting the times for broadcasting of football matches in order to avoid disruption of domestic football fixtures. UEFA argued that such disruption could be detrimental to stadium attendance at professional games and affect participation in amateur games. On the other hand, commercial broadcasters complained about the restrictive nature of the rules.

As a result, in April 2000, after a series of negotiations and changes in the rules over many years, UEFA modified the scope of its rules and notified them to the Commission. From the 2000/2001 football season onwards, the rules generally allow each national football association in Europe to prevent the broadcasting of football within its own territory for two and a half hours per week, either on a Saturday or Sunday, at times which correspond to the main domestic fixture schedule of the relevant country's top two professional leagues.

93. [2001] I.C.C.L.R., p. 75.
94. IP/01/1043, July 20, 2001.
95. The Statement of Objections relates to part of the commercial rights concerned in UEFA's notification of the sale to the UEFA Champions League in 1999.
96. Reuters, October 29, 2001.
97. IP/01/314, March 5, 2001.
98. Case C-246/98, Opinion of March 29, 2001.
99. [2001] O.J. L171/12; IP/01/583, April 20, 2001.

The Commission made various comments concerning potentially affected broadcasting markets. In particular, the Commission suggested that it was likely that there is a separate market for broadcasting rights to football events played regularly, including national first and second league and cup events, as well as the UEFA Champions League and UEFA Cup. The Commission's views were based mainly on the distinct brand image of football and its particular brand-building attractions for broadcasters. The Commission also focused on the attractiveness of football as a means of advertising to a particular audience (of 16 to 35 year-old men with above average spending power, who were difficult for broadcasters to capture through alternative program content)! This latter criterion is (understandably) controversial, given its very specific nature.

As regards internet transmission rights and internet content services, the Commission reserved its position, finding that the technology for the transmission of video streams over the internet was currently immature and that the economic value of such services was still negligible.

The Commission considered that the broadcasting rules did not have any anti-competitive *object* within the meaning of Article 81(1) E.C. Although recognising that the system did have the *effect* of preventing broadcasters from showing live matches for the periods concerned, the Commission also considered that this was not an appreciable restriction in the circumstances.

The Commission also reserved its position as to whether the measures could affect trade between Member States. It observed that appreciable cross-border effects were unlikely, since the measures only applied to so-called "intentional" broadcasts, *i.e.* those specifically produced for a given territory in terms of language. Most broadcasts were only "intended" for the territory of a single national football association.

FIA/Formula One settlement

In June 2001, the Commission published an Article 19(3) Notice, proposing to take a favourable position on modified agreements related to the activities of the Fédération International de l'Automobile ("FIA") and the Formula One Grand Prix motor racing championship.[1] The Notice covers agreements notified to the Commission in 1994 and 1997 concerning the "constitutional" arrangements of the FIA; rules which govern how the relevant motor sports events are to be conducted; claimed ownership of all film and moving picture rights relating to FIA events; the so-called "Concorde" agreements between the various parties involved in the FIA Formula One Championship; agreements with sports marketing companies for the related commercial rights; and agreements with Grand Prix circuit owners and broadcasters of Formula One.

The Notice reflects a settlement reached by the Commission with the FIA, Mr Bernie Ecclestone, and others, after a series of complaints concerning their activities which culminated in a Statement of Objections in June 1999. The Commission's Statement of Objections had alleged the following main concerns:

— The FIA had a conflict of interest in so far as it was using its regulatory powers to block the organisation of races which competed with events promoted or organised by the FIA.
— The FIA had abused a dominant position under Article 82 E.C. by reserving TV rights in any motor sports series that it authorised.
— Formula One had abused a dominant position by imposing certain clauses in the Concorde Agreement, reserving TV rights.
— Certain notified contracts also appeared to contravene Articles 81 and/or 82 E.C. by raising barriers to entry for a potential entrant. Notably:
  - Contracts with promoters that prevented use of circuits for races which could compete with Formula One for a 10-year period.
  - The prohibition on Formula One teams racing in any other racing series comparable to Formula One.
  - Agreements with broadcasters which imposed a financial penalty on the latter for showing motor sports which competed with the Formula One series (in some cases a 33 per cent discount was given to broadcasters for *not* showing competing racing).
  - Agreements between the FOA (a company owned by Mr Ecclestone) and broadcasters had granted exclusivity in defined territories for excessive periods of time.

While the parties concerned did not accept the Commission's objections, they agreed to modify the arrangements, aiming to create a separation between the commercial and regulatory functions of the FIA, the FIA Formula One World Championship and the FIA World Rally Championship. In practice, this meant that:

— Mr Ecclestone gave up his position on the FIA Senate and as FIA Vice-President for Promotional Affairs.

1. [2001] O.J. C169/5. With thanks to Arun Rattan for his assistance.

— Mr Ecclestone sold ISC, the sports marketing company he had founded, which marketed television rights for FIA international series other than Formula One.
— The FIA granted its commercial rights to the FIA Formula One and the FIA World Rally Championships for 100 years respectively to the FOA and to ISC for a "one-off" fixed fee.

In addition, the FIA agreed:

— To improve the transparency of decision-making and appeals procedures; in particular, introducing rights of appeal to the courts as regards FIA regulatory decisions.
— To guarantee access to motor sport and the international sporting calendar for any person meeting the relevant safety and fairness criteria.
— Not to use its regulatory powers to prevent or impede a competition or the participation of a competitor, save where necessary for "the safe, fair or orderly conduct of the sport".
— To give up claims to the FIA's ownership of the media rights of all FIA championships.
— To delete provisions requiring licence-holders to surrender their broadcasting rights to the FIA.
— To waive the requirement that Formula One teams could not participate in any other competing open four wheeler single seat racing event.

The FOA also agreed:

— To waive the requirement that Grand Prix promoters ensure that no competing race occur on the circuits concerned.
— To remove the discount for broadcasters which did not broadcast any open four wheeler racing competing with Formula One.
— To reduce to five years the period of the exclusivity granted to host broadcasters (local broadcasters responsible for the "international feed" of moving images for broadcast) and to three years for all others. Previously free-to-air contracts had been for periods of between one and five years, with some for 10 years and pay-TV contracts had been for periods of up to 11 years.

In the light of these structural changes the Commission proposed to take a favourable view of the agreement. In doing so, the Commission said that it took into account that the organisation of motor sport and, in particular, Formula One, is a complex activity requiring important investments. Moreover, the Commission considered that it was *impossible* to market the individual rights of each team participating in a race. As the FIA, FOA, the teams, the drivers, the manufacturers and the local organiser/promoter may all have rights in the event, some arrangement between them for the collective sale of the rights concerned was considered to be indispensable. (An interesting finding, suggesting that, in general, collective sales may be accepted.)

The Commission found that the new arrangements, which provided for FOA to be the commercial rights holder for the FIA Formula One Championship, negotiating on behalf of the various parties concerned, did not appear to affect prices or output in the market to any significant degree. Individual Formula One events also did not compete with each other as they were not broadcast at the same time. In the Commission's view, the system allowed Formula One to be marketed more efficiently and guaranteed that free-to-air was the principal mode of transmission to viewers.

The Commission also considered that the new regulatory environment removed the previous obstacles to intra-brand as well as inter-brand competition. According to the Commission, competing events within the Formula One discipline and other motor sports (such as rallying) will be possible, new motor sports can be created, and new events and series in potentially competing disciplines can be approved. Circuits, teams and drivers can now participate in such competing events. It will be interesting to see whether this proves to be the case in practice.

One may question whether the FIA's divestiture of its commercial interests for 100 years is acceptable, amounting in practice to an exclusive grant of very long duration. However, the Commission was satisfied once the FIA's commercial interests were separated from its regulatory role. The settlement reconciles a structural type of remedy with historical fact, notably Mr Ecclestone's (considerable) role in establishing Formula One.[2]

In October 2001, the Commission announced that it had closed its investigation.[3]

2. IP/01/120, January 26, 2001.
3. IP/01/1523, October 30, 2001.