Major Events and Policy Issues in EC Competition Law 2001–2002—Part 1

JOHN RATLIFF*

Wilmer, Cutler & Pickering, Brussels

The object of this article is to outline the major events and policy issues related to Articles 81, 82 and 86 EC in the last year.[1] The paper is divided into three sections:

— A *general overview* of major events (EC legislation and notices, European Court cases and European Commission decisions).
— An outline of *current policy issues* (including enlargement, paperless submissions in cartel leniency, books and international issues).
— *Areas of particular interest* (meaning this year, the new motor vehicle block exemption, decentralisation of competition enforcement, energy and sport/ broadcasting).

Table 1: Major Themes in 2002

— Cartels:
  • Eleven decisions/huge fines
  • "Paperless" leniency submissions
— Cars:
  • The Commission's management of sectoral deregulation
  • Too much or a fair response?
— IP reform:
  • An "IPBE" with market share ceilings
  • IP Guidelines and *many* changes?
— "Rule of reason" or EU common sense?:
  • When competition meets other legitimate objectives
— "Airline Alliance" law:
  • Settling down (with structural remedies)
— Distribution:
  • Agents caught by Article 81(1) EC
  • Huge fines for blocking parallel imports
— Imminent:
  Decentralisation and Enlargement

In the first Part, EC legislation and notices, European Court cases and European Commission cartel cases are covered. The Commission's decisions on horizontal co-operation, distribution and Article 82/86 cases are covered, together with current policy issues and areas of particular interest, in the second Part, in next month's ICCLR.

Overview of major events

Legislative developments (adopted and proposed)

Table 2: New Legislation/Notices (Adopted)

— Revised *De Minimis* Notice (Competition): 10%, 15%, 5%/30%
— Revised Leniency Notice:
  • Immunity Reductions
  • *First* contribution > *Best* (evidential) contribution
— Motor Vehicle Block Exemption:
  • No link to servicing
  • Selective distribution without territories or, soon, location clauses.
— Renewed IATA Interlining Block Exemption

Adopted

2002 De Minimis (Competition) Notice

In December 2001, the Commission adopted its new *de minimis* notice.[2] The draft was described last year.[3] However, it may be useful to emphasise three points:

First, the notice deals with effect on *competition*, not effect on trade which is to be the subject of a separate notice shortly, since the notion of "effect on trade" is key to the division between EC and national competition law in the coming "new draft Regulation 17". Even without this, the distinction is useful because often in practice there has been a tendency to run effect on trade and competition together.

Secondly, the notice reflects a basic "two level" test, which broadly corresponds to horizontal and vertical agreements. In the case of agreements *between competitors*, there is deemed to be no effect on competition, if the market shares which the parties' groups hold do not exceed 10 per cent (previously five per cent). In the case of agreements *between non-competitors*, the market share is higher at 15 per cent (previously 10 per cent).

Thirdly, in the event of cumulative effects through parallel networks, the threshold for effect on competition is five per cent for all agreements

* *With many thanks to Ingrid Cloosterin for her help in the production of this article.*

1. The reference period is from November 2001 until the end of October 2002. This is a slightly revised version of a paper given at the IBC Advanced EC Competition law conference in Brussels, November 2002.

2. [2000] O.J. C368/13.
3. [2002] I.C.C.L.R. 7–8.

(whether between competitors or non-competitors), consistent with the approach on significant contribution to cumulative foreclosure. However, the Commission adds that there is unlikely to be a cumulative foreclosure effect if less than 30 per cent of the relevant market is covered by parallel restrictive agreements.

2002 Leniency Notice

In February 2002, the Commission adopted a second version of its "Leniency Notice" in cartel cases.[4] Again the draft was described last year,[5] but it may be useful to emphasise a few points:

First, in practice a company has two ways to obtain *immunity*:

— *Either*, it will be the first company to provide the Commission with sufficient evidence to enable the Commission to take a decision to carry out a "dawn raid" (*Section A, 8(a)*);
— *or*, it will be the first company to submit evidence enabling the Commission to find an infringement of Article 81 EC (provided that another company has not earned immunity under the "evidence for a dawn raid" route) (*Section A, 8(b)*).

In both cases immunity is conditional on other factors also, such as continuous and full co-operation.

Secondly, if immunity is not available, a company can obtain a *reduction in fines* if it provides the Commission with evidence of the infringement that represents "significant added value" to the evidence that the Commission already has. The focus here is on directly relevant written evidence, at best originating from the time of the alleged infringement.

Thirdly, the level of reduction then depends on which company gives the Commission the relevant evidence first. The first company is to benefit from a reduction of 30–50 per cent, the second a reduction of 20–30 per cent, and subsequent companies with a reduction of up to 20 per cent.

Fourthly, in the final section of the notice the Commission sets out a number of general considerations that are proving to be rather important:

— The Commission recognises that the notice creates legitimate expectations on which undertakings may rely.[6]
— The Commission considers that "normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations".[7]
— "Any written statement made vis-à-vis the Commission in relation to this notice forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 EC."[8]

This is discussed further in Part 2 under "Cartel leniency—paperless submissions". Suffice it to say for now that, amid much controversy, American plaintiffs have been trying to obtain these written statements on discovery this year.

It is still arguable as to whether this is an improvement on the old notice or not. There are various issues:

First, this notice gives priority to "*first* contribution" over "*best* (evidential) contribution" and does not appear to envisage more than one company obtaining any of the top three positions —immunity, 30–50 per cent reduction and 20–30 per cent reduction. The extent of leniency is, in this sense, narrowed. This appears to be deliberate, creating incentives to overcome what appears often to be the most difficult step, going to the authorities with the *first* information that starts an investigation.

One may argue that some of the later evidence can also offer *very significant* added value, if only in corroboration. By definition, the Commission *needs* evidence from/against two cartel members to prove an infringement. Why not equally reward the company that, *after* the "dawn raid" recognises its infringement and gives *the best* evidence? The Commission's answer is that it *will* reward such co-operation, but *immunity* is reserved for getting the investigation going, not co-operation after being prompted to do so by an investigation.

Secondly, the scale has changed significantly. The bands have moved from 75–100 per cent, 50–75 per cent and 10–50 per cent (available in principle in each case to one or more companies) to 100 per cent, 30–50 per cent, 20–30 per cent and 1–20 per cent (again, available in the first three cases to one company each). As a result, incentives for some to co-operate have been reduced.[9]

Thirdly, the Commission argues that it has facilitated the grant of immunity in three senses.

— Those who *instigated* a cartel can now still qualify for immunity. (Some had argued that this was unclear and that such

4. [2002] O.J. C45/3. See, generally, Arbault and Pero, EC Competition Policy Newsletter, June 2002, pp.15–22.
5. [2002] ICCLR 8–9.
6. See para.29.
7. See para.32.
8. See para.33.
9. See also Carle, Lindeborg and Segenmark, "The New Leniency Notice" [2002] European Competition Law Review p.265.

uncertainty deterred companies from seeking leniency.)

— To qualify, a company has to be *first in the Commission with the "8(a)" and "8(b)" type evidence, not with "decisive evidence"* (which was apparently perceived as a higher and uncertain standard).
— Since companies are now given a confirmation of their "leniency" position during the Commission's investigatory procedure, it is argued that they do not have to live with uncertainty for so long (another complaint on the 1996 Rules).

One may note that under the *old* rules, various companies *have* qualified for immunity (as described under "Cartels" below). However, that is not the Commission's point. The changes are to keep the cases coming.

Motor Vehicles Block Exemption

During the year, there have been rapid developments on motor vehicle distribution, resulting in a new block exemption (the "MVBE") which was published as a draft in March, adopted in July and has already entered into force on October 1, 2002[10] (see further "Cars" in Part 2).

Other

In June 2002, the Commission renewed its *block exemption for the IATA passenger tariff conferences* for five years.[11] This block exemption ("BE") allows the airlines concerned to consult on scheduled passenger tariffs for interlining through the International Air Transport Association. (It thereby enables passengers to be carried for "legs" of travel on other airlines so that they can have more travel flexibility.) The Commission had questioned whether such an exemption should continue on the basis that there are a growing number of airline alliances and concerns about lack of price competition. It had also suggested that there might be less restrictive alternatives. The Commission has now maintained the BE because there was significant support for it as increasing flexibility for customers *and* giving smaller airlines a greater ability to compete. The Commission has required the participating airlines to collect data on the use of the passenger tariffs and their relative importance for interlining, with a view to considering the issues again in 2005. The Commission has also extended the *block exemption for airport scheduling* until June 2005.

In May 2002, the Council adopted a new Postal Services Directive agreeing to the following market openings:

— From 2003: Delivery of letters weighing more than 100 grammes (or costing more than three times the price of a standard letter); and all outgoing cross-border mail (unless Member States need this revenue to cross-subsidise their universal service).
— From 2006: Delivery of letters weighing more than 50 grammes (or costing more than two and a half times the price of a standard letter).[12]

The Commission has started to develop benchmarking in universal service provision with a *Communication on a methodology for evaluating services of general economic interest*.[13]

The Commission has also issued *Guidelines on the market analysis and the assessment of significant market power ("SMP") in electronic communications*, based on the draft put forward in March 2001. It may be recalled that SMP is now equated with dominance.[14]

Table 3: New Legislation/Notices (Proposed/Coming)

— Transfer of Technology Block Exemption review
- Evaluation report/comments
- "IPBE" Draft with IP Guidelines soon?
- Market share ceilings?
- Competitor/Non-competitor distinction
- Active/passive licensee structures?
- Pools in IP Guidelines?
- Copyright in IP Guidelines?

— Draft Insurance Block Exemption
- "Common market" requirements
- Less exchange of statistics.
- New "Draft Regulation 17" and related notices
- New Fining Guidelines?
- Revised Access to File Notice?

Proposed

Transfer of Technology Block Exemption review

Concept of reform In January 2002 the Commission issued an "Evaluation Report" on the Transfer of Technology Block Exemption ("TTBE").[15] This is a detailed document (some 42 pages) which sets the stage for significant changes. The Commission appears to be looking to achieve several things both with the modernisation and the decentralisation of competition enforcement in mind.

First, the Commission states that it aims to make the TTBE rules clearer and more coherent.

10. IP/02/1073, July 17, 2002; Commission Regulation 1400/2002, [2002] O.J. L203/30. The MVBE expires on May 30, 2010.
11. IP/02/924, June 25, 2002.
12. IP/02/671, May 7, 2002.
13. IP/02/879, June 18, 2002.
14. IP/02/1016, July 9, 2002.
15. IP/02/14, January 7, 2002. (Available on DG Competition website.)

Secondly, the Commission aims to remove the "grey list" of "arguably restrictive" clauses which, at present, can be notified to the Commission under an opposition procedure, but which cannot be in the future (when notification is abolished). Essentially such clauses therefore have to be reviewed and classed as not an issue or fully exempt under the new TTBE.

Thirdly, the Commission is considering to *widen* the scope of the TTBE further so that, as in the case of the Vertical Restraints Block Exemption there may be an "umbrella" type of BE, an "IPBE". The idea is that more types of intellectual property would be covered, including copyright, design rights, software licensing (and perhaps trademarks). At present the TTBE covers only pure or mixed patent and know-how licences. Other rights are only covered if they are ancillary to those exempted.

Fourthly, as in the case of vertical and horizontal restraints, the Commission envisages an "economics-based" approach.

In practice, this means that the Commission (again) suggests that there should be market share ceilings to the TTBE. The main difference, in comparison to the debate on Regulation 240/96, is that cases not covered by the TTBE (for example involving market power) would be dealt within related IP guidelines and, after the new draft Regulation 17, could not be notified *en masse*. (At present, after controversy over a similar Commission position when Regulation 240/96 was being formulated, the Commission has only a right to *withdraw* the benefit of the TTBE, which the Commission has said it may exercise when the licensee's market share exceeds 40 per cent (Article 7(1), Regulation 240/96).)

Otherwise, the Commission favours a more permissive approach to restrictions when parties lack market power or are in a vertical relationship. In the new style of BE, this also means that the "white" list of clauses would be abolished, leaving just a black-list. There is also discussion of the "efficiencies" involved in restrictions (as opposed to a focus on form), linked to a market power assessment in order to see if there is sufficient competition to pull efficiency benefits through to customers.

Fifthly, the Commission has questioned the rationale of some positions taken in the current TTBE or suggested that they may need updating. Above all, the Commission suggests that distinctions should be introduced according to whether licences are *between competitors* or *between non-competitors*; and whether restraints concern the "*exploitation*" of IP rights or not.

Restrictions concerning the exploitation of IP rights would be: territorial restrictions, customer restrictions, output restrictions and price restrictions. Restrictions *going beyond* exploitation of licensed IP rights would be: non-compete obligations, tying, grant backs and no-challenge clauses.

Sixthly, the Commission has re-opened or opened debate on a number of important issues:

- The Commission is concerned that only bilateral licences are covered by the TTBE and is now considering whether *multi-party licensing pools* and other *cross-licensing* arrangements can be considered more favourably and block exempted.
- The current balance between *intra-brand and inter-brand competition* in the TTBE. In practical terms, this could mean (controversially) aligning the prohibition on passive sales between licensees (for the first five years from when a product is put on the market in the EU by a licensee), with the ordinary active/passive rules in distribution, where a restriction on passive sales is black-listed.[16]
- *Who is a "competitor" in the IP licensing context?* Given the potential markets concerned (R&D/innovation, technology and product markets) and the consideration that in the IP context the definition of who is a competitor should be more realistic (and narrow).[17]
- The idea that the nature of competition between a licensor and licensee before an agreement may be transformed, where the licensed process or product in question represents such a "*sweeping breakthrough*" that, without the agreement, the licensee would no longer be a competitor at all.[18]
- The Commission is also focusing more on the use of *patent pools to unblock conflicting IP positions* and to create a new industry standard and has noted the increased use of package-licensing programmes, technology pools and cross-licensing.

The Evaluation Report was based on the Commission's own assessment as to what needed to be reviewed, responses to the Commission's questionnaire last year and taking into account comparative approaches, notably the US Guidelines on Intellectual Property. In response to the Commission's invitation to comment on the Evaluation Report, some 33 entities have submitted comments, which the Commission has published on its website, together with a summary.

We are now waiting for the next stage since, with Enlargement (and therefore modernisation and decentralisation) high on the Commission's

16. Evaluation Report, p.34, para.141.
17. Evaluation Report, p.13, para.43; p.31, para.125; and p.32, para.130.
18. Evaluation Report, p.32, para.130(c).

Table 4: Competition and IP: A New Framework?

IPBE
— *Licensing between non-competitors (vertical relationships)*
- Restrictions related to the exploitation of licensed IP covered up to dominance (for example territorial/customer restrictions, exclusivity, quantity restrictions)
- Restrictions not related to the exploitation of licensed IP covered up to a 30 per cent market share (for example non-compete, tying restrictions)
- "Hardcore" black-list (in line with VRBE?)

— *Licensing between competitors (horizontal relationships)*
- Restrictions related to the exploitation of licensed IP (covered up to 25 per cent market share)
- Restrictions not related to the exploitation of licensed IP ("careful approach" in IPBE and IP Guidelines?)
- "Hardcore" black-list (for example price-fixing, output or sales restrictions, allocation of territories or customers)

IP Guidelines?
— Market definition
— Realistic appraisal of competition
— Rights related to exploitation or not?
— Licensing by dominant companies
— Licensing above market share ceilings
— Multi-lateral licensing pools (cross-licensing/licensing to JVs)
— Variations for different types of IP (copyright, software licensing etc.?)

agenda, the Commission has indicated that it would like changes to Regulation 240/96 *before* its expiry in March 2006. The Commission has now suggested that new competition rules applying Article 81 EC to licensing may be put forward early in 2003. (See Table 4.)

Specific issues It may be useful now to highlight some of the more specific issues in the Evaluation Report:

— The Commission questions exclusive licensing and territorial restrictions between competitors.
— In line with its approach under the VRBE, the Commission appears to advocate specified field of use or customer exclusivity, as well as territorial exclusivity, in licences between non-competitors (albeit with weakened protection against passive sales between licensees).[19]
— The Commission is also thinking about the limits to the duration of exclusive know-how licensing (currently set at 10 years).
— The Commission is reviewing its position on quantity restrictions and licences restricted to defined uses or sites. A first issue is whether quantity restrictions should *not* be black-listed. A second is whether site licences between competitors should be viewed more strictly than those between non-competitors[20] (which has prompted concern from some quarters, in so far as site licences are a common phenomenon in the petrochemical and refining sectors and often concluded between competing companies[21]).
— The Commission is reviewing its position on
- Non-compete obligations which, under the current TTBE, are prohibited (Article 3(2)) (but might be block exempt in future between non-competitors).
- Tying (which might be block exempt up to a certain market share ceiling).
- Non-reciprocal grant-banks and exclusive grant-back licences related to severable improvements (which are currently "grey"). (There is also discussion about what is an "improvement" and what is a new licence.)
- No-challenge clauses, which are "grey", if they concern the secrecy or substantiality of the licensed know-how or the validity of licensed patents (although the licensor can then terminate the agreement).

First comments Much of this is very welcome but some issues are complex and some are very controversial.

One of the biggest changes proposed, introducing structural differences for agreements between competitors and non-competitors, makes a lot of sense. This should then be matched by a realistic assessment as to when companies can compete in IP related markets (which the Commission itself states).

The TTBE *is* complex to apply and narrow in scope. It is perhaps not as much of a "straitjacket"

19. Evaluation Report, p.35, para.145. Customer allocation within a field of use is currently blacklisted under Regulation 240/96, Art.3(4).
20. pp.35–36.
21. See the comments of the EU Committee of the American Chamber of Commerce in Belgium, May 2002 at Section 4.2.

as the Commission seems to think, because in practice, it is often used only as a source of analogy, rather than as a full "safe harbour" because often more specific considerations apply. To that extent however, as the Commission notes, the TTBE is not meeting its defined purpose.

There are also a number of positions taken in the current TTBE which are somewhat artificial. For example, non-competes are black-listed. Businessmen are often uncomfortable with the idea of a licensee handling competing technology at the same time and are not satisfied by the less restrictive obligations which are available under the TTBE.[22] Reform here would be welcome.

There are, however, clearly some complex and difficult issues. Notably, the idea of a market share ceiling for the IPBE.

If there are certain defined market share *ceilings* for a new IPBE, it is not yet clear how the Commission proposes to deal with cases above those ceilings. Many clearly think that the IPBE should *still* apply to situations of high market share and/or dominance, since this often only reflects the *essence* of the IP right concerned. The Commission's view appears to be that, in the appropriate cases, the *exercise* of IP based monopoly rights, *can* be limited, notably in cases of dominance.

The Commission notes in its Evaluation Report that many think that the introduction of an IPBE market share ceiling would backlash on innovation and licensing because the safe harbour would cease to be available if and when the licensed invention would become a success in the market. This is considered to be especially true if a market share threshold would be applied to *technology* markets as opposed to *actual product* markets.[23] This raises the question as to how the Commission will treat IP related "first mover advantage". Interestingly, it appears from one pharmaceutical JV case this year, that the Commission *may* be willing to be quite flexible here. (See "Pharmaceutical co-promotion and co-marketing" in Part 2.)

Clearly compulsory licensing is also very controversial. Non-exclusive licensing in the case of technology overlaps in mergers or joint ventures is not uncommon where market shares are high. However, in other cases there is much opposition to interference with IP rights. The current test for compulsory licensing in dominance cases, on *Magill*, *Ladbroke* and *Bronner*, involves a very high standard. The overlay of competition law on IP rights in such circumstances is possible, but highly exceptional.[24]

A related question is whether, from a regulatory position, companies should be entitled to have that "exceptional" intervention reflected in a general IPBE on IP. In other words, one may argue that the Commission *should have to withdraw* the IPBE in such cases, rather than that there should just be a market share ceiling to the IPBE. The procedural burden involved would allow for appropriate levels of legal certainty. For example, the ICC comments: "Introducing a product market dominance ceiling for evaluation within the scope of an intellectual property right would introduce uncertainty and expose licences of successful innovators to the risk of court litigation and to investigations of national competition authorities applying national competition laws."[25]

Others argue that a market share ceiling is more coherent with the economic approach taken and that, above the market share ceilings, only a closer assessment is required. That assessment can include respect for the whole business sense of R&D and innovation creating IP rights that reward that effort and risk with monopoly. IP rights are, moreover, not necessarily markets in themselves since they may face other functional competitors and, in any event, the Commission's approach will have to reflect the compulsory licensing case law referred to above.

If there were to be market share ceilings and IP Guidelines, a number of issues need clarifying.

- *First*, what the Commission envisages that it might do in cases *between the market share ceiling of the proposed IPBE and the "exceptional" compulsory licensing cases*.
- *Secondly*, a recapitulation and elaboration of the Commission's thinking on *market definition* in relation to innovation, technology and product markets. To some extent, this already can be found in merger cases and the Horizontal Guidelines discussion of R&D. An elaboration of the "realistic" appraisal of competition in IP cases would also be desirable.
- *Thirdly*, what the Commission envisages for *copyright* issues. The case law favours a "flexible approach" to the application of Article 81(1) EC in some cases (for example *Coditel*). At first sight this may be analogous to, or systematised with *Nungesser* type considerations for patents. Care may be required to ensure that the application of competition law to such diverse rights is *common* where it should be and *varied* where it should be.
- *Fourthly*, there is also little Commission guidance on *software licensing* (other

22. Arts 3(2) and 2(1)(9), (17), (18). Evaluation Report, p.9, para.23.
23. Evaluation Report, p.22, para.82.
24. See, *e.g.* the summary in the Commission's *IMS* decision (discussed in Part 2 under "Article 82/86 EC").
25. See, DG Competition website.

than "shrink-wrap" licences, where acceptance is inferred from opening a packet, which are generally treated as other distribution products under the VRBE). As the Commission notes, the main variations here are the duplication of the software product and/or value-added to the underlying software. (Some thought the Commission was planning to take precedent decisions in this area some years ago, but these have not materialised.)

— *Fifthly*, the notion of rights *related to exploitation* of an IP property right or not may need further consideration, especially if different types of restrictions are to have different levels of protection. For example, is a grant-back related to exploitation or not? (The ICC suggests "yes".)

The Commission appears to want to move fast on these issues. This may mean putting less into an IPBE, with more (for now) in IP Guidelines (as the Commission notes in relation to multi-lateral patent pools and cross-licensing issues). The issue is that a new enabling regulation for more than bilateral licences is required and that may take a year.

Insurance—new draft revised Block Exemption[26]

In July 2002, the Commission published a draft revised insurance BE to replace Regulation 3932/92 ("the draft BE"), which is due to expire on March 31, 2003.[27] The draft BE is not designed to be a major overhaul but it does involve several changes.[28] Interested parties were invited to submit comments by September 30, 2002. The Commission intends to adopt the new BE by the end of 2002.

The general scope of application of the insurance BE remains unchanged. It will continue to be applicable to agreements, decisions and concerted practices that have as their object co-operation in the following areas:

— The establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims.
— The establishment of common standard policy conditions.
— The common coverage of certain kinds of risks.
— The testing and acceptance of security devices.

26. With thanks to Pablo Charro for his assistance with this section.
27. IP/02/1028 of July 10, 2002. (Available on DG Competition website.)
28. See also the Commission's Report on Competition and Insurance, COM(1999) 192 final, May 12, 1999; [2000] ICCLR 60.

The draft BE will still not apply to agreements with respect to settlement of claims and registers of, and information on, aggravated risks, as regards which the Commission still believes that it does not have sufficient experience. The Commission also states that it has not found evidence of major competition issues in this field.

The main proposed changes by type of agreement are as follows[29]:
As regards *risk premiums*, the draft BE sets out two new, additional conditions that were not set out in the previous regulation:

— For indicative pure premiums (historic statistics on claims), the calculations or tables are to be broken down to the narrowest extent possible (while remaining a statistically useful sample) in order to give insurers the ability to differentiate their prices to policyholders on the basis of different categories.
— For indicative pure and risk premiums (assessments as to future claims), the calculations, tables and study results must be made available to any undertaking requesting them on reasonable and non-discriminatory terms. The aim of this condition is to ensure that potential market entrants have full access to such information before doing so. Entrants can be required to pay for such information, but not at levels which would amount to a barrier to market entry.

As regards, the *joint calculation of indicative "pure" premiums*, the draft BE is more restrictive with relation to direct insurance than the previous regulation in two ways:

— The use of standard policy conditions is now limited to those agreed in conjunction with the calculation of pure premiums and joint studies related to risk premiums and only if they are necessary and exclusively used for such purposes. The Commission states that the insurance sector has not yet shown that, outside this narrow category, standard policy conditions are beneficial to consumers.
— The Commission has added a new black-listed provision, apparently designed to promote the common market. Any clause is black-listed which excludes or limits the cover of a risk if the policyholder uses security devices, or installing or maintenance undertakings, which are compatible

29. In line with the "modern" BE format, the Commission has also deleted the "white lists" of permitted clauses.

with specifications agreed upon at EU level, or by associations of insurers in *other* EU Member States.

Insurance companies are still expected to compete on commercial premiums (premiums charged to policyholders, including an element for administrative, commercial and other costs, plus a loading for contingencies or profit margins).

As regards *common coverage of certain types of risks*, the draft BE introduces an exemption for co-insurance or co-reinsurance groups which are newly created to cover a new risk (*i.e.* a risk for which there is no historical information on claims which could be used to calculate pure premiums). The exemption will apply for three years from the date of first establishment of the group, regardless of market share. The Commission's idea is that for new risks it is not possible to know in advance the subscription capacity necessary to cover the risk. A timeframe of three years is therefore essential to determine whether creation of a group is really necessary for such a risk.

For other co-insurance or co-reinsurance groups (*i.e.* groups that have been in existence for more than three years or have not been created to cover a new risk) the draft BE reflects a measured economic approach:

— If the members of a pool could not cover the risk without the pool, Article 81(1) EC should not apply.
— If, on the other hand, the members have the capacity to cover more than twice the level of risk, Article 81(1) EC does apply because two groups could be created.
— The position is similar if one company could cover the risk on its own and the others in a group could combine to cover a sufficient level of risk. Also if more than one company could cover the risk on its own. In such cases, the draft BE would continue to apply with higher market share ceilings. In the case of co-insurance groups, the draft BE would apply on condition that the insurance products underwritten within the group do not represent more than 20 per cent of the relevant market (previously 10 per cent). In the case of co-reinsurance groups the ceiling is 25 per cent (previously 15 per cent). (See also "Nuclear insurance pools" in Part 2.)

As regards *security devices*, the draft BE again introduces new conditions which are stated to be designed to promote the achievement of a single market for safety equipment:

— The draft BE is not to apply to agreements on technical specifications, adopted at national level, if equivalent measures have been adopted at EU level.
— A mechanism for mutual recognition is set out. For the exemption to apply, agreements on technical specifications adopted by associations in one or several EU Member States must explicitly recognise similar agreements adopted by associations in other EU Member States as equally valid. They must also recognise the approval of a security device or an installer or a maintenance undertaking in any other EU Member State.

What is not clear is the legal basis for this type of condition. Is the Commission saying that there is insufficient residual competition and therefore markets must be opened further with barriers to entry removed? However, does that not require at least proof of single or collective dominance concerns? Or are these "common market requirements" based on a broader notion of the EC Treaty's competition objectives, by which the Commission is entitled to mix indirect competition (regulatory) and direct competition concerns and thereby open up the free movement of goods? Or is this just a convenient way to eliminate perceived multiple infringements with the agreement of the industry while creating a general safe harbour?

The issue may be important because BEs *are* important and may be *even more important* after decentralisation, with the Commission apparently planning to use the BE system to lay out broad pan-European solutions. In other cases, such as cars, the Commission has now gone even further to develop a common market (as discussed in Part 2).

The Commission envisages a six-month transition period for agreements complying with the previous regulation. The draft BE is expected to enter into force on April 1, 2003 for a period of 10 years.

Other

Looking forward, it appears that we are about to see several new pieces of important legislation and notices. It appears that the "new Draft Regulation 17" may be adopted at the EU Council meeting of November 26, 2002. (This is discussed further below under "Decentralisation".) If so, there should then be a series of draft notices related to the new system, such as *notices on effect on trade and co-operation between competition authorities.* There should also be *revisions to the co-operation notice with national courts.* We also know that the Commission is planning new *notices on complaints, opinions from the Commission on points of law and on the application of Article 81(3) EC.*

It is also understood that the Commission is working on a *revision to the 1998 Fining Guidelines* and may be thinking of clarifying the initial "point of departure" for the basic amount. Some argue that the current rules are too hard on small companies with the "tariff" approach. Others emphasise that the rules should *not* be too clear or they make it too easy to calculate the likely fine as a "cost of doing business". What is clear from recent decisions (discussed below) is that the Commission is *already* focusing on market share and market impact and fining harder at a level "to deter". In the *Vitamins* cartel, Hoffmann-La Roche was fined €462 million and in *Nintendo*, that company was fined €149 million for a vertical infringement.

The Commission has also said that it is considering a further revised notice on *access to file*.

Expiry of the ECSC Treaty In June 2002, the Commission issued a *Communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the European Coal and Steel Treaty ("ECSC").*[30] The ECSC Treaty itself expired on July 23, 2002 marking a historic moment in Community law. As regards competition (anti-trust) cases, the Commission states that:

— Agreements formerly exempted under the ECSC Treaty in general will not be treated as losing their exemption because of the Treaty expiry (the Commission fearing a mass of new notifications at a time when it is moving to abolish the system).
— Joint ventures not caught by the EC merger control and pending at the time of expiry may be converted into co-operative notifications, if the parties so request.

The Commission reserves the right to intervene, nevertheless:

— If the basic facts change.
— If there is a breach of a condition or obligation attached to a decision.
— The earlier decision had been based on incorrect informal or by deceit.
— "Where the parties abuse the authorisation" previously granted.[31]

European Court cases (ECJ and CFI)

Table 5: Main European Court Cases

— *Conte*:
A judicial mechanism for settling Italian architects fees was lawful
— *Manuele Arduino*:
A *draft* Italian lawyers tariff was not a decision of undertakings and unlawful. Nor was the related law from which a judge could depart
— *Wouters*:
A Dutch prohibition on multi-disciplinary partnerships is not caught by Article 81(1) EC
— *Pre-insulated Pipe Cartel Appeals*:
Fines may exceed turnover in products concerned by the infringement
— *EBU*:
Exemption overturned again—sub-licensing did not compensate for restriction through exclusive rights to EBU members
— *Roquette Frères*:
Scope of national court review of "dawn raid" decisions
— *UPS/Deutsche Post*:
An undertaking with exclusive rights can acquire commercial companies, if not using profits obtained abusively
— *Max.mobil*:
Rejection of Article 86(1) EC complaint a reviewable act
— *Various*:
Linkage of EC fundamental principles to ECHR law

State regulation of professional fees

Italian architects

In November 2001, in a case called *Conte*,[32] the European Court of Justice ("ECJ") ruled on a reference for a preliminary ruling from the Magistrate's Court in Genoa concerning the state regulation of architects' tariffs.

The case turned on a close appreciation of the facts. Essentially, when an architect sued for payment of her fees, for services which were set on a discretionary basis by her under the applicable Italian law, her claim was met by the defence that the system for setting such fees was unlawful, as contrary to what are now Articles 10 and 81 EC. The fees in question were not directly controlled under an Italian law regulating the tariffs of architects. However, under the applicable judicial rules an architect could only enforce a claim for such "discretionary" fees if the application to a court was supported by the invoice, endorsed by the opinion from the competent association of Italian architects (here the Association of Genoa). The defendant to the claim argued that such an opinion amounted to a decision of undertakings caught by what is now Article 81 EC.

30. [2002] O.J. C152/5; IP/02/925, June 25, 2002; see also IP/02/898, June 19, 2002.
31. See paras 28–9.

32. Case C-221/99 *Giuseppe Conte v Stefania Rossi*, Judgment of November 29, 2001.

The Court found, however, that the "opinion" in question simply was not binding and therefore was not a restriction on competition as alleged. In particular, it appeared that the national court was bound to follow the opinion if the case were uncontested (*ex parte*) but, if the defence then contested the matter and sought to have the order set aside, the opinion ceased to be binding and the national court could reconsider the matter on the merits. In such circumstances, the ECJ found no restriction of competition promoted by Italian law and therefore, for the case in issue, no infringement of Articles 10 and 81 EC.

Italian lawyers

In February 2002, in a case called *Manuele Arduino* the ECJ ruled on a similar case involving tariffs for lawyers fees.[33] Again, the Court has resolved the case by a close examination of the facts. However, the ruling appears of broader application than *Conte*, because of the nature of the relationship between the state and the Italian Bar Association.

The case arose when, after a claim for damages in relation to a road traffic accident, the Magistrate in Pinerolo, Italy, did not apply the tariff for legal fees provided for in Italian law. On appeal, the Italian Supreme Court found that the Magistrate should have done so. The Magistrate then sought to clarify whether the Italian law making the tariff applicable was contrary to what are now Articles 10 and 81 EC. As the ECJ noted, more precisely, the Magistrate therefore sought to clarify whether those Articles preclude a Member State from adopting legislation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, in the specific procedural context of the Italian legislation. This meant that:

- — The lawyers prepared a draft tariff for their legal fees which was not binding until adopted by the relevant Minister.
- — before adopting the draft tariff, the Minister also sought the opinion of the Italian Inter-ministerial Committee on Prices and the Italian Council of State.

On such facts, the ECJ held that there was no infringement of what are now Articles 10 and 81 EC. The Court focused first on whether the Italian State could be said to have delegated its legislative powers to the Italian Bar Association and found that this was not the case, because those establishing the tariff represented only the interests of the lawyers concerned as economic operators and had no broader public interest role. Nor did they have to take into account the interests of other sectors or users. Those establishing the draft were drawn exclusively from the Bar and the governing Italian law laid down no public interest criteria which had to be taken into account.

Moreover, the Court noted that, in fact, the Italian State had also retained and exercised its power of review of the draft tariff. Notably, a price increase introduced by legislation had been staggered, introduced in two phases as a result of comments by the Inter-ministerial Committee on Prices, taking particular account of inflation. Those comments had led to further consultations with the Italian Bar Association which had accepted the proposed change before the draft was finally adopted by the state. Otherwise, the Court noted that the tariff was a *draft* rather than a compulsory or binding agreement, which the Italian State *required* the Italian Bar Association to produce.

Finally, national courts were responsible for settling the fee level on the basis of the criteria in the Italian legislation and, notably, could depart from the maximum and minimum limits fixed under the legislation.

In such circumstances, the ECJ found that the Italian State had neither delegated its legislative powers to private economic operators, nor had the Italian State *required* or reinforced agreements contrary to what is now Article 81 EC.

Multi-disciplinary professional partnerships

In February 2002, the ECJ also made an important ruling in the *Wouters* case, allowing the Netherlands Bar to maintain a prohibition of multi-disciplinary partnerships between lawyers and accountants. What is interesting is that the Court found that the relevant Bar rules fell *outside* Article 81(1) EC, even though they clearly restricted competition.[34]

The case arose when two lawyers admitted to the Amsterdam Bar sought to practise as partners in respectively Arthur Andersen and Price Waterhouse. In both cases, the Netherlands Bar decided that such a partnership was against their professional regulations (even though partnerships with certain other professions were allowed). On appeal, ultimately the Dutch State Council made a reference to the ECJ concerning the lawfulness of the professional regulations with the EC competition rules (notably again what are now Articles 10 and 81(1) EC) and also with the EC right of establishment and/or the freedom to provide services (now Articles 43 and 49 EC).

The Court found first that the Netherlands Bar constituted an association of undertakings in the sense of Article 81(1) EC, in so far as it was

33. Case C-35/99, Judgment of February 19, 2002.

34. Case C-309/99, Judgment of February 19, 2002.

composed solely of members of the Bar and was not required by statute to take decisions in the public interest. The Court then found that the regulation of the Netherlands Bar which prevented partnerships between lawyers and accountants had an adverse effect on competition. Notably, as regards competition, the Bar regulation limited production and technical development in so far as it would prevent one-stop shopping for complementary services.[35]

In addition, the Court found that the linkage of the (at present) structurally decentralised legal profession with the highly concentrated accountancy profession could lead to a substantial reduction in the number of undertakings in the legal market (an issue which was, as a principle, of particular concern to the Luxembourg Government[36]). In such a competitive assessment, the regulations still represented a restriction of competition, since there were less extreme measures to ensure competition in the market than the absolute prohibition of multi-disciplinary partnerships.

Nevertheless, the Court found that the restrictive agreement represented by the Netherlands Bar regulation fell outside Article 81(1) EC. The Court found that, in the circumstances, account had to be taken of the objectives of the restriction in question, which "are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience".[37]

The Court then compared the legal framework applicable to lawyers and accountants in the Netherlands and concluded that there are material differences in the relevant professional conduct rules. Notably, lawyers had to ensure that they retained the ability to act for clients in complete independence and in their sole interest, to avoid all risk of conflict of interest and the duty to observe strict professional secrecy.[38]

In the Court's view, the Dutch Bar was entitled to consider that members of the Bar might not be in a position to do so if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.[39]

Such a conclusion was not affected by the fact that multi-disciplinary partnerships are allowed in some Member States, the Netherlands Bar being entitled on the Court's case law to consider that the objectives pursued by the prohibition on such partnerships could not be achieved by less restrictive means in the circumstances.[40]

Finally, the Court considered that any restriction on the right of establishment or the freedom to provide services would also be justified for the reasons set out above.

As regards the *effect on competition* the Court focused on whether the consequential restrictive effects of the (legitimate public interest) objectives pursued here were "inherent" therein (and strictly necessary therefore).[41] An approach which has competition lawyers focussing on "rule of reason" or "flexible approach" case law and practice.

One senses, however, a wider pattern here. In general, the European Courts have emphasised in recent years, notably in cases such as *Albany*,[42] that competition law is not an absolute, overriding objective in all cases. It is one of *several* Treaty objectives that may have to give way to or be balanced with others in the appropriate case. This is the "rule of reason" or "contextual approach" reflected in *Wouters*, a concept common to other EC Treaty Articles when legitimate, competing considerations have to be respected. Here the object of the restrictions in question was to ensure respect for the integrity of the legal profession. If the measures concerned for such a legitimate purpose are only those strictly necessary, then the measures as a whole may be considered objectively justified and fall outside the competition rules *and*, by the same reasoning, the rights of establishment and freedom to provide services.

For competition lawyers, the main message appears to be that the "rule of reason" in Article 81(1) EC may be *broader* than purely economic factors. In some cases, there may be *an overlap* with economic factors, which could fall to be treated under either Article 81(1) or 81(3) EC (even though the CFI in *Metropole* seemed to favour putting any economic balancing in Article 81(3) EC[43]). This leaves many competition lawyers uncomfortable, especially if, as here, it appears that there may be different solutions at national level. However, as Commissioners Van Miert and Monti have both emphasised, competition law is a policy, which has to interact with others. This appears to be what the ECJ is doing here, fitting competition into the context and balance of wider EC law and national choices.

Liner conference appeals

In February 2002, the European Court of First Instance ("CFI") ruled on a series of cases relating

35. See paras 87–90.
36. See paras 85 and 93.
37. See para.97.
38. See para.100.
39. See para.105.
40. See paras 99 and 108.
41. See para.97.
42. [2000] ICCLR 67.
43. [2000] ICCLR 14 and Case T-112/99, Judgment of September 18, 2001.

to Commission decisions on liner conferences.[44] Two of these cases concerned Trans-Atlantic price and transport capacity agreements between shipping companies offering transport services east and west bound between Northern Europe and the United States. Faced with a deterioration in the market, various companies offering such services had first entered into "discussion" agreements and then into a more detailed agreement, fixing common price tariffs for maritime and inter-modal transport, including also inland carriage of maritime containers. The parties also agreed not to use up to 25 per cent of their available transport capacity and shared out the volume of goods each was to carry.

In 1992, the parties notified this agreement, which was called the "Trans-Atlantic Agreement" ("TAA"). In October 1994, the Commission prohibited it although, in the meantime, the parties had entered into and notified a new version, the "Trans-Atlantic Conference Agreement" ("TACA").

In the Commission's TAA decision no fines were imposed, but exemption was denied to the price-fixing and capacity sharing agreements concerned. The parties were also obliged to inform their customers that the relevant contracts could be renegotiated or that they could terminate the contracts straight away.

The TAA *case*

In the first *Atlantic Container Line* case, the CFI broadly upheld the Commission's decision, although it annulled this last obligation. As a preliminary matter, the Court found that there was still an interest in ruling on the TAA, even though it was no longer in force, since the decision continued to have legal effects for the applicants.

On the substance of the case, the CFI held that the TAA could not benefit from the liner conference block exemption in Regulation 4056/86, because that exemption only applied to agreements to charge *uniform or common* freight rates by *all* the members of a liner conference, whereas the TAA set out a *scheme* of tariffs which *varied* according to the members. The CFI also considered whether the TAA could qualify for individual exemption. The Court found that it could not, since the TAA afforded the participants the possibility to eliminate competition in respect of a substantial part of the services in question, contrary to Article 85(3) EC (as it then was).

On the other hand, the Court considered that the obligation in the Commission's decision went too far in requiring that participants in the TAA offer customers the opportunity to renegotiate or terminate related contracts into which they had entered. Such a measure was not obviously necessary and did not correspond to an established line of Commission decisions. In the circumstances, it was for the Commission to explain its reasoning. Since the Commission had not done so, the Commission annulled the obligation.

The TACA *case*

In the second *Atlantic Container Line* case, the CFI considered the next phase in these proceedings. In July 1994, the liner conference members had notified the TACA, pursuant to Regulation 4056/86 (dealing with maritime transport). The Commission's reaction was to indicate to the applicants that it would also examine the application under Regulation 1017/68 (dealing with inland transport) and Regulation 17, since the TACA also concerned inland transport and dealt with price-fixing of inland tariffs for inter-modal transport services. In November 1996, the Commission took a decision withdrawing any immunity from fines which the applicants might have by virtue of notification of the TACA. More specifically, the Commission indicated that:

- Unlike Regulation 17, Regulation 1017/68 did not afford the parties any immunity from fines.
- If such an immunity were to be *implied* into Regulation 1017/68, the Commission considered that the criteria for withdrawal in Article 15(6) of Regulation 17 should also be implied.

When the parties challenged this decision, the Commission argued that the action was inadmissible because the activities concerned fell within the scope of Regulation 1017/68. The Commission said that its decision had been adopted "merely as a precautionary measure".

The CFI accepted the Commission's approach. The Court noted that the provisions of the TACA fixing inland transport rates fell within the scope of Regulation 1017/68, not Regulation 4056/86. Since Regulation 1017/68 contained no provision conferring immunity from fines in the event of notification of agreements falling within its scope, notification had not conferred any such protection.

Nor could immunity from fines through notification be inferred as an (overriding) general principle of EC competition law. The mere fact that other EC regulations (Regulations 17, 4056/86 and 3975/87) offered such immunity did not imply the existence of any such general principle. On the contrary, the absence of such provision in Regulation 1017/68 served to underline that agreements which fell within the scope of Regulation 1017/68 did *not* have such immunity.

44. Cases T-395/94 and T-18/97 *Atlantic Container Line AB e.a. v Commission*; Case T-86/95, *Compagnie Générale Maritime e.a. v Commission*, Judgments of February 28, 2002.

The CFI's conclusion was that the contested decision did not alter the legal position of the applications and their action to annul the decision was inadmissible. (For later TACA developments, see "Maritime transport" in Part 2.)

The FEFC *case*

The third case related to agreements entered into by the Far Eastern Freight Conference ("FEFC"), for maritime and inter-modal transport services between Northern Europe and South-East and East Asia.

In 1989 the Commission received a complaint from various German commercial associations concerning the price-fixing activities of FEFC for inter-modal transport. In that complaint, the associations alleged that the FEFC was fixing prices for cargo handling in the ports of origin and destination, as well as inland transport at both ends of the maritime transport concerned. The associations claimed that only the maritime transport concerned was covered by Regulation 4056/86. The Commission agreed, ruled that the FEFC members had infringed Article 85 EC (as it then was) by agreeing prices for inland transport services, ruled that the agreement could not be exempted under Regulation 1017/68 and fined them each ECU 10,000.

In *Compagnie Générale Maritime*, the CFI ruled on the actions for annulment of 13 of the 14 shipping companies to which the Commission's decision was addressed. In general, the CFI upheld the Commission's approach, although the Court annulled the fines imposed.

The CFI found that the FEFC did not fall within the scope of Regulation 4056/86, since that regulation only dealt with transport by sea from port-to-port. The Block Exemption in Regulation 4056/86 was also to be construed narrowly since it was "wholly exceptional", providing for an exemption for an unlimited period for horizontal agreements fixing prices for maritime transport services.

The CFI also found that the Commission was entitled to deny exemption to the agreement, which contained "very serious" price-fixing restrictions and noted that the collective price-fixing for inland transport would also give FEFC members the power to extend the significant position they held on the market for maritime transport to inland transport services. In particular, competition could be damaged by FEFC members absorbing the cost of the discounts they granted on the inland transport market through their maritime transport tariffs. Moreover, it had not been shown that such restrictions were indispensable to attain the objective of "stability" alleged by the FEFC.

The CFI was more sympathetic to the FEFC members' argument that they believed the contested agreement was lawful. In particular, the CFI noted that, in a Joint Declaration to the minutes of the EU Council meeting adopting Regulation 4056/86, the Commission had itself stated that non-application of Article 85(1) EC would be the rule for successive multi-modal transport operations in the context of Regulations 1017/68 and 4056/86. Without ruling on the effect of such a declaration (which could be construed to mean such activities within maritime transport or within inland transport, but not *linking* such types of transport), the Court accepted that it had given rise to doubts and may have led the FEFC members to believe that their agreement was not unlawful.

Some Member States had also encouraged the use of containers and inter-modal transport. Overall therefore, the CFI considered that there was justification for not imposing a fine in the case and annulled the Commission's decision to that extent.

Cartels

Commission ability to raise fining levels

In March 2002, in *the district heating/pre-insulated pipe cartel appeals* the CFI largely upheld fines imposed on ABB and 10 other companies for participating in agreements and concerted practices in the pre-insulated pipe sector in the 1990's. However, the CFI reduced some fines, for example that of Sigma was reduced from €400,000 to €300,000 and the fine imposed on ABB from €70 million to €65 million.[45]

In October 1998, the Commission held that ABB and 10 other companies had infringed Article 85(1) EC (now Article 81(1) EC) through agreements and concerted practices to raise prices. The cartel was found to have originated in November/December 1990 among four Danish producers and was subsequently extended to other national markets (for example the German, Italian and Austrian markets). By late 1994, the Commission found that the cartel covered the whole common market. The Commission imposed fines totalling (now) €92.21 million on 10 companies and a fine of (now) €70 million on ABB, which at the time was thought a huge fine and a major change in policy, because it exceeded ABB's turnover in the products concerned (but not 10 per cent of ABB's aggregate worldwide turnover).

On the main appeal issue, *as to how fines should be calculated*, the CFI confirmed that the Commission had a wide discretion to set the level of fines within the limits of Regulation 17.[46] The

45. See, *e.g.* Case T-31/99, *ABB*, Judgment of March 20, 2002. (There are separate judgments for each company.)
46. See paras 122–136.

Commission could depart from the level of fines in previous cases. It could take into account the "dissuasive effect of fines". The applicants could not trust that the Commission would impose a fine based on turnover in the products concerned. The Commission could have regard to the total turnover of the company infringing and the proportion of that turnover accounted for by goods in respect of which the infringement was committed. (In ABB's case, notably, it appears that the fine corresponded to 60 per cent of its worldwide turnover in the district heating sector and 110 per cent of its turnover on those products in the European Union.[47])

The CFI also held that by setting out its Fining Guidelines, which are not based on the turnover of the undertakings concerned, the Commission did not depart from Article 15 of the Regulation No 17. That Article does not prohibit the Commission from referring, during its calculation, to an intermediate amount exceeding 10 per cent of the turnover of the undertaking concerned, providing that the amount of the fine eventually imposed on the undertaking does not exceed the maximum limit.

Interestingly, the CFI noted that a change in Commission practice brought about by the new Fining Guidelines, compared with the Commission's existing administrative practice, did not constitute an alteration of the legal framework determining the fines which can be imposed. As a result, the change was not contrary to the principles contained in Article 7(1) of the European Convention of Human Rights.

The CFI also ruled that it was irrelevant that the parties were not aware of the Commission's intention fundamentally to change its policy on fines. Further, having regard to the wide discretion which Regulation No 17 leaves to the Commission, the fact that the latter introduces a new method of calculating fines, cannot be regarded as an aggravation, with retroactive effect, of the fines legally provided for by Article 15 of Regulation No 17, which infringed the principle of legality and legal certainty.

However, on the facts the CFI reduced the fine of Sigma from €400,000 to €300,000. The CFI also reduced ABB's fine from €70 million to €65 million. The CFI ruled that the Commission should have differentiated between ABB and the other members of the cartel because ABB, after receiving the Statement of Objections, no longer disputed the findings of fact or their interpretation by the Commission. Thus, the Commission did not observe the principle of equal treatment.

47. See para.117.

Liability for acquired undertakings?

In February 2002, the CFI ruled on two cases resulting from the ECJ's partial setting aside of the CFI's earlier judgements in the *Cartonboard* cases. In *Cascades*,[48] the CFI had to consider what fine should be imposed on Cascades in relation to its two subsidiaries, Van Duffel and Djupafors, which Cascades had acquired in March and April 1989. The ECJ had ruled that Cascades could not be fined for the period in which these companies had participated in the *Cartonboard* cartel, *prior* to those acquisitions. What the CFI did was to follow the Commission's approach to setting the original fines, in order to preserve equality of treatment. In practice, this meant that the fine was based on the turnover figures in 1990, the year preceding termination of the infringement. The CFI considered three different turnover figures for three periods:

- — The 1990 turnover of Cascades' own original Cartonboard subsidiaries (before the acquisitions) in 1990 for June 1986 (the beginning of the infringement) to March 1989.
- — The 1990 turnover of those subsidiaries *and* Van Duffel for March 1989 alone (when Van Duffel had been acquired, but not Djupafors).
- — The 1990 turnover of the subsidiaries, Van Duffel and Djupafors, from April 1989 until May 1991.

The CFI applied then an increase of nine per cent, based on the Commission's finding that Cascades was a ringleader in the cartel (a finding upheld in the first CFI ruling). The net result was that the new fine on Cascades was set at €13,538,000, instead of the Commission's original fine of ECU 16,200,000.

In *Stora*,[49] the CFI was faced with similar issues. The ECJ had partially set aside the CFI's judgement upholding a fine on Stora for the activities of Feldmühle-Nobel ("Feldmühle") and Papeteries Béghin-Corbehem ("CBC") in the *Cartonboard* cartel prior to Stora's acquisition of those companies in September 1990.

The Commission had argued that it was enough that Stora *knew* all about Feldmühle and CBC's activities prior to the acquisition *through the participation in the cartel of its subsidiary Kopparfors*, which it had acquired in April 1987. The ECJ disagreed, finding that Feldmühle and CBC had to answer for their activities before their acquisition by Stora. The CFI added that the

48. Case T-308/94, Judgment of February 28, 2002.
49. Case T-354/94, Judgment of February 28, 2002.

key point is the existence of the legal person responsible for managing the operations of Feldmühle and CBC on the date that the Commission's decision was taken.

Again, the CFI reassessed the fine on Stora using the Commission's approach in the case, to ensure equal treatment. Stora was held responsible for:

— The activities of Koppafors after its acquisition by Stora in January 1987 and not from June 1986, the beginning of the infringement as the Commission found based on the turnover of Kopparfors alone.
— The activities of Feldmühle and CBC after September 1990 until May 1991, based on Stora's full turnover on the cartonboard market.

The CFI then considered how to apply this to the increase in a fine of nine per cent of turnover, for Stora being a ringleader. The CFI noted that Kopparfors had not attended the meetings of the Presidents' Working Group (a core group in the cartel), although Feldmühle had. As a result Kopparfors was not considered a ringleader and was fined on the basis of 7.5 per cent of turnover. The nine per cent rate was only applied from Stora's acquisition of Feldmühle and CBC. The CFI otherwise did not see grounds to change the Commission's decision to give Stora a two-thirds reduction in its fine for co-operation.

The net result was that the new fine on Stora was set at €4,670,000, instead of ECU 11,250,000, a considerable reduction!

Unreasonably long proceedings?

In October 2002, the ECJ ruled on the appeals brought by most of the producers of PVC against the second judgement of the CFI in the *PVC Cartel* case.[50] In 1998, the Commission had fined 14 producers of PVC for participation in price-fixing and quotas related to this plastic. Following an appeal against this decision brought by 12 of the 14 producers, the CFI declared that the Commission's decision was *non-existent*, the Commission having admitted that the text of the decision had not been properly authenticated. On appeal, the ECJ annulled the CFI's judgement, but still *annulled* the Commission's decision. The Commission therefore adopted a new decision, duly authenticated it and imposed the same amount of fines against the 12 producers which had brought the original appeal. These have then again introduced an appeal against the new Commission decision.

In general, the CFI rejected the appeals, except for the duration of the infringement period for one company and the market share used by the Commission to determine the amount of the fines imposed on two other producers.

On further appeal, the ECJ has mostly rejected the pleas developed by the 12 companies. In general, the ECJ confirmed that the Commission *could* adopt a new decision, when the previous one had been annulled for procedural defects. The companies also argued that the Commission could not adopt the second decision, *without a new administrative procedure*. In this respect, the Court held that, after an annulment, the procedure could be resumed at the point at which the illegality occurred. In the circumstances therefore, the Court denied the undertakings concerned the right to a new Statement of Objections and subsequent procedure.

As far as the principle that decisions are to be adopted within a reasonable time, the ECJ found that, in these circumstances, there was no infringement. There is extensive discussion. The matter was strongly contested by the producers (because it was some 19 years since the procedure started!). The Court was not persuaded. It noted, in particular, that much of the time taken in the proceedings had concerned *judicial* review of the case, including measures of inquiry as to the authentication of the Commission's decision. Such periods were related therefore to the rights of defence and the related time should not be considered unreasonable in the circumstances.

Otherwise, interestingly, the ECJ indicated that its case law, as well as that of the European Court of Human Rights, concerning protection against intervention by public authorities concerns *coercive* measures or related acts. Such principles are not applicable when the companies concerned have voluntarily accepted a dawn raid on the basis of a mandate, despite the absence of a formal decision.

In the same vein, the ECJ found that the privilege against self-incrimination could only be applied in a situation where the suspect was subject to some coercive order and where one can establish the existence of an actual interference with the right against self-incrimination. Accordingly, the principle cannot be invoked where the undertaking concerned has *voluntarily* replied to a request for information.

In doing so the ECJ explicitly recognised that it must take into account further developments in the case-law of the European Court of Human Rights, when interpreting the scope of the fundamental rights, enshrined in the European Convention of Human Rights, which the EU respects as "fundamental principles".

50. Joined Cases C-238/99P and others, Judgment of October 15, 2002. With thanks to Anne Vallery for her assistance.

Equal treatment in leniency

In December 2001, in *Krupp Thyssen and Compañia Española*,[51] the CFI also held, in the ECSC *Alloy Surcharge* case, that if companies provided the Commission with similar information concerning the conduct imputed to them at the same stage of the procedure and in similar circumstances, they should be awarded comparable leniency. Distinctions could not be made because one had been contacted earlier than another by the Commission.

EBU and sub-licensing

In October 2002, the CFI gave a further judgement in the *Eurovision* case.[52] It will be recalled that Eurovision is a system for the exclusive exchange of television programmes amongst the members of the European Broadcasting Union ("EBU"). In addition, through Eurovision, EBU members jointly acquire and share sports rights. This has been a long-running story in EC law with a first Commission exemption in 1993, which was annulled by the CFI in 1996 and then appealed to the ECJ. This appeal was subsequently withdrawn in May 2000. The Commission then published a new decision in June 2000, with the aim of setting matters right.[53] The latter decision was the subject of the CFI's judgement.

The CFI ruled that the Commission was wrong to conclude that the *sub-licensing system* set up by the EBU guarantees competitors of EBU members sufficient access to rights to transmit sporting events held by the latter through their participation in the EBU purchasing association. In particular, the Court found that, apart from a few exceptions, nothing in the EBU rules or scheme enabled competitors of EBU members to obtain access to live broadcasts of *unused* Eurovision rights. All the scheme permitted was the acquisition of sub-licences to transmit *highlights/roundups* of competitions, under extremely restrictive conditions.

As a result, the Commission made a manifest error in finding that, even if a product market for certain major international sporting events exists, the sub-licensing scheme gave access for third parties and avoided the elimination of competition in that market. The Commission decision was therefore annulled again.

51. Joined Cases T-45/98 and T-47/98; Case T-48/98, Judgments of December 13, 2001.
52. Joined Cases T-185/00, T-299/00 and T-300/00, *M6 v Commission, Gestevisión v Commission and SIC v Commission*, Judgment of October 8, 2002. With thanks to Natasha Benalal for her assistance.
53. The Commission decision was summarised in the papers of 1999 and 2000, [2000] I.C.C.L.R. 111–112 and [2001] I.C.C.L.R. 75–76.

The CFI considered that the Eurovision system leads to two types of restriction of competition:

- — The joint acquisition of television rights to sporting events, their sharing and the exchange of signal restricts or even eliminates competition among EBU members.
- — The system gives rise to restrictions on competition for third parties, since those rights are generally sold on an exclusive basis, denying access to non-members.

While the joint purchasing of television transmission rights for an event may not in itself be a restriction caught by Article 81(1) EC and might be justified in the particular circumstances, the CFI emphasised that the *exercise of* those rights could amount to a restriction.

Barring access to programmes deprives non-EBU channels of potential revenue and demonstrated Eurovision's extreme exclusivity. If a media group bought the same rights, operators could negotiate to obtain them for their respective markets.

Even if it were acceptable for EBU members to reserve live transmission of events to themselves (as an exclusivity necessary to guarantee the value of a sports programme in terms of viewing figures and advertising revenues), nothing justified their extending that right to *all* the competitions in a given event, even when they did not intend to broadcast those competitions live. The CFI also stated that the possibility of providing deferred coverage or highlights of events was subject to several restrictions, in particular as regards embargo times and the editing of programmes. The third party sub-licensing scheme could not therefore compensate for the restrictions on competition in the EBU system.

National court review of "dawn raid" decisions

In October 2002, in *Roquette Frères*, the ECJ ruled on an interesting case concerning the scope of review by national courts having jurisdiction to authorise entry and seizure at the business premises of a company, following a Commission request for assistance under Article 14(6) of Regulation 17/62.[54] The judgement clarifies the principles established in *Hoechst*[55] on such issues and lists the basic information which the Commission must provide to national courts.

The *Cour de Cassation* (the French Court of Cassation) referred the case in March 2000 on an appeal by Roquette Frères ("Roquette"), a French company active in sodium gluconate which had

54. Case C-94/00, Judgment of October 22, 2002.
55. Joined Cases 46/87 and 227/88, [1989] E.C.R. 2859. With thanks to Flavia Distefano for her assistance.

been dawn-raided by the Commission in September 1998. The Commission suspected Roquette of participation in a cartel. The inspection had been ordered by the Commission with an Article 14(3) decision and authorised by the President of the Lille Regional Court on a precautionary basis, to overcome any possible opposition by Roquette, following a Commission request for assistance under Article 14(6).

Having co-operated during the inspection, Roquette brought a complaint against the authorisation order, claiming that the President of the Lille Court had failed to verify, in breach of Article 48 of the French Order on competition investigation procedures and Article 66 of the French Constitution, whether the authorisation request was justified.

The *Cour de Cassation* considered that the Commission, by submitting only a copy of the Article 14(3) decision (which made no reference to the evidence already gathered) and of the *Hoechst* judgement, had failed to provide enough information or evidence to enable the Lille Court to make such an assessment.

The *Cour de Cassation* therefore requested the ECJ to clarify the principles established in *Hoechst*. In particular, the Court asked whether a national court can refuse to grant coercive measures where it considers that the Commission has failed to submit sufficient information or evidence to support its allegations or, if the ECJ took the view that the Commission is not required to submit any evidence or information, where the Article 14(3) decision lacks sufficient reasoning.

The ECJ recalled that the protection of business premises against "arbitrary" or disproportionate intervention by public authorities is a general principle of law, as established by the ECJ in *Hoechst* and by the European Court of Human Rights (the latter having ruled that Article 8 of the European Convention of Human Rights on the "protection of the home" may, in some cases, cover business premises). When acting in response to a Commission request for assistance under Article 14(6), national courts need to reconcile this general principle with the duty under Article 10 EC to co-operate in good faith with the Community institutions and ensure that the Commission's action be effective.

The ECJ held that, as a result of the invasion of privacy involved, national courts can grant the coercive measures sought only after verifying that these are not "arbitrary" or disproportionate to the subject-matter of the investigation. National courts cannot, however, assess the adequacy of reasons given in an Article 14(3) decision, which falls within the exclusive competence of the European Courts.

As concerns the "non-arbitrary" nature of the required measures, the national court must verify that reasonable grounds for suspecting the competition infringement exist. To allow such assessment, the Commission is required to provide the court with detailed explanations showing that it possesses solid factual information and evidence, but not also to provide the information and evidence contained in its file or even a description of the nature of this information (for example whether it is a complaint or testimony).

As concerns the proportionality test, the national court has to establish that the measures are necessary to carry out the investigation and do not constitute a disproportionate and intolerable interference with human rights. For this purpose, the Commission has to inform the court of the essential features of the suspected infringement, including at the very least a rough indication of the market to be affected, the nature of the alleged competition restrictions and an explanation of the supposed degree of involvement of the undertakings concerned. The Commission has also to give an indication as precise as possible of the evidence sought (but not a list of documents or files), of the matters to which the investigation must relate and the powers conferred on the investigators.

Where the Commission requests the national authorities' assistance as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, it has to show that, without the coercive measures, it would be impossible or very difficult to establish the facts amounting to the infringement.

National courts are entitled to refuse the coercive measures where they consider that the competition infringement is minimal, the undertaking's involvement is limited or the evidence sought is peripheral, so that the intervention is manifestly disproportionate and intolerable.

However, before the national court dismisses an application for assistance under Article 14(6) on the ground that the Commission has failed to provide sufficient information, it has to request the additional information needed as rapidly as possible and allow the Commission to provide the information in the shortest delay. The Commission can provide the information to the national court in any form, for example in the Article 14(3) decision, in the Article 14(6) request or in an answer, even given orally, to a court's question.

Acquisitions by undertaking with exclusive rights

In March 2002, the CFI upheld the Commission's rejection of a complaint by *UPS* that *Deutsche Post* had used profits derived from its monopoly in the German postal market to finance its acquisition of DHL and thus enter the competitive

market.[56] UPS argued that such financing amounted to an abuse of a dominant position under Article 82 EC.

The Court disagreed and found that the use of monopoly profits for acquisitions would only constitute an abuse of market power if those profits were generated by abusive practices.

In May 1998, Deutsche Post sought to acquire 22.5 per cent of DHL's shares which would give Deutsche Post joint control of DHL, together Lufthansa and JAL. UPS filed a complaint against this acquisition, arguing that Deutsche Post could only obtain sufficient resources for the acquisition through its profits on the reserved postal market. UPS also argued that Deutsche Post was not entitled to use its exclusive rights for purposes other than complying with its obligation to provide the services of general economic interest with which it was entrusted. However, in June 1998, the Commission cleared Deutsche Post's acquisition and subsequently rejected UPS's complaint in so far as it was based on Articles 81 EC and 82 EC.

The Court found that the mere fact that an exclusive right is granted to an undertaking in order to guarantee that it provides a service of general economic interest does not preclude that undertaking from earning profits from the activities reserved to it, or from extending its activities into non-reserved areas.

However, the Court made one reservation holding that an acquisition could raise competition law issues where the funds used by the undertaking derived from excessive or discriminatory prices or from other unfair practices in its reserved market. In such a situation, where there are grounds for suspecting an infringement of Article 82 EC, it would be necessary to examine the source of the funds used for the acquisition in question in order to determine whether that acquisition stems from an abuse of a dominant position.

On the facts, there was no evidence that such abuse had taken place and the acquisition was compatible with the common market. Therefore, the mere fact that Deutsche Post possessed funds enabling it to make the acquisition at issue did not allow a presumption that the acquisition was evidence of abusive conduct in the reserved market.

Rejection of an Article 86(1) EC complaint reviewable

In January 2002, in *Max.mobil Telekommunikation Service v Commission*[57] the CFI upheld the Commission's decision that the Republic of Austria had not infringed Articles 86 and 90(1) EC (now Articles 82 and 86(1) EC) by charging the same concession fee to the second mobile operator to be licensed in Austria, Max.mobil, as had been charged to the incumbent mobile operator, Mobilkom.

However, in a significant ruling, the Court held that a complainant has a right to judicial review of a decision by the Commission rejecting a complaint under Article 86(1) EC (formerly Article 90(1) EC). The Commission has appealed this.

In October 1997, Max.mobil lodged a complaint with the Commission concerning, amongst other things, the concession fees which it paid for its GSM licence, which were the same as those paid by the incumbent mobile operator Mobilkom. In December 1998, the Commission informed Max.mobil that on this issue Max.mobil had not produced sufficient evidence to warrant full investigation (while pursuing others). Max.mobil brought an action before the CFI seeking annulment of this decision.

The Commission argued that the action was inadmissible on the grounds that:

- Given the broad discretion the Commission has in deciding whether to take an Article 90(3) (now Article 86(3) EC) decision against a Member State, a complainant did not, as a matter of principle, have standing to challenge a decision by the Commission not to use its powers under that Article.
- Individuals can obtain sufficient recourse under national law for infringements of Article 90(1) EC together with Article 86 EC, since these provisions have direct effect.

In a departure from its previous approach and citing the Charter of Fundamental Rights of the European Union, the Court held that, in principle, the Commission has the same obligation "to undertake a diligent and impartial examination of complaints submitted to it", whether under Articles 81 and 82 EC or Article 86 EC (formerly Article 90 EC), or the State aid rules. As a consequence, "the fulfilment of that obligation must be amenable to judicial review" and a complainant should have standing to protect its legitimate interests by obtaining review of a decision to reject a complaint.

The CFI ruled, however, that the scope of review is limited, in relation to Article 90(1) EC, because of the broad discretion which the Commission enjoys in deciding whether it is necessary to take action against a Member State. Where a complainant is challenging a decision not to pursue an alleged Article 90 EC infringement, the Court's review is confined to checking that the

56. Case T-175/99, Judgment of March 20, 2002. With thanks to Franz Schwarz for his assistance.
57. Case T-54/99, Judgment of January 30, 2002. With thanks to Elena Gasol Ramos for her assistance.

statement of reasons for rejecting the complaint is *prima facie* consistent and reflects consideration of the relevant aspects of the case, the facts relied on are materially accurate, and the *prima facie* assessment of facts is not manifestly erroneous.

On the facts, the CFI found that the Commission's decision to reject Max.mobil's complaint satisfied this standard of review.

Other

In November 2001, the CFI upheld the Commission's decision involving the *Italian Tobacco Monopoly* ("AAMS") and imposing a fine of €6 million for various abuses of dominant position.[58]

In January 2002, in *Cisal v INAIL* the ECJ ruled on a further case concerning compulsory insurance to a State entity and Articles 82/86 EC.[59] The case arose from a decision ordering Cisal to pay arrears of insurance contributions to the Italian National Institute for Insurance against Accidents at Work ("INAIL") in respect of its managing partner, who was subject to compulsory insurance requirements. Cisal appealed, amongst other things, arguing that the Italian legal provisions were contrary to EC competition law, because they unjustifiably maintained a monopoly for INAIL and induced it to abuse its dominant position. The ECJ found that this was not the case since INAIL was not an "undertaking" in EC law. Two aspects of the relevant Italian scheme demonstrated the exclusively social function of INAIL. First, the contributions to the INAIL scheme were *not* systematically proportionate to the risk insured and there was no direct link between the contributions paid and the benefits granted. Secondly, the activities of INAIL were subject to the supervision of the State and the amount of benefits and contributions is fixed, in the last resort, by the State.

In March 2002, the CFI rejected an application by *Satellimages TV 5* for review of a Commission letter declaring provisionally that Article 82 EC was not infringed by the pricing policy of Deutsche Telekom on the cable distribution market. Such a letter was not a reviewable act for the purposes of Article 173 (now Article 230) EC.[60]

In March 2002, the CFI upheld two Commission decisions granting individual exemption to the standard pub leases of two British breweries, Whitbread and Bass. In *Shaw* and *Joynson*[61] the CFI held that the Commission had not made any manifest error of assessment. In the CFI's view, the conditions for a retroactive exemption under Article 81(3) EC were fulfilled, even though under the leases, the tied lessees were charged higher prices than free trade operators and the leases included restrictions which were not exempted by Regulation 1984/83.[62]

Commission Decisions

Cartels

This has been quite an extraordinary year for EC cartel enforcement. Since last year's conference there have been *eleven* cartel decisions and the new pace shows little sign of abating. This appears to be driven partly by the 1996 Leniency Notice, with cases prompted by those rules coming through now and partly by the Commission's increased allocation of resources. It is understood that there are now some 25 case handlers in the "Cartel Unit" and that this is expanding (see further "Reorganisation of DG competition" in Part 2).

I propose now to outline the 11 decisions, most of which have been described only in press releases. (See Table 6 overleaf.)

Vitamins

In November 2001 the Commission fined eight companies a total of €855.22 million for participating in eight separate market-sharing and price-fixing cartels in *vitamin products*.[63] The participants and duration varied for each cartel. All operated between September 1989 and February 1999. Hoffman-La Roche was fined the huge total sum of €462 million. BASF was fined €296.16 million. The Japanese company, Takeda was fined €37 million. The other companies were fined between €5 and €23 million. The vitamin markets concerned were vitamins A, E, B1, B2, B5, C, D3, biotin (H), folic acid (M), beta carotene and carotinoids. The vitamins are used in bulk synthetic substances added to both compound animal feeds and human food products.

The Commission's investigation started in May 1999 and actually involved a finding that 13 companies had participated in the cartels. However, certain companies could not be fined because prescription applied. Thus, the vitamin H and folic acid cartels had ended five years or more before the Commission opened its investigation.

58. Case T-139/8, Judgment of November 22, 2001.
59. Case C-218/00, Judgment of January 22, 2002.
60. Case T-95/99, Judgment of March 7, 2002.
61. Case T-131/99 *Shaw v Commission* and Case T-231/99 *Joynson v Commission*, both judgments of March 21, 2001; and *Bridgeland*, EC Competition Policy Newsletter, February 2002, pp.45–47.

62. In October 2002, the ECJ upheld the CFI's Judgment rejecting an appeal against the Commission decision in *Alpha Flight Services/Aéroports de Paris*, where the Commission had found that the French public company Aéroports de Paris had abused its dominant position by imposing discriminatory fees on groundhandling service suppliers in the Paris airports (of Orly and Charles de Gaulle). Case C-82/01P, Judgment of October 24, 2002.
63. IP/01/1625, November 21, 2001.

Table 6: Cartels

— *Overview*

	Total Fines	**Highest individual fines(s)**
Vitamins:	€855.20	Hoffmann-La Roche (€462)
Citric Acid:	€135.20	Hoffmann-La Roche (€63.5)
Belgian Brewers:	€91.20	Interbrew (€46.5)
Luxembourg Brewers:	€0.45	Bofferding (€0.4)
Zinc Phosphate:	€11.90	Hans Heubach (€3.8)
Carbonless Paper:	€313.70	Arjo Wiggins Appleton (€184.3)
German Banks:	€100.80	Commerz Bank/Dresdner
Bank/Bayerische		Hypo- und Vereinsbank (€28)
Austrian Banks:	€124.30	Erste Bank (€37.7)
Methionine:	€127.00	Degussa (€118)
Dutch Industrial Gases:	€25.70	Hoek Loos (€12.6)
Christie's/Sotheby's:	€20.40	Sotheby's (€20.4)

All figures are € million

— *Themes*

- Fines related to actual impact and deterrence
- Five cases of immunity under the 1996 Leniency Notice
- Total cost: HLR > €462 million (market size and market share) + US$500 million + US$1.05 billion in treble damages?
- Quality of evidence: contemporaneous notes, corroboration etc.
- Instigation of the cartel as a bar to immunity

Prescription also applied to the cartels in vitamins B1 and B6.

The Commission indicates that the cartels involved "target" and "minimum" prices, maintenance of the *status quo* in market shares and compensation arrangements. The Commission also noted that the arrangements on the various vitamin markets were conceived and directed by the same persons at senior levels in the companies concerned.

Hoffman-La Roche was found to be the "prime mover and main beneficiary" in the cartels, with BASF following and forming together a common front in arrangements with the Japanese producers concerned. For example, it appears that they recruited one company, EISAI to the vitamin E cartel together.

The Commission estimated that the EEA market for the products concerned in the decision was some €800 million in 1998. The Commission also noted that European revenues in vitamin C fell from €250 million in 1995 (the last year when the cartel arrangements were in place) to only €120 million in 1998.

The Commission considered that each cartel represented a "very serious" infringement. Most of the participants were involved in infringements of long duration (more than five years), Some cartels were of long duration (for example vitamin A from September 1989 to February 1999), others shorter (for example vitamin C from January 1991 to August 1995). Hoffmann-La Roche and BASF were treated as joint leaders and instigators of the cartels (an "aggravating" factor in the assessment), Aventis (the former Rhône-Poulenc) was given *full immunity* as regards participation in two cartels (the first immunity finding under the 1996 Leniency Notice) but was fined as regards its "passive participation" in another (on which it had not provided information to the Commission). Hoffmann-La Roche and BASF also co-operated with the Commission, leading to a 50 per cent reduction of their fines (and the shocking prospect that *without* the co-operation their *individual* fines might have been some €900 and €600 million respectively!).

These are colossal figures and, even so, *not the full cost* to the companies concerned. Thus, in 1999 Hoffmann-La Roche already settled a parallel case with the US authorities paying a fine of US$500 million, while BASF paid US$225 million and Takeda paid US$72 million. It is reported that Hoffmann-La Roche and others also paid US$1.05 *billion* to a group of US private plaintiffs and some firms have settled claims from some US States.[64] A former Hoffmann-La Roche executive was also jailed for four months and fined US$100,000.

Citric acid

In December 2001, the Commission fined five companies a total of €135.22 million for participating in a price-fixing and market-sharing cartel in citric acid.[65] Hoffmann-La Roche was fined €63.5 million, Archer Daniels Midland €39.7 million and three other companies between €0.17 and €17 million.

The Commission's investigation started in 1997 when the Commission became aware that some of the parties concerned had been charged

64. Reuters, November 15, 2001; February 27, 2002.
65. IP/01/1743, December 5, 2001; [2002] O.J. L239/18.

by the US authorities with participating in an *international* conspiracy. Citric acid is widely used in the food and drinks industries as an "accidulent" and a preservative. Citric acid is also used in household detergents, pharmaceuticals and cosmetics.

The Commission found that the cartel started with four members in March 1991, with a further company joining in May 1992 when it entered the market. The cartel continued until May 1995. The cartel was found to have had four main objectives: the allocation of sales quotas, "target" and "floor" prices for citric acid, the exchange of specific customer information and the elimination of price discounts.

Interestingly, the Commission notes that an exception was made as regards such discounts for the five largest consumers of citric acid worldwide, since it was considered unrealistic by the cartel members to expect them to pay the public list prices. The Commission found, however, that the cartel members agreed that a discount of no more than three per cent would be offered to those larger customers. There were regular so-called "Sherpa" and "Masters" meetings, monitoring systems and a compensation scheme when participants oversold. The Commission also found that the cartel had taken concerted action against Chinese manufacturers through a "concerted and carefully targeted" price war to "recover" customers lost (a so-called "Serbia list").

During the infringement period, the Commission found that the annual EEA market for citric acid was worth some €300 million.

The Commission considered the cartel to be a "very serious" infringement but of medium duration (between one and five years). The fines on Archer Daniels Midland and Hoffmann-La Roche were increased by 35 per cent, each, on the basis that they were co-leaders of the cartel, but others also carried out "leadership" activities (such as chairing meetings or centralised data distribution).

Cerestar was granted a 90 per cent reduction of fine for being the first company to provide decisive information on the cartel, albeit not "spontaneously", *i.e.* not until it was aware that the Commission was investigating the citric acid cartel. Archer Daniels Midland was granted a 50 per cent reduction of fine for its co-operation, namely information which was combined with that from Cerestar to draft requests for information (as the Commission puts it) "to trigger the admission" of the three other companies in the cartel. Haarman & Reimer and Jungbunzlauer were given respectively 40 per cent and 30 per cent reductions for the information which they provided (although this appears to have been discounted insofar as it was in response to a formal request for information).

In the case of Archer Daniels Midland, Haarman & Reimer and Jungbunzlauer the Commission also emphasised the evidential quality of some of the information supplied (for example handwritten notes during cartel meetings, price instructions related to cartel decisions, tables created contemporaneously to the infringement). Hoffmann-La Roche was granted a 20 per cent reduction for confirming its participation and the purpose of the meetings prior to the receipt of the Commission's Statement of Objections.

Again, this case was in parallel to and following on from US (and here Canadian) proceedings in which the companies paid some US$105 million and CAD$10.8 million in fines, with individual fines on executives also.

Interestingly, the Commission's decision contains specific sections on the "*actual impact*" of the infringement in the EEA, in so far as that relates to fine assessment *and* a specific section on whether the fines will have a *sufficient deterrent effect.* This confirms the pattern already suggested by the Commission's press releases, that the Commission's fining policy is focussing on these issues more now.

Beer

In December 2001, the Commission imposed fines on Belgian and Luxembourg brewers for three cartels. In the *Belgian* case total fines of €91 million were imposed for two separate infringements on the Belgian beer market between 1993 and 1998.[66] Interbrew was fined a total of €46.5 million and Danone/Alken-Maes a total of €44.6 million.

In the first *Belgian* cartel, the Commission found that Interbrew and Danone/Alken-Maes had been involved in a general "non-aggression pact" from early 1993 until the beginning of 1998 (called "Université de Lille" or "Project Green" by Interbrew). They had limited investments and advertising in the horeca (hotels, restaurants and café) sector, allocated horeca customers (classic outlets and "national accounts"), fixed prices in the retail sector, agreed on a new tariff structure to be applied in the horeca and retail sectors and pursued a related monthly information exchange system concerning sales volumes. Notable findings were the participation of senior management in the related meetings and that Danone had threatened Interbrew that if Interbrew did not transfer 500,000 hectolitres of beer (some five per cent of the Belgian market) to Alken-Maes in the Belgian retail sector, Danone would "make life difficult" for Interbrew France. This threat lead to a "gentleman's agreement" in 1994, by which the parties committed themselves generally to respect

66. IP/01/1739, December 5, 2001.

each other's market positions, and more specific agreements and practices.[67]

The Commission considered this cartel to be a "very serious" infringement. The Commission appears to have taken into account that Interbrew and Danone are large international companies and decided that Interbrew's basic amount for fines should be higher than that of Danone because its higher market share (some 55 per cent as compared to Alken-Maes' 15 per cent). The cartel was of medium duration (five years) which led to 50 per cent fine increases on both companies.

Danone's fine was increased by a further 50 per cent for two aggravating factors. First, recidivism. The Commission noted that Danone had infringed twice before in the flat glass sector (as BSN), but also there was found to be an overlap in the people involved. Danone had the same Chief Executive Officer and some of the managers involved in the *Flat Glass* case were active in Danone's retail business during the beer cartel. Secondly, Danone's threat of retaliation which led to an increase of cartel activity was treated as "aggravating". Alken-Maes was granted a 10 per cent reduction for ending the information exchange. Interbrew was given a 30 per cent reduction for its co-operation with the Commission and Danone/Alken-Maes 10 per cent.

In the second *Belgian* cartel, the Commission found that, through a series of four meetings between October 1997 until July 1998, Interbrew, Alken-Maes, Haacht and Martens had pursued a concerted practice in the Belgian private label market. They held meetings aimed at avoiding a price war and at consolidating the existing allocation of customers, together with an agreement to exchange information.

The Commission considered the infringement only "serious" (because it was limited to the small private label beer segment in Belgium). The cartel was of short duration (only nine months). Since Interbrew and Alken-Maes took the initiative in organising the meetings, their fines were increased by 30 per cent. Although Interbrew disclosed the cartel to the Commission, it could not obtain full immunity because Interbrew had instigated it. Interbrew received, however, a reduction in its fine of 50 per cent. Interbrew's fine was therefore €812,000 and that of Alken-Maes was €585,000. Haacht and Martens were fined €270,000 each.

In the *Luxembourg* cartel case, the Commission imposed much smaller fines on three brewery companies, amounting to a total of €448,000.[68] The Commission found that Brasserie Nationale-Bofferding, Brasserie de Wiltz, Brasserie Battin and Brasserie de Luxembourg Mousel-Diekirch (a subsidiary of Interbrew) had participated in a market-sharing cartel affecting the Luxembourg horeca sector. Notably, they agreed to guarantee each other's exclusive purchasing agreements with horeca customers and took steps to restrict penetration of the Luxembourg horeca sector by foreign brewers. The cartel activity was found to have taken place from October 1985 until February 2000.

Through the cartel agreement the parties agreed not to supply beer to each other's horeca customers tied by an exclusive purchasing agreement. The agreement extended also to beer ties which were invalid and unenforceable in law and more informal investment-based arrangements with an outlet. The agreement was reinforced by a consultation mechanism before supplying new customers and financial penalties for non-compliance.

As regards foreign competition into Luxembourg, there was a common defensive mechanism, by which the parties consulted together if a foreign brewer attempted to negotiate a supply contract with one of their tied outlets.

The cartel agreement was in writing and signed in 1985. It was of unlimited duration and terminable on 12 months notice, which had not been given when Interbrew informed the Commission of the issue in 2000.

Bofferding was fined €400,000, de Wiltz €24,000, Battin €24,000. The infringement was considered "serious" because of the small Luxembourg market affected and because it was not implemented in full. The duration was, however, long (14 years) leading to a doubling of the basic amount. The Commission noted that, other than Interbrew the companies were small and medium-sized. A 20 per cent reduction was applied because of legal uncertainty about the enforceability of beer ties when the agreement was signed which may have led the parties to doubt if certain parts of the agreement were illegal.

Interbrew/Mousel-Diekirch was given *full immunity* because it disclosed the infringement, provided decisive evidence and co-operated fully throughout the investigation. (Interbrew was not barred from immunity here by having been an instigator of the cartel as occurred in the Belgian private label cartel.)

Zinc phosphate

In December 2001, the Commission also fined six small and medium-sized companies a total of

67. Interestingly, the Commission's finding here appears to be based, amongst other things, on an internal *Heineken* document found in *another* cartel investigation. The Commission also sent a Statement of Objections to Heineken and Carlsberg concerning another "non-aggression pact" this year, see IP/02/350, March 1, 2002. However, the proceedings have now been dropped, IP/02/1603, November 4, 2002.

68. IP/01/1740, December 5, 2001.

€11.95 million for participating in a price-fixing and market-sharing cartel in zinc phosphate, an anti-corrosion mineral pigment widely used for the manufacture of industrial paints for the automotive, aeronautic and marine sectors.[69] The companies concerned, based in the United Kingdom, Germany, France and Norway, were fined between €3.78 and €0.35 million.

The Commission and the EFTA Surveillance Authority carried out dawn raids in May 1998. It appears that the cartel began at a hotel at Heathrow Airport in March 1994 and lasted until May 1998, the Commission having evidence of 16 meetings in that period, a further meeting having been planned for July 1998 when the Commission intervened. The companies agreed to maintain the "*status quo*" on quantities of zinc phosphate supplied in Europe and to attribute to each member of the cartel (which they called "The Club") a market share by reference to the 1991–1993 sales figures in France, Germany, the United Kingdom and Scandinavia. They also set "recommended" minimum prices, shared out specific customers and had a monitoring system. During the infringement period, the annual EEA market for zinc phosphate was worth €16 million. The cartel participants accounted for 90 per cent of that EEA market.

The Commission considered the infringement to be "very serious" and of medium duration (between one and five years).

The Norwegian participant, Waardals Kjemiska Fabrikker, approached the Commission shortly after the dawn raids and gave information which the Commission used to address detailed requests for information. As a result Waardals was given a 50 per cent reduction in its fine.

The position of "one" UK participant is more complex. Britannia Alloys & Chemicals started participation in the infringement in March 1994, but its zinc phosphate activities were the subject of a management buy-out in March 1997, the new company being called Trident Alloys. Since Britannia Alloys continued in existence (as a 100 per cent subsidiary of M.I.M Holdings), the Commission fined it for its three year "responsibility" (€3.37 million). Trident Alloys, however, began to co-operate with the Commission after a request for information, providing a written statement and various documents. As a result Trident Alloys, was able to earn a 40 per cent reduction in *its* fine, presumably for the period from March 1997 until May 1998 when it was responsible for the business activities in question. Trident Alloys' fine was therefore reduced to €1.98 million. The other members of the cartel each received 10 per cent reductions in their fines.

Those selling a company might reflect here because, since Trident Alloys co-operation was not applied to the benefit of Britannia Alloys, Britannia Alloys might have been well advised to investigate its own compliance and seek *immunity* for the cartel *before* selling.

Carbonless paper

In December 2001, the Commission fined ten companies a total of €313.7 million for participating in price-fixing and market-sharing agreements for carbonless paper.[70] Arjo Wiggins Appleton (from the United Kingdom) which was found to be the main instigator of the cartel, received a fine of €184.27 million. Nine other companies (from Germany, France and Spain) were fined between €1.34 and €33.07 million. One company, Sappi (from South Africa) was given *full immunity* from fines (under the 1996 Leniency Notice), as the first company to co-operate in the investigation and offer decisive evidence to the Commission.

Carbonless paper is a special type of paper used in business forms, delivery slips and bank transfer forms. The customers are printers, who buy the paper in reels and sheets.

The Commission started its investigation in 1996 and discovered that, between 1992 and 1995, the eleven companies concerned, most of which were members of the Association of European Manufacturers of Carbonless Paper ("AEMCP"), pursued a Europe-wide cartel to implement collective price increases, agreeing on the amount of increases and the timetable for implementing them. The Commission had evidence that five "general" meetings were held at senior level with some 20 other meetings for France, the United Kingdom and Ireland, Spain and Portugal. There were also admissions concerning meetings for Germany, Italy, Denmark and Sweden. Sales quotas were allocated, market shares set and confidential data on prices and sales volumes exchanged.

Interestingly, the Commission appears to have taken a careful approach to defining both the "starting date" and "termination date" of the infringement for the purpose of its proceedings. Thus, the Commission states that it had evidence that collusive contacts occurred from the mid-80s. However, the Commission focused its case on the period starting January 1992, because it had "convergent statements from cartel members" and "firm evidence of regular collusion" between the producers from then.

Similarly, the Commission considered that the cartel may have continued until early 1997.

69. IP/01/1797, December 11, 2001.

70. IP/01/1892, December 20, 2001.

However, faced with denials from eight of the parties that they had continued to participate in collusion after 1995 and, given that the statements of the other three companies diverged considerably and were not "sufficiently documented or corroborated by conclusive evidence", the Commission decided to limit its case to the period up to September 1995. It appears that this was also the Hearing Officer's recommendation.

The Commission found that the EEA market for carbonless paper was worth some €850 million a year during the period of the infringement (1992–1995). Together, the members of the AEMCP accounted for 85–90 per cent of those sales. The Commission considered the infringement "very serious" and of medium duration (one to five years). The Commission also states that in setting the fines it took into account the market shares of the companies concerned and that Arjo Wiggins Appleton, Sappi and Bolloré were multi-national companies with much larger turnovers than the other participants.

Arjo Wiggins' fine was increased by 50 per cent on the basis that it was the leader of the cartel. As noted above, Sappi was given full immunity, as the first company to co-operate with Commission. It also did not act as an instigator of the cartel. The Commission reduced the fines on six companies by 10–50 per cent (including Arjo Wiggins Appleton by 35 per cent) for co-operation and/or not disputing the facts set out in the Statement of Objections.

Banks—German and Austrian

This year there have been two cases in the banking sector, one concerning the *Eurozone currency exchange* issue in Germany, the other concerning the so-called "*Lombard Club*" in Austria.

In December 2001, the Commission fined five German banks a total of €100.8 million for fixing the charges for the exchange of euro-zone currencies.[71] This is a further part of the proceedings last year which were settled with a large number of European banks.[72] Commerzbank, DresdnerBank and Bayerische Hypo-und Vereinsbank were fined €28 million each. Deutsche Verkehrsbank was fined €14 million and the Vereins-und Westbank was fined €2.8 million.

The Commission found that in late 1997 several German and Dutch banks concluded an agreement on a commission of up to some three per cent for the buying and selling of euro-zone banknotes during the three year period preceding the change to euro notes and coins on January 1, 2002.

In January 1999, when the currencies of the euro-zone were irrevocably locked together, this put an end to the selling and buying "spread" charged by banks and bureaux de change to exchange these currencies. The banks thereby aimed to recover 90 per cent of the "exchange margin" income after the abolition of the spread. During 2001 most banks agreed to reduce such charges and to drop them in total for account holders as from October 1, 2001. The Commission then ended proceedings against these banks. The German banks, however, appear not to have done so.

The Commission states that the cartel affected Germany and the Dutch border regions. The infringement was considered "serious". The Commission states that the fines are related to the size of the banks concerned and set to have a fine with a "sufficiently deterrent" effect.

In June 2002, the Commission fined eight Austrian banks a total of €124.26 million for their participation in a price cartel known as the "*Lombard Club*".[73] Erste Bank was fined €37.69 million. Bank Austria and Raiffeisen Zentralbank €30.38 million each. Five other banks were fined between €1.52 million and €7.59 million. The Commission carried out dawn raids in June 1998. The cartel was found to have: fixed interest rates for loans and savings for private/household customers and for commercial customers, to have fixed the fees consumers had to pay for certain services and to have extended also to money transfers and export financing.

The Commission found evidence of a "network of cartel committees" which covered the whole of Austria and all banking products and services as well as advertising. The Commission found that between January 1994 and June 1998 at least 300 meetings took place in Vienna alone. For every banking product there was a separate committee on which the competent employee at the second or third level of management sat. There were "Lending Rates Committees", "Deposit Rates Committees" and a pan-Austrian Committee called the "Federal Lending and Deposit Rates Committee". At a more senior level, it appears that the Chief Executive Officer of the banks met monthly at what was called the "Lombard Club". This CEO meeting appears to have dealt with the biggest issues such as "avoiding uncontrolled price competition" in relation to interest rates. According to the Commission's press release committee meetings might be called, for example, for "joint reflection of measures to be taken" in relation to a change in key lending rates by the Austrian Central Bank. The CEOs also dealt with issues arising from the lower committees.

71. IP/01/1796, December 11, 2001.
72. [2002] ICCLR 22–23.
73. IP/02/844, June 11, 2002.

The Commission found that eight banks played a key role although most Austrian banks participated. Fines were differentiated on the basis of "the company's ability to harm competition on a given market". The Commission stated that it also placed banks of clearly different size in different groups so that parties with roughly similar market shares paid similar fines. A 10 per cent fine reduction was granted under the 1996 Leniency Notice.

It is an interesting case, emphasising also the sort of changes which do not come easily to some on accession to the EU, especially with cartel arrangements which appear semi-institutionalised. One remembers, for example, the various Dutch cartel decisions in the early 1970s, where cartels even had private arbitration systems.

Methionine

In July 2002, the Commission fined Degussa and Nippon Soda €118 million and €9 million respectively for participating in a price-fixing cartel in methionine together with Aventis[74] (formerly Rhône-Poulenc). Aventis was granted *full immunity* under the 1996 Leniency Notice (and would otherwise have received a similar fine to Degussa).

The Commission investigation started in 1999, after Aventis approached the Commission with information on the cartel, seeking immunity under the 1996 Leniency Notice. The Commission found that Aventis, Degussa and Nippon Soda of Japan participated in a 13-year worldwide cartel (between 1986 and 1999). The companies were found to have agreed on price targets, implemented price increases and exchanged information on sales volumes and market shares for methionine. In the pattern of many other cases (save for the names), the parties held "Summit" (top level) and "managerial" or "staff" level meetings.

Methionine is a sulphur containing "essential" amino acid used in the diets of poultry and pigs and in other speciality animal feeds.

The Commission found that, during the infringement period, the annual EEA market was worth some €260 million.

The Commission considered the infringement to be "very serious". The Commission indicated that, in setting the fines, it had taken into consideration the different market shares of those concerned (Degussa being the largest producer) and "the effective capacity by market leaders to cause greater damage than smaller players". Nippon Soda was granted a 50 per cent reduction for co-operation with the Commission, including high quality evidence (documents contemporaneous to the infringement) and information confirming the existence of the cartel prior to 1990. Degussa was granted a reduction of 25 per cent. The Commission states that most of the information provided by Degussa was not provided voluntarily. Degussa also contested its participation in the cartel before mid-1992 and after 1997 when the Commission states that it had clear evidence demonstrating otherwise.

Dutch industrial gases

In July 2002, the Commission fined seven producers of industrial and medical gases a total of €25.7 million for collusion to keep prices high in the Netherlands between September 1993 and December 1997.[75]

The Commission carried out dawn raids in December 1997 and in the course of 1998. The Commission found evidence that there was collusion between 1989 and 1991 and subsequently from 1993 until 1997. The leading suppliers of industrial gases in the Netherlands essentially agreed not to deal with each others' existing customers for between two and five months every year in order to implement price increases which they had agreed. They also agreed to restrict minimum prices and other trading conditions (such as the rent of cylinders and transportation costs charged to customers when offering gases in cylinders and in bulk to new customers).

Prescription applied to the first infringement In assessing fines the Commission took into account the periods of participation in the cartel of the companies concerned and appears to have focussed on the market share of those companies, dividing them into "leading", "large", "medium-sized" and "small" suppliers. Two companies were given 15 per cent reductions for their "exclusively passive" roles and limited participation in the infringement. Two others (AGA and Air Products) were granted 25 per cent reductions for co-operation, providing evidence, comprehensive explanations of documents and for not contesting the facts after receiving the Statement of Objections.

The net result was that NV Hoek Loos was fined €12.6 million and the six other participants were fined between €4.15 million and €0.43 million.

Christie's/Sotheby's

In October 2002 the Commission adopted a decision finding that Christie's and Sotheby's, the fine arts auction houses, had colluded on

74. IP/02/976, July 2, 2002.

75. IP/02/1139, July 24, 2002.

commission fees and other trading terms between 1993 and 2000.[76] Sotheby's was fined €20.4 million.

The Commission's investigation started in 2000. It appears that the two companies agreed on an increase in the commission paid by sellers at auction (so-called vendor's commission) and other trading terms, such as advances paid to sellers, guarantees given for auction results and payment conditions. There were high level meetings.

The Commission found the infringement to be "very serious". Fines were assessed under the 1996 Leniency Notice and the Commission's Fining Guidelines. It appears that on those rules the Commission came near to the "10% of turnover" maximum fine limit in Regulation 17/62. However, Christie's was granted full immunity from fines, having approached both the US authorities and the Commission first with decisive evidence. Sotheby's was also granted a 40 per cent reduction in fine for its co-operation, bringing the fine to six per cent of its worldwide turnover.

Interestingly, both companies granted waivers and the US and EC authorities co-operated both on the substance and the procedure in the two cases. In the United States, the companies are reported to have paid some US$512 million to settle private claims. Sotheby's has also paid $45 million in fines and senior members of both companies are involved in criminal proceedings.

76. IP/00/1585, October 30, 2002.

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

- The Commission's decisions on horizontal co-operation, distribution and Articles 82/86 EC including: environmental waste management systems and airline alliances, the Commission's decisions in *Michelin* and *IMS*, the application of Article 81 EC to agents in the *Mercedes-Benz* case and a huge fine on *Nintendo* for collusive market sharing with distributors.
- Current policy discussions including: a new phase of organisation of DG Competition, Enlargement in 2004, new practices to provide oral leniency submissions and a further settlement of the German book price-fixing case.
- Areas of particular interest: This focuses on the new Motor Vehicle Block Exemption, bringing sectoral deregulation to the distribution of cars, the new draft Regulation 17 (whose adoption was imminent at the time that this article was written) and various energy cases related to Norwegian gas supply. Finally, recent settlements in the sport and broadcasting sector are outlined, including new *UEFA* proposals on access to various media rights packages.

Major Events and Policy Issues in EC Competition Law 2001–2002—Part 2

JOHN RATLIFF*

Wilmer, Cutler & Pickering, Brussels

Table 7: Joint Ventures/Horizontal Co-operation

— *Environmental clearances*
- Settled pattern developing for nationwide systems

— *Simulcasting and collecting societies*
- Steps towards a "one-stop shop" licence?
- Choice of collecting society and administrative fee transparency

— *Financial services*
- VISA "Multilateral Interchange Fee" cleared after level reductions and cost-based variations for *cross-border* payments and services

— *Maritime transport*
- TACA cleared—agreement change, market change

— *3G network infrastructure sharing*
- Two formulas favoured (reflecting different national regulatory systems)

— *Airline alliances*
- Remedies: "Upfront access conditions?" (*Austrian Airlines/Lufthansa*)
- Slot demands much reduced in (*Lufthansa/SAS/United*) trans-Atlantic case
- Approval of alliance concept; intervention on structural issues (concentrated overlaps/high barriers to entry)
- A "sea-anchor" for predatory pricing?

— AND *cases clearing*:
- Pharmaceutical co-promotion and marketing
- Nuclear insurance/reinsurance pools

This article is the second and final part of the overview of "Major Events and Policy Issues in EC Competition Law" in 2002 following from last month's journal ([2003] I.C.C.L.R. 39). This part of the article is divided into three sections:

(1) The European Commission's decisions on joint ventures and horizontal co-operation, distribution and Articles 82/86 EC.
(2) An outline of current policy issues, including reorganisation of DG Competition, Enlargement, new "paperless submissions" for cartel leniency and a further settlement of the German book-pricing case.
(3) A survey of areas of particular interest this year, focusing on: the new Motor Vehicle Block Exemption, the new "draft Regulation 17" (whose adoption was imminent at the time that this article was written), competition and energy and finally, recent settlements in the sport and broadcasting sector.

Overview of major events (continued)

European Commission decisions

Joint ventures/horizontal co-operation

Environment—more national structures[1]

It may be useful first to note that in the 2001 Competition Report the Commission summarised its *general approach* to packaging waste systems after some seven cases involving decisions or comfort letters.[2] The key principles are:

— Companies should be free not to contract with the dominant system or to do so only with part of their packaging.
— There should be unrestricted market access for alternative service providers, with other types of packaging recovery, as appropriate.
— Self-management and individual compliance solutions should remain possible.
— Exclusivity arrangements must be justified.
— Recognising that the duplication of existing collection infrastructure may be difficult, the sharing of collection facilities by collectors is a precondition for competition.
— The marketing of secondary materials by collectors should be as free as possible, while recognising that materials should find an appropriate reprocessing channel.

The Commission is applying these principles to pending and future cases.

In December 2001, the Commission published its decision approving the *German DSD system*, for packaging collection and recovery.[3] The general lines of the decision were summarised last year on the basis of the press release.[4]

With many thanks to Ingrid Cloosterin for her help in the production of this paper.

1. With thanks to Axel Gutermuth for his assistance with this section.
2. EC Commission Competition Report 2001, pp.25–26.
3. [2001] O.J. L319/1.
4. [2002] I.C.C.L.R. 27. The Commission's Article 19(3) Notice is discussed in [1998] I.C.C.L.R. 9.

Two particular points are worth noting in the decision. First, the assessment of the collectors' exclusivity under Article 81(3) EC. DSD grants geographic exclusivity to the collecting undertakings that actually carry out the collection of packaging waste, by agreeing to use only one such undertaking in each of the approximately 500 German collecting districts. The Commission considered this to restrict competition, but acknowledged that it would lead to efficiency gains "because of the positive network effects and scale and scope advantages that can be achieved in the collection of household packing waste".[5]

The Commission expected the resulting cost savings to be passed on to consumers and, interestingly, also identified the improvement in environmental quality, essentially the reduction of the volume of packaging, as an additional consumer benefit.[6]

Secondly, the Commission investigated the appropriate duration of the exclusivity, which depended on the time needed to achieve an "economically satisfactory redemption" of the investment.[7] On that basis, the Commission held that the exclusivity was indispensable and therefore granted exemption but only until end of 2003, not until the end 2007, as the parties had sought.

In October 2002, the Commission published a complex Article 19(3) Notice indicating that it planned to grant negative clearance or exemption "possibly with conditions" to the *Austrian system of collection and recovery of packaging waste*.[8] This system is operated by *ARA* ("Altstoff Recycling Austria") with various other companies.

The Austrian system roughly follows the pattern of the German *DSD* and the French *Eco-Emballages* systems, both of which have been previously cleared by the Commission.[9] In other words, Austrian law requires manufacturers, importers, packers and distributors (so-called "obligated companies") of transport and sales packaging *either* to take back any packaging they put into circulation and provide for a suitable disposal, *or* to adhere to a general system of collection and recycling. The ARA system is such a general system. Obligated companies adhere to ARA for a "licence fee" and thereby also acquire the right to fix the "Green Dot" mark to their packaging. ARA has entered into "waste disposal contracts" with eight sectoral undertakings (called "*branch*" recycling companies, "*BRGs*"). Each of these BRGs organises the collection and/or recycling of a specific type of packaging material (for example metal packaging, wood and ceramics, plastic and textile fibres, paper and cardboard and glass). The BRGs do not carry out all of these tasks themselves, but contract with sectoral recycling companies and regional collection and sorting partners.

As in the *DSD* and *Eco-Emballages* cases, the Commission appears to be concerned about the sort of issues highlighted in its general approach set out above. Some appear to have been resolved here by the way in which that the ARA system is already designed and some appear to have been resolved by undertakings to the Commission.

In general, the Commission focuses on the fact that the ARA system is the only countrywide collection and recycling system, covering all material waste types (except some drinks cartons). As a result, the Commission seeks to preserve conditions that would allow companies to carry out "self-disposal" in all or part and to allow for the emergence of a complete or partial system, competing with ARA. To do so, the Commission aims to ensure the possibility of access to customers (the "obligated companies") and to the disposal structure.

The Commission appears to be satisfied with *access to customers* here, since:

- Obligated companies can use another system even for parts of their packaging.
- Obligated companies can terminate their affiliation with ARA annually on six-months notice.
- The licence fee is based on the volume of packaging actually handled by ARA.

ARA also does not object if the "Green Dot" mark is put on packaging which is not treated by ARA, provided it can be shown that the packaging is dealt with and recycled in accordance with Austrian law and ARA can verify this. This has now been reinforced by an undertaking to the Commission to this effect (it will be recalled that such "Green Dot" issues are a recurrent theme in Commission decisions in this area).

As regards *access to disposal possibilities*, the Commission notes that the BRGs are prevented from working for other systems, but appears to be about to accept such restrictions. BRGs can work direct with companies pursuing self-disposal. Generally, after initial contract periods of seven to 10 years, these contracts appear to be terminable on one-year's notice. Otherwise, the related fee structure of the BRGs appears to be cost-related to the packaging material in question (and not cross-subsidised between different materials (allowing material focused competition)). Sorting and collection partners of the BRGs are also free to offer services to third parties (whether competitors or companies pursuing self-disposal).

The Commission notes an undertaking ensuring that regional collectors (*i.e.* local authorities and disposal companies) can also work for a competing

5. See para.145.
6. See para.148.
7. See para.155.
8. [2002] O.J. C252/2.
9. The *DSD* decision is noted above; for *Eco-Emballages*, see, [2001] I.C.C.L.R. 24–25.

system and, to that effect, can use the same containers or other facilities as are used for the ARA system. This is subject to an appropriate cost adjustment. One of the BRGs also undertook to waive its "most favoured" status under the regional partner agreements as of November 2000 (allowing regional partners to offer better terms to other collection and recovery systems, as appropriate).

The Commission also appears concerned to promote *competition at the regional collection level*, by giving collectors that are currently outside the ARA system sufficient opportunity to compete for ARA business. (Under the ARA system there is just one regional partner per collection region.) To that end, the Commission noted an undertaking that the regional partner agreements are normally to be terminated after three years and would be put up for tender after five years.

There are various references in the notice to ownership of the waste concerned. It is not yet clear from the notice how the Commission plans to view any restrictions on commercialisation thereof.[10]

Collecting societies—"simulcasting"

In October 2002, the Commission adopted a decision authorising new arrangements between most EEA collecting societies for the international licensing of copyright works for "*simulcasting*" (broadcasting on the internet at the same time as broadcasting on the radio or television).[11]

This is an important decision. Essentially what the collecting societies are seeking to do is to offer a new system to broadcasters whereby they can pay royalties for the copyright works which they broadcast in simulcasts to *one* collecting society, which then pays the others for the broadcasting in the territories where they are responsible for the collection of authors' royalties. In short, offering a new "multi-territorial" licensing system. Such systems have been available for the central licensing of mechanical production rights for some years, but not for other forms of exploitation of rights.

The underlying law is complex because, in some circumstances, Article 81(1) EC may not apply to the traditional reciprocal agreements between collecting societies to collect royalties due for each others' "repertoires" of copyright works in their respective territories. However, here it is clear that *any* collecting society could perform the monitoring required (the internet being available virtually anywhere) *provided* that each collecting society was willing to allow others to do so as regards the "repertoire" of authors' rights which it represents and without territorial restriction. To this extent Article 81(1) EC applies to such "multi-repertoire", "multi-territorial" licences. Sixteen collecting societies in the EEA (and many more outside the EEA) have agreed to do so, allowing broadcasters a "one-stop-shop" system for the countries concerned,[12] instead of having to deal with each collecting society territorially one by one.

The arrangements are "experimental" at present, as the collecting societies work out the system.

After intervention by the Commission, the arrangements provide that a broadcaster can go to *any* collecting society in the EEA to fulfil its obligations to pay for its "simulcasts" on the internet. Previously, the collecting societies had envisaged that a broadcaster could only go to its local collecting society for such "simulcasting" licensing payments/services.

In addition, the Commission has asked the parties to separate out their royalty fee from their respective administrative charges, so that there will be a degree of residual competition between collecting societies based thereon. Previously, the collecting societies had envisaged that each society would just offer an aggregate of the national tariffs, without such an "administrative fee" separation. Discussions between the collecting societies on related technical issues, but not national tariff or administrative fee price levels were accepted as outside Article 81(1) EC. It appears that the collecting societies have not yet broken out the royalty and administrative fee elements for this one-stop service and the Commission has accepted that they may take until the end of 2003 to do so. Exemption was given for the experimental period (until December 2004).

All of this is very interesting. It is a very specific case fitting this limited situation. Nevertheless, one senses a careful move by the collecting societies to develop a new service for the internet, where the traditional collection and payment of royalties country-by-country appears out of date and inefficient. Equally one senses a careful response by the Commission, to give the collecting societies some time to adapt, while insisting on the sort of "administrative cost" competition which has been a feature of other services for some years.

If all of this is successful these should be important developments because similar principles could apply to other types of broadcasting, where monitoring at a distance is feasible by various collecting societies and there would be efficiencies in a one-stop-shop, without harm to author's rights.[13]

10. In November 2001, the Commission indicated that it had closed its proceedings relating to *CECED dishwashers and water heaters agreements*. See, IP/01/1659, November 26, 2001. The related Article 19(3) Notice was summarised last year, see, [2002] I.C.C.L.R. 27–28.

11. IP/02/1436, October 8, 2002. The decision, *IFPI "Simulcasting"*, is available on the Commission's website.

12. France and Spain are not party to the system.

13. See also Wood, "Collective Management and EU Competition law", Speech, Madrid, November 2001 (DG Competition website).

B2Bs/Electronic exchanges

B2B clearances are now frequent and following a settled pattern. For example, in December 2001, the Commission decided to grant negative clearance to two B2B electronic market place joint ventures: one called *Eutilia*, is between 11 major European electricity utilities; the other, *Endorsia*, concerns five manufacturers of machines and industry components from Germany, Sweden and the USA.[14] Both are open to all potential users on a non-discriminatory basis and all exchange members will be free to do business through other on-line and off-line methods. The joint ventures will not act as joint purchasers. Both also have safeguards against the exchange of confidential information.

In *Eutilia*, each parent will hold between 8.5 per cent and 9.8 per cent of the shares. No single party will have control, nor will any identifiable group. The B2B is directed to the procurement of goods and services for utilities in the electricity sector and may expand its activities later (for example into financial services). The notifying parties estimate that the B2B will reduce transaction costs by 20 to 25 per cent. In *Endorsia*, each parent will have a 20 per cent interest. The idea is to support the buying and selling requirements of manufacturers, distributors and end-users for branded industrial goods and services, with one single electronic interface in which each seller maintains separate "store fronts" with its own selling and customer access rules, terms and conditions of sale, shipping policy and pricing.

In January 2002, the Commission cleared the *Eurex* financial derivatives exchange between Deutsche Börse and SWX Swiss Exchange, having found that it involved no restriction of competition.[15] The Commission concluded that there was no appreciable risk of co-ordination of the behaviour of the parents on their own markets through this "partial concentration" of their activities.

In May 2002, the Commission cleared an on-line reinsurance exchange called *Inreon*.[16] The B2B electronic platform has been created by Swiss Re and Munich Re, together with Accenture and a technology company Internet Capital Group. Participants on the platform can request quotations for coverage of property risks and catastrophic risks (for example earthquakes, floods, etc.). In addition to Swiss Re and Munich Re, some 12 other reinsurers and some 50 insurers and insurance brokers are to participate in the platform.

In June 2002, the Commission also cleared an electronic trading platform called *Centradia*, set up by four European banks to offer foreign exchange and money market products to their corporate customers.[17] At present, only the four founding banks are in Centradia but others may be invited to participate. The Commission found no restriction of Article 81(1) EC.

Financial services

In the course of the year, two things have happened as regards the *VISA system*. First, in November 2001, the Commission published its decision in relation to various aspects of the VISA payment card scheme.[18] That decision concerns the "*No Discrimination Rule*", the "*Honour All Cards Rule*" and other modified *VISA rules on cross-border services*. The relevant issues were discussed previously.[19]

Secondly, in July 2002, the Commission announced that it had exempted *the amended MIF (Multilateral Interchange Fee) system* for cross-border VISA card payments in the EEA.[20]

To recap, the MIF is an interbank payment made for each transaction carried out with a payment card. Under the VISA system the MIF is paid to the cardholder's bank by the retailer's bank and constitutes a cost for the latter, which is normally passed on to retailers as part of the fee which they pay to their bank for each VISA card payment. There had been a complaint by EuroCommerce, a European organisation of retailers, about the MIF system. The default level of the VISA MIF, which applies unless two banks agree otherwise, is set by the VISA Board and laid down in the VISA payment card rules.

The Commission objected to this system, in particular in so far as the VISA Board could set the MIF at whatever level it though fit and also did not reveal the level of the charge, which was considered to be a business secret.

VISA has now undertaken to reduce the level of the MIF and to cap it at the level of certain relevant costs. Thus, VISA has agreed to reduce the level of its MIF's for the different types of consumer card (for example deferred debit card or credit card payments). VISA has also agreed to cap the MIF at the level of cost for certain specific services, provided by issuing banks, which in the Commission's view correspond to services provided by cardholder banks and which benefit those retailers who ultimately pay for the cross-border MIF. VISA will also allow member banks to reveal information about the MIF and the relative percentage of the different costs categories to retailers at their request.

The exemption was to enter into force as soon as these modifications had been implemented and

14. IP/01/1775, December 10, 2001.
15. IP/02/4, January 3, 2002.
16. IP/02/761, May 24, 2002.
17. IP/02/943, June 27, 2002.
18. [2001] O.J. L293/24.
19. [2001] I.C.C.L.R. 25.
20. IP/02/1138, July 24, 2002, see also [2002] I.C.C.L.R. 28–29.

to last until December 31, 2007. The exemption decision only applies to *cross-border* payment transactions with VISA consumer cards at retailer outlets in the EEA. The decision does not apply to MIFs for *domestic* VISA payments within Member States, nor to MIFs for *corporate* VISA cards. It appears that the Commission considers that different market conditions may be applicable to such cases. In particular, the question as to what constitutes a reasonable and equitable MIF may be answered differently in such circumstances.

Maritime transport

In November 2001, the Commission issued a Notice indicating that it planned to exempt the Trans-Atlantic Conference Agreement ("TACA"), subject to conditions.[21]

In 1999 the parties to the TACA notified a revised agreement (after earlier proceedings and fines) which did not contain an inland tariff but, interestingly, an agreement that the parties would not charge *below cost* when offering inland transport as part of a multi-model operation pursuant to the conference tariff. In August 1999, the Commission exempted these *inland* aspects of the revised TACA until May 2002, but decided to continue its investigation into the maritime aspects of the agreement. The Commission's focus since then has been on the parties' exchange of information, the possible impact on the negotiation of individual service contracts with shippers and the capacity co-ordination arrangements.

The parties have now changed the agreements so that members do not exchange individual contract data or co-ordinate capacity withdrawals beyond what is allowed under Regulation 4056/86 or as would qualify for individual exemption.[22]

The Commission also noted that since it started reviewing the case, competition in transatlantic container trade had improved.[23] The parties to TACA are now competing both within and outside the conference. Only some 10 per cent of TACA cargoes are carried under the conference, the remaining 90 per cent being agreed on an individual basis between shipowners and shippers. Competition with non-conference members has also increased, the market share of the parties to TACA having fallen from more than 60 per cent in 1995 to some 50 per cent in 2001. There are also now only seven members of the TACA agreement, as compared to 17 in 1996.[24]

Interestingly, the Commission appears now to be arguing for a finite term to the liner conference BE, or at least an automatic periodic review thereof.[25]

3G—Network infrastructure sharing

There have been two Article 19(3) notices concerning 3G network infrastructure sharing this year, prompted by the co-operation being considered by many, given the straightened circumstances of the telecoms industry and the regulatory and environmental demands on 3G "roll-out".

Thus, in August 2002, the Commission indicated that it planned to take a favourable view of a framework co-operation agreement between *T-Mobile and VIAG in Germany*.[26] Through the agreement the parties aim to enter the German national market or markets for 3G infrastructure and wholesale roaming services. The co-operation is designed to promote their individual entry into the market or markets for 3G retail services, but does not directly relate to retail markets.

The parties envisage sharing site infrastructure, base stations and radio network controllers, but not including their "core networks", including mobile switching or databases or frequencies. They will also co-operate on national roaming. Under German regulatory law, they are also not allowed to share customer data (other than as necessary for technical operations). The parties expressly agree this also. Nor are they allowed to have a regional division of coverage areas, which rules out overlapping network and coverage areas. The Commission's decision is in addition to clearance obtained by the German regulatory authorities. The agreement is not exclusive to the extent that both parties can agree on similar co-operation with third parties.

On the national roaming side, the parties are to co-operate on bulk purchasing of both circuit-switched and packet-switched national roaming. Each party has the right to resell the roaming capacity of the other party to resellers and service providers. However, the resale of circuit-switched (voice) capacity to MVNOs (Mobile Virtual Network Operators) is subject to the approval of the other party. It is argued that this aims to stop "voice MVNOs" from providing voice over internet based on roaming access charged at data rates, which would undercut the parties in retail markets.

21. IP/01/1713, December 3, 2001, [2001 O.J. C335/12. (The Commission has now done so. IP/02/1677, November 14, 2002.)

22. *e.g.* there are to be no tariff increases in conjunction with any capacity regulation programme.

23. Confidential individual services contracts are now allowed under US law.

24. The Commission has now also cleared the acquisition by *P&O* of full control of the P&O Stena Line. This joint venture had been exempted under Art.81(3) EC until March 2007 after the Commission had found that, in the circumstances, the joint venture faced sufficient competition. That finding has now been confirmed by the Commission's merger control clearance, albeit that the Commission states that it is continuing to monitor market evolution as regards prices and trade conditions. IP/02/1203, August 8, 2002.

25. See, Pons and Fitzgerald, EC Competition Policy Newsletter, February 2002, pp.10–14.

26. [2002] O.J. C189/22.

The agreement is until December 2011 (for approximately 10 years), with provision for automatic renewal. The parties' 3G licences required a rollout to cover 50 per cent of the population by the end of 2005. As a result of the co-operation, the parties envisage a reduction of up to 30 per cent in their network infrastructure investments, with further savings on network operating costs.

In September 2002, the Commission indicated that it also planned to take a favourable position as regards a similar co-operation agreement between *BT* and *One2One* in the United Kingdom.[27] (In fact, BT and VIAG are both in what is now the (former BT) "MMO2" group and T-Mobile and One2One are both in the Deutsche Telekom Group.)

The co-operation is similar, but different. In the United Kingdom, BT and One2One co-operate on 3G site sharing and national roaming. The United Kingdom is divided into three zones.

— An "*Initial Build Area*" in which the parties will co-operate on site sharing, rather than national roaming. The site sharing involves various infrastructure items, but does not include all of the radio access network. Each parties' core network and frequencies are also not shared.
— A "*Divided Area*", where the concept is that each party will be responsible for a separate territory according to a common (radio and roll-out) plan. Each party will then provide roaming services to the other. Each party can conclude national roaming agreements with third party national 3G operators, but not giving access to the other's network without the latter's approval. Nothing in the agreement prevents either party from reselling its 3G telecommunications wholesale services to non-operator third parties (for example service providers and/or MVNOs).
— A "*Remaining Area*" to which the parties will extend their 3G networks using the principles applied for the Divided Area.

The Initial Build Area accounted for the largest part of the population (20 to 50 per cent) and businesses (50 to 80 per cent). The Divided Area for a further part of the population (40 to 70 per cent). The Remaining Area for the least populated areas of the United Kingdom. Under the UK regulations for 3G licences, the parties are required to cover 80 per cent of the population by the end of 2007.

The parties have argued that this co-operation left competition between them at network level in the Initial Build Area and improved competition at the services level in the Divided Area, by allowing them to compete with other 3G operators nationwide earlier. The co-operation also reduced network deployment costs and would leave the parties co-operating in various ways, including content applications, pricing and services.

In announcing its "favourable positions" in these notices, the Commission indicated that any restrictions of infrastructure competition appeared to be compensated by the faster network roll-out leading to increased services competition and other benefits, such as the limitations of the environmental impact (for example because less sites would be required).

Airline alliances/co-operation

This has been a busy year for airline co-operation cases, but interestingly a settled pattern is now developing.

First, in December 2001, the Commission issued a notice indicating that it planned to exempt a co-operation between *Austrian Airlines and Lufthansa*, on conditions.[28] In this case, the Commission's concern was that this co-operation would substantially eliminate competition on some 27 direct routes between Austria and Germany. The Commission therefore focused on conditions and commitments which would facilitate market entry, having determined that there were other airlines interested to do so. Otherwise, the Commission accepted the merits of the co-operation as pro-competitive and worthy of exemption.

The main conditions and commitments required that, during the whole exemption period, Austrian Airlines and Lufthansa[29]:

— Make available up to 40 per cent of the slots which they operate on any given city pair to any newcomer wishing to operate the routes and which would not be able to find those slots through the normal slot allocation procedure. Such slots to be made available by the parties without any *quid pro quo*.
— Agree to maintain a "frequency freeze" during a new entrant's start-up period (at least four consecutive IATA tariff seasons to ensure that new entrants are not squeezed out shortly after entry).
— Agree that each and every time that they reduce a published fare on a route where they face a new entrant, they would apply an equivalent fare reduction, in percentage terms, on three other Austrian/German city pairs on which they do not face competition, as long as the fare reduction

27. [2002] O.J. C214/17; IP/02/1277, September 10, 2002.

28. [2001] O.J. C356/5; IP/01/1832, December 14, 2001. This resulted in a decision in August 2002: [2002] O.J. L242/25; IP/02/1008, July 5, 2002.
29. See paras 105–116 and the related Annex.

on the new entrant city pair remains effective.

— Agree to allow a new entrant to "block space" a number of seats on their services where the number of frequencies offered by the new entrant is less than that offered by Austrian Airlines and Lufthansa.
— Agree to interline with the new entrant on city pairs which it enters on special prorate terms which correspond to those of the parties with its Alliance partners or other carriers on the route concerned.
— Agree to allow new entrants to participate in their joint frequent flyer programmes ("FFP") for the new entrant city pair(s) if the new entrant does not already participate in one of the FFPs or have a comparable programme of its own.
— Agree to enter into inter-modal agreements, in particular with railway companies, on request.

The Commission identified, on the basis of the commitments offered by the parties, several carriers interested to enter the market (Adria Airways and Air Alps). These respectively started to offer services on the Vienna–Frankfurt and Vienna–Stuttgart routes, even before the Commission's decision, on the basis of voluntary action by the parties. Three other carriers were also interested to enter the market, two from Central and Eastern Europe and one a new Austrian airline (Styrian Airways).

The co-operation involves the STAR Alliance network arrangements covering passenger transport, maintenance, airport facilities, groundhandling, co-ordination on fares and schedules for flight worldwide, reciprocal access to frequent-flyer credits, code-sharing and integration of data processing. In addition, there is a joint venture between Austrian Airlines and Lufthansa that shares profits and losses on bilateral traffic between Austria and Germany.

The main interest in the case lies in the Commission's approach to remedies. Here, the Commission appears to have established the commitments that it wanted in order to lower barriers to entry. Then (as in merger control) the Commission market-tested them to see if third parties thought they were sufficient to make new competition viable and to enter the market.

The Commission then appears to have gone further and *proposed that exemption should be conditional on actual market entry* in so far as the Commission suggests that the exemption might be revoked or amended if competitors were not seriously interested to enter the market,[30] a mixture of "upfront buyer" concepts in merger control and the "market entrant condition" approach in cases like *Atlas?*[31]

Some remedies are also quite innovative, such as the condition linking a price reduction on a new entrant route to three other non-competitive routes. The Commission states that this will assist consumer interests on those routes and "(b)y making the costs of price dumping significantly higher for the parties, this condition affords new entrants some protection from predatory pricing by the parties".[32]

Otherwise, there are several more specific aviation points:

— Markets are defined on the basis of the origin and destination ("O&D") of passengers taking into account direct and substitutable indirect flights and other available transport means.
— The Commission distinguishes between "time-sensitive" and "non-time-sensitive" customers.
— "The Commission rejects the parties" submission that competition is "network/hub" based, rather than on individual routes. Accepting that airlines may feel that this is how they compete, the Commission focuses rather on the consumer's point of view, looking for flights from a specific point of origin to a specific point of destination.[33]

Secondly, in July 2002, the Commission issued notices indicating that it planned to adopt favourable positions concerning the *Lufthansa/SAS/United Alliance* (subject to certain proposed undertakings) and the *KLM/Northwest Alliance*.[34] This resulted in notices indicating that the Commission did not propose to take further action in October 2002.[35]

As regards the *transatlantic alliances*, it will be recalled that the framework of the Commission's intervention is complex, since the focus is on transatlantic passenger air transport services and the relevant enabling/procedural regulations do not give the Commission its normal enforcement powers or the ability to apply Article 81(3) EC exemption.

Nevertheless, based on direct application of Article 81 EC using Article 85 EC (the former

30. See para.114.

31. See also Stragier: "EC Competition Policy in the Aviation Sector: State of Play and Outlook", Speech, Lisbon, March 22, 2002 (DG COMP Website); for *Atlas*, see [1997] I.C.C.L.R. 44.
32. See para.110.
33. See paras 46–50.
34. [2002] O.J. C181/2 and C181/6.
35. IP/02/1569, October 29, 2002; [2002] O.J. C264/5 and 11.

Article 89 EC), the Commission's position has been to object to the *Lufthansa/SAS/United Alliance* on transatlantic passenger services *on certain city pairs*. Notably, this year the Commission explained that it was concerned about overlaps on the O&D pairs: Frankfurt–Chicago and Frankfurt–Washington (where the parties overlapped), and on Frankfurt–Los Angeles, Frankfurt–San Francisco and Copenhagen–Chicago (arguing that the parties were, prior to the Alliance, potential competitors on such routes). On these Frankfurt routes, the parties had combined market shares of between 56 per cent and 95 per cent.

Interestingly, United argued that it was *not* a potential competitor on the latter three routes. The fact that United had a hub at one end of the route was not enough to show this. On its own data forecasts it did not consider such routes could attract a sufficient number of passengers with a satisfactory return for the service to be profitable to United. On those routes, United therefore argued that no remedy was justified. In the alternative, the parties argued that Article 81 EC should not apply because of the related benefits.

Without prejudice to these positions, the parties offered several undertakings in relation to the Frankfurt based routes. No undertaking was offered for Copenhagen–Chicago since the parties considered that the passenger market was too small ("thin" in airline terminology) to justify a further service (and raise the possibility of United as a potential entrant).

The result was that the parties undertook:

- To surrender sufficient slots at Frankfurt airport to allow one additional daily competing air service on the city pairs, Frankfurt–Chicago, Frankfurt–Los Angeles and Frankfurt–San Francisco and up to two additional services on the city pair Frankfurt–Washington (if slots cannot be obtained through normal slot allocation procedures).
- To allow a new entrant using such slots admission to the FFP of the parties and the possibility to enter into an interlining agreement with them.
- The parties also undertook not to participate in the IATA tariff conference concerning EU origin services on the identified city pairs.

Otherwise, the German regulatory authorities stated that they would not prohibit fares on indirect services that undercut fares for non-stop services (understanding that German air carriers would receive equivalent treatment in comparable cases on other EEA markets where necessary).

This is an interesting solution when one recalls the scale of the Commission's demands based on its preliminary "Draft Proposal" in 1998 (which envisaged giving up some 108 slots across the Atlantic[36]). In part, the Commission's position appears to have changed because it has now concluded that under certain conditions indirect flights could constitute suitable alternatives to non-stop services on long-haul routes. The Commission also states that it has been co-operating with Member States to reduce market entry barriers.[37]

The Commission followed a similar approach as regards the transatlantic service of the *KLM/Northwest Alliance*, focusing on O&D markets and Amsterdam–Minneapolis/St Paul, on which the parties had combined market shares of 88 per cent and 78 per cent respectively.

The parties here argued that they faced network competition among airline alliances, with competition in Amsterdam from Zaventem and Frankfurt and various *one*-stop (indirect) alternatives to these *non*-stop services. They also argued that they were not actual or potential competitors on the routes concerned and noted that the vast majority of passengers flying from Amsterdam were connecting passengers.

In the alternative, the parties noted how services had increased since their co-operation started so that the number of non-stop passengers to the United States had almost tripled between 1990 and 1999. They also argued that competition was not substantially eliminated on the routes concerned, because there were possibilities for competitors to start new services and to adjust existing services. Slots were available at both ends of the hub-to-hub routes and there were no regulatory barriers to entry, there being an "open skies" agreement between the United States and the Netherlands since 1992. In any event, the two non-stop routes concerned were "thin" which meant that they were highly unlikely to support two or more competitive non-stop services.

The Commission sought no remedies, having accepted that there were substitutable indirect services and no slot or other regulatory barriers to entry.

Thirdly, essentially as a result of the conditions imposed by the US Department of Transportation for US anti-trust immunity, *British Airways and American Airlines* decided to terminate their Alliance agreements. This led to the end of the procedures opened by the European Commission and the UK Office of Fair Trading into the case.[38]

36. [1999] I.C.C.L.R. 67–69.
37. See, IP/02/1569, October 29. 2002.
38. See, Tomboy, EC Commission Competition Policy Newsletter, June 2002, pp.38–39. The US Department of Transportation had tentatively granted BA/AA's application for anti-trust immunity subject to the divestiture of 224 weekly slots at London Heathrow, a price considered too high by the parties.

Fourthly, in July 2002 the Commission indicated that it had serious doubts about the co-operation agreement between *Air France and Alitalia* (by which Alitalia would join the "Skyteam" Alliance).[39] As in other bilateral agreements the Commission's focus is a structural one, considering routes where the parties have high market shares including here, Paris–Rome, Paris–Milan and Paris–Venice.

Fifthly, in November 2001 the Commission issued an Article 19(3) Notice indicating its intention to take a favourable position on the joint venture between nine European airlines to set up an *Online Travel Portal for the purchase of internet travel agency services (now called Opodo)*.[40] The portal is designed with B2B safeguards on separation from its shareholders and to protect confidential information, similar to those accepted by the Commission in *Volbroker.com*. Amongst other things, the Commission appears to be concerned about the parent airlines, which may be considered dominant purchasers of travel agency services in their home market, offering most favoured ("MFN") status to the portal. It is argued that this may restrict competition on the travel agency services market. The parties argue that they face competition from others who offer MFN status. Commitments have now been offered to allow the parent airlines to grant MFN status to the portal, but only if it is commercially justified (*i.e.* not on a preferential basis) and also to allow the parent airlines to offer more favourable terms to others where the benefits warrant it.

Pharmaceutical co-promotion and co-marketing

In 2001, the Commission cleared two interesting co-operative joint venture cases in the pharmaceutical sector, involving co-promotion and co-marketing of products.[41]

In *Pfizer/EISAI*, Pfizer agreed with EISAI to drop its own "pipeline product" for the treatment of Alzheimer's disease, in favour of that of EISAI, which was to take care of most of the R&D and production activity. Pfizer was to handle most of the marketing through its worldwide distribution network. By the time of notification the product, called *Aricept* had been launched and held a dominant position (in terms of high market share) in many EU Member States.

The Commission found a restriction of competition because Pfizer had given up its own R&D. However, the Commission accepted that there was clear consumer benefits and considered that the high market shares were indicative of "first mover advantage" and not to be criticised. The Commission states that "exemption" was, however, limited to seven years from the market introduction of the product because the parties had not demonstrated that they needed longer to recoup their investments. (The case was dealt with by comfort letter.)

In *Pfizer/Aventis*, Pfizer, Aventis and a small US research company called Inhale entered into a series of joint ventures to develop, manufacture and sell an inhalable insulin product to compete with injectable insulin. The market leaders were Novo Nordisk and Eli Lilly in most Member States. Aventis was the third-placed market player. Pfizer was not present in the (injectable) insulin market. The Commission therefore found that the co-operation fell outside Article 81(1) EC.

The parties appear to have argued that a non-compete obligation for 30 years (plus five years *post* termination) was justified. The Commission found it too long to be considered ancillary. The parties therefore undertook to reduce the obligation to 20 years (plus three years *post*-termination). Interestingly, the Commission accepted this in view of the parties relatively weak market position and the lack of appreciable foreclosure resulting from the exclusive dealing arrangements between them. The Commission decided that, in such circumstances, it did not need to determine the exact period required for recoupment of the parties' large investment.

Nuclear insurance pools

During 2001, the Commission cleared three notifications of *nuclear insurance and reinsurance pools*. In two, those for *nuclear property* and *nuclear reinsurance*, the Commission found that the pool concerned did not have appreciable effects on competition in worldwide markets. In the third, related to *nuclear liability* insurance, the Commission found markets to be national and the pools concerned monopolists. Nevertheless, the Commission found that, without the pooling agreements, there would be no supply of nuclear liability insurance with adequate coverage for the risks involved and therefore the pooling agreements did not restrict competition.[42]

39. IP/02/966, July 1, 2002.

40. [2001] O.J. C323/6.

41. "Co-promotion" means two or more companies sell a product under a single trademark. "Co-marketing" means two companies sell a product, each under its own trademark. EC Commission Competition Report 2001, paras 238–243.

42. EC Commission Competition Report 2001, para.203.

Distribution[43]

Table 8: Distribution

— *Mercedes-Benz*
- Agents caught by Article 81(1) EC.
- Hearing Officer considers length of procedure.

— *Nintendo*
- €149 million fine reflecting market impact and deterrence.

— *JCB*
- The complexities of fining around notification.
- €39.6 million fine for rpm, blocking parallel imports/cross-supplies.

Agents caught by Article 81(1) EC

In September 2002, the Commission published its decision in the *Mercedes-Benz* (DaimlerChrysler) case.[44] The case was already described last year on the basis of the press release,[45] but there a number of additional points worth noting on the decision.

It may be recalled that DaimlerChrysler was fined €71.8 million for essentially four practices:

— Restricting parallel trade (mainly to Belgium and Spain) by issuing instructions to its German *agents* only to supply customers in their contract territory and to avoid "internal" (which the Commission construed to mean intra-brand) competition between dealers. DaimlerChrysler argued that these instructions were meant only to prevent parallel imports to unauthorised resellers, but the Commission found that the relevant texts were capable of applying to sales to final customers also. The Commission also found ambiguous pressure on dealers to use their allocation or "quotas" of cars for sales in their territories.

— Requiring its German *agents* to obtain a deposit of 15 per cent of the vehicle price for orders from foreign EC customers.

— Restricting the supply of cars to independent leasing companies so that they could not accumulate stock or qualify for quantity discounts (and thereby compete with DaimlerChrysler's own leasing facilities).

— Agreeing with dealers in Belgium to restrict discounts, through a "ghost-shopper" verification system (and an apparent threat to reduce allocation/quota of new cars to those concerned in giving high discounts).

The most interesting feature of the case is the way that DaimlerChrysler's German *agents* were treated as independent traders bearing a number of commercial risks, so that agreements with them fell within Article 81(1) EC. There is an extensive analysis as to whether the agents are to be considered independent, with the Commission considering that the agents bear a number of risks under the agency agreement concerning certain of their obligations to DaimlerChrysler and otherwise doing a more traditional, broad-ranging assessment of factors suggesting the agents' independence.[46]

Thus, the Commission focused on the way that:

— The agent may discount his commission. This was considered to involve bearing a "considerable share of the price risk" associated with the vehicle(s) whose sale the agent negotiates (and equivalent from a financial point of view to a dealer's margin).

— The agent bears the transport cost of car delivery and the "transport cost risk" (which appears to mean the risk that the customer will not pay it).

— The agent has to use his own resources for the purposes of sales promotion (for example has to purchase demonstration vehicles and vehicles for the agent's own business). These can then be sold second-hand with the agent "bearing the sales risk for this not inconsiderable number of vehicles".

— The agent has to carry out guarantee work on Mercedes-Benz cars, irrespective of where and *via* whom they have been sold. The agent is paid a "guarantee indemnity". However, the Commission's point is that the agent has to do the work at his own expense and ensure that his *actual* cost does not exceed the standard indemnity levels. The Commission argues that this is a further commercial risk for the agent.

— The agent also has to finance a workshop, offer emergency services and keep a stock of spare parts.

It appears that the "agency revenue" is also exceeded "many times over" by revenues from activities pursued on a self-employed basis (we are not given figures in the non-confidential version).

This is the first case of its type and the first after the Vertical Guidelines "restatement" about the

43. In November 2001, the Commission also published its decision in the *Glaxo Wellcome* case, [2001] O.J. L302/1. This was described in last year's paper: [2002] I.C.C.L.R. 62–63.
44. [2002] O.J. L257/1. During 2001, the Commission also cleared *Porsche's distribution system*, finding that it could come within Regulation 1475/95, after certain changes (sales targets to take into account all sales regardless of buyer's residence; Porsche dealers to be allowed to carry out internet on-line sales). EC Commission Competition Report 2001, point 185.
45. [2002] I.C.C.L.R. 61–62.

46. See paras 153–168.

application of the competition rules to agency agreements.[47] It will be interesting to see if Mercedes-Benz appeals. It is predictable that the Commission should take this line, or face the prospect that many distributors might be converted to agents. One senses that overall two factors have tipped the balance here: the amount of demonstration and business vehicle cost (borne by the agent and required by the principal) and the amount of non-agency revenues. Some of the Commission's arguments in the decision that other risks are indicative of agency independence are less convincing.

Otherwise, it is interesting to see the Commission's approach to market definition and market share. In line with the recent indications in the Explanatory Brochure to the MVBE, the Commission treated the car market as subdivided into a number of segments.[48] The Commission's decision on the infringement is based on finding that the measures concerned had the *object* of restricting competition (without showing that they had the *effect* of doing so). However, the Commission uses *market share* to show appreciability of the restrictions and then later in determining the appropriate fine.

Finally, the Hearing Officer's report deserves mention.[49] He comments in his report on the long duration of the procedure, explaining that this resulted from several additional comments provided after the Oral Hearing. This is useful in so far as it suggests that Hearing Officers will try to ensure that the European Courts' case law on such issues will be given practical effect. Reminders *during* the procedure are much more relevant in practice, than successful appeals many years later.

Huge fines for blocking parallel imports

In October 2002, the Commission stunned many by imposing fines of €167.8 million on the Japanese computer games manufacturer *Nintendo* and its seven European distributors. They were found to have colluded to prevent parallel trade in Nintendo's game consoles and related games, including the Game Boy.[50]

The Commission found evidence of practices to block parallel trade between January 1991 and 1998. There were significant price differences between Member States, above *all* between the United Kingdom and Continental Europe (with the UK being much cheaper). Practices included "shutting off supplies completely" or controlling/restricting supplies in the UK to "certain questionable resellers" (which were exporting).

There are four particularly interesting features of the case. *First*, the Commission has chosen to fine not only the supplier, but also the independent national importers/distributors concerned. This is not the first time, but such an approach is not frequent.

Secondly, the Commission has focused on the scale of the infringement as a whole and by each company in setting the fines. Thus, the Commission notes that Nintendo sold five million game consoles and 12 million games in 1997 and that price differentials between the UK and the Continent ranged from 33 per cent to 67 per cent in 1996/1997.

Nintendo was fined €149 million, taking into account its market share and the fact that it was the instigator and leader of the infringement. The Commission also found that it had continued the infringement even after it knew of the Commission's investigation. John Menzies in the UK was fined €8.6 million. It appears that John Menzies had been boycotted to force it to "collaborate better" in the infringement, but the Commission found that it had also attempted to mislead the Commission on the scope of the infringement. Itochu was fined €4.5 million. Five other companies were fined between €0.8 million and €1.5 million.

Thirdly, even though the 1996 Leniency Notice did not apply (since it relates to cartels), the Commission gave reductions for co-operation, relying on the 1998 Fining Guidelines. Both Nintendo and John Menzies co-operated with the Commission.

Fourthly, it appears that Nintendo offered "substantial financial compensation" to third parties, which the Commission appears to have taken into consideration. Again, this is not the first time this has occurred but it is interesting to see.[51]

This is the largest fine for a vertical infringement by a long way. Only 10 years ago fines in the €2–5 million range were more the norm for export ban cases (for example *Viho/Toshiba*, 1991, €2 million; *Newitt/Dunlop*, 1992, €5 million, reduced on appeal to €3 million). Such fining levels suggests that, with its new emphasis on market impact, the Commission is moving up the scale again.

Fines around a partial notification

In March 2002, the Commission published its decision in the *JCB* case.[52] This was noted in part last year from the press release.[53] A fairly complex picture emerges from the decision.

It may be recalled that the Commission imposed a fine of €39.6 million on JCB, which is a leading producer of machines for construction, earthmoving and farming uses. In 1996, Central Parts SA, a French company specialising in the import and sale of construction and earthmoving machinery, filed a complaint with the Commission alleging that JCB had actively prevented Central Parts from purchasing JCB equipment from the UK, where prices were much lower than in France.

47. [2000] O.J. C291/1, points 12 *et seq.*
48. See paras 143–149.
49. [2002] O.J. C228/10.
50. IP/02/1584, October 30, 2002.
51. See, *Rover*, [1995] I.C.C.L.R. 61–62.
52. [2002] O.J. L69/1.
53. [2002] I.C.C.L.R. 63.

Following an investigation, the Commission found that JCB had pursued various practices contrary to (what is now) Article 81(1) EC:

- Official JCB distributors in several Member States were prohibited from selling outside their allotted territories, in particular to other Member States. The prohibition extended to both active and passive sales to end-users and to both authorised and unauthorised resellers.
- JCB imposed a "service fee" on sales made by JCB distributors outside their allotted territories to other Member States.
- JCB implemented, at least in the UK, a remuneration system called "Multiple Deal Trading Support". Under this system, allowances were granted to distributors only for sales within their allotted territory and only for sales to end-users.
- JCB determined the resale or retail prices or discounts for goods purchased from JCB for resale by official JCB distributors.
- JCB's official distributors were obliged to purchase all of their JCB machines and spare parts for resale exclusively from JCB. Purchases from distributors in other Member States (for example cross-supplies) were thus prevented.[54]

However, matters were complicated because in 1973 JCB notified to the Commission a number of agreements with its distributors concerning countries then in the EEC and also outside it. JCB had then been involved in various exchanges, meetings and supplementary submissions to the Commission. In some cases, the Commission had responded thereto with objections and/or a warning letter seeking changes. In others, submissions elicited no reaction from the Commission. Nevertheless, the Commission also found that various JCB agreements and related practices had *not* been notified. The existence of such practices was contested by JCB which argued that it was only preventing sales to unauthorised resellers, or active sales, or requiring legitimate service support fees.

Ultimately, when it came to fines, the Commission took all of this into account and only fined for activities not covered by a notification.[55] In any event, the Commission cautiously decided to deal with the notification issue in the alternative. In other words, the Commission assessed whether the notified agreements could be exempted under Article 81(3) EC (and found not). The Commission *also* considered that the notifications were not valid, since the agreements were not notified as implemented.[56]

The rejection of Article 81(3) EC application is interesting as an example of the new style of assessment in the Vertical Guidelines.[57] Essentially the Commission was focusing on an exclusive *and* selective distribution system which it found was being used to block parallel imports. Predictably therefore, the Commission was generally negative on consumer benefit and indispensability.

There appears also to have been intense debate about market definition issues since, if the product market were wide (for example all earthmoving and construction equipment), JCB's market shares would be lower and it appears that JCB sought to rely on the VRBE since it came into force. The Commission rejected this, considering that it was clear that markets were to be defined more narrowly by product group so that, for example, there was a market for "backhoe loaders", on which JCB was very strong (with some 60 per cent market share in the United Kingdom and more than 40 per cent across the EU). In any event, the Commission stresses that the restrictions reflected in the criticised practices were blacklisted and also thereby not covered by the VRBE. Nor could Regulation 1983/83 apply in such circumstances. Regulation 1475/95 also could not be relied upon since the vehicles in question were not intended for use on the roads.

The Commission considered the infringements to be "very serious". The Commission noted that the EU market for earthmoving machines was some €7,760 million in 1997. The size of the market served by JCB was therefore considerable. The Commission had earlier found that JCB had some 14 per cent of the EU market for all construction and earthmoving machinery. As noted above, some aspects were not fined because of the notification and related uncertainties.

The basic amount of the fine was therefore set at €25 million, increased by 55 per cent for duration and with a further increase for retaliatory measures against a distributor which had not conformed to the JCB practices. The net result was a fine of €39.6 million. In addition, JCB was required to modify its system essentially *either* to an exclusive distribution system *or* to a selective distribution system allowing active and passive sales outside such exclusive territories.[58]

B&W Loudspeakers

In June 2002, the Commission announced that it had cleared *B&W Loudspeakers'* selective distribution system, after various changes.[59] B&W had notified its system in January 2000. The Commission denied that exemption and started proceedings in December 2000 because the system

54. See para.140 and Art.1 of the Decision.
55. See para.246.
56. See, *e.g.* para.205.
57. See paras 207–222.
58. See Art.3(b) of the Decision.
59. IP/02/916, June 24, 2002.

included certain "hard-core", very serious restrictions of competition: minimum retail prices which the Commission found had been disguised as a prohibition on "bait pricing" (offering low prices to entice customers into an outlet), restrictions on cross-supplies between selective dealers and a prohibition on distance-selling *via* internet sales. These have now been deleted.

Articles 82/86 EC[60]

Table 9: Articles 82/86 EC

- *Michelin*—Rebates and bonuses
  - "Safe harbours" like a "3 month rebate" rule?
  - Or the complexities of specific foreclosure assessment?
  - *Or both*?
- *IMS*—Compulsory copyright licensing
  - Convincing decision on abuse
  - Suspended on balance of interests by European Courts
  - An exceptional case because of customer industry insight built into a standard

Post

In December 2001, the Commission announced that it had imposed a fine of €2.5 million on the *Belgian Post Office* for making a preferential tariff in its general letter mail service subject to acceptance of a supplementary contract covering a new mail special delivery service. This relates to the complaint by Hays outlined last year that such practices amounted to an abuse of dominant position, whereby the Belgian Post Office unfairly competed with Hays' document exchange service for insurance companies.[61]

In December 2001, the Commission also published its decision in the second *Deutsche Post* case, related to the *interception of cross-border mail.*[62] This has been discussed before.[63]

There are two interesting points about the decision which may be mentioned. *First*, it appears that there was a financial settlement between the British Post Office and Deutsche Post, entered into without prejudice to the different interpretations which those Post Offices had of the relevant rules on remail, but coming several months before Deutsche Post's settlement with the Commission.[64] The details of the settlement are confidential.

Secondly, there is an unusually full listing of the procedural steps taken by the Commission in the case. There was an intense discussion as to whether Deutsche Post's rights of defence were infringed. Deutsche Post argued that not all of the relevant documents were in the file to which it had access. The Commission considered that the allegedly missing documents resulted from copying errors made by Deutsche Post's own representatives.

The Commission gave Deutsche Post longer to answer the Statement of Objections as a result. There was an application to the Hearing Officer to have a separate hearing on the question of procedural errors. He decided, however, not to do so, on the basis that Deutsche Post "had not made a conclusive case for a possible breach of the right to a hearing". The Hearing Officer also states "a separate hearing on the question of procedural errors … is … not necessary in order to guarantee the full exercise for the rights of the defence and would not be in accord with the Commission's competition procedure or with considerations of economy of procedure".[65]

Rebates and bonuses

In May 2002 the Commission published its decision in the *Michelin* case.[66] This was summarised already last year from a Commission article.[67]

However, there are certain points to emphasise in the decision:

First, the Commission distinguishes between markets for original equipment tyres, new replacement tyres and retreaded tyres. The focus of the case is on rebates which may foreclose the new replacement tyre and retreaded tyre markets in France. The latter was found to a *service* market, since a tyre is generally taken, reworked and returned to its owner. The market essentially concerns trucks.

Secondly, Michelin was found to be dominant on these markets with a market share in excess of 50 per cent for new replacement tyres, five or six times that of its closest competitor and held over some 20 years. Apparently Michelin had even higher shares on the retreaded market. As in the earlier *Dutch Michelin* case,[68] the Commission was also much impressed by Michelin's other structural advantages (here in terms of technological advance, brand recognition, position on adjacent markets, plants, technical and commercial service etc.). The Commission was also influenced by the fact that Michelin could offer rebates which were paid late (in some cases 13 months after they

60. In March 2002, the Commission also rejected a complaint by two Irish companies that the Irish Government had infringed Arts 82 and 86 EC by denying them planning permission to build a second passenger terminal at *Dublin Airport* to the advantage of the State owned company Aer Rianta. IP/02/440, March 20, 2002.
61. IP/01/1738, December 5, 2001; [2002] I.C.C.L.R. 68.
62. [2001] O.J. L331/40.
63. [2002] I.C.C.L.R. 69–70.
64. See paras 76–77.
65. See paras 79–82 and [2001] O.J. C358/5.
66. [2002] O.J. L143/1.
67. [2002] I.C.C.L.R. 66–67.
68. Case 322/81, [1983] ECR 3461.

were earned). The Commission considered this abusive and unfair, forcing dealers to sell at a loss in the meantime and noted that competitors paid rebates immediately. Such policies were considered evidence of dominance. Michelin was also found to be an "unavoidable trading partner" because of the heavy "spontaneous demand" for its products.

Thirdly, the Commission states that:

> "In the first Michelin case ..., and consistently in more recent cases, the Court of Justice has ruled against the granting of quantity rebates by an undertaking in a dominant position where the rebates exceed a reasonable period of three months ... on the grounds that such a practice is not in line with normal competition based on prices ...".[69]

There are no references or footnotes. This proposition is highly questionable if the Commission is suggesting that rebate reference period can *only* be three months long on the caselaw. It is true that the European Courts have upheld Commission decisions *against* rebate systems of longer duration than three months. However, there is *not* some hard and fast rule that more than a three month reference period is illegal. In *British Gypsum*,[70] the Commission indicated in an Article 19(3) Notice that it planned to take a favourable position on a retail scheme "calculated on the customer's *half-yearly* purchases" (emphasis added). Complex though it is, the legality of quantity rebates using a reference period all depends on what is the foreclosing effect of the rebate depending on how it is structured and in all the circumstances.

Nevertheless, it appears that the Commission *wants to establish* a "bright line" rule that generally dominant companies should not have rebates with reference periods of more than three months. *This might be a very good idea* and one which the Commission could apply to other "grey areas" of Article 82 EC, in so far as compliance with the rule offers a "safe harbour". Part of the problem in advising on such issues is that they are very fact-intensive, turning on precise evaluations (assuming that, in many cases, the commercial method in question *is* designed to compete and therefore does not have an anti-competitive *object*). Some "safe harbours" may be welcome, provided that, as with BEs, it is recognised that *other* practices may be lawful also, on more specific assessment.

Fourthly, on the main issues the Commission objects to the following:

— *Payment of a rebate on total turnover in a product.* So that even the small additional purchase of a quantity affects all that turnover and the payment is greater than the "fair marginal or linear return on the additional purchase".[71]
— *Very late payment of rebate earned.* Here, after the dealer had already committed into the next purchasing/rebate cycle. Until 1995 this involved the resale of Michelin tyres at a loss. The Commission also found that it created uncertainty as to the amount of rebate and therefore inability for the dealer to base any decision to purchase from other suppliers on objective figures.
— *Payment of a rebate over a relatively long reference period putting (undue) pressure on a dealer not to buy from others.* This is not new,[72] but it is useful to quote what the Commission states: "Any system under which rebates are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the foreseeable loss for the entire period".[73] The key issue is what is undue pressure taking into account all the circumstances.
— *Rebates paid for increased "progress" in sales over a previous period.*
— *Payment of a rebate based on turnover in several different tyre categories:* However, the Commission found that Michelin did not do this in practice.[74]
— *Lack of certainty as to what rebate will be paid, creating loyalty.* The Commission states: "What the Commission is challenging in the system of quantity rebates is the uncertainty in which the dealer is placed with regard to the reference framework used (the final total amount of sales of Michelin products over one year) which was an unfair practice and created a loyalty inducing effect".[75]
— *Non-objective elements of a rebate/bonus.* For example, where the "bases" for earning bonus points "rest not on objective, but subjective factors" (and could therefore also be discriminatory).[76] (This is also controversial, because often such systems allow for variable criteria covering varied, but equally important services or returns).

69. at para.216.
70. [1992] O.J. C321/11.
71. See para.216.
72. It was already the core principle in the *Dutch Michelin* case! See Goldsmith and Ratliff: "Rebate and Bonus Systems after *Michelin*", 1984 International Business Lawyer, pp.431–6.
73. See paras 228 and 287.
74. See para.235.
75. See para.239.
76. See para.239.

— *Linkage of different product markets in a rebate system*. Here, new replacement and retreaded tyres. This was considered loyalty inducing and unfair as discriminatory since two dealers that bought the same amounts in a year could qualify for different bonuses.[77]

Compulsory copyright licensing

In February 2002 the Commission published its interim measures decision in the *IMS case involving Germany*. This was already described as a press release last year[78] and since has been suspended on applications to the CFI and ECJ. Certain points are worth noting on the decision.

First, controversial as it is to order compulsory licensing of intellectual property, one may note that the Commission's case on abuse is convincing, if only because it is very specific and directed to an exceptional overlay of competition over IP rights.

The Commission's position is explained in detail. Essentially it is that IMS, a dominant company in the supply of (regional) data services in Germany, has negotiated over a long period with its customer (pharmaceutical) industry a reference structure for data collection and organisation. That structure has become, by virtue of this negotiation procedure, a standard for data collection services, because it reflects much specialised insight from the industry. The industry is now dependent on the structure, having interwoven its own inputs with it, and uses it for many purposes: comparison of data to previous years, sales representative organisation, sales reports and market studies. Various products and services are also modelled on the structure (for example software).

Industry views appear to have been extensively solicited by the Commission (with some 85 replies to requests for information and various meetings). The customer industry made it clear that they would not easily consider switching to another reference system because this would involve major dislocation costs (for example customer relationships with doctors, changes to sales representative territories, related negotiations with Workers Councils on German co-determination law, significant conversion costs for software and applications).

Since IMS has claimed that the reference structure is its copyright, the Commission has had to meet the very high standard for compulsory licensing laid down in a combination of the *Magill*, *Ladbroke* and *Bronner* cases. Essentially, the Commission considers this standard met, because this is an *exceptional* case where denial of access to the reference structure will prevent *all* competition in the market and there appears to be no real or potential substitute. A view which is, moreover, reinforced by the fact that IMS appears to have taken an active litigation policy, against attempts by competitors to invent alternative structures (for example based on more detailed reference structures which still rely on underlying postal codes, like IMS's reference structure).

Without prejudice to further investigation and arguments by those concerned, the point is that this appears to amount to a "reasonably strong *prima facie* case", the substantive element required for interim relief.

Secondly, as a result of German data protection law it may also not be possible to have a second or third structure in the market since, by comparing the different reference structure data, individual results can be determined.

Thirdly, IMS notes that under the TTBE a licensor can refuse to license the relevant IP if a licensee challenges its underlying validity. The Commission's response is that this is a general rule for Article 81(1) EC purposes. It does not cover the specific issue here based on Article 82 EC. The challenge to IMS' copyright may not be objective justification for refusal to license.

The Commission found that the balance of interests was in favour of IMS' competitors, which it feared would be forced out of the market if they were denied licences to the IMS structure. The Commission also found that the denial of competition in the market was likely to lead to intolerable damage in the public interest. It is on this "balance of interest" issue that the CFI and ECJ have suspended the interim measures.[79]

In October 2002, the Commission also announced that it had dropped proceedings against *IMS Health as regards alleged abuses in Belgium, Germany, Spain, Italy and the Netherlands*. The Commission emphasised that these proceedings were separate to the German case.[80]

The Commission sent IMS a Statement of Objections in October 2000, concerning discounting practices and the way that IMS made the sale of some services subject to the prior purchase of others, which practices were considered to restrict competition on markets for pharmaceutical market research data and to raise barriers to entry. The Commission found that IMS had ceased much of the criticised conduct and otherwise was now satisfied that other aspects of IMS' behaviour were not a barrier to entry. The Belgian Competition Council had also issued an interim decision ordering IMS to change its pricing structure in Belgium and was reported to be monitoring IMS' related compliance.

77. See para.266. Other issues were not to divert customer demand to rival products, stock levels as foreclosure, national purchasing from a subsidiary as market partitioning.
78. [2002] I.C.C.L.R. 64–65.
79. Zebedee and Dussart-Lefret, EC Competition Policy Newsletter, February 2002, pp.61–64.
80. IP/02/1430, October 4, 2002.

Telecoms

The Commission has sent *Deutsche Telekom* ("DT") a Statement of Objections concerning alleged margin squeezing.[81] It is suggested that DT has left an insufficient spread between its tariffs for wholesale access to the local loop for third parties and DT's own charges for retail subscriptions. The Commission has also brought proceedings against *KPN* concerning its charges for terminating calls on its mobile network.[82] In December 2001, the Commission sent a Statement of Objections to *Wanadoo Interactive*, a subsidiary of France Telecom in charge of internet access provision.[83] The Commission alleges that Wanadoo has abusively priced its high-speed internet access services *via* ADSL technology below their incremental costs and below their variable costs. Moreover, such an abuse has occurred in 2001, a critical time for the launch of broadband access services in France.

Exclusive dealing

In April 2002, the Commission announced that it had closed an investigation into the practices of *Check Point*, an Israeli company specialised in "firewall and virtual private network" software. Such software is used to prevent unauthorised external access to internal computer networks and to provide data encryption in public computer networks.[84]

In June 2001 a Finnish software company, Stonesoft Corporation launched a rival product to that of "Check Point". The Commission found that Check Point had told some of its distributors and resellers that if they sold Stonesoft's product they would no longer be supplied with Check Point's product and, given Check Point's market presence, that this might infringe Article 82 EC. Proceedings were dropped when Check Point gave a formal undertaking to the Commission, including the issue of a letter to its distributors and resellers confirming their right to sell competing products.

Current policy issues

Table 10: Current Policy Issues

- Reorganisation of DG Comp.
  - Chief Economist, internal panels, second cartel unit
- Enlargement: In 2004?
- Cartel leniency—Paperless submissions or a "settlement privilege"?
- Books—*Sammelrevers* settled again
- International
  - Bilateral dialogues, a draft Japanese co-operation agreement
  - Competition in the WTO and ICN

81. IP/02/66, May 8, 2002.
82. IP/02/483, March 27, 2002.
83. IP/01/1899, December 21, 2001.
84. IP/02/521, April 9, 2002.

Reorganisation of DG Competition

In the course of the year, Philip Lowe took over as Director-General from Alexander Schaub, the first non-German to hold the position. *Three* positions of *Deputy Director General* have also been created, one for antitrust (and decentralisation), one for merger control and one for State aids.[85]

There has been widespread debate over Commission procedures in the context of merger control. In part as a result of this, the Commission has announced that it plans to appoint a new "*Chief Competition Economist*" who will be responsible for overseeing the economic aspects of the Commission's decisions in anti-trust cases, as well as in merger control. There is also talk of creating a new form of "checks and balances" system internally, with an *internal panel reviewing proposed decisions* to ensure that they are sufficiently grounded in appropriate evidence.

In September 2002, the Commissioner Monti also announced that the Commission was establishing a second cartel unit.[86]

Enlargement[87]

During the course of the year, in general the Commission has been tackling various internal issues which it considers necessary to resolve before Enlargement. We have also seen the Commission monitoring whether the 13 candidate countries are ready for EU membership which, in the anti-trust/competition field, essentially means:

- Is the economy in question strong enough to withstand competition in the EU?
- Does the candidate country have the relevant legislation in place?
- Does the candidate country have the structures to enforce it?
- Is it doing so?

The short answers, in the Commission's view, based on their annual Accession Candidate report on such issues, appear to be "yes", "yes", "yes" and "yes, but could be improved"! Thus, the Commission notes: "All candidate countries need to continue their efforts to concentrate their resources on the most serious distortions of competition and to follow a more deterrent sanctioning policy".[88]

85. According to the EC Commission's latest Competition Report, at the end of 2001 the Commission had 840 antitrust cases pending, with 284 new cases and 378 cases closed. The "backlog" is falling (from 1,280 in 1996) and less notifications (94 in 2001, as against 206 in 1996).
86. SPEECH/02/384, September 12, 2002.
87. With thanks to Marisa Kakoulas for her assistance with this section.
88. Devuyst, Känkänen, Lindberg, Orssich and Roebling, EC Competition Policy Newsletter, February 2002, pp.3–5.

Table 11:

	2001 Anti-trust Decisions (not including merger control)	Competition Employees (may include for State aid)
Cyprus	**25**[90]	**7**
Czech Republic	**39 anti-trust:** 12 prohibitions 5 abuse cases 22 restrictive agreements	**129**
Estonia	**21 anti-trust** 4 prohibitions 9 abuse cases 8 restrictive agreements (and 7 sectoral investigations)	**40**
Latvia	**32 anti-trust** 6 prohibitions 15 abuse cases 11 restrictive agreements	**40**
Lithuania	**69 anti-trust**[91] 2 prohibitions	**55**
Poland	**238 anti-trust** 218 abuse cases 20 restrictive agreements	**220**
Hungary	**42 anti-trust** 2 prohibitions 30 abuse cases 10 restrictive agreements	**124**
Slovakia	**58 anti-trust** 9 prohibitions 25 abuse cases 24 restrictive agreements	**75**
Slovenia	**13 anti-trust** 4 prohibitions 3 abuse cases 6 restrictive agreements	**12**
Malta[92]	**not available**	**8**

In October 2002, the Commission recommended conclusion of negotiations with 10 candidates: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. In the Commission's view these countries will be ready for membership *from the beginning of 2004*.[89]

Many companies are already trading in these countries and aware of the competition authorities concerned, mainly because of merger control. However, less is generally known of the decisional practice, a gap which one may hope the Commission or the competition authorities concerned will soon rectify with, for example, short descriptions of the main cases in different Community languages on a Commission or a joint "European Competition Network" website. Especially with a view to decentralised enforcement of EC Competition law soon. It may be of interest to note briefly some of the overall statistics, in so far as they are available from the Commission's Accession Candidate reports and national competition authority websites (see Table 11).

There are also some fairly significant fines. For example, in *Lithuania*, in February 2002, the Council detected an abuse of a dominant position in the market for lease of telecommunications network and passed the resolution to impose upon the AB "*Lietuvos telekomas*" a fine of 2 million LTL (some €560,000).

In *Hungary*, a fine was imposed in a case that focused on information exchange between two competitors in the cement industry. The industrial association (Hungarian Cement Association) took part as well, but was not fined. The two participants, *Duna Dráva Cement és Mészm vek Rt* (Duna Dráva Cement and Lime Works Plc) and *Holcim plc.* were fined (HUF 80 million (€336,000) and HUF 40 million (€168,000) respectively. The two undertakings supplied sensitive business information to the association and the information was distributed by the association to the other members of the association.

There were also two other cases in 2002 with fines. In both cases electric energy suppliers were

89. The Commission also "strongly supports" the candidature of Bulgaria and Romania for membership in 2007 and is more reserved, yet still encouraging to Turkey. IP/02/1443, October 9, 2002 and COM(2002) 700 final, October 9, 2002.
90. It is not clear how this is broken out into decisions.
91. Appears to include merger control, Latvia took 13 anti-trust decisions in 2000.
92. In 2000, Malta took 19 anti-trust decisions (nine abuse cases and 10 concerning restrictive agreements).

fined, *TITASZ*, HUF 65 million (€273,000) and *DÉMÁSZ*, HUF 45 million (€189,000). In both cases the suppliers used their existing exclusivity to supply electric energy on their territory to hinder the market entry of newcomers to the adjacent markets of public lighting (reconstruction, operation and maintenance of public lighting service).

Cartel leniency—paperless submissions?

In its 2002 Leniency Notice the Commission carefully states that it rewards the submission of *evidence*. This is proving to be important.

In general, the practice which has developed is for companies to provide a *written statement* helpful to the Commission of its understanding of a cartel and any direct related evidence (for example copies of notes from meetings etc.) which it may have.

However, recently, plaintiffs in US treble damage claims have been seeking those statements from defendants in US discovery proceedings. This has led some practitioners to advise their clients that, at least in cases with US relevance, they should no longer provide such written statements and this has occurred in some such cases. Instead there would be a so-called "paperless" application for leniency with provision of *actual* evidence of infringement which could be obtained on discovery in any event, *but no written statement*. Such developments may help to explain the general considerations noted at the end of the Commission's Notice, referred to above.

Some companies which *have* provided written statements in recent cartel proceedings are arguing that they did so on an expectation of confidentiality and in pursuit of what some are calling a "settlement privilege". The Commission is understood to have supported such arguments in *amicus* briefs in the relevant US proceedings, arguing that disclosure would not be in the public interest and that written statements of this type should not be disclosed outside its Commission proceedings.

The leading solution for the moment appears to be to have *lawyers* brief the Commission with actual evidence although this may not be very satisfactory for the Commission, the companies or the lawyers concerned.

One might think that normally *both* the public and private interests concerned might want a settlement privilege *without* disclosure of the written statement, disclosing a shortcut to a company's involvement in a cartel. Private litigants can still obtain discovery of underlying documents. However, they also *need* incentives for companies to seek leniency in the first place, leading to decisions on which they may "piggy-back" damages claims later.

Books

Having sent Statement of Objections to the German publishers and booksellers association, the publisher Random House and the bookseller, Koch Neff & Oetlinger last year.[93] The Commission has now settled its reopened proceedings concerning the German national book price-fixing system (the *Sammelrevers*).[94] The Commission has done so on the basis of an undertaking from these entities which explains more clearly than previously the essential settlement. The main features are as follows:

- The *Sammelevers* does not apply to cross-border sales of books *to end consumers* in Germany, including cross-border advertising and internet sales.
- The *Sammelrevers* applies if a (German) bookseller bound by it circumvents it (for example colludes with a bookseller in another Member State "on the basis of a common plan" to sell books to end-consumers in Germany at prices below the fixed price; or exports books solely for the purpose of resale to end-consumers in Germany below the fixed price; or controls an establishment in another Member State for circumventing the *Sammelrevers*.
- The undertaking is only to apply until a new German book-pricing law comes into force.

The Commission's decision is partly driven by appreciability considerations (direct cross-border internet sales of German books are not, at present, significant) and subsidiarity issues (Member State interest in maintaining cultural and linguistic diversity). The Commission has granted negative clearance to the *Sammelrevers*, but reserves the right to intervene, if the undertaking is breached (for example by a collective embargo of foreign-based German internet resellers). The Commission also stresses that its position is without prejudice to applicable EC rules on free movement of goods and services and freedom of establishment.

International

Two particular points may be mentioned. *First*, in June 2002, an American Court ruled that a US complainant to the European Commission could obtain discovery of documents from a US based defendant for the purpose of its complaint. The context was proceedings between *AMD and Intel*. The Commission had rejected AMD's complaint and AMD was seeking further information to try

93. IP/01/1035, July 19, 2001.
94. IP/02/461, March 22, 2002.

and persuade the Commission to take its case, pursuant to Section 1782 USC (under which companies may be ordered to give discovery in proceedings to assist a foreign tribunal).[95]

Secondly, the Commission continues to support its *multi- or international* approach to anti-trust enforcement, in *parallel* to the more specific *bilateral* co-operation agreements.[96] The Commission has proposed an EU Council, EC Commission decision to establish an EU/Japan co-operation agreement.[97] The Commission has also been an advocate of competition in the next WTO round and supportive of development of the *International Competition Network* of competition authorities.[98]

Areas of Particular Interest

Table 12: Areas of Particular Interest

- *Cars/MVBE*
  - Huge change (and controversy)
  - No selective distribution with territorial protection
  - No link of sales and servicing
  - Dealers can set up secondary outlets where they wish
  - Multi-branding made easier
  - No intermediary sales limits
- *The new "Draft Regulation 17"*
  - Almost agreement?
  - Allocation of cases
  - National and EC Competition law interplay
- *Energy*
  - Access to (some) Norwegian gas
  - Long-term supply contracts
  - Interconnector flow management as a competition issue
- *Sport and broadcasting*
  - Settlement with UEFA and FIFA
  - Media rights packages

Cars

General

It has been apparent for some time that radical change was coming to the Commission's motor vehicle BE ("MVBE"). This has occurred. In doing so, the Commission has moved away from the philosophy which it endorsed for almost 20 years, that the sale of motor vehicles requires a special regime, including selective distribution and territorial protection and that dealers could be required to offer servicing facilities as a condition of exemption. There *is still* a special regime, but whose particular feature is that it targets *deregulation* of many of the existing practices accepted for the last 20 years.

Territorial protection with selective distribution will now *not* be allowed for cars, albeit that, after much controversy, some protection through a supplier's control of a selected dealer's location will be retained until October 1, 2005.

The "selective" nature of any EU motor vehicle distribution system has also been hugely watered down. Notably, although in principle limits can be set on the number of selected dealers in a system ("quantitative" restrictions), in practice (as from 2005) any of those dealers can establish *further sales outlets* or *delivery points* anywhere in the EU where the supplier applies selective distribution. This means that the density of selected sales outlets in any given part of the EU is no longer controllable and depends essentially on dealers' assessments of incentives. This is not "quantitative selection" in the normal sense.

It appears that a mighty struggle has been going on. Politically, leading figures such as Mr Schroeder, the German Chancellor have been involved, as has Mr Prodi, President of the Commission. Numerous studies have also been undertaken.[99]

At root, it was not surprising that the Commission should contemplate major change, since Regulation 1475/95 and its predecessor had been highly criticised. There was also a widespread view that servicing was too expensive and being used to cross-subsidise low dealer margins on cars.

That the Commission should have gone *this* far is another matter. One senses a bold political agenda to *create* a common market in cars has, this time, won out over the strict competition case to take proportionate steps to alleviate the restrictive effects of parallel networks.

I propose to outline the main features of the new BE and then to comment on such "sectoral regulation by block exemption", as a concept which could be applied more generally in future.

Main features of the new MVBE[1]

First, the new BE applies to cars, vans, trucks and buses (but not tractors or motorcycles). There are, however, variations as between cars and vans, and trucks and buses, notably territorial protection *is* allowed for the latter.

Secondly, the new BE follows the new VRBE format with "*hard-core*", severely anti-competitive restrictions, *no white or grey lists* and applies to the vertical restraints in the related agreements, subject to certain *market share ceilings* (generally

95. *AMD v Intel*, Judgment of the US Court of Appeals Ninth Circuit, June 6, 2002, WCP Competition Bulletin, June 13, 2002.
96. For the US/EU co-operation, see COM (2002) 45 final, January 29, 2002 and 2001 (COM (2002) 505 final, September 17, 2002.
97. COM (2002) 230 final, May 8, 2002.
98. Pons: "Is it time for an International Agreement on Anti-trust", Speech Frauenchiensee, June 2002 (DG Competition website); Devellenes and Kiriazis, EC Competition Newsletter February 2002, pp.25–28.
99. Listed on a specific motor vehicle distribution page on the DG Competition's website.
1. Commission Regulation 1400/2002, [2002] O.J. L203/30.

supplier market share of 30 per cent on markets for new motor vehicles, spare parts or repair and maintenance services; 40 per cent if quantitative selective distribution for new motor vehicles is envisaged).[2] There are also "*general conditions*" which must be met for the BE to apply, "*specific conditions*" dealing with obligations which are not exempt under the BE, provisions for *national withdrawal* of the BE in defined circumstances and provisions for the Commission to declare that the BE does not apply to parallel networks of similar vertical restraints, covering more than 50 per cent of a relevant market.

Thirdly, the new BE sets out various conditions which are intended to bolster dealer independence:

- Dealers or repairers must be able to transfer their agreements/businesses to other dealers or repairers in the supplier's system, chosen by the transferring dealer or repairer.
- Any notice of termination must include "detailed, objective and transparent reasons" for such termination. (The Commission's concern here being that termination may occur or be threatened because a dealer engages in lawful practices, such as multi-brand sales, or sales to other Member States.)
- Agreements must be for at least five years (in which case they can be terminated on six month's notice). If an agreement is of indefinite duration, generally it can be terminated only on two year's notice. However, this can be reduced to one year if compensation is paid or where it is necessary to reorganise the whole or a substantial part of the network.
- Agreements must also be subject to arbitration (or application to national courts).

Fourthly, the BE envisages essentially two distribution formats:

- *Exclusive distribution*, with active sales bans, territorial or "customer group" protection, but no requirement that dealers must only resell to other selected dealers.
- *Selective distribution*, with no active or passive sales ban or territorial protection, but an obligation only to sell to other authorised resellers/repairers.

In practice, most consider this "choice" unrealistic. All manufacturers appear still to be opting for selective distribution.

The Commission states that suppliers can control the place of establishment of authorised dealers or repairers. However, from 2005 that control cannot be used to restrict the freedom of other members of the selective distribution system to establish sales or delivery points anywhere in the EU where selective distribution is applied.[3] (This is commonly called "*the location clause*" issue.) This is very controversial. In part, because the Commission is still willing to allow such control for truck and bus dealerships. In part, because some territorial protection appears justified for the investments and commitment involved, especially if the dealer wishes to focus on one manufacturer's brand or brands. The Commission's approach now is that secondary sales or delivery outlets are required to promote parallel trade between differentially priced national markets. It argues that these cannot work if territorial protection would block such expansion.

Fifthly, dealers must be able to subcontract the provision of repair and maintenance services to authorised repairers.

Sixthly, there are various provisions designed to strengthen competition in repair and maintenance services and spare part supply. Authorised repairers must be able to supply spare parts to independent repairers. Suppliers of spare parts (original or of matching quality), repair tools or diagnostic or other equipment must be able to sell such goods or services to parties other than the manufacturer (*i.e.* authorised or independent dealers/repairers or end users). Independent operators must also be given access to technical information, diagnostic equipment, tools (including software) or training for repairs maintenance and environmental protection measures.

*Seventh*ly, certain types of important restriction are not covered by the BE:

- Direct or indirect obligations preventing dealers from handling competing motor vehicles or preventing repairers from offering services for competing motor vehicles.
- Obligations preventing the dealer from selling leasing services for new motor vehicles.
- Obligations preventing a distributor of cars or vans (but not trucks or buses) in a selective system from establishing additional sales or delivery points in the EU where selective distribution is applied.[4]
- Obligations controlling the location of authorised repairers.

Interpretative guidance

Further clarifications of the Commission's position are set out in the Preamble to the new BE and a new version of the Commission's "Explanatory Brochure" on motor vehicle distribution. Some of this is helpful, some more controversial.

2. Art.3.1.

3. Arts 4.1(d) and 5(2)(b).
4. Art.5.2(b).

First, unlike the position with the VRBE, the Commission suggests that above the market share ceilings there can be no presumption that vertical agreements falling outside the MVBE may be acceptable. However, purely qualitative selective systems can be acceptable, irrespective of market share.

Secondly, the Commission notes that it has revised its position on motor vehicle intermediaries, abolishing its previous notices thereon. As a result, dealers should be able to sell to end-users through intermediaries with authorisations, *without further quantitative restrictions* (previously a car dealer could be required not to sell more than 10 per cent of new vehicles through a given intermediary).

Thirdly, the Commission underlines that dealers and repairers must be allowed to sell through the internet and/or internet referral sites.

Fourthly, the Commission states that supply quotas based on territories less than the common market amount to indirect restrictions on a dealer's ability to supply to any end-user in the EU.[5] This is controversial (and also central to the *Bayer/Adalat* case in the pharmaceutical sector). Many argue that the setting of such quotas is a *unilateral* act and is a legitimate business decision by a non-dominant company that *has* to organise so as to give all its dealers reasonable supplies. (The background is, however, clearly the idea that undersupply and quotas are used to force dealers to agree not to parallel export or discount below certain levels—see, *Mercedes-Benz*, described above). The Commission also states that remuneration based on the destination of vehicles is unlawful. While understandable as a principle, this still leaves suppliers with difficult issues where a dealer fails to meet basic performance standards in his area.

Fifthly, in order to facilitate a choice for firms to operate as dealers *or* repairers, the MVBE does not apply if the two activities are directly linked or indirectly linked through remuneration or rebates.

Sixthly, the Commission clarifies that in the case of *multi-brand* outlets (which it clearly aims to promote), a supplier can require the dealer to display the vehicles in *brand-specific areas* of the showroom in order to avoid any brand confusion.[6] However, an obligation to display the full range of motor vehicles is treated as a non-compete if it makes the sale or display of motor vehicles of competing undertaking "impossible or unreasonably difficult". The further requirements for brand separation in Regulation 1475/95 are also no longer allowed.

Seventhly, the Commission notes that, while selected dealers are entitled to open further sales or delivery outlets for cars and vans, such outlets can be required to comply with the relevant qualitative criteria for similar outlets located in the same geographic area.

Eighthly, the Commission states that in applying these rules it will make *economic assessments* of the relevant markets. As regards cars, that means that market shares may not be based on *all* national registrations, but rather may be broken down further, into segments or groups of segments. This is already discussed in the *Mercedes-Benz* decision and it will be recalled that for price monitoring the Commission also segments the market. The Commission has also published an econometric study suggesting that certain groups may be linked.[7]

Regulation by block exemption—the case of cars

The new MVBE involves far-reaching changes and represents the Commission's third response to the specifics of the car industry.

- In *Regulation 123/85*, the Commission accepted the combination of selective distribution and territorial protection and the link of sales and servicing. In related guidelines the Commission suggested that it might withdraw the benefit of the BE, if prices in different national markets continued to vary beyond 12 per cent.
- In *Regulation 1475/95*, the same essential premises were accepted, although the Commission weakened the degree of exclusive territorial protection by allowing more active sales (advertising, if not personalised mailing). The Commission suggested that it might withdraw the benefit of the regulation as regards particular manufacturers in the event of action inconsistent with the common market (but in practice has not done so). In 1995, the Commission also strengthened the right of dealers to have multi-brand sales, albeit with distinct companies and showrooms to prevent brand confusion and free-riding.
- In *Regulation 1400/2002*, the Commission has taken a radically different approach, clearly of the view that the premises of the previous regulations were at least in part instrumental in maintaining the continuing price differentials between EU Member States which it has monitored for many years.

5. Recital 16.
6. Recital 27.
7. IP/O2/1392, September 30, 2002. The "Explanatory Brochure" is published on the Commission's website, as is the econometric Study: Verboven, "Quantitative Study to Define the Relevant Market in the Passenger Car Sector", September 17, 2002.

An important theme which has developed is the role of the BE itself, in so far as manufacturers argue (with some force) that they should not be criticised now for complying with the BEs and for the resulting development of standardised formats in their networks. It is argued that this is only normal since the BEs were the result of negotiated agreement with the Commission as to the right balance for the various interests concerned. Moreover, some attempts at variation were even prevented (as when one manufacturer considered using the franchising block exemption, leading to a specific provision in Regulation 1475/95 preventing it from doing so).

Another theme appears to be a degree of consensus *against* allowing alternative forms of distribution (notably sales *via* hypermarkets). It appears accepted that this would undermine the classic advantages of selective distribution, although now internet companies, discount stores and even department stores are beginning to break this mould with intermediary sales or links to selected dealers.

There also seems to have been broad agreement that letting the car sector fall back into the general VRBE would not be appropriate, if only because it might promote single brand outlets, whereas the Commission clearly favours an optional system where dealers may *choose* to follow a multi-brand approach or not.

Beyond this, as already noted, we see this time a clear policy to develop a common market in cars. This has prompted concern amongst car suppliers that their systems will be caught up even more openly than before in the tax differentials between EU Member States which *they* do not control. The Commission states that it does not aim to harmonise national car taxation. In practice, one senses that pre-tax prices *will* have to be harmonised with some going up as a result. The change has also prompted major concern amongst independent distributors and dealers, who are caught in the middle between the car manufacturers and the Commission and will have to live with and apply these major changes.

Should the Commission have gone so far? In other words, is this regulation a *proportionate* response to apparent lack of competition in the sector? *Perhaps not. This is a very long list of changes*, as the Commission seeks a bold reform. Less than all this could have been well expected to improve competition considerably and perhaps with less dislocation to many.

Above all, on the core "location clause" issue, which appeared late in the day and was not discussed in the Commission's hearing, it is far from clear that the Commission's position is sound. In EC franchising cases such as *Computer-Land*, it has been considered reasonable to give dealers making significant ongoing investments small, exclusive protected zones (of say one kilometre around an outlet) to protect the worst forms of free-riding. Location control protection is also endorsed in the VRBE. As noted above, a selected dealer can now set up a full sales outlet or a delivery outlet *on the doorstep* of another.

Clearly the Commission wanted to strengthen cross-border selling structures and feared a web of small territories foreclosing the market. The Commission can also say parallel network effects require a stricter solution. However, this does not address legitimate issues of protection from free-riding. Some dealers may well now use this right *irrespective of different price levels in different EU Member States* to improve their catchment bases and "trade up their locations". This *radically* changes the economic proposition of a car dealership business. The Commission argues this may not happen. It will be interesting to see.

Arguably the car sector is a special case. However, the Commission's rapid change in direction is also unlikely to give much comfort to other sectors where networks of agreements based on the Commission's BE formats are prevalent.

This is also *sectoral regulation by block exemption*. It is the *technical* position that a BE is not "binding law", but only a "safe harbour exemption", to be used if the parties wish to avoid more complex individual appraisals. However, the *practical* position here is different. This *sector specific* BE *is* binding regulatory law which has to be followed, all the more so since the Commission states that more specific individual "exemptions" are unlikely to be granted.

The MVBE is one of the most significant pieces of competition engineering by the Commission so far and an important precedent for the future for sectoral regulation. There *have* been major sectoral reforms before in some EU Member States. One thinks, for example, of the UK reform of the *beer* sector. However, this level of sectoral reform is new at EU level. As in the case of the insurance BE, all this raises questions as to the proper parameters of block exemptions. Should the Commission's BEs be required to be strictly proportionate responses to the defined issues or can they legitimately include broader steps generally to *promote* the common market? In both insurance and cars, the Commission appears to be taking the latter view.

Decentralisation—the "New Draft Regulation 17"[8]

In the course of the year the Commission and the EU Member States have been working on the new draft Regulation 17 and, in particular, focusing on

8. [2000] I.C.C.L.R. 105–110 and [2001] I.C.C.L.R. 67–72 for background.

the balance of power in the "EC Competition Network" concept, as well as the interplay and delineation of EC and national competition laws. It appears that several principles were agreed in July and adoption of the "New Draft Regulation 17" may be imminent. The current position appears to be as follows[9]:

First, the competition authorities should have an equal say in the system, but with a "special role" for the Commission (for example reflecting *Walt Wilhelm*[10] and *Masterfoods*[11]).

Secondly, there should be an indicative time limit for the reallocation of cases amongst the competition authorities, within a maximum time period of three months.

Thirdly, the Commission is not to be just a "clearing house", giving *all* the cases to other national competition authorities. The Commission will deal with some cases itself. It appears that an allocation principle has been agreed that if the "centre of gravity" of the case is in one EU Member State, then the case will be dealt with there. If there are anti-competitive effects in three or more EU Member States then the case will be dealt with by the Commission. In between the two, cases may be dealt with in parallel by more than one competition authority or by one authority or another. The Commission's position appears to be that, in principle, one authority should be responsible in each case, but with parallel action if there are, for example, regional cartels.

Fourthly, the Commission considers that what is involved here is not a *decision* allocating competence, but rather than application of a system of parallel jurisdiction, with each competition authority having the faculty to abstain from acting if it so chooses.[12]

Understandably, there is already a fair amount of debate about this, in particular, in so far as there are material differences in the structures and procedures of the national competition authorities. It is arguable that the expression of wills to act or not to act amount to a decision materially affecting the position of those concerned. It may also be argued on *IBM* principles that the act in question is a preliminary step in a "Community" procedure and not, therefore, a decision capable of challenge.[13] All the more so since an appeal of such a decision would severely delay any relevant investigation. One may also note that the Commission retains a discretion to act, consistent with *Automec 2*.[14]

This is likely to continue to be a subject of debate until national competition authorities are broadly similar and the procedural rules also. It is also not clear that all parties will see their interests as in favour of looking past the issue to the substantive result. If a company seeks fast resolution of its case (as in merger control), it may be willing to do so. However, if it faces serious negative consequences such as different sanctions, because of the change in enforcing authority, or if it considers the procedure of the national competition authority to lack certain defence rights, that may be another matter and we may see the issue go to court.

Fifthly, the Commission will be able to remove a case from a national competition authority ("NCA"), by deciding to intervene, so that the Member State has to suspend its proceedings in the mean time, but will not be able to *force* an NCA to act. The Commission's ability to remove a case is, however, to be subject to certain principles:

- Where there are conflicting decisions in a case.
- Where the envisaged NCA decision is in conflict with consolidated case-law.
- Where there is undue delay in the proceedings.
- Where there is a need to develop EC Competition law on the issue.[15]

Sixthly, a crucial point of debate has been the relationship of EC and national competition law. Understandably so because, in almost all EU Member States, there are now developed competition law systems, reflecting in part a "soft harmonisation" based on EC competition law, but also variations and innovations based on local circumstances and work on particular issues. Member States' competition authorities do not want to lose that position, nor do the Member States' themselves want to lose the essential power of decision which they have currently under *national* competition law (albeit consistent with their broader Community obligations). Some also see the Commission's initiatives here as an attempt to *harmonise* national competition laws, by forcing them to follow the EC model more strictly.

That said there also appears to be greater convergence and co-operation between European competition authorities today than ever before, including the movement of ideas *from* the national competition systems to the EC level, as

9. This section is largely based on a presentation given by Emil Paulis to the IBA Conference in Fiesole, September 2002, together with a non-confidential July draft available from the EU Council on application. The "new Draft Regulation 17" was adopted on November 26, 2002, see IP/02/1739, November 26, 2002.

10. Case 14/68, *Walt Wilhelm v Bundeskartellamt* [1969] E.C.R.-1.

11. Case C-344/98, *Masterfoods v H.B Ice Cream* [2000] E.C.R. I-11369.

12. Art.13.

13. Case 60/81, *IBM v Commission* [1981] E.C.R. 2639.

14. Cases T-24 and 28/90, *Automec 2* [1992] E.C.R. II-2223.

15. Art.11.

well as the other way. There are also now specific meetings between national competition authorities.

What does all this lead to in terms of the principles governing the relationship of EU and national competition laws? It appears that:

— The principle of the parallel application of EC and national competition law has been retained, with the *Walt Wilhelm* obligation of convergence.
— It has also been agreed that where a case affects trade between EU Member States a competition authority will *also* apply EC competition law (some NCAs were already, but not all).
— As regards Article 81 EC, *stricter* national law is *not* to be applied.
— As regards Article 82 EC, *stricter* national law *can apply* (which is apparently designed to accommodate such law, for example, in Germany).
— A notice on "effect on trade" is to come (as the Commission also explained in relation to the newly revised *de minimis* (competition) notice).[16]

Seventhly, as regards decisions, NCA decisions will have national effect, not Community-wide effect. NCAs will be able to take all decisions, except positive decisions.[17]

The Commission's decisions will have Community-wide effect and a special position in the system (since on *Masterfoods* national Courts and NCAs will treat them as precedents unless they distinguish them or they may make referrals to the ECJ under Article 234 EC). (The Commission also stresses that its *own* decisions remain subject to review by the European Courts so that overall the EC Competition legal hierarchy centralises there.)

There will be four types of Commission decision:

— *Prohibitions*, including structural remedies and fines.
— *Interim measures*, (but the Commission emphasises no longer "on demand").
— *Commitment decisions*, where the Commission records undertakings given in settlement of a case.
— *Positive decisions* with binding effect (again no longer "on demand").

The Commission is also to have the power to adopt block exemptions "in close co-operation with the competition authorities of the Member States".

16. Art.3 and Preamble para.8.
17. Art.10.

Eighthly, there will be exchange of information within the "European Competition Network", both between the Commission and NCAs and between/amongst NCAs. This is only to be for the purposes of enforcing Articles 81 and 82 EC. Such information is not to be used for the application of national competition law, except if there is full convergence with Articles 81 and 82 EC (apparently applying *Spanish Banks*[18]).[19]

This has also been the subject of much debate with some arguing that there should be an opportunity for the parties to object to transfer of the information through an *AKZO* procedure.[20] In any event, it appears that the *SEP* principles[21] also still apply, so that there should be no transfer to an NCA, if it is shown that there is a risk that, in doing so, the information may come into the hands of other market players or "interested" Ministries. Authorities must respect the confidentiality of information supplied, with the override that there can be disclosure where there is a necessity to use evidence for proof of an infringement.

Ninthly, there will be safeguards on sanctions where cases are transferred (or as the Commission puts it "not allocated" to one NCA or another). Sanctions can be on companies or natural persons (since this varies in national law) but, if the latter, cannot include prison. It is also clear that, in this context, the Commission would like to promote the development and/or harmonisation of EC and national leniency programmes.

Finally, it may be recalled that the Commission is seeking broader powers of enforcement, including inspections at home and the right to take oral evidence.[22] These are very controversial. It will be interesting to see precisely how the Commission and EU Member States envisage their use in the legislation to come. Some Member States already have such powers in the their national laws. Cases such as *Roquette* this year, show that the use of such rights is likely to be hotly contested.

Energy

In the course of the year, there have been three main competition developments in energy: two cases related to *Norwegian gas*, and the Commission's investigation of the *UK/Belgian interconnector* case.

18. Case C-67/91 *Dirección General de Defensa de la Competencía v AEBP* [1992] E.C.R. I-4785.
19. Arts 11 and 12.
20. Case 53/85, *Akzo Chemie v Commission* [1986] E.C.R. 1965.
21. Case T-39/90, *SEP v Commission* [1991] E.C.R. II-1497.
22. Arts 19 and 20.

Partial opening of long-term Norwegian gas supply

GFU

The "GFU" is a Norwegian "Gas Negotiation Committee" which, amongst other things, co-ordinates joint sales of Norwegian gas production. The GFU is composed of two permanent members, Statoil and Norsk Hydro and, according to the Commission, was also "occasionally extended to certain other Norwegian gas producers". The Commission has objected to its activities and obtained agreement that its operations would be discontinued for the future. However, there has been intense controversy concerning *existing long-term supply contracts*, partly in so far as it is argued that important investment decisions were based on these contracts, which cannot therefore simply be renegotiated without undermining their whole economic rationale. The Commission's position has been that the contracts have to be changed or their anti-competitive consequences would not be removed for many years to come. In 2001, the Commission sent Statements of Objections to the members of the Committee accordingly.[23]

At the end of 2001, it appears that both the Norwegian Government and the parties concerned responded with the argument that the GFU scheme had been discontinued for sales to the EEA *(only) as of June 2001*, pursuant to a Norwegian decree and that, until then, the companies had been *compelled* to enter into the joint sales through the GFU system established by the Norwegian Government. As a result the EC Competition rules did not apply to their activities.

Since then, the negotiations have continued and, in July 2002, a settlement was announced.[24] As regards the permanent members of the GFU (Statoil and Norsk Hydro), it appears to have been agreed that these companies are to negotiate individually when contracts come up *for review*. Further, they are to reserve certain gas volumes for new customers who have not previously bought from the Norwegian gas producers. Statoil and Norsk Hydro have agreed to make available 13 and 2.2 billion cubic metres of gas respectively, on commercially competitive terms, between June 2001 and September 2005. This corresponds to some 5 per cent of Norwegian gas sales per year. Although not part of the GFU case, Statoil and Norsk Hydro have also confirmed that they will not introduce territorial sales restrictions or resale restrictions in their gas supply contracts.[25]

As regards six groups of Norwegian gas companies (ExxonMobil, Shell, TotalFinaElf, Conoco, Fortum and Agip), it appears that similar commitments were given to those of Statoil and Norsk Hydro to the effect that they will negotiate individually when contracts come up for review.

As regards the other Norwegian gas producers, the Commission states that it has decided to close the case "under the assumption" that they will sell Norwegian gas individually in the future.

Marathon/Thyssengas

In November 2001, the Commission also indicated that it had closed its proceedings against *Thyssengas*, related to a complaint by *Marathon* of an alleged joint refusal to give Marathon's Norwegian gas access to Continental European gas pipelines.[26] Thyssengas has given a series of undertakings on balancing, trade in capacity rights, congestion management, transparency and the handling of access requests. The Commission's investigation continues as regards the other companies alleged to be involved in the joint refusal.

Rigidities in interconnector flows

In March 2002 the Commission announced that it had closed an investigation into possible competition infringements on the *UK/Belgium gas interconnector*.[27]

In January 2001 the UK Department of Trade and Industry raised concerns that *imports* to the UK *via* the gas pipeline had switched to *exports* to the Continent and did not switch back until two weeks later, although UK prices were higher than on the Continent. The Commission therefore checked whether there might have been any anti-competitive behaviour.[28] In other words, collusion to "screen off" the UK market and benefit from higher gas prices, or action by Distrigas, the Belgian company (perhaps with others) to influence the flow of gas, or unnecessary rigidities in the pipeline flow decisions.

The Commission found that the gas producers owning the interconnector capacity did not collectively influence the change in gas flow. The high UK prices and the differentials between the United Kingdom and the Continent were mainly related to differences in market structure. The market in the UK is fully liberalised with "gas-to-gas" competition. The market on the Continent is not so liberalised and still largely influenced by the oil price. The Commission found that Distrigas had an "influential role" in the change in gas flow. However, the Commission found no evidence of infringements or that Distrigas would have opposed transport of gas from the Continent to the UK.

23. [2002] I.C.C.L.R. 75.
24. IP/02/1084, July 17, 2002.
25. There have been reports of some agreement in the *Gazprom* case, but not a final settlement. Reuters, July 17, 2002.
26. IP/01/1641, November 23, 2001.
27. IP/02/401, March 13, 2002.
28. Distrigas being involved both in gas transmission and gas trading in Belgium.

However, the Commission identified some rigidities in the agreement governing the interconnector, which restricted gas shippers' ability to transfer capacity to third parties. Notably, the long minimum duration of assignment and sub-lease contracts and the high minimum amounts to be delivered through such contracts. In November 2001, the gas shippers through the interconnector agreed on more flexible rules, including quicker flow transition rules and less stringent sub-lease conditions for interested third parties. These were to be implemented in a staged process by 2003. They also agreed on increased transparency by announcing flow reversals in advance.

What appears to have happened therefore is that flow changed to follow high Continental prices, UK prices then rose and gas could not be switched back, reducing prices again, because of the way that the various contracts were organised. The Commission has intervened to allow the flow to change faster. An interesting case, raising the prospect of a whole new dimension to Commission intervention in interconnector management!

Other

In September 2002, the Commission announced that it had cleared two agreements whereby *EdF Trading* in the United Kingdom would supply gas to *WINGAS*, the German gas wholesale company.[29] The agreements are for 10 years starting in 1998/99, but renewable for a further five. They concern 2 billion cubic metres of gas per year. Such volumes represent some 20 per cent of WINGAS' total annual gas purchases. Certain amendments were required in so far as the agreements originally provided for reductions in the amount bought by WINGAS, if EdF Trading sold to new market participants in WINGAS' main supply territory. EdF Trading can now sell to all wholesalers in Germany, incumbents and new entrants, on the German border.[30]

Sport and broadcasting[31]

Transfer rules

On June 5, 2002, the Commission announced that it had closed its investigation into the *FIFA regulations on international football transfers*.[32] The Commission had sent a Statement of Objections to FIFA in December 1998 taking the view that the transfer rules (concerning the international transfers of football players under contract the as to transfer of football players from non-Member States to Member States) violated EC competition law and did not qualify for Article 81(3) EC exemption. The rules agreed with the Commission have now been formally adopted by FIFA and the related complaints either withdrawn or rejected.[33]

Broadcasting and other media rights

The Commission's general position as regards exclusivity of broadcasting rights is that exclusive contracts for a single sports event or for one season in a given championship does not normally pose any competition problem, but exclusivity of a longer duration or for a wide range of rights can restrict competition, as it is may lead to market foreclosure.[34] It now appears that the Commission is also focusing on "disaggregation" of the (developing) package of media rights in order to promote competition further.

In July 2001,[35] the Commission expressed the preliminary view that the collective, exclusive sale by UEFA on behalf of national clubs or football associations of the broadcasting rights to the final stages of the *UEFA Champions League* amounts to a price-fixing agreement and limits the broadcasting of football, since one broadcaster usually is awarded *all* the rights for a long period of time.

After negotiations this year, in August 2002, the Commission published an Article 19(3) Notice, proposing to take a favourable position on UEFA's revised commercial policy as regards the selling of broadcasting rights and other media rights.[36] That policy contains a commitment from UEFA to award the TV rights following a public invitation to bid to broadcasters. UEFA will award the TV rights contracts of the UEFA Champions League for a period not exceeding three UEFA Champion League seasons.

UEFA will also offer its TV rights in several smaller packages. UEFA will have the following exclusive rights:

- To sell two main live rights packages (free or pay-TV) each comprising two matches *per* match night.
- To sell the remaining matches for live pay-TV/pay-per-view exploitation.
- To sell a highlights package covering all matches of the UEFA Champions League. (From Thursday midnight, one day after the last match of the match week, both UEFA and the football clubs can exploit the deferred TV rights.)

29. IP/02/1293, September 12, 2002.
30. In January 2002, the Commission also cleared a hydro power production JV between *E.ON* and *Verbund*, IP/02/62, January 15, 2002.
31. With thanks to Natasha Benalal for her assistance with this section.
32. IP/02/824, June 5, 2002.
33. [2002] I.C.C.L.R. 77.
34. Speech of Alexander Schaub, *Sports and Competition*, at the European Competition Day, Madrid, February 26, 2002.
35. [2002] I.C.C.L.R. 78–79.
36. [2002] O.J. C196/3; see also IP/02/806, June 3, 2002.

— To sell live TV rights outside the EEA area.

Moreover, both UEFA and the clubs will have the right:

— To provide video content on the internet.
— To offer streaming of live audio.
— To provide audio/video content *via* UMTS services.
— To exploit the physical media to archive material from the previous UEFA Champions League seasons (with an embargo of 48 hours after the final).
— To sell licences to live radio broadcasting of UEFA Champions League football matches on a non-exclusive basis. (In all, it appears that this splits the media rights into some 14 smaller packages, some exploited by UEFA and some *co*-exploited by UEFA and the individual clubs.)

The new rules will take effect in the 2003–2004 season if they are approved.

The separate sale of internet and 3G mobile services from traditional TV broadcasting is an interesting concession to Commission requirements. The Commission has previously complained that companies were stifling technological development by buying up the new media rights and leaving them unused, to protect their larger investment in TV rights.

The Commission has also started an investigation into the policy of the *International Olympic Committee* ("IOC") regarding the non-exploitation of new media rights and is also investigating the *English Premier League* and the *German Football Association* regarding issues of joint-selling of TV rights.[37]

The Commission is also continuing its case against *Telefónica and Sogecable*, Spain's leading digital TV platforms, concerning the rights to the Spanish Premier League sold to their joint venture, *Audiovisual Sport*.[38] It appears that there are still concerns, notably the duration of the joint-buying arrangement.[39]

Sporting rules

In April 2002, the Commission announced that it had closed its investigation into the *FIFA rules on player's agents*.[40] One of the complaints had been that the ban on players and clubs using the services of agents not licensed by the FIFA was anti-competitive. The Commission had stated in its Statement of Objections that it considered that the FIFA rules prevented or restricted access to this profession, particularly by requiring payment of a large and non-interest-bearing deposit.

FIFA has now agreed to remove this rule. FIFA has also adopted new rules that the Commission considers justified in order to maintain appropriate professional standards among players' agents. Under the new rules the deposit has been replaced by a liability insurance. A test has been introduced for people who want to become a players' agent, as well as an obligation to sign a Code of Professional Conduct.

In August 2002, the Commission also indicated that it had rejected a complaint against the *IOC* by swimmers banned from competitions for *doping*.[41] The swimmers alleged that the anti-doping rules adopted by the IOC (and the *Fédération Internationale de Natation Amateur*) regarding the threshold for defining the presence of a banned substance in the body as doping, restricted competition within the meaning of Articles 81 and 82 EC (and also restricted the freedom of swimmers to provide services under Article 49 EC).

The Commission stated that, although the contested anti-doping rules derive from a restrictive agreement, they are closely linked to the smooth functioning of competition in sport, they are necessary for the fight against doping to be effective and their restrictive effects do not go beyond what is necessary to achieve this objective. Accordingly, the Commission concluded that the anti-doping rules were not caught by the prohibitions under Articles 81 and 82 EC.

Ownership of sporting clubs

In June 2002, the Commission closed its investigation into the UEFA rule on *multiple ownership of football clubs*.[42] The investigation was triggered by a formal complaint by ENIC[43] in February 2000, concerning an UEFA rule that no two or more clubs participating in an UEFA club competition may be directly or indirectly controlled by the same entity or managed by the same person. ENIC considered that the rule distorted competition by preventing and restricting investment in European clubs.

The Commission considered that the UEFA rule was a decision in principle caught by Article 81(1) EC. However, the Commission accepted that the rule could be justified by the need to guarantee the integrity of the UEFA competitions (*i.e.* to avoid situations where the owner of two or more clubs participating in the same competition could

37. Speech of Alexander Schaub, *Sports and Competition*, at the European Competition Day, February 26, 2002.
38. IP/02/296, February 22, 2002.
39. SPEECH/02/79 by Mario Monti at the European Competition Day in Madrid on February 26, 2002.
40. IP/02/585, April 18, 2002.
41. IP/02/1211, August 9, 2002.
42. IP/02/942, June 27, 2002.
43. ENIC owns stakes in six clubs; Glasgow Rangers FC in Scotland, FC Basel in Switzerland, Vicenza Calcio in Italy, Slavia Praga in the Czech Republic, AEK Athens in Greece and Tottenham Hotspur in England.

be tempted to rig matches). Accordingly, Article 81(1) EC was not infringed.

The Commission stated that this was fully in line with the Declaration on the specific characteristics of sport adopted by the European Council in Nice.[44] In other words, a rule may fall outside the scope of competition rules despite possible negative business effects, provided that it does not go beyond what is necessary to ensure its legitimate aim (*i.e.* to protect the uncertainty of the results in the interest of the public) and provided that it is applied in a non-discriminatory way[45]. An interesting (and by now expected) "sports rule of reason" formulation!

44. Annex IV to the Presidency conclusions, Nice, December 7–9, 2000.

45. In August 1999, the Court of Arbitration for Sports in Lausanne, Switzerland, delivered a decision on a similar matter, *i.e.* multi-club ownership, in a case between two ENIC-owned football clubs and UEFA. The Tribunal decided that EC competition law is applicable to the rule, but concluded that the rule "preserves or even enhances economic competition between club owners and economic and sporting competition between clubs". See CAS 98/200 *AEK Athens and Slavia Prague*.