

# Major Events and Policy Issues in EC Competition Law, 2004–2005 (Part 1)

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 Competition Law; EC law

This article is designed to offer an overview of the major events and policy issues related to Arts 81, 82 and 86 EC in 2004–2005.

The article follows the format of previous years and is divided into three sections:

- A general overview of major events (legislation and notices, European Court cases, European Commission decisions, ECN developments and new sector inquiries).
- Discussion of current policy issues, including cartel enforcement, private actions and Art.82 EC modernisation.
- An outline of certain areas of specific interest, notably competition and the liberal professions, the Commission's "Sport and 3G" review and a DG COMP paper on competition and waste management.

Legislation, European Court judgments and European Commission cartel cases are included in Part 1. The other sections will be included in Part 2, published in the next issue of I.C.C.L.R.

## Major themes of the year

This has not been a dramatic year in terms of EC competition law enforcement. If anything, it appears to have been rather quiet in the European Commission: with a new Commissioner, Mrs Kroes, and a number of cases with important technical points, but few headline-catching antitrust

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### Box 1

#### • Major Themes in 2005

- Cartels
  - \* Many old decisions
  - \* A dedicated "Cartel Directorate"
  - \* Plea bargaining to come?
- Modernisation/Decentralised enforcement
  - \* "Commitment decisions" (*Bundesliga/Coca-Cola*)
  - \* Old "(national)" cases now "ECN EC" cases
  - \* A "collective approach" to enforcement
- New Sectoral Reviews
  - \* Energy, payment cards, insurance

decisions. However, clearly we are still in a transitional phase, after so much activity in modernising and expanding the enforcement system into that of a European Competition Network ("ECN") of 26 EU competition authorities. As the Commission is noting, it may also be more correct to measure results not just by the Commission's activities, but by the collective result of all the ECN authorities and national court decisions.

The biggest antitrust issues of the year in the European Commission's activities appear to be:

- Cartel enforcement, with many of the older decisions published and ideas to deal with the large number of cases which the Commission has in progress.
- The new modernised and decentralised enforcement system, as the ECN gets going, with the first Commission commitment decisions.
- The Commission's launch of the two new sectoral reviews, one for energy and another for financial services, including retail banking, payment cards and insurance.

## Overview of major events

### Legislative developments (adopted and proposed)

### Box 2

#### • Legislation/Notices

- Small amendments to shipping block exemption
- Discussion about IATA block exemption
- Location clauses no longer covered by MVBE
- New fining guidelines?
- Access to File Notice caught up in VKI/Regulation 1049/2001 debate
- Damages and Art.82 EC papers coming

## Adopted

### *Amended shipping block exemption*

In April 2005 the Commission renewed the Liner Shipping Consortium Block Exemption Regulation 823/2000 until 2010, with some small modifications.<sup>1</sup> Under this regulation all agreements whose objective is the joint operation of liner shipping services are exempted from Art.81 EC, provided that they meet the relevant market share and other criteria. The exemption does not apply to price-fixing, or to the transport of passengers.<sup>2</sup> The modifications are that:

- A consortium member can be required not to withdraw from a consortium for a period of 24 months (instead of 18). In other words, consortia must allow members to give notice of withdrawal without financial penalty after 18 months, such notice to be a maximum of six months.
- A consortium member can also be required not to withdraw for 24 months, if the members have agreed on substantial new investment in consortium services (i.e. when an investment constitutes at least half of the total investment made by the consortium members). This may be increased up to 36 months in the event of a highly integrated consortium, with a net revenue pool and a high level of specific investment.
- “Individual confidential contracts” by consortium members (as well as independent rate action) may now also be considered in order to assess the existence of “effective price competition”, one of the conditions of the block exemption.

The Commission is still reviewing Council Regulation 4056/86 as part of its campaign to persuade the EU Member States to change it.<sup>3</sup>

### *Car block exemption*

On October 1, 2005, so-called “location clauses”, requiring dealers only to operate from defined locations, ceased to be covered by the Motor Vehicle Block Exemption, Regulation 1400/2002.<sup>4</sup> Dealers still have to comply with the quality standards applicable where the secondary outlet will be established. The idea is that car manufacturers

will deliver to the dealer’s primary outlet (unless the agreement provides otherwise) and the purchasing conditions and sales targets remain those applicable to that location. It will be interesting to see what happens now, notably to what extent dealers will think that there are gaps in the network, justifying secondary outlets.

The Commission has stated that, in principle, car manufacturers can still include location clauses, which are not “hard core” restrictions, if they can show on a specific, individual basis that the positive benefits of the clause would outweigh any negative effects. However, most think this is unlikely to occur in practice.

The Commission’s enforcement focus is currently on access to technical information for independent car repairers, in which area there are four investigations.<sup>5</sup>

## Proposed

### *IATA block exemption review*

In March 2005 the Commission published a discussion paper on whether the IATA passenger tariff conferences should continue to be exempted from Art.81 EC. This discussion has been going on for some time now, with the airlines arguing that it is necessary to discuss prices for scheduled passenger flights in order to organise interlining. The Commission has been questioning whether such issues justify a block exemption (like Commission Regulation 1617/93), or whether, through the development of more alliances between air carriers and code-sharing arrangements, the block exemption is no longer required.<sup>6</sup>

### *New fining guidelines?*

It appears that the Commission is currently considering revised fining guidelines.

It is understood that they may look somewhat different from the 1998 Guidelines, in particular since the Commission is now thinking about plea bargaining (understood to mean that companies would agree their level of fine). Some argue that for such purposes more predictable guidelines are required, so that would-be plea bargainers can know what is the maximum fine that they may face.

It will be interesting to see if the Commission will clarify the starting amount assessment and

1. Commission Regulation 611/2005 [2005] O.J. L101/10; Commission Press Release IP/05/477, April 25, 2005.

2. The Commission has also published on its website a report written by the European Liner Affairs Association dated March 2005.

3. See last year’s review [2005] I.C.C.L.R. 47 at p.55. The submissions received by the Commission in relation to its “White Paper” are now published on its website.

4. IP/05/1208, September 30, 2005.

5. See comments of Messrs Mehta and Cesarini at the IBC Conference on the Motor Vehicle Block Exemption, October 5, 2005.

6. IP/05/289, March 14, 2005. An earlier consultation paper from 2004 and the responses received are on the Commission’s website. Just after this paper was completed the Commission announced that it planned to revise the IATA block exemption with a view to its “discontinuation” by June 2008; see IP/05/1432 and MEMO/05/430, November 16, 2005.

deterrence increases, since these are the most difficult to assess in practice.

Otherwise, one may expect changes to allow for lower fines for smaller companies and cartels, since this is another area of difficulty, especially in cases involving small markets and/or cartels in the smaller EU Member States.

#### *New access notice?*

In October 2004, the Commission published a new draft notice on access to file.<sup>7</sup> However, this has not yet been finalised. One senses that this may be because of the controversial issue of information access under the Transparency Regulation after the VKI judgment (discussed below).

#### *Other?*

There are a number of discussion papers in the pipeline. Notably:

- A “Green Paper” on private enforcement of Arts 81 and 82 EC. Apparently, this is being discussed with Member States and may come early next year.
- Possible guidelines on Art.82 EC enforcement. Again, it appears that these are being discussed with Member States and are expected to come early next year for consultation.

## European Court cases (ECJ and CFI)

### General cases

#### **Access to file and the Transparency Regulation**

In April 2005 in *VKI v Commission*,<sup>8</sup> the CFI gave an important judgment on the access of third

parties to the Commission’s file in cartel cases under Regulation 1049/2001.<sup>9</sup>

The context was the *Austrian Banks* cartel case, concerning the so-called “Lombard Club”.<sup>10</sup> The VKI is a consumer organisation which has the right to bring proceedings to assert the financial claims of consumers which have been assigned to it. The VKI is conducting proceedings against BAWAG, one of the banks involved in the case, claiming that the bank jointly fixed the interest rates for certain investments and loans and therefore that BAWAG charged its customers too much interest on variable interest loans for a number of years.

In that context, the VKI sought access to the Commission’s administrative file in the “Lombard Club” decision (save for internal documents), relying among other things on Regulation 1049/2001. The Commission rejected that request *in its entirety*. The VKI then confirmed its request (as the procedure under Regulation 1049/2001 provides). The Commission responded with a decision confirming its rejection of VKI’s request. In that decision the Commission divided the documents in the file into internal documents and 11 other categories and explained which of the exceptions under Regulation 1049/2001 it considered to apply for each category, without there being any overriding public interest in disclosure. The Commission also explained that “partial access” (i.e. to part of a document) and detailed examination of each document was not feasible because there were some 47,000 pages in the file. The Commission considered that this represented an excessive and disproportionate amount of work.

It may be recalled that the main exceptions to access under Art.4 of Regulation 1049/2001 are: where the disclosure of documents would be contrary to privacy and the integrity of the individual; or where disclosure would undermine

7. See last year’s summary, fn.3 above, at pp.54–55.

8. Case T–2/03, judgment of April 13, 2005.

9. [2001] O.J. L145/43.

10. See [2005] I.C.C.L.R. 109 at pp.112–113.

#### *Box 3*

##### • Main European Court cases—general

- *VKI v Commission*
  - \* Need for a “concrete, individual assessment” of Regulation 1049/2001 requests and exceptions (47,000 pages!)
- *max.mobil*
  - \* ECJ holds that no right to judicial review of Commission decision not to bring proceedings under Art.86(3) EC against Member States
- *Syfait*
  - \* Greek Competition Commission cannot refer questions to ECJ under Art.234 EC
  - \* Maybe true for *all* other NCAs?
- *DaimlerChrysler*
  - \* German car agents *not* independent; did not take the risk of the sale
  - \* Behaviour therefore unilateral
  - \* Bulk of fine overturned
- *Sumitomo/Sumika*
  - \* Commission must justify a decision to find an infringement after limitation period on fines expires (*Microsoft* interim order not granted; *Piau* football agent complaint correctly rejected.)

the protection of commercial interests, court proceedings and legal advice, or the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

The VKI appealed, primarily arguing that the Commission could not refuse access to the administrative file in such a blanket way, without having first actually examined each of the documents contained in the file.

The CFI agreed with the VKI. The court found that where an EU institution receives a request for access under Regulation 1049/2001, it is required in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request, in order to assess the extent to which an exception to the right of access is applicable, or whether partial access should be given. The court stated that this may not be required in cases where, owing to the particular circumstances of the case, it is obvious that access must be refused or granted.<sup>11</sup> Such an individual examination could also be avoided where the administrative burden of such an examination would be unreasonable and particularly heavy, but such cases should be exceptional and only after all other conceivable options had been considered.<sup>12</sup>

In practice, the court found that the exceptions relied on by the Commission did not necessarily apply to the whole Lombard Club file and that, even where they might apply, they might concern only certain passages in documents. The Commission relied partly on the exception that disclosure would undermine the protection of inspections and investigations, suggesting that disclosure would be detrimental both to leniency co-operation and responses to requests for information.<sup>13</sup> However, this was not accepted by the court. As a result the Commission was obliged to examine *each* of the documents referred to in the request to see whether any exceptions applied or whether partial access was possible.

Clearly, this ruling may have major practical consequences for both those dealing with the Commission, whether as a party to a case or as a third party and the Commission itself. It is understood that the Commission is now doing the more specific assessment.

### Article 86 EC complaints

In February 2005, the ECJ set aside the CFI's judgment in the *max.mobil*<sup>14</sup> case. It may be recalled that in 1997 *max.mobil*, the second

GSM operator in Austria, had complained to the Commission that the Austrian authorities had unlawfully conferred advantages on Mobilkom, its state-owned competitor, in the allocation of frequencies and by not charging different concession fees to the two companies contrary to what was then Art.90 EC (now Art.86 EC). The Commission rejected the complaint.

On appeal, somewhat controversially, the CFI ruled that *max.mobil* was entitled to bring an action against the Commission's decision, arguing that there were differences in the Commission's position under Art.90(3) EC and its general infringement proceedings against Member States under what was Art.169 EC (now Art.226 EC). Notably, Art.169 EC states that the Commission "*may*" commence infringement proceedings, whereas Art.90(3) EC (now Art.86(3) EC) provides that the Commission "*is to adopt* the appropriate measures where necessary". The court also appeared influenced by the lack of redress for individuals in such situations, noting that the right to judicial review is a fundamental right. The CFI then found on the substance that *max.mobil*'s application was unfounded.

The Commission appealed against the finding of admissibility and won. The ECJ decided that the Commission is required to ensure that Member States comply with their duties under Art.90 EC (now Art.86 EC) and can take directives and decisions to that end. However, the Commission was not obliged to bring proceedings against Member States in such cases. An individual could not oblige the Commission to take a position in a specific sense.<sup>15</sup> An individual might have a "direct and individual interest" in annulment of a Commission refusal to act on its complaint, but that was not enough to entitle the individual to challenge the decision.<sup>16</sup> Such decisions of the Commission were therefore not amenable to judicial review.

### Microsoft interim measures

In December 2004, the President of the CFI dismissed Microsoft's application to suspend the remedy orders imposed in the Commission's Art.82 EC decision last year.<sup>17</sup>

It will be recalled that the Commission had found that Microsoft had abused its dominant position through two types of conduct:

- First, Microsoft had refused to supply information to competitors which would allow them to develop and distribute products competing with Microsoft's own products on the work group server operating

11. fn.8 above, at [75].

12. *ibid.*, at [102]–[115].

13. *ibid.*, at [81].

14. Case C–141/02P, judgment of February 22, 2005. With thanks to Lisa Arsenidou for her assistance. See also Hocepić (Spring 2005) *EC Commission Competition Policy Newsletter* 53–56.

15. Case C–141/02P, fn.14 above, at [69].

16. *ibid.*, at [70]–[72].

17. Case T–201/04R, Order of December 22, 2004.



system market and make these products interoperable with Microsoft's system from October 1998.<sup>18</sup>

- Secondly, Microsoft had tied the supply of Windows Media Player to its windows PC operating system from May 1999, preventing competition from other “streaming” media playing systems.

As a result, the Commission fined Microsoft some €497 million and required Microsoft to implement two main remedies: first, to make available the information required for such interoperability and secondly to market its Windows PCs without Media Player installed (although Microsoft could still offer a combined product in parallel).<sup>19</sup>

All of this is hugely controversial, partly because it involves Microsoft, which virtually all of us now use in our PCs, and partly because there are some fundamental issues. Notably, on the tying issue is it not normal and reasonable progress for a company, even if it is dominant, to develop its product and offer new features? Put very broadly, the Commission's answer to that is “no, not if that means that all competition in the markets for those products is foreclosed”, and it found that is the case here, where Microsoft is so hugely dominant in the underlying PC operating system. The interoperability issue is equally contested, if only because *any* case of compulsory licensing of IP rights is controversial, even though this can only happen in exceptional circumstances on the case law.

Microsoft has appealed the Commission's decision and, with it, applied for an order suspending these remedy requirements. As a result, the Commission agreed not to enforce the remedies pending the order of the President.

In order to succeed, in principle Microsoft had to show three things as regards each remedy: first, that its claim on appeal disclosed a *prima facie* case (i.e. some point of fact or principle deserving careful consideration). Secondly, that its claim was urgent, in the sense that it would suffer serious and irreparable harm if the remedies were implemented. Thirdly, that on a weighing up of the interests involved, suspension of the remedies should be granted.

There are three main aspects to the President's order<sup>20</sup>:

18. Work group server services are basic infrastructure services that are used by office workers in their day-to-day work, such as sharing files stored on servers and printers.

19. See fn.10 above, at pp.118–120.

20. See generally: Madero, Banasevic, Hermes, Huby and Kramler (Spring 2005) *EC Commission Competition Policy Newsletter* 53–58; Van Bael and Bellis, “CFI President rejects Microsoft's application for interim measures” (2005) 43 *EC Competition Law Reporter* 1–4; Vinge and Dedoo, “Microsoft v. EC: In the European Courts” [2005] CRI 97–102.

First, for procedural reasons, Microsoft's arguments on TRIPs (WTO trade) aspects were not considered. Microsoft had annexed them to its application and had not included them sufficiently in the text of the application itself.

Secondly, on the interoperability issue, the President focused on three main questions<sup>21</sup>:

- (1) The question as to whether, for a refusal to supply information protected by IP rights to be abuse of dominant position, the conditions of *IMS Health* had to be met or whether the Commission could find an abuse in other circumstances. In other words, were the conditions in *IMS Health* “necessary” for a finding of abuse, or merely “sufficient”?
- (2) The question whether the nature of the protected information had to be taken into account and whether the value of the information mattered.
- (3) The question whether the requirements of *IMS Health* were met. Notably, whether the interoperability information to be disclosed was indispensable (to competition) and whether the refusal was objectively justified.

He concluded that there were arguments which needed detailed examination and that there was a *prima facie* case.

However, the President was more critical of Microsoft's claims that it would suffer “severe and irreparable harm” from the disclosure of the interoperability information. In particular, Microsoft had not shown that disclosure of the “alleged” IP in question would cause such harm in itself. The harm requirement could only be met if the effect of the disclosure on Microsoft's IP rights would cause serious and irreparable harm over and above the simple breach of Microsoft's IP rights. The President also noted that Microsoft could still impose contractual restrictions and safeguards to prevent use of its IP, if its appeal were successful. The President also found that Microsoft had not clearly established that the disclosures required would reveal more about Microsoft's systems. He emphasised that Microsoft had not shown that it would not be able to resume its “initial” business policy if it succeeded on appeal. Nor was he satisfied that such disclosure would lead to an irreversible development of market conditions.

Thirdly, on tying aspects, the President again focused on three main questions<sup>22</sup>:

- (1) Whether the way Windows Media Player is installed in so many operating systems,

21. fn.17 above, at [206]–[216].

22. *ibid.*, at [390] *et seq.*

giving it general “ubiquity”, would lead content providers and applications manufacturers to design their products on the basis of Windows Media Player, creating “indirect network effects” which would “tip” the market to Microsoft. (This was also contested by Microsoft on the facts.)

- (2) Whether any positive effects from product standardisation could amount to objective justification or such effects should only be accepted if they resulted from the competitive process or decisions of standardisation bodies.
- (3) Whether Media Player was just a feature or function added to the Windows PC operating system or a distinct product, given that Microsoft and others have included *some* media functionalities in their operating systems in the past.

Again he concluded that these were complex questions and that a *prima facie* case was made out.<sup>23</sup>

Again however, the President was more critical of Microsoft’s arguments on “serious and irreparable harm”. Notably, the President did not consider that the requirement to offer a version of Windows without Media Player would lead to irreparable interference with Microsoft’s commercial freedom, nor had Microsoft shown significant effects of the remedy likely to cause irreversible damage. All the more so as it appeared that Microsoft did not expect the version of Windows without Media Player to be sold in significant quantities (because Microsoft still planned to sell the full version with Media Player at the same price). The Commission also considered that the non-inclusion of Media Player might be resolved later through an update.

In such circumstances, the President did not proceed to the “balancing of interests” assessment and dismissed the application for interim measures.

Judgment in the main action is expected in the first half of 2006.<sup>24</sup>

### Can competition authorities refer questions to the ECJ?

In May 2005, the ECJ did *not* rule on the issue as to whether a dominant company abuses that position by only supplying what a market requires.<sup>25</sup>

23. *ibid.*, at [394]–[404].

24. There have also been various press reports of intensive discussion between Microsoft and the Commission concerning the implementation of the remedies; and it appears that in August 2005 Microsoft brought an appeal on related issues, Case T–313/05 *Microsoft v Commission* [2005] O.J. C257/16.

25. Case C–53/03, *Syfait v GlaxoSmithKline*, judgement of May 31, 2005. With thanks to Lisa Arsenidou for her assistance.

However, the ruling was still important because the court found that the Greek Competition Commission (the Epitropi Antagonismou) was not a “court or tribunal” able to refer a case to the European Court for a preliminary ruling.

GlaxoSmithKline (“GSK”) supplied medicinal products including Imigran (for migraines), Lamictal (for epilepsy) and Serevent (for asthma) to pharmacists and pharmaceutical wholesalers through its Greek subsidiary. Until November 2000, GSK met all orders in full, although a large amount were then exported to other Member States. After November 2000, GSK stated that it would stop supplying wholesalers and supply hospitals and pharmacies directly, because such exports were resulting in shortages in Greece. In practice, GSK continued to supply, but in limited quantities.

The Greek associations of pharmacies and pharmaceutical wholesalers then complained to the Greek Commission. The Greek Commission ordered interim measures, requiring GSK to meet the associations’ orders in full. GSK’s Greek subsidiary then met the complainants’ orders to the extent that it was supplied by its parent company, meaning with more than Greek consumption (as required by law, 125 per cent), but not enough to meet the complainants orders in full. GSK also made a notification to the Greek Commission seeking negative clearance for its system.

The Greek Commission then asked the ECJ whether and in what circumstances a dominant pharmaceutical company could refuse to meet orders placed with it by wholesalers to restrict parallel trade in its products. Interestingly, Advocate General Jacobs suggested that, in defined circumstances, such a refusal might *not* be an abuse.<sup>26</sup>

Europe was therefore poised for a critical ruling addressing the Art.82 EC dimension of the debate on pharmaceutical parallel trade and State intervention on national pricing levels.

It did not happen. Instead, the ECJ found that the Greek Commission was not a court or tribunal which could refer a question under Art.234 EC, because it did not have the appropriate independence and was not called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

According to settled case law, in order to determine whether a body making a reference is a court or tribunal for these purposes, the ECJ takes account of factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. It

26. See last year’s review, fn.3 above, at p.60.

may also be recalled that the ECJ has found that the Spanish Competition Commission could make such a reference in the past.<sup>27</sup>

In this case, the court found that these criteria were not met:

- First, the Greek Commission was subject to the supervision of the Minister of Development to a certain extent. According to the court, this implied that the minister was empowered, within certain limits, to review the lawfulness of the decisions adopted by the Commission.
- Secondly, the dismissal or termination of the appointment of members of the Greek Commission was not subject to any particular safeguards.
- Thirdly, there was no separation of functions between the decision-making body of the Greek Commission and its secretariat, a fact-finding body on the basis of whose proposal the Greek Commission adopts decisions. The Commission's President was responsible for the co-ordination and general policy of the secretariat and was the immediate supervisor of the secretariat's personnel, who could exercise disciplinary power over them.
- Lastly and importantly, at [34], the ECJ noted that it was not clear that proceedings initiated before the Greek Commission would lead to a decision of a judicial nature because, as a national competition authority, it was required to work in close co-operation with the European Commission and could be relieved of its competence by a Commission decision initiating its own proceedings (under Art.11(6) of Regulation 1/2003).

What should one conclude from all this? The author would suggest:

First, the ECJ is being strict on what is required for national competition authorities ("NCA") independence. This may be deliberate, given their enhanced role in EC competition enforcement now.

Secondly, the ECJ appears to prefer a hierarchical co-ordination whereby the NCAs co-operate with the Commission and issues come to the ECJ or CFI only on appeal from NCAs. In particular, one may think that the Art.11(6) point in this judgment may now mean that no NCA can refer a question to the ECJ, or at least not unless the Commission has made it clear that it will not intervene to take a case.

Thirdly, on the pharmaceutical issue, we will have to see what comes next. The issue appears to be one for ECN co-operation with the Commission (since EC law is raised), unless the Commission just leaves the Greek Commission to take a decision (perhaps still influenced by Advocate General Jacobs' views) and then, presumably, the difficult issues raised may come back to the ECJ again on a reference from the appeal court!

### Independent (car) agents

In September 2005, the CFI heavily reduced the fine imposed on DaimlerChrysler for restricting parallel imports and annulled the Commission's 2001 decision as regards Germany and Spain, but upheld the decision as regards Belgium.<sup>28</sup> That meant that DaimlerChrysler's fine was reduced from €71.8 million to €9.8 million.

It may be recalled that in 2001 the Commission found that DaimlerChrysler had concluded agreements with its agents and dealers in Germany, Belgium and Spain on retail sales of its Mercedes-Benz cars.<sup>29</sup> The Commission fined DaimlerChrysler:

- Some €47 million for giving its German agents instructions to sell new cars only to customers in their own contract territory, to avoid internal competition and to require the payment of a 15 per cent deposit for orders from abroad.
- €15 million for prohibiting German agents and Spanish dealers from supplying cars to leasing companies where no customer was identified, which the Commission found was designed to stop such companies from obtaining volume rebates and accumulating stock.
- €9.8 million for participating in resale price maintenance agreements restricting discounts in Belgium.

On appeal, the CFI found that the German agents were to be assimilated to employees of DaimlerChrysler and were therefore part of DaimlerChrysler's economic unit. The court overturned the related fines accordingly. On that basis, DaimlerChrysler was found to have acted unilaterally in its behaviour with such agents.

The CFI found that the Commission had incorrectly assessed the fundamental characteristics of the German agency contract concerned, which is based on the German Commercial Code. Notably, Mercedes-Benz set the prices and took the main risks of the sale of the cars concerned, not the

27. Case C-67/91, *Asociación Española de Banca Privada*, judgment of July 16, 1992 [1992] E.C.R. I-4785.

28. Case T-325/01 *DaimlerChrysler AG v Commission*, judgment of September 15, 2005. With thanks to Lisa Arsenidou for her assistance.

29. [2002] O.J. L257/1.



agents.<sup>30</sup> It was Mercedes-Benz which sold the cars and took the risks on delivery and of insolvency of the customer. The fact that the agent could rebate his own commission did not change this. Nor did the agent have to hold a stock of new cars (in contrast to the position in Mercedes' agreements with dealers in Belgium and Spain). All this meant that the Commission was wrong to find that German agents took the "risk of the price" paid and were independent.

The CFI also found that, in practice, the Commission had overstated the risk of transportation of the cars (notably since many were picked up at the factory) and the risks related to the obligation of agents to purchase demonstration cars (since these were normally supplied at preferential rates and could be sold only a few months later). It was also not established that obligations on agents to provide guarantee services were a "risk", since this was compensated and it had not been shown that such remuneration was inadequate.

Finally, the fact that an agent had to provide after sales services had not been shown by the Commission to involve appreciable risks. In any event, if it did, the court found that they related to activities on other markets to that for the resale of new cars<sup>31</sup> and, according to the court, this should not modify the characterisation of the relationship between Mercedes-Benz and its agents on the (new car supply) market concerned here.

This is an important ruling. The CFI focuses strictly on the assessment of the agent's independence in terms of the risk of the transaction on the market concerned and not on broader considerations as to the risks of the agent's business.

As regards Spain, the court found that the restrictions of which DaimlerChrysler was accused, namely that each leasing company had to have an identified customer for a leasing contract at the time of acquiring a vehicle, were derived from Spanish legislation and were therefore also not contrary to Art.81(1) EC.<sup>32</sup>

On the other hand, the court confirmed that DaimlerChrysler had participated in agreements with dealers in Belgium to prevent discounts and upheld that part of the Commission's decision. Mercedes-Benz had been found to participate in dealer meetings where measures were discussed to prevent discounts, including "ghost shoppers" to verify prices. There had also been a threat of non-supply of a dealer's allocation of cars if discounts were too low. The court rejected Mercedes-Benz's arguments that such discussions only involved "recommendations".

## Limitation

In October 2005, the CFI issued its judgment in *Sumitomo/Sumika*, annulling the Commission's decision that these two companies had participated in the vitamins cartel.<sup>33</sup>

In November 2001, the Commission had issued a decision in which it found that Sumitomo and Sumika participated in the vitamins cartel as regards vitamin H and folic acid, but it did not impose any fines on the two companies.<sup>34</sup> The Commission found that the infringements committed by Sumitomo and Sumika had lasted from October 1991 to April 1994 and from January 1991 to June 1994 respectively. Limitation barred the Commission from imposing a fine on the two companies.

The two companies claimed during the administrative procedure that the findings of infringement themselves were time-barred, so that Commission had no power to find that the two companies committed those infringements. It may be recalled that Art.1 of Regulation 2988/74 provides, among other things, that the power of the Commission to impose fines or penalties for (ordinary) infringements of the EC competition rules is subject to a limitation period of five years.

When the Commission rejected that position in its decision, Sumitomo and Sumika appealed to the CFI, with two main lines of argument.

First, they argued that the term "penalty" in Art.1 of Regulation 2988/74 should be interpreted to include a formal prohibition decision without fines, because at least three types of punitive effect flow from it:

- (1) A finding of infringement in an allegedly worldwide cartel is capable of giving rise to other public law proceedings in Member States with different rules on limitation periods and in other countries where the finding may be used as *prima facie* evidence of the infringement there.
- (2) Applicants could face damages actions based on this decision.
- (3) The decision is detrimental to their reputation.

They also claimed that the Commission was time-barred from adopting a decision against them by reason of general principles of Community law, such as legal certainty and the presumption of innocence.

Secondly, the companies alleged that the Commission had no competence to adopt a decision that they had infringed Art.81(1) EC, where the infringement had come to an end

30. fn.28 above, at [90]–[102].

31. *ibid.*, at [104]–[113].

32. *ibid.*, at [156].

33. Joined Cases T–22 and 23/02, judgment of October 6, 2005. With thanks to Helena Dolezalova.

34. [2003] O.J. L6/1.



## Box 4

## • Main European Court cases—cartel appeals

- *Speciality Graphites*
  - \* Fine on SGL Carbon on isostatic graphite market halved. Mistake in turnover used for starting amount
  - \* When should cartels be broken out and assessed/fined separately?
  - \* Captive sales included for fining turnover
  - \* Deterrence reduction maintained, despite fine reductions by CFI
- *Pre-insulated Pipes*
  - \* Companies could have reasonably foreseen that the Commission would introduce the 1998 Fining Guidelines method?
- *SAS Maersk*
  - \* Changed position on facts during appeal? Compare to position during the administrative procedure
- *Belgian Beer*
  - \* No principle of limitation in recidivism in statutory framework (but perhaps there should be?)

outside the limitation period of Art.1 of Regulation 2988/74. They argued that the Commission had failed to show that it had a legitimate interest in taking such a decision (in particular, the existence of a genuine danger of a return to such a practice by the two companies).

The CFI rejected the first line of argument but upheld the second.

The court concluded that a decision finding an infringement is not a “penalty” within the meaning of Art.1(1) of Regulation 2988/74. The word “penalty” there was intended to capture pecuniary sanctions which could be imposed other than fines (e.g. periodic payments).<sup>35</sup> Therefore such a finding was not subject to the limitation period.

As regards the companies’ second line of argument, the CFI held that the fact that the Commission had no longer power to impose fines for infringements because the limitation period had expired did not imply that the Commission had also lost the power to adopt a decision finding a *past* infringement.

The exercise of this power was, however, subject to the requirement that the Commission show that it had a legitimate interest in taking such a decision (as the ECJ had held in the *GVL*<sup>36</sup> case). While the Commission had suggested several possible grounds for such an interest to the Court (e.g. clarifying the legal situation, promoting exemplary behaviour on the part of the undertakings concerned, discouraging recidivism and assisting national court proceedings by injured parties), it had not specifically explained what ground it relied on in *this* case as constituting a legitimate interest in taking *this* decision.<sup>37</sup>

The CFI concluded that the Commission had failed to consider whether the findings of infringements against the applicants were justified by a legitimate interest.<sup>38</sup> Consequently, the CFI annulled the Commission decision.

## Cartel appeals

## Speciality Graphites

In June 2005, the CFI ruled on appeals in the *Speciality Graphites* cartel case.<sup>39</sup> In the case of SGL Carbon, its fine in relation to the isostatic graphite cartel was reduced from €18.94 million to €9.64 million. In the case of Intech EDM AG, its fine was reduced from €980,000 to €420,000.

The following are the particular noteworthy aspects of the judgment:

First, there is interesting argument about the way that the Commission separated out three cartels in the graphite sector, one dealt with in the *Graphite Electrodes* case and the other two in the *Speciality Graphites* case, with the separate calculations for the “isostatic” and “extruded” graphite products. Essentially SGL Carbon argued that this artificially inflated the amount of fines (because of the tariff system, etc.). The CFI rejected the argument because it found that the Commission had been entitled to distinguish three separate infringements. They involved products on different markets, generally different cartel participants (although there were some overlaps) and different elements in the nature of the infringements.<sup>40</sup>

This is interesting because on other occasions the Commission has dealt together with various unlawful activities, talking of one “complex” and/or multiform” infringement and of unlawful behaviour as all part of an “overall plan” to distort competition in a (broadly stated) market (see, for example the *Copper Plumbing Tubes* or *Choline Chloride* decisions described below). The issue may be important, because it may affect the overall amount of fines imposed.

Secondly, it appears that in the Statement of Objections, SGL Carbon was considered to be a ringleader in the isostatic cartel, together with Le Carbone, but was surprised to discover in

35. fn.33 above, at [60]–[61].

36. Case 7/82 [1983] E.C.R. 483.

37. fn.33 above, at [37], [121]–[122] and [138].

38. *ibid.*, at [135]–[138].

39. Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, judgment of June 15, 2005.

40. *ibid.*, at [117]–[129].

the decision that Le Carbone had successfully rebutted that claim. The CFI found that the Commission's change in position was, however, not a new allegation on which SGL Carbon had not had an opportunity to be heard. The court considered that SGL Carbon should have been able to foresee that Le Carbone might argue as it did and itself contest that it was a ringleader.<sup>41</sup>

However, when considering whether a 50 per cent increase in fine on SGL Carbon for being a ringleader was justified, the court found that there was not such a difference between its conduct and that of others and reduced that increase to 33 per cent.<sup>42</sup>

Thirdly, the court found that the Commission had made a manifest error in assessing SGL Carbon's worldwide turnover in isostatic graphite,<sup>43</sup> which had an important impact on the related fine, partly because it was early in the calculation. Thus SGL Carbon had supplied the Commission with figures for a wider product group (including products other than isostatic graphite), but then corrected them to focus on the isostatic products concerned in the case. However, the Commission had continued to use the first figures given in assessing SGL Carbon's starting amount. In practice, that meant that the Commission had taken into account a turnover of €80.4 million in 1997, when it should have taken €45.6 million. This meant that SGL's starting amount changed from €20 million to €11.3 million (with related "knock-on" effects in the overall fine calculation). (Interestingly, however, the CFI decided *not* to adjust the starting amounts of the other companies, in so far as on the new figures, ToyoTanso was the largest producer.<sup>44</sup>)

Fourthly, in considering SGL Carbon's turnover, the court confirmed that the Commission could include its internal sales. The court's position is that otherwise this would give an unfair advantage to vertically integrated companies.<sup>45</sup> (This is not new, but is noted here because the issue is often raised in practice.)

Fifthly, the CFI found that the "10% of turnover" limit should have been applied separately to the two Intech companies in the case, since each had been found to have participated in the infringement and Intech/EDM BV had ceased to be the parent of Intech EDM AG in 1997 (even if both still belonged to the same holding company).<sup>46</sup> The result was that the fine on Intech EDM AG was reduced from €980,000 to €420,000.

Sixthly, the Commission argued that if the court significantly reduced the starting amount

of the fine (as it did), then the 33 per cent reduction which the Commission had given SGL Carbon (because of the two fines it faced in quick succession and its straightened financial circumstances) was unjustified. The CFI rejected this, considering that the factors justifying that 33 per cent reduction remained valid, even after the adjustments made to the starting amount.<sup>47</sup>

Finally, the court (again) confirms that there is no double punishment (*non bis in idem* plea), if a company is fined in the United States and in the EU, the respective authorities fining for the infringements in their respective territories. Nor is there double punishment because the Commission considered the worldwide turnover of the companies concerned in attributing relative weightings to companies for fining purposes. (Again this is not new, but noted here because it still comes up frequently in practice.)

### Pre-insulated Pipes

In June 2005, the ECJ upheld the CFI's judgments concerning the *Pre-insulated Pipes* cartel.<sup>48</sup> The main point in the judgment is that the ECJ found that the application of the 1998 Fining Guidelines to infringements committed before the Guidelines were adopted was not contrary to the principles of protection of legitimate expectations<sup>49</sup> and non-retroactivity.<sup>50</sup> The court found that the Guidelines and the new method of calculating fines therein were "reasonably foreseeable" at the time the infringements were committed.<sup>51</sup>

This is clearly still controversial. Companies might well have been advised that the Commission had a very wide discretion to determine the gravity of an infringement and could increase fining levels, provided that the Commission stayed with the "10% of turnover" limit in Art.15(2) of Regulation 17/62. This appears essentially to be the court's position. However, it is very hard to see how companies or their advisers could have "reasonably foreseen" that the Commission would introduce an entirely new fine calculation method, based on a tariff system, which is what the ECJ also appears to state in the judgment.

In practice, it was also somewhat hard on the companies concerned, since the new Fining Guidelines were introduced after the Statement of Objections and Hearings in the case. It was also not disputed that the Guidelines were applied in the Commission's decision, although not referred to.<sup>52</sup> One might think that it would have been more reasonable to apply the Guidelines only for future

41. *ibid.*, at [151].

42. *ibid.*, at [327]–[331].

43. *ibid.*, at [251].

44. *ibid.*, at [265].

45. *ibid.*, at [260].

46. *ibid.*, at [390]–[392].

47. *ibid.*, at [404]–[407].

48. Joined Cases C–189/02P, C–202/02P, C–205/02P to C–208/02P and C–213/02P, judgment of June 28, 2005.

49. *ibid.*, at [169]–[173].

50. *ibid.*, at [207]–[232].

51. e.g. *ibid.*, at [231], [440] and [454].

52. *ibid.*, at [26]–[27].

procedures (or at least those not yet at the level of Statement of Objections). However, the problem for the Commission then is delay and the many cases it has in the pipeline.

One senses that the ECJ considered that it *had* to find this way, or the court would have been introducing general limits on the Commission's ability to change its policy to deter cartels. Neither the ECJ nor CFI appear willing to do so, save to the extent of specific review on the basis of proportionality and equal treatment and checking that the Fining Guidelines have been applied properly.

### Alloy Surcharge

In July 2005, the ECJ ruled on appeals from the CFI's judgment in the *Alloy Surcharge* cartel case.<sup>53</sup> It may be recalled that in 1998 the Commission fined six producers of stainless steel for jointly agreeing the price supplement called the "Alloy Surcharge", which they added to the basic price for stainless steel for use of certain alloys (nickel, chromium and molybdenum).

On appeal, the CFI largely confirmed the Commission's decision, but reduced the fine on three companies because it found that the Commission had infringed the principle of equal treatment by taking the view that they had not produced any new information within the meaning of the Commission's Leniency Notice.

The three companies then appealed further. As regards Acerinox's appeal, the ECJ considered that the CFI had incorrectly presented Acerinox's position concerning that company's participation in a cartel in Spain and therefore that the CFI's reasoning in this respect was incorrect.<sup>54</sup> However, the ECJ still considered that the Commission had correctly concluded that Acerinox had participated in such a cartel and therefore upheld the fine on Acerinox. Otherwise the ECJ dismissed the claims made.

### Luxembourg Breweries

In July 2005, the CFI upheld the Commission's decision concerning the *Luxembourg Breweries* cartel.<sup>55</sup> It may be recalled that in 2001 the Commission found that Luxembourg brewers had entered into an agreement to preserve their respective customers/beer ties in the hotels, restaurants and cafés sector and to prevent foreign breweries from penetrating the sector, imposing relatively small fines of some €400,000 to €24,000 on the participants.

The companies appealed, arguing among other things that the infringement was "minor", not serious. The CFI rejected all claims made. It noted that an agreement which covered the territory of a whole Member State, with the object of dividing the market and partitioning the common market, could not be considered a "minor" infringement under the Commission's Fining Guidelines. The CFI also found that it was no defence to argue, as the brewers did, that the co-operation had been designed to deal with the problem that the Luxembourg courts were systematically annulling exclusive beer ties. In any event, the co-operation had been wider than that, applying also where there was no exclusive tie.

### SAS Maersk

In July 2005, the CFI also upheld the Commission's decision in the *SAS-Maersk* airline case.<sup>56</sup> It will be recalled that this case related to a market-sharing agreement between SAS and Maersk which resulted in fines on SAS of some €39.37 million and on Maersk, €13.12 million. In its decision, the Commission had found the infringement "very serious", but had reduced the fine by 10 per cent, since neither SAS nor Maersk had contested the facts in the Statement of Objections.

On appeal, SAS challenged the Commission's view that the infringement was "very serious", suggesting that it should have been considered "serious", among other things because the case was limited in effect and comparable to the *Greek Ferries* case. The Commission had also described the affected geographic market as "the EEA and beyond", whereas SAS argued that, in fact, the markets in issue were only a limited number of point to point combinations to Denmark. Further, the Commission had taken into account statements as to the perceived gains from the market sharing, which SAS contested.

The CFI upheld the Commission's view, noting that infringements which do not cover the whole of the common market may still be "very serious". The court also considered that the Commission is not obliged to define the markets in question for the purposes of applying its Guidelines (a principle which is still controversial given the need to assess proportionality). The Commission had been entitled under its Guidelines to take into account any economic benefit which may have been derived by offenders.

Otherwise, it is of interest to note that the Commission applied to the CFI for an *increase* in the fine imposed, because of alleged challenges by SAS as to the scope and nature of the infringement

53. Case C-57/02P *Acerinox* and Joined Cases C-65/02P and C-73/02P, *Thyssen Krupp and Thyssen Krupp Acciai Speciali Terni*, judgments of July 14, 2005.

54. *ibid.*, at [34].

55. Joined Cases T-49/02 to T-51/02, *Brasserie nationale, Brasserie Jules Simon and Brasserie Battin*, judgment of July 27, 2005.

56. Case T-241/01, *SAS v Commission*, judgment of July 18, 2005. With thanks to Georg Terhorst for his assistance.



in its Reply before the Court. The Commission argued that SAS was substantially contesting the facts. The court rejected the Commission's claim. It noted that the key issue in such a case is whether an applicant before the court had gone back on facts acknowledged during the administrative procedure.<sup>57</sup> However, here SAS had already said in its Reply to the Statement of Objections that the infringements did not have an effect on the market, which it was maintaining on appeal in claiming a reduction in fine. Therefore SAS was not changing its position from that for which it had been given the 10 per cent reduction and no increase in fine was to be considered.

### Belgian Beer

In October 2005, the CFI ruled on Danone's appeal against the *Belgian Beer* "non-aggression pact" cartel case.<sup>58</sup> Put shortly, in December 2001, the Commission imposed fines on Belgian brewers for three cartels. In the Belgian case total fines of €91 million were imposed on Danone (and its subsidiary Alken-Maes) and Interbrew for two separate infringements on the Belgian beer market between 1993 and 1998. Danone was fined a total of €44.6 million for participating in a general "non-aggression pact" with Interbrew from early 1993 until the beginning of 1998 in the horeca (hotels, restaurants and café) sector.

Among other things, the Commission found that Danone had threatened Interbrew that if Interbrew did not transfer 500,000 hectolitres of beer in the Belgian retail sector to Alken-Maes, Danone would "make life difficult" for Interbrew in France. Allegedly, this threat had led to a "gentleman's agreement" in 1994, by which the parties committed themselves generally to respect each other's market positions (and more specific agreements and practices).

Danone's fine was increased by 50 per cent for two aggravating factors: first, recidivism. The Commission noted that Danone had infringed competition law twice before in the flat glass sector (as BSN). Secondly, Danone's threat of retaliation, which allegedly led to an increase of cartel activity, was treated as an "aggravating" circumstance.

On appeal, the CFI rejected all of Danone's claims, save that the court found Danone's threat had not induced Interbrew to enter into the "non-aggression pact". Taking into account the parties' attitudes before and after the threat, as well as the importance of the threat in its context, the court stated that the agreement could have been the result of the parties' common objectives to

restrict competition in general.<sup>59</sup> Danone's fine was therefore reduced by €1.6 million from €44 million to €42.4 million.

The court then asked the Commission what percentage of the 50 per cent increase it had imposed on the basic amount for aggravating circumstances related to the threat. On being told that this was a "lesser" amount, the court attributed 10 per cent of the 50 per cent to it and reduced the increase for aggravating circumstances to 40 per cent from 50 per cent.

Otherwise, the CFI found that the Commission had deviated from its Guidelines when calculating the fine, since in its calculations it had not applied the aggravating circumstance increase to the basic amount of the fine, but had applied it to a fine which had already been "adjusted".<sup>60</sup> The CFI therefore corrected this also.

Three other points may be noted: first, (somewhat bravely) Danone challenged the level of starting amount which the Commission had set as disproportionate. Although accepting that the court should verify the proportionality of a fine, given its gravity and duration, the court rejected this on the facts, since it found that the Commission had reasonable grounds for its finding in discretion and on its Fining Guidelines.<sup>61</sup>

Secondly, Danone argued that there should be some principle of limitation as regards recidivism claims, based on legal certainty, an argument which is frequently raised in practice. The CFI rejected this on the basis that no such principle is provided for in the relevant statutory framework. In any event the court found that, on the facts, the time between the third infringement (in 1993) and the second one (in 1984) was not excessive (although the time between the 1993 infringement and the first one (in 1974) was long.<sup>62</sup>)

Thirdly, Danone argued that recidivism should not be found, if there was no pecuniary sanction for the first infringement (as was the case for the 1974 infringement), an argument open on the *Thyssen Stahl* case. The court took the view that this was not the case. The fact that the first infringement was analogous was enough, even if it had not involved a pecuniary sanction.<sup>63</sup> In any event, a fine *had* been imposed for the 1984 infringement.

### Football agents' complaint

In January 2005, the CFI upheld the decision of the Commission to reject a complaint by Mr Laurent Piau against its settlement of the

57. *ibid.*, at [238].

58. Case T-38/02, *Groupe Danone v Commission*, judgment of October 25, 2005. With thanks to Lisa Arsenidou for her assistance.

59. *ibid.*, at [295]–[313].

60. *ibid.*, at [521]–[523].

61. *ibid.*, at [145] *et seq.*

62. *ibid.*, at [353]–[355].

63. *ibid.*, at [362]–[366].



FIFA players' agents case.<sup>64</sup> It may be recalled that in 1999 the Commission challenged various provisions of regulations established by FIFA in 1994 concerning players' agents. FIFA then agreed to amend its regulations in 2000/2001. However, the regulations still provided that a player's agent had to:

- hold a licence from a national association for an unlimited period;
- pass an examination in the form of a multiple-choice test;
- have a written contract, with the player represented for a maximum of two years, but renewable, in which the agent's remuneration is calculated on the basis of the player's basic gross salary (or, if the parties cannot reach agreement, fixed at 5 per cent of the salary);
- hold a professional liability insurance policy (or provide a bank guarantee);
- hold a system of sanctions on clubs, players and agents in relation thereto.

The Commission indicated to Mr Piau in 2001 that it would take no further action on his complaint, on the basis that the main restrictions in the 1994 regulations had been removed and that it was not in the Community interest for the Commission to continue with the procedure. However, Mr Piau maintained his complaint, arguing that these amended regulations were still unlawful, as contrary to Arts 81 and 82 EC. When the Commission still rejected his complaint, he appealed.

The CFI's review falls into three parts. First, the court considered how the Commission had treated Mr Piau's complaint and found that it had not failed in its obligations to consider the case carefully, in view of the way it had carried out its intervention.

Secondly, the court then reviewed the Community interest in the case. The court found that FIFA was an association of national football associations, themselves representing football clubs, whose activities came within Art.81 EC. Equally, it found that a player's agent carried out an economic activity which was not specific to the nature of sport and therefore came within Art.81 EC.<sup>65</sup>

The court then also focused on the Commission's decision concerning the compatibility of the FIFA regulations with competition law. On this, the CFI held that the Commission had not made a manifest error in finding that the most serious restrictions of competition had been repealed. Notably,<sup>66</sup> the examination required to become an

agent offered satisfactory guarantees of objectivity and transparency; the obligation to take professional insurance was not disproportionate; and the court considered that the remuneration provisions did not amount to imposing prices (since the 5 per cent provision was only a fall-back mechanism for settlement of disputes).

The court also noted that the obligation to hold a licence to be a player's agent was a barrier to access to the agent's activity and affected competition, which could only be accepted if it met the conditions under Art.81(3) EC (although elsewhere in the judgment, the court appeared to find licence requirements qualitative in nature).<sup>67</sup> However, the court agreed with the Commission that the conditions for application of Art.81(3) EC could apply. Notably, the FIFA rules could be justified: as necessary to raise professional and ethical standards among players' agents; to protect players whose careers are short; by the absence of national rules on such issues (save in France); and the lack of a collective organisation of player's agents. Moreover, the court noted that competition is not eliminated by the system, which involved a qualitative, rather than quantitative selection. (FIFA had noted here that, while there were some 214 players' agents in 1996, there were some 1500 at the beginning of 2003, with more coming.)

Thirdly, the court considered whether Art.82 EC could apply, which the Commission had rejected, since FIFA was not active on the market of advising players, like players' agents. Here, the court found, somewhat surprisingly, that FIFA, as an emanation of the football clubs, might be considered to hold a collective dominant position on the market of services of players' agents, in so far as the clubs were linked together in setting the Players' Agents Regulations and the clubs were buyers of the Players' Agents' Services.<sup>68</sup> In any event, the court considered that the rules were not an abuse for the same reasons that they were capable of exemption under Art.81(3) EC, in other words because of their qualitative nature. As a result, the Commission had been right to find that there was no infringement of Art.82 EC.

### Italian Bar rules

In February 2005 in *Mauri*, the ECJ found that certain Italian rules on access to the Milan Bar were not contrary to the EC Competition rules.<sup>69</sup>

It appears that Mr Mauri took the written exams to be admitted to the Milan Bar but did not obtain enough points to be admitted to the subsequent oral stage of the exams. He then

64. Case T-193/02, judgment of January 26, 2005. The case is under appeal.

65. *ibid.*, at [72]–[73].

66. *ibid.*, at [96].

67. *ibid.*, at [101], [103] and [117].

68. *ibid.*, at [113]–[116].

69. Case C-250/03 [2005] E.C.R. I-1267, Order of February 17, 2005.

appealed, arguing that the structure of the State Examination Committee was unlawful because it included two members of the Milan Bar, who were, moreover, the President and vice-president of the committee in question. He argued therefore that the way the committee was constituted was contrary to the EC competition rules and rules on freedom of establishment. The other members of the committee were two judges and a professor of law. It appears that there is such a committee for each Court of Appeal district in Italy and the members thereof are nominated by the Minister of Justice.

The Regional Administrative Court of Lombardy referred the question as to whether such rules were unlawful as claimed, notably in so far as the committee could protect the interests of existing lawyers, limiting access to the profession quantitatively.

The ECJ ruled that the Italian regulations were not unlawful, noting in particular that the Italian state had a substantial presence in the committee through the two judges and the Minister of Justice controlled the work of the committee at each stage. Further, a negative decision by the committee could be appealed to the administrative courts. As such the ECJ found, following *Arduino*, that the Italian state had not delegated its powers to private operators, nor favoured the conclusion of anti-competitive agreements. Even if the participation of lawyers in the committee might restrict the freedom of establishment, it was also justified to ensure the best evaluation of the candidates.

## Commission decisions

### Cartels

#### Choline Chloride decision

In December 2004, the Commission announced that it had imposed fines of some €66.34 million on Akzo Nobel, BASF and UCB for participating

Box 5		
New cartel fines (November 2004–October 2005)		
	Total Fines	Highest company fines(s)
<i>Choline Chloride:</i>	€66.34	BASF €34.97
<i>Monochloroacetic:</i>	€216.91	Akzo Nobel €84.38
<i>Industrial Thread:</i>	€43.00	Coats €15.05
<i>Italian Raw Tobacco:</i>	€56.00	Deltafina €30
	€382.25	
(All figures are € million)		

in a cartel on the European market for Choline Chloride, known as Vitamin B4.<sup>70</sup> The other companies concerned were Bioproducts, DuCoa (from the United States) and Chinook (from Canada). This product is mainly used as a feed additive for poultry and pigs. It is sold to animal feed producers, which in turn supply farmers.

It appears that there were two phases in the events.

From October 1992 to April 1994, the main North American and European producers of choline chloride met in a global cartel. The North American producers agreed not to enter the European market, the Europeans agreed to withdraw from the US market and the companies concerned also agreed to correlate their positions in the Far East and Latin America (with meetings in Mexico and Malaysia and a key agreement called the “Ludwigshafen agreement” in 1992).<sup>71</sup>

Then, between March 1994 and October 1998, the European producers agreed prices, allocated customers and agreed market shares in Europe.

The Commission treats this as one infringement involving an overall scheme, with two related “levels”, a global one and a European one. More

70. IP/04/1454, December 9, 2004. The summary of the decision was published in [2005] O.J. L190/22. The non-confidential version of the decision is on the Commission's website.

71. See, in particular, *ibid.*, at [77] of the non-confidential decision.

#### Box 6

##### • Cartel decision issues

- Significant reductions for evidentiary contributions outside the 1996 Leniency Notice
- Cartels infringements as
  - \* overall plans and complex, “multi-form” infringements or
  - \* several distinct infringements (geographically or in time)
- To be first in, you have to give decisive evidence first
  - \* The EU system is not a “marker” system as in the United States
- Interplay issues with US prosecutions (*Sorbates*)
- Commission focus on “supports” to cartels
  - \* Swiss statistics firm and trade associations (several cases)
- Immunity withheld for revealing immunity application (*Italian Raw Tobacco*)
- Government influence strong mitigation in Spanish Raw Tobacco case—40 per cent reduction
- Distinctions between types of cartel when assessing recidivism
  - \* Armistice and equilibrium agreements not on a par with price-fixing (*French Beer*)

specifically, the infringement was found to have involved:

- Price-fixing 1992–1994 worldwide and then in Europe 1994–1998.
- Action to control distributors and so-called “converters” (which would take choline chloride in liquid form and convert it into a dry “carrier” form, either for the account of the producer or for their own account).
- Market allocation (at the global level, generally on different continents; in Europe as regards individual customers).
- Related exchange of commercially sensitive information.

The North American companies ended their participation in April 1994 and, applying limitation. The Commission did not impose fines on them.

The Commission found that the infringement was “very serious”. The EEA market in the last year of the infringement was valued at €52.6 million, the worldwide market at some €183.7 million. The Commission used the market shares of the participants on a global level to determine weightings for fining. Akzo Nobel’s fine was increased by 50 per cent and BASF’s fine by 100 per cent for deterrence, based on the participants’ worldwide turnover in the last financial year before the decision. BASF’s fine was also increased by what the Commission calls “the normal rate” of 50 per cent, for recidivism based on its two previous infringements.<sup>72</sup> The ultimate individual fines were: Akzo Nobel €20.99 million, BASF €34.97 million, UCB €10.38 million.

The following are the main points of particular interest in the decision:

First, Chinook was in fact the first to approach the Commission, but it was not allowed to claim immunity because it did not then offer decisive evidence, which Bioproducts did when it came in a little later. The Commission stated that Chinook’s counsel had said that the contacts were “professional, exploratory and informal” in nature.<sup>73</sup>

Secondly, the way that the Commission treats the infringement as part of one overall scheme, despite its two separate phases and levels. One may note that otherwise fines for the global cartel would have been time-barred for all since it would have ended in April 1994 and the Commission’s investigations only started in May 1999 (i.e. more than five years later).<sup>74</sup> In particular, the Commission considered that the European phase continued earlier action on prices and the control of converters.

72. *ibid.*, at [208].

73. *ibid.*, at [45] and [52].

74. *ibid.*, at [149]–[154], [184].

Thirdly, there was a parallel case in the United States, which at times affected the EU procedure. For example, when the Commission requested certain information, DuCoA’s answer was “very brief”, apparently because three of its staff had agreed to plead guilty in the US proceedings at the time and the only copies of relevant records had been seized by the US authorities.<sup>75</sup>

Fourthly, the Commission reduced UCB’s fine by 25.8 per cent of the starting amount for its evidentiary contribution outside the 1996 Leniency Notice.<sup>76</sup> The Commission states that before UCB’s information, it only knew of the global co-operation and therefore the duration would have been one and a half years, whereas with that information, the Commission found that the infringement extended until 1998, nearly six years. The reduction takes away the increase in the fine for UCB, based on that extended duration.

Fifthly, BASF argued that there was no need to increase its fine for deterrence because it had already acted to prevent future infringements as a result of the parallel *Vitamins* proceedings. However, the Commission’s position is that “each separate infringement merits a separate fine, which should be proportionate to the size of the undertaking to be effective”<sup>77</sup> (and therefore increased for deterrence).

Sixthly the hard enforcement line of recent years continues as regards certain pleas. Thus the Commission gave no reduction for termination before the Commission intervened, disciplinary measures on employees concerned, the introduction of a compliance programme and arguments that the industry was in crisis.

### Monochloroacetic Chemicals

In January 2005, the Commission announced that it had fined Akzo Nobel, Atofina and Hoechst some €216.91 million for a cartel in relation to monochloroacetic acid (“MCAA”).<sup>78</sup> This is a chemical intermediate used to produce detergents, adhesives, textile auxiliaries and thickeners and is used in foods, pharmaceuticals and cosmetics. The Commission noted that the value of the EEA market in MCAA was some €125 million. The individual fines were: Akzo Nobel €84.38 million, Atofina €58.5 million, and Hoechst €74.03 million. A fourth company, Clariant, was also in the cartel, having taken over Hoechst’s

75. *ibid.*, at [50]. In the United States DuCoA and Chinock pleaded guilty and paid fines totalling US\$5.5 million. Five executives also pleaded guilty to a conspiracy to fix prices and allocate customers. In Canada, fines of some CAD \$5 million were also imposed and one executive was given a nine-month prison term.

76. *ibid.*, at [218].

77. *ibid.*, at [204].

78. IP/05/61, January 19, 2005. See Mayock (Spring 2005) *EC Commission Competition Policy Newsletter* 71–72.



MCAA business in 1997, but received a 100 per cent reduction in fine for disclosing the cartel to the Commission first.

### Industrial Thread

In September 2005, the Commission fined producers of industrial thread some €43.49 million for two cartels and also noted the existence of an earlier cartel.<sup>79</sup>

In November 2001 the Commission dawn raided several EU producers of textile/haberdashery products. As a result, the Commission found three cartels:

- A cartel for industrial customers in the Benelux and Nordic countries (from January 1990 until September 2001).
- A cartel for automotive customers in the EEA from May/June 1998 until May 2000.
- A cartel for industrial customers in the United Kingdom from October 1990 until September 1996.

The cartels involved meetings and bilateral contacts to agree on price increases and/or target prices, to exchange information on price lists/prices charged to individual customers and to avoid undercutting an incumbent supplier's prices to allocated customers.

Industrial thread is used in various industries to sew or embroider products such as clothes, home furnishings, automotive seats and seatbelts, leather goods, mattresses, footwear and ropes. The Commission considered the infringements "very serious", but appears to have tempered the fines considerably (we are not yet told on what basis). Thus fines for the Benelux/Nordic countries infringements ranged from €15.05 million on Coats and €13.09 million on Amann and Söhne to €0.5 million on Bieze Stork. Fines for the automotive thread cartel ranged from €4.8 million on Cousin/Amann to €0.65 million on Coats. No fines were imposed for the UK case, because of limitation.

### Italian Raw Tobacco

In October 2005, the Commission announced that it had fined four Italian tobacco processors a total of €56 million for collusion on the prices paid to growers and other intermediaries and on the allocation of suppliers.<sup>80</sup> The Commission has also imposed small fines on the trade associations of tobacco processors and tobacco growers for engaging in collective price negotiations.

The case appears to be very similar to that concerning Spanish raw tobacco (described below).

The Commission found that, between 1995 and 2002, the leading tobacco processors colluded on their purchasing strategy, agreeing purchase prices between themselves and allocating their suppliers (growers and "third packers" which do initial conditioning of tobacco) on a preferential or exclusive basis. The Commission also found that the tobacco processors had rigged their bids in respect of public auctions organised by public authorities for the sale of tobacco in 1995 and 1998.

From 1999 public negotiations took place between the processors' and growers' trade associations on reference minimum prices to be inserted in "cultivation contracts" at the beginning of the season. The processors also colluded on the final prices that they would pay upon delivery of tobacco, as well as on the allocation of supplies.

The Commission emphasises that the behaviour concerned was not required by the EU common market organisation on raw tobacco. However, the Commission also states that an Italian law provided for the collective negotiation of minimum prices in the agricultural sector, which "had a clear effect on the conduct of" the two associations. The implication appears to be that this was treated as strong mitigation, as in the Spanish case.

Deltafina was fined €30 million. It appears that Deltafina was initially granted conditional immunity, but the Commission withheld that immunity, because Deltafina was found to have breached its co-operation obligations by revealing to its competitors that it had applied for immunity. However, the Commission still reduced Deltafina's fine given its contribution to establishment of the processors' infringement. Other processors were fined between €14 million and €2 million. The two associations were fined €1000 each.

### Spanish Raw Tobacco decision

The Commission has now published its 2004 decision in the *Spanish Raw Tobacco* cartel case.<sup>81</sup> This case relates to two infringements:

- First, agreements and/or concerted practices between the processors of raw tobacco in Spain and the sister company of one of them in Italy, which was a purchaser of the tobacco concerned, in order to fix each year the maximum average delivery prices paid for each variety of raw tobacco; and to share out the quantities of each variety of tobacco bought between 1996 and 2001. For three years, 1999–2001, the processors also

79. IP/05/1140, September 14, 2005.

80. IP/05/1315, October 20, 2005.

81. The decision is on the Commission's website; see also Reyners Fontana, De Luca and Morillas (Spring 2005) *EC Commission Competition Policy Newsletter* 65–66.



agreed the price brackets per quality grade of raw tobacco variety and other conditions applicable.<sup>82</sup>

- Secondly, agreements and/or concerted practices between the representatives of the producers to fix each year the price-brackets per quality grade for each variety of raw tobacco and the additional conditions that would apply, notably the minimum price to be paid by the processors.

It appears that the origin of the cartel was increases in the average buying prices offered to producers in 1996, which made Spanish tobacco less competitive on export markets, notably in Italy.

The processors concerned were the *Compañie Espanola de tobacco en rame SA* (“Cetarsa”) (which, until 1990, had a legal monopoly on tobacco processing in Spain), *Agroexpansion* (a subsidiary of US corporation *Dimon*), *World Wide Tobacco España* (“WWTE”; a subsidiary of another US company, *Standard Commercial Corporation*) and *Tobacco Españoles*, a subsidiary of another US company, *Universal Corporation*. An Italian company, *Deltafina*, was also involved. *Deltafina* was a sister company of *Tobacco Españoles* and a purchaser of tobacco in Spain.

The producers were essentially members of 10 groups and were linked through three agricultural branch or union organisations and the Spanish Confederation of Agricultural Cooperatives.

Although most of the infringement appears to have been localised to Spain, “effect on trade” was found because of the fact that the raw tobacco, once processed, was sold mainly for export. The Commission also argued that the infringements extended over the whole territory of a Member State, although conceding that the production area concerned was in fact in one region of Spain.

The Commission noted that the market concerned was “rather small”, but considered both infringements to be “very serious” because of their nature. The value of tobacco bought in Spain in 2001 was some €25 million. *Deltafina* was fined €11.8 million, the processors between €3.6 million and €108.000 and the producers’ trade association representatives €1000 each.

Particular aspects of the case were as follows:

First, the way that the sector was organised. Notably, that there is a common market organisation for tobacco, that there were standard buying and selling contracts for the purchasing and that, even if joint negotiations between the processors and the producers were not required by law (notably as regard prices), such negotiations were at least actively encouraged by the Spanish Agricultural Ministry.<sup>83</sup>

The Commission rejected any defence based on the agricultural regulation of the sector, quoting the ECJ’s judgment in *Milk Marque* that “the common organisations of the markets in agricultural products are not ‘a competition free zone’”.<sup>84</sup> In particular, the Commission noted that EC regulations exempting co-operation in the tobacco sector explicitly excluded agreements on fixing prices or sharing out quantities.<sup>85</sup>

On the other hand, the Commission noted that

- “Standard” contracts had been given to the Spanish Agricultural Ministry from 1995 to 1998, with the price clause still blank, but mentioning that the producers’ representatives would negotiate jointly with each individual processor on prices and additional conditions.
- In 1999, the Spanish Agriculture Ministry approved schedules of jointly negotiated prices.
- In 2000 and 2001, the Spanish Agriculture Ministry organised meetings, some of which were held at the ministry itself, with a view to agreeing on the price schedules. (reminiscent of the actions of the French minister in the *French Beef* crises case<sup>86</sup>).

As a result, the Commission accepted that the ministry had at least encouraged the joint negotiations. Applying the *Italian Matches* case,<sup>87</sup> the Commission found Art.81 EC applicable, but treated this government influence as strong mitigation. Otherwise, the Commission considered that the fines on the producer representatives should be only symbolic, again because of the role of the Agricultural Ministry on their activities.

The Commission found that the public negotiations between producers and processors determined at least to some extent the material framework of the processor’s behaviour. The result was a reduction of 40 per cent in the fines of the processors and *Deltafina*.<sup>88</sup>

Secondly, *Deltafina*, the main purchaser of Spanish tobacco from various processors, was given the highest starting amount/position. The Commission found that this gave *Deltafina* considerable capacity to influence the Spanish processors. *Deltafina*’s fine was also increased by 50 per cent, because it was considered to have had a “key role” in the organisation of the restrictive practices, including acting as a mediator for disputes between the processors.

82. Decision, fn.81 above, at [274]–[277].

83. *ibid.*, at [60]–[65], [291].

84. *ibid.*, at [345]; Case C–137/00, [2003] E.C.R. I–7975 at [57] and [61].

85. fn.81 above, at [348].

86. See [2004] I.C.C.L.R. 57–58.

87. Case C–198/01; [2003] E.C.R. I–8055.

88. fn.81 above, at [438].

Thirdly, the position on leniency is not straightforward. Tobacco Españoles was given a 40 per cent reduction, in part because of its role in explaining the involvement of Deltafina. However, Deltafina did not have the same treatment. It appears that Deltafina had co-operated with Tobacco Españoles in providing information for the latter's leniency application, but otherwise did not independently seek leniency (although the parent of both companies asked that Deltafina be considered for leniency also). However, this was not considered to be enough of an application by the Commission, which only granted Deltafina 10 per cent leniency.<sup>89</sup>

### Carbon and Graphite decision

The Commission has now published its 2003 decision in this case which relates to electrical and mechanical carbon and graphite products.<sup>90</sup> It may be recalled that the Commission had imposed fines of some €101 million on five companies, Le Carbone Lorraine ("Le Carbone"), Schunk, SGL Carbon, Hoffman Elektrokohle and Conrady Nürnberg. The individual fines were: Carbone Lorraine €43 million, SGL Carbon €23.6 million, Schunk €30.8 million, Hoffmann €2.8 million and Conrady €1 million. Morgan Crucible obtained full immunity.<sup>91</sup>

The infringement had three main aspects:

- First, the fixing of selling prices (including agreements on specific bids to large (often public) customers<sup>92</sup> and other trading conditions.
- Secondly, market-sharing, including agreements on account leadership for major customers and agreements not to advertise or participate in sales exhibitions.
- Thirdly, concerted action against competitors. This included co-ordinated quantity restrictions, price increases or boycotts to resellers that offered potential competition and coordinated price undercutting of competitors.<sup>93</sup>

The Commission states that concentration in this industry appears to have been going on since as long ago as April 1937! However, in most cases

the Commission found infringements from 1988 to 1999 (some 11 years and 2 months) for which it considered that it had adequate evidence.

The products concerned are carbon and graphite products used for electrical and mechanical applications and the blocks of carbon and graphite from which these products are made. It appears that there are many types of product, tailored to specific applications, with carbon products mainly used to transfer electricity and products involving graphite used to seal gas and liquids in vessels and to keep machines lubricated. The market was found to be essentially EEA-wide with a value of some €291 million in 1998.

There are three particularly interesting features in the Commission's decision:

First, there is a lot of detail about the customers concerned in the decision. It appears these were mainly (1) large automobile suppliers and producers of consumer products; (2) public transport companies (railways, metros and trolley buses); (3) industrial producers of electrical motors; (4) smaller customers and end users of such electrical motors seeking replacement parts; and (5) "cutters", third parties which turn "blocks" into finished products for onward sale.

Secondly, there appears to have been some dispute about questions in a Commission request for information, which according to the Commission was "standard and purely factual" but which two companies refused to answer. At least one of them then provided answers, but only as part of its leniency application.

Thirdly, Carbone Lorraine claimed that it should have a reduction for "significant added value" to the Commission's case under para.21 of the 2002 Notice. The Commission rejected this, considering that since Morgan Crucible had applied under the 1996 Notice, only that Notice applied and that a defendant could not "just select elements more favourable to it under the later Notice".<sup>94</sup> (However, it may be noted that the Commission *has* made analogies to para.23 of the 2002 Notice and granted reductions for specific evidentiary contributions which have a direct bearing on the duration or gravity of a suspected cartel.)

Fourthly, the fine on SGL Carbon was reduced by 33 per cent, taking into account that SGL was "both undergoing serious financial constraints *and* has relatively recently been subject to two significant fines" (€80 million for graphite electrodes in 2001; €27.5 million for speciality graphites in 2002). In such circumstances the Commission accepted that imposing the full

89. *ibid.*, at [455]–[456].

90. The non-confidential version is on the Commission's website.

91. One may note that there were parallel US proceedings concerning a *global* cartel for certain types of electrical carbon products. In 2002 Morganite Inc pleaded guilty to related charges. Its UK parent pleaded guilty to charges of attempts to obstruct the investigation. Agreed fines were some US\$11 million, with four executives indicated. There had also been earlier proceedings concerning graphite electrodes and speciality graphite.

92. Decision, fn.90 above, at [134].

93. *ibid.*, at [91], [219], [239]–[241] and [278].

94. *ibid.*, at [327].

amount on the fine “does not appear necessary to ensure effective deterrence”.<sup>95</sup>

### Organic Peroxides decision

In April 2005, the Commission published its 2003 decision in the *Oxygen Peroxides* cartel case.<sup>96</sup>

The case related to a 21-year cartel from 1971 to 1999, involving Akzo Nobel, Atofina, Peroxid Chemie (originally owned by Interlox, then Laporte Plc, then Degussa) and Peroxides Organicos, known as “Perorsa” (originally part of Interlox, then owned by Laporte and FMC Forest—called “Laporte” here). The Swiss statistics consultancy AC Treuhand was also found to have infringed because of its role in the cartel. Another company, Pergon, was implicated, but not ultimately found to have infringed, because of limitation.

Organic peroxides are organic molecules containing a “peroxy” or “oxygen-oxy” bond. They are highly explosive and come in various forms, powders, liquids or pastels. They have three main applications, in high polymers, unsaturated polyester and as so-called “cross-linking” agents. There are also some seven classes of product, so the variations possible are many. For the purposes of these proceedings, the Commission treated the products as one relevant product market. Their use is mainly in the plastics and rubber industries.

The Commission found that European producers of organic peroxides pursued anti-competitive behaviour concerning the entire EEA market, although there were more specific “sub-arrangements” for some of the applications and in certain countries (Spain, France and the United Kingdom).<sup>97</sup> Akzo was the leading supplier in Europe, followed by Atochem and Laporte.

The market in Europe in 1999 (the last year of the infringement) was found to be some €250 million. The infringement was considered to be “very serious”. Atofina’s fine was some €43.47 million, Peroxid Chemie and Degussa (Laporte) some €16.7 million, Peroxid Chemie (alone) €8.8 million, Perorsa €0.5 million (and as noted AC Treuhand was fined €1000.) Akzo obtained full immunity on the first company in with decisive evidence

Particularly interesting aspects of the case are as follows:

First, the Commission decided to fine AC Treuhand for its role as an organiser of the cartel. AC Treuhand was formed after a management buyout of the Swiss statistics firm, Fides, in 1993.

The Commission’s position is that AC Treuhand’s role went beyond that of a mere secretariat.

In this respect, the Commission noted that AC Treuhand, among other things:

- held the original (cartel) agreement and key data used for the cartel in Zurich on “pink” and “red” paper to distinguish them;
- at times “mediated” in cartel disputes;
- reimbursed travel expenses so that these did not appear in company records.<sup>98</sup>

The Commission noted also that it had indicated that the Commission would take such a position before, in the 1980 *Italian Flat Glass* cartel.<sup>99</sup> However, because of variations in approach since then, the Commission treats its position here as new, justifying only a symbolic fine of €1000.

Secondly, there is a lot of discussion in the decision about whether there were several separate infringements, or one infringement with many aspects. Perorsa argued, notably, that the Spanish “sub-arrangement” was in fact a separate cartel, for which fines were time-barred, because that cartel ended before the main agreement. The Commission considered all the sub-arrangements linked together, relying on case law emphasising that a cartel may change in form over its duration and denying such limitation claims. The Commission follows its classic position of arguing that the various practices were all part of an “overall plan or scheme” to distort competition in the EEA organic peroxides market.<sup>1</sup> This also links together the practices in time, even though the Commission may note that certain parts ended at certain times.

Thirdly, who was first in was a close thing.<sup>2</sup> Akzo gained that position and full immunity, but only just, with Atochem only a few weeks behind. It appears both had opening conversations with the Commission, confirmed in writing afterwards, but Akzo was first in with a detailed statement with “numerous annexes”. This shows again the importance of submitting documentary evidence fast in leniency applications.

Fourthly, Atochem benefited from a huge reduction in fine for its evidentiary contribution outside the 1996 leniency notice: €94.19 million.<sup>3</sup> The Commission’s reasoning is that Atochem’s position on the evidence in 1992 was key in proving the full duration of the infringement. This was because there was some debate as to whether one cartel stopped that year and another started again later. Without it, the Commission would likely have only found an infringement of six and a half years (against 29 for some!). The reduction

95. *ibid.*, at [360].

96. [2005] O.J. L110/44; the non-confidential text is the Commission’s website. It appears that since 2002 the American authorities had also been investigating organic peroxides.

97. *ibid.*, at [37].

98. *ibid.*, at [91]–[105], [331] *et seq.*

99. *ibid.*, at [348].

1. *ibid.*, at [315], [320].

2. *ibid.*, at [56]–[60].

3. *ibid.*, at [493]–[495].



corresponds to the additional fine on Atochem for those extra years.

Fifthly, beyond the more classic cartel behaviour, designed to stabilise market share, co-ordinate price increases and allocate customers, the participants also admitted and the Commission found that the participants had agreed to buy up certain potentially disruptive competitors (and did so).<sup>4</sup>

Finally, given the long duration for some (29 years), fine duration increases were huge: e.g. 245 per cent for Akzo and Atochem, 207.5 per cent for Peroxid Chemie and 220 per cent for Perosa. Interestingly, the Commission gave 10 per cent per year increases for the 20 years pre-1999 and 5 per cent for earlier than that, considering that competition policy then was less strict, companies were less aware of the rules and fines were lower.<sup>5</sup>

### Industrial Tubes decision

The Commission has now published its 2003 decision in this case.<sup>6</sup> It may be recalled that the Commission imposed fines of some €79 million on three groups of companies, KME, Outokumpu and Wieland Werke. The Commission found that, around a quality association for air conditioning and refrigeration tubes called Cuproclima, the companies had co-ordinated on prices and allocated market shares in the EEA market for industrial copper tubes from 1988 until early 2001. The EEA market was found to be some €288 million in 2000.

The Commission found that the infringement was “very serious”. The KME group was fined some €39.8 million, Wieland Werke some €20.7 million and Outokumpu some €18.1 million. Outokumpu’s fine included an increase of 50 per cent for deterrence and 50 per cent for recidivism, the Commission noting that Outokumpu had been the addressee of a previous decision under the ECSC Treaty which it considered of the same type. (This is under appeal, since Outokumpu considers that the earlier steel case involved a very-different, public context.<sup>7</sup>)

There are two main points of particular interest:

First, Outokumpu’s fine was reduced by a lump sum of some €22 million, for co-operation outside the 1996 Leniency Notice (in addition to a 50 per cent leniency reduction for co-operation), in so far as Outokumpu was the first to give evidence that the duration of the infringement was some 12 years rather than four years.<sup>8</sup> Outokumpu’s fine was therefore adjusted to what it would have had

for a four-year infringement. The Commission’s approach here was overtly similar to that in the 2002 Leniency Notice, para.23, and aimed to ensure that Outokumpu should not be penalised for its co-operation with a higher fine than it would have had to pay without the co-operation.

Secondly, the question as to whether the fines should relate to the full tube turnover of the companies, or only the value of the conversion work which the companies did, transforming copper into the products concerned. Notably, in so far as customers fixed the metal values first, based on the prevailing price on the London Metal Exchange, so that the companies’ co-ordination focused on their prices for “conversion work”.<sup>9</sup>

### Needles decision

The Commission has now published its 2004 decision on the needles and haberdashery cartel.<sup>10</sup> In that decision the Commission fined two companies, Coats and Prym, €30 million each. Entaco received 100 per cent immunity from fines under the 1996 Leniency Notice as the first company providing decisive evidence of the cartel. The European “hard haberdashery” market was found to be worth some €1.5 billion and the two other more specific markets affected here, €30 million each.

The Commission found that the three companies entered into a series of bilateral written agreements amounting, in practice, to a tripartite agreement under which they shared product markets and geographic markets. More specifically, the Commission found that between 1994 and 1999, among other things, Prym and Entaco had agreed:

- to limit the business activity of Entaco to the handsewing and special needles business (and therefore not other types of haberdashery);
- to limit Entaco’s activity in the needles market to the United Kingdom, Ireland and to some extent Italy (with an exception for certain “accounts”), effectively reserving the Continental European market for needles to Prym.

Coats was also found:

- to have protected its own retail needle brand, Milward, from competition by entering into an exclusive supply and purchasing agreement with Entaco which covered the

4. *ibid.*, at [271]–[273] and [353] *et seq.*

5. *ibid.*, at [466].

6. Non-confidential version on the Commission’s website.

7. *Industrial Tubes, ibid.*, at [349].

8. *ibid.*, at [384]–[387].

9. This is under appeal.

10. The non-confidential version is available on the Commission’s website. With thanks to Stefano Fratta for his assistance with this and comments on other cases; see also Roques (Spring 2005) *EC Commission Competition Policy Newsletter* 59–61.



United Kingdom and partially Italy (effectively preventing Entaco from selling other branded needles there);

- to have imposed on Entaco the obligation to respect the geographic market-sharing agreement between Coats and Prym.

The Commission found that these agreements were inter-conditional (the Commission quotes several clauses to that effect).

It appears that Coats and Prym had co-operated for a number of years across Europe in the distribution of haberdashery. In 1991 Coats sold part of its needles business to Entaco in a management buyout. These agreements were then developed, partly to have Entaco fit into the scheme, partly so that the newly independent Entaco did not undermine the business of Coats and partly so that Entaco secured its business platform (with committed purchasing from Coats and protection from Prym competition). Later on, the agreements broke down, with Prym supplying Coats more. Entaco then offered to sell itself to Prym, but Prym did not pursue the possibility. A little later Entaco approached the Commission.

There are five particular aspects to the case.

- First, this is not a simple classic cartel. The unlawful co-operation is built up from several bilateral agreements (together with a number of bilateral and tripartite meetings).
- Secondly, Coats was not operating at the same level as Prym and Entaco in the needles concerned. Rather Coats, after it sold the relevant needle production business to Entaco in 1991, was only a distributor of such products. (The Commission noted that Coats dominated the distribution of needles and pins across Europe.) Nevertheless, the Commission found Coats to have been fully implicated in the unlawful arrangements.<sup>11</sup>
- Thirdly, the Commission found that the exclusive supply and purchasing agreement between Coats and Entaco could not come under the then applicable exclusive distribution block exemption (Regulation 1983/83), because the agreement was in fact tripartite and required Entaco to respect a non-exempt restriction, namely market-sharing with Prym.
- Fourthly, the Commission also stated that the specialisation block exemption could not apply because the market shares of Entaco and Prym were too high for the applicable thresholds.
- Finally, one may note that this is yet another example of the antitrust complexities which can arise when companies are sold out of a

group, but still closely related or dependent on the group concerned for their ongoing business.

### Plasterboard decision

In June 2005, the Commission published its 2002 decision in the *Plasterboard* case.<sup>12</sup>

The Commission found that four companies, BPB, Knauf Westdeutsche Gipswerke, Lafarge and Gyprox Benelux had participated in a price-fixing and market sharing cartel between 1992 to 1998, designed to stabilise the four principal markets for plasterboard in the EU, namely Germany, the United Kingdom, France, and Benelux.

The value of the plasterboard market in the countries concerned in 1998, the last year of the infringement was some €1,200 million. BPB's fine was increased by 50 per cent for recidivism in so far as its subsidiary BPB De Eendracht had been involved in the cartonboard cartel. Similarly, Lafarge's fine was increased by 50 per cent because of its previous infringement in the cement cartel. The final amounts were: Lafarge €249.6 million, BPB €138.6 million, Knauf €85.8 million, Gyproc €4.32 million.

It appears that after BPB acquired a company called Rigips in Germany in 1987, radical changes occurred in the European market, with the largest producers buying up many of the smaller ones to the point where an oligopolistic structure was created with BPB, Knauf and Lafarge the main players and Gyproc and Norgips minor ones. There are also a number of cross-holdings in the industry. There was then a price war and intense competition on volumes. From 1992 BPB and Knauf started an information exchange system, which Lafarge and Gyproc joined. There were also exchanges of information on prices in the United Kingdom and Germany and meetings which the Commission found were with a view to "stabilising" the German market.

The companies concerned argued, among other things, that their contacts were essentially designed to create statistical information which was not otherwise available, contested that their actions were unlawful and argued that the contacts had little market impact. Much of this appears to relate to the fact that contacts were often at a high level (in terms of people and information exchanged) rather than with the rank and file and in great detail.

Particular noteworthy points in the decision are:

First, the Commission considered that, on the contrary, there were clear discussions and meetings and market effects and that the contacts

11. *Needles* case, *ibid.*, at [274].

12. [2005] O.J. L166/8. The non-confidential version is on the Commission's website.

could not be assimilated to legitimate statistical exchange when they included “secret” mail and/or faxes to the private homes of executives involved.<sup>13</sup>

Secondly, that Gyproc was given a lesser fine in part because of the role BPB on its activities. BPB was a significant minority shareholder, held the *Gyproc* trade mark and sat on the board of Gyproc. It appears that one of the BPB directors in Gyproc passed on information concerning its activities. This did not amount to a defence or a finding of “passive participation” for Gyproc, but it was treated as mitigation.<sup>14</sup>

Thirdly, the way that the Commission’s decision on information data exchanges is based in part on the oligopolistic nature of the market and on the *Tractor Exchange* case.<sup>15</sup> In other words, that in the market circumstances, even if there was only an exchange of information, that was an infringement.

### Sorbates decision

In July 2005, the Commission published its decision in the 2003 *Sorbates* cartel.<sup>16</sup> Sorbates are chemical preservatives (anti-microbial agents), capable of retarding the growth of micro-organisms such as yeast, bacteria, moulds or fungi and are used primarily in food and beverages. They are also used as stabilisers in other products, such as pharmaceuticals, cosmetics, pet food and animal feed. The relevant geographic market was found to be worldwide in scope.

The cartel concerned European and Japanese companies: Hoechst, Daicel Chemical, Chisso Corp, Nippon Synthetic Chemical and Ueno Fine Chemicals. These companies were found to have agreed on price targets and allocated volume quotas.<sup>17</sup> An unusual feature of the case was on agreed policy not to give sorbates technology to potential new entrants.<sup>18</sup> The arrangements were found to have lasted from December 1978 until November 1995/October 1996, i.e. for some 17–18 years.

Hoechst and Daicel were considered to be the leaders of the cartel, Hoechst being the largest worldwide producer and Daicel arranging related co-ordination meetings of the Japanese producers.

The Commission considered the infringement “very serious”. The Commission weighted the starting amounts based on worldwide turnover in the last year of the infringement, 1995. Hoechst’s

fine was increased by 100 per cent for deterrence. Given the duration, the increases on that account were significant, mainly 175 per cent and in one case 165 per cent. Hoechst’s fine was also increased 50 per cent for recidivism and 30 per cent for its leading role in the cartel, with Daicel also having a 30 per cent fine increase for its leading role. Total fines were €137.8 million. Hoechst’s fine was €99 million, Daicel €16 million, Ueno €12.3 and Nippon €10.5 million.

The main points of particular interest in the case were the following:

First, there was some dispute about which company came in first. One company, Chiasso, came to the Commission in September 1998. Another, Hoechst/Nutrinova then came in October 1998, giving a description of the cartel’s activities. Then in November, Chiasso gave another oral description and documentary evidence.

The Commission found that Chiasso was the first to produce decisive evidence (and therefore qualify for 100 per cent immunity if the other conditions of the 1996 Leniency Notice were met). Hoechst disagreed, but this was rejected by the Commission, which found that Hoechst’s October contribution had not been precise, detailed or reliable enough.<sup>19</sup> The key point was that the oral description of the cartel here was not treated as decisive evidence.<sup>20</sup> (The Commission also found that Hoechst had played a “determining role” in the cartel and therefore could not qualify for 100 per cent leniency on that account.)

This makes interesting reading for those following the debate as to whether decisive evidence should be required or just a US style “marker” to qualify for immunity.

Secondly, there appear to have been some delays in the EU procedure, while the companies concerned dealt with parallel US criminal issues.<sup>21</sup> For example, some requests for information in May 1999 were not answered until 2001 or even 2002.<sup>22</sup> Written submissions were also delayed so as not to be discoverable prior to potential US prosecution.<sup>23</sup> The Commission appears to have also treated such delay as indicative of a lack of continuous co-operation.<sup>24</sup>

Thirdly, unusually the Commission gave one company, Ueno a reduction on the basis that it had shown that it did not implement the volume quota

13. *ibid.*, at [162]–[164].

14. *ibid.*, at [574].

15. *ibid.*, at [449]–[450] and [535]; Case C-7/95P; *John Deere v Commission* [1998] E.C.R. I-3111.

16. [2005] O.J. L182/20. The non-confidential version of the decision is on the Commission’s website.

17. *ibid.*, at [264]–[281].

18. *ibid.*, at [117].

19. *ibid.*, at [443].

20. *ibid.*, at [444].

21. In the United States, five producers pleaded guilty to price fixing and other fines of some US\$132 million. Fines were also imposed in Canada.

22. See non-confidential decision, fn.16 (2nd ser.) above, at [6], [9], [10].

23. *ibid.*, at [441].

24. *ibid.*, at [447]–[449].

allocations.<sup>25</sup> Often such arguments are rejected as mere “cartel cheating”, but here Ueno showed that it more than doubled its volume quota in its European sales since 1991.

### Fine Art Auction Houses decision

In July 2005, the Commission published its 2002 decision in this case.<sup>26</sup> The Commission found that, between April 1993 and February 2000, Christies and Sothebys, the world’s leading fine arts auction houses for fine art objects, antiques, furniture “collectibles” and memorabilia, had agreed, among other things, to adopt identical commission structures for vendors, to increase vendor commission charges and to refrain from offering special conditions to sellers. They also co-operated on conditions applicable to buyers.

It appears that the co-operation developed during a recession, in which the houses had been offering all sorts of advantages to sellers, including 0 per cent commission in order to obtain business, leaving the auction house income as only from a premium paid by buyers.

The Commission found that there were two main phases: first, a “grand plan” agreement in 1993, with some implementation on terms and conditions and then, in 1995, a more specific step of introducing new and stricter rules on vendor’s commissions, from which it was agreed not to deviate, except for agreed “grandfather lists” of pre-existing agreements.

Christies was granted a 100 per cent reduction in fine, since it informed the Commission first. Sothebys also co-operated with the Commission and received a 40 per cent fine reduction under the Leniency Notice, meaning that its fine was €20.4 million.

### French Beer decision

In July 2005, the Commission published its decision in the *Danone/Kronenbourg Heineken* cartel case.<sup>27</sup> It may be recalled that this was a somewhat unusual case in which these two companies had entered into a so-called “armistice agreement”, agreeing not to purchase more drinks wholesalers, to “balance” the total volume of beer distributed through the two networks and to balance the volume of each other’s beer brands distributed by the other party. The case arose as a result of information from Interbrew, which is the main importer of beer into France.

The focus of the Commission’s case was the agreement itself, entered into in March 1996,

with the Commission openly stating that it did not have evidence of implementation (as Danone and Heineken continued to buy wholesalers and supplanted their competitors’ beer in their own distribution networks).<sup>28</sup> This was therefore a case based on “object”, rather than effect, although the Commission found an effect on trade through the way that the agreed structure could affect the conditions of access for third parties such as Interbrew, to the French market. The ultimate fine on Danone/Kronenbourg was €1.5 million and on Heineken €1 million.

There are three main points of interest:

First, the Commission decided that the infringement was only “serious”. The Commission found that the armistice agreement was not as serious as a price-fixing agreement:

“an agreement designed to bring wholesaler acquisition costs under control in the short term by putting an end to an acquisition war cannot be regarded as a clear infringement on a par with a price-fixing agreement”.<sup>29</sup>

Although the Commission found that the agreement on equilibrium between the two distribution networks was akin to a market-sharing agreement, the agreement was also found not to be market-sharing in the “conventional” sense, “since the agreement was intended mainly to prevent one group from dominating the market” (rather than to eliminate *all* competition between the groups or impede third parties).<sup>30</sup> Otherwise, the Commission noted that the agreement was not implemented and related only to the “away from home” sales of drinks in France (found to be less than one-third of the national sales volume).

Secondly, Danone’s fine was still increased by 50 per cent for recidivism because it was involved in market-sharing agreements in the *Benelux Flat Glass* case in 1984 (through BSN).<sup>31</sup> However, the Commission did *not* take into account Danone’s infringement in the *Glass Containers* case in 1974 on the basis that the case, mainly involved price-fixing.<sup>32</sup> In other words, the Commission distinguished between different types of cartel, in determining what was an infringement “of the same type” under the Fining Guidelines.

Thirdly, there were no reductions for leniency because there were no applications, although the companies had co-operated with the Commission. No reductions were given for not challenging the facts, since that is not available under the 2002 Leniency Notice which applied.<sup>33</sup>

25. *ibid.*, at [404]–[406].

26. [2005] O.J. L200/92; the non-confidential text of the decision is on the Commission’s website.

27. [2005] O.J. L184/57. The non-confidential text is on the Commission’s website. See also, Rutgeerts (Spring 2005) *EC Commission Competition Policy Newsletter* 63–64.

28. *ibid.*, at [48].

29. *ibid.*, at [83].

30. *ibid.*, at [83].

31. *ibid.*, at [91].

32. *ibid.*, at [91], fn.93.

33. *ibid.*, at [101].

### Copper Plumbing Tubes decision

The Commission has now published its 2004 decision in this case.<sup>34</sup> It may be recalled that the Commission imposed fines of some €222.3 million on seven groups/companies: KME, IMI, Boliden, Outokumpu, Wieland, Halcor and HME Nederland. Mueller Industries was also found to have infringed, but given full immunity.

The Commission found that the companies had been involved (to differing extents) in price-fixing and market sharing in the EEA for varying periods from 1988 until March 2001. The products concerned are generally used for water, oil, gas and heating installations in the construction industry. The overall market, taking together plain, insulated or plastic coated tubes was found to be worth some €1.15 billion in 2000. The Commission found that the infringement was “very serious”. Fines ranged from some €67 million on the KME group to €4.4 on HME Nederland BV.

Particular features of the case are as follows:

First, the way that the Commission found a “single, continuous, complex” (and, as regards certain companies) “multiform” infringement.<sup>35</sup> In doing so the Commission treated co-ordination among (1) users of the *Sanco* trade mark for plain copper tubes; (2) users of the *WICU/Cuprothem* trade mark for plastic-coated tubes; and (3) other market participants as all part of *one* infringement, even though not all companies were involved in all these activities or made the same types of products.

Secondly, as in the *Industrial Tubes* case there is debate as to whether fines should be based on total product turnover or distinguish “conversion work” from the underlying copper which was made into the products concerned. Outokumpu

was also considered to be recidivist on the basis of an ECSC decision (which Outokumpu contested, among other things, on the basis that the earlier case was in a very different situation in a quasi-public content and Outokumpu was acting under government influence in a trade context).<sup>36</sup>

Thirdly, Halcor pleaded that it had been coerced into the arrangements. This was not accepted by the Commission.<sup>37</sup>

Fourthly, Outokumpu’s fine was reduced by a lump sum of €40.17 million, for co-operation outside the 1996 Leniency Notice, in so far as Outokumpu disclosed the whole duration of the cartel. KME was also granted a reduction of €7.93 million in its fine outside leniency co-operation, for its evidentiary contribution as regards the WICU/Cuprothem arrangements. The Commission’s reasoning is that reductions should be granted by analogy with the later 2002 Notice, which provides for such a consideration, even though this case was under the 1996 Notice.<sup>38</sup>

In Part 2, to be published in the next journal, John Ratliff will outline:

- Other European Commission cases on horizontal co-operation and distribution
- Proposed “commitment decisions” for diamond supply and collecting society licensing
- ECN developments
- New sectoral reviews into energy, payment cards and insurance
- Interesting Art.82 EC cases on clearing and settlement of securities and predatory pricing in ADSL internet services
- Policy discussion on cartel plea-bargaining

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34. Non-confidential version on the Commission’s website. See also Mische (Spring 2005) *EC Commission Competition Policy Newsletter* 67–70.

35. *Copper Plumbing Tubes*, *ibid.*, at [458].

36. *ibid.*, at [721]. The case is on appeal.

37. Paras 534 *et seq.*

38. See, Mische, *fn.34* (2nd ser.) above, p. 69 and Decision paras 757–761.



## Major Events and Policy Issues in EC Competition Law, 2004–2005 (Part 2)

JOHN RATLIFF\*

 Competition law; Competition policy; EC law

This article is the second and final part of the overview of “Major Events and Policy Issues in EC Competition Law, 2004–2005”, following from last month’s journal.<sup>1</sup> This part of the article is divided into three sections:

- (1) The final part of the “Overview of major events”, including: recent Commission decisions on horizontal co-operation, distribution and abuse of dominant position; the Commission’s first commitment decision involving Bundesliga media rights; comments on developments in the European Competition Network; and two new sectoral reviews, one for energy, the other for financial services.
- (2) Focus on current policy issues, including: cartel enforcement and plea bargaining, damages claims and private actions for the enforcement of the competition rules and progress towards EC guidelines to modernise Art.82 EC.
- (3) An outline of Commission activities in relation to three areas of particular interest: competition and the liberal professions; the sectoral review of “Sport and 3G”; and a DG COMP paper on “Competition and Waste Management”.

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1. [2006] I.C.C.L.R. 39.

## Overview of major events (continued)

### Other horizontal decisions/prohibitions

#### Box 1

- *Belgian Architects*
  - \* N.B. The fine was €100,000
- *Diamond supply between competitors*
- *Santiago copyright licensing societies agreement*
  - \* Territorial restrictions/MFN clauses removed by two
- *Classic airline co-operation cases*
  - \* Slots to *existing* competitors as a remedy
- *Bundesliga media rights*
  - \* Joint sales allowed but packages of rights and some club rights retained

### Belgian Architects

In January 2005, the Commission published its decision in this case.<sup>2</sup> It may be recalled that the Commission imposed a fine of €100,000 on the Belgian Architects Association for having adopted in 1967 and then maintained until 2003 a recommended minimum fee scale for architects’ services, calculated as a percentage of the value of the works carried out. The Commission concluded that the recommended fee scale constituted an infringement of Art.81 EC, because it had the object of co-ordinating the pricing behaviour of architects in Belgium.

The following are the main points of interest in the decision:

First, as will be apparent, the Commission is now imposing real (if moderate) fines for unlawful recommended prices in the services sector, as opposed to symbolic ones.<sup>3</sup> In this case, the Commission treated the infringement as “very serious” by nature, but “serious” overall (partly because it only concerned one Member State). The starting amount was therefore €1 million. This was increased by a huge 350 per cent, 10 per cent a year for 35 years, giving a possible fine of €4.5 million, but then reduced on the basis that there might have been some uncertainty about such practices before the Commission’s decision in the *CNSD* (Italian customs agents) case in 1993. In other words, the increase for duration was only 100 per cent. The Commission then reduced the fine again significantly on the basis that in *CNSD* the Commission imposed no fine and, in its later services case, the *Fenex* (Dutch forwarding agents) case in 1996, imposed only a symbolic fine. One may also wonder if the Commission thought that larger fines on independent architects, even through a trade association, would be too much.

2. [2005] O.J. L4/10. The non-confidential version is on the Commission’s website.

3. *ibid.*, at [126]–[137].

Secondly, the Commission makes it clear that it does not consider recommended minimum prices to be capable of falling outside Art.81(1) EC, on the basis of the principle in *Wouters* that certain professional rules may be necessary for the proper practice of the profession.<sup>4</sup> The Commission's view is, above all, that this prevents cost-based competition.

Thirdly, the Commission does not say that recommended prices are automatically unlawful.<sup>5</sup> Its case here relies on the way that the recommendation was presented as a rule (until very recently when it was renamed a "guideline") and applied as if it had a binding character. The Commission considered that these factors showed that the recommendation had the object of restricting competition. The Commission's position is that recommendations on how architects could calculate their own costs might be lawful. However, this is not the case if a recommendation actually "diverts" architects from taking into account their own costs when setting their fees.<sup>6</sup>

Fourthly, the Commission did not accept (1) "public defence" arguments that the Architects Association was a public law body, with responsibility for the "ethics" of architects in Belgium; or (2) the idea that the recommendation was just a proposal to the Belgian State which had approved it and made it law (e.g. arguments based on *Arduino*). The Commission found that the relevant minimum fee recommendation was more than a "mere preparatory act".<sup>7</sup> The Commission found that the Association also had a considerable margin of discretion and was not required to establish such minimum fee rules.

## Diamonds

In December 2004, the Commission indicated that it was considering certain commitments in relation to a "trade agreement", under which De Beers, the African diamond producer, purchased diamonds from the Russian producer Alrosa.<sup>8</sup> This then led to an Art.27(4) notice in June 2005, market testing those commitments.<sup>9</sup> It may be useful to recall that De Beers is the largest diamond mining company in the world and Alrosa is the second largest.

The Commission explains that in 2002 De Beers and Alrosa notified an agreement from December 2001 under which Alrosa would supply De Beers with rough diamonds to the value of US\$ 800 million per year for five years. This amounted to approximately half of Alrosa's production

and appeared to be a successor to previous similar agreements. Implementation was said to be conditional on confirmation by the Commission that this was not an infringement of Arts 81 and 82 EC.

The Commission sent Statements of Objections to the two companies, indicating that it had concerns under Arts 81 and 82 EC. The Commission considered that, by entering into the agreement, De Beers would gain control over a significant source of supply on the worldwide rough diamonds market, on which it is already dominant. This would give De Beers more diamonds to sell, as well as a wider range. The Commission considered that this would eliminate Alrosa as a source of supply on the market outside Russia and enhance De Beers' dominance, preventing the growth or maintenance of competition. Further, through the agreement, De Beers would act as a distributor of about half of the production of its largest competitor, substantially weakening competition.

It appears that the parties have offered to amend the agreement to provide for a progressive decrease in the diamonds to be sold by Alrosa to De Beers between 2005 and 2010, from a maximum value in 2005 of €700 million to a maximum value of €275 million in 2010 and thereafter. An independent third party is to be appointed to monitor compliance.<sup>10</sup> Finally, the Commission notes that the decision to come "would not conclude whether or not there has been an infringement", although it will make the commitments binding.<sup>11</sup>

It will be interesting to see what happens. On the substance, one can see why the Commission has objections and there are analogies with older cases of supply agreements between market leaders. What is not clear from the notice is why there was this sort of transitional period. Perhaps Alrosa may have wanted time to set up other arrangements or it was thought that abrupt changes were not possible for other reasons.

## Santiago Agreement

In August 2005, the Commission issued an Art.27(4) Notice in relation to undertakings given by BUMA and SABAM in relation to the Santiago Agreement<sup>12</sup> concerning the right to license public performance rights on musical works online. The Santiago Agreement is, in fact, a standard bilateral agreement for reciprocal representation between collecting societies which authorises each party to grant non-exclusive licences for the online public performance of musical works of the repertoire of the other party on a worldwide basis.

4. Case C-309/99 [2002] E.C.R. I-1577 and see decision, fn.2 above, at [97]–[99].

5. fn.2 above, at [77].

6. *ibid.*, at [88]–[89].

7. *ibid.*, at [39]–[49].

8. IP/04/1513, December 20, 2004.

9. [2005] O.J. C136/32.

10. The commitments are on the Commission's website.

11. fn.9 above, at [2].

12. [2005] O.J. C200/11.

It may be recalled that the Commission has been involved in proceedings relating to the Santiago Agreement for some time. The agreement was notified in April 2001 and the Commission issued a first notice about it in May 2001.

In April 2004 the Commission issued a Statement of Objections concerning the way in which, under the Santiago Agreement, only the collecting society of the country where the content provider has its actual and economic location is authorised to grant multi-repertoire licences. The Commission considers that this gives each national collection society absolute territorial exclusivity for the grant of multi-territorial/multi-repertoire licences for online music rights.

In addition, the Commission considers that the Most Favoured Nation clause under the Santiago Agreement (which requires participating societies to give equally favourable contractual or other licensing terms to all societies within the EEA which are parties to the agreement), reinforces the multilateral nature of the territorial system applicable to multi-repertoire licences and prevents the market from evolving in different ways.

It appears from the Commission's notice that BUMA and SABAM have decided not to defend the clauses in question, in each case with express reservations that any decision taken should not find that they have infringed the EC competition rules and offered undertakings not to be party to such a territorial restriction or Most Favoured Nation clause. The undertakings are for three years in view of the emerging nature of the markets concerned.

It will be interesting to see how this proceeds, in particular if, at the same time, the Commission pursues proceedings against the other members of the Santiago Agreement, which perhaps may not have the same view.

### **Air France/Alitalia**

In December 2004, the Commission published its decision clearing the co-operation between Air France and Alitalia, subject to certain commitments.<sup>13</sup>

It appears that in November 2001, Air France and Alitalia notified a number of co-operation agreements to the Commission which are part of a bilateral strategic alliance, itself part of the SkyTeam Alliance. These include an agreement aimed at creating a European multi-hub system based on their main airports at Paris, Rome and Milan to interconnect their worldwide networks, as well as co-ordination of the parties' passenger service operations and co-operation in other areas,

such as cargo transport and maintenance. The parties also envisaged a closer co-operation on the "France/Italy bundle", including agreements on frequencies, capacity sharing and sharing of earnings.

A first notice on the case was published in May 2002, after which other airlines expressed interest in operating on some of the routes concerned.

The Commission indicated that the alliance affected passenger and goods transport and ground handling, but that this procedure related only to the passenger co-operation. The Commission generally acknowledged the positive effects of such co-operation, but focused on structural concerns about overlaps on seven city pairs between France and Italy. The companies offered commitments which were published in December 2003 and subsequently improved.

The Commission's decision provides for an exemption for a six-year period from November 2001 until November 2007. However, technically the exemption lapsed several weeks later (since the decision was in April 2004, just before Regulation 1/2003 entered into force).

The commitments provide, among other things, for the release of slots if required to support a total of 20 to 21 frequencies on the seven routes concerned.

Interestingly, slots are to be made available on a preferential basis to the competitor which will operate the highest number of frequencies on the route.<sup>14</sup> The Commission also considered that slots at Orly airport should be surrendered to competitors, who already offer services there, so that they can increase the number of services they provide. A similar approach was taken at Milan Linate.

It appears that the Commission wants to build up the existing competition, rather than just have a number of (small) new entrants. Otherwise, there are (now) typical remedies designed to reduce entry barriers, concerning access to frequent flyer programmes, interlining, special prorate agreements and intermodal passenger agreements.

### **Austrian Airlines/SAS**

In September 2005, the Commission published an Art.27(4) Notice, indicating that, subject to market testing, the Commission planned to take a decision under Art.9 of Regulation 1/2003, declaring commitments offered by Austrian Airlines and SAS to be binding.<sup>15</sup> The Commission invited third-party comments within a month.

This case, relating to co-operation between Austrian Airlines and SAS, has also been going on for some time. In 1999, the two

13. [2004] O.J. L362/17. The non-confidential version is on the Commission's website.

14. *ibid.*, at [17].

15. [2005] O.J. C233/18.



companies notified a co-operation agreement to the Commission for individual exemption. Under the agreement, the parties co-operated on all routes worldwide. However, as between Austria and the Nordic countries (Norway, Sweden and Denmark) they envisaged a “Joint Traffic System” joint venture, in which they would share all costs and revenues. After a first notice seeking comments, the Commission indicated that it had serious doubts about the agreement, in particular as to whether the Joint Traffic System would qualify for clearance under Art.81(3) EC, because of its impact on the Vienna–Copenhagen and Vienna–Stockholm routes.

The companies then suggested a lesser co-operation, with a “carve-out” for bilateral traffic between Austria and the Nordic countries. However, this solution could not be implemented. Then, in 2002, they proposed an amended co-operation agreement without a carve-out, but also without a joint venture for bilateral traffic. This included, notably, a harmonised pricing policy, co-ordination on route programmes and capacities, the co-ordination of sales by each respective home carrier and integration of frequent flyer programmes.

The Commission regarded this co-operation as “close” and still sought structural remedies with regard to the Vienna–Copenhagen and Vienna–Stockholm city pairs.

The commitments offered follow a classic pattern:

- The two companies agree to make available the take-off and landing slots necessary for up to two frequencies a day between Vienna and Copenhagen (it appears that a new entrant is already providing services on this basis) and between Vienna and Stockholm. They also agree to freeze their own frequencies for a period.
- The parties agree to interline with the new entrant based on established IATA principles.
- They also agree a non-discriminatory special prorated agreement, where part of a journey involves one of the routes affected.
- They agree to allow the new entrant to participate in their frequent flyer programmes.
- They agree to enter into intermodal transport agreements with rail or other surface transport companies as regards air transport on the affected routes.

### Bundesliga media rights

In January 2005, the Commission published its first “commitments decision” under Regulation 1/2003 in relation to the German Football League’s

joint sale of media rights to first and second divisions matches of the Bundesliga.<sup>16</sup>

It may be recalled that the settlement involved the offer of various packages of Bundesliga rights (as a “league brand”), for a duration not exceeding three seasons and under a defined awards procedure.<sup>17</sup> Otherwise, clubs can sell their rights to some extent, in particular to new media under their own “club brand”, for example through deferred coverage on the internet on the club homepage.

The summary decision in the EC Official Journal is only four paragraphs. It indicates that, in view of the commitments offered, there are no grounds for the Commission to take action under Art.9(1) of Regulation 1/2003 and makes the commitments binding until June 30, 2009.

The full decision is also short, some 43 paragraphs on 9 pages, but with another 10 pages of commitments in annex. The Commission explains the basic features of the case, explains that there were two rounds of consultation: one notice in 2003, which led to comments from various quarters, including several clubs and three national competition authorities, and then a second notice under Art.27(4), which also led to some comments, but none such as to make the Commission change its favourable view. Otherwise, the Commission emphasises that its decision is based on a preliminary assessment only.

The Commission is now understood to be in heavy discussions with the English FA Premier League.

### Aviation Insurers

In March 2005, the Commission announced briefly that aviation insurers had given certain undertakings “to promote competition and transparency”.<sup>18</sup> The undertakings were given by the International Underwriting Association of London and the Lloyd’s Market Association. In future, standard wording for aviation insurance policies and clauses will be drawn up by insurers, in consultation with customers. The Group dealing with such Aviation Insurance Clauses will also publish the Group’s meeting records. The Commission states that the terms of reference for a “liaison forum” between the two aviation insurers’ associations have also been redefined to avoid the risk of excessive co-ordination.

16. IP/05/62, January 19, 2005; [2005] O.J. L134/46, with a confidential version on the Commission’s website. See also Wilbert (Summer 2005) *EC Commission Competition Policy Newsletter* 44–46.

17. See Ratliff [2005] I.C.C.L.R. 109 at p.127.

18. IP/05/361, March 23, 2005.

## Box 2

- **The developing format of commitment procedures**
  - Preliminary assessment
  - Short OJ and non-confidential decisions
  - Parties may offer commitments, but without accepting infringements
  - Commitments may be for a defined period of time
  - Often two rounds of consultation
  - Query whether the preliminary assessment is like a Statement of Objections, giving rights to third parties?<sup>19</sup>
  - Query also what the effects of such a decision are on other EC NCA proceedings? (Arts 9 and 13 and Recital 13 of Regulation 1/2003)<sup>20</sup>

## Distribution

## Gas supply

In February 2005, the Commission announced that it had decided to close its investigation into gas supply contracts between Gazprom and OMV (the Russian and Austrian gas suppliers).<sup>21</sup> The companies have agreed to delete territorial sales restrictions from their existing gas supply contracts, allowing OMV to resell outside Austria and to remove a right of first refusal in favour of OMV, which required Gazprom to offer any gas for Austria first to OMV. Otherwise, OMV has agreed to “promote” an increase in the capacity of the Trans Austria Gazleitung (“TAG”) pipeline, which runs through Austria to Italy, in so far as it is one of the TAG shareholders, and to “promote” improved third-party access to that pipeline.

In June 2005, the Commission announced that Gazprom and E.ON Ruhrgas had also agreed to removed destination clauses (territorial sales restrictions/resale export bans) in their gas supply agreements and “MFN” (most favoured customer) provisions, under which Gazprom would not supply competitors of E.ON Ruhrgas on better terms than those offered to E.ON Ruhrgas.<sup>22</sup>

The Commission states that investigations continue as regards imports by Italian and Spanish operators of Algerian gas.<sup>23</sup>

19. Thus far, it appears that the Commission is not treating a preliminary assessment in this way.

20. See Helmut Brokelmann’s paper in the Decentralisation Panel at this conference, where he discusses the Spanish *Coca-Cola* case. The issue is whether a NCA should stop (or not start) any similar proceedings of its own if the Commission takes a commitment decision.

21. IP/05/195, February 17, 2005.

22. IP/05/710, June 10, 2005.

23. During the year the Commission also published a non-confidential version of its decisions in the *GDF ENI* and *GDF ENEL* cases on its website. See also Cultrera (Spring 2005) *EC Commission Competition Policy Newsletter* 45–48; and Ratliff, fn.17 above, at p.125.

## Peugeot fine

In October 2005, the Commission fined Peugeot €49.5 million for obstructing new car exports from the Netherlands.<sup>24</sup> The Commission states that between 1997 and 2003, Peugeot made part of the remuneration payable to dealers dependent on the final destination of the vehicle and discriminated against sales to foreign customers. Notably, performance bonuses were refused if dealers sold to non-Dutch citizens. Otherwise, the Commission found that Peugeot had exercised pressure on dealers which had significant exports, for example by threatening to reduce the number of cars supplied to them.

## Articles 82/86 EC

## Box 3

- *Clearstream*
  - \* Complex market definitions for clearing and settlement services
  - \* Various statements on “abuse concept” and refusal to supply
    - One abuse ≠ a defence for another
    - *Earned* dominance different from others?
- *Wanadoo*
  - \* Predatory pricing rules applied in a growth market (although adjusted)
  - \* Dominant company cannot align below cost if in a wide-ranging strategy of market pre-emption
  - \* Competitor prices must “objectively” pose a threat
  - \* Considered likelihood of recoupment and decided “yes”
- *AstraZeneca*
  - \* Abusive extension of patent protection
- *Coca-Cola*
  - \* Finalised commitments but reasoning not yet revealed (e.g. tying *within* a product family and exclusivity OK if competitive tender?)

## Clearstream

In April 2005 the Commission published its *Clearstream* decision on its website. It is an interesting decision. It will be recalled that the main issue was direct access for Euroclear to the primary “clearing and settlement” services of Clearstream in Germany (meaning the steps which occur post-trading to complete a securities transaction).<sup>25</sup>

The Commission has been investigating this sector for some time and intervened when it found that Euroclear had been denied direct access to such services for almost two years, when Euroclear’s competitor Clearstream International

24. IP/05/1227, October 5, 2005.

25. See Ratliff, fn.17 above, at p.120.

and others had been able to obtain access in only a few months.

The Commission found that this was an unlawful refusal to deal and unlawful discrimination, Clearstream being dominant in the market for primary clearing and settlement services for securities issued according to German law.<sup>26</sup> Among other things, the Commission found that this was preventing Euroclear (and others) from developing “one-stop shop” services without having recourse to local agents in the various Member States. In addition, in so far as Euroclear was charged a higher access price than others considered to be receiving equivalent services for some five years, Clearstream was found to have discriminated against Euroclear in its pricing.

There are some complex issues in the case, notably market definition. The Commission considers that there are two levels of clearing and settlement: primary, within the entity with which the securities have been deposited; and secondary, by intermediaries other than the entity where securities are safekept. The Commission considers that the latter is at a “downstream level” to primary settlement and that the two levels of settlement are not substitutable. The Commission found that Euroclear needed direct and non-discriminatory access to the primary level of settlement in order to offer its services at the secondary level competitively. (This was “indispensable”.)

Interestingly, it appears that Euroclear may not entirely agree on the market definition, because in some cases the clearing and settlement may occur *only* at secondary level (e.g. where the relevant transfers are “internalised” to an account held by an intermediary). To that extent, secondary activity may be substitutable for primary activity. However, the Commission disagreed and found that this is not generally the case.<sup>27</sup>

There are also a number of statements of wider interest on the nature of an abuse. Thus the Commission notes that:

- Intent is not as such a prerequisite to establish an abuse but, if present, it may be easier to show “objectively abusive behaviour”.<sup>28</sup>
- The concept of refusal to deal covers not only outright and final refusal but also “protracted and dilatory tactics” by a dominant company amounting, in effect, to a refusal to supply or deal within a reasonable period of time, without valid justification.<sup>29</sup> In such cases, the issue is to

look at whether the commercial conduct in question forms part of a pattern of behaviour which is unreasonable in the circumstances. (Much of the Commission’s decision is taken up with examining this.)

- The registered shares of certain key companies were also considered to be “must have” products for financial intermediaries serving on international market.<sup>30</sup>
- An abuse of dominant position does not cease to exist if the party committing the abuse may in turn itself be the subject of another potentially competitive behaviour. Even if there were two abuses, one anti-competitive behaviour does not “negate” the other.<sup>31</sup> (The context here is whether Clearstream could argue that a denial of direct access to Euroclear’s French operations could justify Clearstream’s own refusal, an argument not accepted by the Commission.)
- The Commission also noted, following *Tetra Pak II*, that the scope of a dominant firm’s special responsibility was related to the degree of dominance held and the special characteristics of the market. Here the Commission noted that Clearstream’s dominant position was not built up through commercial growth in competition with others, but mainly through concentration combined with regulatory and quasi-regulatory measures.<sup>32</sup>

According to the Commission there was also discrimination to the extent that Clearstream applied to Euroclear different and unfavourable prices from those charged to others seeking equivalent services, even if those different prices were also charged to Clearstream Luxembourg, Euroclear’s international competitor.<sup>33</sup>

Since this was the first Commission decision in the sector, no fine was imposed.<sup>34</sup>

## Wanadoo

In December 2004, the Commission published its 2003 decision in this case. It may be recalled

26. See the non-confidential decision on the Commission’s website at [300] *et seq.*

27. *ibid.*, at [135] *et seq.* and 178 *et seq.*, with conclusion at [199]–[201].

28. *ibid.*, at [218].

29. *ibid.*, at [223].

30. *ibid.*, at [241] and [287].

31. *ibid.*, at [279].

32. *ibid.*, at [300].

33. *ibid.*, at [330].

34. In June 2005, the Commission also placed on its website a report by London Economics on current arrangements for “Securities Trading, Clearing, Central Counter Parties and Settlement in EU 25”. A central conclusion of the report is that, at present, in the vast majority of securities cash markets in Europe, users have no choice with respect to providers of clearing and settlement services, which are to be used to clear and settle a trade in a specific security on a specific market”. See also the Commission’s report “Clearing and Settlement in the European Union—The Way Forward” COM (2004) 312 of April 28, 2004 at pp.28–29.



that the Commission fined Wanadoo Interactive (a subsidiary of France Telecom) €10.35 million for predatory pricing practices in the market for retail ADSL internet services.<sup>35</sup>

The Commission found that, from August 2001 to October 2002, Wanadoo infringed Art.82 EC by charging retail prices for its “eXtense” ADSL service which were below average total cost (with an intent to eliminate competition) and that between January and July 2001 did not cover the average variable cost of providing the service (applying *Akzo* and *Tetra Pak II*<sup>36</sup>). Wanadoo suffered significant financial losses up to the end of 2002 as a result.

The Commission interpreted internal (and still confidential) documents uncovered during a dawn raid and other circumstances as showing that the practice coincided with a company plan to “pre-empt” the strategic market for high-speed internet access. The Commission found that Wanadoo had specifically traded off its minimal profitability to the objective of market penetration. In bringing the case the Commission also states that it was influenced by other facets of France Telecom’s position and noted that, while Wanadoo was making losses on ADSL, France Telecom was making profits for its wholesale ADSL services.<sup>37</sup>

The Commission noted that from January 2001 to September 2002, Wanadoo’s market share rose from 46 to 72 per cent on a market that saw more than a fivefold increase over the same period and considered that the level of losses involved had a dissuasive effect on competitors. The Commission found that the abuse came to an end when France Telecom reduced its wholesale ADSL prices by some 30 per cent. (Given the new emphasis on sectoral inquiries it may also be of interest to note that the case arose from the Commission’s sectoral investigation into unbundling of the “local loop”.)

Much of the decision is highly specific, focused on the relevant costs and revenues and how these were allocated (in great detail). Much also remains confidential.

Particular aspects of the case of general interest are as follows:

First, there are a number of statements in the decision about a dominant company’s ability to align on a competitor’s price.<sup>38</sup> On the one hand, the Commission notes that, in principle on *Akzo*, a dominant company can align its prices on those of its competitors. On the other hand, the Commission states that a dominant company cannot align itself on the promotional prices of

a non-dominant company, if that involves not recovering the costs of the service in question.<sup>39</sup>

Later the Commission states, however, that its concern here was not so much that Wanadoo had set its prices below cost for a period as that it had subsequently maintained its prices at that cost level “as part of a wide-ranging strategy of market pre-emption”.<sup>40</sup> Arguably therefore a short, below-cost response to competition may still be lawful, if it is not part of a wider campaign to drive out competition over a longer period.

Secondly, in looking at average variable costs here, the Commission spread customer acquisition costs over 48 months, instead of just looking at costs and revenues in the company’s accounts (as the *Akzo* judgment suggests) and took a nominal revenue per subscription, not the revenue actually observed. This was in order to deal with the fact that the relevant events took place in a growth market.<sup>41</sup>

Thirdly, the Commission suggests that below-cost pricing for a new service cannot be justified by the aim to achieve greater economies of scale that would lead to lower unit costs in the longer term. According to the Commission, this cannot serve to justify the relevant practice under EC competition law “since it has the effect of conferring a more favourable cost structure on the dominant undertaking to the detriment of its competitors”.<sup>42</sup>

Fourthly, the decision suggests that dominant companies must be cautious in relying on “meeting competition” arguments. In other words, the Commission emphasises that a dominant company can only meet a competitor’s prices if they “objectively pose a serious threat to the interests of the dominant undertaking”<sup>43</sup> and that a mistaken perception about the real extent of the competitive pressure exerted by rivals is not a valid defence. (On the facts it appears that Wanadoo may have overestimated the competitive threat.)

Fifthly, the decision contains a fairly lengthy discussion of the probability that Wanadoo could recoup its losses.<sup>44</sup> While the decision stresses that the Commission is not obliged to look at recoupment,<sup>45</sup> the Commission nevertheless chose to look at it and concluded that there were significant entry barriers and high entry costs, which made recoupment by Wanadoo of its initial losses a likely scenario.<sup>46</sup>

Sixthly, the Commission rejected the view that pricing in an emerging (or growth) market like this should be considered differently.<sup>47</sup> Wanadoo’s

35. The non-confidential version is available on the Commission’s website. See also IP/03/1025, July 16, 2003. With thanks to Sven Voelcker, Axel Desmedt and Helena Dolezalova for their assistance.

36. *ibid.*, at [256].

37. *ibid.*, at [278], [288].

38. *ibid.*, at [314]–[331].

39. *ibid.*, at [315].

40. *ibid.*, at [331].

41. *ibid.*, at [262].

42. *ibid.*, at [309].

43. *ibid.*, at [315]–[316].

44. *ibid.*, at [332] *et seq.*

45. *ibid.*, at [333].

46. *ibid.*, at [367].

47. *ibid.*, at [300]–[302].

point was that significant losses are inevitable in such cases. The Commission's position is that predatory pricing must be penalised "wherever there is a risk that it will eliminate competition". All the more so here, since the high-speed internet access market was considered to be closely linked to other telecoms markets which are not emerging, such as local access.

### **AstraZeneca fine**

In June 2005, the Commission fined Astra Zeneca €60 million for abuse of dominant position between 1993 and 2000.<sup>48</sup> The Commission found two infringements.

First, that AstraZeneca had provided misleading information to national patent offices in Belgium, Denmark, Germany, the Netherlands and the United Kingdom in order to obtain supplementary protection certificates (giving extended patent protection for up to five years after the normal expiry of the patent) for a product called Losec, used in the treatment of stomach ulcers.

Secondly, the Commission held that AstraZeneca had misused the rules and procedures of national medicines agencies which issue marketing authorisations in order to prevent generic competition with, and parallel imports of, Losec. The Commission found that AstraZeneca switched Losec from capsule to tablet form and selectively deregistered the marketing authorisations for the capsules in Denmark, Norway and Sweden, preventing parallel importers and generic producers from marketing the original capsule.

### **Coca-Cola**

In June 2005, the Commission accepted the commitments in this drinks distribution case. A short decision was published in the Official Journal in September 2005 (again four paragraphs)<sup>49</sup>! Somewhat surprisingly, it appears that there will not be a non-confidential version of the decision. The final commitments are on the Commission's website and a summary of the proposed commitments is in last year's review.<sup>50</sup> The decision is addressed to Coca-Cola and its three major bottlers based in Luxembourg, Germany and Greece.

The main points appear to be that:

- The commitments, as amended, are considered sufficient to address identified competition concerns in the distribution channels for consumption at home and on premises in the EU Member States, Iceland and Norway,

where these companies "reach defined market share thresholds", apparently where Coca-Cola accounted for more than 40 per cent of carbonated soft drinks and more than twice the share of the nearest competitor in such a channel in the previous year. It also appears that the countries concerned will be listed each year on the websites of the Commission and the companies concerned.

— The companies are:

- (1) To refrain from concluding exclusivity agreements, save in specific circumstances (such as private sector or public authority competitive tenders).
- (2) To refrain from granting growth and target rebates.
- (3) To provide that requirements concerning assortment and shelf-space be defined separately for "certain categories of brands". The Commission says this addresses the concern that "strong brands" could be leveraged in favour of "weaker" brands. (The idea is apparently to stop linkage of brands like regular Coke or Fanta Orange to other products like Sprite or Vanilla Coke.)
- (4) To reduce contract duration for financing and technical equipment.
- (5) To give customers the option to repay and terminate agreements for equipment without penalties.
- (6) To free up "a certain" share of cooler space. (The Commission states that the previous arrangements were a concern because they might lead to outlet exclusivity. It appears that up to 20 per cent of cooler space will be available depending on the circumstances.)

The commitments will be in place until December 2010.

This appears to be very much a settlement where we are still having to piece together what is going on. As noted last year, the decision appears innovative in allowing exclusivity in the tender context (if Coca-Cola is dominant) and in apparently preventing tying together of products within a product family.

### **Other**

In its 2004 Competition Report, the Commission indicated that it had rejected two complaints lodged by Scandlines and Sundbusserne, which are ferry operators, against the port of Helsingborg in Sweden. The complaints related to alleged excessive fees charged by the port for services on the Helsingborg–Elsinore route between Sweden and Denmark.<sup>51</sup>

48. IP/05/737, June 15, 2005.

49. [2005] O.J. L253/19–21, (with Advisory Committee Opinion and Hearing Officer Report); IP/05/775, June 22, 2005. The non-confidential version of the decision has been published since this paper was written.

50. See fn.17 above, at pp.121–122.

51. 2004 EC Commission Competition Report, at paras 45–46. The non-confidential versions of the decisions are published on the Commission's website.

The Commission has now also published its Art.86 EC decision concerning rules of Germany's postal regulatory framework which bar commercial mail preparation firms from earning discounts for handing over pre-sorted letters at Deutsche Post's sorting centres.<sup>52</sup>

In November 2004, the Commission also published a decision rejecting the complaint lodged against La Poste by Ufex related to express courier services.<sup>53</sup> In March 2005 the Commission asked Sweden to end the monopoly of Teracom AB, a state-owned company, as regards analogue terrestrial broadcasting and transmission services.<sup>54</sup>

## ECN developments

It is still a little early to comment on how the ECN is developing. However, certain general themes and points may be noted:

- First, at present many of the “EC” cases are in fact former “national” cases to which NCAs are also applying Arts 81 or 82 EC.
- Secondly, a large number of cases are being communicated within the network and a few are being reallocated/co-ordinated (e.g. the *Deutsche Post* case referred to above, where the Commission handled the Art.86 EC case and the Bundeskartellamt the Art.82 case).<sup>55</sup>
- Thirdly, the ECN has developed some 14 “sub-groups” or “working groups” focusing on particular business sectors or topics (e.g. payment cards, insurance, securities, energy, railways and leniency). Interestingly, these bring together the case-handlers from the various NCAs, sector by sector.

52. The text is on the Commission's website; see now also Martinez Lopez and Obst (Spring 2005) *EC Commission Competition Policy Newsletter* 31–34; and see fn.17 above, at p.122.

53. The decision is published on the Commission's website.

54. IP/05/343, March 21, 2005. There are also more specific telecoms developments: in May 2005, the Commission vetoed the assessment by the German telecoms regulator of significant market power/dominance as regards call termination on individual public telephone networks at fixed locations in Germany (see IP/05/564 and MEMO/05/162, May 17, 2005, with the decision on the Commission's website; and see also Grewe, Inotai and Kramer (Spring 2005) *EC Commission Competition Newsletter* 49–51 for veto decisions concerning Finland and Austria). There are now also cases on collective dominance under the specific consultation mechanism on electronic communications under which EU national regulators co-ordinate their positions with the Commission (see e.g. Bernaerts and Kramer (Summer 2005) *EC Commission Competition Policy Newsletter* 47–52).

55. See the paper by DeKeyser and Dalheimer at the Commission/IBA conference in March 2005 at pp.7–8.

- Fourthly, the ECN appears to be “playing as a team”. For example, there are a whole series of cases at NCA level on the liberal professions (in line with the Commission's initiative in this area) and many inspections are being carried out by NCAs for NCAs (some 11 in 2004).
- Fifthly, various Member States have now abolished national notification systems and moved to the legal exception system.
- Sixthly, various Member States have also adopted their national procedural rules to mirror Regulation 1/2003 (e.g. on interim measures, commitment decisions and investigatory powers).
- Finally, it appears that the NCA enforcement focus, as at Commission level, is on cartel and dominance cases.<sup>56</sup>

## New sectoral reviews

### Energy

In June 2005, after some delay, the Commission launched sectoral inquiries into the supply of gas and electricity.<sup>57</sup> The EFTA Surveillance Authority also opened a parallel investigation.

The EU sectoral inquiries are based on Art.17 of Regulation 1/2003. The idea is that the Commission sends out questionnaires in a sector, in order to see how competition is working, and then, if the Commission finds issues, it may go on to more specific case proceedings, or attempt to achieve the desired changes under threat of such proceedings. These are not the Commission's first sectoral inquiries. The Commission has also looked at the “local loop”, leased lines, mobile roaming, and sport and 3G.

In the case of energy the Commission appears to have several related agendas:

- First, to see to what extent there are competition issues in energy supply.
- Secondly, to see to what extent its liberalisation directives are working in opening up cross-border energy flows (although apparently the Commission is also reviewing implementation of the directives with another DG TREN study).
- Thirdly, to react to the recent increase of energy prices, notably oil prices.

More specifically, the Commission appears to be focusing on access to customer markets,

56. See generally the new ECN section in the Commission's Annual Competition Report and the paper by Paulis and De Smijter at the Commission/IBA conference, March 2005.

57. IP/05/716; June 13, 2005; MEMO/05/203, June 13, 2005.



interconnector use and access and, in the process, particular issues from recent cases such as destination and reduction clauses and profit-splitting mechanisms.<sup>58</sup> There have also been comments about access to gas storage (so-called “flexibility resources”).

The questionnaires came out in early summer 2005 and went to producers, electricity generators, gas importers, electricity and gas wholesalers, transmission system and gas storage operators, and retailers and customers, etc. The Commission targeted an interim report before the end of 2005 and the main results in 2006.<sup>59</sup>

### Retail banking and insurance

In the financial services field, the Commission is looking in detail at payment (debit and credit) cards and business insurance.<sup>60</sup> Again, questionnaires were set out in the summer of 2005 and the Commission plans that the main results will be published in 2006. It appears that in the payment cards inquiry questionnaires have gone to payment card networks and some 300 banks. Classic issues from recent cases are addressed, such as: membership requirements, fees (to join, for interchange services and to merchants and cardholders), the extent to which confidential information is shared, the extent to which the system can be used with others and barriers to cross-border activity.

On the insurance side, it appears that questionnaires went first to insurance associations with questions on market concentration and standard policy conditions, among other things.<sup>61</sup> Since then further questionnaires have gone to insurance intermediary and risk management associations.

## Current policy issues

### Cartels

There are a whole range of issues in cartel enforcement at the moment. The main policy issues are the following:

58. See e.g. Nyssens and Osborne (Spring 2005) *EC Commission Competition Policy Newsletter* 25–30. “Profit-splitting mechanisms” are clauses which provide for a sharing of profit between gas suppliers and wholesalers, notably where gas is sold in a country other than its originally intended destination.

59. Shortly after this article was completed the Commission published an “Issues Paper” in this inquiry on its website and announced that it saw a number of serious “problems” or “malfunctions” in the EU gas and electricity markets; see also IP/05/1421; MEMO/05/425 and MEMO/05/427, November 14, 2005.

60. IP/05/719, 13 June 2005 and MEMO/05/204, 13 June 2005.

61. The related decisions are available on the Commission’s website.

#### Box 4

- *Cartels—Many issues*
  - \* Plea bargaining
  - \* Leniency “one-stop shops”
  - \* Criminal and civil sanctions
  - \* US discovery of corporate statements
  - \* Regulation 1049/2001
  - \* New Fining Guidelines
- *Damages*
  - \* “Green Paper” to come
  - \* Incentives to litigate?
- *Article 82 EC modernisation*
  - \* Discussion paper to come
  - \* More effects based assessments coming?
  - \* BUT the Commission says no radical shift in policy

First, in April 2005 Mrs Kroes raised the prospect of “plea bargaining”, meaning (as far as the author understands) that companies would be able to “agree” their fine.

This might be interesting to companies if it meant lower fines and more discussion on what the case is about and the proposed fine assessment, but clearly much will depend on what the Commission will have in mind. For example, in terms of conditions, would there have to be an admission of wrongdoing? There are also various obvious questions including: what would be the related procedure? Would there be a preliminary assessment or Statement of Objections and then a decision? What happens if some plea bargained and others did not?

Such a system might be interesting to the Commission if it helped clear its backlog of leniency applications (or so it is argued). It appears that there are now some 35 ongoing investigations and the Commission only produces seven to eight decisions a year. The Commission is also interested in the idea that such a system might mean fewer appeals, since, as matters stand, many companies still appeal the Commission’s fining decisions.

Secondly, the question has been raised of the development of a “one-stop shop” for leniency in the EU, with the related principle that, if a company approaches any part of the ECN network, that has effect for all (to prevent odd results according to who goes to see whom first). The ECN also needs to fill in the remaining EU jurisdictions (only 17 Member States have leniency procedures) and align what is actually involved in leniency in each country.

Thirdly, how to deal with criminal, individual and civil, corporate sanctions? Individual action clearly raises the stakes for executives and may promote deterrence, but criminal sanctions are severe, so that the standard of proof is more demanding. The Commission also has no powers to impose criminal sanctions (even if there is much

debate about whether its sanctions are penal). However various Member States do.

Fourthly, there remains the problem of US discovery of corporate statements made for leniency applications in the EU. Current practice involves various ways to deal with this, notably oral statements, but these are far from satisfactory in terms of optimal leniency co-operation.

Fifthly, as noted in Part 1 of this paper in relation to the *VKI* case, there is now also the issue of how Regulation 1049/2001 affects leniency procedures.

Sixthly, it appears that the Commission is currently revising its Fining Guidelines.

Finally, it appears that the Commission is looking at ways to establish closer co-operation with the US authorities on cartels. There is talk of a “second generation” EU/US co-operation agreement.

Otherwise the Commission has come back to the idea of a specialised unit to deal with cartels, now expanded to be a “Cartel Directorate”, apparently deciding that this would be more efficient, given the particular technicalities of the work concerned.

## Damages Green Paper

There has been talk of a “Green Paper” on damages for breach of the EC competition rules for some time now. This is projected for the end of 2005.

In speeches in September and October 2005, Mrs Kroes has explained something of what is going on.<sup>62</sup>

First, the Commission appears committed to developing such actions, in part because it likes the direct relevance of compensation going to the victims of loss suffered and a further widening of enforcement (“direct justice” as Mrs Kroes puts it.)

Secondly, the Commission states that it is seeking public debate with a discussion paper, rather than just putting forward its proposals. Such caution appears to be driven by concern that damages claims should be used to widen the “competition culture” with reasonable costs and risks. This appears to be a reference to the concern about the way US treble damages claims work, with what may appear to be unreasonable pressure to settle, caused by treble damages awards, joint and several liability and litigation costs in general. The approach may also be driven by the view that Member States’ procedures are what will need amending.

Thirdly, there is concern that promoting damages claims may undermine the EC leniency

process. Mrs Kroes argues that the obligation to compensate victims should not have a “chilling effect” on leniency claims. However, that is an open question. Notably, the scale of overall fines and damages is a factor which is daunting to some, if one has to reckon on fines and/or treble damages claims in the United States and worldwide proceedings and fines also in the EU, Canada, Australia, Korea and elsewhere.

Fourthly, it is interesting to see Mrs Kroes’ approval of recent changes in US law allowing the first leniency applicant to limit his liability to single damages and avoid joint and several liability, raising the prospect that perhaps an “EU version” of such incentives might be in the issues to be discussed.

Fifthly, Mrs Kroes has aired the idea of incentives to make it easier for those most likely to succeed to bring an action to do so. This may suggest a right for direct customers concerned to sue, even though they may have passed on the injury. In her second speech on damages recently, Mrs Kroes has also suggested damages which might “go beyond pure compensation” (but presumably fall short of US levels).

Sixthly, in her Paris speech, Mrs Kroes queries whether the principle in *Masterfoods II*, that a national court should not take a decision at odds with a Commission decision, should not also apply to decisions of NCAs. The idea would be to permit more follow-on damages actions, using the findings of the NCA decision as proof of the infringement.

Finally, Mrs Kroes has also listed a number of issues likely to be covered in the Green Paper, including: access to evidence, the fault requirement, the calculation of damages, collective or representative actions, costs of proceedings, the passing-on defence and the question of standing of indirect purchasers.<sup>63</sup>

## Article 82 EC modernisation

It is understood that the Commission has been discussing Art.82 EC issues with the Member States for some time and that there will be consultation on possible guidelines early in 2006.<sup>64</sup>

63. Interestingly, in Spain there was an award of damages in a football broadcasting rights case in 2005 (see Helmut Brokelmann’s paper in the decentralisation panel at the IBC Conference, Brussels, November 2005).

64. In July 2005, the Commission also published a report from the Economic Advisory Group for Competition Policy, entitled “An economic approach to Article 82” on its website. With thanks to Paul Kelly for his assistance.

62. Dinner speech at the Harvard Club, New York, September 22, 2005, SPEECH/05/533; and at the Cour de Cassation, Paris, October 17, 2005, SPEECH/05/613.

In September 2005, Mrs Kroes gave us a first indication as to her thoughts on the Commission's approach to Art.82 EC in a speech at Fordham.<sup>65</sup>

Her main themes appeared to be as follows:

- The Commission does not propose radical changes, but aims to “develop and explain its theories of harm”.
- The Commission will focus on restrictive effects, actual or likely, on the market, in the medium to long term.
- The Commission is looking first at exclusionary abuses, rather than exploitative abuses (with which it will deal later).
- The Commission is concerned with effects on “competition in the market”, not just the position of one or two competitors.
- A “possible approach” in pricing abuse cases would be to see if an efficient competitor could compete with the dominant company's pricing, with the benchmark of efficiency being the costs of the dominant company, “except where it is not possible to determine such costs”, or the dominant company has some “first-mover advantages” which later entrants cannot be expected to match.
- There should be scope for admitting efficiency-enhancing effects as a defence or justification of an Art.82 EC abuse, provided that the efficiencies (1) are likely to be realised; (2) are created by the conduct in question; (3) outweigh the negative aspects of such conduct; and (4) that residual competition is not eliminated.

## Areas of specific interest

### Liberal professions

In September 2005 the Commission issued a press release urging Member States to continue efforts to open up professional services to competition, and a related “Communication”.<sup>66</sup>

In its press release, the Commission emphasises the way in which some NCAs have been pursuing this issue, notably quoting Polish and Irish competition studies and offering a comparative appraisal as to which Member States are pursuing reform and which are not.

The Communication is a follow-up to the Commission's 2004 Report on Competition in Professional Services. It provides a summary of activities

and progress made by the EU Member States and the detail behind the comparative appraisal noted above. The Commission concludes that most progress had been done where there was a structured programme of pro-competitive reform in place (in Denmark, the Netherlands and the United Kingdom) with a focus on price-fixing and advertising first. On the other hand, in seven EU Member States, no activity had been reported (the Czech Republic, Cyprus, Finland, Greece, Malta, Spain and Sweden). The Commission also notes that 10 new cases were opened by the NCAs under EC Competition rules in this sector and a number of cases under national competition rules.

### Sport and 3G

In September 2005, the Commission published the “Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks”,<sup>67</sup> which inquiry was carried out in co-operation with the EFTA Surveillance Authority (“ESA”). The report summarises the results of the sector inquiry which started in 2004 and led to hearings this year.

3G networks are wireless networks which provide for much larger bandwidth than their 2G counterparts. This means that, in addition to traditional voice and text services, internet and other audiovisual downloads are also possible. It is generally thought that sports-related audiovisual content (e.g. short video clips of a particular football match) will play a key role in the development of 3G services.

The Commission and ESA considered what were the relevant markets and noted that there is little substitutability between sports services offered over mobile platforms and non-mobile platforms (TV). Nor did the respondents to the questionnaires concerned expect other mobile-related technologies to offer commercially viable alternatives to 3G technologies for the provision of sports-related services. These authorities also considered that the coverage of sports events over mobile networks may not be in the same market as other content distributed over those networks.

The Commission has decided to focus on four areas which it considers to be the most important in restricting the availability of mobile sports content:

- *First, cross-platform bundling:* This refers to practices where a right owner sells bundled audiovisual rights for various retail platforms to one or only a limited number of operators. The Commission states that it

65. “Preliminary thoughts on Policy Review of Article 82 EC”, September 23, 2005, SPEECH/05/537.

66. IP/05/1089 and MEMO/05/299, September 5, 2005; “Commission Communication: Professional services: Scope for Reform” (SEC (2005) 1064). With thanks to Helena Dolezalova for her assistance.

67. The text is on the Commission's website. With thanks to Georg Terhorst for his assistance.



favours unbundled sales of rights and will target cases where rights to premium sports remain underexploited through the bundled sale of rights and subsequent warehousing of rights by powerful operators.

- *Secondly, overly restrictive conditions:* The sector inquiry found evidence of serious restrictions on 3G rights, in terms of transmission length and timing. Apparently these are justified to protect the value of TV rights. The authorities questioned the “proportionality” of this, since TV and mobile services are not considered substitutable. The Commission stated that it intends to target individual situations where serious time embargoes limit the availability of 3G content.
- *Thirdly, joint selling:* Most sports rights are co-owned by clubs or organisations and sold collectively. Mobile operators reported positively that joint selling leads to easier negotiations and access to a complete content offer. However, the authorities noted that mobile operators also voiced competitive concerns that joint selling results in less supply when all mobile rights are not exploited. The authorities concluded that when collective selling of 3G rights is unsuccessful, the rights should fall back to the individual rights owners, so that they can be exploited individually.
- *Fourthly, exclusive access:* The authorities noted that contracts in this area mainly have a duration of two to three years. They stated that they would monitor the development of 3G markets and advocate remedies if exclusive access to premium content had anti-competitive effects.

The conclusion of the sector inquiry is not the immediate launch of formal investigations. The market players were invited to take note and comply! However, the authorities also stated that

they would review further situations which could give rise to cause for concern with the NCAs concerned and initiate cases, if necessary.<sup>68</sup>

## Competition and waste management

In September 2005, DG Competition published a paper concerning issues of “Competition in Waste Management Systems” on its website.<sup>69</sup> The paper outlines competition policy in the waste sector, namely as regards (1) packaging waste; (2) end-of-life vehicles (“ELVs”); and (3) waste electrical and electronic equipment (“WEEE”). It is based on an information exchange which has been going on between the Commission and the NCAs since 2003 and takes into account the Commission’s decisions so far.

The paper acknowledges that special regulatory regimes apply in this sector based on: the Packaging Directive,<sup>70</sup> the ELV Directive<sup>71</sup> and the WEEE Directive,<sup>72</sup> but notes that their application may not result in distortion of competition.

In the case of each directive the paper outlines and discusses the relevant competition principles, including market definitions and possible competition concerns, based on the decisions of the Commission (where available) and the European Court’s case law.

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68. In May 2005 the Commission also indicated that FIFA had modified arrangements for ticket sales to the 2006 World Cup to allow for more payment methods. IP/05/519, May 2, 2005.

69. With thanks to Helena Dolzalova for her assistance.

70. Directive 94/62 of December 20, 1994, as amended by Directive 2004/12 [1994] O.J. L365/10 and [2004] O.J. L47/26.

71. Directive 2000/53 of September 18, 2000 on end-of-life vehicles [2000] O.J. L269/34.

72. Directive 2002/96 of January 27, 2003 on waste electrical and electronic equipment [2003] O.J. L37/24.