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DEVELOPMENTS IN EC COMPETITION LAW IN 2004: AN OVERVIEW

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1. Introduction

If one looks for a single guiding theme of EC competition policy in 2004, it is probably "competition and innovation". The new Technology Transfer Block Exemption Regulation and accompanying guidelines entered into force, the European Commission adopted its landmark *Microsoft* decision, the Court of Justice ruled on compulsory licensing of intellectual property rights in *IMS Health*, and the Commission approved Oracle's hostile bid for PeopleSoft. Other notable developments covered in this review include the Commission's *Wanadoo* decision on predatory pricing for broadband Internet access services and its *Clearstream* decision regarding access to a competitor's electronic settlement platform.

Of course, 2004 also marked the entry into force of Regulation 1/2003 and the recast Merger Regulation together with their accompanying implementing legislation and notices. Experience with these new legal regimes is still limited, but in particular with regard to Regulation 1/2003, it appears that the practical effects of the change have been less dramatic than some observers had feared.

Like last year's article, this overview discusses the major developments in EC competition law in 2004, without attempting exhaustively to report or analyse all potentially significant events. It is divided into six sections: (2) legislation and notices of general application (other than merger control); (3) application of competition rules to non-economic activities; (4) competitor cooperation and cartels; (5) distribution and vertical relationships; (6) abuse of a dominant position; and (7) merger control.

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2. Legislation and notices of general application

Outside the merger control area, the two most significant pieces of legislation entering into force or adopted in 2004 are the "Modernization" Regulation 1/2003 and the Technology Transfer Block Exemption Regulation (TTBE) with their respective accompanying guidelines and notices.

2.1. *"Modernization" reform*

Regulation 1/2003 entered into force on 1 May 2004 and at the same time the Commission adopted its Regulation on procedures[1] and six notices and guidelines on various issues of interpretation and implementation of the legislative package.[2] The final versions of these instruments do not differ significantly from the drafts summarized in last year's overview. As stated above, it is still too early for a detailed assessment of how modernization and decentralization is working in practice. However, a few trends can already be observed.

First, the Commission has clearly resisted whatever temptation there may have been to allow the "reintroduction of a notification system through the back door". As of August 2005, the Commission had not adopted a single Article 10 decision, nor has it been known to have issued any formal "guidance letters" to companies. Indeed, even in major pending cases, the Commission appears to prefer its new policy instrument of "commitment decisions" under Article 9,[3] which by definition makes it unnecessary for the Commission to make any pronouncements on questions of principle. This does not mean that the Commission no longer gives any kind of informal

1. Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004, L 123/18. *See generally* Venit, "Brave new world: The modernization and decentralization of enforcement under Articles 81 and 82 of the EC Treaty", 40 CML Rev. 537–543.

2. Commission Notice on cooperation within the Network of Competition Authorities, O.J. 2004, C 101/43; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. 2004, C 101/54; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2004, C 101/65; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), O.J. 2004, C 101/78; Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. 2004, C 101/81; Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, O.J. 2004, C 101/97. On distribution of jurisdiction see Brammer, "Concurrent jurisdiction under Regulation 1/2003 and the issue of case allocation", 42 CML Rev., 1383–1424.

3. See the discussion of the Repsol and Coca-Cola commitments below in Sections 5.2 and 6.4.

guidance to companies, but a widely held view is that companies have become more reticent to approach the Commission for such guidance given the very limited upside of such contacts.

Second, the question of how to maintain the effectiveness of the Commission's and national leniency programmes given the active interagency cooperation and exchange of confidential information provided for in Articles 11 and 12 has emerged as an important practical concern. While it is rightly pointed out that Regulation 1/2003 has not as a legal matter exacerbated the pre-existing difficulties facing a leniency applicant in knowing whether it is applying to the "right" authority for leniency,[4] as a practical matter increased cooperation in the context of the European Competition Network makes it far more likely that other NCAs may start parallel investigations. As a result, companies are increasingly faced with having to make precautionary leniency applications to the Commission and a number of NCAs,[5] which is both inefficient and potentially an (unwanted) deterrent to making such applications in the first place. While harmonizing national leniency programmes would be a difficult process, it may be possible to limit the current system's inefficiencies by developing more specific rules for the allocation of cartel investigations triggered by leniency applications.[6]

Third, the Commission's Guidelines on the Application of Article 81(3), despite the acknowledged benefits of a "more economic approach"[7] have attracted a fair amount of critical commentary for the limitation of the grounds for exemption, the complex and cumbersome approach to analysing efficiencies and the resulting legal uncertainty introduced.[8] It remains to be seen what influence they will actually have on the practice of NCAs and national courts.

4. Blake and Schnichels, "Leniency following modernisation: safeguarding Europe's leniency programmes, *Commission Competition Policy Newsletter*, Summer 2004, 7.

5. For a summary of situations in which multiple leniency applications are advisable, see Levy and O'Donoghue, "The EU leniency programme comes of age", 27 *World Competition* (2004), 75, 93–95 .

6. At present, the allocation principles set out in the Commission's Network Notice are not rules of jurisdiction on which the parties can rely, see Blake and Schnichels, op. cit. *supra* note 4, at p. 12.

7. For an explanation of the Commission's viewpoint, see Kjolbye, "The new Commission guidelines on the application of Article 81(3): an economic approach to Article 81, (2004) ECLR 566.

8. See e.g. Lugard and Hancher, "Honey I shrunk the article! A critical assessment of the Commission's Notice on Article 81(3) of the EC Treaty", (2004) ECLR 410.

2.2. *The new Technology Transfer Block Exemption Regulation and IP Guidelines*

The Commission adopted the new TTBE Regulation 772/2004 and related Guidelines on the application of Article 81 EC to technology transfer agreements (the "IP Guidelines") in April 2004.[9] A detailed assessment of the TTBE and the Regulation is beyond the scope of this article,[10] but the most important changes can be summarized as follows.

The TTBE's scope has been widened to copyright software licensing and the provision of goods or services as well as licensed manufacturing. "White" and "grey" clauses have been eliminated, leaving only a blacklist whose length now depends on whether the agreement is between competitors or non-competitors and whether it contains reciprocal licences. The most important change to the predecessor Regulation 240/96 is the introduction of market share ceilings of a combined 20 percent (agreements between competitors, under certain conditions also for reciprocal licences) and individually 30 percent (agreements between non-competitors). The most important changes made *vis-à-vis* the draft TTBE as a result of the Commission's public consultation process concern the TTBE's blacklist. In effect, many of the changes reflect the re-introduction of exceptions that were already contained in Regulation 240/96. Another significant change is the clarification in Article 4(3) that the important distinction between competitors and non-competitors should be based on the point in time at which the licence agreement is concluded, so that the more favourable rules for non-competitors continue to apply even if the parties should later become competitors, unless the agreement is modified "in a material respect". While these changes will for the most part be welcomed by industry, the fundamental innovation of the TTBE – market share ceilings in an area that by definition is extremely dynamic – is likely to remain controversial, despite the Commission's clarification in Recital 12 that exceeding the market share ceilings does not imply that the agreement in question is caught by Article 81(1) or incompatible with Article 81(3), as the case may be.

The IP Guidelines contain detailed explanations of the various provisions of the proposed TTBE, as well as principles for the treatment of provisions

9. Commission Regulation 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, O.J. 2004, *L 123/11*; Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. 2004, C 101/2.

10. See e.g. Korah, "Draft block exemption for technology transfer", (2004) ECLR, 247; Vollebregt, "Changes in the new technology block exemption compared to the draft", (2004) ECLR, 660.

not explicitly exempted by it, namely royalty obligations, exclusive licensing, sales restrictions, output restrictions, field of use restrictions, captive use restrictions, tying and non-compete obligations. The IP Guidelines also create a second "safe harbour" outside the TTBE. They state that outside the area of hard-core restrictions, Article 81 is unlikely to be infringed where there are four or more independently controlled technologies (in addition to the technology controlled by the parties to the agreement) that may be substitutable for the licensed technology at comparable costs. The IP Guidelines further contain criteria for the assessment of arrangements that by definition fall outside the TTBE, in particular technology pools.

3. Application of competition rules to "non-economic" activities

The Community Courts issued two interesting judgments on the application of the competition rules in sensitive areas: health insurance and sports. In both cases, the Courts excluded the application of the competition rules on the basis of the "purely social" rather than economic goals pursued by the applicable legislation.

3.1. *Statutory health insurers are not undertakings: AOK Bundesverband*

In March 2004, the ECJ ruled that German statutory health insurers (*Krankenkassen*, also translated as "sickness funds") do not constitute undertakings or associations of undertakings within the meaning of Article 81 EC when they jointly set maximum amounts for the reimbursement of medicinal products.[11]

Most German statutory health insurers are bodies governed by public law. Membership is mandatory for most German employees, and both the level of contributions (a percentage of the employee's wages) and basic benefits are defined by law. The statutory health insurers have a duty to accept any employee covered by the system and are compensated for an overrepresentation of "bad risks" by an equalization mechanism. The German legislation allows associations of sickness funds to determine maximum amounts for the reimbursement of medicinal products on the basis of "the most inexpensive supply possibilities". If the associations cannot reach agreement, the German Federal Ministry of Health takes the final decision.

11. Joined Cases C-264/01 etc., *AOK Bundesverband etc.* v. *Commission*, [2004] ECR I-2493

Unlike Advocate General Jacobs, the ECJ found that statutory health insurers do not constitute undertakings when they fix maximum amounts for reimbursement. They are involved in the management of the social security system and fulfil an exclusively social function, which is founded on the principle of national solidarity and non-profit making. The ECJ concluded that statutory health insurers are not in competition with each other when it comes to fixing maximum amounts for reimbursement. While the German legislature had introduced an element of competition with regard to contributions, the ECJ found that this had no other purpose than encouraging the sickness funds to operate in accordance with principles of sound management.

The Court thus did not have to address whether (i) the German legislation left sufficient room for the application of Article 81; (ii) the fixing of maximum amounts for reimbursement restricts competition; (iii) any restriction of competition would be compatible with Article 81(3); or (iv) Article 86(2) is applicable. Arguably, application of those criteria would have allowed for a more satisfactory disposition of the issues before the Court than a case-by-case analysis of whether statutory health insurance companies or other social security institutions constitute undertakings.[12]

3.2. *Anti-doping rules are outside the scope of Article 81 EC – Meca-Medina and Majcen*

In September 2004, the Court of First Instance found that certain anti-doping rules adopted by the International Olympic Committee (IOC) and the International Swimming Federation were not subject to the EC competition rules, as they were not related to economic activity.[13] The CFI thus dismissed an action for annulment brought against the Commission's rejection of a complaint by two swimmers who had been suspended for having tested positive for prohibited anabolic substances, and had unsuccessfully appealed the suspension to the Court of Arbitration for Sport.

In its judgment, the CFI recalled the Community courts' jurisprudence according to which the Treaty's economic freedoms apply only to the economic aspects of sporting activities. Rules that concern questions of "purely sporting interest", including the "rules of the game" in a narrow sense, are not subject to the Treaty rules. While those principles had been developed in the

12. For a detailed analysis see the case note by Drijber, 42 CML Rev. (2005), 523–533.

13. Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, Judgment of 30 Sept. 2004, nyr.

context of the free movement of persons and services, the CFI found them to be equally applicable in the context of the competition rules.

The CFI found that the anti-doping rules were not alleged to be discriminatory and were intimately linked to sport as such. It dismissed the argument that those rules had an economic aspect because of the economic repercussions of a doping ban on the athletes in question or the IOC's own economic considerations, i.e. not to see the economic potential of the Olympic Games diminished by scandals linked to doping. The CFI also rejected the need for any *Wouters*-type[14] balancing analysis on the basis that *Wouters* concerned market conduct – the establishment of networks between lawyers and accountants – and thus applied to an essentially economic activity.

While it is understandable that the CFI was unwilling to second-guess the application of technical anti-doping rules by a specialized quasi-judicial body, the dividing line between the economic aspects of sporting activity and "purely sporting rules" will be less clear-cut in many cases. Banning players or teams from professional sporting competitions will in many cases have severe economic repercussions, and it is not difficult to imagine situations in which such bans are not unambiguously motivated by the "preservation of the noble competition and other ideals of sport".[15]

4. Cartels and other forms of competitor cooperation

In the course of 2004, the Community courts delivered a number of significant judgments in the cartel area.

4.1. *Access to file and fines – Cement*

In January 2004, the ECJ largely upheld the CFI's judgment in the *Cement cartel* case.[16] To recall, the CFI found in 2000 that the Commission had not sufficiently proved the participation of some undertakings in the infringement. In addition, the CFI concluded that two applicants were denied access to documents that could have been useful in their defence. Accordingly, the CFI had reduced the Commission's € 248 million fine to € 140 million.[17] The ECJ further reduced the fine for one company, but otherwise upheld the CFI's judgment.

14. Cf. Case C-309/99, *Wouters and Others*, [2002] ECR I-1577
15. *Meca-Medina and Majcen* v. *Commission*, at para 49 (citing A.G. Cosmas).
16. Joined Cases C-204/00 etc., *Aalborg Portland and others* v. *Commission*, [2004] ECR I-123.
17. Joined Cases T-25/95 etc., *Cimentéries CBR and others* v. *Commission*, [2000] ECR II-491.

The ECJ found that the CFI had rightly upheld the decision despite the Commission's acknowledgment that it had denied access to three quarters of the documents in its file. An annulment requires a showing that the insufficient access to the file denied the applicant access to documents that are likely to be of use in its defence.[18] In addition, the ECJ recognized that the Commission may exclude from the administrative procedure evidence that has no relation to the allegations of fact and of law in the statement of objections and is therefore irrelevant for the investigation.[19] If an undertakings claims that the Commission has harmed its rights of defence by withholding relevant information, the Court must assess whether the disclosure of that information would have had even a small chance of altering the outcome of the administrative procedure. Where the Commission did not communicate an exculpatory document, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the Commission's decision. Finally, the ECJ confirmed that an undertaking did not have the right to cross-examine the authors of certain documents. The procedure before the Commission is purely administrative and a right of cross-examination is not mandated by the applicable procedural rules, nor does it follow from the European Convention on Human Rights, which does not lay down rules of evidence as such.[20] Overall, one senses a reluctance by the ECJ to entertain technical procedural challenges in an extremely complex case.

Interestingly, this is one of the rare cases in which the ECJ overrules the CFI on a finding of fact. The CFI itself had excluded the turnover of Ciments français' Spanish and Greek subsidiaries from the company's fine on the basis that it had acquired these subsidiaries only after the infringements had ceased, but had not done the same for Ciment français' Belgian subsidiary, which was acquired at the same time. The ECJ found that the administrative file, and indeed the *Cement* Decision itself, showed that Ciments français had acquired its Belgian subsidiary at the same time as its Spanish and Greek subsidiaries, so that the CFI judgment contained an obvious error that the ECJ could itself correct without having to remand the case. Consequently, the ECJ decreased Ciments français' fine by another € 3 million.

18. *Aalborg Portland* v. *Commission*, *supra* note 16, at para 101.
19. *Aalborg Portland* v. *Commission*, at para 126.
20. *Aalborg Portland* v. *Commission*, at para 200.

4.2. *Application of the Commission's fining guidelines and leniency notice – Tokai Carbon v. Commission (Graphite electrodes)*

In April 2004, the CFI ruled on various appeals against the Commission's *Graphite Electrodes* decision.[21] The CFI significantly reduced some of the fines imposed, but also for the first time used its unlimited discretion to marginally *increase* a fine by cancelling part of the reduction the Commission had given to one company for not contesting the facts. The CFI's judgment (appealed in part by the Commission) is of considerable significance for cartel cases in a number of respects.

First, the judgment all but eliminates any *ne bis in idem* defence in transatlantic cartel cases.[22] The applicants claimed that, by basing its fine on worldwide (rather than EEA) turnover in the affected market, the Commission failed to take into account the penalties already imposed by the US and Canadian authorities. The CFI, however, questioned whether the *Walt Wilhelm* jurisprudence on parallel proceedings within the Community could be extended to international cases at all, given the absence of shared jurisdiction between the Community and the Member States that underlines that jurisprudence. In any case, the CFI found that there was no indication that the US and Canadian authorities had sought to penalize the companies for the cartel's effects outside of their respective jurisdictions, noting that if those authorities had sought to do so, this "would have clearly encroached on the territorial jurisdiction of the Commission".

Second, notwithstanding the Commission's wide discretion in setting and changing its general fining policy, the CFI stressed that the Commission must apply its own fining guidelines strictly and coherently. Indeed, the CFI identified two areas in which the Commission had not consistently applied its fining guidelines in the case at hand: the slotting of the companies into the appropriate category for purposes of setting the "starting amounts" of the fine and application of the "deterrence multiplier". With respect to the former, the CFI found that the Commission had "exceeded the acceptable limits" of its discretion by placing two companies in the same category even though one of them had only half of the other's market share. The CFI thus cut the smaller company's fine by half. With respect to the deterrence multiplier, the CFI also found that the Commission had applied its fining guidelines in an incoherent way, because it had used a deterrence multiplier for one company that was six times that of another, even though the global turn-

21. Joined Cases T-236/01 etc., *Tokai Carbon and Others* v. *Commission*, judgment of 29 April 2004, nyr.

22. *Tokai Carbon* v. *Commission*, at para 132 et seq.

over with which the Commission justified the multiplier was only twice as high. On the other hand, the CFI did not entertain a number of other pleas related to the application of the fining guidelines, i.e. that the Commission should not have used worldwide turnover for calculating starting amounts, that the cartel "had no real impact" in the EEA, that the Commission had applied too large a multiplier for duration and that it had incorrectly assessed a number of aggravating and attenuating circumstances. Viewed together with other recent jurisprudence, it is thus clear that the most promising grounds for companies seeking to have their fine reduced are inconsistencies within the decision itself, rather than circumstances extraneous to it, in particular the Commission's handling of similar issues in previous cases.

Third, the CFI took the Commission to task for not strictly applying its own Leniency Notice. Of particular importance are the CFI's statements on the voluntary nature of the cooperation that qualifies for a reduction of the fine under Section D, first indent, of the Leniency Notice (provision of information, documents or other evidence that materially contribute to establishing the existence of infringements before a statement of objections is sent). The Commission had claimed that to justify a reduction in the fine, any documents or information must be provided "outside the exercise of any investigatory power", meaning that any information provided in response to a Commission information request could not be included. The CFI not only rejected this notion, but also held that answers to any questions in such requests that go beyond "purely factual questions" and the production of "documents already in existence"[23] should be viewed as voluntary contributions and thus justifying a reduction of the fine. The CFI also found that the Commission had wrongly refused to give a company credit for oral communications that were only put in writing at a later stage. According to the CFI, it is the practical utility of the information for the investigation and not the form of the evidence provided that should drive the level of the reduction of the fine.[24]

Fourth, as mentioned above, the CFI for the first time used its unlimited discretion to *increase* a fine imposed by the Commission, albeit only by a small amount. Applicants Nippon and SGL had for the first time before the Court contested that the infringement had continued beyond the beginning of the Commission's investigation, a finding that the Commission had based on their "objective conduct" during the investigation and "rather general non-contest statements". While in the absence of a specific admission of the facts

23. See Case T-112/98, *Mannesmannröhren-Werke* v. *Commission*, [2001] ECR II-729, at paras. 77 and 78.

24. *Tokai Carbon* v. *Commission*, at para 431.

in question, the applicants were not estopped from raising the matter on appeal, the CFI found that the Commission, against any expectation it could reasonably base on the parties' cooperation during the administrative procedure, was required to draft and submit a defence before the Court dealing specifically with facts that it considered would no longer be called into question.[25] In light of the relative ease with which the Commission was able to counter the applicants' challenges, the CFI decided to apply only a 2 percent increase in the fine.

4.3. *Insufficient evidence of agreement in a default judgment – German Banks*

In October 2004, the CFI issued its judgments in the *German Banks* case, annulling the Commission's decision fining a number of German banks for their alleged involvement in an agreement to fix charges for converting currency into Euros in the transitional period before the Euro was introduced.[26]

The Commission had found there to be an agreement between the banks on the basis of two accounts of a meeting in 1997, corroborated in the Commission's view by statements made at the oral hearing and the banks' own behaviour. The applicants claimed that there was no agreement between the banks on the method and amount of charges for currency exchange and that the meeting served a different purpose, namely to remove certain regulatory and technical uncertainties connected with the transition to the euro and principally affecting interbank currency exchange services.

Apparently because of technical problems with fax transmission, the Commission did not lodge a defence within the time limit prescribed. The applicants subsequently requested the Court to give judgment by default, i.e. without considering the Commission's defence. The CFI granted such a judgment and limited its assessment as to whether the applicants had adduced "sufficient evidence of factors susceptible of calling in question" the validity of the Commission's evidence for the existence of an agreement. The Court found this to be the case and accordingly annulled the decision, as neither the documents concerning the meeting, nor statements at the oral hearing, nor the banks' subsequent conduct constituted sufficiently convincing evidence.

25. *Tokai Carbon* v. *Commission*, at paras. 112, 418.

26. Cases T-42/02, *Dresdner Bank AG* v. *Commission*, T-54/02, *Vereins- und Westbank* v. *Commission*, T-60/02, *Deutsche Verkehrsbank AG* v. *Commission*, T-56/02, *Bayerische Hypo- und Vereinsbank* v. *Commission*, T-61/02, *Commerzbank AG* v. *Commission*, judgments of 14 Oct. 2004, nyr.

4.4. *Burden of proof and equal treatment in imposing fines – Seamless Steel Tubes*

In July 2004, the CFI ruled on the appeals of the Commission's 1999 decision fining various European and Japanese producers for sharing the European market for seamless carbon-steel pipes.[27] The CFI reduced the fine imposed on the applicants on different grounds.

On the basis of a detailed analysis of the factual record, the CFI found that the Commission had not proven to the requisite standard the full duration of the infringements claimed in the decision. For the Japanese companies, the CFI found that the Commission had not proven that the infringements lasted beyond July 1994, whereas for the European companies, the Commission was not able to produce evidence from its file to prove that the voluntary export restraints and similar trade measures between the Community and Japan between 1972 and 1990, which had caused the Commission to not impose a fine for that period, did not extend to the end of 1990.

The CFI's statements on the equal treatment of companies in setting fines are particularly interesting. The Japanese applicants argued that the fine imposed on them for supposedly agreeing to limit their exports to Europe was disproportionate in comparison with the fines imposed on the European producers. They submitted that the latter had committed an additional separate infringement of Article 81 EC by agreeing to share the European market, conferring on their infringement an intra-Community aspect absent from the infringement alleged against the Japanese producers. The CFI acknowledged that the Commission did not take account of this separate infringement in calculating the fines and concluded that by this omission the Commission had treated different situations in the same way without an objective justification and thus in breach of the general Community law principle of equal treatment.

The Commission observed at the oral hearing that any unequal treatment should be remedied by an increase in the fines imposed on the European producers, rather than a reduction of the fines imposed on the Japanese producers. The CFI agreed that the most appropriate way of restoring a fair balance between the addressees of the contested decision would have been to increase the fine imposed on each of the European producers rather than to reduce the amount of the fines imposed on the Japanese applicants. However, since the Commission had not argued this point in its defence against

27. Joined Cases T-67/00, T-68/00, T-71/00 & T-78/00, *JFE Engineering Corp. et al.* v. *Commission*; and Joined Cases T-44/00, *Mannesmannröhren-Werke* v. *Commission*; T-48/00, *Corus* v. *Commission*, T-50/00, *Dalmine* v. *Commission*, judgments of 8 July 2004, nyr.

the European producers and had only raised it at the hearing, the European applicants had been denied the opportunity to give their views on the appropriateness of an increase of their fines. Accordingly, the CFI decided that the most appropriate way to remedy the unequal treatment applied by the Commission was to reduce the fine imposed on the Japanese producers.[28]

The judgment illustrates opportunities and risks for companies challenging fines where there is an argument of unequal treatment. Had the Commission asked the Court for an increase of the European producers' fines already during the written procedure, it would appear that the Court would have granted such a request.

4.5. *Legal privilege in cartel investigations – AKZO*

In September 2004, the ECJ President issued an order[29] annulling the CFI President's interim measures order[30] in the *AKZO* case concerning the extent of legal privilege in EU competition proceedings. Significantly, the President of the ECJ avoided any substantive discussion of the extent of legal privilege, thus leaving this issue to be decided by the CFI in the main proceedings. Instead, the ECJ President found that AKZO's application to prevent the unsealing of potentially privileged documents by the Commission lacked the requisite urgency. He noted that Commission officials had already "cast a cursory glance" at those documents anyway, that the Commission would as a legal matter be prevented from using those documents as evidence if the CFI later found them to be privileged, and that the Commission had undertaken not to allow third parties access to those documents unless it succeeded in the main action before the CFI on their privileged character.

While it should be welcomed that the ECJ President did not limit the CFI's scope for sensible extensions of legal privilege, one has to wonder whether his pronouncements on urgency do not largely undermine the effectiveness of any such extensions. Even more so than the CFI President's order, the ECJ President appears to give the Commission *carte blanche* simply to review documents regardless of their privileged character and thereby eliminate the urgency of any interim measures application to protect those documents. Even if the Commission is not allowed to use such documents as direct evidence, it may well glean information that allows it to issue informa-

28. *JFE Engineering* v. *Commssion*, *supra* note 27, at para 579.

29. Case C-7/04 P(R), *Commission* and *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd.*, order of the President of the ECJ of 27 Sept. 2004, nyr.

30. Joined Cases T-125/03 R & T-253/03 R, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd.* v. *Commission*, order of the President of the CFI of 30 Oct. 2003, nyr.

tion requests or conduct further dawn raids that uncover non-privileged documents. In the absence of a clear-cut "fruit of the poisonous tree doctrine", it will often be very difficult for parties to show before the CFI that such later investigative measures were possible only because of the use of privileged information.

4.6. *Commission decisions in cartel cases*

The Commission issued five new cartel decisions in 2004.

In *Copper plumbing tubes*,[31] the Commission imposed a € 222 million fine on eight undertakings operating on the European market for copper tubes. The investigation was carried out in parallel with the *Industrial tubes* case,[32] sanctioned at the end of 2003. Among the undertakings involved, Mueller Industries enjoyed full immunity for having approached the Commission first, while Finnish company Outokumpu's fine was increased for recidivism.

In *French beer*,[33] adopted in September 2004, the Commission fined the Danone and Heineken groups for having concluded an "armistice" agreement. The agreement provided for a moratorium on the parties' increasingly costly acquisitions of wholesale distributors in the Horeca (i.e. hotels, restaurants and cafés) sector in France, as well as maintaining an "equilibrium" in the Horeca market between the two groups. Since the agreement to bring wholesaler acquisition costs under control could not "be regarded as a clear infringement on par with a price-fixing agreement" and the agreement as a whole was never implemented, the Commission determined this to be only a "serious" rather than a "very serious" infringement, which explains the relatively low fines imposed (€ 1.5 million for Danone and € 1 million for Heineken).

In *Spanish raw tobacco*,[34] the Commission imposed a € 20 million fine on five companies involved in raw tobacco processing in Spain. The particularity of this cartel is that it was a purchasing cartel, in which the tobacco processing companies had agreed the prices to be paid to, and the quantities to be acquired from, the Spanish tobacco growers. In addition, Spanish tobacco producers were also fined for fixing the price brackets per quality grade of

31. Commission Decision of 3 Sept. 2004, see Commission Press Release IP/04/1065.

32. Commission Decision of 16 Dec. 2003, see Commission Press Release IP/03/1746.

33. Commission Decision of 29 Sept. 2004, Case No. COMP/C.37.750/B2 – *Brasseries Kronenbourg, Brasseries Heineken*, non-confidential version available on the Commission's website.

34. Commission Decision of 20 Oct. 2004, Case No. COMP/C.38.238/B2 – *Raw Tobacco Spain*, non-confidential version available on the Commission's website.

each variety of raw tobacco and more specifically for having agreed the minimum level of the average price per producers in order to increase the final selling price of their raw tobacco above the competitive level. However, and notwithstanding the fact that their infringement was qualified as "very serious", the Commission decided to impose on the producers only a symbolic fine (€ 1000), because of the degree of involvement of the Spanish Authorities, who had on some occasions invited the producers to agree on the price schedules.

In its *Needles and Haberdashery* decision,[35] the Commission imposed a fine of € 30 million each on Coats Holdings and William Prym for concluding a series of formally bilateral agreements that in effect amounted to a cartel involving product and geographic market sharing. A third company that was party to the agreements, Entaco, received full immunity from fines in exchange for its cooperation under the Leniency Notice. The decision is a somewhat unusual case of a "very serious infringement" of the competition rules, in that it does not concern a clandestine arrangement between competitors but rather a series of formal agreements apparently initiated by a major distributor (Coats) in order to protect its retail activities from the two producers (Prym and Entaco). A related anomaly is that this cartel neither set prices nor quotas, but constituted a "specialization agreement" along product and geographical lines.

In its *Belgian Architects* decision,[36] the Commission imposed a fine of € 100 000 on the Belgian Architects Association for having adopted and maintained a recommended minimum fee scale for architects' services, calculated as a percentage of the value of the works realized by the entrepreneur, for more than 35 years. The Commission concluded that the recommended fee scale constituted an infringement of Article 81 because it aimed at coordinating the pricing behaviour of architects in Belgium. In the Commission's view, the fees should reflect an architect's skills, efficiency and costs and should not be dependent solely on the value of the works or the price of the entrepreneur. The Commission also rejected the "*Wouters* defence", because the recommendation of minimum prices was not necessary in order to ensure the proper exercise of the architectural profession. The decision must be seen in the context of the Commission's drive towards ensuring competition in the liberal professions. In February 2004 the Commission

35. Commission Decision of 26 Oct. 2004, Case No. COMP/F-1/38.338 – *Needles*, non-confidential version available on the Commission's website.

36. Commission Decision of 24 June 2004, Case No. COMP/38.549 – *Barême d'Honoraires de l'Ordre des Architectes Belges*, non-confidential version available on the Commission's website.

issued a Communication on Competition in Professional Services,[37] to encourage national legislators and professional bodies to revise and amend their restrictive rules and practices to enable the professions to better contribute to growth and economic welfare in the EU. The Commission has been gradually increasing the level of fines imposed in cases involving the liberal professions: it did not impose any fine on the Italian customs agents in its 1993 CNSD decision and only a symbolic fine of 1000 in its 1996 *Fenex* Decision,[38] but indicated in the *Belgian Architects* decision that under the fining guidelines, a fine of € 4.5 million would normally have been appropriate, thus clearly signalling that the next case involving recommended minimum prices will not be treated as leniently.

5. Distribution and vertical relationships

5.1. *Proof of restrictive effects of notified distribution network – JCB Service v. Commission*

In January 2004, the CFI issued its judgment in *JCB Service* v. *Commission*, annulling parts of the Commission's decision finding that JCB, a maker of earth moving and construction equipment, had operated a distribution system that restricted parallel imports.[39] The CFI also reduced JCB's fine from € 39.6 million to € 30 million. The judgment is a significant development in the area of distribution for a number of reasons.

First, the judgment illustrates the incomplete protection from fines resulting from notification of an agreement under Article 15(5) of Regulation 17. While the CFI ruled that this provision barred the Commission from using JCB's enforcement of an "illegal" clause in a properly notified agreement as an aggravating circumstance in calculating JCB's fine, the CFI also found that (i) simply sending amended agreements to the Commission without observing the notification formalities of Regulation 17 and (ii) an application of a notified agreement that in any way diverges from its terms, does not benefit from the protection of Article 15(5).

Second, the judgment suggests that the CFI will not readily assume *de facto* retail price maintenance where a supplier and a distributor enter into "the usual commercial dialogue" about the suppliers' ex-works prices in light

37. COM(2004)83 final.
38. Commission Decision of 5 June 1996 (Case No. IV/34.983) O.J. 1996, L 181/28, at para 137.
39. Case T-67/01, *JCB Service* v. *Commission*, judgment of 13 Jan. 2004, nyr.

of prices the distributor is able to achieve. Indeed, the CFI seems to take the position that the Commission must adduce "unequivocal evidence" establishing the "systematic fixing of retail prices" by the supplier to establish an infringement of Article 81 EC. Such infringement cannot simply be assumed where the supplier fixes its ex-works invoice prices for distributors by applying a discount to the recommended retail price. As the CFI notes, "some limitation in price competition is inherent in any selective distribution system".[40] These statements are of significant practical importance, in particular for the availability of block exemptions, given that the fixing of (minimum) resale prices continues to be blacklisted.[41]

Last, consistent with its relatively relaxed attitude towards resale price maintenance, the CFI also imposes a stronger burden on the Commission to prove the anticompetitive effects of other mechanisms designed to ensure the smooth and efficient operation of distribution systems, namely (i) the supplier's involvement in setting support payments by distributors to compensate other distributors for additional after-sales service costs in the case of parallel exports into their territory; and (ii) the limitation of marketing support for sales to retail customers rather than resellers to ensure maximum penetration of the allocated sales territory. The CFI requires clear proof that such arrangements have the object or effect of limiting parallel imports.

5.2. *Commission Decisions*

In May 2004, the Commission cleared *Porsche's* new distribution and after-sales network.[42] Because of Porsche's relatively low market share (<5%), Porsche was allowed to include in its agreements certain restrictive clauses such as a non-compete clause preventing its dealers from selling and repairing competing car brands at the same premises.

Also in May 2004, the Commission fined *Topps*, the maker of Pokémon stickers and cards, € 1.6 million for preventing imports from low-price to high-price countries for cards and sweets bearing the image of Pokémon cartoon characters.[43] The Commission found that Topps entered into a series of agreements and/or concerted practices with its distributors in several Member States in a market estimated to be worth € 600 million and charged distributors up to 243 percent more in Finland than in Portugal. Neverthe-

40. *JCB Service* v. *Commission*, at para 126.
41. See e.g. Article 4 a of Regulation 2790/1999.
42. Commission Press Release IP/04/585.
43. Commission Decision of 26 May 2004, Case No. COMP/37.980 – *Souris/Topps*, non-confidential version available on the Commission's website.

less, the Commission viewed the infringement as only "serious" (rather than "very serious") and moreover granted Topps a 40 percent reduction based on its immediate termination of infringements once it became aware of the Commission's investigation and Topps' subsequent cooperation. Compared with the nearly € 40 million fine the Commission imposed in the JCB case (see section 5.1 above), one is left wondering about the predictability of the Commission's fining policy in distribution cases.

In October 2004, the Commission published an Article 27(4) Notice concerning *Repsol's motor fuel distribution practices* through service stations situated in Spain.[44] After notification of agreements and model contracts by Repsol in March 2002, the Commission decided to initiate proceedings in June 2004 with a view to adopting a decision under Article 9 of Regulation 1/2003. While the Notice is sanguine about maximum resale prices fixed by Repsol, it indicates concern about non-compete clauses given Repsol's strong position in supplying fuel to service stations in Spain. To address these concerns, Repsol offered a number of commitments, which include buy-back options for certain service station operators, a five-year maximum duration for new fuel distribution agreements, a moratorium on the acquisition of service stations that are not already part of Repsol's network, an obligation to advertise the expiry of fuel distribution agreements and the institution of a monitoring trustee that is to submit annual reports on compliance to the Commission.

6. Abuse of a dominant position

Without question the most publicized development in the area of Article 82 EC in 2004 was the Commission's *Microsoft* decision. However, there were several other highlights: the ECJ's long-awaited judgment in *IMS Health*, Coca-Cola's commitments regarding its rebate policy and Advocate General Jacobs' Opinion in *Syfait.* 2004 also saw the publication of the Commission's *Wanadoo* decision. These developments, all of which relate to the concept of "abuse", highlight the at times still less than coherent application of this complex notion.

44. O.J. 2004, C 258/7, Case No. COMP/38.348 – *Repsol CPP SA.*

6.1. *Refusal of a dominant firm to license IP rights: IMS Health*

In April 2004, the Court of Justice issued its judgment in *IMS Health*.[45] The background facts as well as Advocate General Tizzano's Opinion were already discussed in last year's overview.[46] To recall, the key question was whether IMS' refusal to license its copyright-protected "1860 brick structure" for the collection of pharmaceutical data to competitor NDC constitutes an abuse of dominance.

Drawing on its *Bronner* judgment,[47] the Court first clarified that it is not an essential element of the *Magill* doctrine that the "input" that is deemed to be essential to competing in the downstream market is sold separately. Rather, it is sufficient if the input is part of a "potential" or even a "hypothetical" market. This means that a dominant IP holder cannot defend itself solely on the basis that it has never commercially licensed its rights to anyone.

The Court also stated that compulsory licensing can be required only where the company requesting the licence "does not intend to limit itself essentially to duplicating the goods or services already offered" by the dominant IP right holder, but "intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand". There are clearly a number of ambiguities in the Court's language. In particular, there appears to be a grey zone between products that are not "essentially a duplication of existing products" and products that are truly "new". Given that the Court deals with a scenario in which the "new" and existing products by definition belong to the same (dominated) antitrust market, significant improvements to existing products could arguably suffice to be considered "new products".[48] Moreover, the Court's notion of an "intent" to offer new products begs the question of how serious such intent must be to gain access to the dominant company's essential inputs. It remains for future cases to resolve these questions, so it is premature to say whether *IMS Health* should be read as a limitation or expansion of *Magill* in this respect.

Last, the Court agreed with the complainants in the *IMS Health* case that the extent to which customers had participated in the elaboration of IMS's

45. Case C-418/01, *IMS Health* v. *NDC*, [2004] ECR I-5039. See case note by Hatzopoulos, 41 CML Rev., 1613–1638.

46. See Völcker, "Developments in EC Competition Law in 2003: an overview", 41 CML Rev., 1027, at 1056 et seq.

47. Case C-7/97, *Oscar Bronner* v. *Mediaprint Zeitungs- und Zeitschriftenverlag*, [1998] ECR I-7791.

48. See also A.G. Tizzano's terminology ("goods and services of a different nature"), Case C-418/01, *IMS Health* v. *NDC Health*, Opinion of A.G. Tizzano, para 62, [2004] ECR I-5039.

brick structure, and the costs that they may incur in switching to an alternative structure, are relevant for the analysis under Article 82 EC insofar as they affect the complainants' ability to offer a viable product in competition with IMS. If such switching costs are fatal to a viable competitive offering, this would imply that access to IMS's brick structure is in fact "indispensable" and could thus give rise to compulsory licensing if the other elements of the *Magill* test are met.

While it is arguably not decisive for the pending *Microsoft* appeal[49] discussed below, *IMS Health* does have significant general implications for dominant IP right holders. As already noted with respect to the Advocate General's Opinion,[50] the Court's statement that even a "hypothetical" market for the essential input is sufficient in a compulsory licensing context could have far-reaching consequences for dominant companies holding process and component patents, copyrights, or other forms of secret know-how that provide a significant competitive advantage. Also, as mentioned above, the ambiguity of the Court's "new product" and "intent" requirements may tempt some national authorities and courts to adopt a broad interpretation of compulsory licensing requirements, in particular where Article 82 EC is invoked as a defence in patent infringement cases. Last, the Court's acknowledgement that customer involvement in developing products can heighten the risk of compulsory licensing may in certain cases discourage such customer involvement with a negative impact on innovation.

6.2. *Refusal to supply interoperability specifications and tying in the software industry – Microsoft*

In March 2004, the Commission issued its long-awaited decision against Microsoft.[51] After a five-year investigation and three statements of objection, the Commission found that Microsoft's refusal to supply interoperability information for work group server software and the tying of its music player software to the Windows operating system infringed Article 82 EC. It also imposed a fine of € 497 million on Microsoft. The decision is undisputedly *the* key event of 2004 and has already received an extraordinary amount of

49. In *Microsoft*, the Commission did not directly rely on the test set out in *Magill*, and its case is thus not directly affected by any modification or clarification of *Magill* in *IMS Health*. Nor would *IMS Health* appear to affect the Commission's premise that there is no "exhaustive check list" of "exceptional circumstances" justifying compulsory licensing.

50. See Völcker, op. cit. *supra* note 46, at 1057.

51. Commission Decision of 24 March 2004, Case No. COMP/C-3/37.792 – *Microsoft*, non-confidential version available on the Commission's website.

comment.[52] In December 2004, the CFI President rejected Microsoft's application for a suspension of the Commission's remedies,[53] but the main appeal is still pending, and with the *juge rapporteur* reportedly having been removed from the case for writing a candid editorial on the inner workings of the Court,[54] promises more drama in the future. An exhaustive discussion of the Commission's decision and of the CFI's order is beyond the scope of this overview; a brief summary of the facts and issues must suffice.

6.2.1. *Commission Decision*

The Commission's Decision discussed two distinct infringements. Arguably the more significant part of the decision, in particular for future software cases, is the Commission's analysis of Microsoft's bundling of its Windows Media Player ("WMP") with the Windows Operating System ("OS"). The Commission determined that PC OSs and media players constitute separate markets and that Microsoft was dominant in the tying market (OS). Much of the Commission's case is based on a network effects and an "applications barrier to entry" theory. It argues that given the dominance of Microsoft's Windows OS, bundling WMP guarantees it a ubiquity that could not be counteracted by other media player manufacturers' use of alternative distribution channels. The decision then draws attention to the danger of WMP becoming the industry standard and competitors' products being driven out of the market, as content providers and software developers increasingly produce content exclusively in WMP format. The Commission also fears that Microsoft might acquire control over related markets such as media delivery software and digital rights management technology. In developing its "tipping" theory, the Commission engages in an extensive analysis of the actual

52. See e.g. Art and McCurdy, "The European Commission's Media Player remedy in its Microsoft decision: compulsory code removal despite the absence of tying or foreclosure", (2004) ECLR, 694; Evans and Padilla, "Tying under Article 82 EC and the Microsoft decision: a comment on Dolmans and Graf", 27 *World Competition* (2004), 503; Dolmans and Graf, "Analysis of tying under Article 82 EC: the European Commission's Microsoft decision in perspective", 27 *World Competition* (2004), 225; Geradin, "Limiting the scope of Article 82 EC: what can the EU learn from the U.S. Supreme Court's judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?", 41 CML Rev. (2004), 1519; Net, "Microsoft Europe and switching costs", 27 *World Competition* (2004), 567; Pardolesi and Renda, "The European Commission's case against Microsoft: kill Bill?", 27 *World Competition* (2004), 513; Völcker, "The implications of Microsoft and IMS Health: interesting times for dominant intellectual property holders in Europe", *Competition Law Insight*, June 2004, 4; Völcker and O'Daly, "Implications of the Court of First Instance's Microsoft order", *Competition Law Insight*, February 2005, 8.

53. Case T-201/04 R 2, *Microsoft* v. *Commission*, order of the President of the CFI of 22 Dec. 2004, nyr.

54. "EU Court transfers Microsoft case to judge panel", *Reuters News*, 8 July 2005.

as well as projected foreclosure effects of Microsoft's behaviour. Under the CFI's recent case law (*British Airways*[55] and *Michelin II*),[56] this was arguably not necessary as in those cases the CFI was satisfied that the conduct in question was "likely to" or "tended to" lead to actual foreclosure.[57] This "belt and braces" approach suggests that the Commission did not want to risk that the CFI might take a different tack on appeal because of the specifics of the software industry (such as the possibility of downloading other media players over the Internet). The President's interim measures order (see the discussion below) appears to confirm that this was a good decision.

Another notable aspect of the Commission's WMP-tying analysis concerns the Article 82 requirement that purchasers be forced to acquire the tied good along with the tying good. Microsoft argued that WMP was in effect "given away" along with the OS; purchasers did not pay any additional amounts for this product. The Commission rejected this argument, as a charge for WMP could be hidden in the bundled price and, in any event, the price being demanded for the tied product was immaterial given the foreclosure concerns that underlie the law on tying. In addition, although the Commission ends up rejecting Microsoft's efficiency defences (related to distribution and to WMP as a platform for content and applications), it is interesting that it carries out a very thorough examination of these arguments. It may be that – like the extensive discussion of actual foreclosure effects – this is simply an attempt to make the decision appeal-proof, but it is also possible that the Commission has made a policy decision to at least be open to efficiency justifications in Article 82 cases.

The other part of the Commission's decision concerns Microsoft's refusal to make interoperability information for work group server OSs (i.e. information relating to file, print and group and user administration services for Windows work group networks) available to its rivals.

The Commission found that Microsoft was dominant on the market for both desktop PC OSs and on the market for work group server OSs. The Commission emphasized the close links between the two markets because of interoperability requirements, and referring in particular to *Tetra Pak II*,[58] found those links to be a further element of Microsoft's dominance on the market for work group server OSs.

The Commission determined that Microsoft abused its dominance on the PC OS market by refusing to supply the specifications for both client-to-

55. Case T-219/99, *British Airways plc* v. *Commission*, [2003] ECR II-5917.
56. Case T-203/01, *Michelin* v. *Commission*, judgment of 30 Sept. 2003, nyr.
57. See the discussion in Völcker op. cit. *supra* note 46, at 1049 *et seq.*
58. Case C-333/94 P, *Tetra Pak International SA* v. *Commission*, [1996] ECR I-5951.

server and server-to-server protocols that would enable vendors offering competing server OS software fully to interoperate with Windows. According to the Commission, the refusal to supply the specifications also limited technical development on the market to the detriment of consumers.

In a key passage, the Commission recognizes that requiring disclosure of interoperability could infringe Microsoft's IP rights and would therefore be mandated by Article 82 EC only in "exceptional circumstances". Referring in particular to *Magill*,[59] the Commission considered the previous sets of circumstances that the Community courts identified as justifying compulsory licensing of IP rights. The Commission denied that it is bound by any "exhaustive list of exceptional circumstances" and stated that the "entirety of the circumstances" must be taken into account when deciding whether a licensing obligation should be imposed.

In the *Microsoft* case, the Commission identified the following exceptional circumstances. First, Microsoft had disclosed the relevant interface information to rivals before it had developed its own credible server software offering. The disruption of "previous levels of supply" has been relied on as justifying an obligation to supply, e.g. in *Commercial Solvents*.[60] Second, Microsoft's behaviour risked eliminating competition in workgroup server OS given the indispensability of the interoperability information and Microsoft's own "rapid rise to dominance". Finally, the Commission found that Microsoft's conduct was not justified by the need to safeguard IP rights and innovation; any future disincentives to innovate would be outweighed by promotion of innovation in the market as a whole.

In addition to fining Microsoft a record € 497 million, the Commission imposed the following remedies on the company. First, Microsoft is required to offer PC makers and consumers a version of its OS without WMP, even though Microsoft is free to continue to offer the bundled version in parallel. Second, with respect to workgroup server interoperability, the Commission ordered Microsoft to provide all interested parties with the necessary interoperability specifications within 120 days on reasonable and non-discriminatory terms.

59. Joined Cases C-241/91 P & C-242/91 P, *RTE and ITP* v. *Commission*, [1995] ECR I-743.

60. Joined Cases 6/73 & 7/73, *Instituto Chemioterapico Italiano SpA* v. *Commission*, [1974] ECR 223.

6.2.2. *Interim measures order by the President of the Court of First Instance*

Microsoft appealed the Commission's decision to the CFI. On 22 December 2004, the CFI President issued an order rejecting Microsoft's application for a suspension of the remedies imposed by the Commission.[61] The President found that while Microsoft had established a *prima facie* case on the merits, it had not proved that it would suffer serious and irreparable harm from immediate implementation of the remedies. While obviously not binding on the chamber considering Microsoft's main case, the order contains some interesting statements on the substance, even if most of them are *obiter dicta*.

On interoperability, the President stated that the *Microsoft* case is "fundamentally different" from *Magill* where the information in question was already "widely known" rather than commercially sensitive. The President further suggested that "the value of the underlying investment, the value of the information concerned for the organization of the dominant undertaking, and the value transferred to competitors in the event of disclosure" was of relevance in this context. In an *obiter dictum*, the President also suggests that in the *IMS* case, the ECJ sets out "sufficient" (rather than necessary) conditions for an abusive refusal to license,[62] which would seem to confirm the Commission's position that *IMS* and *Magill* do not set out an exhaustive checklist of necessary conditions for finding an Article 82 violation in such situations.

As regards the unbundling remedy, the President recognized that Microsoft had established a *prima facie* case. In particular, he accepted that the following allegations were not obviously devoid of substance: that the Commission had relied on a novel "indirect network effects" rather than a traditional tying theory; that it should have given greater weight to the positive "design concept" of Windows; that it had not adduced sufficient evidence as to exclusionary effects; and that it had incorrectly concluded that PC OSs and media players constituted separate product markets. The President thus seems to have by and large accepted the way in which Microsoft has framed the issues before the CFI. However, he also refers to *Michelin II* and *British Airways* for the proposition that proof of actual foreclosure was not required under Article 82 EC, which would seem to support the Commission's legal position.

It is thus apparent that both Microsoft and the Commission will find encouragement for their positions in the President's order. The outcome of Microsoft's main action remains entirely open.

61. Case T-201/04 R 2, *Microsoft* v. *Commission*, order of the President of the CFI of 22 Dec. 2004, nyr.

62. At para 206.

6.3. *Refusal to supply clearing and settlement services to a customer/ competitor: Clearstream*

In June 2004, the Commission adopted a decision[63] finding that Clearstream Banking AG (Clearstream) and its parent company Clearstream International SA (CI) infringed Article 82 by refusing to supply to Euroclear Bank SA (EB) certain clearing and settlement services for registered shares issued in Germany.[64] The Commission also found that Clearstream charged a higher per transaction price to EB than to other securities depositories outside Germany for equivalent clearing and settlement services. According to the Commission, Clearstream's actions were motivated by EB's competition with Clearstream's sister company Clearstream Banking Luxembourg on the downstream market for secondary clearing and settlement of securities in cross-border trade. In view of the novelty of the factual and legal issues, the Commission decided to adopt a formal decision finding an Article 82 EC infringement even though Clearstream had ended the practices in question more than two years earlier. At the same time, however, the Commission refrained from imposing a fine on the company. While many aspects of the Commission's comprehensive decision are specific to the complex area of clearing and settlement of securities, the decision contains a number of statements that are of broader significance in the context of refusals to supply.

Clearstream is Germany's only Central Securities Depository (CSD) and the only German bank authorized to keep securities in collective safe custody. Collective custody is the only significant form of custody for traded German securities. As a result, Clearstream is the only provider of primary clearing and settlement services involving German securities actually deposited in final custody, as opposed to downstream secondary clearing and settlement services that are provided by intermediaries (banks) to their customers, either by way of "internalization" (where both buyer and seller of the securities happen to have accounts with the intermediary in question), or by way of a mirror operation reflecting the result of primary clearing and settlement.

The Commission determined that, for CSDs such as EB, the relevant market included only direct access to another issuer CSD such as Clearstream.

63. Commission Decision of 2 June 2004, Case No. COMP/38.096, non-confidential version available on the Commission's website.

64. Securities clearing and settling are necessary for completion of a securities trade. Clearing is generally understood as the process that ensures that the buyer and the seller have agreed on an identical transaction and that the seller is entitled to sell the securities in question. Settlement is the transfer of the securities from the seller to the buyer (and the transfer of funds from the buyer to the sellers), as well as the relevant annotations in securities accounts.

Indirect access through an intermediary bank (to which EB had to resort during the period in which Clearstream did not give it direct access) was held not to be an alternative because of the resulting delays, complexity, costs and potential conflicts of interests. The Commission also found that the possibility of internalization did not change the dependence of customers such as EB on direct access to the issuer CSD's primary clearing and settlement services.

The decision identifies two forms of abuse by Clearstream: (i) a refusal to supply primary clearing and settlement services for registered shares through access to Clearstream's CASCADE RS trading platform, which contrasted with normal industry practice and previous examples of Clearstream giving expeditious access to comparable customers; and (ii) discriminatory prices for primary clearing and settlement services that disadvantaged EB *vis-à-vis* other non-German CSDs without any reasonable justification.

The decision adds a significant precedent to the case law on refusals to supply under Article 82 EC. A number of aspects are particularly noteworthy. First, the decision demonstrates the linkage between the degree and source of dominance, and the abusive nature of the conduct in question. Citing *Tetra Pak II*,[65] the Commission emphasizes that Clearstream is a *de facto* monopolist on the market in question, that barriers to entry are high, and that Clearstream's dominant position was not built through competition with other CSDs but mainly through mergers between the German regional CSDs in combination with a number of regulatory and quasi-regulatory measures.

Second, the decision suggests that the dominant undertaking's conduct in handling negotiations with a customer may be significant for the finding of an abuse. The Commission emphasizes that Clearstream "breached EB's legitimate expectations" that EB would be supplied with primary clearing and settlement services for registered shares within a reasonable period of time, and that management of Clearstream's parent company intervened with additional objections to prevent access even once it could technically be granted. Such considerations imply an increasing element of "fairness" in the abuse concept despite the Community courts' insistence that the notion of abuse is an "objective concept".[66] They also possibly imply an ongoing obligation to an existing customer to upgrade the level of supply if market conditions change, in this case because of the increasing importance of registered securities in Germany. While not inconsistent with the notion that refusal to sup-

65. Case T-83/91, *Tetra Pak International* v. *Commission*, [1994] ECR II-755, paras. 114–115, 155; confirmed by Case C-333/94 P, *Tetra Pak International* v. *Commission*, [1996] ECR I-5951.

66. See e.g. Case T-228/97, *Irish Sugar* v. *Commission*, [1999] ECR II-2969.

ply an existing customer is more readily found to be abusive than refusal to supply a new customer, this may have implications for cases involving interface information or physical connections to the extent that this does not involve intellectual property rights (see the discussion on *Microsoft* and *IMS Health* above).

Third, the Commission considers the possibility of a "quid-pro-quo" defence in an Article 82 EC context. Clearstream argued that the refusal to supply was justified by similar access problems it was having with the French CSD (acquired by EB during the period in question) with respect to French securities. While stating that it is not a defence against an Article 82 EC allegation that the complainant is also guilty of anticompetitive conduct, the Commission does go on to consider the validity of a "quid pro quo" defence in the context of developing commercial negotiations.

6.4. *Rebate schemes by dominant firms: Coca-Cola's proposed undertakings under Article 9 of Regulation 1/2003*

In October 2004, the Commission published, for third-party comment, the text of a proposed set of commitments offered by Coca Cola with respect to its rebates in the EEA.[67]

Procedurally, the draft commitments and the Commission's accompanying press release are interesting in that they show that the Commission will accept commitments before having issued a statement of objections. Article 9 of Regulation 1/2003 is not clear on this point, as it refers to "concerns expressed ... by the Commission in its preliminary assessment". It now appears that a preliminary assessment need not be in the form of a statement of objections, but can be contained in an informal statement to the parties.

In substantive terms, the commitments offer interesting insights into the Commission's thinking on dominance as well as which kinds of rebates and other commercial practices could generally be considered abusive. As regards dominance, it is noteworthy that Coca-cola's commitments apply only where Coca-Cola or its local bottler account for (i) more than 40 percent of the overall CSD market *and* (ii) more than twice the share of the nearest competitor in the respective country and channel (*i.e.*, take-home and on-premise). The second requirement implies that a company may not be viewed as dominant where it has, for example, a market share of 60 percent while its nearest rival has 35 percent (provided no issues of collective dominance arise).

67. Commission Press Release IP/04/1247.

As to the kinds of rebates and other commercial practices the Commission may find abusive, the commitments generally offer few surprises in view of the case law.[68] They prohibit tying, exclusive purchasing, minimum purchase obligations based on total requirements, target and growth rebates (defined in relation to a previous reference period), rebates depending on stocking a wider range of products, and rebates that cover beverage cooler exclusivity where this amounts to outlet exclusivity, even though Coca-Cola may require that 80 percent of rent-free placed coolers be used for its own products.

However, there are interesting exceptions to the ban on exclusivity for certain sponsorship and tender agreements. The commitments allow exclusivity for the sponsoring brands in the case of venue sponsorship (e.g. sports stadia and theme parks), and exclusivity across the whole range for products for event sponsorship (e.g. festivals or sporting events of limited duration). Even more importantly, the commitments also allow for exclusive supply agreements where these have been negotiated as the result of open, transparent, and non-discriminatory public or private tenders. While the commitments contain some limitations on private tender agreements (they must not exceed a five year duration and most not represent more than 5 percent of the company's annual CSD sales in the on-premises channel), the apparent acceptance of the notion that exclusivity will often not be abusive if it is the result of an open tendering process is a significant development.

6.5. *Refusal to supply pharmaceuticals for parallel trade not abusive: Advocate General Jacobs' Opinion in Syfait*

In October 2004, Advocate General Jacobs delivered his Opinion in an Article 234 EC reference case from the Greek Competition Commission on the question of whether a dominant supplier of pharmaceuticals may refuse to meet orders from wholesalers in order to limit parallel trade.[69] The Opinion questions one of the most time-honoured notions of EC competition law, namely that parallel trade is an activity that must be preserved at any cost. Based on a thorough review of the case law on refusals to supply, Advocate General Jacobs found that such refusals can be classified as abusive only in

68. See e.g. Case 85/76, *Hoffmann La Roche* v. *Commission*, [1979] ECR 461, Case 322/81, *NV Nederlandsche Banden Industries Michelin* v. *Commission*, [1983] ECR 3461, Case T-65/89, *BPB Industries plc and British Gypsum* v. *Commission*, [1993] ECR II-389 and Case T-228/97, *Irish Sugar* v. *Commission*, [1999] ECR II-2969.

69. Case C-53/03, *Syfait and others* v. *GlaxoSmithKline*, opinion of A.G. Jacobs of 28 Oct. 2004, nyr. The ECJ declined to rule on the substance of the case, since it ruled that the Greek competition commission is not a court or tribunal for the purposes of Art. 234 EC, see judgment of 31 May 2005, nyr.

exceptional circumstances, i.e. after close scrutiny of the specific factual and economic context shows serious harm to competition. At least in the "highly specific" context of the European pharmaceutical industry, the Advocate General considered that a restriction of supply in order to limit parallel trade could be objectively justified as a reasonable and proportionate measure to protect the producers' legitimate commercial interests:

First, the pervasive and diverse regulatory constraints imposed on pharmaceutical companies and distributors have a decisive bearing on the reasonableness and proportionality of any refusals to supply. Price differentials that create opportunities for parallel trade are the result of national price caps rather than company-initiated restrictions of intra-brand competition, so companies' attempts to limit parallel trade are merely reactive. Moreover, the real barrier to exporting goods in the wholesalers' possession is the public service obligations imposed on them by national regulation. Legal and/or moral obligations restrict pharmaceutical companies' ability to withdraw supplies entirely from low-price Member States, while parallel traders' activities risk destabilizing public-service obligations designed to ensure an adequate supply of medicinal products to cover patient needs in all Member States.

Second, an unlimited requirement to supply parallel traders may harm consumer welfare, as it would incentivize pharmaceutical companies to either negotiate with low-price Member States for a price increase, or to delay the launch of new products in such Member States, and in the long term reduce their incentives to invest in research and development.

Third, because of the special features of the pharmaceutical markets, the benefits of parallel trade are for the most part absorbed in the distribution chain and thus do not extend to ultimate consumers or the public bodies that in effect purchase the traded products.

The Opinion itself makes it clear that its reasoning does not extend beyond the pharmaceuticals market. An interesting question however is to what extent it bears on the application of Article 81 EC to this industry. In 2001, the Commission prohibited Glaxo Wellcome's dual-pricing structure in Spain – designed to limit parallel exports[70] – on grounds that would be appear to be undermined by the Advocate General's Opinion. An application for annulment is currently pending before the CFI.[71]

70. Commission Decision of 8 May 2001, Case No. IV/36.957/F3 – *Glaxo Wellcome*, O.J. 2001, L 302/1.

71. Case T-168/01, *Glaxo Wellcome plc* v. *Commission*, O.J. 2001, C 275/17.

6.6. *Predatory pricing for retail broadband Internet services – Commission Decision against Wanadoo Interactive*

Although adopted already in 2003, the Commission's Decision fining Wanadoo Interactive (a 72% subsidiary of France Telecom) € 10.35 million for predatory pricing practices in the market for retail broadband Internet services[72] became available only recently. It is the first Commission Decision on predatory pricing since the Court of Justice's *AKZO* judgment and the Commission's *Tetra Pak II* decision in the early 1990s.

The Commission found that, from at least March 2001 to October 2002, Wanadoo infringed Article 82 EC by charging retail prices for its "eXtense" ADSL service that did not cover the total cost, and for a short period (up to August 2001) did not even cover the average variable cost of providing the service. Wanadoo suffered financial losses up to the end of 2002 as a result of this practice. The Commission interpreted documents uncovered during a dawn raid as showing that the practice coincided with a company plan to "pre-empt" the "strategic" market for high-speed Internet access. Indeed, from January 2001 to September 2002, Wanadoo's share rose from 46 to 72 per cent on a market that saw more than a five-fold increase over the same period. In October 2002, market conditions changed significantly in favour of Wanadoo's competitors when France Telecom introduced a new ADSL wholesale pricing structure.

Even if key parts of the Commission's decision are redacted to protect business secrets, it is clear that the decision is of broader significance. *First*, the decision suggests that even below-cost pricing for a relatively short period can be viewed as predatory. Wanadoo's pricing had been below variable cost, and thus clearly predatory, only for a four-month period. For the rest of the period in question, Wanadoo covered its variable costs and "came close" to recovering its full costs. Moreover, the Commission found it immaterial that Wanadoo had not actually cut its prices during the period in question, and by implication never targeted any particular competitor with its pricing policy.

Second, the decision suggests that "promotional" below-cost pricing for a relatively new service cannot be justified by a quest for greater economies of scale and learning effects that would lead to lower unit costs in the longer term. According to the Commission, this cannot serve to legitimize the relevant practice under EC competition law "since it has the effect of confer-

72. Commission Decision of 16 July 2003, Case No. COMP/38.233, non-confidential version available on the Commission's website.

ring a more favourable cost structure on the dominant undertaking to the detriment of its competitors".[73]

Third, the decision appears to reduce the scope of any "meeting competition" defence in predatory pricing cases. While the decision cites the *AKZO* judgment in acknowledgment of the proposition that a dominant operator "is not strictly speaking prohibited from aligning its prices on those of competitors", it appears to limit the meeting competition defence to cases where the challengers "objectively pose a serious threat to the interests of the dominant undertaking".[74] Of particular interest is the objectivity criterion in the present case, as the Commission states that a "mistaken" perception about the real extent of the competitive pressure exerted by rivals is not a valid defence – an observation that seems inconsistent with the "subjective intent" test for predatory pricing developed by the *AKZO* Court.[75]

Last, the decision contains a fairly lengthy discussion of the probability that Wanadoo could recoup its losses. For example, the Commission points out the costs of entering and acquiring critical size in a mass market such as broadband Internet service given the relative lack of subscriber mobility, and the costs of creating alternatives to wholesale access to ADSL services offered by Wanadoo's parent company France Télécom. While the decision repeatedly states that under Community law as it stands, the Commission is not obliged to undertake any such investigation, the existence of such a discussion points towards the Commission's gradually increasing focus on competitive effects rather than *per se* rules, in particular when viewed together with the Commission's similar approach in *Microsoft*. At the same time, however, it is apparent that a "recoupment defence" is of little use in a case where the Commission focuses (as it does here) on very short term below-cost pricing that is primarily motivated by stimulating demand that will in turn restore positive margins. In such cases, the company's defence is primarily that pricing is not really below-cost in the first place if one looks at it over a reasonable time frame, but if the Commission does not accept this argument it is then hard to claim that no recoupment of losses is possible over the relevant time period.

Overall, one is left wondering whether the Commission has struck the right balance in this case between preventing elimination of competition on an emerging market and discouraging aggressive pricing by the incumbent operator, a tactic that will often stimulate demand for new services such as broadband Internet access in the first place. In light of the importance given

73. See para 309.
74. See paras. 315–316.
75. Case C-62/86, *AKZO Chemie BV* v. *Commission*, [1991] ECR I-3359.

to broadband penetration in the context of the Lisbon Agenda, one would have thought that the Commission would avoid decisions that may have a chilling effect on companies' willingness to offer attractively priced packages to customers. The *Wanadoo* decision seems pre-occupied by the idea that all competitors must receive their fair (if not equal) share of a rapidly growing market, which is arguably inconsistent with creating incentives to sign up new subscribers as quickly as possible. The decision itself suggests that the real reasons for Wanadoo's competitors' relatively slower growth may have been unrelated to the below-cost nature of Wanadoo's retail prices, but had to do with France Telecom's wholesale pricing structure that was later corrected through regulatory intervention.

7. Merger control

With the principal reforms of the Merger Regulation having been determined in 2003, and a temporary dearth of merger cases on the Community courts' dockets, the most interesting developments in 2004 have been in the Commission's own decisional practice. The adoption of a number of Commission measures completing the reform of the Merger Regulation and the ECJ's judgment in *Portugal* v. *Commission* are also noteworthy.

7.1. *Legislative developments*

Further to the amendments to the Merger Regulation that were reported in last year's review, the Commission has adopted a new Implementing Regulation (Commission Regulation 802/2004), which includes a revised Form CO, a revised Short Form CO, and a new Form RS ("reasoned submission") for Article 4(4) and (5) pre-notification referrals. The respective changes largely reflect changes in the Merger Regulation and the adoption of the Commission's Horizontal Merger Guidelines. The new Implementing Regulation also contains other minor changes such as (i) the suspension of deadlines for referrals or the submission of commitments where the Commission had to "stop the clock" for the merging parties' failure to reply to information requests; (ii) the extension to consumer associations of the right to be heard; (iii) a legal obligation on the notifying parties as well as third parties to provide non-confidential versions of their submissions and a justification for any redactions; and (iv) a stricter obligation on the parties to report to the Commission any additional material information that may have "come to light" subsequent to the notification. Form RS has been slimmed down significantly compared to the version that was subject to public consultation,

but still requires fairly onerous information to be provided at the relatively early stage at which Form RS is typically submitted.

The Commission also adopted new notices on case referrals,[76] ancillary restraints[77] and the simplified procedure.[78] The changes in the latter two largely reflect changes in the Merger Regulation. By far the most interesting of the three is the notice on case referrals. In particular, it gives companies some indication as to how the Commission will exercise its own discretion (or, as the case may be, informally encourage Member States to exercise their discretion) in the case of pre-notification referral requests under Article 4(4) and 4(5) and post merger referrals under Articles 9 and 22 of the new Merger Regulation.[79] The notice also takes positions on some important questions as to the Commission's powers under Article 22. It suggests that only those Member States that are empowered to review the merger under their own national legislation may make or join a referral under Article 22,[80] and states that the Commission, once it has accepted the referral, will examine the transaction's effects only with respect to those Member States that have made or joined the referral request.[81] The draft notice circulated for public consultation had suggested a more expansive view of the Commission's powers under the new Article 22.

7.2. *Commission's powers under Article 21(3) of the Merger Regulation: ECJ's judgment in Portugal v. Commission*

In June 2004, the ECJ issued an important judgment regarding the Commission's powers to control Member State measures to block mergers with a Community dimension on public interest grounds.[82] The Portuguese Government had used its powers under national legislation with respect to partly privatized companies to block a public offer by a Portuguese-Swiss consortium for Cimpor, a formerly State-owned company in which the Por-

76. Commission Notice on case referral in respect of concentrations, O.J. 2005, C 56/2.

77. Commission Notice on restrictions directly related and necessary to concentrations, O.J. 2005, C 56/24.

78. Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation 139/2004, O.J. 2005, C/32.

79. See also the European Competition Authorities' "Principles on the application, by National Competition Authorities with the ECA, of Articles 4(5) and 22 of the EC Merger Regulation", Jan. 2005, available at www.oft.gov.uk

80. See Case Referral Notice, *supra* note 76, at footnote 45 (reference to competence of Member State to review the transaction in question).

81. See Case Referral Notice, *supra* note 76, at footnote 46.

82. Case C-42/01, *Portuguese Republic* v. *Commission*, judgment of 22 June 2004, nyr. Cf. Case note by Rodger in 42 CML Rev, 1519–1532.

tuguese Government still had a shareholding of 12.7 percent. Finding that the merger had a Community dimension, and that the Portuguese Government had failed to notify any public interest grounds that would justify the measure refusing the merger under Article 21(3) of the Merger Regulation, the Commission adopted a decision finding that the interests underlying the measure were incompatible with Community law. The ECJ rejected the Portuguese Government's appeal. The Court found in particular that the Commission is competent to take a decision on the compatibility of public interest grounds with Article 21(3) even where the national government fails to notify the Commission of such grounds. Drawing on an analogy with the *Boussac* case law in the State aid field,[83] the Court found that if the Member State in question does not provide the information the Commission requests in good time, the Commission is entitled to take a decision on the basis of the facts it has.

The judgment is important in that it strengthens the Commission's hand *vis-à-vis* national governments trying to block certain transactions on industrial policy grounds, often the very kind of cross-border transactions that the creation of the Common Market was meant to encourage. Had the Court followed the Portuguese Government's submission that in the absence of a notification by the national respective government, the Commission must resort to an infringement procedure under Article 226 EC, this would have condemned the Commission to a rather passive role even in cases of blatant protectionist measures. The confirmation of its ability to use Article 21(3) decisions proactively paves the way for a more active involvement of the Commission in cases where national governments may try to use more informal (but nevertheless effective) means of preventing cross-border transactions in favour of national industrial policy solutions.

7.3. *Commission Phase II decisions*

In 2004, the Commission adopted a number of Phase II decisions that are of interest beyond the facts of the respective case:

7.3.1. *Merger in the French book publishing sector: Lagardère/Natexis/VUP*

In January 2004, the Commission approved, subject to far-reaching commitments, the acquisition by the Lagardère conglomerate of Editis, formerly known as Vivendi Universal Publishing or VUP. Lagardère was allowed to

83. Case C-301/87, *France* v. *Commission*, [1990] ECR I-307, para 22.

retain only about 40 percent of Editis business, leaving it only with those businesses that plainly caused no competition problems (French language academic and professional publishing and Spanish language publishing). The 300–page decision contains a thorough investigation of the French publishing market that may well be representative of the situation in other Member States. It shows the difficulties of fashioning limited remedies in an industry characterized by strong vertical integration covering the entire value chain (acquisition of publishing rights, marketing and sales and distribution services, and sale of books to wholesalers and retailers). The parties' case was clearly not helped by the multitude of complaints lodged, a familiar feature in publishing mergers.

The Commission identified a large number of relevant product markets at each stage of the value chain. It distinguished publishing rights for general literature, comic strips, academic and professional publications in French and foreign languages, as well as markets for secondary rights for pocket books and books sold through book clubs. On the next level, the Commission distinguished between (i) sales and marketing and (ii) distribution services for each of these categories, and in addition between the different types of resellers targeted by the service providers (bookstores, hypermarkets, and wholesalers). Finally, as regards the sale of books by publishers to resellers (wholesalers and retailers), the Commission distinguished nine different markets on the basis of categories (e.g. children's books, academic and professional books, pocket books), and, as for marketing and distribution services, between the different types of resellers.

For all markets identified (with the exception of school textbooks) the Commission found that the relevant geographic market was the French-speaking area of the European Union rather than only France. The difference was significant in that it allowed the Commission to refuse the French Government's request for a referral on the basis of Article 9(2)(a) of the (old) Merger Regulation (distinct market within the territory of the relevant Member State), and to exercise its discretion to reject a referral of the small remaining part of the transaction (school text books). One can speculate whether the French authorities' handling of the *SEB/Moulinex* merger (which was approved on the basis of the failing company defence that the Commission had already explicitly rejected) may have contributed to the Commission's reluctance to refer any part of the transaction.[84]

The Commission's substantive assessment focused on the parties' strong positions throughout the value chain, in particular as regards the "more in-

84. See Völcker, op. cit. *supra* note 46, at 1072.

dustrialized"[85] part of the publishing business: publishing rights for general literature and pocket books, marketing and distribution, and sales through especially significant commercial channels such as hypermarkets and other so-called "level 3 retailers" (retailers for which the sale of books are only secondary products). Other areas in which the transaction would have eliminated most competition were schoolbooks in France, educational supporting materials, and dictionaries.

While the Commission found that the merged entity would not have become dominant in a number of markets examined (such as publishing rights outside general literature, and pocket books, and sales to wholesalers in categories such as comic strips, art books and professional and university books), the degree of vertical integration of both publishing groups appeared to make it difficult to fashion a remedy that would allow Lagardère to retain a significant portion of Editis' business in these areas. In the end, Lagardère essentially agreed to divest the entirety of Editis while retaining only those activities that would clearly not create a competition problem. Indeed, for French-language dictionaries, the remedies improved the competitive structure *vis-à-vis* the pre-merger situation in that Lagardère would retain Larousse while selling on Le Robert with the remainder of Editis, whereas Editis had previously controlled both Larousse and Le Robert and thus more than 80 percent of that market.

7.3.2. *Prohibition of transaction in partly-liberalized markets: EDP/ENI/GDP*

In December 2004, the Commission prohibited the acquisition of joint control over Gas de Portugal (GDP), the incumbent gas company in Portugal, by Energias de Portugal (EDP), the incumbent energy company, and the Italian energy company ENI.[86] The Commission rejected the parties' extensive commitment package as insufficient to address the competition issues it had identified on various electricity and gas markets. It was the Commission's first prohibition of a merger since *Tetra Laval/Sidel* in 2001.

With regard to the wholesale and retail electricity markets, the Commission rejected the parties' principal argument that the relevant geographic market was broader than Portugal. It also rejected the parties' proposed "transitional market approach" based on the planned creation of an inte-

85. Boeshertz, Kleiner, Nouet, Petit, von Koppenfels and Rabassa, "Lagardère/Natexis/VUP: big deal in a small world", *Commission Competition Policy Newsletter*, Spring 2004, 8.

86. Commission Decision of 9 Dec. 2004, Case No. COMP/M.3440 – *ENI/EDP/GDP*. This decision is subject to an appeal before the CFI (Case T-87/05, *EDP-Energias de Portugal* v. *Commission*).

grated Iberian electricity trading market in the coming years. On the basis of such nationally-defined markets, the Commission had serious concerns based on horizontal and non-horizontal theories of competitive harm. As for horizontal effects, the Commission found that GDP represented the most credible potential threat to EDP's dominant position on the electricity markets because of GDP's competitive access to gas resources and its concomitant advantage in power generation through gas-fired power plants, as well as its ability to provide joint gas/electricity offerings to its customer base. As for non-horizontal effects, the Commission relied principally on EDP's immediate access post-merger to critical information on gas supplies to EDP's competitors, and on EDP's ability and incentive to foreclose its competitors' access to the Portuguese gas infrastructure.

As to the wholesale and retail gas markets, the Commission found that the merger would strengthen GDP's existing dominant position, as it would foreclose GDP's competitors' access to EDP's gas-fired power plants as well as to EDP's Portgás subsidiary – the one regional Portuguese gas distribution company not owned by GDP. The Commission found that EDP was also the most likely entrant on the downstream markets for gas supply to industrial and residential customers, given its existing access to gas supplies for its gas-fired power plants and its ability to pursue a multi-utility strategy. A particularly interesting aspect of the Commission's analysis is that, in contrast to the electricity markets, the gas markets in Portugal are yet to be fully liberalized. Under a special derogation in the Second Gas Directive, full liberalization of the Portuguese gas market is not required before 2010. The Commission therefore took into account effects that would materialize only in the relatively distant future, well beyond the typical time frame for prospective review in merger cases. The Commission's ability to do so is one of the aspects of the decision challenged by EDP in its appeal currently pending before the CFI.

To remedy the Commission's concerns, the parties submitted an extensive package of proposed commitments, which they amended both before and after the statutory deadline for second-phase commitments. In its decision, the Commission rejected as insufficient each iteration of the commitments, in the case of the commitments submitted after the deadline because they did not fully and unambiguously and without need for further market investigation resolve the competition concerns identified. The Commission's rejection of these commitments is the main target of EDP's pending appeal.[87]

The EDP/ENI/GDP decision underscores the Commission's vigilance when it comes to ensuring that industry consolidation does not undermine

87. O.J. 2005, C 82/44.

the hard-fought liberalization of the European energy markets. The decision also illustrates the difficulties in formulating complex yet effective remedies in the energy markets, in particular at a late stage of the deadline-driven merger review procedure. EDP's appeal before the CFI raises important questions about the Commission's handling of commitments (such as the burden of proof as regards their effectiveness) and hopefully the CFI's forthcoming judgment will bring some clarifications to this important aspect of EC merger practice.

7.3.3. *Unilateral effects analysis in the software industry: Oracle/ PeopleSoft*

In October 2004, the Commission unconditionally cleared Oracle's unsolicited bid for PeopleSoft, 12 months after notification and 16 months after the announcement of the transaction.[88]

The transaction impacted on the market for enterprise application software that helps companies automize back-office functions such as financial and human resources management. While a large number of software vendors provide such solutions, the Commission's concerns focused on whether there was a separate market for "high-function" software capable of satisfying the needs of large and complex companies, in which the transaction would reduce the number of players from three (SAP, Oracle and PeopleSoft) to two. While the Commission maintained in its decision that there was indeed such a separate "high-function" market, it found that contrary to its initial assumptions, this market was served also by a number of other vendors, in particular the US companies Microsoft and Lawson. The inclusion of additional vendors in the "high-function" market was largely based on extensive bidding data submitted by Oracle, evidence that showed that vendors other than SAP, Oracle and PeopleSoft bid for and in some cases won large licence deals from companies with unquestionably complex functionality requirements.

In its competitive effects analysis, the Commission also centrally relied on Oracle's bidding data. As regards non-coordinated effects, the Commission found that the larger number of players in the market undermined a simulation of price effects it had undertaken based on the (mistaken) assumption that the transaction constituted a three-to-two merger. The Commission further found that neither the number nor the identity of bidders in the final round had any statistically significant influence on the discounts offered. In other words, the Commission found no evidence that the presence of PeopleSoft had a uniquely constraining effect on Oracle's pricing. The Com-

88. Commission Decision of 8 Nov. 2004, Case No. COMP/M.3216.

mission also concluded that the transaction would not lead to coordinated effects between the merged entity and SAP. While the Commission maintained that despite the heterogeneity of the products in question and the lack of transparency as a result of significant non-public discounts, coordinated effects would have been at least conceivable in a post-merger duopoly situation, the recognition that the "high-function" software markets were populated by significantly more vendors removed its coordinated effects concerns.

The *Oracle/PeopleSoft* decision is noteworthy both in procedural and substantive terms. Procedurally, the Commission "stopped the clock" twice, including for a period of six months following a comprehensive request for information that was issued after the oral hearing and thus unusually late in the procedure. The timing of the request for comprehensive bidding data (and of the submission of that data) allowed the Commission to take its own decision with the benefit of the evidence before, and the ruling of, the US District Court of the Northern District of California,[89] which after a full trial refused to grant the US DOJ's request for a permanent injunction against the transaction.

While the Commission's procedural approach may thus at first blush suggest that the final decision was driven by comity considerations, a comparison of the substantive analysis in the US District Court's ruling and the Commission's decision suggests otherwise. Most importantly, the Commission maintained its "high-function" software market definition despite the US District Court's rejection of this definition. Relying to a significant degree on evidence produced in the US trial, the Commission also found that outsourcing did not constitute a significant constraint on packaged software vendors despite the US District Court having reached the opposite conclusion on the basis of the full evidentiary record before it. At the end of the day, it is apparent from the Commission's decision that the key evidence driving its decision was the bidding data produced by Oracle in response to the Commission's information request, evidence that was not part of the record before the US District Court.

The Commission's use of non-coordinated (unilateral) effects analysis in a case that still fell under Regulation 4064/89 and thus was to be decided under the traditional dominance test is also interesting. Given the very substantial market position of SAP, in particular in Europe, it would have been extremely difficult for the Commission to argue that the merger would create a position of single dominance in the traditional sense. As a result, a prohibi-

89. *United States* v. *Oracle Corp.*, 331 F. Supp. 2nd 1098, 2004 U.S. Lexis 18063, 9 Sept. 2004.

tion based on non-coordinated effects would have required the Commission to take the view that even under the dominance test, it could challenge such effects even absent the creation of a market leader, in other words, that there was no "enforcement gap" under the old Merger Regulation.[90] However, it was precisely the doubts about the existence of the enforcement gap that prompted the Commission to seek a legislative amendment of the Merger Regulation's substantive test at the very time it was considering the *Oracle/ PeopleSoft* merger. In the event, as it found no non-coordinated effects, the Commission did not have to take a position on its competence to apply a unilateral effects test under the old Merger Regulation.

7.3.4. *Coordinated effects after Airtours: Sony/BMG*

In July 2004, the Commission granted unconditional clearance to a joint venture combining the respective recorded music businesses of Sony and Bertelsmann Music Group (BMG) after an in-depth investigation and the issuance of a statement of objections. The decision illustrates the Commission's more economic approach to collective dominance/coordinated effects cases inspired by the *Airtours* judgment.[91] In its decision, the Commission focused on whether the reduction in the number of major players ("majors") in the recorded music industry from five to four would lead to the strengthening of a pre-existing position of collective dominance. The Commission ultimately concluded that this would not be the case.

First, the Commission did not find evidence of parallel pricing behaviour in any of the national markets it examined. While the majors' average net wholesale prices appeared to show a "relatively similar price development", the Commission found this not to constitute sufficient evidence for past coordination. It examined whether published prices to dealers ("PPDs") may have provided a focal point for coordination, but found that apparent parallel movement of average PPDs and net prices masked huge fluctuations of discounts on a customer-by-customer and album-by-album basis. The Commission finally analysed whether the majors' discounts were aligned and sufficiently transparent to allow efficient monitoring of price coordination, but found that the majors' discount practices (in particular so-called "campaign discounts") were insufficiently transparent notwithstanding "permanent interaction with the same customer base" and the weekly market intelligence reports by the parties' respective sales forces.

90. For a comprehensive discussion of the "enforcement gap", see Völcker, "Mind the gap: unilateral effects analysis arrives in EC Merger control", (2004) ECLR, 395–409, and Ehlermann, Völcker and Gutermuth, "Unilateral effects: the enforcement gap under the old EC Merger Regulation", 28 *World Competition* (2005), 193–204.

91. T-342/99, *Airtours* v. Commission, [2002] ECR II-2585.

Second, the Commission examined whether the markets for recorded music were characterized by features facilitating coordinated behaviour. The Commission found that the relatively heterogeneous nature of the content of recorded music, and the pricing implications of the vastly different and often unpredictable success of individual albums, makes tacit collusion difficult. Similar considerations led the Commission to find that transparency in the recorded music markets is limited despite the publication of weekly hit charts, a stable customer base and the reporting systems set up by the majors. The Commission also found no evidence of any retaliation against "cheating" (price cutting) majors, for example in the form of "a temporary return to competitive behaviour" or exclusion of the "cheater" from multi-artist compilation album cooperation.

Third, in the absence of any evidence of past coordination and market characteristics facilitating coordination, the Commission briefly considered whether the merger would lead to the creation (rather than the strengthening) of a position of collective dominance. It observed that while in some oligopolistic markets, a reduction in the number of major players from five to four could in fact lead to the creation of a position of collective dominance, there was no suggestion that such a reduction would substantially change anything about the lack of transparency, heterogeneous product characteristics, and the lack of retaliatory action in the recorded music markets.

7.3.5. *Spill-over effects of joint venture: Areva/Urenco/ETC JV*

In October 2004, the Commission granted conditional Phase II clearance to the creation of joint control by French nuclear group Areva and Urenco, a company set up by the governments of the UK, Germany and the Netherlands, over Enrichment Technology Company (ETC), Urenco's existing subsidiary active in the development of centrifuges used to enrich uranium. The Commission had obtained jurisdiction as a result of a joint referral by France, Sweden and Germany under Article 22(3) of Regulation 4064/89. The rationale of the transaction was to give Areva access to more cost-effective centrifuge technology that it does not currently have. The Commission's decision is instructive as regards its approach to coordinated effects analysis in a highly concentrated market, the use of firewall-type remedies in joint-venture situations, and the involvement of other regulatory authorities (in this case ESA) in monitoring commitments.

The Commission's analysis focused on whether the joint venture would lead to coordinated effects between Areva and Urenco on the downstream market for enriched uranium. The Commission questioned the parties' contention that the relevant geographic market was worldwide, based on (i) the stability of European producers' high combined market shares in Europe

over time; (ii) the differences in the principal players' market shares depending on the geographic region; (iii) at least some evidence of price variations across regions; (iv) structural links between Community customers and producers; and (v) regulatory, capacity and cost constraints preventing the non-European producers from increasing their sales to Europe, namely Russian supplier Tenex, whose exports in Europe are restricted by the so-called "Corfu Declaration" issued by the Community institutions in 1994 in order to protect EU producers of natural and enriched uranium.

On the European market for the supply of enriched uranium, Areva and Urenco are the only significant suppliers. In its originally notified form, the Commission found that the joint venture would have had three different anticompetitive effects: (i) because any centrifuge sales required unanimous approval under the originally notified joint-venture agreement, the joint venture would enable Areva and Urenco to control each other's decisions on enrichment capacity; (ii) because of the close link between capacity, output and price on the market in question, such control was likely to push up prices in Europe and the rest of the world; and (iii) as a result of the increased market transparency and information flows to be expected within the joint venture, the joint venture would likely facilitate tacit coordination in the supply of enriched uranium in the Community.

The Commission nevertheless cleared the transaction without a statement of objections on the basis of commitments given by the parties to (i) amend the ETC shareholder agreement to remove the parties' veto rights on capacity expansion, leaving such decisions largely in the hands of ETC management; (ii) put in place fire walls to limit the flow of sensitive commercial information between ETC and its parent companies and vice versa; and (iii) supply details of future uranium enrichment contracts to ESA, who in turn could take corrective measures by authorizing additional Russian imports in case of any adverse market developments.

In its assessment of the commitments, the Commission emphasizes the "specificity of the nuclear industry and the regulatory function of ESA under the Euratom Treaty", as well as the pro-competitive effects of giving Areva access to a low-cost technology, even though the Commission at the same time rejects Areva's efficiency defence without further explanation as "not merger-specific". Nevertheless, the firewall remedies accepted by the Commission provide an interesting template for other cases in which a joint venture is seen as creating a structural link contributing to coordinated effects.

7.3.6. *Other Phase II decisions*

The Commission adopted two other Phase II decisions in 2004 with interesting aspects:

In *Sonoco/Ahlstrom*,[92] the Commission found that a joint venture combining the parent companies' European coreboard and paper core activities would have achieved a dominant position in the markets for high-end papermill cores in Scandinavia and for low-value cores in Norway and Sweden. The parties had argued in particular for wider geographic markets, which the Commission rejected on the basis of typical delivery distances from the respective plants, limited trade flows, and regional price differences. To remedy those concerns, the parties offered to divest Ahlstrom's only Norwegian core manufacturing facility in Sveberg. While the Commission rejected this as insufficient in Phase I because of the remote location of the plant and uncertainty about its financial viability, the parties were able to demonstrate in Phase II that, at least with the right buyer, the divestiture of Sveberg would be an effective remedy. Accordingly, the Commission approved the transaction subject to an "up-front" buyer condition, allowing the parties to close their transaction only once they had signed a binding purchase agreement with a buyer pre-approved by the Commission.[93]

In *Continental/Phoenix*,[94] the Commission approved the acquisition of Phoenix AG (Hamburg) by German company Continental AG subject to a number of divestiture commitments designed to remove overlaps in various technical rubber products, in particular air springs and steel cord conveyer belts. An interesting aspect of this decision is that the Commission did not require a remedy for rail vehicle air springs despite the merged entity having a market share of around 60 percent, with no other competitor holding more than 5 percent. The Commission found that all suppliers of such air springs depended on other suppliers for components, and moreover that given the long lead times for developing new rail vehicles and matching air springs, railways could easily "sponsor" entry by new suppliers. The decision's frequent references to what appear to have been extensive interviews with customers and competitors also suggests that the Commission is increasingly using its new powers under Article 11(7) of the new Merger Regulation.

7.3.7. *Phase I decisions of interest*

The following Phase I decisions also raise interesting aspects:

In *GE/Amersham*,[95] the Commission examined complainants' allegations that a combination of GE's diagnostic imaging equipment and Amersham's

92. Commission Decision of 6 Oct. 2004, Case No. COMP/M.3431.

93. Three weeks after the decision, the Commission approved Abzac, a French core manufacturer with significant activities in Continental Europe, see *Commission Competition Policy Newsletter*, Spring 2005, 74.

94. Commission Decision of 26 Oct. 2004, Case No. COMP/M.3436.

95. Commission Decision of 21 Jan. 2004, Case No. COMP/M.3304.

diagnostic pharmaceuticals business would result in the creation or strengthening of a dominant position through leveraging in the form of commercial, "forced", or technical bundling. The Commission found that such allegations were unfounded, because the stipulated strategies would either not be possible, economically rational, or result in material foreclosure effects. Most interesting are the Commission's comments on product complementarity and long-term foreclosure as pre-conditions for a leveraging story. The Commission states that leveraging analysis "becomes redundant when there is no or limited complementarity between the products assessed",[96] which while correct is directly contrary to the Commission's submission before the CFI in *Tetra Laval* v. *Commission.*[97] The Commission also finds that a prediction of anticompetitive leveraging requires a reasonable expectation that rivals will exit the market and that the merged entity will subsequently be able to implement unilateral price increases that are sustainable in the long term without a likely challenge by new rivals entering or previously marginalized rivals re-entering the market. This goes far beyond the Commission's leveraging analysis in previous cases (including *Tetra Laval/Sidel* and *GE/Honeywell*) and corresponds to the approach suggested by the author in this journal.[98]

In *Air Liquide/Messer Targets*,[99] the Commission cleared the acquisition of large parts of the German industrial gases supplier Messer by French competitor Air Liquide, subject to the divestiture of pipeline networks, tonnage plants, and bulk and cylinder businesses covering a large part of Germany. The decision is interesting in three respects. First, it represents a text-book example of a situation in which the Commission will oppose a three-to-two merger on coordinated effects grounds: the elimination of Air Liquide as a "maverick" that was the most aggressive player in the highly concentrated German market for bulk and cylinder gases, and evidence of past collusion in the same product market, albeit in a different Member State.[100] Second, it demonstrates the use of HHI-concentration ratios to ensure that in "national markets with important local aspects", a divestiture package consisting of local production plants would limit the increase in

96. See para 32.

97. Case T-5/02, *Tetra Laval* v. *Commission*, [2002] ECR II-4381, para 169 ("Leveraging is possible not only when the products in question are complements in the economic sense of the term, but also when they are commercial complements, that is to say, when the products are used by the same group of customers").

98. See Völcker, "Leveraging as a theory of competitive harm in EC merger control", 40 CML Rev. (2003), 581, at 595 et seq.

99. Commission Decision of 15 March 2004, Case No. COMP/M.3314.

100. See Commission Decision of 24 July 2002, Case No. COMP/E-3/36.700 – *Industrial and Medical Gases*, O.J. 2003, L 84/1.

concentration in all localities concerned (in this case as many as 720 customer clusters based on German postal codes). Third, in procedural terms, the decision illustrates that even a fairly complex case can be resolved in Phase I if remedies are submitted early in the process. In this case the first commitment package was submitted four days after notification, and substantially amended twice following market-testing.

In *Air France/KLM*,[101] the Commission granted Phase I approval to the most significant European airline merger to date, subject to a number of commitments to resolve competition problems on overlap routes. The decision represents an evolution of the Commission's practice in dealing with airline alliances and mergers, and provides a template for the further expected consolidation of the European airline industry. For the first time, the Commission found that direct and indirect flights may under certain circumstances represent competitive alternatives even on short haul routes. With respect to remedies, the Commission required a number of commitments to provide additional incentives for new entry on overlap routes, such as an infinite duration of slot divestiture remedies, shorter "bracket periods" to ensure that the new entrant receives slots closer to its desired time, a "grandfather rule" that allows a new entrant to use slots for other destinations after having operated on the overlap route for a certain period of time, supervision of the commitments by a monitoring trustee, and – in contrast to the Commission's usual resistance against behavioural remedies in merger cases – a commitment restricting the merged entity's pricing on hub-to-hub routes in response to new entry.

8. Conclusion and outlook

The year 2004 has produced a rich harvest of judicial and Commission case law, be it in the area of cartels, Article 82 EC or merger control. While there is no single unifying theme, one can detect certain trends, such as a reluctance by the Community courts to subject "non-economic" activities to the application of the competition rules (*AOK*, *Meca-Medina*), while continuing and perhaps increasing their scrutiny of the Commission's enforcement activity in the area of Article 81 (*Tokai Carbon*, *German Banks*, *Steel Tubes*, *JCB Service*). Article 82 clearly is an area that remains in flux, with time-honoured principles such as the protection of parallel imports being questioned (*Syfait*) while at the same time the Commission is pushing for a clarification (and arguably an expansion) of the obligations on dominant IP

101. Commission Decision of 11 Feb. 2004, Case No. COMP/M.3280.

holders. The prohibition of the *EDP/ENI/GDP* merger notwithstanding, the Commission appears to proceed with caution in the merger control area, preferring to settle even complex and difficult cases on the basis of commitments in both Phase II as well as Phase I.

At the time of writing, 2005 was shaping up to be a somewhat less exciting vintage. However, it may still finish on a strong note if the CFI were to issue its judgment in *GE/Honeywell*, and the Commission to publish a first draft of its eagerly awaited Article 82 guidelines before year's end.