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## Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 1)

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# Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 1)

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## **Abstract**

This paper is designed to offer an overview of the major events and policy issues related to Arts 81, 82 and 86 EC in the last year. The paper follows the format of previous years and is divided into three sections: — A general overview of major events (legislation and notices, European Court cases and European Commission decisions). — An outline of current policy issues, including legal privilege, private actions and Art.82 guidelines. — Discussion of certain areas of specific interest, notably competition and the liberal professions, energy, sport and media and certain international issues.

# Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 1)

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Brussels*

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- A general overview of major events (legislation and notices, European Court cases and European Commission decisions).
- An outline of current policy issues, including legal privilege, private actions and Art.82 guidelines.
- Discussion of certain areas of specific interest, notably competition and the liberal professions, energy, sport and media and certain international issues.

Legislation and European court judgments are included in Part 1. The other sections will be included in Part 2, published in the next journal.

## Box 1

### • Major Themes in 2004

- Enlargement: 10 new Member States
  - \* With modernisation and decentralisation
    - No notifications/no immunity
    - Shared Art.81(3) EC
    - Now: Art.9 commitments and lapsed notification cases?
- *Basics litigation*
  - \* Still litigating what is an agreement
  - \* Still litigating what the privilege against self-incrimination means
  - \* Still litigating what legal privilege is
  - \* BUT also highly complex Art.82 issues
    - E.g. compulsory licensing of IP
- *Competition advocacy and the liberal professions*

\* With many thanks to Ingrid Cloosterin and Flavia Distefano for their general help in the production of this paper and

In the author's view there have been *three* major themes this year.

The primary theme of the year in competition terms was the combination of Enlargement, modernisation and centralisation, turning around the focal point of May 1, 2004. On that day, 10 countries joined the EU, bringing a scale change and new systems of competition enforcement. The notifications system stopped. The "European Competition network" started. National courts were also given the right to apply Art.81(3) EC. The Transfer of Technology Block Exemption entered into force,<sup>1</sup> with market share ceilings and related Guidelines, completing the modernisation of Art.81 EC legislation.

Already, there have been developments with Regulation 1/2003, notably planned "Article 9" commitment decisions<sup>2</sup> and proceedings against previously notified practices, no longer covered by immunity. Companies and their lawyers are thinking about "self-assessment" rather than "To notify or not to notify?"!

The second theme of the year has been "basics litigation": In *Volkswagen II* and *Bayer Adalat*, on the question as to what is an agreement; in *Graphite Electrodes* and *Austrian Banks*, questions as to what material a company has to give the Commission in response to a request for information; and in *Akzo Nobel* questions as to what legal professional privilege covers. It is true that there are complex issues also, such as when, exceptionally, dominant companies may have to license their IP as in *IMS*, but it is striking to see basic issues like this coming up again, issues which should perhaps be clear by now.

The third theme has been the Commission's drive into the liberal professions. It appears that the Commission wants to push far fast. The Commission has started with a case involving *Belgian Architects* and a "Communication" urging self-review by the professions. It will be interesting to see how the issues develop or whether (like, for example, sport or air transport) matters will take a while to clarify and sort out.

*Elisabeth Arsenidou for her drafting assistance in various sections. This is a slightly revised version of a presentation given at the IBC Advanced Competition Law Conference, Brussels, November 2004. The reference period is from November 2003 until October 2004. The paper does not cover merger control.*

1. See, generally *Commission Press Releases* IP/04/511, April 21, 2004; IP/04/411, March 30, 2004.

2. Commitment decisions; MEMO/04/217, September 17, 2004.

## Overview of major events

### Legislative developments (adopted and proposed)

#### Box 2

- **Legislation/Notices**
  - *Regulation 1/2003 and the related decentralisation package*
    - \* N.B. Leniency provisions
    - \* A narrowing of Art.81(1) EC?
  - *New Transfer of Technology Block Exemption*
    - \* Key new distinctions/limits
    - \* Related “IP Guidelines”
    - \* N.B. 4 technologies “*de minimis*” rule
  - *Extension of EC procedural framework in air transport to third country routes*
    - \* Finally!
  - N.B. New draft revised Access to File Notice just published

### Adopted

#### May 1, 2004: Overview

On May 1, 2004, there were huge changes to the way in which EC Competition law is enforced. Four aspects apply to general competition, the fifth is a new EC Merger Regulation with a new substantive test, not covered in this paper<sup>3</sup>:

- First, the new Enlargement, with 10 new EU Member States.<sup>4</sup> This is probably the most important change, because it results in a *scale change* in the size of the EU, which moves from 15 to 25 Member States and a much wider geographic scope for EC Competition law.
- Secondly, the modernising features of Council Regulation 1/2003.<sup>5</sup> These came into force on May 1, 2004. Above all with the abolition of notifications to the European Commission (“the Commission”) for clearance of agreements.
- Thirdly, the decentralisation aspects of Council Regulation 1/2003. Above all, the shared enforcement of *the whole* of Art.81 EC with national competition authorities (“NCAs”) and national courts, meaning that they can also apply Art.81(3) EC, as well as the Commission.
- Fourthly, the new investigatory powers of Regulation 1/2003. Above all, the new right for the Commission to inspect *private homes*, as well as company premises, if it is shown

3. See, WilmerCutlerPickeringHaleandDorrLLP, *Guide to EC Merger Regulation* (4th ed., September 2004).

4. Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and the Czech Republic.

5. [2003] O.J. L1/1.

that evidence of infringement is likely to be there.

At the same time, a new procedural regulation entered into force, Commission Regulation 773/2004.<sup>6</sup> In the Spring of 2004, the Commission also finalised and adopted various notices on: Effect on trade; Art.81(3) EC; co-operation amongst the Commission and NCAs; co-operation amongst the Commission, NCAs and national courts; informal guidance on novel questions; and the handling of complaints.<sup>7</sup>

These documents were summarised in detail last year as drafts.<sup>8</sup> Some have changed a little, but generally they are much the same. (Key points are noted below.)

#### Enlargement

Enlargement involves four key changes.

- First, the new NCAs join in the new “European Competition Network” (“ECN”) of competition authorities, sharing enforcement of the EC rules with the European Commission (as well as enforcing their own national rules).
- Secondly, since May 1, 2004, the Commission is able to intervene directly in the 10 new Member States, with inspections on company premises and new, controversial powers to carry out such inspections in private homes.<sup>9</sup>
- Thirdly, there should be more focus on restrictions on trade and competition (i) among the 10 new Member States and (ii) between the 10 new Member States and the 15 old EU Member States. Previously, competition enforcement in or with these countries was a question for national laws or EC law and the Europe Agreements. Direct application of relevant EC rules is likely to be more direct and focussed on cross-border restrictions.
- Fourthly, in the new Member States, we expect an enforcement drive on (i) “15 old Member State companies” (who arguably should know better) and (ii) also on former monopolies and oligopolies that came about through privatisation and still hold dominant positions.

#### Modernisation

This has been going on for some time. Seven points may be noted now.

6. [2004] O.J. L123/18.

7. All are conveniently grouped in [2004] O.J. C101 and are otherwise available on the Commission’s website. See, also Gauer, Kjøbye, Dalheimer, De Smijter, Schnichels and Laurila, *EC Commission Competition Policy Newsletter* (Summer 2004), pp.1–6.

8. [2004] I.C.C.L.R. 25–32.

9. Art.21 of Council Regulation 1/2003.

- First, the Commission has sought to focus on restrictions on competition by those with market power, involving more significant effects, with a greater emphasis on economic assessments than previously. In practice, that has meant vertical and horizontal block exemptions with market share ceilings and related guidelines, setting a review framework for situations where companies have market power and are not covered by the block exemption's "safe harbours".
- Secondly, the Commission has also modernised its legislation to fit a system with no notifications for "exemption" since, from May 2004, this was abolished. In practice, this means that companies and their advisers now cannot notify to obtain immunity from fines, if there is a perceived risk that an arrangement could be viewed so unfavourably as to justify them. There is still a possibility to obtain guidance from the Commission on cases involving novel questions, but this is intended to be of limited application, for "genuinely unresolved" questions. The Commission has also removed "grey-listed" (possibly unlawful) clauses from block exemptions and the related "opposition procedures" for tacit approval of notified agreements.
- Thirdly, although the focus on economic assessments is generally welcome, it has been at a price in terms of legal certainty. Notably, the introduction of market share ceilings on block exemptions means that there may often be more insecurity for companies. For example, if the relevant market for supply of a product is European, then one approach can be taken for Europe as a whole. If, on the other hand, there are national or regional markets with variations in market positions and market power, then corresponding variations may be required to the agreements to reflect these factual variations. Probably this should be welcomed insofar as it may lead to more precise, correct factual assessments, but it will make simple co-ordination of "European" wide trading positions difficult in many cases.
- Fourthly, there will also be more insecurity insofar as there will not be exemptions for a given period of time. This concern can be exaggerated, insofar as there were only few actual exemption decisions and a great deal of private practice has been about moving companies into broadly acceptable positions, with some risk of challenge but good arguments in defence, rather than notifying. That has not changed. Nevertheless, a clear issue is how time will be treated in EC competition rulings before NCAs and courts. It is no longer a question of a forward looking prediction for a period, justifying "exemption". It is more of a "snapshot" as to whether, at a given moment, a restriction is anti-competitive. It will be interesting to see if this will lead to different results in future rulings. It also remains to be seen for how long clearance decisions will be effective, given the risk that plaintiffs may seek their review and may not be clearly prevented from doing so, as with a formal exemption decision.
- Fifthly, it should be emphasised that the process of modernisation is also not over. This year we saw the third general area to be covered, with modernisation of the Transfer of Technology Block Exemption. However, there have also been discussions as to modernising Art.82 EC enforcement, with draft guidelines to come, it is suggested next year. Related to this, the Commission has indicated in its Transfer Technology Guidelines and Notice on Art.81(3) EC that dominant companies may have more scope to benefit from Art.81(3) EC, provided that the practice in question is not abusive.<sup>10</sup> This may well mean that the Vertical Restraints and Horizontal Guidelines will need related revision, since they both generally treat dominance, not abuse as the limit for Art.81(3) application.<sup>11</sup>
- Sixthly, since May 2004, the Commission appears to have started proceedings against various practices which had been notified previously and whose fine immunity lapsed with the entry into force of Regulation 1/2003, changing the situation hugely for those involved. (Some of these are described below.)
- Finally, the numerous new rules and "guidelines" will have to be tested to see how they work in practice. Phrases in the now numerous guidelines are useful, but no substitute for actual cases.

### Decentralisation

There are also a few points on decentralisation which merit special mention.

First, special thought has been devoted to shared enforcement and the varying leniency programmes in most but not all EU Member States.

This has resulted in special undertakings by NCAs that information submitted by leniency applicants will not be passed on to another authority, without the consent of the leniency applicant,

10. [2004] O.J. C102/2, para.151; [2004] O.J. C101/97, para.106.

11. See the *Vertical Guidelines*, [2000] O.J. C291/1, paras 153, 211 and 222; *Horizontal Guidelines*, [2001] O.J. C3/2, para.36.

unless either the applicant has also applied for leniency in the same case before the receiving authority or the receiving authority has given a specific commitment not to use the information transmitted to impose sanctions on the leniency applicant or on its staff.<sup>12</sup> The Commission has also indicated in the Notice on co-operation with national courts that it will not transmit to a national court information voluntarily submitted by a leniency applicant without the consent of that applicant.<sup>13</sup>

Otherwise, because of the risk that a cartel case may be passed to different enforcing authorities one may note that multiple applications for leniency (at NCA and Commission level) may often still be advisable.

Secondly, it will be recalled that there is a rebuttable presumption that trade between Member States is not capable of being affected when the aggregate annual EU turnover of the companies concerned does not exceed €40 million and the aggregate market share of the parties on any relevant market within the EU affected by the agreement does not exceed 5 per cent.<sup>14</sup>

Thirdly, there has been a fair amount of discussion about the Art.81(3) EC Notice. Notably, it is argued that the Notice has narrowed the scope of application of Art.81(1) EC while making the Art.81(3) EC “exception” very demanding.

What is new for a Commission text is the statement that some market power is required for Art.81(1) EC to apply. We have always talked about the “appreciability” of restrictions. Now the Commission is going beyond “*de minimis*” effect concepts to say that, where effect is the basis for infringing Art.81(1) EC, some consumer impact and/or market power must be shown:

“For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability”.<sup>15</sup>

This is welcome insofar as one would think it is right to focus resources on the more important cases. What is troublesome, however, is that this may not be an easy line to define in practice.<sup>16</sup> The Commission says that all this simply reflects the modern view that both plaintiffs and regulators and defendants must have real evidence to substantiate their claims that Art.81(1) EC is infringed, or that

Art.81(3) EC is met. If so, this is welcome, but it is true that, as drafted, the Art.81(3) EC Notice portrays that provision as the “exception” rather than a rule often met.

Fourthly, it is clear that the advice which practitioners are giving has already changed. Until now the tendency has been to assess closely the enforcement practice of the Commission in a certain field. Such assessments are now much more difficult, insofar as the test is whether *any* competition authority or court dealing with the case would find an infringement or would be likely to apply Art.81(3) EC. Practitioners therefore have to give a more general and, perhaps, more objective assessment than previously.

Fifthly, the Commission will still be key on the big issues. For the “Art.10” declaratory decisions (which only it can take and which are specifically designed to clarify the position on certain types of new or important practice<sup>17</sup>) and also because of the principles confirmed in the European Court of Justice (“ECJ”) *Masterfoods* judgment.<sup>18</sup> It will be recalled that this judgment requires that national authorities and courts do not take decisions that run counter to a Commission decision or are likely to run counter to a Commission decision in proceedings on the same issue or matter. NCA decisions also still have to be co-ordinated with the Commission and other authorities. If a NCA were not to follow agreed EC Competition law, the Commission could still decide to take over a case<sup>19</sup> so, to that extent also, Brussels still has a special role to play.

Sixthly, there are some important points to note on work-sharing. Since May 1, 2004, a competition case can be dealt with by a NCA or the Commission in Brussels or handled by several NCAs or before a national court.

According to the principles of work-sharing, a “material link” between the infringement and the enforcing authority or authorities is required. It will be recalled that the key principles are that an authority is considered “well-placed” to deal with a case if (i) the behaviour of the parties has substantial effects for the territory in which the authority is based; (ii) the authority can effectively gather all relevant information; and (iii) the authority can effectively bring the infringement to an end.<sup>20</sup>

We expect those cases with their main competitive impact in a single Member State to be dealt with by the “local” NCA, since it should be best placed to deal with the case, unless a special principle or precedent is involved, in which case the matter may be dealt with by the Commission. On the other hand, if three or more EU Member States

12. Paras 39–42 of the “Notice on Co-operation between Competition Authorities”; see also, Blake and Schnichels, *EC Commission Competition Policy Newsletter* (Summer 2004), pp. 7–13.

13. Para. 26 of the “Notice on Co-operation with National Courts”.

14. Para. 52 of the “Notice on Effect on Trade”.

15. Paras 24–27 of the “Notice on Art.81(3) EC”.

16. See also Kjølbye, “The New Commission Guidelines on the Application of Article 81(1)” [2004] E.C.L.R. 566.

17. Art. 10 and recital (14) of Council Regulation 1/2003.

18. Case C-344/98, [2000] E.C.R. I-11369, available on the European Court of Justice website.

19. See Art. 11(6) of Council Regulation 1/2003.

20. Paras 8–9 of the “Notice on Co-operation between Competition Authorities”.

are affected by a restriction, we expect the case to be handled in Brussels. In between, there may be joint action by NCAs or action by one NCA.

This may become a developing area. For example, it may be of interest to note that the Nordic competition authorities often appear to co-operate together and have signed an official agreement on such procedures. It may be that, in the years to come, interventions by other combinations of authorities, for example, the Spanish and Portuguese, or the Austrian, Czech and Slovak authorities should be expected.

In practice, one may also expect the Commission to pass cases to NCAs more willingly, unless it is thought that they may not be dealt with for lack of resources or other factors. The Commission could do this before, notably invoking *Automec II*,<sup>21</sup> but now it has even more incentive to do so, because it can leave the actual case to others and still be involved through the ECN.

Finally, it is emphasised that in applying EC Competition law the national authorities will follow their national procedural rules, which may involve important distinctions. For example, on recognition of legal professional privilege, which may be different where national rules apply to EC competition enforcement. Thus, in Portugal, it is argued that in-house counsel, who are still members of the Portuguese Bar, have such privilege. There are also variations in national practice on the privilege against self-incrimination.

### The TTBE and related guidelines

The new Transfer of Technology Block Exemption (“TTBE”) Commission Regulation 772/2004 and related guidelines (the “Transfer Technology” or “IP” Guidelines) were adopted on April 7, 2004 and entered into force on May 1, 2004.<sup>22</sup>

The main principles are as follows:

#### *Transfer of Technology Block Exemption*

First, the new TTBE reflects two key changes in comparison to the old one: (i) a distinction is made between competitors and non-competitors and (ii) the Block Exemption (“BE”) is only available up to certain market share ceilings. Thus,

- If an agreement involves competitors which together have more than 20 per cent of the relevant technology or product market then the agreement cannot benefit from the BE.
- If an agreement involves non-competitors either of which on its own has more than 30 per cent market share on the relevant

technology or product market, then again the benefit of the BE cannot be claimed.

Critically therefore some market assessment must now be made. Different “black-lists” for unacceptable provisions apply (so-called “hardcore” provisions). Whether companies are competitors is assessed at the time the agreement is entered into and, importantly, that status is retained even if they subsequently become competitors, unless there are substantial amendments to the agreement later.

Secondly, the BE applies to software copyright licensing, but not generally to licensing of rights in performances and other copyright, and not to trademarks. Licences must be for production of contract products, not just resale, and licences must be between two parties. The BE is also applicable to sub-licensing and sub-contracting provided that the primary purpose of the licence remains the production of contract products.<sup>23</sup> Settlement and non-assertion agreements are now normally covered by the BE.<sup>24</sup>

Thirdly, restrictions on a licensee using severable improvements and/or requiring their exclusive licensing or assignment to the licensor and no-challenge clauses are excluded from the BE. (It may be useful to recall that including “hardcore” provisions in an agreement means that the whole agreement falls outside the BE. An “excluded” provision just falls outside the BE to be assessed individually.)

Fourthly, the hardcore restrictions list has been revised as between the draft and the final TTBE.

- For competitors, the main black-listed provisions are: maximum and minimum price-fixing, reciprocal output limitations, certain market-sharing provisions and restrictions on a licensee’s ability to exploit its own technology or pursue its own separate R&D. The BE is stricter for reciprocal than non-reciprocal agreements between competitors. Non-reciprocal output restrictions between competitors are now covered by the BE.
- In the case of non-competitors, the main hardcore restrictions are: minimum resale price maintenance, certain passive sales and restrictions on sales where a licensee is in a selective distribution system.
- The TTBE allows active sales bans on licensor and/or licensee, as well as customer and territorial restrictions on the licensor.
- It is noteworthy that, between non-competitors, you can restrict passive sales into the territory or customer group of another licensee during the first two years in which

21. Case T-24/90, *Automec v Commission* [1992] E.C.R. II-2223.

22. [2004] O.J. L123/11 and [2004] O.J. C101/2. IP/04/470, April 7, 2004. With thanks to Cormac O’Daly for his assistance with this section. See also [2004] I.C.C.L.R. 22.

23. See the IP Guidelines, paras 42 and 44.

24. See the IP Guidelines, paras 43 and 204–209.

the licensee is selling contract products in that territory.<sup>25</sup>

Fifthly, new licences have to comply with these rules already. Existing licences have to be brought into line by March 31, 2006 or fall to be considered under the general rules, not benefiting from the BE.

### *Transfer Technology Guidelines*

These Guidelines are extensive. They explain the general application of Art.81(1) EC to licensing and the position of the TTBE in comparison to other BEs (such as Joint R&D and Vertical Restraints). They include comment on the TTBE itself and focus on certain types of agreement, considering the position if they are not covered by the TTBE.

Some of the more important general points are as follows:

- Outside the area of hardcore restrictions, Art.81 EC is considered unlikely to be infringed where there are four or more independently controlled, commercially viable, substitutable technologies on the relevant market, in addition to those controlled by the parties to the licensing agreement.<sup>26</sup>
- Market shares in technology markets are calculated for the purpose of the TTBE by reference to sales of products incorporating the licensed technology.<sup>27</sup>
- On a technology market, the parties are considered to be actual competitors, if the licensee is already licensing competing technology, apparently irrespective of where.<sup>28</sup> Potential competition on the technology market is not taken into account for the application of the BE.<sup>29</sup> However, potential competition may be relevant when assessing an agreement which falls outside the BE.<sup>30</sup>
- If the parties' own technologies are in a blocking position *vis-à-vis* another technology, the parties are considered to be non-competitors on the technology market. The Commission clearly will be critical before accepting such a claim.<sup>31</sup>
- If a licensed technology represents such a major (or breakthrough) innovation that the technology of the licensee becomes obsolete or uncompetitive, then licensor and licensee may not be considered competitors.<sup>32</sup>
- The buyer power of the purchaser of licensed products is taken into account in assessing whether the parties to the licence have market power (in individual assessment cases).<sup>33</sup>
- The Commission appears open to economic arguments on the application of Art.81(1) and (3) EC: "Article 81 cannot be applied without considering the *ex ante* investments and the risks related thereto. The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 81(1) EC or fulfilling the conditions of Article 81(3) EC, as the case may be, for the period of time required to recoup the investment".<sup>34</sup>
- As noted above, the Commission refers to the limits of Art.81(3) EC clearance as "precluding any application of the exception rule to restrictive agreements that constitute an *abuse* of a dominant position"<sup>35</sup> (emphasis added). Therefore, the fact that an agreement is concluded by a dominant firm does not in itself act as a bar to exemption.

Thereafter the Commission discusses various specific obligations/restrictions:

- Royalties
- Exclusive licensing and sales restrictions
- Output restrictions
- Field of use restrictions
- Captive use restrictions
- Tying and bundling
- Non-compete obligations
- Settlement and non-assertion agreements
- Technology pools

Running through this part of the Guidelines is the theme that a licensor is not expected to create direct competition to himself. There is also a general sliding scale of concern: reciprocal agreements between competitors are treated most cautiously (fearing that they amount to simple market-sharing); then non-reciprocal agreements between competitors; and then agreements between non-competitors.

The following points are of particular interest, where an agreement is not covered by the BE.

Generally, so-called "*running royalties*" (meaning royalties based on product sales) are considered to be a normal form of revenue collection.

However, in a limited number of cases, royalty obligations between competitors may be viewed as price-fixing, *e.g.* where competitors cross-license and provide for reciprocal running royalties and it is considered that the licence is devoid of a

25. Art.4(2)(b)(ii) TTBE.

26. Para.131.

27. Para.23.

28. Para.28.

29. Para.30.

30. Para.66.

31. Para.32.

32. Para.33.

33. Para.137.

34. Para.147.

35. Para.151.



pro-competitive purpose.<sup>36</sup> In addition, the Commission considers that calculating royalties on the basis of *all* licensee sales, regardless of whether the licensed technology is being used, is a hardcore restriction deterring a licensee from using his own technology.<sup>37</sup>

With respect to exclusive licensing between competitors, outside the TTBE, the Commission will examine the competitive significance of the licensor. Where the licensor is only competing on the technology market and is, for example, a small research institute, there is unlikely to be an infringement of Art.81(1) EC.<sup>38</sup> Exclusive licensing to non-competitors is viewed favourably. It may not fall within Art.81(1) EC at all. If it does, the Commission states that it will generally fulfil the conditions of Art.81(3) EC. It is acknowledged that exclusivity may be required in order to induce investment by a licensee.<sup>39</sup> However, it is said that intervention may be warranted where a dominant licensee obtains an exclusive licence and entry into the technology market is difficult.<sup>40</sup>

Above the BE market share ceiling non-reciprocal sales restrictions between competitors may be within Art.81(1) EC, if either licensor or licensee has market power. However, such restrictions may be indispensable to protect other licensees' investments.<sup>41</sup> Outside the BE, sales restrictions imposed between non-competitors are still viewed favourably. Restrictions on a licensee may fall outside Art.81(1) EC, if without the restrictions, the licensing would not occur. A technology owner is also not expected to create competition with himself, so restrictions on a licensor are likely to fulfil the conditions of Art.81(3) EC.<sup>42</sup> Between licensees, while restrictions on active sales may fulfil Art.81(3) EC, the Commission considers that Art.81(3) EC is unlikely to apply to restrictions on passive sales exceeding the two year period provided for in Art.4(2)(b).<sup>43</sup>

Non-reciprocal output restrictions between competitors can now come within the BE. The favourable approach continues outside the BE, as Art.81(3) EC is said to be likely to apply, at least where the licensor's technology is substantially better than the licensee's and the output restriction substantially exceeds the licensee's output prior to the agreement.<sup>44</sup> The argument is that such restrictions may be required as an incentive for the licensor to grant the licence in the first place.

On field of use restrictions, the Commission emphasises that the parties have to define their fields of use objectively by reference to "identified and meaningful characteristics of the licensed product" or they risk a finding that the restriction constitutes a customer restriction.<sup>45</sup> Reciprocal field of use clauses between competitors, when combined with exclusive or sole territories, are considered to be hardcore restrictions.<sup>46</sup> There is also some caution with regard to cross-licensing between competitors, where an agreement provides for asymmetrical field of use restrictions, *i.e.* where one party is permitted to use the technology within one product market or technical field and the other is permitted to use it within a different product market or field of use.<sup>47</sup>

Complex as this all is, it is a huge improvement on the old TTBE. However, clearly the introduction of market share ceilings creates new uncertainties. We still do not know a lot about how the Commission will deal with situations involving market power.<sup>48</sup> In addition, there is much work to do now, seeing if existing licences need revision or termination, given changes under the new rules.

#### Air transport between the EU and third countries

In February 2004, the EU Council adopted Council Regulation 411/2004, giving the European Commission a procedural framework to review airline transactions which have an impact on routes between the EU and third countries.<sup>49</sup> No more complex, direct reliance on the EC Treaty and complex co-operation with national authorities for intervention in Airline Alliance cases (although presumably such co-operation will continue, but now under the general "ECN" framework). Previously the Commission had to rely on (what is now) Art.85 EC, (the former Art.89 EC), which was cumbersome and did not confer on the Commission the power to impose remedies.<sup>50</sup>

The change appears to have come about mainly because of the ECJ's judgment in the "*Open Skies*" cases in 2002,<sup>51</sup> which established that Member States acted illegally when they entered into agreements with the United States on a number of issues where the Community has exclusive competence. It also fits in with the new spirit of ECN enforcement, especially as the Airline Alliance cases patently have broad EU implications.

36. Paras 80 and 157.

37. Para.157.

38. Para.164.

39. Para.165.

40. Para.166.

41. Paras 170 and 171.

42. Paras 172 and 173.

43. Para.174.

44. Para.175.

45. Para.180.

46. Para.181.

47. Para.183.

48. See also Monti: "The new EU Policy on Technology Transfer Agreements", SPEECH/04/19, January 16, 2004.

49. IP/04/272, February 26, 2004; [2004] O.J. L68/1.

50. See, *e.g.* [2003] I.C.C.L.R. 93–94.

51. See, *e.g.* Case C–466/98 *Commission v United Kingdom* [2002] E.C.R. I-9427. (There were several cases.)

## Proposed

### Market access to port services

In October 2004, the Commission adopted a new proposal for a Directive on Market Access to Port Services, which would introduce specific rules on access to port services and aiming at the creation of a level playing field in competition between ports.<sup>52</sup> The proposal addresses two main issues: (a) intra-port competition (competition between providers of the same port service within a port) and (b) inter-port competition (competition between ports).

The Directive applies to ports with 1.5 million tonnes and/or 200,000 passengers per year. The services concerned are pilotage, towage, mooring cargo and passenger handling.

As regards intra-port competition, authorisations for service providers are mandatory and a system for providing authorisations is established. The Directive requires objective, transparent and non-discriminatory criteria for granting authorisations, which should be relevant, proportional and public.

The method used for granting the authorisation determines what will happen in the event of a later limitation in the number of service providers of a port service. Thus, when such a limitation arises, authorisations which have been granted through a selection procedure must remain unchanged, whereas authorisations which have been granted without a selection procedure are to be terminated and reconsidered with a selection procedure. Compensation is foreseen for the existing service provider for past, not fully amortised investments, if he does not win the selection procedure. As regards pilotage, authorisations may be subject to criteria related to public service obligations and maritime safety. Self-handling should be allowed subject to an authorisation, granted in an efficient and expedient manner and remain in force for as long as the self-handler complies with the criteria for granting it.

As regards inter-port competition, the managing body of the port is required to have transparent accounting. The Financial Transparency Directive is considered applicable to all ports covered by the proposed Directive. State Aid guidelines are to be adopted by the Commission within a year after the adoption of the Directive.

### Access to file

In October 2004, the Commission published a Communication inviting comments on a draft Access to File Notice to replace the previous one from 1997.<sup>53</sup> The draft takes into account (amongst other things)

Regulation 1/2003 and recent case law such as the *CFI Cement* judgment.

The following are the main points of interest for general enforcement (not focussing on separate merger control issues):

- The Commission continues with the position that access to file is a right of defence and therefore can only be asserted after a Statement of Objections.<sup>54</sup> (This is a point of continued controversy where many argue that principles of fairness and good administration should allow earlier access, at least for the parties.)
- Importantly for cartel leniency cases, where minutes are taken and agreed by the undertaking in question, they may be accessible after deletion of any business secrets or other confidential information (and may be evidence relied on in the case).<sup>55</sup>
- Most documents passing within the ECN will not be accessible. However, documents emanating from Member States, the EFTA Surveillance Authority or EFTA States may be disclosed where they contain allegations brought against a party that the Commission must examine, or that form part of the evidence in the investigative process, similar to documents from private parties.<sup>56</sup>
- Material may be withheld, if its disclosure would significantly harm a person or undertaking. This may be used to protect anonymous complainants or third parties where retaliation is feared.<sup>57</sup> (It is, however, a right which defendants dislike because they fear they are missing part of the case against them.)
- The Commission states that it generally presumes that turnover, sales, market-share and similar data which is more than five years old is no longer confidential.<sup>58</sup>
- The draft notice underlines that even confidential information may have to be disclosed if it is necessary to prove an infringement or to exonerate a party.<sup>59</sup>
- The draft Notice states that in Art.81 and 82 cases, access will be granted “on one single occasion”. Generally, no access is given to replies of other parties to Statements of Objections, although further access may be necessary if documents received after the issue of the Statement of Objections constitute new evidence against a party.<sup>60</sup>

52. IP/04/1212, October 13, 2004.

53. [2004] O.J. C259/8. For the current notice, see [1997] O.J. C23/3.

54. Paras 1 and 3.

55. Para.12.

56. Para.15.

57. Para.18.

58. Para.22.

59. Para.23.

60. Para.26.

- Complainants do not have the same rights of access as parties, but may be given access to documents on which the Commission has based its provisional assessment if they contest the Commission’s rejection of a complaint.<sup>61</sup>
- There are procedures for appeals on confidentiality issues to the Hearing Officer.

Finally and importantly again for (plaintiff) cartel cases, the Commission underlines that access is only for the purposes of its administrative proceedings. If documents are used otherwise and counsel are involved, the Commission may complain to national bars.<sup>62</sup> This is a big issue since the sanction appears weak and one may also think that the focus should be on the party, not the lawyer. Apparently in the *Austrian Banks* cartel case, a political party was admitted as a third party to the proceedings and made the non-confidential Statement of Objections public despite an instruction from the Hearing Officer not to do so!<sup>63</sup>

### Liner shipping conferences

In October 2004, the Commission adopted a “White Paper” aiming to bring more competition to the maritime sector.<sup>64</sup> The Commission suggested modifying or repealing the existing Council Regulation 4056/86 on the application of Arts 81 and 82 EC to maritime transport, or replacing it with other instruments, such as guidelines.

It will be recalled that shipping companies have traditionally organised themselves as liner conferences, whereby they would agree common or uniform freight rates in order to provide regular scheduled maritime transport services to shippers and freight forwarders. The 1986 Regulation contains rules which exempt price-fixing, capacity regulation and other agreements or consultation between liner shipping companies from Arts 81 and 82 EC. The justification for these exemptions has been the view that the rate-setting and other activities of liner conferences lead to stable freight rates, allowing shippers to offer reliable scheduled maritime transport services. As noted last year, the Commission is campaigning for modernisation, repealing these exemptions.<sup>65</sup>

61. Para.30.

62. Para.47.

63. [2004] O.J. C48/7.

64. IP/04/1213, October 13, 2004.

65. The Commission also issued a consultation paper concerning Commission Regulation 1617/93, relating to IATA Consultations on Passenger Tariffs on Scheduled Air Services and Slot Allocation to Airports in June 2004; the text is available on the Commission’s website.

## European Court cases (ECJ and CFI)

### Box 3

- **Main European Court Cases**
  - Article 82 EC
    - \* *BA Virgin*—Classic fidelity rebates judgment (again)
    - \* *IMS*—Compulsory licensing (exceptionally)
    - \* *Syfait*
      - A.G. Jacobs’ opinion
      - Suggests that it is not abusive for a pharmaceutical supplier to withhold a product to prevent parallel trade, in the current exceptional circumstances
  - What is an agreement?
    - \* *Volkswagen/Bayer Adalat*
    - \* Exhortations not enough
    - \* Continuous commercial relations not enough
    - \* Specific acquiescence to the particular unlawful conduct required

## Article 82 EC cases

### *BA Virgin*

In December 2003, the Court of First Instance (“CFI”) upheld the Commission’s decision in *BA/Virgin*.<sup>66</sup> British Airways (“BA”) had appealed against the Commission’s decision that it had abused its dominant position as a purchaser of UK air travel agency services, by applying a growth bonus. The Commission fined BA €6.8 million.

There has been much discussion about the judgment (as *Michelin II*<sup>67</sup>), mainly because dominant companies would like to be allowed to use incentive bonuses and see them as “normal competition”.

BA had agreements with travel agents in the United Kingdom in order to sell tickets there. Until 1997, BA applied two flat rate commissions: 9 per cent for international tickets and 7.5 per cent for domestic tickets. In addition, BA applied various financial incentives, including a performance bonus, calculated by reference to the growth of sales of BA tickets from one financial year to another.

Subsequently, after a complaint by Virgin and a Commission procedure, in 1998 BA adopted a different system of performance bonuses based on a new, lower basic commission rate of 7 per cent on all tickets sold (irrespective of destination), with an extra commission of up to 3 per cent on international tickets and 1 per cent on domestic tickets for growth in sales. Growth was measured against the corresponding month in the previous year. Bonuses applied not only to the growth element,

66. Case T–219/99, judgment of December 17, 2003.

67. Case T–203/01, judgment of September 30, 2003.

but also to all sales of BA tickets during the reference period in question.

On a second complaint by Virgin, the Commission found that BA had infringed Art.82 EC. BA was considered a dominant purchaser of travel agency services for distributing tickets in the United Kingdom. The Commission found essentially two abusive aspects in BA's performance bonus system:

- There was discrimination insofar as BA's reward scheme could entail the application of different commission rates to an identical amount of revenue, because the rate of increase in sales of BA tickets could differ from one agency to another.
- The system was loyalty inducing, because it restricted agents' freedom to supply their services to other airlines, without the system being based on any economically justified consideration.

The CFI agreed. Several points may be noted.

First, the Court found that it made no difference that BA was a dominant purchaser (as opposed to a seller) of services. Article 82 EC applies equally to companies in a dominant position in relation to their suppliers and those in the same position as regards their customers.<sup>68</sup>

Secondly, the Court found that it did not matter that BA might not be dominant in the transport markets affected by its conduct on the agency services market. Quoting *Commercial Solvents*,<sup>69</sup> the Court stated that an abuse committed on a dominated product market, the effects of which are felt in a separate market on which the company concerned does not hold a dominant position, may fall within Art.82 EC, provided that the separate market is closely connected to the first.<sup>70</sup> This was the case here.

Thirdly, BA was found to be in a dominant position despite a fall of some 6 per cent in its share of air ticket sales handled by members of the largest UK travel association in the previous four years. The Court noted that BA still had almost 40 per cent, a multiple of its nearest rivals (such as Virgin on 5.5 per cent) and still had a "very largely preponderant share" of the agents' business. Moreover, BA offered more routes and frequencies from the United Kingdom than its rivals, so it was an obligatory business partner for travel agents there. The Court also considered that the way that BA had reduced the flat rate commission to introduce its new combined flat rate and performance based system was indicative of market power.<sup>71</sup>

Fourthly, the Court upheld the Commission's position on discrimination.<sup>72</sup>

Fifthly, the Court repeated what has now become the classic explanation of the fidelity rebate rules.<sup>73</sup> Dominant companies have a special responsibility not to distort competition. A dominant company may defend its commercial interests, but not with behaviour whose purpose is to strengthen that dominant position.

A system of rebates whose effect is to prevent customers from obtaining supplies from market competitors is considered abusive for a dominant company. Quantity rebate schemes linked to efficiencies and economies of scale which result in lower tariffs to customers are lawful, but, where such positive effects are not proved, an unlawful "fidelity-building" effect may be inferred. Actual exclusionary effects do not have to be shown, if it is clear that the conduct concerned is capable of having, or likely to have, such an effect.<sup>74</sup>

Sixthly, on the facts the Court found that BA's system was "fidelity-building". The Court noted that the system gave greatly increasing rewards to travel agents for increased sales and disproportionate reductions in the rate of performance reward if an agent's sales of BA tickets fell. The Court agreed with the Commission that BA's rivals could not attain a "level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a reward scheme similar to BA's in order to counter the exclusionary effect of that scheme".<sup>75</sup>

To the extent that BA granted additional commission on all tickets sold, rather than on just the tickets sold once a sales target was reached, the Court also found that there was no objective economic justification for the scheme. As such, BA was found to have had "no interest" in applying the scheme other than ousting rival airlines.<sup>76</sup> The likelihood of exclusionary effects had also been shown, given that 85 per cent of all air tickets in the United Kingdom were sold through agents, which generally had to do business with BA. Nor was it necessary to show damage to consumers, if there was objective detriment to the structure of competition itself<sup>77</sup> (relying on *Continental Can*<sup>78</sup>).

Finally, the Court rejected BA's argument that it had a legitimate interest in the rebate scheme (other than ousting rivals). BA argued that the incentive scheme should be accepted: (i) because it was impossible to calculate the precise cost savings involved in particular ticket supply; and (ii) because, given the air transport industry's high fixed costs, improvements in capacity utilisation yielded lower average unit costs, which BA is entitled to share with agents and customers. The Court would not

68. [101].

69. Joined Cases 6 and 7–73, [1974] E.C.R. 223.

70. [127].

71. [217]–[219] and [224].

72. [234]–[240].

73. [241]–[249].

74. [293].

75. [278].

76. [288].

77. [311].

78. Case 6/72, [1973] E.C.R. 215.

accept this. It noted the lack of precise correlation between the amount of benefit from increased seat occupancy and the amount of performance bonus to the agent. It even considered that the amount of increased rewards payable to agents might *exceed* the profits to BA from the higher occupancy rate.<sup>79</sup>

Interestingly, this was not the same chamber of the CFI as in *Michelin II*. Within a few months therefore, the CFI has confirmed its orthodox position on fidelity rebates twice in clear terms. Given that modernisation of Art.82 EC was already in the air, it may be thought that the CFI wished to point out clearly that it does not wish these specific rules to change.

In practical terms, after *Michelin* and *BA/Virgin*, it is confirmed that dominant companies should generally avoid performance bonuses based on individualised growth, payable retrospectively on all sales achieved. However, one may think that standard scales of increased rewards, backed by reasonably precise, proven economic justifications and payment of rebate just on additional sales after a given scale step, should be lawful. That will not allow dominant companies to do everything their smaller competitors can (which will remain controversial), but it will allow companies to give some incentives for increased performance.

It may be thought somewhat harsh of the Court to have found no legitimate interest on the part of BA in the scheme. Part of BA's aim appears to have been to reduce a large "flat rate" commission approach and replace it with a more performance based system, which may well be laudable in competitive terms. Unfortunately, as so often happens in these cases, certain additional, arguably non-essential, features of a bonus scheme may affect its whole characterisation and mean that it is condemned rather than upheld. The key for the dominant undertaking is to see whether they actually need those extra features, given their market strength.

### IMS

In April 2004, the ECJ gave its judgment in a preliminary ruling concerning the *IMS Health/NDC Health* case.<sup>80</sup> We have noted the parallel European Commission and Court proceedings before.<sup>81</sup>

The case arose because IMS Health ("IMS") developed a way of gathering information on pharmaceutical sales and prescriptions in Germany, using a matrix for classification of the information, called a "brick" structure. This structure involves some 1860 "bricks" or units, on the basis of which IMS Health had been selling regional data to pharmaceutical companies. There was evidence (although also some dispute) about the extent to which the

customers for this information had helped IMS to develop the structure. IMS claimed copyright in it (a position confirmed in German courts).

A former employee of IMS started to offer competing services based on a different classification structure, but with little success because customers argued that the data had to follow the "1860" structure (or other structures based on it) to be comparable with earlier studies and because it was the accepted structure. In those circumstances, NDC (which had acquired the former employee's business) argued that the brick structure was a *de facto* legal standard and that IMS should be obliged to license it to NDC, or else it would eliminate all competition.

The Commission agreed with NDC in these exceptional circumstances and ordered interim measures. However, the CFI subsequently suspended such measures, pending the determination of the main proceedings, mainly for reasons related to the balance of convenience. Later the Commission then withdrew its order on the basis of lack of urgency.

In parallel, IMS had sued for breach of copyright and an injunction to stop NDC using its brick structure, by proceedings before the Frankfurt Landgericht.

Importantly, the referring court found that IMS had distributed its "brick structures" free of charge to pharmacies and doctors' surgeries, which had helped the structures to become the normal industry standard to which its clients adapted their information and distribution systems. The Court then made a reference to the ECJ, considering that, if there were an abuse of dominant position, IMS would have to license. There were essentially three questions:

- (1) Was it abusive to refuse a copyright licence where the licensee seeks access to the same market on which the owner of the copyright has a dominant position?
- (2) Is it relevant that the owner had involved customers in creating the databank protected by copyright?
- (3) Is it relevant to consider the "material outlay/costs" which clients would incur if they were to go over to a competitor, when considering the abusive conduct of the copyright owner.

The ECJ's answers were essentially "yes" to questions 2 and 3 and "it depends" to question 1.

The Court looked first at whether access to the brick structure was "indispensable" and in the process considered questions 2 and 3. Applying *Bronner*,<sup>82</sup> the Court held that, for a product or service to be indispensable, it had to be established at least that the creation of competing products or services was not economically viable *on a scale*

79. [289]–[290].

80. Case C-418/01, judgment of April 29, 2004.

81. See [2002] I.C.C.L.R. 64–65.

82. Case C-7/97, *Oscar Bronner v Mediaprint* [1998] E.C.R. I-7791.

comparable to that of the undertaking which controlled the existing product or service. If it were proven that the pharmaceutical companies had participated in developing the 1860 brick structure, that may have created a user dependency on that structure at a technical level. If so, that would be relevant. Equally, in such circumstances, it would be likely that customers would have to make exceptional “organisational and financial” efforts in order to acquire regional sales studies based on another structure. That might force the rival supplier to offer the rival products on such terms that it would not be economically viable on a scale comparable to IMS. That might make the brick structure indispensable to market access, a question which the national court had to assess on the facts.

Turning then to *question 1*, the Court was faced with argument as to whether the *Magill* criteria for compulsory licensing were met. The Court summarised that case and stated that for *Magill* to apply it had to be shown that: (i) the refusal to license was preventing the emergence of a new product for which there was potential consumer demand; (ii) such refusal was unjustified; and (iii) the refusal would exclude any competition on a secondary market.

The Commission argued that it was not necessary for the refusal to be on a separate market to that in which competition was denied. It simply had to relate to a “stage of upstream production”.

The Court’s view appears to be that there must be two markets, but then suggested ways in which it may be easy to infer the upstream market. Notably, the fact that an upstream product or service (such as the delivery service in *Bronner*) is not marketed separately, does not mean that a separate upstream market does not exist, if such a potential or hypothetical market can be identified.

However, then the Court focussed on whether the refusal to license prevented the emergence of a new product. The Court noted: “in the balancing of the interest in protection of copyright and the economic freedom of its owner, against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the *secondary market* to the detriment of consumers”<sup>83</sup> (emphasis added).

Moreover, a refusal to allow access to a product protected by copyright, where that product is indispensable for operating on a secondary market was only abusive: “where the undertaking which requested the licence *does not intend to limit itself to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services*”<sup>84</sup> (emphasis added). Whether there were, in fact, two markets here, or whether NDC would

produce new products was left to the national court to determine.

In practice, the Court therefore summarised that a refusal to licence would be abusive if:

- (1) NDC intended to offer new regional sales data products or services, not offered by IMS and for which there is potential consumer demand;
- (2) IMS’ refusal is not objectively justified; and
- (3) IMS’ refusal reserved to IMS the data services market in question by eliminating all competition therein.

It will be interesting to know what the national court finds. The criteria are demanding and one may wonder how “new” a product NDC is really contemplating or the Court will require.

This remains therefore a hugely controversial and difficult area, where it is only in exceptional cases that compulsory licensing will be ordered. The judgment may also put in doubt the reasoning in some earlier Commission decisions. In other words, it is clear that *Magill* was about a new product: a comprehensive TV listings guide. It is less clear that the port cases were about new products, unless one treats new frequencies or types of transport as new products or services.

In any event, IP holders may be somewhat pleased with the general respect for their rights, albeit that the Court is still saying that it is possible to override such rights in exceptional cases.

## What is an agreement?

In the course of the year there have been two judgments on what constitutes an agreement, following on from *Volkswagen I* last October.<sup>85</sup> First, in December 2003, the CFI annulled the Commission’s decision finding that Volkswagen’s calls to its dealers to raise the prices of VW Passat sales were unlawful.<sup>86</sup> Then, in January 2004, the ECJ upheld the CFI’s ruling in *Bayer Adalat* that the Commission had not proved the existence of an agreement between Bayer and its Spanish and French wholesalers to prevent parallel imports into the United Kingdom.<sup>87</sup>

### *Volkswagen II*

The case was an appeal against the Commission’s decision in 2001 to fine Volkswagen almost €31 million for “setting the price of the VW Passat on the basis of exhortations to its German authorised dealers to grant limited discounts or no discounts at all

83. [48].

84. [49].

85. Case C-338/00, judgment of September 18, 2003.

86. Case T-208/01, judgment of December 3, 2003.

87. Joined Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure and Commission v Bayer*, judgment of January 6, 2004.

to customers in selling the VW Passat”<sup>88</sup> (emphasis added).

The issue was whether the Commission could find that there was an unlawful agreement between Volkswagen and its dealers, merely because they had entered into distributorship agreements which were then followed up by calls not to discount. The Commission argued that, by entering into the underlying distribution agreement, the dealers had already agreed to follow the manufacturer’s policy and had therefore agreed to follow such “exhortations” to raise prices. Volkswagen argued that for an agreement to be caught by Art.81(1) EC it is necessary to show a “concurrence of wills”. One could not infer from entering into a lawful distributorship agreement that a dealer had agreed to accept later, unlawful contractual variations. In order to prove an infringement here, the Commission had also to show that dealers had “acquiesced” in or accepted the exhortations in issue and, at least, had also changed their conduct in relation to prices. In short, Volkswagen argued that its actions were unilateral and that the Commission had not shown that the dealers acquiesced in Volkswagen’s exhortations not to discount.

The CFI agreed with Volkswagen and was critical of the Commission’s approach. There had been other (Court) cases where dealers were found to have accepted apparently unilateral conduct by a manufacturer in the context of continuing relations with dealers. However, the Court stressed that in such cases the Commission has to establish the acquiescence of other contractual partners, express or implied, in the attitude adopted by the manufacturer. In previous cases it had done so. On the facts here, the Commission had not shown that the exhortations in issue were implemented in practice.<sup>89</sup> Moreover, the Court stressed that it could not be said that an unlawful contractual variation could be accepted as having been accepted in advance upon and by the signature of a lawful distribution agreement.<sup>90</sup>

The Court also rejected the Commission’s interpretation of earlier case law, noting that the cases concerned turned on distributors accepting conduct which was necessarily unlawful, not acquiescence in advance to an, as yet, unknown policy of the manufacturer. Other cases had therefore involved a proven concurrence of wills.

### ***Bayer Adalat***

In January 2004 the ECJ confirmed the CFI’s judgment overturning the Commission’s *Bayer Adalat* decision.<sup>91</sup> The Commission and certain pharma-

ceutical importer associations had appealed. There are three points of particular interest.

First, the way the parties addressed the underlying policy debate. Notably, the Commission argued that the CFI’s restrictive interpretation of what constituted an agreement and its stricter requirement as to proof thereof called “into question the policy pursued by the Commission in fighting restrictions of competition based on hindrances to parallel imports”.<sup>92</sup> Bayer, on the other hand, argued that the Commission was seeking to establish “hindrance to parallel imports” as “being in itself” an infringement of (what is now) Art.81(1) EC<sup>93</sup> and to catch unilateral measures which could only be challenged if carried out by a dominant company.

Secondly, the focus of the Court on the specific issue as to whether an agreement to restrict competition had been entered into in the circumstances. Importantly, the ECJ noted that in this case there was “a simple refusal to sell and not a sale allegedly subject to certain conditions imposed on distributors”.<sup>94</sup>

The Court then went on to distinguish any wider Commission objective. The fact that Bayer’s unilateral policy of quotas and the national requirement that wholesalers offer a full product range produced the same effect as an export ban, did not mean that Bayer had imposed such a ban, nor that Bayer and the wholesalers had entered into an agreement not to export.<sup>95</sup> Agreeing with Bayer, the Court observed:

“[t]o hold that an agreement prohibited by [what was then] Article 85(1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article 86 of the EC Treaty”.<sup>96</sup>

Then, in terms entirely in line with the CFI in *Volkswagen*, the ECJ went on:

“The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the objective or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists”.<sup>97</sup>

Thirdly, the ECJ distinguished *Sandoz*,<sup>98</sup> which appears to have been a key part of the Commission’s approach here. The Court noted that, in *Sandoz*, an agreement was found when Sandoz placed the

88. Case T-208/01, judgment of December 3, 2003.

89. See [32]–[38].

90. [43]–[45].

91. Joined cases C-2/01P and C-3/01P, judgment of January 6, 2004.

92. [65].

93. [69].

94. [86].

95. [88].

96. [101].

97. [141].

98. Case C-277/87, *Sandoz Prodotti Farmaceutici v Commission*, [1990] ECR I-45.

words “export prohibited” on invoices (*i.e.* demanded a particular line of conduct from dealers) and dealers still paid the relevant invoices and kept ordering. In other words, the manufacturer had imposed an export ban which had been tacitly accepted by the wholesalers.<sup>99</sup> Here the Court emphasised that Bayer had not imposed an export ban on its wholesalers and the wholesalers had not manifested an intent not to export. On the contrary, wholesalers had taken measures to circumvent Bayer’s unilateral system in order to keep exporting.<sup>1</sup>

The theme of these judgments for competition authorities and plaintiffs is clear: Prove the specific agreement not to export by dealers and distributors, not just the manufacturer’s desire to achieve that objective.

### *Syfait*—A.G. Opinion<sup>2</sup>

In October 2004, A.G. Jacobs delivered his Opinion in an Art.234 EC reference case from the Greek Competition Commission, where that Commission asked the ECJ to clarify whether and in what circumstances a dominant pharmaceutical company may refuse to meet orders from wholesalers in order to limit parallel trade.<sup>3</sup>

The Greek Commission launched an investigation in November 2000, after various Greek associations of pharmaceutical wholesalers, including Syfait, complained that Glaxosmithkline (“GSK”, formerly Glaxowellcome) had stopped meeting all of the wholesalers’ orders for certain products. GSK claimed that wholesalers, by exporting a large proportion of their orders to other EU Member States where prices were much higher, had caused shortages on the Greek market. GSK initially stated that it would only supply hospitals and pharmacies, but subsequently reinstated supplies to wholesalers in limited quantities.

The Greek Commission considered that GSK enjoyed a dominant position at least in one of the products in question, “Lamictal” (an anti-epileptic drug). On that basis, in August 2001, it granted interim measures and ordered GSK’s Greek subsidiary to meet in full the orders from wholesalers, limited to the supplies it received from the parent company. However, supplies through GSK’s Greek subsidiary were sufficient to satisfy the demand on the Greek market, but not the wholesalers’ much larger orders for parallel trade. Following hearings, the Greek Commission decided in January 2003 to

suspend the case and refer various questions to the ECJ.

The Greek Commission considered that unrestricted parallel trade could seriously undermine the financial interests of pharmaceutical manufacturers, eroding their revenues and disrupting their organisational arrangements in Member States where products are exported. It also noted that parallel trade mainly benefited wholesalers rather than consumers and that, since Member States are the effective purchasers of most pharmaceutical products, through health schemes, they can lower national prices, if they want to pay less.

The Greek Commission asked the Court whether and on which conditions the protection of legitimate commercial interests can justify a restriction of supply by a dominant pharmaceutical company in order to limit parallel imports.

A.G. Jacobs noted that, based on the case law of the Court, a refusal to supply by a dominant undertaking is an abuse only in exceptional circumstances, after close scrutiny of the specific factual and economic context of each case shows serious harm to competition.

He considered that a refusal to supply in order to limit parallel trade does not amount *per se* to an abuse within the meaning of Art.82 EC, because a dominant company is not obliged to meet orders which are “out of the ordinary” and is justified in defending its commercial interests.

In particular, as concerns the “highly specific” context of the European pharmaceutical industry, he considered that a supply restriction in order to limit parallel trade can be objectively justified, as a reasonable and proportionate measure to protect the producers’ legitimate commercial interests.

A.G. Jacobs stressed that his conclusions were limited to the pharmaceutical market only and were based on the following three considerations:

- First, price differentials which create opportunities for parallel trade are the result of the regulated nature of the European pharmaceutical market. Companies are justified in attempting to limit parallel trade because they are not seeking to entrench price differentials of their own making, but to avoid the negative consequences which would follow if very low prices in some Member States were generalised across the Community. A requirement to meet all orders would, in many cases, impose a disproportionate burden, especially given the moral and legal obligations incumbent on companies to maintain supplies in all Member States.
- Secondly, a requirement to supply would harm the incentive for dominant companies to innovate and invest in R&D, given the low returns which they could expect during the period of its patent protection.

99. [142].

1. [104], [123] and [142].

2. With thanks to Flavia Distefano and Elisabeth Arsenidou for their assistance.

3. Case C-53/03, *Syfait v Glaxosmithkline*, opinion of October 28, 2004; Press Release No.87/04, October 28, 2004.



- Thirdly, such parallel trade mainly benefited wholesalers rather than purchasers.

A.G. Jacobs also considered whether the Greek Commission could be considered as a “judicial body” under Art.234 EC, despite the fact that only two out of its nine members are lawyers,<sup>4</sup> so that a reference to the ECJ was admissible.

He concluded that the Commission could be considered as a “judicial body”, because an authority charged with complex technical issues, such as competition law, is expected to have a lower proportion of members with pure legal background. He also noted that this is in line with Regulation 1/2003. A generous approach towards references by national competition authorities would provide an additional safeguard for the uniformity of Community law.

Clearly an important opinion! It will be interesting to see what the Court now rules.

#### Box 4

- Cartel cases
  - \* *Greek Ferries*:
    - Can the Commission ask for increased fines for appeals of the facts?
  - \* *Cement*
    - Company acquired after infringement not part of relevant turnover for fine.
  - \* *Graphite Electrodes*
    - Very detailed review by CFI of the way the Commission applied the fining guidelines
    - Fine increases may be made in some cases (2 per cent here) (Time for a new rule?)
    - What does a company have to give in response to a request for information? Even notes of cartel meetings?!
  - \* *Seamless steel tubes*
    - Voluntary restraint not legal protection, just politics
    - Fine increase discussed, but decrease in circumstances
  - \* *German banks*
    - Weak evidence
    - Beware the fax!
  - \* *Dutch electro-technical Fittings wholesalers*
    - Unilateral collective exclusive dealing agreement

## Cartel cases

### *Greek Ferries*

In December 2003, the CFI generally upheld the Commission’s decision in the *Greek Ferries* cartel

4. The Court has already dealt in the past with references from national competition authorities, e.g. it admitted a reference by the Spanish Tribunal for the Defence of Competition in Case C-67/91, *Asociación Española de Banca Privada and Others* [1992] E.C.R. I-4785.

cases, while reducing the fines on two companies.<sup>5</sup>

It may be recalled that these cases involved alleged price-fixing and market-sharing between Italy and Greece. The markets concerned were small and there was argument about whether governmental involvement in the sector should be treated as sufficient to suggest that the companies had been instructed or otherwise pressured to enter into such agreements. The Commission rejected such defence claims, but reduced fines in part because it accepted that there may have been some uncertainty on the issue. As a result of these factors, the Commission treated a “very serious” infringement as a “serious” one and tailored the fines to the small market size.

The companies concerned still appealed. Several points are of interest.

First, the CFI found that one company, *Ventouris*, had been fined too much because the Commission had treated the infringement as a single continuous one whereas, in fact, the infringement should have been divided into two, one related to passenger services and another related to cargo services. Since *Ventouris* had only been involved in the cargo infringement, which only concerned a smaller market on specific routes and which was about one quarter of the passenger services market, its fine was reduced from €1.01 million to €252,000.<sup>6</sup> The fine on another company, *Adriatica di Navigazione*, was similarly reduced from €980,000 to €245,000.

Secondly, the companies contested the lawfulness of the Commission’s investigation, insofar as the Commission had carried out a “dawn raid” on premises believed to belong to Minoan Lines, but which were in fact those of Minoan’s agent, a company called the European Trust Agency (“ETA”). After a detailed review, the Court found that the Commission could validly investigate such third party premises since the Commission was entitled to treat them as the premises of Minoan. On the facts, the Court noted that ETA had been given the power to represent Minoan in the investigation and the premises were the real centre of Minoan’s activities. The Court also found that ETA was operating as a single economic unit with Minoan.

Thirdly, insofar as on appeal some companies contested findings of fact related to the infringement, the Commission asked the CFI to remove the 20 per cent reduction of fines which had been granted in the Commission’s proceedings for not contesting the facts and to increase the fines accordingly. The Court rejected this. The Court’s view, echoing that taken in the *Stora* case, was that the companies could not be prevented from

5. Cases T-56, T-59, T-61, T-65 and T-66/99, judgments of December 11, 2003.

6. Case T-59/99, *Ventouris v Commission* at [214]–[222].

exercising their appeal remedies normally under the Treaty. In particular, a company could not be criticised for disagreeing with the manner in which the Commission obtained documents and could also contest the manner in which the Commission appraised those documents as evidence of a cartel.<sup>7</sup> (This issue has come up also in *Graphite Electrodes*, described below.)

Finally, on the substance, the CFI predictably upheld the Commission's approach on governmental action. It is a difficult defence plea to make out, since the Court insists on clear evidence that conduct was *required* by governmental action.

### **Wholesalers of electro-technical fittings**

In December 2004, the CFI dismissed two applications for annulment of the Commission's decision in the *Dutch electro-technical wholesalers fittings cartel* case.<sup>8</sup>

It may be recalled that CEF Holdings Ltd, a UK wholesale distributor for electro-technical fittings, faced difficulties entering the Dutch market and lodged a complaint with the Commission. After a somewhat protracted investigation, in October 1999 the Commission found that FEG, a Dutch association of wholesalers of electro-technical fittings, had infringed Art.81(1) EC by entering into a collective exclusive dealing arrangement intended to prevent supplies to non-members of the FEG. This arrangement had included an agreement with NAVEG, a Dutch association of "Exclusive (supplier) Representatives" in the electro-technical sector and concerted practices with suppliers not represented in NAVEG. Moreover, the Commission found that FEG had restricted the freedom of its members to determine selling prices individually. One company, Technische Unie ("TU") which was one of FEG's members, was also accused of taking active part in these infringements. The Commission imposed a fine of €4.4 million on FEG and €2.15 million on TU.

In January 2000, both TU and FEG appealed. The CFI upheld the Commission's finding that FEG had entered into a collective exclusive dealing arrangement aimed at preventing supplies to non-members of the FEG.

The infringement comprised (i) a gentlemen's agreement between FEG and NAVEG by which NAVEG undertook that it would advise its members not to sell electro-technical fittings to wholesalers not belonging to the FEG; and (ii) concerted practices whereby the FEG and its members sought to extend that agreement to certain suppliers not belonging to NAVEG. The exclusive dealing arrangement, however, was not reciprocal, meaning that FEG members were, in principle, free to purchase products from firms which were not party to the agreement.

On appeal, FEG argued that the "unilateral" collective exclusive dealing arrangement was "devoid of purpose" and that NAVEG members had no interest in concluding such an arrangement. However, the Court rejected this argument, pointing out that FEG had 96 per cent of the Dutch wholesale market for electro-technical fittings and still some 50 per cent if a broader market definition were taken, including direct distribution from suppliers to retailers. In short, FEG had purchasing power which could not be disregarded by NAVEG members.

As regards the concerted practices aimed at extending the exclusive dealing arrangement to undertakings not belonging to NAVEG, FEG denied that they could be attributed to it as an association, arguing that they should be attributed to its members. The Court rejected this as well, noting that the respective actions concerned the same object, shared the same beneficiaries and were implemented by the members and certain executives of the FEG. As a result, they should be deemed attributable to that association.

Finally, the applicants argued that the administrative procedure had been excessive in duration. Eight and a half years had passed from the complaint until the Commission eventually adopted its decision in 1999. It was argued that this was not a reasonable period for proceedings which are likely to lead to penalties.

However, the CFI rejected this also. Quoting A.G. Mischo in the *PVC II* case,<sup>9</sup> the CFI considered that it was necessary in considering the reasonableness of such an extended procedure to make a distinction between the investigative phase prior to the Statement of Objections and the rest of the administrative procedure.

In this context, the Court drew an analogy between criminal and competition law observing that, in criminal matters, the reasonableness of the time for a procedure referred to in Art.6(1) of the European Human Rights Convention ran from the time when a person is charged. Similarly, the CFI considered that the fact that a procedure was long up to the Statement of Objections, was not in itself capable of affecting the rights of defence.

Here the administrative procedure after the Statement of Objections had taken more than 39 months. The reasonableness of this had to be assessed by reference to the specific circumstances of the case. In this case, the Court concluded that the 16 months that had elapsed between the Statement of Objections and the Hearing of the parties were not excessive. However, the 23 months between the Hearing and the final decision exceeded the period which, in the normal course of events, would be needed for adoption of the decision. Since the

7. Case T-65/99, *Strintzis Lines v Commission*, at [27]–[30].

8. Joined Cases T-5/00 and T-6/00, judgment of the Court of December 16, 2003.

9. Opinion in Case C-250/99, *P Limburgse Vinyl Maatschappij*.

Commission had already reduced the fines in the case by €100,000 on both FEG and TV to deal with this, the appeal was rejected.

The CFI considered that the uncertainty and adverse effects on reputation involved in such proceedings were just inherent in Regulation 17 procedures.

With respect, this is a somewhat harsh and narrow approach. Practically, one can understand that procedures with new issues and multiple defendants can take time, but five years between complaint and Statement of Objections is not adequate, either for the Commission (with staff mobility every five years) or the parties. One may also question whether this issue is just about the rights of the defence. Should not this be a question of good administration, a principle which might sensibly be used to promote quicker procedures?

### Cement

In January 2004, the ECJ gave judgment on the appeals brought by six companies from the CFI judgments in the cement cartel case.<sup>10</sup>

In November 1994, the Commission had imposed fines, totalling €248 million on companies and a trade association which had been involved in various anti-competitive practices on the grey and white cement markets. The Commission's long and detailed decision found, amongst other practices: agreements on non-transshipment between EU countries, specific agreements on market-sharing, and collective action to prevent exports of Greek cement to Italy, the United Kingdom and other countries.

In 2000, the CFI reduced the amount of the fines imposed by €140 million.<sup>11</sup> The Court found that (i) the Commission had not adequately proved participation by some companies in the cartel; (ii) some of these had participated for shorter periods of time than claimed by the Commission; and (iii) two of the companies had been deprived of evidence which might have aided their defence. In consequence their fines were annulled. In addition, the CFI found that the Statement of Objections had not indicated an intention to fine the trade association, so its fine was annulled.

The ECJ largely upheld the CFI's judgment.

First, in the case of *Ciments français*, the ECJ found that turnover of a Belgian subsidiary had been incorrectly included in calculating the applicable fine. This subsidiary had not come under the control of *Ciments français* until October 1990, *i.e.* after the infringement ended. The fine on *Ciments français* was reduced by just under €4 million to €9.6 million accordingly.<sup>12</sup>

Secondly, the ECJ confirmed the correctness of the CFI's approach on a number of procedural issues. Notably:

- The CFI had been correct not to annul the decision despite the Commission's acknowledgment that it had denied access to three quarters of the documents in its file.
- Before any such annulment it had to be shown that the lack of sufficient access to the file prevented access to documents which were likely to be of use in the companies' defence.<sup>13</sup>
- By ordering measures of organisation, allowing the parties to review the file to see if there were material documents, which they could have used in their defence, the CFI had also not attempted to replace the Commission in its investigative role. It had merely carried out a provisional examination of the evidence to assess whether there had been an infringement of the rights of the defence.<sup>14</sup>
- Furthermore, to justify a finding of a material error, the CFI had been correct to hold that it was necessary to determine an "objective link" between the documents withheld by the Commission and an objection contained in the decision.<sup>15</sup>
- The CFI was also correct in its view that the test for when lack of access to a document might justify annulment of the decision was whether, following disclosure, there would have been even a small chance of the outcome of the administrative procedure being altered.<sup>16</sup>

One senses that the ECJ, like the CFI, was not supportive of technical procedural challenges to this enormous decision in an enormous case.

Thirdly, the ECJ also found that an interested party is not entitled to be informed by the Commission if the latter drops certain objections (here in relation to certain conduct on the Italian market).<sup>17</sup> It is only necessary to inform a would-be addressee of such a decision if there would be a material alteration in the evidence relied on in a decision, or if new facts would be taken into account.<sup>18</sup>

Fourthly, the CFI was correct to reject Irish Cement's argument that it had a right to cross examine the authors of certain documents. The procedure before the Commission is purely administrative and there is no requirement that cross examination be permitted.<sup>19</sup>

10. Joined Cases C–204/00 and others, *Aalborg Portland*, judgment of January 7, 2004. With thanks to Cormac O'Daly for his assistance.

11. Joined Cases T–25/95, etc. *Cimentières CBR v Commission* [2000] E.C.R. II-491. See [2001] I.C.C.L.R. 13–15.

12. [381] to [385].

13. [101].

14. [102] to [106].

15. [126] to [129].

16. [131].

17. [188] to [196].

18. [192].

19. [200].

### Graphite Electrodes

In April 2004, the CFI issued its judgment in various appeals against the Commission's *Graphite Electrodes* decision.<sup>20</sup> It may be recalled that this decision involved a worldwide price-fixing and market-sharing cartel for electric arc furnaces, which are mainly used to make steel.<sup>21</sup> Fines totalling some €220 million were imposed. Eight European, American and Japanese firms were involved. There were parallel proceedings in the United States and Canada.

There were seven appeals, leading to significant reductions of fines, essentially on the basis that the Commission has misapplied its own fining guidelines. In one case, the CFI also *increased* a fine, in the sense that it modified the reduction in fine which the Commission had given the company. Overall, the fines on the seven companies concerned were reduced from €207.2 million to €152.8 million.

The case is interesting for a number of points.

First, although the Court stated that the Commission has a large measure of discretion in fining, it stressed that the Commission must apply its own fining guidelines strictly. In particular, there should be respect for the principles of proportionality and equal treatment as between the cartel offenders. Interestingly, in this case the Court was also willing to look closely at the evidence which the Commission relied on for each element of the guidelines, in order to see if there were "manifest errors" in their application.

The result is that the CFI checked the Commission's positions in detail and, in several ways, disagreed with the Commission's findings, leading to significant reductions in almost all of the fines imposed. Thus, the largest fine was reduced from €80.2 million to €69.1 million and others were simply halved.<sup>22</sup> Amongst other things, the Court reviewed (and corrected) whether firms had been placed in the right "size categories" for the starting amount of fines; the amount of multiplier applied to a firm for deterrence; and the importance of the cooperation of companies to the Commission's case.

Secondly, the Court rejected the argument that fines and damages paid for the infringement outside the EEA should be taken into account in assessing EU fines. The Court held that such sanctions penalised infringements with impacts on different markets. However, the Court confirmed that fines or damages paid for infringements inside the EU are to be taken into account, since they apply to the same territory.<sup>23</sup> The Court also found that it was not unlawful for the Commission to consider

worldwide turnover derived from sales of the relevant product in order to evaluate the economic capacity of the cartel members to harm competition in the EEA.<sup>24</sup>

Thirdly, the Court found that a company which cooperates through oral communications should be given credit for that cooperation under the leniency programme.<sup>25</sup> On the facts, UCAR had given information orally, which was later confirmed in written statements, but the Commission had not given UCAR credit for the oral information. The CFI said that was wrong because the information had been useful to the Commission's investigation.

Fourthly, the Court again had to deal with requests by the Commission to increase fines imposed where firms had challenged the findings of fact in the case on appeal, while receiving a reduction in the fine imposed for not contesting the facts.<sup>26</sup> The Commission asked for increases of at least 10 per cent.

The Court's approach here was more nuanced than in *Greek Ferries*. The Court stated:

- If a firm has expressly, clearly and specifically acknowledged the facts, it is estopped, in principle, from disputing them on appeal.<sup>27</sup>
- If a firm does not expressly acknowledge facts, the Commission must prove them and a company can put forward any plea in defence which it deems appropriate.
- If the Commission's case is not clear and the firm concerned considers that the facts have been misinterpreted, it can raise such an issue on appeal. That was the case here since the Commission had relied on general conduct and no-contest statements, rather than specifics.
- However, if a company does so, it may lose the 10 per cent reduction for co-operation or part of it, where the company has obliged the Commission to put forward further evidence, or to draft a defence on such an issue.
- A company is also entitled to put "a fresh legal complexion" on documentary evidence previously submitted in the procedure.<sup>28</sup>

On the facts, this led to an increase of one fine by 2 per cent<sup>29</sup> (*i.e.* a reduction for non-contestation of the facts from 10 per cent to 8 per cent).

This has become undesirably complex. Perhaps it is inevitable because the fines are so high and their level turns on precise facts. However, one would think that a solution would be to give companies a "draft preliminary findings of fact"

20. Cases T-236/01 and others, *Tokai Carbon v Commission*, judgment of April 29, 2004.

21. [2002] I.C.C.L.R. 24.

22. [458].

23. [132]–[134], [138], [148] and [348].

24. [200].

25. [430]–[433].

26. [98] and [272].

27. [108]–[109].

28. [288].

29. [112]–[113]; [286]–[288] and [418].

document, before the formal Statement of Objections, so that they can check it and co-operate with the Commission in making sure that it has the facts right. At the moment, companies are faced with the Statement of Objections and know that if they “contest” it that may be perceived as a ground for denying them a 10 per cent reduction in fines. As a result, companies may not clarify particular points, which can lead to disputes later, when the companies realise that fines are much higher as a result.

Fifthly, the Court upheld appeals that companies should be given credit for providing answers to Commission requests for information, which went further than legally permitted. In other words, the CFI found that the Commission had asked companies not only purely factual questions and for existing documents, but also to describe what happened at meetings and for the results/conclusions and for protocols and other material disclosing the contents of meetings which the Commission suspected involved infringements.

Applying *Orkem* and *Mannesmannröhren-Werke*,<sup>30</sup> the Court held that such material did not have to be provided, since it involved admissions of the infringements concerned. By providing that information, the companies were therefore not acting pursuant to a legal obligation and were entitled to credit for their voluntary waiver of their defence rights.<sup>31</sup> The result is that the Commission had to give companies “co-operation credit” for answering requests for information which go beyond what the Commission was legally entitled to ask for. The Court also held that a company is not required to tell the Commission facts which will be used to increase its fine (*i.e.* here that it had warned another company of an investigation<sup>32</sup>). The Commission is appealing these points.

Finally, the Court confirmed that the Commission is not obliged to give a reduction for the financial difficulties facing the cartel participants (although it may choose to do so in its discretion, where appropriate). It is argued that many cartels arise because a sector is in difficulty and therefore such an obligation would require the Commission to give such a reduction in most cases.

### **Seamless Steel Tubes**

In July 2004, the CFI gave judgment on appeals to the *Seamless Steel Tubes* decision.<sup>33</sup>

The Commission had found a market-sharing agreement between European and Japanese producers of seamless carbon-steel pipes and tubes,

so-called “Oil Country Tubular Goods” (“OCTG”) and “Line Pipes” used to transport oil and gas. This was called the “Europe-Japan Club”. The Commission had fined the eight companies, with amounts totalling €99 million. Seven of the eight brought annulment actions which the CFI largely rejected. However, the fines were reduced by €13 million on two grounds.

First, it may be recalled that the Commission had taken into account the existence of voluntary export restraints and similar measures concluded between the Commission and Japan between 1972 and 1990 to conclude that fines should only be imposed from *the beginning* of 1990 onwards.<sup>34</sup> The parties claimed that the voluntary restraints continued until *the end* of 1990. Since the Commission was for some reason unable to produce evidence to the contrary from its archives, the CFI upheld the position of the companies.

In addition, in the case of the Japanese companies, the Commission was found not to have adequately proved that the infringement lasted beyond July 1, 1994, although it had claimed that the infringement ceased at the beginning of 1995. As a result, the period in respect of which the fine was calculated for the Japanese companies was reduced from five to three and a half years and the relevant period for the European companies was reduced by one year.

It should be noted also that the Commission did not treat the voluntary restraints as obliging it to reduce the fines concerned, particularly because the old 1972 Commission Notice on Imports from Japan stated that no comfort could be drawn from voluntary restraint agreements as regards the application of competition law. Rather, the reductions were viewed as political concessions.<sup>35</sup>

Secondly, the CFI reduced the Japanese companies’ fines for breach of the principle of equal treatment. The European companies had committed an additional, separate infringement of Art.81 EC, but the Commission had not taken account of this in determining the amount of their fines.<sup>36</sup> In this respect, different situations had been treated identically. The CFI stated that the logical way to remedy this would have been to increase the fines payable by the European companies.<sup>37</sup> However, the Commission had not argued this point in its defence and had only raised it at the hearing.<sup>38</sup> Given that the European companies had therefore been unable to give their views on a possible increase in their fines, the CFI decided that it would

30. Case 374/87, *Orkem v Commission* [1989] E.C.R. 3283; Case T-112/98, *Mannesmannröhren-Werke v Commission* [2001] E.C.R. II-729.

31. [401]–[409] and [412].

32. [412].

33. Cases T-44/00, T-48/00, T-50/00 and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, judgment of July 8, 2004. With thanks to Cormac O’Daly for his assistance.

34. [2004] I.C.C.L.R. 61.

35. See the Joined Cases judgment at [340]–[528] and [582]–[587].

36. [567] to [571].

37. [576].

38. [578].

be more appropriate to reduce the fines imposed on the Japanese companies.<sup>39</sup>

### **German Banks–Eurozone**

In October 2004, the CFI annulled the Commission's decision concerning the alleged involvement of German banks in an agreement to fix the way of charging and the actual charge for converting currency into Euros in the transitional period before the Euro was introduced.<sup>40</sup>

The Commission had found such an agreement on the basis of two accounts of a meeting in 1997 between German banks, corroborated in its view by statements made at the Oral Hearing in the case and the banks' actual behaviour.

The Commission considered that there was (at least some) consensus that a percentage commission be used for such exchange and on a target commission of about 3 per cent (to achieve 90 per cent recovery of the income which banks made previously on currency exchange through currency buying and selling rate differentials).

The banks put forward alternative arguments. Notably, that there had been no actual agreement. In fact, the agreed communication to the German Bundesbank after the relevant meeting had stated that each bank would decide for itself the form to be taken by its future charging structure.

On the facts, the Court found for the applicant. All this occurred by way of a ruling on judgment in default since, owing to a faxing error, the Commission had not submitted its Defence in time. What the Court did therefore was to assess the applicant's arguments against those in the Commission's decision, but without the Defence. In such circumstances the Court did not consider the Commission's decision to be founded on sufficiently cogent evidence on the way charges were to be made or their amount.<sup>41</sup>

### **Other**

In January 2004, the CFI reduced the fine imposed by the Commission on *JCB* from €39.6 million to €30 million.<sup>42</sup> It will be recalled that *JCB* produces construction site, earth moving and agricultural machinery/equipment.<sup>43</sup> The Court upheld two out of the five elements of the infringement which the Commission had found. Thus, the Court upheld Commission findings of restrictions on passive sales by *JCB*'s distributors and restrictions on sources of supply on some dealers. However, the Court con-

sidered that there was not adequate evidence of other findings: that *JCB* fixed discounts or resale prices of its distributors in the United Kingdom and France; that *JCB* imposed service support fees on its UK distributors selling to other Member States, or that *JCB* withdrew trading support from agents in the United Kingdom in the case of sales outside the territory.

In April 2004, the ECJ dismissed *British Sugar's* appeal against the CFI's judgment upholding the Commission's *British industrial and retail sugar* decision.<sup>44</sup> The Court upheld the CFI's assessment of effect on trade between Member States and rejected other challenges to the CFI's review of the fines imposed.<sup>45</sup>

In September 2004, the CFI also ruled that the International Olympic Committee's anti-doping regulations were not subject to EC Competition law, being purely sporting rules which do not pursue any economic objective.<sup>46</sup>

In Pt 2, to be published in Issue 3, the author will outline:

- Recent Commission cartel, co-operation and distribution cases, in areas such as national recycling schemes, airline alliances, financial services, and the distribution of Pokémon stickers.
- Various new proposed "commitment decisions" for the German *Bundesliga*, *Coca-Cola's* rebate system and *Repsol's* service stations in Spain.
- The Commission's Art.82 EC decision in *Microsoft*.
- Policy issues, such as a possible extension of in-house privilege.
- The Commission's recent drive to promote competition in the liberal profession with a decision involving *Belgian Architects*.

39. [579].

40. Case T-56/02 *Bayerische Hypo- und Vereinsbank v Commission*, judgment of October 14, 2004. The other cases are T-44/02, T-54/02, T-60/02 and T-61/02.

41. For related previous proceedings see [2004] I.C.C.L.R. 59 and [2003] I.C.C.L.R. 62.

42. Case T-67/01, judgment of January 13, 2004.

43. See [2002] I.C.C.L.R. 63.

44. See [1999] I.C.C.L.R. 11.

45. Case C-359/01P, judgment of April 29, 2004.

46. *Meca-Medina and Majcen v Commission*; Press Release No.71/2004, judgment of September 30, 2004.