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## Major Events and Policy Issues in EC Competition Law, 2002-03 (Part 2)

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# Major Events and Policy Issues in EC Competition Law, 2002-03 (Part 2)

John Ratliff

## **Abstract**

This article is the second and final part of the overview of major events and policy issues in EC competition law in 2003, following on from last month's journal ([2004] I.C.C.L.R. 19). This part of the article is divided into three sections: (1) European Commission decisions on cartels, joint ventures/horizontal co-operation, distribution and Articles 82/86 EC. (2) An outline of current policy issues, including competition and the liberal professions, review of the liner conference block exemption, and the modernisation of Article 82 EC enforcement. (3) A survey of areas of specific interest, focusing mainly on recent Commission activity as regards competition and gas supply, with brief notes on the Commission's leased lines sectoral enquiry and what the Commission has been doing in sport and media.

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- (1) European Commission decisions on cartels, joint ventures/horizontal co-operation, distribution and Articles 82/86 EC.
- (2) An outline of current policy issues, including competition and the liberal professions, review of the liner conference block exemption, and the modernisation of Article 82 EC enforcement.
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### Overview of major events (continued)

#### European Commission decisions

##### Cartels

Cartel enforcement has continued apace. The Commission emphasised in 2002 the creation of a second cartel unit, but this has been disbanded as the Commission generally reorganised on sectoral lines in anticipation of the next 10-State "Enlargement" in May 2004.<sup>1</sup> Again, there have been many new decisions (see Table 5 overleaf).

We have not yet seen a revised Notice on fining guidelines, although Mr Rocca has been talking about fining and, above all, about *deterrence*.<sup>2</sup> The key idea appears to be that large firms should be

1. IP/03/603, April 30, 2003. The contact procedure for leniency applications on the Commission's website remains.  
2. Arbault, *EC Commission Competition Policy Newsletter*, no.2 (Summer 2003), pp.1–7.

fined more, because they should know better and can afford to police themselves better, and the Commission wants to hit hard and one time only to deter, rather than pursue multiple proceedings against large companies. Equally, that in small markets, small firms should be fined less. Both themes are reflected in the Commission's decisions published this year.

There has also been talk about electronic searches for information.<sup>3</sup> In this context, it may be interesting to note that the Dutch Competition Authority, the NMA, has now published guidelines on such searches.

There is also more international co-operation in dawn raids now. Thus, in February 2003, the Commission announced that there had been co-ordinated inspections on companies producing plastic additives related to the production of PVC, heat stabilisers, impact modifiers and processing aids *on three continents*, involving EU, US, Canadian and Japanese competition authorities.<sup>4</sup>

Finally, there have also been new issues about the confidentiality of corporate leniency disclosures, as plaintiff groups have applied for them, and other evidence, in the *Austrian Banks Case* under the EC's new transparency regulations.<sup>5</sup>

##### *Methylglucamines*

On November 27, 2002, the Commission fined Aventis Pharma and Rhône-Poulenc Biochemie (both in the Aventis Group) €2.85 million for participating in a price-fixing and market-sharing cartel with Merck KgaA from 1990 until 1999.<sup>6</sup> Methylglucamine is a chemical used for the synthesis of x-ray media, pharmaceuticals and colourings. Merck was granted full immunity because it revealed the cartel to the Commission and provided decisive evidence on the cartel's operation. Aventis and Rhône-Poulenc were granted a 40 per cent reduction for co-operation in the investigation. The market concerned is very small in size (€3.1 million in 1999).

##### *Plasterboard*

On November 27, 2002, the Commission fined plasterboard producers Lafarge, BPB, Gebrüder Knauf Westdeutsche Gipswerke and Gyproc Benelux a total of €478 million for a cartel covering the four main markets in the European Union (Benelux, Germany, France and the United Kingdom).<sup>7</sup> This was the second highest fine ever imposed for an infringement, after the *Vitamins*

3. 2002 EC Commission Competition Report, paras 683–684.

4. MEMO/03/33, February 13, 2003.

5. Notice of action brought in Case T-2/03, *VKI v Commission* [2003] O.J. C-55/37.

6. IP/02/1746, November 27, 2002.

7. IP/02/1744, November 27, 2002.

Table 5: Cartels

— Overview:	Total fines (€ million)	Highest individual fines (€ million)
<i>Methylglucamines</i>	€2.85	Aventis was fined €2.85
<i>Plasterboard</i>	€478.00	Lafarge was fined €249.6
<i>Food flavour enhancers</i>	€20.56	Ajinomoto was fined €15.5
<i>Specialty graphites</i>	€60.60	SGL was fined €27.75
<i>Concrete-reinforcing bars</i>	€85.00	Ria Acciaio was fined €26.9
<i>French beef</i>	€16.70	FNSEA was fined €12
<i>Sorbates</i>	€134.40	Hoechst was fined €99
— Themes:		
• deterrence ... and “multi-product” companies;		
• big and small fines;		
• transparency disclosures?		
• cross-border retaliation as effect on trade/“group effect” ( <i>Dutch Gases/Belgian Beer</i> );		
• State action reducing fines.		

*Cartel Case* (€855 million in December 2001). Lafarge was fined €249.6 million, BPB €138.6 million. These companies were found to have restricted competition in these markets, exchanged information on sales volumes and informed one another of price increases on the German and UK markets. Lafarge, BPB and Knauf were found to have participated in the cartel from 1992 to 1998, Gyproc from 1996 to 1998.

In contrast to methylglucamine, the Commission noted that plasterboard is a very large market, some €1.2 billion in 1997. Lafarge was also given a greater fine for deterrence because its overall size was five times that of BPB or Knauf. Lafarge and BPB also had their fines increased for recidivism, Lafarge having participated in the cement cartel, and a subsidiary of BPB having participated in the cartonboard cartel. The Commission’s argument is that at the time when these decisions were notified to them, the two companies were participating in another restrictive agreement in which they persisted.

#### *Food flavour enhancers*

On December 17, 2002, the Commission fined Japanese and South Korean companies a total of €20.56 million for a price-fixing and customer allocation cartel in relation to “nucleotides”, or nucleic acid.<sup>8</sup> This product is made from glucose and used to add flavour to foods. The cartel was found to have operated from 1988 to 1998.

One Japanese company, Takeda Chemical Industries (Japan), was granted full immunity (under the 1996 Leniency Notice) because it submitted decisive evidence at a time when the Commission did not know of the cartel. Ajinomoto Co Inc (Japan) was fined €15.54 million, Cheil Jedong Corporation (Korea) €2.74 million, and Daesant Corporation (Korea) €2.28 million.

8. IP/02/1907, December 17, 2002.

#### *Specialty graphites*

On December 17, 2002, the Commission fined seven companies a total of €60.6 million for taking part in a price-fixing cartel on the market for isostatic specialty graphites.<sup>9</sup> The companies concerned were SGL Carbon (Germany), Le Carbone-Lorraine (France), Ibiden Co, Tokai Carbon Co, Toyo Tanso Co Ltd and Nippon Steel Chemicals Co (Japan), Intech EDM BV and Intech EDM AG (Netherlands), and Graftech International (formerly UCAR) (United States).

SGL Carbon was also fined €8.81 million for its involvement with GraphTech International in price-fixing collusion affecting the market in extruded speciality graphite.

GraphTech International was granted full immunity for both infringements, because it revealed the existence of the cartels and provided decisive evidence on them.

#### *Concrete-reinforcing bars*

Again on December 17, 2002, the Commission fined nine undertakings a total of €85 million for their participation, together with a trade association, in a cartel covering the Italian concrete-reinforcing bars market.<sup>10</sup>

The case reflects the changeover from the ECSC Treaty to the EC Treaty in so far as the cartel infringed Article 65(1) ECSC, which expired in July 2002, and the Commission continued the procedure under the EC rules.<sup>11</sup> The companies were found to have fixed prices for “size extras”, the basic prices and standard payment terms, and to have restricted or controlled production and/or sales.

The fines ranged from €26.9 million (Riva Acciaio) to €3.57 million (Ferriere Nord). Fines on Riva and Lucchini reflected the fact that these companies are in major groups whose turnover is

9. IP/02/1906, December 17, 2002.

10. IP/02/1908, December 17, 2002.

11. The Commission’s Communication of June 26, 2002, [2002] O.J. C152/5.

much bigger than the other members of the cartel. The trade association involved, Federacciai, was found to have infringed, but was not fined. Ferriere Nord's fine was increased for recidivism. However, because it also co-operated with the Commission, its fine was reduced. The other companies involved were Alfa Acciai, Feralpi Siderugica, IRO Industrie Riunite Odolesi, Leali and Acciaiere e Ferriere Leali Luigi in liquidation, Siderpotenza, Valsablia Investimenti, and Ferrara Valsablia (nine undertakings, eleven companies in total).

*Table 6: French beef*

"I arranged for a cross-industry meeting to be held this morning at eight-thirty in order to get everyone to face their responsibilities.

"People are now negotiating with the help of the Ministry, which is trying to iron out any difficulties. I would like to get downstream undertakings to agree to stop purchasing abroad for a few weeks, or indeed a few months. Of course, I have no means of obliging them to do so, the State cannot force them to do so ...

"I would like to get all parties to agree to a fair purchasing price scale."<sup>12</sup>

*Commission fine reductions*

- minus 60 per cent for the crisis;
- minus 30 per cent for State encouragement.

*French beef*

In April 2003, the Commission took an interesting decision imposing relatively small fines on six French federations in the beef sector for unlawful price-fixing and measures to block imports. The context was the falling price of beef in a secondary phase of the BSE crisis. The Commission appears to have been keen to underline that even those circumstances cannot entitle private parties to pursue blatant infringements.<sup>13</sup>

What appears to have happened is that when beef prices collapsed in October 2001, French farmers started to block imports of foreign beef with so-called "inspections" of trucks to see where livestock was coming from, and sometimes violent blockades of French slaughterhouses.

Keen to resolve such unrest, the French agriculture minister actively encouraged what was called a "cross-industry agreement" between four French farmers' unions and two French slaughterhouse unions. This agreement provided for the purchase of beef at certain (minimum) prices *and the boycott of imported beef* (which was usually cheaper). There were various press reports which were picked up by the Commission, resulting in letters to the French Government and dawn raids on the unions concerned. As a result, the actual agreement was short-lived. However, it

appears that, in practice, the agreement was continued as a "recommendation" from the unions concerned, in fact implemented by local action. There were some exceptions, where slaughterhouses refused to comply with the demands made of them, but the decision notes extensive evidence of "covert" implementation of this type. The Commission found that the infringement continued from October 2001 until January 2002.

Various aspects of the case are interesting. First, there have not been many straight cartel cases in the agricultural sector at EC level, although there have been quite a few cases on auctions and co-operatives and there have also been agricultural cases at national level.

Secondly, this is another classic example of how government *encouragement* can be a trap for all private parties concerned. The French minister stressed that he could not oblige the unions to agree, but had them on his premises to "encourage" them to do so. France had also unlawfully banned imports of beef from the United Kingdom at that time.

Thirdly, predictably the French unions sought refuge in Regulation 26/62, but such claims were rejected by the Commission on the basis that the exception in Art.2(1) is very narrow. (It is necessary for agreement to be *between farmers alone*, to show that *all* the objectives of (what is now) Art.33(1) EC were met and that the agreement is *necessary to that end*.)

Fourthly, this is unusual in so far as the fine is on the "unions" concerned. The Commission stresses that activity *within* the scope of legitimate trade or professional union representation is not within Art.81(1) EC, but where, as here, such activity is considered to go *outside* that representation, it is caught by Art.81(1) EC if the activity has restrictive effects on inter-state trade.<sup>14</sup>

Fifthly, the fines were *very* low, as the Commission gave extensive credit for the exceptional economic context, or, as one defendant put it, "the human crisis" which developed beyond the economic one, as farmers faced acute hardship.

The Commission started predictably by considering an agreement on minimum prices and blocking imports as "very serious". In order to assess the relative strength of the unions, the Commission decided not to look at market shares and looked instead at the ratio between the amount of the annual membership fees collected by each of the farmers' federations to assess their relative size and responsibility.<sup>15</sup> The infringement was of short duration. The Commission treated the farmers' violence to compel slaughterhouse co-operation as an aggravating circumstance, justifying a 30 per cent increase on basic amounts and the covert continuation to have justified another 20 per cent.

12. Document 38.279/309 and 310.

13. Commission Press Release IP/03/479, April 2, 2003; Decision [2003] O.J. L209/12.

14. Para.112.

15. Para.170.

The fines on the slaughterhouse federations were reduced by 30 per cent because of the “forceful” French Government pressure to conclude the agreement and a further 30 per cent for the “very special situation” they faced with “physical coercion” from farmers.

However, beyond this, the Commission stated that this is the first decision to penalise an agreement concluded entirely between “unions” and which relates to a basic agricultural product and involves two links in the production chain.<sup>16</sup>

As a result, the Commission considered *the specific economic context* and concluded that this “went beyond a straightforward collapse in prices or the presence of a well-known disease”. The Commission had emphasised earlier in the decision that various measures had been taken under the Common Market organisation for beef in order to attenuate these circumstances, suggesting therefore that *further action* (of the type challenged here) was not justified. When assessing the specific context, however, the Commission notes such measures as *evidence* of the exceptional circumstances.<sup>17</sup> Accordingly, the fines were reduced by *60 per cent*, rather than the more usual 10–15 per cent for an “industry in crisis”. The farmers’ unions were fined between €12 million and €600,000; the slaughterhouse unions between €720,000 and €480,000.

Sixthly, as will be apparent from the above, the Commission did not treat the pressure on the slaughterhouse federation as enough to deny the existence of an agreement at all.

Finally, for once it is the Commission rather than the defendant that emphasises that the *effects* were uncertain. It appears that imports of beef rose in early 2002, but the Commission is careful to note that it is not clear that this was because the agreement ended.<sup>18</sup>

### Sorbates

On October 2, 2003, the Commission fined four producers of a chemical preservative called a “sorbate” a total of €134.4 million for a price-fixing and market-allocating cartel between 1978 and 1995–96.<sup>19</sup> Sorbates are used to prevent the development of moulds, bacteria and other microorganisms in foods and beverages. They are also used for the coating of wrapping paper or in cosmetics. There was one European (Hoechst) and four Japanese participants. The case started through a leniency application by one of the Japanese companies (Chisso Corporation), which received full immunity. Hoechst was fined €99 million, apparently reflecting increases for recidivism and being a co-leader in the cartel with Daicel Chemical Industries, together with a reduction of 50 per cent

for co-operation in the investigation. Daicel was fined €16.6 million, Ueno Fine Chemicals €12.3 million, and the Nippon Synthetic Chemical Industry Co €10.5 million.

### Beer decision

In August 2003, the Commission published its decision in the *Belgian Brewers—Bilateral Cartel and Private Label Cases*.<sup>20</sup>

It may be recalled that this case related to two infringements: a form of co-operation or “non-aggression pact” between Danone Alken-Maes and Interbrew in Belgium; and concentration in offers for private beer supply. The main interest in the case lies in the finding that Danone demanded a “500,000 hl” transfer of business, threatening otherwise to destroy Interbrew’s business in France.<sup>21</sup> *This was treated as evidence of effect on trade*.<sup>22</sup> It was also relevant to recidivism, since Danone (as opposed to Alken-Maes in Belgium) had been found to have infringed the competition rules through cartels before.<sup>23</sup>

Otherwise, the Commission decided, based on the gravity of the infringement, to set the basic amount for the non-aggression pact at €45 million for Interbrew and €25 million for Danone, in part because of market share and apparently also in part because Interbrew and Danone are large international undertakings and *because Danone is a “multi-product company”*. The amounts are perhaps not so remarkable, but the view that *international and/or multi-product companies* should be fined more is, this author thinks, highly questionable. Fines should relate to infringements, not whether companies are conglomerates or not, especially if they can be fined more for recidivism on other markets in any event. The final amounts of the fines were €45.6 million for Interbrew and €44 million for Danone. In the *Private Label Case*, Interbrew’s fine (€812,000) was increased by a factor of five, and that of Alken-Maes (€585,000) by a factor of two.<sup>24</sup>

### Vitamins decision

In January 2003, the Commission published its decision in the *Vitamins Cartel Case*.<sup>25</sup> It will be recalled that this case involved proceedings related to 12 vitamin markets. The Commission dealt with several infringements in one decision without, however, treating them as a single conspiracy (albeit that the same people were involved in Hoffmann La Roche and other companies). The Commission stressed also that no producer was

16. Para.181.

17. Para.185.

18. Para.78.

19. IP/03/1330, October 2, 2003.

20. [2003] O.J. L200/1. See also [2003] I.C.C.L.R. 59–60.

21. Para.53.

22. Paras 271–273.

23. Paras 314–316.

24. Para.344. See also [2003] I.C.C.L.R. 57–58.

25. [2003] O.J. L6/1.

held responsible for collusion in products in which it was not involved.

The value of the EEA market in such products was some €800 million in 1998. The Commission noted the different sizes of the companies concerned and their market shares in the products concerned. Infringements varied in duration between 1989 and 1999. Some were not subject to fines on account of the five-year prescription rule.

Interestingly, in deciding to apply differential treatment to the companies involved, the Commission looked at their relative importance in each of the product markets concerned *and* their worldwide product turnover, since each cartel was global.<sup>26</sup> At the same time, the Commission states that there is no overlap with fines from other jurisdictions such as the United States because its fine is only for restrictions on competition in the European Union/EEA.<sup>27</sup> As a result, for example, the basic amount of the fine of Hoffmann La Roche for vitamin A was increased from €20 million to €30 million. Taking account of their size and overall resources, the fines on BASF, Hoffmann La Roche and Aventis were also increased by 100 per cent for deterrence.

Hoffmann La Roche's basic amount was increased by 50 per cent for its leadership role, and similarly that of BASF by 35 per cent. Aventis obtained a 100 per cent reduction in some markets, since it was the first undertaking to offer decisive evidence on two of the vitamin cartels (and otherwise met the conditions of the 1996 Leniency Notice). Hoffman La Roche and BASF also provided such evidence but had lesser (50 per cent) reductions as instigators of the cartels concerned.

The key point to understand Hoffmann La Roche's huge fine was *the accumulation of its fines* for each infringement, each of which had been increased for "differential treatment" of the companies concerned, and for "sufficient deterrence", with also a 50 per cent increase for having a leadership role. The total fine for Hoffmann La Roche was €462 million.

Finally, an interesting procedural point is that the companies were given the opportunity to comment on the written replies of the other parties to the statement of objections at the Oral Hearing.<sup>28</sup>

#### *Soda Ash 2 decision (and new appeal)*

In January 2003, the Commission published its second decision in the *Solvay, CFK, Soda Ash Case*.<sup>29</sup> This decision is essentially the same decision as the Commission took in 1990, which the CFI annulled for lack of proper authentication in 1995. The Commission again imposes a fine of €3 million for a market-sharing agreement lasting three years, now

26. Paras 678–681.

27. Para.773.

28. Para.147.

29. [2003] O.J. L10/1.

almost a modest sum in comparison to more modern fines. The Commission notes that the appeal proceedings (CFI and ECJ) took some eight years and nine months, during which time the prescription period in Regulation 2988/74 was suspended.

One can but note that all this takes far too long, even if one can understand how it happens. In this case, Solvay's appeal was lodged in May 1991, the CFI ruled in June 1995, and the ECJ in April 2000.

#### *German banks—Euro-zone Case decision*

In January 2003, the Commission published its decision in the *German Banks (Euro-zone Currency Exchange) Case*.<sup>30</sup> In this case, the Commission fined five *German banks* between €28 million and €2.8 million for setting an agreed commission of some 3 per cent for the buying and selling of euro-zone bank rates during the three-year transitional period to the introduction of the euro (January 1999 to January 2002). The purpose was to recover some 90 per cent of the "exchange margin" income which banks had made from currency exchange, after the abolition of the "spread" between buying and selling rates for national currencies.

The Commission's key point was that there was no need for the banks to standardise the prices concerned, the charging structure or any other service concept. It may be recalled that the bulk of European banks settled similar proceedings with changes to their practices during 2001. Among other things, the banks argued that the service in question was local in nature and hence this was a purely national case.<sup>31</sup> The Commission's view was that the service of exchanging the currencies of other EU Member States was "already cross-border in nature".<sup>32</sup> The "basic amounts" for the fines on the large banks concerned were all increased by 100 per cent for deterrence.

#### *Dutch industrial and medical gases decision*

In May 2003, the Commission published its decision in the *Dutch Industrial and Medical Gases Case*<sup>33</sup> (with a rectification decision in May 2003<sup>34</sup>). This decision is unusual in various ways and merits a close reading.

Essentially, the case relates to agreements between suppliers of industrial and medical gases in liquid (bulk) form and in cylinders (such as Hoek Loos, ASA Air Liquide, and others) in the Netherlands. They were found to have agreed:

- To raise prices;
- not to compete for customers in periods after each price increase so that such increases

30. [2003] O.J. L15/1. See also [2003] I.C.C.L.R. 62–63.

31. Para.153.

32. Para.156.

33. [2003] O.J. L84/1. See also [2003] I.C.C.L.R. 63.

34. [2003] O.J. L123/49.

worked (so-called annual “cease-fires” or “moratoria”); and

- to co-ordinate certain other trading conditions for various periods between 1989 and 1991 and 1993 and 1997.

A first issue is the effect on trade. Importantly, based on various merger control cases, the Commission found that the geographic market for the supply of industrial gasses in bulk form and in cylinders is limited by high transport costs and is therefore local or regional.<sup>35</sup> Governmental regulations on the use of cylinders reinforced the view that markets were national. The Commission concluded that the market for bulk supply was also national.

Unusually, the Commission included in its cartel decision an assessment of market concentration, including (Herfindahl-Herschmann Index) “HHI” figures showing concentration exceeding 1,800 in each market. The Commission also assessed competition in such circumstances, including the likelihood of retaliation in the event of customer loss.<sup>36</sup> It is not entirely clear why the Commission took this unusual step for a cartel decision. However, it may be in relation to effect on trade, since in the absence of evidence of *actual* cross-border trade flows, the Commission argues that one way in which trade *may* be affected in the case is because *retaliation* may be cross-border, on *other geographic markets*.<sup>37</sup>

The Commission also argued that trade between Member States can be affected because *swaps between companies*, which may be cross-border, may be affected. The Commission noted that there are considerable imports and exports of industrial gases which “concern almost exclusively sales and swaps within industrial gases groups or between such groups”.<sup>38</sup>

Furthermore, the Commission argued that the infringement could affect the financial flows within a group and the profitability of a branch within a group “because of changes in dividend payments or investment funds needed” (a reference back to the old German insurance case—*Verband der Sachversicherer*).<sup>39</sup> The Commission also argued that the downstream customers for the gases will be affected, in so far as they export or compete with imports.

It will be interesting to see what the CFI makes of this. At first sight, these elements appear remote and unconvincing. Unsurprisingly, Air Liquide is contesting the Commission’s approach, arguing that the issue is whether the *infringements* affect trade, not the fact that the parties are in *multi-national groups* or might compete through

retaliation in other national markets. In the circumstances, the case looks far more like a *Dutch* case, which (at least after May 2004) one would expect to be passed to the Dutch Competition Authority to apply *Dutch* and/or EC competition law.

A second issue in the case is duration. Here, the Commission lacked evidence of one single continuous infringement from 1989 to 1991 (in other words, no evidence of meetings or other unlawful exchanges of information in 1991–93). As a result, the Commission accepted that the earlier period was covered by prescription.<sup>40</sup>

A third issue was the liability of BOC for the acts of its subsidiary, in so far as there was no evidence that the *group* was aware of infringements at the time. Again a little surprisingly, the Commission appears to infer responsibility from the fact that the same internal and external counsel represented the subsidiary!<sup>41</sup> On the other hand, the Commission appears to have *fined* BOC only on the basis of its local involvement.

A fourth issue is the effect of the anti-competitive behaviour, the Commission recording extensively argued price increases of the cartel members. The companies concerned, on the other hand, noted an *erosion* of prices between 1990 and 1999. Interestingly, as in the *French Beef Case*, the Commission accepted that causation in cases like this can be complex. Nevertheless, the Commission followed its usual line, suggesting that the cartel members would not have carried on repeatedly meeting if the cartel were perceived as having no impact.<sup>42</sup>

Finally, the Commission includes an interesting section on the issue as to whether a cartel infringement with limited geographical scope should be treated as “serious” or “very serious” in terms of the Commission’s fining guidelines. The Commission’s general position is that an infringement of limited geographic scope may be categorised as a “serious” infringement, but accepts no *obligation* to deviate from the general rule that a price cartel is by its nature a “very serious infringement”.<sup>43</sup> It appears that the Commission also looked at the general scope of effects related to the infringement, the level of participation in the companies (*i.e.* whether only at local subsidiary level or higher) and the economic significance of the sector concerned (where the Commission noted, for example, that banking is of “outstanding importance” for the economy as a whole<sup>44</sup>). Since its decision, the Commission has also conceded a factual mistake in the assessment of one company’s participation going to the duration and therefore reduced the fine on that company by a corresponding amount.

35. Paras 64 *et seq.*

36. Paras 77 *et seq.*

37. Para.372.

38. Paras 366 *et seq.*

39. Para.371.

40. Paras 387–388.

41. Para.401.

42. Paras 418–421.

43. Para.425.

44. Paras 423–427.

### *Zinc phosphates decision*

In June 2003, the Commission published its decision in the *Zinc Phosphates Case*.<sup>45</sup> Zinc phosphate is a product used as an anti-corrosion mineral pigment in protective coating systems. The main points of interest regarding the decision are:

- The explicit way that the Commission details how the cartel members divided up sales to customers; and
- the Commission's statement that it is not its practice to look at the size of the product market as a relevant factor to assess the gravity of an infringement (*i.e.* whether it is "very serious" or "serious"), but that it does look at the geographical scope of the market for that purpose. *In this case*, the Commission took into consideration the limited size of the product market.<sup>46</sup> In practice, this meant that, taking into account also the EEA turnover of the different participants, the largest basic amount before duration increases was only €3 million.

### *Seamless steel tube decision*

In June 2003, the Commission published its decision in the *Seamless Steel Tubes Case*.<sup>47</sup> This decision was actually taken three and a half years ago, in December 1999. Essentially, the case involved a market-sharing agreement between European and Japanese producers for certain seamless carbon-steel pipes and tubes called "oil country tubular goods" and "line pipes" used for transporting oil and gas.

The industry has been in crisis since the 1970s, with significant overcapacity (which in 1999 was some 40 per cent). The arrangement was found to have operated from 1977 until 1995, but interestingly, *in view of voluntary export restraints* and similar measures concluded between the Commission and Japan between 1972 and 1990, *the Commission only took into account the period from 1990 onwards*.<sup>48</sup> Fines also reflected the fact that the sales of the companies concerned in the European Union were only some €73 million per year.<sup>49</sup>

## **Joint ventures/horizontal co-operation**

### *3G mobile network sharing*

In April and July 2003, the Commission followed up on its Article 19(3) Notices of last year related

to *3G mobile network sharing in the United Kingdom and Germany*, with two decisions clearing the arrangements on slightly modified terms.<sup>50</sup> It will be recalled<sup>51</sup> that the agreements in the United Kingdom are between T-Mobile and mmO2 and provide for site sharing and national roaming.<sup>52</sup>

The Commission has now concluded that the *site sharing* is not caught by Article 81(1) EC, because:

- It only concerns basic network infrastructure, allowing the parties to differentiate their services downstream and compete; and
- the system did not lead to widespread foreclosure for third-party operators (even if there were particular problem sites, national regulators could also impose site sharing).

Environmental and health considerations were also taken into account.<sup>53</sup>

As regards *national roaming* between network providers, the Commission concluded that this limits competition with respect to coverage, retail prices, quality and transmission speeds. However, it also promotes market entry, leading to a better and quicker 3G service "roll-out" and coverage.

The Commission's position (reflecting that of the parties) varies according to the nature of the area concerned. National roaming in *rural* areas of the United Kingdom is exempted until December 31, 2008. In *urban* areas, such roaming is exempted until December 31, 2007, the parties having indicated that they would not enter into such agreements in the 10 largest cities, but only in some small cities covering less than 10 per cent of the UK population.

The agreements in Germany are again between T-Mobile and mmO2 and follow a similar pattern, with exemption variations on national roaming according to the circumstances.

### *Canal Digital*

In June 2003, the Commission issued an Article 19(3) Notice indicating that it planned to take a favourable decision concerning agreements between *Telenor Broadband ("TBS"), Canal+ and Canal Digital* related to the distribution of pay-TV premium content channels *via* the direct-to-home ("DTM") satellite platform of Canal Digital.<sup>54</sup> The agreements were entered into when Canal+ sold its 50 per cent stake in Canal Digital to TBS and are designed to secure ongoing supply of Canal+ content for the platform.

The main issue was that the Commission required the parties to reduce related periods of exclusivity in time and scope. Thus, Canal+

45. [2003] O.J. L153/1. See also [2003] I.C.C.L.R. 60–61.

46. Paras 302–303.

47. [2003] O.J. L140/1.

48. Paras 25–27, 108 and 166.

49. In October 2003, the Commission published its decision in the *Methionine Cartel Case*: [2003] O.J. L255/1. See also [2003] I.C.C.L.R. 63.

50. IP/03/589, April 30, 2003; [2003] O.J. L200/59; IP/03/1026, July 16, 2003.

51. [2003] I.C.C.L.R. 91–92.

52. [2003] I.C.C.L.R. 91–92.

53. Paras 108 and 99.

54. [2003] O.J. C149/16.

undertook not to own a competing DTH/SMATV (satellite master antenna network) distribution platform in the Nordic region for 10 years (although it could continue to supply other Nordic pay-TV premium content channels through third-party cable networks). This was reduced to four years and the definition of DTH/SMATV distribution was narrowed to cable networks.

For its part, TBS undertook not to operate a pay-TV premium content channel for DTH/SMATV distribution and not to distribute such channels of competing suppliers *via* DTH/SMATV and certain smaller cable networks for 10 years. (This did not apply to Telenor's cable television networks.) This was reduced to three years.

The arrangements also provided for the joint acquisition of certain content by the parties, the duration of which was also reduced to three years.

### 3G patents

In November 2002, the Commission cleared *agreements for the licensing of patents for 3G mobile services* between a group of some 18 companies called the "3G Patent Platform Partnership" ("3G3P").<sup>55</sup> In order to produce 3G equipment, manufacturers need to comply with the "IMT-2000 3G" standard. This standard covers five different technologies, each of which can be used to produce 3G equipment. To make such equipment, manufacturers need access to the patents essential for a particular technology.

3G3P notified a set of agreements providing for procedures to establish whether a patent is essential, to streamline licensing of those considered essential, and to reduce the overall licence fees paid for the entire portfolio of essential patents.

The Commission noted that "essential patents" may compete if two technologies compete, and has therefore required the parties to modify these agreements so that there are now *five* sets of arrangements, one for each technology, instead of all the essential patents in one platform.<sup>56</sup>

The Commission's idea is that these *five sets* of licensing arrangements will not restrict competition in the five technologies concerned. The Commission also took into account that a number of 3G essential patent holders were not involved (including Ericsson, Nokia, Motorola and Qualcomm).

55. IP/02/1651, November 12, 2002.

56. In addition, the Press Release states that: (i) each licensing agreement is limited to essential patents only; (ii) the agreements are not to foreclose competition in related or downstream markets; (iii) licensing is to be on non-discriminatory terms; (iv) commercially sensitive information is not to be exchanged; (v) 3G manufacturers are not forced to pay for patent rights which they do not need; and (vi) the licensing arrangements "should not" discourage further R&D and innovation.

### *Philips/Sony*<sup>57</sup>

In August 2003, the Commission cleared a set of agreements between *Philips and Sony* establishing the worldwide "*Philips/Sony*" CD Licensing Programme and a standard joint licence agreement (the "2003 SLA").<sup>58</sup>

According to a complex Press Release, Philips and Sony had co-operated for some years on R&D in the field of optical data storage technology, resulting in joint inventions. In that context, Philips and Sony developed CD system standard specifications, which were adopted by music companies and consumer electronics manufacturers, with access to the combined patents of the two companies. The CD system standard specifications were subsequently entered into new formats, including CD-ROM used by the computer industry.

However, several CD manufacturers had complained that the agreements between Philips and Sony and the standard licence agreements infringed Articles 81 and 82 EC. After certain improvements to the programme, the Commission concluded that it was covered by the transfer of technology block exemption.

The Commission also cleared the 2003 SLA to be offered to third parties, which covers the essential patents for compliance with the different CD specifications, after some changes.

The Commission concluded that the 2003 SLA, as amended, did not infringe Article 81 EC because, among other things:

- The SLA recognises the right of Philips and Sony to license their respective patents *separately* and to give non-assertion undertakings with regard to jointly owned patents, whether within or outside the standard specifications of the CD systems;
- the SLA 2003 provides options for licensees for different types of CD;
- the Commission is satisfied that the patents covered *are* only the essential ones (after an independent-expert report);
- licensees are only obliged to license back their patents essential for the type(s) of CD they have selected;
- royalty payment obligations reflect the territorial scope and duration of the licensed patents;
- licensees are only required to provide Philips with information regarding royalties bearing CDs produced and sold;
- conditions for access to a "reduced compliance royalty rate have been clarified and made more attractive".

57. With thanks to Flavia Distefano for her assistance with this section.

58. IP/03/1152, August 7, 2003.

More information is available on Philips's licensing website. Apparently, Philips has also offered a one-time credit of US\$10,000 on royalties to each EEA licensee.

### REIMS II

In April 2003, the Commission issued an Article 19(3) Notice, indicating that it planned to take a favourable decision as regards a revised version of the *REIMS II* postal terminal dues system.<sup>59</sup> This has now been followed up by a clearance decision.<sup>60</sup>

It may be recalled that "REIMS" stands for "Remuneration of Mandatory Deliveries of Cross-Border Mails". These agreements provide for a phased *increase* in the charges which postal operators can make for completing delivery of cross-border mail to specified percentages of the domestic tariffs concerned. The agreements were exempted in 1999 on various conditions, notably:

- Certain quality of service criteria (*e.g.* in terms of speed of delivery) had to be met;
- postal operators had to offer a low-cost alternative for bulk and commercial mail (called "Level 3 access");
- the maximum agreed collective tariff for terminal dues was set at 70 per cent of the domestic tariff until 2001;
- the postal operators had to introduce a transparent cost-accounting system, designed to allow the Commission to assess what charges were justified for such postal termination services.

Since 1999, the postal operators have modified their agreements. Among other things, they have:

- Admitted the accession of Swiss Post, bringing the parties to 17;
- considered quality standards;
- agreed on a new phased transitional period designed to allow them to charge terminal dues of 80 per cent of defined domestic tariffs by 2004;
- envisaged renegotiations if the geographic structure of incoming mail of a postal operator has changed so that the receiving operator cannot cover its costs.

The Commission noted that the quality of cross-border mail delivery had improved. However, the Commission had three big issues:

- First, the Commission reviewed the parties' cost data and proposed a longer phased transitional period to 2006, going only up to 78.5 per cent of domestic tariffs. The Commission considers that this is closer to the parties' costs.

59. [2003] O.J. C94/3; IP/03/557, April 23, 2003.

60. IP/03/1438, October 23, 2003.

- Secondly, the Commission has found that "Level 3 access" is not viable. The operators have therefore proposed a new, specific "international direct mail" system which is meant to offer an effective low-price alternative system to the general terminal dues.
- Thirdly, taking account of the liberalisation of *outgoing* cross-border mail since January 2003 (if it is not necessary to sustain universal postal services), the parties have agreed to offer any third-party operator competing with a REIMS II party in such services access to *inbound* cross-border mail services in its country, at rates and conditions which are non-discriminatory as compared to those offered to the REIMS II party in the sender's country.

### Other

Several of last year's decisions have now also been published.<sup>61</sup> Thus, the *Revised TACA* clearance was published in January 2003<sup>62</sup>; the *VISA Multilateral Interchange Fee* clearance was published in November 2002<sup>63</sup>; and the *IFPI Simulcasting* decision was published in April 2003.<sup>64</sup>

In August 2003, the Commission also approved a *rail joint venture* through the Frejus tunnel between France and Italy.<sup>65</sup> In October 2003, the Commission cleared the *Austrian "ARA" system for the disposal of packaging waste*, which was described previously.<sup>66</sup>

### Distribution

Table 7: Distribution

- Interbrew:
  - clearance for the dominant on conditions;
  - only brewer above VRBE;
- De Beers: restrictions for efficiency for the dominant?
- Other:
  - Yamaha: low fine;
  - Nintendo decision: high fine—300 per cent for deterrence.

### Interbrew

In November 2002, the Commission published an Article 19(3) Notice, indicating that it proposed to

61. In the course of the year, the Commission has also invited comments on the *British Airways/Iberia/GB Airways* co-operation, [2003] O.J. C217/2; and the *British Airways/SN Airlines* co-operation, [2002] O.J. C306/4. The latter was cleared with undertakings as regards the Brussels–Manchester route: IP/03/350, March 10, 2003.

62. [2003] O.J. L26/53; see, further, [2003] I.C.C.L.R. 91.

63. [2002] O.J. L318/17; see also [2003] I.C.C.L.R. 90–91. (A change concerning the French *Groupement des Cartes Bancaires* was also described in a Notice: [2003] O.J. C80/13.)

64. [2003] O.J. L107/58. This was described in detail last year: [2003] I.C.C.L.R. 89.

65. IP/03/1148.

66. IP/03/1405, October 17, 2003; [2003] I.C.C.L.R. 88.

take a favourable position concerning *Interbrew's* modified “tied house” purchasing system in Belgium.<sup>67</sup> This is interesting as one of the first examples of the Commission dealing with distribution by a company above the 30 per cent ceiling of the Vertical Restraints Block Exemption (“the VRBE”), complicated by the fact that Interbrew had pre-existing agreements reflecting long-term loans, leases and sub-leases, etc.

Interbrew notified its brewery agreement for the Horeca sector (hotels, restaurants and cafés) in Belgium in June 2000. There were five types of agreement: loan agreements; lease and sub-lease agreements; concession agreements; franchise agreements; and “opening tax” agreements. Interbrew was found to hold *some 56 per cent of the Belgian Horeca sector*, followed by Alken/Maes (Scottish & Newcastle) with 13 per cent, Haacht with 6 per cent and Palm with 7 per cent. The first three focus on Pilsner (in Interbrew’s case, Jupiler and Artois), Palm on an amber beer. In 1999, Interbrew’s tied market share in the Horeca sector (measured by the amount of beer sold through some [11,000–13,000] exclusive “Interbrew beer” outlets) was some [17–22 per cent] (we are not told the precise figures).

In the *loan* agreements, broadly Interbrew loaned money or equipment in return for an obligation to sell only Interbrew beer. Typically, these agreements were for five years. The *lease and sub-lease* agreements contained similar non-compete provisions. The duration of the lease agreements is nine years, renewable twice for a similar period up to a maximum of 27 years. The *franchise agreements* also reflect a non-compete obligation, and concerned concessions for the exploitation of the franchise formula for Leffe pubs (an abbey beer), Hoegaarden pubs (a wheat beer) and “Radio 2” pubs (a concept franchise with more than one type of Interbrew beer). Interbrew would also tender for public authority “concessions” (in sports centres etc.) and then sell only its own beer through the outlet. Interbrew had some 100 such concessions, with durations usually from 5–10 years. Finally, Interbrew would sometimes pay the *outlet “opening tax”* for an operator, a financial benefit in return for which Interbrew would require a non-compete obligation.

As notified, the scope of the “tie” varied according to the type of agreement. Generally, there was an obligation for an outlet operator to buy *all his requirements for beers and other drinks* specified in the brewery agreement from Interbrew (*i.e.* not sell competing beers or drinks) (with variations from franchise outlets). Loans and “opening tax” agreements entered into after March 2001 tied *draught beer only*, and those from June 2001 were terminable on three months’ notice. Agreements after July 2001 required that the operator *purchase*

*at least 75 per cent of his total beer turnover* from Interbrew (instead of a non-compete).

After two rounds of amendment, what the Commission required (broadly) was *a reduction in the breadth and extent of the minimum purchasing obligation* to give more access to Interbrew’s tied outlets for other beers, save as regards draught Pils, core distributed products. The Commission also required *shorter termination possibilities* for the operators (three months):

- In the case of *loan ties* (which accounted for more than 7,000 outlets), the “quantity forcing” obligation (exclusive or minimum purchasing obligation) only applies to *draught Pilsner*, allowing operators to sell bottled or canned Pilsner, or other types of beer whether draught or bottled, provided that the outlet buys at least *50 per cent* of its total beer requirements from Interbrew. Moreover, all such agreements are now to be terminable on *three months’ notice*. The outstanding loan balance is repayable, but without an early repayment penalty or other financial compensation. This concerns [11–16 per cent] of the tied share.
- As regards some 2,000 *loan or bank guarantee agreements* which Interbrew entered into between 1997 and 2000 with a duration of 10 years, Interbrew undertakes to terminate the quantity forcing obligation at the latest on December 31, 2006. (The Commission appears to have accepted a five-year transition period beyond that provided for in the VRBE.)
- In the case of *leases*, the non-compete obligation is reduced in a different way to cover *all types of draught beer brewed by Interbrew* (Pilsner and others) under its own brands or under a licence (meaning in practice Tuborg). The operator can therefore sell *draught Trappist beer* and all types of bottled or canned beer made by competitors. Interbrew will treat its *concession agreements* in the same way as the lease or sub-lease contracts. In the case of *Leffe or Hoegaarden franchises*, Interbrew limits the non-compete obligation to the type of beer that is the subject of the franchise formula, subject to a minimum purchase obligation of 25 per cent of all beer purchases. There is no non-compete or minimum purchasing obligation for the Radio 2 franchises.

In the Commission’s Press Release for its decision in April 2003, the Commission amplified or changed certain points<sup>68</sup>:

- First, that the “50 per cent of total beer turnover requirement” in the *loan agreements*

67. [2002] O.J. C283/14.

68. IP/03/545, April 15, 2003.

was not thought likely to have major foreclosing effects, since outlets were expected to account for that through *draught* Pilsner, not therefore limiting third-party sourcing for other bottled or canned beers.

- Secondly (although it is not entirely clear in the Press Release), it appears that in the *lease agreements*, the operator can also sell *one* brand of a competitor's draught beer, other than draught Pilsner, instead of being limited to Interbrew's range of draught beers. This "guest beer" could therefore include wheat or amber beer, not just beers like Trappist which Interbrew does not sell. It appears, however, that the "guest beer" will be supplied by Interbrew or a wholesaler appointed by it (and the Commission will review this "guest beer" system after one year). Here, the Commission appears to have been influenced by the fact that Interbrew *owns* the premises, only leasing them out.

All of this is very interesting. The brewery sector is something of a special case, but has been the vehicle for some of the Commission's most detailed decisions on distribution foreclosure/market access. This is one of the first cases above the 30 per cent market-share ceiling in the VRBE. The Commission appears to have recognised:

- The need to balance the commercial interests of a supplier *which might be considered dominant (Interbrew had 56 per cent of the sector) and was the only market participant outside the VRBE*, with the interest of competitors (and customers) to see greater market access; and
- the commercial fact that Interbrew had a whole network of agreements, reflecting commercial choices on both sides which one would think cannot be radically changed overnight.

The overall solutions do not appear that surprising. In other contexts, the Commission has allowed dominant suppliers to have "50 per cent exclusivity" obligations on customers, where these may be justified.

Practically, one may note, however, that Interbrew's competitors operating *under* the VRBE will be allowed to impose stricter ties on Horeca outlets (*i.e.* they can oblige such outlets to buy *all their beer* from the supplier in exchange for a five-year loan, or for the full duration of any lease or sub-lease if the supplier owns the premises).

It is interesting also to see the Commission accepting a *three-month notice period* without penalty as indicating adequate switching possibilities. One senses that the Commission thinks that one loan from one brewery could be replaced by another loan from another—apparently also that

Interbrew's market position will not *de facto* deter such switching. Interesting material, given cases like *Masterfoods II*, where the possibility of switching on two months' notice was rejected as being something which *in practice* the outlet would not do.

Finally, the Commission has also stressed that it has co-operated with the Dutch competition authority in relation to another case above the VRBE ceiling involving *Heineken*<sup>69</sup> (and, highlighting the new European Competition Network ("ECN") framework, that it planned a "workshop" with the other national competition authorities on beer (brewery contracts)!).

#### *De Beers diamond distribution*

During the year, there have been three developments related to the *De Beers diamond distribution system*.

First, in November 2002, the Commission indicated that it planned to clear an amended new distribution system called the *Diamond Trading Company's ("DTC") "Supplier of Choice" system* (notified in May 2001).<sup>70</sup> This has been followed up by a Press Release confirming the clearance in January 2003.<sup>71</sup>

Secondly, in that same Press Release, the Commission has indicated that it *objects to a trade/supply agreement between De Beers and Alrosa Company Ltd ("Alrosa")*, a Russian state-owned company which produces some 20 per cent of world production of rough diamonds. Under that agreement, Alrosa agrees to sell to De Beers some €800 million of rough diamonds over five years which De Beers will subsequently release on the market. The Commission considers that this infringes Articles 81 and 82 EC and sent a Statement of Objections to De Beers and Alrosa.

Thirdly, the Commission has cleared a joint venture between De Beers and LVMH Moët Hennessy Louis Vuitton ("LVMH") for the retail of diamond jewellery under the EC Merger Control Regulation on the basis that this does not strengthen the dominant position held by De Beers in rough diamond supply. The Commission's decision contains much information useful to understanding the *Supplier of Choice* and *Alrosa Cases*.<sup>72</sup>

What appears to be happening is that De Beers is changing its distribution strategy. Until recently, it controlled some 85–90 per cent of rough diamond supply (*i.e.* before the diamonds are polished and cut for jewellery). Recently, however, some smaller competitors have started to supply the market independently. Notably, three companies, Argyle,

69. NMA decision of May 28, 2002, Case 2036/Heineken. RBB Brief 04, August 2002, and [www.nmanet.nl](http://www.nmanet.nl).

70. [2002] O.J. C273/2.

71. IP/03/64, January 16, 2003.

72. [2003] O.J. L29/40.

Alrosa and BHP Diamonds (“BHP”), now sell independently (although, according to the Commission’s merger decision, it appears that Alrosa has an agreement to supply half of its production through De Beers and DTC, and that BHP supplies 35 per cent of its output *via* De Beers sales channels). It appears from the Commission materials that Argyle has less than 5 per cent of the rough diamond market, Alrosa between 10 and 15 per cent (independently), and BHP less than 5 per cent (independently).<sup>73</sup> There have been (and still are) arguments for a concentration of supply, in order to provide consistency and (overtly) to protect price levels.

De Beers now controls some 60–65 per cent of rough diamond supply and is therefore the dominant supplier.

Until recently, De Beers supplied the market through some 120 “sightholders”, whereby customers bought pre-prepared “lots” or “boxes” of rough diamonds sorted by quality and cost, after so-called “sights” when they saw the diamonds.

Recently, De Beers has indicated that it plans to switch to a system whereby it will have fewer sightholder customers, but will invest with them in terms of giving them improved supply and access to DTC’s marketing and branding surrounding the DTC name, the so-called “Forevermark” icon and the “A Diamond is Forever” advertising slogan. Retail strategy through the LVMH joint venture will be based on the “De Beers” name. Sightholders are also to be encouraged to work more with De Beers’ downstream partners to improve diamond distribution.

The changes in distribution strategy are aimed at increasing demand for De Beers diamonds.

Through the Supplier of Choice system, De Beers essentially limits the customers through which it will distribute, but intensifies the relationship with them.<sup>74</sup>

As originally designed, the Commission considered that the system constituted not only an infringement of Article 81 EC but also an infringement of Article 82 EC because of the criteria for sightholder selection and the amount of information sought. Under the system, De Beers sought much detailed and confidential information on their customers’ operations. Based on that information, De Beers intended to select a limited number of sightholders with which it would do business and to determine the allocation of diamonds which each might receive. After the Commission’s intervention, this has been reduced. For example, the number of questions involved in the De Beers questionnaire has been reduced from 60 to 21, with corresponding changes to the rest of the system.

73. The Commission’s merger decision at paras 46 and 58–59.

74. The Commission’s merger decision at paras 77 *et seq.* and the Art.19(3) Notice referred to above.

Sightholders also do not have to reveal their marketing or promotional initiatives to DTC, save where DTC support is sought.

Various sightholder (selection) criteria were involved in the system as originally designed, relating to the strength of the sightholder and compliance with certain “best practice” principles, including an obligation not to handle artificially treated/synthetic diamonds. The latter has now been removed after the Commission’s intervention.

De Beers also sought greater information on the market, although the Commission appears to have considered that it had enough already, partly because De Beers also has sales subsidiaries selling to the secondary market (one level after the sightholders) and polishing operations of its own.

Under the Supplier of Choice system, DTC is not obliged to offer boxes to sightholders, although DTC is to use reasonable endeavours to meet applications.

The Commission appears to have been concerned that the system left sightholders too dependent on DTC, giving De Beers too much scope to restrict their commercial behaviour, and therefore has intervened and accepted a new “Ombudsman” dispute resolution system (in addition to existing arbitration and litigation possibilities). The Ombudsman is to consider whether DTC has followed improper procedures in its decisions on selection or deselection of sightholders, and also in relation to DTC’s supply decisions.

Sightholders are appointed for two-year periods with a six month termination notice period (instead of three months). According to the Article 19(3) Notice, supplies are also to be based on six-month purchasing requirement indications. Sightholders will be able to buy only the boxes they have applied for and after inspecting the stones.

Sightholders no longer have to renounce any claims against De Beers relating to the period before the Supplier of Choice arrangements.

The Commission’s approval appears somewhat tentative as it states the system could still be used to artificially reduce supply. It appears that, for the moment at least, the Commission is more focused on opening up other channels of supply. Hence its challenge to the Alrosa arrangements. Nevertheless, although very exceptional, this is an interesting and rare example of a dominant supplier apparently being able to modify its distribution structure with related restrictions to promote efficiency and competition.

#### *Audi authorised services and repair network*

In January 2003, the Commission indicated that it had intervened as regards *Audi’s authorised service network*<sup>75</sup> after complaints from dealers and

75. IP/03/80, January 20, 2003, and SPEECH/03/59, February 6, 2003, at p.4; Gams, *EC Commission Competition Policy Newsletter*, no.2 (Summer 2003), pp.53–55.

authorised Audi repairers concerning termination of dealer or authorised repairer agreements before the end of the transition period to the new Motor Vehicle Block Exemption (“MVBE”).

In a complex Press Release, the Commission set out its position that car manufacturers’ agreements with service repairers which do not also sell cars were not covered by the old MVBE and could therefore only reflect *qualitative* selection criteria, *even before* the end of the transitional period.

Agreements with *car dealers* which *also* involved service repairs benefited from Regulation 1475/95 until October 1, 2003 and could therefore involve *quantitative* restrictions. However, the existence of such agreements was no ground for not applying purely qualitative criteria in other cases.

The Commission emphasised that *car dealers* performing service and repair obligations whose agreements had been terminated before the end of the transitional period should also qualify as service repairers under the current qualitative criteria. Independent pure service repairers should also already have the same opportunity.

Audi agreed to follow this approach. As a result, various dealer or repairer agreements were reinstated in the VW network, apparently as authorised repairers. The Commission has indicated that Volkswagen is also doing so, as is Opel.

### *Yamaha*

In July 2003, the Commission imposed a fine of €2.56 million on *Yamaha* for restricting trade in the European Union and fixing resale prices.<sup>76</sup>

It appears that *Yamaha* pursued a number of practices, including obligations on official dealers: to sell only to final customers; to purchase exclusively from *Yamaha* subsidiaries; to contact *Yamaha* before exporting *via* the internet; and the fixing of resale prices. The Commission indicated that such activities concerned Germany, Italy, France, Austria, Belgium, the Netherlands, Denmark and Iceland.

Although the Commission notes that such an infringement is “serious”, it appears to have imposed a very moderate fine. It will be interesting to see more precisely why when the decision is published.

There have been low or no fines for limited parallel import cases before (*e.g. Triumph* motor cycles).<sup>77</sup> Clearly, however, there have also been the huge fines like *Nintendo*. From the Press Release, it appears that the *Yamaha* infringement was more sporadic than systematic, being applied only to a limited number of dealers and products, *not* being systematically included in all *Yamaha* agreements in the EEA, and that the restrictions were not fully implemented. The Press Release also speaks of the

“object” of such practices being to restrict competition, more than discussing effects. *Yamaha* is stated to have terminated “a majority” of the restrictions as soon as the Commission intervened. It is not clear what duration was involved.

Otherwise, this is a classic area of practical concern, as companies feel the need for some territorial restrictions within a selective distribution system (limiting cross-sales within the network), even though that may be blacklisted in the VRBE.

### *Nintendo decision*

In October 2003, the Commission published its *Nintendo* decision.<sup>78</sup> It will be recalled that this case involved parallel import restrictions on markets for game consoles and cartridges such as the “Game Boy” system. The Commission fined not only *Nintendo*, but also various distributors, and the fine on *Nintendo* was a record €149,000 million for a “vertical” infringement.

The decision explains how this high level was reached. Essentially, the Commission found that:

- The infringement was very serious and EEA-wide;
- *Nintendo*’s position should be given more specific weight;
- *Nintendo*’s basic amount should be *increased by 300 per cent* for deterrence, taking into account its size and overall resources, and that it was the manufacturer of the products concerned;
- *Nintendo* continued its infringement, after the Commission had started an investigation into EU video game prices and specifically *Nintendo* in 1995, justifying a 25 per cent increase.

Although the Commission treated the infringement as vertical and denied *Nintendo* and others the specific application of the (cartel) Leniency Notice, much of the decision reads like a cartel case, with classic references to case law on agreements and concerted practices.

The Commission also allowed *Nintendo* and John Menzies analogous reductions for their cooperation with the Commission. In *Nintendo*’s case, this was 25 per cent.

Interestingly, *Nintendo* was also given a reduction in its fine of €300,000 million for “substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm”.<sup>79,80</sup>

78. [2003] O.J. L255/33; [2003] I.C.C.L.R. 97.

79. Paras 440, 441.

80. In June 2003, the Commission indicated that it had opened proceedings against *Topps* for practices designed to prevent imports of Pokémon collectible stickers and cards from EU countries where these are low-priced to

76. IP/03/1028, July 16, 2003.

77. IP/00/1014, September 15, 2000.

## Articles 82/86 EC

### *Deutsche Telekom*

Table 8: Articles 82/86 EC

- Deutsche Telekom:
  - margin squeeze;
  - wholesale access compared to several retail products;
  - weighted approach;
  - EC intervention although NRA review;
- IMS: interim measures withdrawn.

In May 2003, the Commission adopted a decision fining *Deutsche Telekom* (“DT”) some €12.6 million for what it considered an abusive *margin squeeze* for wholesale access to the final (or “local”) telecommunications loop between the last switch and the household.<sup>81</sup>

The Commission found that DT was dominant on the markets for wholesale and retail access to the local loop. As regards wholesale access, DT is the only network operator offering nationwide retail coverage in Germany. There are other forms of technical infrastructure (fibre optic and wireless networks, satellites and upgraded TV networks) but the Commission found them not sufficiently developed to be equivalent to DT’s network.

After a complex assessment, the Commission considered that DT had been “*margin-squeezing*”. In other words, the Commission found that there was an insufficient spread between DT’s (wholesale) local loop access prices and DT’s downstream tariffs for retail subscriptions. As a result, third-party competitors could not compete for end customers.

The Commission found that, from 1998 to 2001, DT had charged competitors more for unbundled access *at wholesale level* than it charged its subscribers for access *at the retail level*, leaving competitors no margin to compete for the retail subscribers. From 2002, prices for wholesale access were lower than for retail access, but the Commission found that the difference was still not enough to cover DT’s own downstream product-specific costs for the supply of end-user services.

The Commission stated that it had reduced the fine in two ways. First, it had not increased the basic amount of the fine for the period from 2002 onwards “due to the reduced scope for price adjustments” under German regulation. Secondly, the Commission reduced the basic amount by 10 per cent “because of legal uncertainty about the tariffs under scrutiny”.<sup>82</sup>

This is an interesting and complex case. There are three big issues.

First, the calculation of the *margin squeeze* is new and complex. The Commission had to compare the

others where they are high-priced for most of the year 2000: IP/03/866, June 19, 2003.

81. IP/03/717, May 21, 2003; [2003] O.J. L263/9.

82. Press Release, p.2.

*single* wholesale service (local loop access) to *several* retail services (access to analogue, ISDN and ADSL connections), in itself a complex task, leaving scope for differing interpretations. The Commission decided it could do so and then applied a “*weighted approach*” to prices and costs, aggregating retail access for analogue, ISDN and ADSL *on the basis of the number of each variant* that DT had marketed to its own end-users.

The “comparable” wholesale and retail services were found to be fully unbundled local loop access and retail access in analogue, ISDN and ADSL. The Commission found that:

- If the average retail prices are below the level of the wholesale charges, there is a margin squeeze.
- If DT’s average retail costs were above its wholesale charges, then the Commission looked at DT’s product-specific costs for providing its own retail services, and considered that there was a margin squeeze if those costs exceeded the “positive spread” between the retail and wholesale prices. DT argued, among other things, that this was too narrow an approach and that revenues for call services (which also feature in the overall pricing decisions) should also have been taken into account.

As the Commission acknowledged on fining, this is new, and previously the weighted method applied to determine the margin squeeze has not been the subject of a formal Commission decision. The Commission’s decision should be very important to network industries in similar positions.<sup>83</sup>

Secondly, there is much controversy over the extent of scope for autonomous conduct which DT had in the case where DT’s wholesale prices were regulated (apparently at what the German regulatory authority considered to be cost level). DT’s retail prices were also regulated, albeit in a different way. Both *had* been regulated by the German authorities and the German regulator had also considered the issue of a price squeeze.

The Commission argued that DT could still have increased its retail charges to increase the spread between wholesale and retail prices,<sup>84</sup> and that national action does not prevent the Commission applying the EC competition rules. DT also argued that this is at odds with its obligations to provide affordable universal services, while the Commission argued that a restructuring of the tariffs concerned could still achieve that.<sup>85</sup>

Thirdly, DT argued that the Commission was in effect applying a *per se* rule, since no negative effects on the market were shown. The Commission

83. Decision, Paras 102–111 and 206.

84. Paras 53–57.

85. Paras 192–198.

argued that it was enough if it proved the existence of the margin squeeze, referring to case law such as *Hoffmann La Roche* and *AKZO*.<sup>86</sup> However, the Commission also considered that the margin squeeze did raise barriers to entry, noting that few competitors *had* entered the market thus far.

DT has appealed.

#### *Wanadoo Interactive*

In July 2003, the Commission also fined *Wanadoo Interactive*, a subsidiary of France Telecom, some €10.35 million for predatory pricing in ADSL-based internet access services to the general public.<sup>87</sup> The Commission considered that between 1999 and 2002, Wanadoo marketed its ADSL services at prices below their average costs (before August 2001, below variable costs; afterwards, equivalent to variable costs, but below total costs) while France Telecom was expecting significant profits for its wholesale ADSL provision to internet service providers (including Wanadoo). In effect, the Commission argued that this was a deliberate policy to take the market for high-speed internet access, as it was first introduced. The abuse was found to have ended in October 2002 when France Telecom reduced its wholesale ADSL prices by some 30 per cent. We have not yet seen the decision.

#### *IMS*

In August 2003, the Commission withdrew its interim measures decision again *IMS*.<sup>88</sup> The Frankfurt *Oberlandesgericht* had ruled that, while IMS Health's 1860 brick structure is protected by German copyright, NDC Health (IMS's rival) can develop another brick structure similarly based on administrative and postal divisions, "even if the resulting structure might have a similar number of brick segments to the 1860 structure and might be deemed to be derived from that structure". It also appears that since then, NDC has signed a number of contracts, some with bigger pharmaceutical firms, and therefore may be able to stay on the market. In addition, AzyX, another would-be competitor of IMS in Germany, has withdrawn from the German market. The Commission therefore considers that there is no urgency justifying an interim measures decision requiring IMS to license its copyright to NDC.

On the facts, however, NDC's German subsidiary was found to have infringed German unfair competition law by copying IMS's 1860 structure and using it. (In another case, the *Landgericht Frankfurt* has made a reference to the ECJ on these issues.<sup>89</sup>)

86. Paras 176–180.

87. IP/03/1025, July 16, 2003.

88. IP/03/1159, August 13, 2003; [2003] O.J. L268/69.

89. Case C-418/01, Notice of action brought on January 5, 2002, [2002] O.J. C-3/23.

#### *Italian railways*

In August 2003, the Commission announced that it had followed through and adopted a decision in its case involving access to *Italian railways* for an operator seeking to offer a service from *Germany* to Milan *via* Basle.<sup>90</sup> The Ferrovie dello Stato ("FS") had refused to offer traction services and refused to discuss terms for access to track. In the circumstances, FS was considered to be the only undertaking/operator able to offer such services. FS settled the case and agreed to deal with these issues, or at least to use its best endeavours to do so. The Commission emphasised that, in the circumstances, for FS not to do so would be considered an abuse of its dominant position.

#### *Other*

In January 2003, the Commission published its readopted decision in the *Soda Ash, Solvay Rebates Case*.<sup>91</sup> As with the *Soda Ash Cartel Case*, the text is essentially the same, save that there is a section dealing with the appeal which led to annulment of the decision for lack of proper authentication/signature. Again, the time taken on appeal is striking—amounting to almost nine years. Solvay has now appealed again on the substance.

In March 2003, the Commission announced that it had sent a Statement of Objections to *Clearstream Banking AG*.<sup>92</sup> The Commission considered that Clearstream is the dominant supplier of clearing and financial settlement services for securities issued under German law. Clearstream is the German Central Securities Depository. The Commission's objections relate to an alleged refusal to allow Euroclear Bank SA access to settlement services for German-registered shares for some two years, while Clearstream established a competing cross-border operation. The Commission also alleged that Clearstream was discriminatory, since other customers were given access much more quickly. Moreover, until January 2002, Clearstream charged a higher per transaction price to Euroclear than to national Central Securities Depositories outside Germany. In the Commission's view, this is not justified.

In July 2003, the Commission sent *Astra Zeneca* a Statement of Objections, alleging that it had misused the patent system and other regulatory procedures for the marketing of pharmaceuticals in order to block or delay market entry for generic products.<sup>93</sup>

90. IP/03/1182, August 28, 2003; the decision is available on the Commission's website.

91. [2003] O.J. L10/10.

92. IP/03/462, March 31, 2003. See also, in this field, Mr Monti's speech: "The integration of European capital market infrastructures and competition law", SPEECH/02/614, December 5, 2002.

93. IP/03/1136, July 31, 2003.

The Commission contended that, contrary to Article 82 EC, Astra Zeneca concealed the date on which it first received its marketing authorisation for a product called *Losec*, used in the treatment of stomach ulcers and other acid-related diseases. As a result, Astra Zeneca obtained supplementary protection certificates for *Losec*, extending its patent protection. It is also alleged that Astra Zeneca switched *Losec* from a capsule formulation to a tablet formulation and requested national medicines agencies to de-register the market authorisations for the capsules, making it more difficult for generic producers to obtain marketing authorisations and for parallel importers to obtain related import licences.

Otherwise, we await events concerning the *Microsoft* and *Coca-Cola Cases*.<sup>94</sup> On *Microsoft*, the Commission indicated in the summer that it had sent Microsoft a further Statement of Objections.<sup>95</sup> The Commission's position was that Microsoft is leveraging its "overwhelming dominant position from the PC into low-end servers, the computers which provide core services to PCs in corporate networks". Otherwise, the Commission's position was that Microsoft's tying of Windows Media Player to the Windows operating system was unlawful. It appears that the Commission has also given Microsoft the opportunity to comment on proposed remedies. On the first alleged infringement, "core disclosure obligations" to allow interface by rival vendors of low-end services are being considered. On the second alleged infringement, there is discussion of untying Windows Media Player from Windows or requiring Microsoft to offer competing media players (a so-called "must carry" provision). The hearings were set for early November.<sup>96</sup>

## Current policy issues

Table 9: Current policy issues

- Liberal professions:
  - Vienna study;
  - key restrictions: prices, advertising (and more?);
  - persuade greater action because of public regulation?
- Liner conference block exemption:
  - can the Commission convince the Member States to review it?
  - not clear;
- Modernisation of Art.82 EC:
  - more movement on Art.81(3) EC than the concept of abuse.

## Liberal professions

The Commission is continuing to advocate more competition for liberal professions. At the end of last year, the Commission engaged the Institute of Advanced Studies in Vienna to study facts concerning the regulation of *lawyers and notaries, architects and engineers, auditors and accountants, and medical practitioners and pharmacists* in the European Union. The consultants were also asked to do a representative cost-benefit analysis of the regulation of some professions.

During the year, the Commission has explained its position more clearly. Put shortly, it appears to be that variations in the degree of regulation in different Member States show that *some* restrictions in some Member States are disproportionate and not objectively justified. If removed, they may expand the market for the services concerned.<sup>97</sup>

Just recently, in October 2003, the Commission has released the results of the Vienna Study on the Commission's website and held a conference on the subject of the regulation of professional services. Among other things, it has published a list of the key restrictions for each profession in different Member States and has suggested that, through Arts 10 and 81 EC and the *Italian Matches case*, there may be ways to push change further.

These issues need careful evaluation. Many rules reflect consumer interests, *as well as* those of the professionals concerned. Many rules also reflect value judgments concerning objective justifications for the rules concerned, or economic assessments which may also be quite valid. After *Wouters*, it is also clear that national variations may be allowed.

While one can understand what the Commission is doing to advocate competition in services, one should therefore not infer too easily from comparative studies that any evaluation of relative standards must be to the least demanding standard. On the other hand, there may be a case for modernisation of *some rules*, allowing for increased competition.

The Commission's idea now appears to be to persuade *the Member States* that some liberalisation of these areas would be beneficial, even though there may be recognised grounds for specific (often self-) regulation of the professions concerned. The Commission appears to be targeting pricing and advertising restrictions first. A key point is that many restrictions stem *from national legislation*, as opposed to private agreements.<sup>98</sup> It is likely to be a lively debate for some years to come.

94. Reuters, February 11 and June 19, 2003.

95. IP/03/1150, August 6, 2003.

96. It appears a new complaint against Microsoft was also filed this spring, in relation to its Windows XP system: Reuters and *New York Times*, February 11, 2003.

97. Speech by Mr Monti to the German Federal Bar Association (*Bundesanwaltsskammer*), March 21, 2003, SPEECH/03/149, available on the Commission's website and as IP/03/420, March 21, 2003.

98. 2002 EC Commission Competition Report, paras 197–209.

This has been coming for some time, flanked by some EC and national competition decisions, notably in the United Kingdom and the Netherlands.

## Review of liner conference block exemption<sup>99</sup>

In March 2003, the Commission published a Consultation Paper on the justification for a continued block exemption for liner conferences,<sup>1</sup> contained in Regulation 4056/86. Since then, various responses have been posted on the Commission's website and the Commission has continued to advocate that the liner conference block exemption should be reviewed.

Essentially, the Commission argues that:

- The exemption is too generous, in so far as it allows horizontal price-fixing and limitation of output, and is unlimited in time;
- it is now some 16 years old and “[un]like wine there is no evidence that block exemptions improve with age”.<sup>2</sup> In other words, market conditions may have changed;
- the benefits therefore need to be specifically justified, showing that there are not less restrictive solutions (following an approach, the Commission has also applied to other block exemptions recently).

The Commission also notes that with Regulation 1/2003, the possibility for further individual exemptions has ended.

Against this, one may note that like Regulation 26/62 for agriculture, this block exemption *is* a special case, since it was adopted to supplement the rules of the UNCTAD Code of Conduct for liner conferences. In other words, part of the reasoning behind the exemption was *trade* considerations in transport, which may still be live issues.

Equally, there is extensive debate on the benefits of the stability given to the trades concerned. As the Commission has predicted, there is now likely to be a protracted debate, not least because the liner conference block exemption is embedded in a *Council* Regulation, so again the Member States must be *convinced* to change.

## Modernisation of Article 82 EC enforcement

Ideas have been aired this year to modernise Article 82 EC.<sup>3</sup> It is an interesting thought, because so much of Commission modernisation is about moving to

more effect-based assessments. US lawyers have also advocated closer parallels to US law. On the other hand, the European Court has maintained its case law on the concept of abuse, focusing on rules operating in markets “weakened by dominance”, in cases such as *Michelin*. (The Court has also rejected claims that US law would give different results as not relevant.)

It appears as a result that more reflection is required on how usefully to modernise *the abuse concept* in the European context. In the meantime, as noted above, the Commission appears to be emphasising that *Article 81(3) EC clearance can be used by the dominant*—in the IP Guidelines, the draft Guidelines on Article 81(3) EC and cases like *Interbrew*.

## Areas of specific interest

*Table 10: Competition and gas supply*

- Danish gas supply—joint marketing ended and gas to new customers
- Further *Marathon* settlements:
  - improved access to pipeline capacity;
  - entry and exit fees, not contractual paths;
- Gazprom:
  - territorial restrictions removed and “Italian” gas to third parties?

## Competition and gas supply

### “Acceleration Directive”

In November 2002, the EU Member States reached political agreement on the so-called “Acceleration Directive” to increase liberalisation in the electricity and gas sectors.<sup>4</sup> The main points are:

- Market opening for all *non-domestic* gas and electricity customers from July 1, 2004, and for *all other customers*, including private households, from July 1, 2007;
- reinforced universal service obligations;
- legal and functional unbundling for transmission system operators as of July 1, 2004 (phased to July 1, 2007 for distribution system operators);
- regulated third-party access for transmission, distribution and liquefied natural gas facilities. For storage, EU Member States can choose between regulated and negotiated third-party access regimes;
- regulatory authorities to be established for network access tariffs.

99. With thanks to Oleh Malskyy for his assistance with this section.

1. On the Commission's website.

2. Speech by Mr Monti, June 12, 2003, SPEECH/03/294, available on the Commission's website.

3. See n.53, above.

4. IP/02/1733, November 26, 2002.

## Danish gas supply

In April 2003, the Commission announced that, with the Danish Competition Authority, it had settled an investigation into the *joint marketing of North Sea gas by the Danish Underground Consortium* (“DUC”) composed of A.P. Moeller and Chevron Texaco.<sup>5</sup> The investigation started in July 2001. DUC argued that the arrangements were covered by the Specialisation Block Exemption. The Commission disagreed. Without prejudice to their position, the three DUC companies agreed to cease their joint marketing and to market their gas individually in future.

Moreover, they agreed to offer some 7 billion cubic metres of gas for sale to new customers over a period of five years starting January 1, 2005, or earlier if new gas volumes were available before then. This would amount to some 1.4 billion cubic metres per year, *i.e.* 17 per cent of the total production of the DUC parties.

The investigation also concerned certain gas supply agreements between the DUC and DONG, the incumbent Danish gas supplier. It appears that there were gas sales agreements between DONG and each of the DUC partners. Through these agreements, they satisfied Danish demand and supplied additional volumes to Sweden and Germany.

Certain provisions have now been terminated:

- A provision obliging DONG to report to the DUC the volumes sold to certain categories of customers in order to obtain a discount or special prices;
- an obligation imposed on the DUC partners to offer all their future gas finds first to DONG. Here, DONG has committed *not* to buy the volumes dedicated by the DUC partners to new customers, and not to buy any new DUC gas from April 2003 until three years after the start of a new pipeline which is being built to link the Danish gas fields with the existing infrastructure to the European continent. The pipeline is expected to be operational by January 1, 2005 at the latest;
- a so-called “necessary adjustment mechanism”, under which DONG claimed the right to reduce the amount of gas it would buy from the DUC partners if they started to sell gas onto the Danish market. DONG argued that it needed this as protection for its “take or pay” obligations in the agreements. The competition authorities accepted this as long as DONG had limited connection possibilities to sell gas outside Denmark. However, DONG agreed to waive the provision six months after the new pipeline starts.

DONG has also agreed to introduce an improved access regime for its off-shore pipelines linking the Danish gas fields to Denmark.

The competition authorities state that they expect this commitment to facilitate competition in Denmark and also in countries such as the Netherlands and Germany.

## Further *Marathon* settlements

In April and July 2003, the Commission announced that it had continued with the *Marathon Case*, and had settled with *Gasunie* and *BEB* (having settled the case with Thyssengas in November 2001).<sup>6</sup>

The case concerns the alleged joint refusal to grant access to continental European gas pipelines by a group of five European gas companies. The Norwegian subsidiary of the US company Marathon complained. There does not appear to be a live issue with Marathon after an out-of-court settlement, but in practice the parties have amended the underlying practices related to the dispute in order to settle the Commission proceedings.

Stating that the Commission had worked closely with the Dutch energy regulator, *Dte*, the Commission indicated that it was closing the case against *Gasunie* after several commitments. These are that *Gasunie* will:

- Publish on its website the contracted transport capacity *at all entry and all major exit points* of its gas network, improving transparency as to available transmission capacity;
- introduce an online balancing system to avoid high prices for gas supplied by *Gasunie* because of an unexpected increase/or decrease by one of its customers; and
- improve handling of access requests through online screen-based booking procedures which are particularly relevant for short-term trading.

Furthermore, *Gasunie* has undertaken to offer to link other pipelines to its own system. It appears that *Gasunie* has already improved its access regime through various measures, including short-term transport contracts for one day, and a so-called “*entry/exit system*” to deal with “fictitious” transport of gas (which enters the system but is not actually transported, other gas being taken off elsewhere to supply the order in question). Under the system, shippers only have to book capacity at entry and exit but do not have to pay for gas transport according to so-called “contractual transport paths” which may not coincide with the physical gas flows.

5. IP/03/566, April 24, 2003.

6. IP/03/547, April 16, 2003; IP/03/1129, July 29, 2003; [2003] I.C.C.L.R. 111.

The commitments will remain in place until January 2007.

As regards *BEB*, the position is fairly similar. *BEB* is owned by ExxonMobil and Shell. Marathon sought access to its Northern German pipeline network, which was refused. To settle the proceedings, *BEB* has undertaken to:

- Publish on its website available transport capacity at all entry and major exit points of its transmission network, *as well as availability of storage capacity*;
- introduce an online balancing system and a bulletin board for shippers to co-operate on transport and storage. *BEB* will also allow companies to use its storage facilities in defined circumstances;
- offer online screen-based booking procedures;
- apply a “use it or lose it” principle for transport capacity reservations of its own gas trading branch (so that others can use it as appropriate) and to allow customers to lease or sub-lease capacity; and
- introduce an entry/exit regime similar to that for Gasunie. Prices no longer relate to “contractual paths”. Apparently, *BEB* has also agreed to consider extending the system throughout Germany (presumably if other adjacent pipeline operators agree).

The commitments will remain in place until January 2007. Apparently, the *Marathon case* is continuing for two more operators.

#### **Territorial restrictions—Nigeria and Gazprom**

In December 2002, the Commission closed its investigation into the *European gas supply agreements of the Nigerian gas company NLNG*.<sup>7</sup> The Commission was concerned about territorial sales restrictions and other barriers to onward intra-EU sales. It is not clear from the Commission’s Press Release what the Commission found, other than a territorial sales restriction in one agreement. (It appears that NLNG is the second largest supplier of liquefied natural gas (“LNG”) to Europe, with some 5 billion cubic metres of gas shipped every year to customers in Italy, Spain, France and Portugal.)

NLNG has agreed:

- To release the customer bound by the territorial sales provision and not to introduce such provisions in future supply agreements;
- not to introduce use restrictions in future supply agreements (preventing buyers from using gas for purposes other than those agreed); and
- that the agreements do not include profit-splitting mechanisms, whereby if gas is sold

7. IP/02/1869, December 12, 2002.

across borders or for uses other than those agreed upon, then the supplier receives a share of the profits (and not to introduce such provisions in the future).

In October 2003, the Commission announced a settlement in its long-standing case against the territorial restrictions in the *gas supply agreement between the Russian gas supplier Gazprom and the Italian gas supplier ENI*.<sup>8</sup>

As regards the agreement concerned, the companies agreed to delete the territorial sales restrictions from their existing long-term gas supply agreements and not to introduce such clauses in new contracts. They also agreed to delete a provision which obliges Gazprom to obtain ENI’s consent when selling gas to other customers in Italy.

In addition, ENI has agreed to offer significant gas volumes to customers outside Italy over five years. If ENI does not sell enough by a defined date, it is to organise an auction for certain gas volumes at Baumgarten on the Austrian–Slovakian border where Russian gas is delivered to a number of European customers. ENI also agreed to increase capacity on the Trans-Austria Gazleitung (“TAG”) transit pipeline and offer an improved third-party access regime on the pipeline.

#### **Telecoms—leased-lines sectoral enquiry**

In December 2002, the Commission closed its sectoral enquiry into leased lines, on the basis that the issues relating to high prices and possible discrimination were now being addressed.<sup>9</sup> Notably, the Commission found that leased-line prices had considerably decreased and that national regulatory authorities were being more proactive. The Commission closed its specific investigations in Belgium and Italy, but has kept them open (together with pressure on the parties to reduce prices) in Spain, while “closely monitoring” the situation in Portugal and Greece.

#### **Sport and media**

For reasons of space, the author does not propose to go into the details of *sport* in the paper this year. However, the author will just note the main events for those following it:

- The Commission opened proceedings against the *joint selling of media rights concerning the English Premier League* in December 2002.<sup>10</sup>

8. IP/03/1345, October 6, 2003.

9. IP/02/1852, December 11, 2002; EC Commission 2002 Annual Report, paras 101–103.

10. IP/02/1951, December 20, 2002.

- In May 2003, the Commission closed its investigation into *Audiovisual Sport* after Sogecable and Telefonica's Via Digital merged.<sup>11</sup>
- In the same month, the Commission indicated that it had cleared *ticketing arrangements for the Olympic Games* in Athens in 2004.<sup>12</sup>
- The Commission has adopted a decision exempting the *joint selling arrangements of UEFA for the media rights to the Champions League*,<sup>13</sup> and has published a Notice

- proposing clearance of the *joint selling of the media rights to the German Bundesliga*.<sup>14</sup>
- In October 2003, the Commission indicated that it was ceasing monitoring of the *FIA/Formula One* settlement.<sup>15</sup>

Finally, in the spring of 2003, the Commission indicated that it was investigating whether *Hollywood film studios and European pay-TV* have been colluding to fix the prices and terms for movie rights distributed in the European Union.<sup>16</sup>

11. IP/03/655, May 8, 2003.  
12. IP/03/738, May 23, 2003.  
13. IP/03/1105, July 23, 2003.

14. IP/03/1106, July 24, 2003; [2003] O.J. C261/13. There are also recent speeches on these issues on the Commission's website by Herbert Ungerer, Jurgen Mensching and Miguel Pereira.  
15. IP/03/1491, October 31, 2003.  
16. *Financial Times*, January 15, 2003.

