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Major Events and Policy Issues in EC Competition Law 2003-2004 Part 2

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Abstract

This paper is the second and final part of the overview of "Major Events and Policy Issues in EC Competition law in 2004", following from last month's journal. This part of the paper is divided into three sections: (1) Recent Commission decisions on cartels, co-operation, distribution and abuse of dominant position, including notably the Microsoft decision; (2) an outline of current policy issues, including possible extension of in-house privilege and possible Art.82 EC guidelines; (3) a survey of some areas of particular interest.Notably, the Commission's recent drive topromote cempetition in the liberal professions with a decision involving Belgian Architects; recent energy cases; and the Commission's decision on the sale of UEFA's football media rights.

Major Events and Policy Issues in EC Competition Law, 2003–2004 (Part 2)

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This paper is the second and final part of the overview of "Major Events and Policy Issues in EC Competition law in 2004", following from last month's journal.[1] This part of the paper is divided into three sections:

(1) Recent Commission decisions on cartels, co-operation, distribution and abuse of dominant position, including notably the *Microsoft* decision;
(2) an outline of current policy issues, including possible extension of in-house privilege and possible Art.82 EC guidelines;
(3) a survey of some areas of particular interest. Notably, the Commission's recent drive to promote competition in the liberal professions with a decision involving *Belgian Architects*; recent energy cases; and the Commission's decision on the sale of UEFA's football media rights.

Commission Decisions

Cartels (see Table 1)

There has not been quite the same level of fining decisions this year as last. Two "old" decisions which have been published this year merit some comment: *Austrian Banks* and *Methylglucamine*. Otherwise, there have been eight decisions announced, ranging in sector from copper tubes supply to architects' services and tobacco purchasing. It is proposed to outline the new cases first and then point out some aspects of the "old" decisions. The *Belgian architects* case is discussed in the section on areas of particular interest below, together with the Commission's recent action on competition and the liberal professions.

It may be useful to note at the outset there is now no "cartel unit" as such. Rather, enforcement of Art.81 EC, including cartels, has been reorganised on an industry basis within DG COMP (as was the case some years ago).

The Commission also now publishes (i) press releases; (ii) short case summaries (in the EC Official Journal); and (iii) full decisions in the language of the case and the official Commission languages on its website. This appears to be a result of the new Enlargement, bringing yet more languages into the EU.

Those concerned with worldwide cartels should also be aware that the US rules have changed to allow an amnesty applicant to limit its exposure to single instead of treble damages under certain conditions.[2]

Table 1

	Total Fines	Highest fines(s)
Carbon and graphite products:	€101	Carbone Lorraine was fined €43.05
Organic peroxides:	€70	Atofina was fined €43.47
Industrial tubes:	€79	KME Group companies fined a total of €39.81
Belgian architects:	€0.1	
Copper plumbing tubes:	€222.3	KME Group companies fined a total of €67.08
French beer:	€2.5	Danone €1.5
Spanish raw tobacco:	€20	Deltafina €11.88
Needles and haberdashery:	€60	Coats and Prym €30 each
	€554.9	**(All figures are € million)**

N.B. — Credit for evidentiary contribution outside leniency (2002 Notice principle applied in 1996 Notice cases also).
— Issue of responses to requests for information in *Austrian Banks* decision also.
— "Treuhand" consultant firm fined in *Organic Peroxides.*

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1. [2005] I.C.C.L.R. 47

2. See, Wilmer Cutler Pickering Hale and Dorr Antitrust and Competition Law Update, June 2004 available at *wilmerhale.com.*

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Carbon and graphite products

In December 2003, the Commission imposed fines of some €101 million on five companies for operating a cartel in the market for electrical and mechanical carbon and graphite products. Electrical carbon and graphite products are used mainly to transfer electricity to and in electrical motors.[3] Mechanical carbon and graphite products are used to seal gases and liquids in vessels and to keep low-wear parts in machines lubricated.

The EEA-wide market for such products was found to be worth some €291 million in 1998, the last year of the infringement (interestingly, here the Commission identified the market as *including* the value of *captive* use). The infringement was treated as "very serious".

The cartel operated between October 1988 and December 1999. During this period the companies, which were found to control 93 per cent of the European market, held more than 140 meetings to decide price increases for a broad range of products, as well as for large individual customers.

Although during the same period some of the companies were participating in two other cartels, graphite electrodes and speciality graphite, which have also been found and punished, the fines imposed were not increased for this, because the collusive behaviour was broadly contemporaneous.

The Commission reduced the fine that would otherwise have been imposed on SGL by 33 per cent, because it had already imposed high fines on SGL in the previous two cartels and because the undertaking was in a difficult financial situation (although the Commission did not otherwise accept SGL's submission on inability to pay).

The fines, after reductions for co-operation in most cases, ranged from €43 million on Le Carbone Lorraine to €1 million on Conradty Nürnberg, with Morgan Crucible receiving full immunity for having been the first company to report the cartel to the Commission.

Organic peroxides

In December 2003, the Commission imposed fines of nearly €70 million on five companies for operating a cartel in the market for organic peroxides, chemicals used in the plastic and rubber industries.[4]

The Commission found that the cartel operated between 1971 and the end of 1999. With a total duration of 29 years, this made it the longest-lasting cartel with which the Commission has dealt so far. The cartel involved price-fixing and market-sharing in an EEA market worth some €250 million a year. The Commission found this to be a "very serious" infringement. The fines ranged from €43.47 million on Atofina to €1,000 on AC Treuhand, a Swiss consultancy company involved in the cartel administration.

The fines for Atofina, Laporte (now Degussa UK Holdings) and Peroxid Chemie were increased significantly for recidivism. Akzo was given full immunity (under the 1996 Leniency Notice) because it was the first to approach the Commission in early 2000 with decisive information on the cartel.

The decision to fine AC Treuhand is interesting, because normally such third-party service providers have not been penalised. Here, AC Treuhand is reported to have organised meetings, produced market share papers and reimbursed the travel expenses of participants to avoid leaving traces of illegal meetings, suggesting that its involvement went unusually far.

Industrial tubes

In December 2003, the Commission imposed fines totalling some €79 million on three companies for operating a cartel in relation to the supply of industrial copper tubes for air-conditioning and refrigeration.[5] The cartel was found to have involved allocation of markets and the setting of price targets and increases and other commercial terms in the framework of the Cuproclima Quality Association.

The cartel was operated between May 1988 and March 2001 in a market that the Commission estimated to be worth €290 million in 2000 (although the companies argue that much of that was just the cost of metal, which was not part of their unlawful co-operation, since its price was established on the London Metal Exchange).

The fines, after reductions for co-operation, ranged from €39.8 million on the companies now in the KME group to €18 million on Outokumpu. Outokumpu's fine was increased for recidivism, relying controversially on a decision under the ECSC Treaty related to stainless steel cold-rolled products. This is the subject of an appeal (as is the metal turnover aspect of the decision).

Mueller Industries was given full immunity for having approached and co-operated with the Commission first.

Interestingly in the case, which came under the 1996 Leniency Notice, the Commission also applied the principle in the later 2002 Leniency Notice, whereby a company's fine may be reduced for a specific evidentiary contribution. Here, in addition to 50 per cent for leniency co-operation, Outokumpu's fine was reduced some further 20 per cent for evidence disclosing the full duration of the infringement.

Copper plumbing tubes

In September 2004, the Commission imposed fines totalling some €222.3 million on some eight groups

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3. IP/03/1651, December 3, 2003; O.J. L125/45, April 28, 2004 (summary).
4. IP/03/1700, December 10, 2003.
5. IP/03/1746, December 16, 2003.

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of companies for operating a cartel in the European market for copper water, heating and gas tubes.[6] The cartel was found to have operated between June 1988 and March 2001, in a market which the Commission estimated to be worth some €1.15 billion in 2000. This was a similar infringement to that involving industrial tubes and was contemporaneous with it, this time revolving around a quality mark called SANCO.

Fines, after leniency, ranged from €67 million on the companies now in the KME group to €9 million on Halcor. Again Mueller Industries was granted full immunity for having approached the Commission first. Outokumpu's fine was again increased for recidivism, based on the earlier ECSC infringement.

French beer

In September 2004, the Commission also imposed small fines totalling €2.5 million on the two main brewery groups in France: Danone/Brasseries Kronenbourg S.A. and Heineken N.V., for having agreed to "balance" the "Horeca" markets between the two groups.[7]

It appears that a so-called "armistice" agreement was entered into by the parties in 1996, after an "acquisition war" during which each group had been buying up drinks wholesalers, leading to an inflation in the acquisition costs of such wholesalers.

The companies are reported to have agreed to bring an end to such rising costs and to "balance" their integrated distribution networks. This meant that they agreed (a) to a temporary acquisition stop; (b) to the "balancing" of the *total volume of beer* distributed through the integrated network of each party; and (c) to the "balancing" of the volume of beer *brands* distributed by each party on behalf of the other.

In setting the low fine, the Commission considered the infringement "serious" but took into account that the agreement was never implemented. However, the fine on Danone/Brasseries Kronenbourg was increased for recidivism (after the Belgian beer case).

Spanish raw tobacco

In October 2004, the Commission imposed fines totalling €20 million on five companies involved in raw tobacco processing in Spain, together with smaller fines of €1,000 on several tobacco growers' associations.[8]

The processing companies were found to have colluded on prices paid to and the quantities bought from tobacco growers in Spain. In other words, this involved a *purchasing* cartel, rather than a sales cartel. However, the tobacco *growers* were found to have engaged in collective price negotiations on their side also. They agreed on price ranges and minimum prices for negotiation of "cultivation contracts" with processors.

The infringements took place between 1996 and 2001 and were considered to be "very serious" breaches in a market of relatively limited size (€25 million per year). Deltafina, a company active also in Italy, was fined €11.8 million. The practices appear to have been influenced by the agricultural regulatory context, although the Commission states that the conduct "cannot be imputed" to the Common Market Organisation for Raw Tobacco. It is a little surprising to see a statement in the press release that this was "very serious", given the limited national scope and size of market.

Needles and haberdashery

In October 2004, the Commission announced that it had fined two companies, Coats Holdings and William Prym, €30 million each for operating a cartel in the needle market and for segmenting the European market for haberdashery products (needles, pins, buttons, fasteners and zips) between September 1994 and the end of 1999.[9] A third company, Entaco Group Ltd, received full immunity for disclosing the cartel to the Commission. The Commission states that Coats, one of the main distributors of such products in Europe, forced Entaco to enter into market-sharing with Prym at manufacturing level in exchange for protection of its own private label brand "Milward". This was found to be a "very serious" infringement, in a European market worth €1 billion in 2003. However, the cartel is said to have had limited impact.

Methylglucamine

The Commission published its decision in relation to methylglucamine in February 2004.[10] It may be recalled that the case related to a price-fixing and customer allocation agreement between Rhône-Poulenc Biochimie RPB (part of Aventis Pharma) and Merck, found to have operated between 1990 and 1999.

Methylglucamine is a product which is mixed with others to create a "contrast" agent used in x-rays in medical applications. The market in question is quite small, some €3.1 million per year (at least this was so in 1999).

The Commission granted Merck a 100 per cent reduction for coming forward first and co-operating under the 1996 Leniency Notice. RPB/Aventis were fined €2.85 million after a 40 per cent reduction for co-operation.

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6. IP/04/1065, September 3, 2004.
7. IP/04/1153, September 29, 2004.
8. IP/04/1256, October 20, 2004.
9. IP/04/1313, October 26, 2004.
10. O.J. L38/18, February 10, 2004. (The decision itself was taken in November 2002, see [2004] I.C.C.L.R. 55.)

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On the decision, it appears that the Commission relied much on Merck's explanations and admissions from both companies. The Commission suggests that there were a series of price increases by the two companies, generally after annual meetings to review the last year's performance. There was some debate about when the cartel ended and therefore who had been responsible for the termination. Ultimately, the Commission could not decide the issue and therefore took the last day for validity of clearly agreed prices as the end. Again, the Commission noted that proving the extent to which prices differed as a result of a cartel is extremely difficult, given the various factors which may apply.[11]

On fines, while finding the infringement "very serious", the Commission reduced the basic amounts considerably (to €2.5 million for each company) because of the limited size of the product market. The Commission *increased* the fine by 100 per cent on Merck on the basis of deterrence (academically because of the immunity granted), taking the view that the addressees on the Aventis side were in fact smaller than Merck (even though the Aventis group itself was much bigger). There appears to have been no increase for recidivism, even though Rhône-Poulenc had infringed before. There was a 90 per cent increase for duration.

Aventis also sought mitigation of its fine for having adopted a compliance programme. Unlike the position some years ago, this was rejected by the Commission. These days the credit given appears only to be for *results* leading to termination and/or leniency applications![12]

Austrian banks

The Commission published its decision in the "Lombard Club" banking case in February 2004.[13] It may be recalled that this was a decision relating to an extensive, widely-known structure of committees which had operated in Austria for many years.[14] The Commission fined eight banks some €124 million in June 2002. Various aspects of the decision are interesting.

First, originally the co-ordination arrangements concerned had been endorsed in law, apparently in part because there was concern that there were poor levels of profitability amongst the many banks in Austria. There is also debate as to the extent to which the authorities continued to be involved informally, with the Commission noting that certain committees "quite central to this network were not *as a rule* attended by the Austrian National Bank" (emphasis added).[15]

Secondly, the arrangements concerned agreements on various issues, notably interest rates for lending and deposits, and advertising measures. In particular, the Commission found that on occasion the banks would react in concert to a reduction in the National Bank's key lending rates by lowering deposit rates, without at the same time lowering lending rates.

Thirdly, the Commission found that there was a structure of committees dealing with different issues, with systems for higher level discussion and ultimately a group at the top called the "Lombard Club". The Commission also found that certain banks represented not only themselves in such committees, but also certain sectoral groupings (*e.g.* savings banks).

Fourthly, the Commission discussed in its decision a period from 1994 to 1998. However, Austria only joined the EU from 1995. Since the Commission's right to intervene was not clear for 1994 (it was argued that only the EFTA Surveillance Authority was competent) as regards activities in the EEA, the Commission did not find an infringement for that year.[16]

Fifthly, there is extensive treatment of the issue of effect on trade: the banks arguing, on *Bagnasco* and the *Dutch Banks cases*, that the effects were limited to Austria; the Commission arguing that such a comprehensive arrangement clearly affected trade.[17] In addition, the Commission also set out specific examples of the ways in which it considers trade was affected, some appearing more directly relevant than others. Thus, the Commission referred to cross-border payment transactions and foreign banks seeking to enter the Austrian market. However, the Commission also suggested that there was indirect impact on investment and production decisions of subsidiaries of foreign firms and Austrian firms in Austria, and that the ability of individuals to purchase imported consumer durables such as cars from other countries might be affected.

Sixthly, the Commission's approach to fining is unusual. The Commission selected a number of the larger banks, found to have played a more important role and, as noted, in some cases to have represented certain banking sectors. Fines were *only* imposed on these selected banks and appear to have been increased on those with such "representative" roles.[18] The infringement was also treated as "very serious" because of its "comprehensive and institutionalised" nature and the relevance of banking services to the whole economy.[19]

Seventhly, there is extensive discussion about the duty of companies to reply to requests for information and the related issue as to whether, if they give more than they have to, they should

11. See para.231.
12. See para.260.
13. O.J. L56/1, February 25, 2004.
14. See, [2003] I.C.C.L.R. at p.62.
15. See para.496.
16. See para.406.
17. See para.445 *et seq.*
18. See paras 516–519 and 538.
19. See paras 506–507.

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receive "co-operation credit" for so doing. As in *Graphite Electrodes*, the Commission considered that the banks were required to give the material facts of their involvement in meetings, and existing documents. (The Commission stated that here it relied entirely on pre-existing documents.) The banks argued that, insofar as this involves direct admissions, they do not have to answer such requests and, if they do, it is a voluntary act deserving a reduction in fine.[20] The Commission also rejected claims that a "joint exposition of the facts" had clarified the case, arguing that it was more of a defence document. In the end, the Commission only reduced the fines by 10 per cent, because the banks did not contest the facts set out in the Statement of Objections.

Co-operation

Table 2

- *Co-operation*
  - * Austrian *ARA/ARGEV*
    - Local collector exclusivity allowed, if public tendering.
  - * *Air France Alitalia*
    - Competitors required on key routes!
  - * "SOs" for *Cartes Bancaires* and *VISA*.
    - NB. GCB notification had "lapsed".
- *Distribution*
  - * Small fine on Topps for blocking parallel trade in *Pokémon* stickers.
  - * Proposed commitment decision for *Repsol* service station settlement.
    - Considerable market opening proposed.
    - N.B. Cumulative network effect and high market share.

Horizontal co-operation

There have been few full Commission decisions this year on horizontal co-operation. However, the Commission has published its decisions on the *German Network Sharing Agreement* between O_2 and T-Mobile[21] and the *Reims II* postal co-operation case.[22] These have been outlined before.[23]

National recycling schemes

The Commission has also published its decision clearing the Austrian "ARA" system for collection and recovery of packaging waste.[24] This system is operated by *ARA* ("Altstoff Recycling Austria") with various other companies. It may be recalled that in 2002, the Commission had published a rather complex Art.19(3) Notice indicating that it planned to grant negative clearance or exemption "possibly with conditions" to the Austrian system.[25]

Companies active in transport and sales packaging, which are obliged by Austrian law to take back any packaging they put into circulation and provide for a suitable disposal, can adhere to ARA, which is the main system for collection and recovery of packaging waste in Austria. They have to pay a "licence fee" and thereby also acquire the right to fix the "Green Dot" mark to their packaging. ARA has entered into "waste disposal contracts" with eight sectoral undertakings (called "branch" recycling companies, "BRGs") covering all sorts of packaging material for the entire Austrian territory. Each of these BRGs organises the collection and/or recycling of a specific type of packaging material (*e.g.* metal packaging, wood and ceramics, plastic and textile fibres, paper and cardboard, and glass). The BRGs do not carry out all of these tasks themselves, but contract with sectoral recycling companies and regional collection and sorting partners.

Various undertakings were given to ensure that the "Green Dot" system does not prevent free movement of goods[26] (as in other cases). Otherwise, in its 2002 Notice, the Commission had appeared concerned to promote *competition at the regional collection level*, by giving collectors, which are currently outside the ARA system, sufficient opportunity to compete for ARA business (under the ARA system there is just one regional partner *per* collection region).

Subsequently, in its 2003 decision, the Commission found that the exclusivity clauses binding BRGs to one collector (but not also the collectors to BRGs) *per* region for a five-year period infringed Art.81(1) EC, because they hindered market entry by other domestic and foreign collectors, which were not participating in the ARA system.

The Commission granted an Art.81(3) EC exemption, after finding that the existing network effects created by engaging only one collector per region lead to efficiency gains through economies of scale and scope.[27] Furthermore, it estimated that the relevant cost savings would be passed on to consumers on the market for the packaged products. It considered that three-year exclusivity could be accepted to allow the recycling companies to recover the substantial investments necessary to build up the collection infrastructure, while it was guaranteed that, after five years at the latest, new contracts would be awarded *via tendering* in a competitive, transparent and objective procedure.[28]

20. See paras 485 *et seq.* and paras 544 *et seq.*
21. O.J. L75/32, March 12, 2004.
22. O.J. L56/76, February 24, 2004. See, Gabathuler and Sauter, *EC Commission Competition Policy Newsletter*, Autumn 2003, p.43.
23. See, [2004] I.C.C.L.R. at p.61 and p.63.
24. O.J. L75/59, March 12, 2004.
25. O.J. C252/2, October 19, 2002, [2003] I.C.C.L.R. 88.
26. See para.139.
27. See paras 160, 270, 272.
28. See paras 139, 277.

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Interestingly, therefore, the Commission is accepting competition *by tender* for disposal area contracts at the latest every five years as sufficient residual competition for the fourth requirement of Art.81(3) EC,[29] acknowledging that it would be almost impossible in practice and in economic terms to duplicate collection infrastructure in the household sector across the whole of Austria.

The Commission granted an exemption from June 20, 1994 to December 31, 2006, on condition that BRGs in the ARA system would not hinder the *shared use* of collection facilities. Further, that the BRGs in the ARA system could only require disposal firms to provide evidence of packaging quantities corresponding to ARA's share of the total packaging licensed by recovery systems (the BRGs contested these obligations as impractical and unreasonable).[30] These obligations were considered necessary to safeguard access to the disposal infrastructure and, accordingly, competition on the market for collection and recovery of packaging waste.[31]

The exemption does not apply to ARA's charges system and any possible related cross-subsidising issue. The focus is rather on the underlying "macro" structure of such waste collection systems. The Commission also expressly noted that the decision is without prejudice to the application of Art.82 EC.

Air transport

In December 2003, the Commission cleared the alliance between *British Airways, Iberia and GB Airways*, a franchisee of British Airways.[32] The agreement, which was notified in July 2002 under Regulation 3975/87 enables the parties to co-operate in terms of pricing, scheduling and capacity. It was cleared after certain Commission concerns were met. Notably, the parties agreed to give up enough slots to enable one competitor to operate four daily services between London Gatwick and Madrid, and one further daily service between London Gatwick and Bilbao. The parties also undertook to surrender sufficient slots for one daily service out of Gatwick to Seville and for another to Valencia, if and when the number of business passengers increases to a defined level.

In December 2003, the Commission also published information on remedies proposed by *Air France and Alitalia* for their bilateral alliance.[33] Then, in April 2004, the Commission announced a decision clearing the alliance agreement between Air France and Alitalia.[34]

The two companies entered into a co-operation agreement in 2001, with the aim of creating a European "multi-hub system" based on their main airports of Paris Charles de Gaulle, Rome Fiumicino, and Milan Malpensa. The agreements involve, amongst other things, agreements on prices and the sharing of earnings on routes between France and Italy (and general network co-operation on pricing, scheduling and capacity). The companies notified the agreement to the Commission in November 2001 for exemption.

In general, the Commission was favourable (as in other recent alliance cases), recognising that consolidation is required in the European airline sector, that the two airlines had mainly complementary networks, that the alliance agreement improved connectivity, and that the co-operation created cost savings and synergies for the parties. However, as in other cases, the Commission has structural concerns over overlapping route services. Thus, the Commission identified seven routes where the combination of Air France and Alitalia would eliminate or significantly reduce competition (Paris-Milan, Paris-Rome, Paris-Venice, Paris-Florence, Paris-Bologna, Paris-Naples and Milan-Lyon) because, prior to the alliance, the two companies were the main competitors on these routes. After discussions, the two airlines agreed to mechanisms to "surrender" up to 42 pairs of slots *per* day, which would allow some 21 return flights.

The idea was that a new entrant would apply for slots under the existing IATA slot allocation system. If it cannot obtain them, then a new entrant can turn to the parties and seek slots, which the parties agreed to make available up to certain limits, at certain times and under conditions. The Commission will also be involved in the process, notably in assessing whether the new entrant is a sufficiently viable long-term competitor. The parties also agreed not to add new frequencies on a route where there was a new entrant for two years (save in exceptional circumstances).

Otherwise, the parties agreed to enter into interlining agreements with a new entrant, to "host" the new entrant in their frequent flyer programmes if required, and also agreed to enter into inter-modal passenger agreements at the request of rail or other surface or sea transport companies, to widen transport choices.

In announcing its decision, the Commission stated that, in practice, Air France and Alitalia might not have to surrender as many slots as foreseen, because slots had become available through the bankruptcies of airlines holding slots at Orly. Companies such as Volare, Easyjet and Meridiana were therefore offering services. However, the Commission added that if any actual competitor were to exit the market, Air France and Alitalia would have to make its slots available to other rivals in order to restore the level of competition sought by this decision.

29. See paras 278 *et seq.*
30. See paras 288 *et seq.*
31. See paras 288 *et seq.*
32. IP/03/1703, December 10, 2003.
33. IP/03/1676, December 9, 2003; O.J. C297/10, December 9, 2003.
34. IP/04/469, April 7, 2004.

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As with the *Austrian Airlines/Lufthansa* decision, it appears therefore that the Commission is taking the ongoing maintenance of competition seriously in its remedies in this sector. The clearance was granted for six years from November 12, 2001.

Credit card systems

In July 2004, the Commission sent a Statement of Objections to nine major banks and to the French *Groupement des Cartes Bancaires* "GCB".[35] The objections relate to an alleged agreement on bank payment cards by means of which the banks, with the help of Groupement des Cartes Bancaires, are alleged to have shared out the market for the issue of CB cards in France in order to restrict competition from new entrants, such as banking arms of large retailers and medium-sized banks.

At the end of 2002, GCB, an economic interest grouping under French law comprising some 155 banks, notified the Commission on behalf of its members of the introduction of new, higher, complex charges payable to GCB by banks issuing CB cards.

The Commission appears to have formed the view that the notified agreements stemmed from a secret agreement to foreclose the market to new entrants and stated that it found evidence thereof, during inspections in May 2003 on the premises of GCB and of certain banks.

It is alleged that the tariffs adopted by GCB raised new entrance charges for CB cards and forced them to scale down their card-issuing projects considerably. Interestingly, the Commission specifically suggests that the agreement increased their costs by up to €23 per card and per year, and that this charge was passed on to consumers. Moreover, it is alleged that the banks party to the agreement were spared the new charges, and benefited from them, since the charges paid by new entrants accrued to them.

This appears to be an interesting "Regulation 1/2003 development" since, from May 1, 2004, presumably GCB's notification expired and it therefore no longer has immunity from fines. It will be interesting to see whether the case develops further or the banks adequately explain what was going on.

In August 2004, the Commission also sent VISA a Statement of Objections[36] concerning a rule in the Visa International by-laws according to which the VISA International Board shall not accept for membership any applicant deemed by the Board to be a competitor of VISA. The Commission was concerned that this rule has not been applied in an objective and non-discriminatory manner *vis-à-vis* all applicants for VISA membership. Notably, it appears that in April 2000 Morgan Stanley Dean Witter complained that it was denied VISA membership, apparently because it operates the "Discover" brand credit card, while others, such as Citigroup (which owns Diners Club), some Japanese banks (which are shareholders in the JCB system) and Cetelem (which operates the Aurora payment card network) are allowed. The Commission also notes that Mastercard does not operate a similar rule. There have been investigations on similar issues before.[37]

According to the Commission's preliminary assessment, this VISA rule implies that potential entrants would not be able to operate on the VISA network *anywhere* in the EEA, restricting competition for merchant acquiring. In addition, being refused VISA membership is thought to prevent potential new entrants from engaging in *cross-border* acquiring.[38]

Collective licensing of music copyrights

On May 3, 2004, the Commission sent a Statement of Objections to 16 organisations which collect royalties on behalf of music authors, stating that their co-operation agreement (known as the "Santiago Agreement") was potentially contrary to the EC competition rules.[39]

The Commission stated that the cross-licensing arrangements which the collecting societies have between themselves lead to an effective lock-up of national territories, transposing into the internet the national monopolies which the societies traditionally have held otherwise. The Santiago Agreement was notified in April 2001. Then, it was stated that the purpose of the agreement is to allow each of the participating societies to grant to online commercial users "one-stop-shop" copyright licences, which include the music repertoires of all societies and which are valid in all their territories.

While supportive of that purpose, the Commission considered that the structure put in place by the parties results in commercial users being limited in their choice to the monopolistic collecting society established in their own Member State. The Commission considered that the developments in online activities should be accompanied by an increasing freedom of choice by consumers and commercial users throughout Europe as regards their service providers. Notably, the Commission considered that the *territorial exclusivity* afforded by the Santiago Agreement to each of the participating societies was not justified by technical reasons

35. IP/04/876, July 8, 2004.
36. IP/04/1016, August 3, 2004.
37. See [1997] I.C.C.L.R. 41.
38. In May 2004, the Commission also issued a Press Release welcoming VISA and Mastercard's decisions to publish their multilateral interchange fee rates for European cross-border payments on their respective websites, after discussions with the Commission on the issue. It appears that retailers have been complaining that banks are reluctant to give them the information. IP/04/616, May 7, 2004.
39. IP/04/586, May 3, 2004.

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and is irreconcilable with the worldwide reach of the internet. It also noted that territorial exclusivity was not required in the *IFPI Simulcasting Agreement* which the Commission exempted in 2002.[40]

The date of this Statement of Objections suggests that this is another "Regulation 1/2003 development" since the societies' notification has now lapsed.[41] Again, this is only a preliminary phase and we will have to see how the societies justify the territorial provisions in the circumstances.

Telenor Canal+

In January 2004, the Commission announced in a short press release that it exempted for five years certain exclusive distribution agreements between Telenor and Canal+ Nordic, under which Telenor will have the exclusive right to distribute Canal+ Nordic's premium pay-TV channels in the Nordic region through its satellite television platform Canal Digital.[42]

The agreements were concluded in 2001, in order to guarantee continuity of pay-TV service after Telenor acquired the remaining 50 per cent shareholding in Canal Digital from Canal+ Nordic. Previously Canal Digital was a joint venture between Canal+ Nordic and Telenor. The agreements as initially notified included a long-term exclusivity, which the Commission considered anti-competitive. The Commission stated that it decided to exempt the co-operation after the parties agreed to limit the exclusivity to a shorter period. The Commission noted the presence of a second satellite pay-TV distributor in the Nordic region, MTG/Viasat, and that consumers would have available two distinct pay-TV brands at competitive prices.

Distribution

Porsche

In May 2004, the Commission cleared *Porsche's new distribution and after-sales network*, after Porsche committed to revise its agreements so as to comply with the new Motor Vehicle Block Exemption ("MVBE").[43] Porsche has opted for a selective distribution system, as have almost all the other car manufacturers.

As regards Porsche's *distribution network*, dealers are now free to provide after-sales services directly, or to sub-contract them to an authorised Porsche service centre.

The Commission found that the network is "*de minimis*", as Porsche's market shares in the relevant markets for car distribution are below five per cent in each EU Member State. As a result, Porsche is allowed to include certain restrictive clauses listed in Art.5 of the MVBE, as not appreciable in the specific circumstances and outside Art.81(1) EC.[44] In particular, Porsche is allowed to impose a "non-compete" clause requiring dealers to sell competing car brands through separate showrooms and sales personnel, as well as to prohibit dealers from opening secondary outlets even beyond October 1, 2005 (when such "location clauses" generally will not be capable of exemption under the MVBE).

As concerns its *after-sales network*, Porsche could only opt for a *qualitative selective* system, as it has more than 30 per cent of the Porsche car repair market. Based on this system, the Porsche official network is now open to any independent repairers who fulfil the required *qualitative* criteria.

However, Porsche service centres are not allowed to sell competing brands of sports cars and sport utility vehicles, such as Aston Martin, Audi, BMW, Jaguar, Lamborghini, Land Rover, Mercedes or Volkswagen (Touareg). The Commission authorised this non-compete clause, as it found that it only affects some eight per cent of operators in the car business and therefore the Commission considered that it was not an appreciable restriction on the market for the repair of Porsche cars. Moreover, the restriction did not apply to Porsche dealers who may also have a repair workshop or to independent or authorised car repairers.

Pokémon stickers and cards

In May 2004, the Commission fined Topps, a group of companies which produce *Pokémon stickers and cards*, some €1.6 million for seeking to prevent imports from low-price to high-price countries for cards and sweets bearing the image of Pokémon cartoon characters.[45]

The Commission has found that Topps entered into a series of agreements and/or concerted practices with several of its distributors in the United Kingdom, Italy, Finland, Germany, France and Spain with the objective of preventing parallel imports. It appears that in 2000, Topps charged its distributors up to 243 per cent more in Finland than in Portugal. The EEA market was estimated to be worth €600 million in 2000. Distributors which would not trace back parallel imports and monitor

40. O.J. L107/58, April 30, 2003 and [2003] I.C.C.L.R. 89.
41. In November 2003, the Commission also published a notice inviting comments concerning the *Cannes Extension Agreement* on the administration of phonomechanical rights in Europe, O.J. C282/14, November 25, 2003.
42. IP/04/2, January 5, 2004, see also [2004] I.C.C.L.R. 61 and Nehl *EC Commission Competition Policy Newsletter*, Summer 2004 at p.56.
43. IP/04/585, May 3, 2004. With thanks to Flavia Distefano for her assistance.
44. See the Explanatory Brochure to the MVBE ("Distribution and Servicing of Motor Vehicles in the European Union") of July 2002, Commission response to Question 7, at p.23.
45. IP/04/682, May 26, 2004.

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the final destination of the products were threatened with supply cuts.

The Commission states that it set the overall fine at (only) some €1.6 million, taking into consideration the short duration of the infringement and the fact that it was terminated immediately after receipt of a warning.

Repsol

In October 2004, the Commission published an "*Art.27(4)*" Notice in relation to Repsol's motor fuel distribution practices through service stations situated in Spain.[46] This is another "Regulation 1/2003 development", insofar as it is a notice indicating that, subject to market testing, the Commission is planning to take a decision declaring commitments binding under Art.9 of Regulation 1 and inviting comments on such proposed action.

After notification of agreements and model contracts by Repsol in December 2001, the Commission found in March 2002 that Repsol's distribution practices involving non-compete clauses for the party to the agreement which operates at the lowest level of the distribution chain, could fall within the scope of Regulation 17 and invited interested parties to submit their possible observations.[47] Then, in June 2004, the Commission decided to initiate proceedings with a view to adopting a decision pursuant to Art.9 of Regulation 1/2003.

The notified agreements concern the exclusive purchase of fuel by service station operators in Spain and are of eight different categories depending on the type of tenure of the service station and on the nature of the commercial relationship between Repsol and the service station operator. Repsol was found to have market shares ranging between 35 per cent and 50 per cent on the fuel *wholesale* markets for petrol and diesel in Spain, and similar shares on downstream market for retailing of fuel in Spain.

The Commission considered three issues: (a) the distinction between agent and retailer in EC competition law, (b) clauses relating to the setting of a maximum fuel retail price, and (c) non-compete clauses for fuel, which might foreclose the market.

As regards agency issues, the Commission does not appear to have concluded whether the agents are independent traders or not (in terms of taking commercial or financial risk or not). However, the Commission considered that, "whatever the agent's situation in the light of these criteria, the non-compete clauses ... may be problematic owing to the effects on inter-brand competition",[48] notably, if they lead to market foreclosure. As regards maximum pricing, the Commission was not concerned, since agents were free to grant discounts.

With regard to maximum prices, most of the notified agreements prohibit service station operators from selling fuel at a price higher than the maximum set by Repsol. On the other hand, operators are free to grant discounts. In some cases Repsol simply recommended a retail price and left it to the operators to set the actual price. Since its investigation did not reveal any indications that the setting of maximum prices might create significant alignment effects, there was nothing to suggest a restriction of intra-brand competition.

As to the non-compete clauses, which only cover fuel and not other products intended for sale through service stations, the Commission found that the agreements might facilitate significantly foreclosure on the fuel retail market in Spain. Non-compete clauses were found in more than 2,500 agreements, mainly for a duration of some five years. Where Repsol owned the outlet, the "usufruct" or tenancy arrangement included non-competes ranging from 25 to 40 years.

Due to significant vertical integration of operators, cumulative effects of the parallel networks of vertical restraints, and difficulties arising because of the saturation of the market and the nature of the product, the market was accessible only with difficulty by competitors.[49] In this context the Commission considered that the tied share of Repsol's sales was some 25–35 per cent, the non-compete obligations were of substantial duration, and service station operators and final customers were weak in comparison with suppliers such as Repsol which had a substantial market share.[50]

Repsol proposed the following commitments, to remain valid until May 31, 2010:

- To offer service station operators, with usufruct or tenancy rights with only some 12 years left to run, the option to "buy back" the right *in rem* before the scheduled expiry of their agreements.
- To observe a five-year maximum duration for new fuel distribution agreements with operators where it is not the owner of the service station concerned.
- Not to buy existing service stations which are not already tied to its network outright from their operators until the end of 2006.
- To advertise in advance the expiry of fuel distribution agreements with service stations and the option to terminate in advance agreements involving rights *in rem* via a communication to the Ministry of Economic Affairs made public on the Ministry's website.

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46. O.J. C258/7, October 20 2004, on "Article 9 commitments" see MEMO/04/217, September 17, 2004.
47. O.J. C70/29, March 19, 2002.
48. See para.17.
49. See para.23.
50. See para.24.

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- A third-party (auditor) to draw up annual reports for the Commission to verify compliance by Repsol with the commitments.

The Commission has announced its intention to adopt a commitment decision accepting these undertakings, finding that Repsol's commitments provide a "practical response to its concerns about the foreclosure effects on the Spanish market". The Commission considered that the commitments would increase the number of outlets open to change supplier from 140–160 service stations *per* year, to more than 400 *per* year. Agreement durations are also considerably shortened and a temporary restraint on Repsol's vertical integration is introduced. The Commission considered that this gives new opportunities for competitors to attain the minimum number of outlets necessary for the economic operation of a distribution system in the sector.

It is an interesting development because there is a lot behind this, above all a cumulative network foreclosure assessment in a case where the supplier has high market share (*i.e.* is above the Vertical Restraints Block Exemption ceilings).

Articles 82–86 EC

Table 3

— *Microsoft*
- * €497 million fine for:
  - (i) bundling of Windows and Media Player; and
  - (ii) refusal to supply inoperability specifications for server operating systems.
- * "Exceptional" grounds for disclosure even if IP protected.
- * Sophisticated 300-page decision (already appealed).

— *Coca-Cola*
- * Proposed commitments on exclusivity, rebates, tying and some cooler access.

Microsoft[51]

In March 2004, the European Commission issued its long awaited *Microsoft* decision, which has now been published on its website.[52] It is a mere 300 pages long! There is already an enormous amount of discussion and literature on the case. Microsoft has already appealed. The case concerns two main issues:

(1) Microsoft's tying of the Windows operating system with the Windows Media Player.
(2) Microsoft's withholding of interoperability specifications for server operating systems.

As regards Microsoft's tying of Windows to Media Player, since 1999 Microsoft has licensed its successive versions of Windows operating systems only in a bundle with its own Windows "Media Player".[53] The Commission found this to constitute illegal tying under Art.82(d) EC. In the Commission's view, this practice amounts to an abuse of Microsoft's dominant position in the PC operating systems market. The Commission ordered Microsoft to unbundle the two products by making available to PC OEM manufacturers a version of its operating systems that does not include Media Player code.[54]

The Commission concluded that Microsoft holds a dominant position in the PC operating systems market:

> "A dominant position which exhibits extraordinary features since it controls the quasi-standard of the relevant market in question and has done so for some time. Microsoft's dominance relies on high market shares and significant barriers to entry".[55]

The Commission also found that "streaming" media players constitute a market separate from PC operating systems. To support this finding, the Commission relied, among other things, on evidence of demand for streaming media players separate from operating systems (mostly through free internet downloads), as well as the existence of specialised media player vendors such as Real Networks (RealPlayer) and Apple (QuickTime).

The Commission rejected Microsoft's argument that there is no consumer demand for operating systems without a media player. It found that, without Microsoft's bundling, PC OEMs could meet consumer demand for a pre-installed media player by supplying the operating system with a media player other than Media Player.

Then, the Commission found that Microsoft's refusal to license its Windows operating system to OEMs without Media Player constituted tying within the meaning of Art.82(d) EC. In particular, the Commission observed that, although OEMs were free to install additional media player software, they were unable technically to *un*-install Windows Media Player. It also rejected Microsoft's argument that Media Player is included in Windows without "extra charge", because (i) a charge

51. With thanks to Sven Voelcker and Antonio Capobianco for their assistance. See also Banasevic, Pena Castellot, Sitar, Piffaut, *EC Commission Competition Policy Newsletter*, Summer 2004, pp.44–48; and IP/04/382 and MEMO/04/70, March 24, 2004.
52. *www.europa.cu.int/comm/competition/antitrust/cases/decisions/37792/eu.pdf.*
53. See paras 794 *et seq.* Previously, it had bundled the Windows operating system with the media player developed by complainant Real Networks.
54. See paras 1011 *et seq.*
55. See paras 429 and 472.

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for Media Player might be "hidden" in the Windows/Media Player bundled price; and (ii) the pricing issue was, in any event irrelevant to the foreclosure concerns that drive the rules against tying.

The Commission then undertook an extensive analysis of the foreclosure effects of tying Media Player to Windows. It found that, given the ubiquity of Microsoft's operating system, suppliers of other media players cannot gain comparable access to customers' PCs. Although the Commission examined other distribution channels (*e.g.* internet downloading and OEM installation agreements), it concluded that none could match the penetration of the Windows operating system.

The Commission also found the ubiquity of Media Player to create incentives for content providers and software developers to encode their products using only Media Player technology. According to the Commission, the rapid growth of Media Player to the detriment of competing media players (measured, *e.g.* on the basis of player usage, format usage, content offered by websites, installed base) shows the exclusionary effects of Microsoft's practice. Elsewhere in the decision, the Commission also noted the potential "chilling effect" of Media Player-style bundling on software developers seeking to develop additional functionalities, whose markets would be pre-empted if Microsoft decided to integrate comparable functions into Windows.[56]

Finally, the Commission considered, but ultimately rejected, several "objective justifications" that Microsoft put forward. As to distribution efficiencies, the Commission noted that the same efficiencies could be obtained if Microsoft offered OEMs the *choice* whether to include Media Player or another media player with PCs they ship. As to possible efficiencies resulting from content and applications developers being able to place calls to Media Player's application programming interfaces ("API"), the Commission also found that such efficiencies could be realised without tying, *i.e.* by OEMs deciding on their own to pre-install Media Player if the latter offers the best functionality.

As regards Microsoft's withholding of interoperability specifications, the Commission found that Microsoft had infringed Art.82 EC by abusing its dominance in the desktop and workgroup server operating system markets[57] in order to achieve and maintain dominance in the latter market. The Commission found that Microsoft had refused to supply Sun Microsystems and other rivals with the specifications for protocols that Windows workgroup servers use.

By refusing to do so, Microsoft kept those companies from implementing such specifications to develop fully interoperable workgroup server operating system products. As a remedy, the Commission ordered Microsoft to provide all interested parties with the necessary interoperability specifications within 120 days on reasonable and non-discriminatory terms.[58]

The Commission found Microsoft dominant not only in the market for PC operating systems, but also in the market for workgroup server operating systems, delivering file, print and group and user administration services in small to medium-sized networks. Microsoft vigorously argued that there is not a separate market for such a narrow category of server operating systems (Microsoft has a much weaker market position for other types of server operating systems, in particular for high-end servers). The company argued that the same operating systems could be used for all types of servers, regardless of what tasks the servers performed, and that operating systems for higher-end types of servers could easily be "slimmed down" to be sold as workgroup server operating systems.

The Commission responded that Microsoft itself offers a differentiated range of server operating systems for different tasks at significantly different prices. Moreover, it found that due to their frequent interaction with client PCs, workgroup server operating systems require a higher degree of interoperability than operating systems for other types of servers and are thus not substitutable by other types of servers. This also led the Commission to conclude that competitors could not easily "scale down" operating systems originally designed for higher-end servers, since those usually do not offer the same degree of interoperability with client PCs as workgroup servers do.

In the market for workgroup server operating systems, the Commission estimated that Microsoft's market share exceeds 60 per cent. In addition, it emphasised the close links with the market for PC operating systems due to interoperability requirements. Referring in particular to the *Tetra Pak II* judgment, it inferred from those links that Microsoft should be considered dominant in *both* markets. Nevertheless, it appears that the Commission links Microsoft's abusive behaviour primarily to its dominance in the market for PC operating systems.

The Commission found that Microsoft had abused its dominant position by refusing to supply specifications for both client-to-server and server-to-server protocols that would enable competing server operating systems software to fully operate with the Windows domain architecture.[59]

The Commission reached this conclusion despite its explicit recognition that disclosure of the

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56. See para.983.
57. See para.541.
58. See paras 999 *et seq.*
59. See paras 546 *et seq.* and 779–784.

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relevant protocols could impinge on Microsoft's intellectual property rights. Although recognising that refusals to license intellectual property can constitute an abuse only in exceptional circumstances, the Commission refused to be bound by an "exhaustive checklist" of such circumstances as set out in *Magill*[60] or other judgments by the European Court.

Here, the Commission found the following facts to constitute exceptional circumstances justifying the finding of an abuse.[61]

- First, Microsoft's refusal to disclose protocol specifications amounted to a disruption of "previous levels of supply". In particular, the Commission found that Microsoft made such disclosures before it had a credible server operating systems offering, but deliberately discontinued them after it developed one, in order to disadvantage its rivals.
- Secondly, Microsoft's refusal to disclose protocol specifications risked eliminating competition in the workgroup server operating systems market, as demonstrated by Microsoft's "rapid rise to dominance" in that market.
- Thirdly, the Commission emphasised that interoperability disclosures were indispensable for rivals to compete, and that open industry standards supported in Windows, the distribution of client-side software by the server operating systems vendor, or reverse engineering of Microsoft's products, provided no viable substitute.
- Fourthly, the Commission found that Microsoft's conduct was not justified by the protection of its intellectual property rights. "On balance", any disincentives for future innovation by Microsoft resulting from the compulsory disclosure of such IP rights would be outweighed by the substantial promotion of competitive innovation in the market as a whole.[62] The Commission repeatedly pointed out that it was not requiring Microsoft to disclose the actual source code of its operating systems, but only the specifications necessary to ensure interoperability.

The Commission also fined Microsoft €497 million, a huge sum in EC terms.

Clearstream

In June 2004, the Commission adopted a decision against Clearstream International,[63] having sent a Statement of Objections in March 2003 alleging abuse of dominance.[64] In its decision, the Commission identified two types of abuse: refusal to supply and discriminatory pricing.

The Commission noted that Clearstream was the only "final custodian of German securities kept in collective safe custody", and that Clearstream was an unavoidable trading partner for intermediaries seeking clearing and settlement services for the registration of shares under German law. New market entry was unrealistic.

Consequently, by refusing Euroclear Bank SA access to settlement services for German registered shares for some two years, Clearstream had abused its dominant position. The Commission also noted that Euroclear could not duplicate the services that it was requesting, and that the refusal had the effect of impairing Euroclear's ability to provide an efficient cross-border service in the downstream market for cross-border clearing and settlement of EU securities.

The Commission found discrimination because of the unreasonable delay with which Clearstream eventually supplied Euroclear (two years) in comparison with other customers (four months). Moreover, by charging Euroclear a higher *per* transaction price than other securities depositories outside Germany in the years between 1997 and 2001, Clearstream had also discriminated in its prices to Euroclear.

By the time the Commission adopted its decision, the infringements had ceased. No fine was imposed, because account was taken of the fact that there was no EC case law dealing with the relevant issues, and because clearing and settlement services in the EU are evolving, in particular as regards cross-border transactions.[65]

Interbrew

Following last year's settlement with regard to Interbrew's "tied house" purchasing system on the retail level in Belgium,[66] in April 2004, the Commission closed a procedure concerning Interbrew's rebate practices in relation to Belgian beer wholesalers, after it had received a series of commitments.[67] The Commission specifically stated that Interbrew's amended commercial practices do not constitute an abuse of Interbrew's alleged dominant position on the Belgian beer market.

As regards its rebate system, Interbrew offers standardised volume rebates based on the total

60. Joined cases C–241/91P and C–242/91P, *RTE and ITP v Commission* [1995] E.C.R., I-743.
61. See paras 578 *et seq.*
62. See paras 709 *et seq.* especially at para.783.
63. IP/04/705, June 2, 2004, see also Martinez Rivero and Buftan, *EC Commission Competition Policy Newsletter*, Summer 2004, p.49.
64. IP/03/462, March 31, 2003; [2004] I.C.C.L.R. 69.
65. The Commission has also published a study on current arrangements in the securities area, dealing with clearing, central counterparties and securities settlement; details are available on the Commission's website at the competition page. The main interest from the competition perspective is that the Commission has said that it plans to address (with NCAs) anti-competitive practices in the sector and to monitor existing monopoly positions and further industry consolidation.
66. IP/03/545, April 15, 2003; [2004] I.C.C.L.R. at 63.
67. IP/04/574, April 30, 2004.

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volume of each type of beer purchased by a wholesaler in a year, paying the rebate for each category of beer. Rebates will be more transparent in the sense that wholesalers will know the full rebate scale. Wholesalers which sell Interbrew's beer through their own tied retail outlets also receive separate rebates for each type of beer sold. However, these will no longer increase as a function of the number of the wholesalers' tied outlets. Instead, they are paid for fixed amounts of particular beers sold, irrespective of the number of outlets.

Interbrew also has some "management support" partnership agreements with wholesalers. Interbrew will no longer have the pre-emption right to buy the wholesaler's business in the event of a competitor's bid. Moreover, it will no longer have access to the wholesaler's confidential business data.

Interbrew also has commercial agreements with wholesalers, according to which Interbrew grants them incentives in return for promotional activities. In these agreements, Interbrew will abolish product exclusivity requirements, make the eligibility criteria fully transparent and clarify that the same incentives are open to all wholesalers.

Finally, Interbrew has terminated its distribution agreement with its competitor Haacht, according to which Interbrew beers have benefited from exclusive access to retail outlets tied to Haacht.

Interbrew agreed to introduce these changes by December 31, 2004.

Proposed Coca–Cola Settlement

In September 2004, after a five-year investigation, the Commission decided to initiate proceedings with a view to adopting a commitment decision pursuant to Art.9 of Regulation 1/2003 in relation to Coca-Cola's commercial practices in the EU. The commitments from Coca-Cola were received in October and are published on the Commission's website for third-party comments.[68]

These commitments establish rules which will govern the practices of The Coca-Cola Company and its bottlers, and are applicable to all sales of all carbonated soft drinks under the Coca-Cola brand destined for consumption in countries where Coca-Cola or its bottlers may be subject to Art.82 EC or Art.54 of the EEA agreement. They concern the take-home and on-premise channels, sponsorship and public and private tender agreements and technical equipment placement.

The main commitments proposed are as follows:

- Coca-Cola customers will remain free to buy and sell any third-party carbonated soft drinks and will not be required to purchase a specified minimum percentage of their total requirements.
- Coca-cola will offer no target or growth rebates and no tying provisions linking Coca-Cola branded cola or orange to other products in its range.
- Where Coca-Cola agreements include shelf space commitments, these will be non-exclusive and defined separately for Cola and orange carbonated soft drinks.
- Where Coca-Cola sponsors venues, it will not require that non-Coca-Cola branded soft drinks will not be available in the venue, other than in respect of the sponsoring brands or flavour categories.
- Where Coca-Cola sponsors limited duration events, exclusive supply rights for the full range of Coca-Cola's soft drinks may be linked to the sponsorship agreement, provided that the event does not exceed 60 days per year.
- However, Coca-Cola may compete for and enter into public tender agreements containing exclusive beverage supply rights.
- The same applies for private tender agreements, provided that they are limited to a maximum of five years and give the customer an annual option to terminate the agreement without penalty after an initial term not exceeding three years.

There are particular provisions as regards "coolers"/vending machines:

- Where Coca-Cola provides a beverage cooler on a rent-free basis and the customer does not have any other installed chilled beverage capacity to which the consumer has direct access, the customer will be free to use at least 20 per cent of that cooler's capacity for any products of its choosing.
- Where the cooler is being provided in exchange for rental payments, the customer will also be free to stock any products of its choosing in at least 20 per cent of the cooler's capacity.
- If the customer has purchased the cooler from Coca-Cola or a manufacturer to which Coca-Cola refers the customer, it will be free to stock the cooler with any products of its choosing.
- Furthermore, Coca-Cola will not require customers to refrain from placing competing fountain dispensers or packaged carbonated soft drinks on any premises, while purchase commitments for products sold through fountain dispensers will not exceed three years and customers will have the option to terminate such commitments without penalty with effect at any time following an initial term not exceeding three years.

68. IP/04/1247, October 19, 2004; see also now the Art.27(4) notice published at O.J. C289/10, November 26, 2004.

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- No agreement under which Coca-Cola provides vending machines will require that the customer refrains from placing competing vending machines on any premises.

This is almost an anti-climactic proposed settlement, since many had expected a major fight. We will have to see what the final decision looks like. However, thus far, it is interesting to see that the Commission appears to be requiring unbundling *within* a product family. If so, that is a new development. Equally, dominant companies may be encouraged to see the Commission allowing exclusivity for specific contexts, such as sponsorship and in the context of tenders.

The "Coca-Cola companies" concerned propose to apply the commitments throughout the EU, Norway and Iceland insofar as Coca-Cola branded carbonated soft drinks ("CSD") accounted, in the year, for more than 40 per cent and more than twice the share of the nearest competitor of national CSD sales in either the take-home or on-premises sales channel.

Telecoms issues

In December 2003, the Commission issued a Statement of Objections to Telia Sonera ("TS") alleging that TS had abused its dominant position in the markets for the provision of local broadband infrastructure and the provision of high-speed internet access, by intentionally bidding below cost for the construction and operation of such a network for HSB Malmö, a regional housing association.[69] It appears that in October 1999, Telia, which was not yet merged with Sonera and owned approximately 90 per cent of the local infrastructure susceptible to be used for the provision of high-speed internet access, won a bid for a contract with HSB Malmö, the second largest co-operative housing association in Sweden, to construct a new fibre-optic network and provide broadband services to households in the Malmö region exclusively for five years. A competitor, B2 Bredband AB, complained.

In March 2004, the Commission terminated its investigation of alleged abusive margin squeezing by Deutsche Telekom ("DT") in the provision of broadband access to its fixed telecommunications network.[70] DT was considered to be the dominant supplier of broadband access both at wholesale and at retail level, and the only operator with a network of nationwide coverage. DT also accounted for almost 90 per cent of the retail market. Competitors of DT alleged that its tariffs for line-sharing were so high that they could not make any profits from offering the broadband service at retail level. There was only a tight margin between the line-sharing tariff of DT and the end consumer price for broadband service via ADSL, which prevented entry to the market by new competitors. Line sharing tariffs were introduced by the German Regulator in March 2002 and it is on that date that DT's practice allegedly started.

The Commission decided to accept commitments proposed by DT in this case and not to open formal proceedings. DT committed to stop charging its competitors monthly line sharing from April 2004 until the end of 2004 and to substantially reduce the current line sharing tariffs from the beginning of 2005. Additionally, DT decided to increase certain of its retail ADSL tariffs.

German mail rules

In October 2004, the Commission addressed a decision pursuant to Arts 86(3) and 82 EC against Germany concerning its legal postal regulatory framework.[71] According to certain provisions thereof, private senders are allowed to feed self-prepared mail directly into Deutsche Post's sorting centres and are granted discounts for doing so, while commercial mail preparation firms are not given such discounts.

The Commission considered that the respective provisions induced Deutsche Post, which has the exclusive rights to distribute letters below 100 grams, to discriminate against commercial sorting operators, placing them at a considerable competitive disadvantage. Germany was given two months to inform the Commission of the measures taken to comply with EC competition law.

Current policy issues

Table 4

— *Legal Privilege*
  * *Akzo Nobel*:
    - Privilege for preparatory material before approaching counsel
    - And for in-house lawyers, members of a Bar?

— *Private actions for damages*
  * A Green Paper to come; debate launched

— *Art.82 EC Guidelines*
  * Clear work going on:
    - How to modernise classic European Court case-law?
    - With a rebuttable presumption for some effect cases, involving efficiencies?

Legal privilege

There are some interesting signs of possible elaboration of legal privilege. Perhaps not a revolution,

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69. IP/03/1797, December 19, 2003.
70. IP/04/281, March 1, 2004.
71. IP/04/1254, October 20, 2004.

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but some extension of the scope of the privilege, resulting from recent court proceedings involving Akzo Nobel.

In February 2003, the Commission issued a decision ordering Akzo Nobel, Akcros Chemicals and their subsidiaries to submit to an investigation under Art.14(3) of Regulation 17. The Commission carried out an onsite inspection at the companies' premises, during which a dispute arose between the Commission officials and company representatives with respect to five documents which the company claimed to be covered by professional privilege.

Copies of two of these documents, allegedly drafted for the purpose of a telephone conversation with an outside counsel, were placed in a sealed envelope. The remaining three documents were simply copied and not treated in any special way. These contained a series of handwritten notes by the General Manager of Akcros Chemicals, drafted during discussions with lower level employees for the purpose of preparing the sealed documents, as well as an exchange of emails between the General Manager of Akcros Chemicals and Akzo Nobel's competition law coordinator, who was a member of the Dutch Bar and also a member of Akzo Nobel's legal department employed by Akzo on a permanent basis.

Through applications for interim measures, the question of the possible privilege applying to these various documents came before the President of the CFI, who made a number of interesting observations.[71a]

First, as regards the "sealed documents", the President considered that there might be a need to extend the scope of professional privilege, as defined by the case law, in order to cover also working or summary documents drafted for the sole purpose of obtaining the assistance of a lawyer.[72] Interestingly that might include the review of facts connected with a current investigation or an investigation which a company might reasonably fear or anticipate, and where therefore the company might choose to prepare in defence in advance.[73] As regards the handwritten notes, the President took a similar view.

Secondly, as regards the email exchange with an in-house counsel admitted to the Dutch Bar, the judge first noted that the emails were not, in principle, covered by professional privilege on *AM&S*.[73a] However, the President stated that such a rule might need review since *AM&S*, especially where in-house counsel were members of a Bar.[74]

Thirdly, the President also underlined that legal privilege is not just about rights of the defence, it is about the right of every person to consult a lawyer without constraint.[75] This is something which seems to have been forgotten in recent years where regulators sometimes see privilege as an abusive tactic to avoid detection of competition law infringements, rather than a fundamental value and right.

Many are now watching with great interest how the Court will interpret legal privilege in the main proceedings, conscious that an internal summary of external legal advice is already privileged and that not to allow a company to prepare material for the purpose of consulting external counsel may be both counter-productive in undermining genuine compliance steps and at odds with the fundamental right just noted. (The President's actual ruling turns on the interim nature of his review and the specific balance of interest in the circumstances and has been appealed to the ECJ since.)

Private actions for damages

The Commission is now pushing to promote more private actions to enforce the competition rules,[76] although conscious that there have been few damages awards. In practice, such actions are still very difficult (although there have been some settlements). The Commission has sought a (major) study on the conditions for claims for damages, prepared by Ashurst, which has now been published on DG COMP's website. There is also a useful article in the Commission's Newsletter summarising the related issues and some of the existing damages awards, notably in France and Sweden.[77] The Commission states that it envisages a Green Paper to identify potential ways forward.

Article 82 EC Guidelines

The Commission is also thinking seriously about modernisation of Art.82 EC enforcement. At the time of writing, it appears that the Commission does not plan any discussion draft until the middle of 2005 at the earliest.

In October 2004, Mr Monti emphasised that, in this area, the EU position may be driven by different interpretations and considerations to those in the United States.

Substantively, there is much discussion about whether and if so, how to allow the dominant to compete more, based on efficiency arguments.[78]

71a. Joined cases T–125/03R and T–253/03R, October 30, 2003.
72. [102]–[109].
73. [113].
73a. Case 155/79, [1982] E.C.R. 1575.
74. [122].
75. [167].
76. See, Mr Monti's Paper at the IBA meeting in Fiesole SPEECH/04/403, September 17, 2004.
77. See Woods, Sinclair and Ashton, *EC Commission Competition Policy Newsletter*, Summer 2004, pp.31–37.
78. See also Ratliff, "Abuse of Dominant Position and Pricing Practices—A Practioner's Viewpoint", *EUI Proceedings, Florence* (Hart Publishing, June 2003) and available at *www.iue.it.*

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There is also debate about the extent to which competitors of the dominant should have equal opportunities to compete and develop the critical mass to survive in the market.

There is debate about whether *per se* rules are appropriate, although, as noted in the first part of this paper, at least in the case of loyalty rebates, the European Court appears to consider such an approach valid, given the market strength of the dominant. Against this, part of the whole "modernising" process has been to focus on effects. If effects are not unreasonable in economic terms, should not a dominant company be allowed to pursue its often self-created, rather than incumbent successful business? Predictability is also considered key, so that companies can comply reasonably easily on the basis of practical tests.

It also appears that the Commission is willing to allow dominant companies greater use of Art.81(3) EC.

Areas of specific interest

Table 5

— *Liberal Professions*
  * *Belgian architects* fine.
    • Recommended minimum fee system.
  * Competition Advocacy/Communication.
    • Serious drive on blatantly unjustified or disproportionate restrictions.
    • Others may involve more difficult balancing.

— *Energy*
  * A marathon "Marathon" (where the runner dropped out long ago?!)
    • Entry/exit fee systems and multiple zone charges.
  * Decisions on territorial restrictions announced.

— *Sport/Media*
  * Packaging of football media rights and a decision at last!
  * Hollywood Studios MFN clauses withdrawn (mainly).

Liberal professions

Belgian architects fee system

In June 2004, the Commission fined the Belgian Architects Association €100,000, concluding that its scale of recommended minimum fees was a violation of the EC competition rules.[79]

The recommended prices were considered to facilitate price co-ordination. In the Commission's view, such fees should reflect an architect's skills, efficiency, costs and perhaps reputation and should not be dependent solely on the value of the works or the price of the entrepreneur. In any event, the architect should determine the fee independently of competitors and in agreement with the client alone.

The amount of the fine was stated to reflect a gradual approach by the Commission in fining anti-competitive practices in the professions and also the fact that the fee scale was abolished in 2003. The Commission also noted that the French Competition Council prohibited the French Architects' Association from further elaborating and distributing fee scales in 1997, while the UK Office of Fair Trading also came to the conclusion that the Royal Institute of British Architects' (RIBA) indicative fee guidance could facilitate collusion.

Commission "Communication"

In February 2004, the Commission issued a "Communication on Competition in Professional Services".[80] This is a follow-up to the detailed "Vienna Study" commissioned and published last year, as well as the related Commission conference.

The Communication is a clear piece of competition advocacy, as the Commission invites professional associations to review the proportionality of any restrictive practices into which they have entered, with the threat of NCA or European Commission intervention against unjustified practices, whether directly against the professions concerned, or indirectly by "disallowing" or otherwise challenging laws contrary to Arts 10 and 81 EC.[81]

Clearly the Commission may have a point concerning some of the more blatant, often old practices. However, in many areas this will be a far more complex debate than the Communication suggests.

On *Wouters*, it is clear that restrictions may be justified and outside Art.81(1) EC in specific circumstances, if essential to preserve core values of a profession. It is also perfectly valid on *Arduino* to propose suggested restrictions to public authorities which, after appropriate review, may choose to adopt them as their own regulations.

On the other hand, in some circumstances, state action may be challenged as merely "facilitating" an anti-competitive agreement which is contrary to Art.81(1) EC and patently disproportionate private restrictions clearly may fall within Art.81(1) EC. National competition authorities also have a duty to disallow such laws on *Italian Matches*.

However, judging the proportionality of a state measure can be difficult, especially where the state overtly wishes to further specific universal (public) service or quality value considerations.[82]

It is a little disconcerting to see the Commission arguing (as occurred after the detailed study last

79. IP/04/800, June 24, 2004.

80. COM (2004) 83 final, available on the Commission's website; IP/04/185, February 9, 2004.

81. See also Amato, Collins, De Waele, Paseman, *EC Commission Competition Policy Newsletter*, Summer 2004, pp.71–74.

82. See Ratliff, "EC Competition Law and the Liberal Professions", Paper at IBC London, April 2004.

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year) that just because some Member States take a very "liberal" approach with one notion of service, others with more restrictive systems supporting a different notion of service are necessarily following disproportionate solutions.

One may also think that there is a middle path, in which key professional values associated with liberal professions can be reasonably balanced with competition. However, at the moment the Commission's advocacy is clearly aimed to push fast for change, at least as regards those restrictions which are *not* reasonable in this sense.

Energy

More "Marathon" settlements

In April 2004, the French and the German gas companies, *Gaz de France* and *Ruhrgas*, offered commitments to improve third-party access to their respective networks, thereby settling the Commission's investigation into their alleged refusal to grant the Norwegian subsidiary of the US gas producer, Marathon, access to their networks.[83]

It may be recalled that in April and July 2003 the Commission announced that it had settled with *Gasunie* and *BEB*, having previously settled the case with *Thyssengas* in November 2001.[84]

The commitments by Gaz de France and Ruhrgas, which reflect the market situation in each country and are therefore not identical, will remain in force for several years. Their fulfilment will be monitored by a trustee who is to report to DG Competition.

The main commitments made by Gaz de France are:

- Gradual reduction in the number of tariff and balancing zones on which the entry/exit transport system is based in France. The idea is to reduce the number of zones from seven to two by 2009, facilitating access for new entrants by reducing the cost of transport connected with the crossing of several zones.
- Starting in January 2005, the transport division of Gaz de France will offer operators the possibility *to* convert high calorific value gas into low calorific value gas, thus giving greater access to gas which can be used to compete for low calorific gas users (a large part of the French market).
- Starting in January 2005, for three years, Gaz de France has undertaken to implement a "gas release programme" in southern France, where there is currently no competition.

The main commitments by Ruhrgas are:

- There will be a new regime allowing customers to book gas transport capacities separately at entry and exit points, without booking any capacity between the two points.
- Ruhrgas will introduce six tariff zones, which it will progressively reduce to four by May 2006.
- Ruhrgas will extend the new entry/exit regime beyond its own network, to include other regional transmission companies in which it holds a majority or minority stake.

In addition to these commitments, Gaz de France and Ruhrgas will improve transparency, handling of requests for network access and congestion management. Ruhrgas also promised to introduce the so-called "use-it-or-lose-it" principle into all its transport contracts.

Territorial restrictions

In October 2004, the Commission announced that it had taken two decisions concerning territorial restrictions in the gas sector.[85] They concern two contracts concluded by Gaz de France in 1997, one with ENI, and the other with ENEL.

Under a transport contract between GdF and ENI, GdF transports gas bought by ENI in northern Europe through French territory to the border with Switzerland. This contract contained a clause obliging ENI to market the gas only after leaving France ("downstream of the redelivery point"). The contract between GdF and ENEL concerned swaps of gas purchased by ENEL in Nigeria and required ENEL to use the gas only in Italy. The Commission considered that these clauses partitioned national markets by preventing French consumers from being supplied by ENI and ENEL.

The Commission adopted the two decisions, although the parties had already terminated the infringements, with a view to clarifying the situation for all undertakings operating in the gas sector.

Sport and media

UEFA Champions League

In November 2003, the Commission published its (long awaited) decision in the *UEFA Championships League* case.[86]

It may be recalled that the Commission considers the collective, exclusive sale by UEFA on behalf of national clubs or football associations of the broadcasting rights to the final stages of the UEFA

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83. IP/04/573, April 30, 2004
84. IP/03/547, April 16, 2003, IP/03/1129, July 29, 2003; [2004] ICCLR 72; IP/01/1641, November 23, 2001; [2003] I.C.C.L.R. 111.
85. IP/04/1310, October 26, 2004.
86. [2003] O.J. L291/25, November 8, 2003. See Toft, *EC Commission Competition Policy Newsletter*, Autumn 2003, p.47.

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Champions League to be a price-fixing agreement and an output restriction which limits the broadcasting of football.[87] Such awards are also considered to distort competition in broadcasting markets for which football is key content.

In August 2002, however, the Commission published an Art.9(3) Notice, proposing to take a favourable position on UEFA's revised commercial policy under which UEFA would award the television rights following a public invitation to bid to broadcasters for various packages of media rights.[88]

In its decision, the Commission distinguished the following relevant markets:

- The upstream markets for the sale and acquisition of free-TV, pay-TV and pay-per-view rights;
- the downstream markets on which television broadcasters compete for advertising revenue depending on audience rates, and for pay-TV/pay-per-view subscribers;
- the markets for media rights for new media (wireless/3G/UMTS rights, internet rights and video-on-demand rights); and
- the markets for other commercial rights, namely sponsorship, "suppliership" and licensing.

As regards notably the upstream markets for television and pay-per-view rights, the Commission considered several factors in relation to the special value of broadcasting rights for football events, which can be attributed to this sport's ability to act as a developer of a brand image of channels and to attract the most sought-after viewers (*i.e.* men with an above average spending power and who are in the age groups of 16–20 and 35–40).

The Commission then concluded that there existed a separate market for the acquisition of television broadcasting rights to football which is played regularly throughout every year.[89] This definition involved matches in national league and cup events, as well as the UEFA Champions League and UEFA Cup.

Interestingly the Commission concluded that:

> "... there are no programmes which place a competitive constraint on the ability of the holder of the TV rights to football events being played regularly throughout every year to determine the price of these TV rights. *TV rights to other sports events or other types of programmes such as feature films do not put a competitive restraint on the holder of the TV rights to such football events.* Including such rights in the market definition would make the definition too wide. In other words, there is no substitutability between the TV rights to football and the TV rights to other programmes."[90] (Emphasis added).

The Commission found that the grant by football clubs to UEFA of the exclusive right to sell jointly certain commercial rights on behalf of the clubs fell within Art.81(1) EC, as did the restrictions on the football clubs selling their commercial rights individually. The Commission noted, however, that UEFA might be the co-owner of some of the media rights as a result of its role in organising the League and UEFA "brand image" (without purporting to rule on the issue). The Commission then concluded that an Art.81(3) EC exemption was justified.

Through the joint selling arrangements, a quality branded content product sold in packages via a single point of sale was created, thus providing advantages for media operators, football clubs and viewers. Media operators and consumers could receive more efficient and easier access to a unique content which, in addition, was carrying the UEFA Champions League brand label.

The joint arrangement not only created efficiencies for media operators, which would be able to invest in improved production and transmission technologies, but also allowed viewers to obtain access to better quality media coverage, enabling them to watch all premium matches over the course of the entire season.

The Commission also accepted that the restrictions were indispensable to provide the efficiencies and improvements leading to consumers benefits, as long as the joint selling body was able to find demand for the jointly sold media rights.[91]

Finally, the Commission accepted that the arrangements did not eliminate competition. The Commission found that (i) UEFA Champions League rights represented only some 20 per cent of the relevant market; (ii) the jointly sold media rights had been split up into packages offered for sale in a competitive bidding procedure open to all interested media operators; and (iii) both UEFA and the football clubs sold certain categories of these rights on a non-exclusive basis.

However, the Commission found that no benefits arose from the restriction on football clubs selling live television rights to free-TV broadcasters and subjected its decision to the condition that football clubs be able to do so where there was no reasonable offer from any pay-TV broadcaster. The duration of the exemption was set for two contract periods with expiry on July 31, 2009.

English FA Premier League

In December 2003, the Commission also announced that it had reached a "provisional agreement" with the English FA Premier League concerning the joint selling of media rights to Premier League matches.[92]

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87. [2003] I.C.C.L.R. at 112.
88. [2002] O.J. C196/3, August 17, 2002; see also IP/02/806, June 3, 2002.
89. See para.63.
90. See para.77.
91. See paras 136–180.
92. IP/03/1748, December 16, 2003.

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The League has agreed that after 2006 there would be at least two television broadcasters of live League matches. The League would create "balanced packages" of matches "showcasing" the Premier League as a whole, and no broadcaster would be allowed to buy all of the packages. The auctions will be examined by the Commission and Premier League to ensure that they do not exclude potential competitors.

BSkyB, which recently acquired the television rights to Premier League matches, has also agreed to offer to sub-license a set of up to eight top quality Premier League matches each season to another broadcaster (starting next season).

German Bundesliga

In September 2004, the Commission published an Art.27(4) Notice in relation to the joint selling of media rights to the German Bundesliga.[93] This is another Regulation 1/2003 development, insofar as it is a notice indicating that, subject to market testing, the Commission is planning to take an Art.9 decision declaring commitments binding, and inviting comments on such proposed action. The commitments are summarised in the Official Journal, but the actual terms are published on the Commission's website. Substantively, the commitments fit the same sort of standard pattern as the *UEFA* case.

The Commission is concerned that if *all* the media rights to the first and second German football leagues are sold through a central marketing system, then clubs lose the right to sell their rights in packages and at prices of their own choosing. Moreover, there is concern that obtaining the rights can have crucial significance to downstream advertising and pay-per-view markets, for which such content may be important.

As a result, the clubs are authorised to transfer media rights to the Bundesliga, but these are then offered to "exploiters" in 10 packages, according to content and transmission medium (*e.g.* live, "near live" and deferred transmission of matches, highlights etc. for free-to-air television, pay-per-view, internet and mobile phones, etc.). Rights packages are for a maximum of three seasons and clubs retain rights to sell home games to free-to-air television broadcasters and home and away game extracts on the internet. Unused rights may also be exploited by the clubs. The Commission has reserved its position should one company acquire several centrally-marketed packages with exclusive rights.

Finally, we should note that in January 2004, the Commission announced a sectoral investigation in the sale of sports rights to internet companies and to providers of third generation mobile phone services, with a view to acquiring comprehensive information on the availability of audiovisual sports rights in the European Union and on possible relevant anti-competitive practices that need to be addressed.[94]

Hollywood film studios

In October 2004, the Commission closed its investigation into the so-called "output deals" between six major Hollywood film studios and a number of pay-television companies in the EU.[95] Output deals, which are common in the Hollywood film industry, are agreements whereby the studios agree to sell to broadcasters their *entire* film productions for a given period of years.

The Commission objected to so-called "most favoured nation" clauses which gave the studios the right to enjoy the most favourable terms agreed between a pay-TV company and any one of them, because the Commission considered that the cumulative effect of these clauses distorted price competition. In particular, any increase agreed with *one* of these studios would trigger the right to parallel increases for the prices of other studios.

Six studios have either withdrawn the clause or waived their related rights. Two studios, NBC Universal and Paramount, have not agreed to withdraw the clause from their respective contracts.

International

EU-related issues in US courts

Two cases decided in the United States Supreme Court in June 2004 deserve comment for their European interest.[96]

First, in *F. Hoffmann-La Roche Ltd v Empagran SA*, the Supreme Court set aside a lower court ruling under which purchasers that had bought a cartelised product outside the United States from non-US sellers could nonetheless sue for treble damages in the US courts, if the conspiracy had some effect in the United States. The issue hinged on the interpretation of the US Foreign Trade Antitrust Improvements Act of 1982, a statute that was meant to clarify the extent to which the US antitrust laws apply to foreign conduct.

The Supreme Court's ruling cut back on the scope of recovery for purchasers outside the United States, but did not wholly close the issue. The Court said that foreign purchasers could not sue in the United States when their injury from the cartel is "independent" of the cartel's effect in the United States. As might be expected, the question as to

93. O.J. C229/13, September 14, 2004.

94. IP/04/134, January 30, 2004.
95. IP/04/1314, October 26, 2004.
96. With thanks to Chuck Stark for his assistance. See further, *Antitrust and Competition Law Update*, June 2004, available at *wilmerhale.com*.

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when foreign and US injuries are "independent" of one another is now being litigated in the US cases.

Secondly, in *Intel Corp v Advanced Micro Devices Inc*, the Supreme Court held that US legislation aimed at securing US-located evidence to assist foreign tribunals, 28 USC s.1782, could be used by a complainant in a non-US antitrust investigation to obtain discovery from the company against which it was complaining. AMD, a US-based semiconductor maker, had complained to the European Commission about conduct by its rival, Intel, that AMD argued constituted an abuse of a dominant position by Intel. AMD had asked the Commission to require Intel to provide the Commission with documents which Intel had produced in US intellectual property litigation with another company, but the Commission declined to do so. AMD then brought an action in a US Federal Court seeking the Intel documents so that AMD could give them to the Commission.

The Commission filed an *amicus* brief arguing that US discovery should not be available to complainants in Commission investigations. It argued that it was not a "tribunal" within the meaning of the US legislation and that allowing such discovery would interfere with its own proceedings. The Court nonetheless held that the statute allows discovery in such cases, but noted that it leaves the District Court with substantial discretion as to whether or on what terms to allow discovery. The case was remanded to the District Court, which then declined to grant AMD's discovery request on the grounds, *inter alia,* that the Commission had made clear that it did not want the material and did not welcome the US court's "assistance".

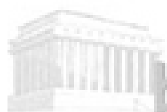
EU-China and Korea competition dialogues

In May 2004, Mr Monti and the Chinese Commerce Minister signed an agreement on a "structured dialogue" on competition between the European Union and China.[97] This agreement is a follow-up to a declaration signed in November 2003 between the Commissioner and the ministerial authorities that are responsible for the drafting of the new Chinese competition law.[98]

The agreement constitutes the basis for a formal dialogue having as its primary objective a "permanent forum of consultation and transparency" between China and the EU in this area.

In October 2004, Mr Monti and the Chairman of the Korean Fair Trade Commission appear to have signed a similar Memorandum of Understanding on a similar "structured dialogue" on competition between the EU and Korea.[99] This Memorandum is perceived as the basis for a formal dialogue between the EU and the Republic of Korea which makes official the existing co-operation practices.

97. IP/04/597, May 6, 2004.
98. IP/03/1587, November 24, 2003.
99. IP/04/1325, October 28, 2004.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