III. COMPETITION

A. Article 85

The period under consideration (mid-1995 to March 1998) was a relatively quiet one for Article 85. Note should be taken of the publication in 1997 of the Commission's Green Paper on vertical restraints in competition policy,[1] which is likely to lead to a significant overhaul of a number of block exemption regulations. The existing block exemptions on patent licensing and know-how agreements[2] were merged into a new single block exemption on technology transfer.[3] Perhaps the most interesting and potentially far-reaching development was the Commission decision in *Bayer/Adalat*,[4] in which the Commission characterised as agreements—and so falling within Article 85—attempts by the German chemicals group Bayer to limit supplies of a range of pharmaceutical products from its wholly owned distributors in other member States to wholesalers there in order to stem parallel exports. This was not an Article 86 case (Bayer was not dominant in the relevant product market), of which refusal to sell is more commonly a feature, and an agreement between manufacturer and distributor/wholesaler which prohibits re-export of the contract goods has long been recognised as falling within Article 85(1). But in *Bayer/Adalat* the wholesalers never agreed to the (alleged) export ban, and in fact resisted Bayer's attempts to limit supplies both directly and by subterfuge. Nevertheless, the Commission found an agreement between the Bayer distributors and the wholesalers, effectively simply in continuing to deal, the former having committed "an infringement of Article 85(1) by imposing an export ban as part of their continuous commercial relations with [the latter]",[5] the ban having "been agreed [*sic*] as part of their ongoing business relations".[6]

Even if Bayer's conduct had the object or effect of inhibiting parallel trade, an agreement (or concerted practice, which was not asserted by the Commission) is necessary in order for Article 85 to apply. And if this conduct is an agreement, it is stretching Article 85 to—or beyond—its limits. Not surprisingly, the decision has been challenged by Bayer.[7] Should the Court of First Instance (and doubtless the Court of Justice on appeal) sustain the Commission, it will mark a significant reorientation of Article 85 and a (possibly serious) limitation on contractual and commercial freedom in the Community.

B. Enforcement

1. Commission procedure

There has been a good deal of case law on the principles governing the duty of the Commission to consider complaints from undertakings alleging an infringe-

1. COM(96)721 final.
2. Reg.2349/84 (1984) O.J. L219/15 and Reg. 556/89 (1989) O.J. L61/1 respectively.
3. Reg.240/96 (1996) O.J. L31/2.
4. Decision 96/478 (1996) O.J. L201/1.
5. *Idem*, para.155.
6. *Idem*, Art.1.
7. Case T–41/96 *Bayer* v. *Commission*, pending. See Case T–41/96R *Bayer* v. *Commission* [1996] E.C.R. II–381, in which the president of the Court of First Instance suspended the operative part of the decision pending final determination of the case.

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ment of the competition rules by competitors. The *Automec II* rule,[8] that the Commission need not pursue a complaint by means of an investigation, and need only give reasons for not doing so, remains intact. A complainant was always entitled to an "Article 6 letter"[9] informing it of the decision not to proceed, but an Article 6 letter is a provisional step in an ongoing administrative procedure and so not liable to review before the courts.[10] However, in *Guérin*[11] the Court of Justice confirmed that the Commission is under a duty to adopt, within a reasonable period of time following written observations from the complainant in response to an Article 6 letter, a final and definitive decision not to proceed—so opening up a refusal to proceed to judicial scrutiny. The Court of First Instance continues to scrutinise the Commission's economic reasoning and procedural irregularities with greater vigour than did the Court of Justice; in this context the Commission must now disclose with sufficient clarity the reasons for which a complaint was rejected, so enabling the complainant to defend its rights.[12] A definitive decision rejecting a complaint may be annulled by the Court of First Instance if there were legal defects in the provisional stages leading up to its adoption[13] or it was based upon a materially incorrect appreciation of the facts or was vitiated by an error of law, a manifest error of appraisal or misuse of powers.[14]

At the same time, the rights of third parties to judicial redress have taken a knock. The 1992 Commission decision to approve Nestlé's takeover of Perrier[15] was challenged by neither undertaking, in part because the conditions imposed were far from onerous. However, it was challenged by a number of competitors' works councils, employees' representatives and trade unions. The Court of First Instance held that, although individually concerned, they were not directly concerned (within the meaning of Article 173) by the decision and so had standing to challenge only infringement of the procedural guarantees afforded them in the administrative stage, and not the substance of the decision.[16] In *AssiDömän Kraft Products*[17] it also confirmed that if an addressee of a Commission decision fails to seek review of the decision under Article 173 it becomes definitive for and binding upon him, even if it is subsequently annulled in proceedings raised by another party. However, the Court added that Article 176 of the Treaty and the principles

8. Case T-24/90 *Automec* v. *Commission* (*Automec II*) [1992] E.C.R. II-2223.
9. Reg.99/63 (1963) J.O., p.2268, Art.6.
10. Case T-64/89 *Automec* v. *Commission* (*Automec I*) [1990] E.C.R. II-367.
11. Case C-282/95P *Guérin Automobiles* v. *Commission* [1997] E.C.R. I-1503.
12. Case C-360/92P *Publishers Association* v. *Commission* [1995] E.C.R. I-23; Cases T-70-71/92 *Florimex* v. *Commission* [1997] E.C.R. II-693; Case T-504/93 *Tiercé Ladbroke* v. *Commission* [1997] E.C.R. II-923.
13. *Guérin Automobiles*, *supra* n.11.
14. *Automec II*, *supra* n.8; Case T-114/92 *BEMIM* v. *Commission* [1995] E.C.R. II-147; Cases C-359 and 379/95P *Commission and France* v. *Ladbroke Racing*, [1997] E.C.R. I-6265.
15. Decision 92/553 (1992) O.J. L356/1.
16. Case T-96/92 *Comité Central d'Entreprise de la Société Générale des Grandes Sources* v. *Commission* [1995] E.C.R. II-1213 and Case T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vittel* v. *Commission* [1995] E.C.R. II-1247.
17. Case T-227/95 *AssiDömän Kraft Products* v. *Commission* [1997] E.C.R. II-1185; under appeal as Case C-310/97P, pending.

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of legality and of good administration require the Commission, pursuant to a request made within a reasonable period, to review the legality of a decision in the light of the judgment annulling it in order to determine whether it would be appropriate to repay any fines levied against undertakings not party to the proceedings—as is implicitly the case where the analysis and/or reasoning of the decision which led to its annulment applied equally to them.

2. *Fines*

The Commission has turned to both carrot and stick in its policies on imposing fines under Regulation 17. The reissued 1997 Notice on agreements of minor importance provides that if an agreement covered by it nevertheless falls foul of Article 85(1) and was not notified because the parties assumed in good faith that the Notice applied, the Commission will not "consider imposing fines".[18] Furthermore, in this "leniency" or "whistleblower's" Notice it has further undertaken to impose no fine upon any undertaking participating in a cartel which betrays the cartel to the Commission, provided the undertaking was not a "ringleader" in, or originator of, the cartel, and to grant "very substantial reductions" in a fine where an undertaking co-operates fully with an investigation already launched by the Commission.[19] It is probably now estopped from imposing fines contrary to the terms of these undertakings. Notwithstanding long commitment to the principle that uncertainty as to the amount of a fine is a legitimate element of its deterrent effect, in 1998 the Commission published a Notice detailing various tariffs it uses and the considerations it will give to gravity ("minor", "serious" and "very serious" infringements) and duration and aggravating and attenuating circumstances in computation of a fine.[20] Immediately the Commission asserted its new virility and, surpassing its previous record for a fine imposed upon a single undertaking (75 million ECUs in *Tetra Pak II*[21]), it fined Volkswagen 102 million ECUs for having, through threats to terminate dealership contracts, reducing profit margins and bonuses, limiting deliveries, monitoring dealers and encouraging them falsely to justify refusals to sell, sealed off the German and Austrian markets from parallel imports of its motor cars from Italy.[22] *Volkswagen* was neither an Article 86 case (as was *Tetra Pak II*) nor a cartel, which usually attracts the greatest Commission opprobrium, yet was a "very serious infringement", indicating the Commission's

18. Notice on agreements of minor importance which do not fall within the meaning of Art.85(1) (1997) O.J. C372/13, para. 5.

19. Notice on the non-imposition or the mitigation of fines in cartel cases, (1996) O.J. C207/4.

20. Notice on the method of setting fines pursuant to Art.15(2) of Reg.17 and Art.65(5) of the ECSC Treaty (1998) O.J. C9/3.

21. Decision 92/163 (1992) O.J. L72/1, upheld in Case T-83/91 *Tetra Pak* v. *Commission* [1994] E.C.R. II-755 and on appeal in Case C-333/94P *Tetra Pak* v. *Commission* [1996] E.C.R. I-5951.

22. Decision 98/273 (1998) O.J. L124/60. Volkswagen has indicated that it will seek review of the decision.

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resolute disapproval of market partitioning by any means. It is also worth noting that the Commission drew upon Volkswagen's exploitation of its economic strength in its relations with its dealerships, so, as in *Bayer/Adalat*, importing into Article 85 principles which are more common to Article 86 analysis.

3. *Decentralisation*

The Commission continues to pursue its policy of "decentralisation" to competent national authorities of enforcement of the competition rules, and increasingly encourages undertakings to pursue civil remedies,[23] taking the view that there will not normally be a "sufficient Community interest" justifying Commission intervention where a complainant is able to secure adequate protection of his rights from a national court.[24] It therefore indicated in its 1997 Notice on agreements of minor importance that in the event of agreements falling within the terms of the Notice or those involving small and medium-sized undertakings, it is "in the first instance ... for the authorities and courts of the Member States to take action", and it will institute proceedings, either upon its own initiative or upon a complaint, only exceptionally.[25] In order to assist, it has recently adopted a plethora of notices, on co-operation with national courts[26] and with national competition authorities,[27] on agreements of minor importance[28] and on the definition of relevant markets,[29] as well as issuing (and reissuing) a number of notices on the manner in which it is likely to discharge its own administrative responsibilities under Regulations 17 and 4064/89.[30] It is not clear that increasing reliance upon these soft law devices is prudent or will lead to greater efficiency in enforcement. There have been just over a dozen requests from national courts for Commission assistance under the 1993 Co-operation Notice, which would seem to suggest that their impact has not been great.

23. Notice on co-operation between national courts and the Commission in applying Arts.85 and 86 of the EEC Treaty (1993) O.J. C39/6, paras.14–16. The Commission intends to reissue an amended version of this Notice; see (1996) O.J. C262/5.

24. *Automec II*, *supra* n.8. Nor is the Commission under a duty to intervene where there is divergent national case law on Arts.85 and 86, for "it falls first to the national courts" to ensure the uniform application of Community law; Case T–5/93 *Tremblay* v. *Commission* [1995] E.C.R. II–185, 215.

25. Notice on agreements of minor importance, *supra*, n.18, at paras.5, 11, 19, 20.

26. *Supra* n.23.

27. Notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Arts.85 or 86 (1997) O.J. C313/3.

28. *Supra* n.18.

29. Notice on definition of the relevant market for the purposes of Community competition law (1997) O.J. C372/5.

30. The leniency Notice, *supra* n.19; the setting of fines Notice, *supra* n.20; Notice on internal rules of procedure for processing requests for access to the file (1997) O.J. C23/3; Notice on restrictions ancillary to concentrations (1990) O.J. C203/5; Notice on the concept of a full function joint venture (1998) O.J. C66/1; Notice on the notion of a concentration (1998) O.J. C66/5; Notice on the notion of concerned undertakings (1998) O.J. C66/14; Notice on the calculation of turnover (1998) O.J. C66/25.

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C. Mergers

The long-awaited reform of the Merger Regulation was finally agreed in 1997[31] and came into force in March 1998. As amended, the Regulation provides new thresholds by which a merger or takeover will have a "Community dimension" and so fall within the ambit of the Regulation: a concentration now has a Community dimension where: (a) the combined aggregate worldwide turnover of all undertakings involved exceeds 2,500 million ECUs (not 2,000 million as widely anticipated); (b) the combined aggregate turnover of all undertakings exceeds 100 million ECUs in at least three member States; (c) in each member State covered by (b), the aggregate turnover of each of at least two undertakings exceeds 25 million ECUs; and (d), as with the old thresholds, the undertakings do not generate two-thirds of their turnover in a single member State.[32]

The new thresholds do not displace the old ones; rather, the two sets coexist, and apply coterminously to what may be different situations. They mark a recognition that the old thresholds excluded a number of concentrations with significant Community and cross-border effects, and demonstrate a policy decision to bring a significantly greater number of concentrations within the scope of the Regulation—but only where there is a (significant, but not excessively high) impact in at least three member States. This will lead to wider access to the "one-stop shop" which is a policy objective of the Regulation and, like the two-thirds rule which applies to both sets of thresholds, the three-member-State rule applying to the lower threshold is consistent with the principle of subsidiarity. The new thresholds are to be reviewed by July 2000.[33]

The provisions of the Regulation addressing joint ventures were also amended significantly. Under the old rules, significant analysis was necessary to determine whether a joint venture was "co-operative" or "concentrative". If the former, it was not a concentration within the meaning of the Regulation. This is no longer so. A joint venture now need meet only the joint control (that is, decisions concerning its activities require the agreement of all parents), enduring (intended to operate upon a lasting basis) and full function (the human, material and financial resources necessary to function and function independently, not merely in an ancillary manner to the commercial activities of its parents) tests in order to be concentrative,[34] and so fall within the Regulation. It must also of course meet the thresholds in order for the Regulation to apply. But notwithstanding the abandonment of the concept of "co-operative joint venture", Article 85 will apply to a concentrative joint venture to the extent that it has as its object or effect the co-ordination of the competitive conduct of undertakings party to it.[35] If the effect of the joint venture is primarily structural, Article 85(1) will not normally apply.[36] However, where two or more parents retain significant economic activities in the same market or in an upstream, downstream or closely neighbouring market as the joint venture,[37]

31. Reg.1310/97 (1997) O.J. L180/1.
32. Reg.4064/89 (1990) O.J. L257/14, Art.1(3).
33. Art.1(4), (5).
34. Art.3(2); see also Reg.1310/97, recital 5.
35. Art.2(4).
36. Reg.1310/97, recital 5.
37. Reg.4064/89, Art.2(4).

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Article 85(1) may well apply. In this event and to that extent, the Commission is to consider a notified concentrative joint venture in the context of Article 85(1) and (3)—in effect, as if the co-operative aspects, which are subject to Article 85(1), were notified for exemption under Article 85(3). So, a joint venture may fall to be considered upon two distinct but related tests: the concentrative aspects fall within the criteria of the Merger Regulation, the co-operative aspects (if any) within those of Article 85(1) and (3). Where co-operative aspects exist, if the criteria of Article 85(3) are not satisfied—which is likely to be the case where the creation of the joint venture results in co-ordination which affords the relevant undertakings the possibility of substantial elimination of competition[38]—the (entire) concentration is to be declared incompatible with the common market.[39] Whilst the new system may be complex, it is a significant improvement upon its predecessor.

Otherwise the amendments did little more than housekeeping. The "Dutch clause",[40] which permits a member State to refer to the Commission a concentration which significantly impedes effective competition within its territory but which has no Community dimension to be considered under the Regulation as if, in effect, it had, was to be dropped once the thresholds were reviewed,[41] but survived unmolested.[42] The "German clause",[43] which allows a referral by the Commission of a concentration with a Community dimension to national competition authorities for determination in accordance with national competition law, was to be "reviewed",[44] but has undergone no material change. "Partial referrals" under the German clause—referral by the Commission of certain aspects of a concentration to national authorities whilst retaining other aspects for its own deliberations—became increasingly common (six out of the eight partial referrals to date occurring in 1997), but it was never clear that the Commission had authority to do so. This is now cured by the amendments.[45] Requests under the German clause are likely to increase with the new thresholds, but given the three-member-State rule, the Commission is unlikely to be accommodating.

As to the application of the Merger Regulation, an important development was the judgment in *France and SCPA and EMC* v. *Commission*,[46] in which the Court of Justice confirmed what the Commission has urged since *Nestlé/Perrier*, that the Regulation applies to the creation or strengthening not only of a dominant position but also of a collective dominant position. Not only that, it applies to the creation of collective dominance shared by parties to a concentration on the one

38. *Ibid.*
39. Art.8(3).
40. Art.22(3).
41. Art.22(6), now repealed.
42. Except that under the new Art.22(3), a referral may be made by two or more member States acting jointly (the "Scandinavian clause"), so allowing the Commission to consider the effects of a referred concentration in more than one member State.
43. Art.9.
44. Art.9(10), now replaced with a commitment for review by July 2000.
45. Cf. the old version of Art.9(3)(b) ("the Commission may refer *the case* to the competent [national] authorities") with its replacement ("the Commission may refer the whole or part of the case to the competent [national] authorities").
46. Cases C-68/94 and 30/95; judgment of 31 Mar. 1998, not yet rep.

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hand and another undertaking unconnected with the concentration on the other. As with the recent case law on collective dominant position under Article 86, it is necessary for the Commission to show, if necessarily prospectively, that the jointly dominant undertakings "together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market".[47] This it failed to show, and the decision in issue was annulled. But doubtless emboldened by the question of principle being settled, the Commission will return to the creation or strengthening of collective dominance or oligopoly with vigour.

As to the application of the Merger Regulation generally, the number of notifications has risen steadily—110, 131 and 172 in 1995, 1996 and 1997 respectively—and the Commission has now considered about 700 concentrations under the Regulation. In the period under consideration it opened phase 2 proceedings—which it is required to do where it entertains "serious doubts" as to the compatibility of a concentration with the common market[48]—in 26 cases, allowed 14 to proceed only if conditions were complied with, and prohibited six, bringing the total since the Regulation entered into force to eight. Three of the six were referrals under the Dutch clause, two from the Netherlands and one from Finland. (With the entry into force of the new Dutch *Mededingingswet* in January 1998, Denmark, Luxembourg and Finland remain the only member States without national merger regulation control.)

ROBERT LANE*

IV. INSURANCE AND BANKING

A. The New Legislative Landscape: Consolidation and Recommendations

The internal financial market is still far from its completion. Parts of the financial market and certain financial institutions are not yet covered by implementing directives. In areas that are covered by directives, transposition by member States has not removed important practical barriers to cross-border establishment and provision of services. An interesting feature of the current developments in the EC regulation of financial markets is the Commission's use of "Communications" to implement Treaty freedoms and so to remedy the situation where the member States have blocked proposals for a directive or where unacceptable barriers remain after their transposition.

The incomplete structure of the internal financial market is illustrated in a recent judgment of the European Court of Justice, *France* v. *Commission*.[1] It concerned an attempt by the Commission to complete the structure of the internal financial market in an area where the normal legislative procedure had failed.

47. Para.221.
48. Reg. 4064/89, Art.6(1)(c).

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1. *French Republic* v. *Commission of the European Communities* [1997] E.C.R. I–1627.

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