CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joe McMahon

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I. COMPETITION LAW

A. Enforcement of the Competition Rules

1. Regulation 1/2003

By any measure the single most important development across the field of Community competition law during the period under review (Spring 2001–Autumn 2003) is the adoption of Regulation 1/2003, by which the Pope abandoned the Vatican for the embrace of the Free Presbyterian Church. Regulation 17 has been the bedrock of the enforcement of the Community rules since 1962.[1] Fundamental changes to it, first proposed by the Commission in 1999,[2] were so startling as to be likened to 'a lifelong devout Catholic suddenly converting him/herself to Protestantism'.[3] Yet they were adopted by the Council in late 2002, and published early in 2003 as Regulation 1/2003[4]—the Council here, maybe, missing a trick in not waiting a fortnight so as to adopt it as Regulation 17/2003. The new regulation is to apply from 1 May 2004—the date also scheduled for the formal accession of the ten new Member States.

The (then) proposed changes were considered in an earlier note,[5] and as the regulation as adopted adheres in all essentials to the proposals, they will not be re-rehearsed here. At the heart of the changes is the surrender of the Commission monopoly of the power of exemption of anticompetitive agreements and practices under Article 81(3), henceforward to be 'decentralized'. It means the adoption in place of the present (German) system of central administrative, quasi-judicial authorization of exemption, which has obtained since 1962, of a (French) system of *exception légale*: that is, an agreement, decision or practice which is prohibited by Article 81(1) is nonetheless valid from the date of its formation or adoption, without need of notification and authorization ('no prior decision to that effect being required'),[6] provided that it satisfies the

[1] JO (1962) 204.
[2] White Paper on Modernization of the Rules Implementing Arts 85 and 86 of the EC Treaty, OJ (1999) C132/1.
[3] J Nazerali and D Cowan 'Modernising the Enforcement of EU Competition Rules—Can the Commission Claim to be Preaching to the Converted ?' [1999] ECLR 422, at 422.
[4] OJ (2003) L1/1.
[5] (2000) 49 ICLQ 232–4.
[6] Regulation 1/2003, Art 1(2).

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criteria for exemption laid down in Article 81(3); and the determination of whether this is so is to fall within the competence no longer solely of the Commission, but also of both national administrative authorities and national courts.

Commission powers of investigation have been beefed up in some measure, and safeguards have been introduced intended to minimize inconsistencies between Commission and national authorities, and between and amongst the various national authorities and the multiplicity of national courts, so in turn seeking to minimize the attraction of forum shopping. An effort is made to confer pre-eminence upon the Commission over both national administrative authorities[7] and national courts,[8] so codifying the principles of the judgment of the Court of Justice (the Court) in *Masterfoods*.[9] In October 2003 the Commission published its 'modernization package', consisting of a draft regulation on Commission procedures[10] plus six (of doubtless many to come) draft notices on:

- cooperation within the network of competition authorities;
- cooperation between the Commission and national courts;
- the handling of complaints;
- guidance relating to novel questions on Articles 81 and 82 ('guidance letters');
- the concept of effect upon trade; and
- the application of Article 81(3).

So the die is cast. Unless the Court of Justice is minded to find Regulation 1/2003 unlawful for inconsistency with Article 81, a possibility (and no more) suggested by the German and Austrian governments,[11] Community competition law undergoes its most significant change in 40 years in May 2004. And if nothing else is certain, the genie is out of the bottle for good, for a Council of 25 (acting by qualified majority vote)[12] is unlikely ever to agree to the degree of centralized enforcement achieved by Regulation 17. The wisdom of it is yet to be tested.

2. Leniency

In 1996 the Commission, inspired by American practice, adopted its 'leniency' or 'whistleblowers' programme, and a notice to give it effect, for the better detection of cartels.[13] In early 2002 it adopted a replacement notice.[14] The leniency programme now offers complete immunity from Commission fines to an undertaking who is the first to submit to it evidence which is sufficient to justify a formal investigation or, if the Commission has that much, sufficient to establish an infringement of Article 81(1), provided that it stops its own participation in the infringement immediately, it cooperates with the Commission fully and continuously, and did not coerce other undertakings

[7] Art 11. [8] Art 16.

[9] Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369.

[10] OJ (2003) C243/3. The regulation will replace Regulation 2842/98 OJ (1998) L354/18, which itself replaced the original procedure regulation, Regulation 99/63 JO (1963) 2268.

[11] Stellungnahme der Bundesregierung zum Weissbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EGV, 29 Okt 1999; Österreichische Position zum Weissbuch der Europäischen Kommission über die Modernisierung der Anwendung der Art 81 und 82 EG-V, undated.

[12] Art 83 EC.

[13] Notice on the non-imposition or the mitigation of fines in cartel cases, OJ (1996) C207/4.

[14] Notice on immunity from fines and reduction of fines in cartel cases, OJ (2002) C45/3.

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into the cartel. The old rule that an instigator or 'ringleader' undertaking was by that fact excluded has been abandoned. A reduction of fines is available to other undertakings submitting evidence of 'significant added value' to that already in the Commission's possession. The new notice and in particular the 'first through the door rule', seems to be bearing generous fruit: adopted in February 2002, it resulted in ten major cartels being shopped to the Commission before the year was out.[15]

In the meanwhile, the Commission's rapacity in the matter of fines grows apace. Of 21 cartel decisions adopted between 2001 and late 2003, nine involved fines in excess of €100 million, including record combined fines in a global vitamins cartel of €855 million, one participant undertaking (Hoffmann-La Roche of Basel) being fined €462 million;[16] combined fines in a long-standing plasterboard cartel of €478 million, with one undertaking (Lafarge SA of Paris) fined €250 million;[17] and combined fines in a carbonless paper cartel of €314 million, including €183 million for Arjo Wiggins Appleton plc of London,[18] the highest fine ever imposed upon a single undertaking for a single infringement of the Community rules. Even non-cartels are beginning to feel the Commission's bite. In late 2002 Nintendo was fined €149 million (and a number of its European distributors €19 million) for agreeing to and colluding in the restriction of parallel imports of its electronic games consoles and cartridges.[19] In its decisions the Commission is also devoting ever increasing care to adherence to its 1998 guidelines on the calculation of fines[20]—whether for fear of falling foul of the Court of First Instance (CFI) or otherwise, it does not say.

3. Block Exemption

Although Regulation 1/2003 could be argued to render them otiose, the Commission will continue to issue block exemptions for greater certainty. In the period under review it adopted three block exemptions:

- a block exemption governing vertical arrangements in the motor vehicle sector,[21] which will apply until 2010. It will apply to all vertical arrangements in the sector but in a manner specifically designed for it and generally stricter than the general vertical restraints block exemption;[22]
- a block exemption regulation in the insurance sector;[23] and
- a fourth block exemption in the State aids sector, governing employment aid.[24] It applies to aid for the creation of employment and for the recruitment, and additional costs of employing, disadvantaged or disabled workers; it applies to aid in the agricultural sector but not in coal, shipbuilding or transport.

[15] European Commission, *XXXIInd Report on Competition Policy 2002*, para 34.
[16] Decision 2003/2 (*Vitamins*) OJ (2003) L6/1.
[17] *Plasterboard cartel*, decision of 27 Nov 2002, not yet published.
[18] *Carbonless paper cartel*, decision of 20 Dec 2001, not yet published.
[19] Decision 2003/675 (*Nintendo*) OJ (2003) L255/33.
[20] Guidelines on the method of setting fines pursuant to Art 15(2) of Regulation No 17 and Art 65(5) of the ECSC Treaty, OJ (1998) C9/3.
[21] Regulation 1400/2002 OJ (2002) L203/30, replacing Regulation 1475/95 OJ (1995) L145/25.
[22] Regulation 2790/1999 OJ (1999) L336/21.
[23] Regulation 358/2003 OJ (2003) L53/8, replacing Regulation 3932/92 OJ (1992) L398/7.
[24] Regulation 2204/2002 OJ (2002) L337/3.

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The 1996 block exemption covering technology transfer agreements is scheduled to apply until 2006,[25] but is expected now to be replaced in 2004.

B. Undertakings

It is trite law to say that the Community competition rules apply to 'undertakings', and do not—cannot—apply to the conduct of any entity lacking the quality of an undertaking. Because of this the concept is drawn very broadly, embracing, in the now standard *Höfner* formula, 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'[26] and so a host of entities, from individuals to the State itself, beyond the intuitive understanding meaning of the word. In German competition law it is established that an individual purchasing a good or service for his or her personal consumption is not an undertaking.[27] If this has leaked into Community competition law, it has never been recognised by the Court. But in a little remarked 2003 judgment in *FENIN* the CFI leapfrogged the point, taking it significantly further.[28]

In *FENIN*, a Spanish association of undertakings engaged in marketing medical goods and equipment lodged a complaint with the Commission alleging abuse of a dominant position, and so a breach of Article 82, on the part of the various bodies which run the *Sìstema nacional de salud* (SNS), the abuse consisting essentially of systemic late payment for goods supplied immune from any effective commercial pressure from creditors. The Commission declined to intervene on the grounds that the various bodies were not undertakings when engaged in the management of a public health service, and FENIN challenged the decision before the CFI. It said: [29]

> [I]t is the activity consisting in offering goods and services in a given market that is the characteristic feature of an economic activity, not the business of purchasing as such. Thus . . . it would be incorrect, when determining the nature of the subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.
>
> Consequently, an organisation which purchases goods—even in great quantity—not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which the entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.

This answers the question of the individual consumer as undertaking and a good deal more. According to the CFI, re-sale is a necessary activity of an undertaking; the end user is not an undertaking, even an end user wielding the monopsonistic market power of the Spanish health service. *Why* this is so is not made clear. The CFI supplies little by way of authority, the services of the SNS *are* paid for, even if not by the actual

[25] Regulation 240/96 OJ (1996) L31/2, Art 13.
[26] Case C-41/90 *Höfner & Elser v Macrotron* [1991] ECR I-1979, at para 17.
[27] Bundeskartellamt, *Jahresbericht* (1961), S 61.
[28] Case T-319/99 *FENIN v Commission*, judgment of 4 Mar 2003, not yet reported.
[29] Ibid, paras 36–7.

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user, and the apparent belief that purchasing is not an economic activity is economically illiterate. There are of course difficulties in applying Articles 81 and 82 in socio-economic spheres,[30] but that is why Article 86(2) (and now also Article 16) is in the Treaty. If correct, the CFI immunizes a good deal of economic activity from the competition rules. It may also render privatisation of social services a far less attractive option.

The judgment in *FENIN* has been appealed to the Court.[31] In the meanwhile, the Competition Commission Appeal Tribunal in the United Kingdom, which is bound by statute to apply the Community law meaning to materially identical UK statutory terms,[32] found a health and social services board operating within the National Health Service to be an undertaking insofar as it purchased services of and accommodation in nursing and residential homes in Northern Ireland.[33] Some of this may come to be reconsidered as the Office of Fair Trading gears up to investigate a price fixing cartel amongst various public (ie, private fee paying) schools in England, and as English universities consider if, when and how to apply 'top up' fees.

C. Article 81(1) and the Rule of Reason

There has been a long, and unresolved, academic debate upon the extent to which Article 81(1) admits of any flexibility, or whether it prohibits any anticompetitive agreement or practice, however beneficial, remote or minimal its effects. The Court early on recognized a *de minimis* rule, that Article 81(1) does not apply to an agreement or practice which restricts or distorts competition only 'inappreciably'.[34] Related to, but distinct from, *de minimis* is the question of a contract being saved because its distorting effects are beneficial—what is sometimes called a 'rule of reason'. This construct of American antitrust law involves a balancing test applied by American courts whereby a contract which is not per se anticompetitive can be saved from the prohibition of section 1 of the Sherman Act if those anticompetitive qualities are outweighed by any pro-competitive benefits it may bring. As these are considerations addressed by Article 81(3), which may be regarded as a codification of a rule of reason, it has been argued that Article 81(1) of itself admits of no rule of reason analysis. In 2001 the CFI said: [35]

> [A]s a consequence of the existence of a rule of reason in Community competition law, when Article 85(1) of the Treaty is applied it is necessary to weigh the pro- and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in that article. It should, however, be observed . . . that . . . the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have

[30] See, eg, the discussion of A-G Jacobs in Case C-67/96 *Albany International* [1999] ECR I-5751, at paras 132–94 of his opinion, wherein he considers the difficulties in applying Art 81 to occupational pension schemes.

[31] Case C-205/03P *Federación Española de Empresas de Tecnología Sanitaria v Commission*, pending.

[32] Competition Act 1998, s 60.

[33] *BetterCare Group Ltd v Director General of Fair Trading* [2002] CompAR 299.

[34] Case 56/65 *STM v Maschinenbau Ulm* [1966] ECR 235; Case 5/69 *Völk v Vervaecke* [1969] ECR 295; see n 45 below and accompanying text.

[35] Case T-112/99 *Métropole Télévision v Commission* [2001] ECR II-2459, at paras 72 and 74.

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> been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful. . .
>
> It is only in the precise framework of [Article 85(3)] that the pro- and anti-competitive aspects of a restriction may be weighed. Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.

But in a 2002 judgment in *Wouters* the Court of Justice brought a new opaqueness to the issue.[36]

Wouters involved a 1993 regulation of the Dutch *Orde van Advokaten* which prohibited advocates from entering into a partnership (*samenwerkingsverband*) with members of other professions outside the Bar. Mr Wouters was an Amsterdam advocate who wished to enrol at the Rotterdam Bar and practise there in a single undertaking alongside tax consultants and accountants. He was refused permission by the General Council for incompatibility with the 1993 regulation. He appealed. Upon referral from the *Raad van State*, the Court found that advocates were undertakings and that the *Orde van Advokaten*, even in discharging statutory duties, was an association of undertakings; and that the Dutch regulation had 'an adverse effect' upon competition[37] and 'restrict[s] competition'.[38] It continued: [39]

> However, not every agreement between undertakings or every decision of associations of undertakings which restricts the freedom of action of the parties or one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. . . . [A]ccount must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumer of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. *It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.* . . .

And having duly considered, [40]

> [a] regulation such as the 1993 regulation could . . . reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

So, the Court finds a decision of an association of undertakings which restricts competition, yet is justified by reference to the social interests it serves, and so is not a breach of Article 81(1). If this is not rule of reason analysis, it is something very close. Yet the CFI thinks not; 21 months after *Wouters* it *still* says: [41]

> As regards [the applicant's] argument relating to the application of the rule of reason in the present case, the Court would point out that the existence of such a rule in Community competition law is not accepted.

How can this be squared?

The answer must be that the two courts are talking about two different things. The CFI sees rule of reason as a direct translation of its American progenitor, the applica-

[36] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advokaten* [2002] ECR I-1577.
[37] Ibid, para 86.
[38] Ibid, para 94.
[39] Ibid, para 97; emphasis added.
[40] Ibid, para 107.
[41] Case T-65/98 *van den Bergh Foods v Commission*, judgment of 23 Oct 2003, not yet reported, at para 106.

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tion to an anticompetitive agreement or practice of economic criteria by which it may find counterbalancing justification; and to the CFI that is the proper, and sole, province of Article 81(3). The Court is more subtle. It finds a practice which restricts competition, but finds in it objective necessity in the service of a social end, here the prudential supervision of the legal profession. Now, in the socio-economic sphere the Court could neutralise the competition rules by paring back the meaning of undertaking, as it has done, but sparingly only, in the case of social security offices operating a compulsory social insurance scheme[42] or a port's anti-pollution surveillance authority, even where port users paid fees to finance its activities.[43] *Wouters* may be a step in a similar, but distinct, direction. Its closest cousin is not rule of reason (as viewed by the CFI) but the mandatory requirements doctrine of *Cassis de Dijon*[44]—sometimes also called the rule of reason. These are considerations which it is legitimate to safeguard in the public interest, and so insulate from the rigours of Article 81, provided, presumably, they are objectively justifiable, necessarily incidental and proportionate ('inherent in the pursuit of those objectives'). It is a test which is restricted to the proper interpretation and application of Article 81(1), recourse to Article 81(3) being unnecessary. This is just as well, for had the 1993 Dutch regulation required to be justified by reference to Article 81(3), it is unlikely it would have survived: those criteria are economic criteria, unsuited to this task.

It is also a new test, or at least a new orientation, and so will require far more precision from the Court. But it may not get it, for with *exception légale* introduced by Regulation 1/2003, the rule of reason analysis (or whatever it is to be called) and (contemporaneous) consideration of Article 81(3) may blend together. And it will certainly not make the task facing national authorities and courts any easier.

Alongside the rule of reason (whatever it may mean), the prohibition of Article 81(1) is also inapplicable if an agreement or practice distorts competition 'inappreciably', and this *de minimis* defence is one given (soft) flesh by a series of Commission notices, the first adopted in 1970. The most recent, and fifth, notice, addressing 'agreements of minor importance which do not appreciably restrict competition', was published at the end of 2001.[45] It raises the bar of appreciability for horizontal agreements from 5 to 10 per cent of market share and for vertical agreements from 10 to 15 per cent of market share. It also provides that the Commission will not in any case intervene in a matter falling within the terms of the notice, and that an agreement or practice which is assumed by the parties, in good faith, to be covered by it is immune from the Commission's power to fine. So, the Commission is probably estopped from acting in a manner inconsistent with these provisions. Whilst the notice does not bind national authorities and courts, and expressly recognizes this, it is clearly intended to serve as persuasive assistance to them, the authority of which may increase with the pre-eminence sought to be bestowed upon the Commission (in other respects) by Regulation 1/2003.

[42] Cases C-159 and 160/91 *Poucet et Pistre v Assurance Générales de France* [1993] ECR I-637.
[43] Case C-343/95 *Diego Calì e Figli* v *Servizi Ecologici Porto di Genova* [1997] ECR I-1547.
[44] Case 120/78 *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[45] OJ (2001) C368/13.

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D. Mergers and Oligopolies

The year 2002 was not a good one for the Commission in merger control. From 1990 (when the Merger Regulation[46] entered into force) to date, the Commission has prohibited eighteen mergers outright. Three of the prohibitions were set aside by the CFI in 2002 in robust language, and the repercussions may be costly.

Airtours involved the proposed acquisition of the number three (First Choice) by the number two (Airtours) UK tour operator and supplier of package holidays. The market was already oligopolistic, four operators sharing 79 per cent of it, all others with less than 5 per cent, with both upstream and downstream integration. The Commission found the acquisition would lead to a collective dominant position in the UK market for short-haul foreign package holidays, competition would therefore be significantly impeded, and so vetoed it.[47] *Tetra Laval* involved a takeover bid by Tetra Laval of a French undertaking (Sidel), the two from different but closely neighbouring subsections of the packaging industry—hence a conglomerate merger—which, said the Commission, would result in a future dominant position across the two markets.[48] *Schneider Electric* was the acquisition of one French electrical equipment manufacturer (Legrand) by another (Schneider) which, claimed the Commission, would create a dominant position in a number of national sectoral markets.[49]

All three Commission decisions were challenged before the CFI. Its judgment in *Airtours* was excoriating.[50] It first set about producing a new working definition of collective dominance, at least within the context of the Merger Regulation, considered previously in *Kali & Salz* and *Gencor*.[51] Collective dominance exists where a concentration results in a situation in which it is economically rational and preferable for undertakings to adopt a lasting common policy in the market without need of an agreement or concerted practice to that end, and without effective competitive restraints from competitors, latent competition or powerful buyers.[52] It therefore requires three conditions:

- each oligopolist must be able to observe the conduct of the others in order to monitor the adoption, or otherwise, of the common policy;
- the situation of 'tacit coordination' must be sustainable over time, that is, there is an incentive not to depart from the common policy, or a likelihood of retaliation in the event; and
- there is no effective external constraint from competitors, new market entrants or powerful consumers.[53]

There is no mention of any necessary 'links' which were part of the previous case law. The conditions must be made out, necessarily, by a prospective market analysis.[54]

[46] Regulation 4064/89 OJ (1990) L257/13.
[47] Decision 2000/276 (*Airtours/First Choice*) OJ (2000) L93/1.
[48] *Tetra Laval/Sidel*, decision of 30 Oct 2001, not yet published.
[49] *Schneider/Legrand*, decision of 10 Oct 2001, not yet published.
[50] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.
[51] Respectively Cases C-68/94 & 30/95 *France and ors v Commission* [1998] ECR I-1375 and Case T-102/96 *Gencor v Commission* [1999] ECR II-753.
[52] Above n 50, para 61.
[53] Ibid, para 62.
[54] Ibid, para 63.

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The CFI then found the Commission to have made multiple errors of assessment. There was insufficient evidence of an existing tendency towards collective dominance, its demand growth and demand volatility analysis was inaccurate, a finding of market transparency unsubstantiated, another of incentive not to depart from oligopoly discipline erroneous, the potential of competition from small operators underestimated, ease of market access improperly considered, and competitive restraints of the consumer discounted. Therefore[55]

> the Decision, far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created.

The other two judgments were gentler in tone but no less fatal to the Commission. In *Tetra Laval* the challenge was based upon both procedure and substance. The Commission was upheld on the former but roundly defeated on the latter, essentially for errors of assessment.[56] In *Schneider Electric* the Commission had failed to muster sufficient evidence to show a requisite dominance-to-be in any of the markets claimed except that of France. The CFI therefore annulled the decision upon the shortcomings of the Commission's analysis except as regards the French market, but annulled that part of the decision for infringement of the rights of defence.[57]

This has led, directly or indirectly, to a number of developments. Following a 2001 Green Paper,[58] in December 2002 the Commission formally proposed the adoption of a new merger control regulation.[59] The changes proposed are not great. The existing turnover thresholds for 'Community dimension' remain unchanged;[60] the present 'dominance test' is retained,[61] despite urgings from some quarters for the adoption of a 'substantial lessening of competition' (SLC) test. However there is a new definition of dominance provided, that is, one or more undertakings are

> deemed to be in a dominant position if, without coordinating, they hold the economic power to influence appreciably and sustainably the parameters of competition . . . or appreciably to foreclose competition.[62]

There is new preambular reference to oligopolistic markets, designed to ensure they fall for consideration within the regulation;[63] and a new system of referrals to and from the Commission is provided.[64]

The regulation has not yet been adopted but, like Regulation 1/2003, it is scheduled to apply from 1 May 2004.[65] It is the cornerstone of the Commission's 'comprehensive merger control reform package', which includes also an as yet unpublished draft notice on the appraisal of horizontal mergers and a major administrative shake-up, primarily the break-up of the Merger Task Force and its integration into four sector-specific directorates (information, communications and multimedia; services; industry and energy; consumer goods) within D-G Competition and the appointment of a chief

[55] Ibid, para 294.
[56] Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.
[57] Case T-77/02 *Schneider Electric v Commission* [2002] ECR II-4201.
[58] Green Paper on review of Regulation (EEC) No 4064/89, COM (2001) 745 final.
[59] Proposal for a Council Regulation on the control of concentrations between undertakings, OJ (2003) C20/4.
[60] Art 1(2–3).
[61] Art 2(3–4).
[62] Art 2(2).
[63] Preamble, 21st indent.
[64] Arts 4(4–5), 22.
[65] Art 26(2).

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competition economist and a deputy director general for mergers, and peer review panels for the closer scrutiny of phase 2 investigations.

In the meanwhile the Commission has appealed the judgment in *Tetra Laval*[66] but, following reconsideration and undertakings given, has allowed the concentration to proceed.[67] More worrying for the Commission, MyTravel (the successor to Airtours) has now raised an action in reparation against it under Article 235, claiming that in the *Airtours* decision the Commission infringed Article 2 of the Merger Regulation and general principles of sound administration, care and diligence, and did so with such manifest disregard for the limits of its discretion as to give rise to liability in damages—the claim thought to be in excess of £500 million.[68] Schneider Electric has also now jumped on the bus, similarly seeking damages thought to be in the region of €1.5 thousand million,[69] the largest ever damages claim against the Commission. Whilst questions of Commission liability in this context are unprecedented, it seems the *MyTravel* claim (in substance if not quantum) at least is not so far-fetched. Perhaps the Community is to be relieved of much of the additional income the Commission has so enthusiastically garnered for it.

Finally, in the context of oligopolies more generally (that is, outwith the ambit of the Merger Regulation), the Commission invested a good deal on the matter of collective dominance under Article 82 in its 1998 *TACA* decision.[70] The TACA was a liner conference comprising 15 shipping companies. The Commission found a number of infringements of Article 81 (fixing tariffs, brokerage fees and prohibiting terms and conditions in service contracts) and also infringements of Article 82, a function of abuse of the collective dominance enjoyed by the companies:

> the members of the TACA collectively enjoy a dominant position by reason of the fact that they are bound together by a considerable number of economic links which has led to a significant diminution of their ability to act independently of each other.[71]

And for the infringements of Article 82 it imposed fines totalling a then record €273 million.

On review, the CFI found material breaches of the rights of defence, in Commission reliance upon documents in the file it had failed to disclose, and of good administration. On substance, there was considerable consideration of the nature of collective dominance under Article 82,[72] and the CFI found, based essentially upon the economic links amongst the parties to the conference—in the light of *Compagnie Maritime Belge*[73] a test maybe no longer necessary—that the companies did occupy a collective dominant position. But it went on to find that:

- much of the abuse of that dominance alleged by the Commission—primarily, inducement of other shipping companies into the conference rather than competing independently—was supported by insufficient evidence;

[66] Case C-12/03P *Commission v Tetra Laval*, pending.
[67] *Tetra Laval/Sidel*, decision of 13 Jan 2003, not yet published.
[68] Case T-212/03 *MyTravel Group v Commission*, pending.
[69] Case T-351/03 *Schneider Electric v Commission*, pending.
[70] Decision 1999/243 (*Transatlantic Conference Agreement*) OJ (1999) L95/1.
[71] Ibid, para 525.
[72] Cases T-191 etc/98 *Atlantic Container Line and ors v Commission*, judgment of 30 Sept 2003, not yet reported, paras 579–757.
[73] Cases C-396 & 396/96P *Compagnie Maritime Belge v Commission* [2000] ECR I-1365.

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- the Commission could not impose fines for infringements of Article 81(1) because of the fact of notification of the agreement; and
- fines for the remaining infringements of Article 82 ought not to have been imposed in respect of conduct falling within the notification.

The result was the annulment of much of the decision, setting aside of all fines and another Commission bloody nose.

There is a footnote to the *TACA* judgment. The CFI recognized that the contested decision was (at 112 pages in the *Official Journal*) 'one of the longest ever adopted by the Commission in application of Articles 85 and 86 of the Treaty' and that 'it raises relatively complex issues of fact and law'.[74] Nevertheless, it found the length of the applicants' written submissions so extensive as to amount to an abuse, and so ordered them to bear their own costs, an option available to the Court only where circumstances are exceptional or where a party has caused the other side to incur costs unreasonably or vexatiously.[75] There is as yet no rule limiting the length of written pleadings, and prior to this judgment no case law; but in light of the Court's decision here, applicants may henceforward wish to rein in any unnecessary extravagances in their submissions.

E. National Legislation

In 2002 three Member States adopted legislation making significant reform of their own competition laws and, in varying degrees and in various ways, aligning them more closely to the Community regime. In Ireland the comprehensive existing law was consolidated and replaced by the Competition Act, 2002. In Austria the 1988 *Kartellgesetz* was amended in some respects and supplemented by a new 'competition law' (*Wettbewerbsgesetz*).[76] Finally, in the United Kingdom, the 1998 Competition Act remains the primary governing law but is amended significantly and complemented by provisions of the Enterprise Act 2002.

The normal sanction for infringement of national competition law is an 'administrative fine'.[77] This is (necessarily) so also in Community law, both presently[78] and to come.[79] The most noteworthy innovation of the amendments is therefore the adoption in both Irish and United Kingdom law, joining the French before them,[80] of criminal sanctions for certain anticompetitive conduct. In the UK administrative fines ('penalties') imposed now by the Office of Fair Trading remain, but new 'cartel offences' were created, which consist in the hardcore practices of price fixing, limiting production or supply, market sharing and bid rigging.[81] A person convicted of a cartel offence is liable to a term of imprisonment of up to 5 years.[82] However, it is an offence only if

[74] Above n 72, para 1646.
[75] Rules of Procedure of the CFI, Art 87(3).
[76] Wettbewerbsgesetz–WettbG und Änderung des Kartellgesetzes 1988, des Strafsgesetzbuches und des Bundesfinanzgesetzes 2002, BGBl I Nr 62/2002.
[77] See, eg, in Denmark, Konkurrenceloven, §23; in Spain, Ley 16/1989, Art 10; in Italy, legge No 287 del 10 ottobre 1990, Art 15; in the Netherlands, Mededingingswet, Arts 56–68; in Sweden, Konkurrentslaget (1993:20), § 26.
[78] Regulation 17, Art 15(4).
[79] Regulation 1/2003, Art 23(5).
[80] Code de Commerce, Art L420-6.
[81] Enterprise Act 2002, s 188.
[82] Ibid, s 190(1).

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the function of an agreement[83] (cf Irish law which embraces hardcore practices, the product also of decisions of associations of competing undertakings or concerted practices)[84] is one which is 'dishonest'.[85] The test of dishonesty may constitute a significant hurdle in securing a conviction, even were enforcement power to be wielded by an authority other than the Serious Fraud Office, which has an altogether lacklustre record of success. It is also one that varies considerably as between English law and Scots law, so leading in all likelihood to differing application of the cartel offence as between the two jurisdictions. In order better to detect cartels—and complementing its existing leniency programme in the imposition of fines,[86] which was inspired by Commission practice—immunity from prosecution (a 'no-action letter') may be granted to cartel whistleblowers by the OFT.[87] In order to benefit the whistleblower is required to sing loudly and long. The Act also provides for the disqualification of a director of an undertaking that infringes either UK or Community competition law (the 'Competition Disqualification Order'),[88] and he or she must be disqualified if the court determines that the infringement renders him or her unfit. The OFT will not seek disqualification of a director benefiting from a no-action letter or leniency.[89] Disqualification may be for up to 15 years.[90]

Irish law is altogether less gentle. In Ireland *all* breaches of sections 4(1) and 5(1) of the Competition Act—equivalents (effectively *verbatim*) of Articles 81(1) and 82 of the Treaty—are made criminal offences[91] punishable by fines of up to 10 per cent of annual turnover,[92] and various hardcore cartel practices (price fixing, limitation of output or sales, market sharing) are offences for which managers and/or directors of an offending undertaking may be fined individually and imprisoned for terms of up to 5 years;[93] conviction for abuse of a dominant position or minor anticompetitive practices carries no term of imprisonment.[94] For hardcore cartels the burden of proof (on balance of probabilities)[95] is reversed: where a cartel is shown to exist, it is presumed that it has as its object or effect the prevention, restriction or distortion of competition 'unless the defendant proves otherwise'.[96] The 'ignorance' defence introduced in 1996 is therefore abolished. [97] This is similar to the approach adopted in Community law where parallel conduct is found.[98] However, as the Irish sanctions are clearly, and expressly, 'criminal penalties', this may not withstand a challenge under Article 6 of the European Convention on Human Rights. All criminal penalties are imposed by the courts; if proceedings are by indictment, by the Central Criminal Court.[99]

[83] Ibid, s 188(1).
[84] Competition Act, 2002, s 6(2).
[85] Enterprise Act 2002, s 188(1).
[86] See *Guidance as to the Appropriate Amount of a Penalty*, OFT423.
[87] Enterprise Act 2002, s 190(4); see *The Cartel Offences: Guidance on the Issue of No-action Letters for Individuals*, OFT513. No-action letters do not (and cannot) pre-empt prosecution in Scotland, but the Lord Advocate may take the cooperation into account.
[88] Company Directors Disqualification Act 1986, s 9A (as amended by the Enterprise Act); see *Competition Disqualification Orders*, OFT510.
[89] OFT510, paras 4.27, 4.12.
[90] Company Directors Disqualification Act 1986, s 9A(9).
[91] Competition Act, 2002 (No 14 of 2002), ss 6(1) and 7(1).
[92] Ibid, s 8(2).
[93] Ibid, ss 6(1), 6(2) and 8(1)(ii).
[94] Ibid, s 8(3).
[95] Ibid, s 3(3)(a).
[96] Ibid, s 6(2).
[97] Competition (Amendment) Act, 1996 (No 19 of 1996), s 2(c)(i).
[98] See Cases 100-103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825, per A-G Slynn, at 1930-1 and Case C-199/92P *Hüls v Commission* [1999] ECR I-4287.
[99] Competition Act, 2002, s 11.

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But Irish law goes further still. The Enterprise Act provides expressly that an offence is committed only if the hardcore cartel agreement is implemented in whole or in part within the UK,[100] and the Competition Act provides that (criminal) infringements of sections 4(1) and 5(1) consist in and require anticompetitive practice or conduct 'in the State or in any part of the State'. But Articles 81 and 82 of the Treaty are of course of pan-Community application, and the Competition Act makes infringements of Articles 81(1) and 82 of themselves offences in Irish law.[101] This is unique in the Community. On its face the Competition Act therefore criminalizes, in Irish law, price fixing, for example, on ferry services between Helsinki and Tallinn. Presumably, if for nothing other than practical difficulties, the Competition Authority and the Director of Public Prosecutions would be slow to mount a prosecution of the practice. Notwithstanding, it is still remarkable that a State, the constitution of which provides that no authority other than those of the State may make laws binding in and for the State,[102] is prepared to create a criminal offence—one punishable by five years' imprisonment—which may be crucially contingent upon the exercise of Commission discretion.

Ironically the Austrian law abandons criminal penalties (which were in the event rarely imposed) in favour of fines.[103] The exception is bid rigging in public procurement (*Submissionskartelle*), which is made an offence subject to a term of imprisonment of up to three years.[104] Fines are imposed by the *Kartellgericht*, in response to proceedings initiated by the *Bundeswettbewerbsbehörde* (BWB),[105] by the *Bundeskartellanwalt*[106] or by the various utilities regulators.[107] The *Kartellgericht*'s previous competence, much criticised, to commence proceedings *ex officio* in the public interest, is abolished. Abuse of a dominant position is prohibited per se[108]—previously it was not clear whether this was so—and limited, but not absolute, immunity from fines may be granted to cartel whistleblowers.[109]

Both the Irish and the UK Acts provide comprehensive new rules for the regulation of mergers and takeovers,[110] whilst the Austrian law amends the existing system.[111] In all three cases administrative authorities were created (the BWB and its advisory *Wettbewerbskommission*, the *Bundeskartellanwalt*) or strengthened (the Competition Authority, the Office of Fair Trading, both made bodies corporate)[112] with new powers of investigation and enforcement. Powers specific to criminal investigation and prosecution were laid down in both Irish[113] and UK[114] law. The Enterprise Act also granted autonomy to (and renamed) the Competition Appeal Tribunal, and provides for a claim for damages before the Tribunal in respect of injury caused by infringements of UK or Community competition rules, but only after the Office of Fair Trading, the Tribunal itself, or the Commission has adopted a decision that such an infringement has

[100] Enterprise Act 2002, s 190(3).
[101] Competition Act, 2002, ss 6(1) and 7(1).
[102] Constitution of Ireland, Art 15.2.1°.
[103] § 142 KartG.
[104] § 186b StGB.
[105] § 2 II WettbG.
[106] § 44 KartG.
[107] § 50 KartG.
[108] § 35 KartG.
[109] § 143 KartG.
[110] Competition Act, 2002, ss 16–28 (replacing the Mergers, Take-overs and Monopolies (Control) Act, 1978) and Enterprise Act 2002, ss 22–130 (replacing (what is left of) the Fair Trading Act 1973).
[111] §§ 42a–42e KartG; § 17 WettbG.
[112] Competition Act, 2002, s 29; Enterprise Act 2002, s 1.
[113] Competition Act, 2002, s 45.
[114] Enterprise Act 2002, ss 192–202; see *Powers of Investigating Criminal Cartels*, OFT505.

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occurred.[115] The Act is *still* silent on whether or not an infringement gives rise to a cause of civil action.[116] The new remedy of damages awarded by the Tribunal would suggest that, absent Tribunal intervention, it does not. But this would give rise to the anomaly of a remedy in damages for infringement of Community competition rules—if that is a requirement of Community law, which seems likely[117]—but not, directly, for infringement of UK competition rules.

In the face of Regulation 1/2003, both Irish and Austrian law provide for greater cooperation with other national competition authorities.[118] Irish law also cleaves to Regulation 1/2003 by adopting into Irish law a system of *exception légale*;[119] but like the Commission, the Competition Authority may continue to issue 'declarations', essentially block exemptions.[120] Both Irish and Austrian law provide for the enforcement of Articles 81 and 82, in the same manner as domestic rules are enforced, by national administrative authorities, the Competition Authority[121] and the BWB[122] respectively. This is a requirement for all Member States by virtue of Regulation 1/2003.[123] With appropriate Danish and Swedish rules adopted in 2000,[124] of the present Member States only Luxembourg, Finland and the UK remain without. At the time of writing there is a bill before the Finnish Parliament to that purpose. In the UK the Secretary of State is by the Enterprise Act afforded power to make such modification to the Competition Act 1998 as she 'considers appropriate for the purpose of eliminating or reducing any differences between the Act and Community competition law'.[125] But other than issuing a consultation paper,[126] she has so far done nothing. Whilst it faces a legal obligation to confer enforcement powers upon the OFT, the government need not follow the Irish lead and adopt an internal system of *exception légale*; but if it does not, there will be huge difficulties in disentangling the legal effects of an anticompetitive agreement of UK and Community application which is unobjectionable in Community law because it meets the criteria of Article 81(3), but falls foul of section 2 of the Competition Act and was not notified to, and/or exempted by, the OFT. The rule of reason may continue here to have significant impact.

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[115] Competition Act 1998, s 47A.

[116] Cf the Competition Act, 2002, s 14, which provides expressly for a right of action for injunction, declaration or damages, including exemplary damages, for injury caused by an infringement of Irish or EC competition rules. See also Competition Act 1998, s 58A.

[117] See Case C-128/92 *Banks v British Coal Corporation* [1994] ECR I-1209, per A-G van Gerven.

[118] Competition Act, 2002, s 46; § 10 WettbG.

[119] Competition Act, 2002, s 4(2, 5).

[120] Ibid, s 4(3).

[121] Ibid, ss 6(1), 7(1), 8(9), 14(2).

[122] §§ 2 II, 3 WettbG; § 42f KartG.

[123] Regulation 1/2003, Arts 5 and 35.

[124] Lov nr 416 af 31. maj 2000 (Lov om ændring af konkurrenceloven); Lag (1994:1845) om tillämpningen av Europeiska gemenskapernas konkurrens- och statsstödsregeler, § 2 (Ändring 2000:1023).

[125] Enterprise Act 2002, s 209.

[126] *Modernisation—consultation on the government's proposals for giving effect to Regulation 1/2003 EC and for re-alignment of the Competition Act 1998*, 008/03 (Apr 2003).

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