II. COMPETITION LAW

A. The Modernization Programme

1. General

The period under review (Autumn 2003–December 2006) saw in not only the expansion of the Union from 15 to 25 Member States, but also the attendant 'big bang', on 1 May 2004, in competition rules with the entry into operation of Regulations 1/2003 and 139/2004. The changes introduced by Regulation 1/2003[1]—primarily abandoning the notification/authorization procedure which had obtained since 1962 in favour of a directly effective Article 81(3) and *exception légale*, and including further measures enabling/compelling the decentralized enforcement of Articles 81 and 82—are discussed in previous notes[2] and (copiously) elsewhere, and it is not proposed to re-rehearse them here. Rather, the concern is the manner in which the dust has settled, in what is, after the frenetic legislative change and the absorption of 10 new Member States into a new culture of competition, a time of consolidation.

Briefly, under the new decentralized regime the competition rules are enforced by the Commission, by its fellow national administrative competition authorities (NCAs) and by the courts. As a means of securing uniformity Regulation 1/2003 makes the Commission *primus inter pares*: as previously, an NCA is pre-empted ('relieve[d] . . . of their competence to apply Articles 81 and 82') by the initiation of Commission proceedings[3] and is bound by ('cannot take decisions which would run counter to') an existing Commission decision.[4] National courts too are bound by an existing Commission decision[5] and 'must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated'.[6] Otherwise uniformity is sought to be secured by a system of compulsory 'close cooperation'[7] between the Commission and NCAs: the Commission is obliged to forward to the NCAs the 'most important documents' collected with a view to taking action, and other documents upon request;[8] an NCA must inform the Commission of any action it intends to take 'under Article 81 or Article 82'[9] and forewarn it at least 30 days prior to taking any formal decision;[10] thus can the Commission intervene if it sees fit. The Commission has adopted a notice on the manner with which it cooperates with NCAs addressing allocation of work and the provision of assistance to and from the

[1] Reg 1/2003 OJ 2003 L1/1.
[2] (2000) 49 ICLQ 232–4; (2004) 53 ICLQ 465–6.
[3] Regulation 1/2003, Art 11(6).
[4] Art 16(2).
[5] Art 16(1).
[6] ibid. This is codification of a principle recognized by the Court of Justice in Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369.
[7] Art 11(1).
[8] Art 11(2). This is a substantial change from previously, for it jeopardizes the confidentiality purported to be protected (Art 28) but was better protected under Reg 17—eg the disappearance of the bar to using information provided the Commission to make out an infringement of national competition law.
[9] Art 11(3).
[10] Art 11(4).

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Commission and amongst the NCAs themselves.[11] An investigation by any one authority is sufficient grounds for another to suspend its own and to reject a complaint.[12] Underpinning this extensive collaboration is a 'network of competition authorities' (European Competition Network, or ECN) initiated informally at the time of the adoption of Regulation 1/2003 by a joint statement of the Council and the Commission.[13] Made up of the Commission and the 27 national authorities, the ECN now boasts annual meetings between the Director-General of DG Competition and the heads of all NCAs to discuss important policy issues, 'plenary meetings' for discussion of general issues, working groups and 13 sectoral subgroups.[14]

As for the courts, the Commission cannot pre-empt them in the same way as it can administrative authorities, for that would be to deny the direct and prompt effect of Articles 81 and 82. The clear preference is that a court ought to defer to the Commission and so stay any civil/commercial proceedings in which there is a risk of incompatible outcome, but this solution does not always work well in practice.[15] To assist, the Commission or an NCA may submit written observations to a court in the course of litigation before it and may, with permission, appear as *amicus curiae*;[16] national courts must transmit to the Commission copies of any judgment involving Community competition law[17] and may ask it for assistance and guidance on any relevant question or issue.[18] The Commission undertakes to provide them with informal 'guidance letters' when novel questions arise before them[19] and has adopted a specific notice on cooperation with them.[20]

The key question is whether any of this works. In the 30 months of operation of Regulation 1/2003 the ECN was informed of 651 new cases, 133 by the Commission and 518 from an NCA;[21] 55 per cent of cases involved Article 81, 33 per cent Article 82, and 12 per cent both. The Commission was informed of impending national action in 168 cases. 115 cases were notified to the Commission by national courts; however, 105 of them came from six Member States (in descending order of frequency Germany, France, Spain, The Netherlands, Austria, and Belgium), and the courts of 14 Member States notified none. There have been 12 requests from national courts for guidance, one Lithuanian, the rest Spanish and Belgian. The Commission has yet to be invited to

[11] Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C101/43; buttressed by Notice on the handling of complaints by the Commission under Arts 81 and 82 of the EC Treaty, OJ 2004 C101/65.

[12] Reg 1/2003, Art 13.

[13] Council of the EU, Doc 15432/02 Add 1, 10 Dec 2002. The ECN thus has no formal basis and creates neither rights nor obligations.

[14] For banking, securities, insurance, food, pharmaceuticals, professional services, healthcare, environment, energy, railways, motor vehicles, telecoms, and media.

[15] See below.

[16] Reg 1/2003, Art 15(3). This derives from German practice, in which the *Bundeskartellamt* appears frequently, and to persuasive effect, before national courts in cases in which the Gesetz gegen Wettbewerbsbeshränkungen (GWB) is in issue; § 90 II GWB.

[17] Art 15(2).

[18] Art 15(1).

[19] Notice on informal guidance relating to novel questions concerning Arts 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ 2004 C101/78.

[20] Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC, OJ 2004 C101/54.

[21] These and subsequent data taken from the annual *Report on Competition Policy* and the DG Competition website.

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appear in national proceedings as *amicus curiae*. These preliminary data indicate a healthy working relationship amongst the administrative authorities within the ECN, and one which appears to be deepening. Cooperation with the courts appears to be less successful, but this is culturally a different matter. Aspects of the problem are considered in Part B below.

2. *Particular problems*

As part of the strategy of the wider enforcement of Articles 81 and 82 by national authorities, Regulation 1/2003 conferred not only the power, but also an obligation upon them: if and when an NCA or a national court applies its own competition law to a situation in which Article 81 and/or Article 82 is also joined, it is required to apply them as well.[22] This works relatively well if the two are coordinated, but less so if they are not. There are especial problems in two areas.

(a) Notification: The Community having abandoned the notification/authorization procedure in favour of a directly effective Article 81(3), most Member States have followed suit in their own law, amending the system (if it existed) requiring notification and administrative authorization in order to circumvent a prohibition equivalent to Article 81(1) in national law. But Regulation 1/2003 did not, and could not, require it, and eight Member States (Belgium,[23] Bulgaria,[24] Denmark,[25] Spain,[26] Italy,[27] Cyprus,[28] Latvia,[29] and Romania[30]) have retained the old system. This would give rise to obvious problems in cases where both Article 81 and its national equivalent are breached by the same material infraction, Article 81(3) is satisfied, but an equivalent exemption provision of national law is not because of a procedural failure of notification. The remedy in the regulation is a system of 'parallel exemption' whereby national law may not be applied in a manner which sets aside an agreement or practice which may be anticompetitive but which fulfils the conditions of Article 81(3) or falls within a block exemption.[31] But the result is some confusion and friction at the points of fine tangency between Community law and national law—especially where the latter is more rigorous.

(b) Leniency: The Commission leniency programme has borne much fruit since it was introduced in 1996,[32] betraying the existence of a number of cartels, some of them deeply entrenched. The stick is being wielded with greater vigour—in 2006 the Commission imposed cartel fines totalling €1.85 thousand million—and the lure of the

[22] Reg 1/2003, Art 3(1).
[23] Loi sur la protection de la concurrence, Art 7.
[24] Закон за защита на конкуренцията, Arts 11–13.
[25] LBK nr 785 af 8 Aug 2005 om Konkurrenceloven, § 8(2).
[26] Ley 16/1989, Art 3, 4. This will change under proposed reform of the competition law; see Proyecto de Ley de Defensa de la Competencia, published 25 Aug 2006.
[27] Legge N° 287 of 10 Oct 1 1990, Art 4.
[28] Νόμος 207/89, Arts 4(3), 5.
[29] Konkurences likuma, Art 11(2).
[30] Legea concurentia nr. 21/1996, Art 5(3).
[31] Reg 1/2003, Art 3(2).
[32] Commission Notice on the non-imposition or reduction of fines in cartel cases, 1996 OJ 1996 C207/4.

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carrot is becoming increasingly difficult to resist: in November the Commission imposed fines of €519 million—its second highest fine—upon five producers of synthetic rubber but let Bayer AG off a €204 million fine, it having earned, even if a major player in the cartel and a repeat offender, complete immunity (introduced in 2002) by being the first to blow the whistle.[33]

In September 2006 the ECN adopted a 'model leniency programme'[34] in order to ease the parallel handling of leniency applications within the network. In December the Commission amended its leniency notice for a second time,[35] partly to adapt it to the ECN model. Changes are:

- clarification of the immunity thresholds, setting out more clearly the type of information and evidence required for immunity, linking them to assisting in 'targeted' inspections and setting out and defining an obligation of 'genuine, full, continuous and expeditious' cooperation;[36]
- clarification of the thresholds for reduction of fines; evidence that requires little or no corroboration will have greater value, and will be rewarded outside the normal bands for reduction if used to establish any additional facts increasing the gravity or duration of the infringement; the obligation of full and continuous cooperation applies equally;[37]
- introduction of a discretionary 'marker system' (*système d'ordre d'arrivée des demandes*); an undertaking may apply initially for a 'marker' and provide the information and evidence necessary to qualify for immunity or reduction at a later date (by agreement with the Commission) without losing its place in the queue;[38] and
- a procedure for the protection of 'corporate statements' made under the notice from discovery in civil damages proceedings, so that undertakings which cooperate are not put at a disadvantage by those which do not.[39]

But as with exemption this has no effect upon national law, and it remains that six Member States (Spain, Italy, Cyprus, Malta, Portugal, and Slovenia) have no leniency programme. Again, there are obvious problems for the co-application of a Community and national prohibition where leniency is sought from and granted by the Commission but is not, and cannot be, granted in the national arena. There is no equivalent of parallel exemption here. The problem is particularly insurmountable where the national prohibition is founded in criminal law and any question of leniency is a matter for the public prosecutor.

[33] Case COMP/38.638 (*Synthetic Rubber*), decision of 29 Nov 2006, not yet published. The highest fine ever imposed was €855 million in a global vitamins cartel, by Decision 2003/2 (*Vitamins*) OJ 2003 L6/1.

[34] ECN Model Leniency Programme, 26 Sept 2006; unpublished.

[35] Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17. The original 1996 notice was first amended in 2002; see OJ 2002 C45/3.

[36] paras 8–22.

[37] paras 23–30.

[38] paras 14–15.

[39] paras 31–5.

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3. Tidying up

Prior to the adoption of Regulation 1/2003 the competition rules were applied for the most part through the medium of Regulation 17/62. Excluded however from the ambit of Regulation 17 were the specific sectors of agriculture and transport, in which the rules were applied—and applied in a manner different from that of Regulation 17—through specific regulations;[40] and wholly excluded were civil air transport from a Community airport to that of a third country, tramp shipping and cabotage, to which the competition rules could be applied, if at all, only through the residual (and rudimentary) mechanisms of Articles 84 and 85 of the Treaty. With the introduction of Regulation 1/2003 the transport regulations were partially scrapped,[41] so bringing most fields within the general application of Regulation 1/2003. That regulation originally excluded, as previously, civil air transport to a third country, tramp shipping and cabotage, but the air transport exclusion was removed in 2004,[42] tramp shipping and cabotage in 2006.[43] This should result in significantly more robust application of Articles 81 and 82 to various transport activities. The only sectors now not to fall under Regulation 1/2003 are (a) agriculture, and in 2006 the venerable Regulation 26/62 was retired by the Council and replaced with a new measure which now applies the competition rules (still relatively gently) to production and trade in agriculture products;[44] and (b) transport by rail, road and inland waterways, for which the Commission proposed in November 2006 a consolidating regulation applying Articles 81 and 82 to defined agreements, decisions and concerted practices common to the fields but providing 'exceptions' (*exception légale*; *gesetzliche Ausnahme*) for a variety of technical agreements and exemption for groups of small and medium-sized enterprises (SMEs).[45]

4. The block exemptions

The Commission discharged its exclusive authority to grant exemption under Article 81(3) partly by means of individual exemptions in response to notification for that purpose and partly by means of 'block exemptions', that is a series of instruments which set out permitted and prohibited terms which, if met by the parties to an agreement, would result in the agreement being accorded automatic exemption from the prohibition of Article 81(1), without need of notification to and individual authorization from the Commission. With the entry into force of Regulation 1/2003 the notification system was abandoned and the block exemptions ought, in logic, to have become otiose. But they have been retained, and the Commission will continue to adopt them, because they serve two useful purposes: first, they contribute to legal certainty

[40] For agriculture, Reg 26/62 JO 1962, 993; for transport Reg 17 was expressly excluded by Reg 141/62 JO 1962, 2751, the competition rules applied by Reg 1017/68 JO 1968 L175/1 (rail, road, and inland waterways); Reg 4056/86 OJ 1986 L378/4 (maritime transport); Reg 3975/87 OJ 1987 L374/1 (civil air transport).

[41] Reg 141/62 repealed and Reg 1017/68 repealed in part by Reg 1/2003, Arts 43(2) and 36 respectively; Reg 3975/87 repealed by Reg 411/2004 OJ 2004 L68/1; Reg 4056/86 repealed by Reg 1419/2006 OJ 2006 L269/1.

[42] Reg 411/2004 OJ 2004 L68/1.

[43] Reg 1419/2006 OJ 2006 L269/1.

[44] Reg 1184/2006 OJ 2006 L214/7.

[45] COM(2006) 722 final. The regulation is proposed to be adopted by the Parliament and the Council as it relies upon both Arts 71 and 83 of the Treaty as its legal base.

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and assist the Commission in directing policy; second, they provide the advantage to undertakings claiming the benefit of exemption (and which normally bear the onus of showing that they ought to have it)[46] of relieving them of the burden of arguing that the agreement in question meets each of the four criteria of Article 81(3). Rather, they need show only that it falls within a block exemption; the rest is presumed. Since 2003 the Commission has repealed the block exemption for maritime transport[47] and replaced the technology transfer block exemption[48] and the civil aviation block exemption on schedules, joint operation, tariff consultation and slot allocation at airports.[49]

B. Remedies

1. Damages

The Court of Justice (hereinafter the Court) long resisted invitations to say expressly that, as a matter of Community law, a breach of Articles 81 and 82 gives rise to a right in reparation for injured third parties. All it would say was that the nullity provided by Article 81(2) for an agreement prohibited by Article 81(1) is 'absolute'[50] and '[s]ince the nullity referred to in Article [81](2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against [*n'est pas opposable aux*] third parties.'[51] Otherwise it left the civil consequences to be determined by national law[52]—which of course leads to serious risk of disequilibrium and forum shopping. It was only in *Courage v Crehan*[53] in 2001 that the Court was compelled to pronounce a view. *Crehan* is now cited as authority for a right in damages for breach of Article 81. True, the Court said:

> The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. . . .[A]ctions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.'[54]

But *Crehan* was an uncommon case, the damages being sought by a party to the agreement owing to loss caused him by its oppressive terms. The Court appears to have presumed the existence of a remedy in damages in English law (which had not in fact been established, and the authorities indicated otherwise)[55] which was denied Mr Crehan solely because he was a party—albeit *non in pari delicto*—to the objectionable

[46] Reg 1/2003, Art 2.

[47] See (n 41); Reg 4056/86 not only applied Arts 81 and 82 to maritime transport, it contained elements of block exemption which the Commission considered no longer justified. The block exemption for liner shipping consortia (Reg 823/2000 OJ 2000 L100/24) remains in force.

[48] Now Reg 772/2004 OJ 2004 L123/11.

[49] Reg 1459/2006 OJ 2006 L272/3.

[50] Case 22/71 *Béguelin v GL Import Export* [1971] ECR 949, para 29; Case 319/82 *Société de Vente de Ciments et Bétons de l'Est v Kerpen & Kerpen* [1983] ECR 4173, para 11.

[51] Case 22/71 *Béguelin*, ibid para 29.

[52] Case 319/82 *Kerpen & Kerpen*, para 12.

[53] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

[54] ibid paras 26 and 27.

[55] This is because a contract which infringes Art 81 is in English law not only void but illegal, so barring recovery by a party to it either in reparation or in restitution; see *Gibbs Mew v Gemmell* [1998] EuLR 588 (CA).

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agreement. The Court went on to determine that '[t]here should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.'[56]

Crehan is therefore not direct authority for the availability of damages to injured third parties. That followed finally in 2006 in *Manfredi*,[57] in which the Court has now confirmed:

(a) there is a remedy in damages for injury suffered by a third party by a breach of Article 81 where there is a 'causal relationship' between the two, causation to be determined by national law;
(b) the principle of effectiveness requires that damages are available not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*); and
(c) the principle of equivalence requires that exemplary damages be available if similar domestic remedies so provide, subject to prevention of unjustified enrichment.

This leaves the remedy still a matter for national law but bites fairly deeply into the freedom of manoeuvre that law continues to enjoy. Some variance remains, not least the determination of causation left still to national law.[58] But *Manfredi* may open the floodgates to a remedy which is still astonishingly underdeveloped. This is a course which has the enthusiastic support of the Commission, which commissioned a major comparative study on damages for breach of Articles 81 and 82 from the law firm Ashurst, which produced its report in August 2004,[59] and published a Green Paper in December 2005[60] with a view to facilitating, and encouraging, recourse to private damages actions. A White Paper is anticipated sometime in 2007.

Crehan is, in ways, more interesting in the manner of its disposal. At issue was an alleged breach of Article 81 consisting in the terms of a publican's leases to two tied public houses in Staines, an English town in the London *banlieux*. Because two leases on their own could not possibly affect trade between Member States appreciably,[61] it

[56] (n 53) para 28.

[57] Joined Cases C-299 to 298/04 *Manfredi v Lloyd Adriatico Assicurazioni*, judgment of 13 July 2006, not yet reported.

[58] eg the Court first established a general right in reparation from the Member States in the joined Cases C-46 & 48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport*, ex parte *Factortame* (No 3) [1996] ECR I-1029. Factortame eventually recovered damages (of some £55 million plus costs) in the English courts (see *Factortame v Secretary of State for the Environment, Transportation and the Regions* [2002] EWCA Civ 22, [2002] 2 All ER 838) but Brasserie du Pêcheur recovered nothing because it failed to meet the (higher) standard of causation required in German law (BGH, 24 Oct 1996, BGHZ 134, 30).

[59] *Study on the conditions of claims for damages in case of infringement of EC competition rules*; consisting of a comparative report, an analysis of economic models for the calculation of damages, and a national report (with executive summary) from each Member State.

[60] Damages actions for breach of the EC antitrust [*sic*] rules, COM(2005) 672; see also the Commission Staff working paper, SEC(2005) 1732.

[61] For an anticompetitive agreement or practice to be caught by Art 81 it must affect, or have the potential to affect, trade between Member States 'appreciably'; see Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235; Case 5/69 *Völk v Vervaecke* [1969] ECR 295; Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art 81(1) of the Treaty establishing the European Community (de minimis), OJ 2001 C368/13.

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would be necessary to show, in finding a breach, that the two *Delimitis* conditions[62] were met, that is that the agreement at issue is one of a number of similar agreements which, taken together, contribute cumulatively to market foreclosure ('Delimitis 1'), and second, that the agreement in question contributes significantly to that effect ('Delimitis 2'). It happened that the Commission had recently turned its attention to a series of tying agreements involving UK brewers other than Courage, and in three decisions in the late 1990s had found that the British on-trade (that is, pubs, hotels and restaurants) beer market *was* foreclosed by their various ties, but in each case granted exemption under Article 81(3).[63] Upon the *Crehan* ruling being remitted to the English courts, the High Court determined that the Commission had been wrong, the market was not foreclosed, Delimitis 1 not satisfied, and therefore refused damages.[64] The Court of Appeal reversed the High Court, finding it to have been bound by the Commission decisions:

> It is not open to a national court to find that a decision of the Commission is invalid. . . . In our judgment, in the present case the English court was obliged under the duty of sincere co-operation to give to the Commission much greater deference than that which the [High Court] judge, with all respect to him, was prepared to give . . .
>
> In our judgment it was inappropriate for the judge to adopt the approach that he should receive such evidence and hear such submissions, as the effect of the judge second-guessing the Commission and concluding that the Commission was wrong has been to create an irreconcilable inconsistency in the application of the Community's competition policy to the relevant market . . . The judge's decision offended against the principle of legal certainty in the Community. In our opinion the judge failed to comply with the duty of sincere co-operation and thereby erred in law.[65]

It therefore found for Mr Crehan and awarded him damages of £131,336 plus interest,[66] the first instance of damages awarded by a UK court for breach of Community competition rules.[67] But the Court of Appeal was reversed in turn by the House of Lords, and the judgment of the High Court reinstated.[68] Lord Hoffmann said:

> The Court of Appeal said . . . that it was left 'profoundly uneasy' by the judge's decision to allow Inntrepreneur to challenge the Commission's opinion. But I must confess that I am left profoundly uneasy by the unfairness of the Court of Appeal's decision that Inntrepreneur could not do so. . . .

[62] From Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935.

[63] Decision 1999/230 (*Whitbread*) OJ 1999 L88/26; Decision 1999/473 (*Bass*) OJ 1999 L186/1; Decision 1999/474 (*Scottish & Newcastle*) OJ 1999 L186/28. Courage had notified its standard lease to the Commission for negative clearance and/or exemption but withdrew the notification; Art 81(3) therefore had no bearing in the case.

[64] *Crehan v Inntrepreneur Pub Company* [2003] EWHC 1510 (Ch), [2003] EuLR 663; Courage's estates of public houses had in the meanwhile been acquired by Inntrepreneur.

[65] [2004] EWCA Civ 637, [2004] EuLR 693, paras 84, 97, and 98.

[66] This was very much less than the £1,311,500 Park J in the High Court would have awarded (for loss of profits and loss of capital assets, subject to capital gains tax) had the claim been made out.

[67] The first English case to proceed to full trial and judgment was *Arkin v Borchard Lines* [2003] EWHC 687, [2003] 2 Ll Rep 225, in which no damages were awarded as the claimant failed to show a breach of either Art 82 (the primary claim) or Art 81; the case was described subsequently by the Court of Appeal as a 'disastrous piece of litigation' (*Arkin v Borchard Lines and ors* [2005] EWCA 655, [2005] 3 All ER 613, 615), defendants' (unrecoverable) costs put at around £6 million.

[68] *Inntrepreneur Pub Company v Crehan* [2006] UKHL 38, judgment of 19 July 2006, not yet reported.

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> There was a good deal of discussion, both before the Court of Appeal and in argument before the House, about the degree of 'deference' which a national court should show to a decision of the Commission. . . . For my part, I do not find deference in this context a very helpful expression. It is commonly (if not altogether happily) used in administrative law when a court decides that the decision-making power on a particular question properly belongs to someone else and that the court should not substitute its own view. But the decision-making power on whether Article 81(1) applies plainly belonged to the English court, exercising concurrent jurisdiction, and I find it difficult to see how the exercise of this power can be combined with 'deference' to the decision of someone else. The correct position is that, when there is no question of a conflict of decisions in the sense which I have discussed, the decision of the Commission is simply evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account. If, upon an assessment of all the evidence, the judge comes to the conclusion that the view of the Commission was wrong, I do not see how, consistently with his judicial oath, he can say that as a matter of deference he proposes nevertheless to follow the Commission.[69]

This goes to the heart of the problems of concurrent enforcement and uniform application of the competition rules, and is arguably inconsistent with the pre-eminence accorded the Commission by Regulation 1/2003[70] to which the Court of Appeal so loyally cleaved, which even if not in force at the relevant time is merely a statement of principle already recognized by the Court.[71] But Lord Hoffmann's point that Courage had been induced by the Commission to withdraw its notification and litigate the matter in England, and 'for Inntrepreneur then to find its main defence shut out by a subsequent decision of the Commission in which it took no part seems to me a denial of a fair trial',[72] is of course well taken. Mr Crehan's only remaining option is to persuade the Commission (or the Office of Fair Trading) to take up the baton anew. This it may do in the context of past events if it can show a 'legitimate interest',[73] and it did so once before in comparable circumstances in the Irish ice cream war,[74] but that episode is not seen to have been an unalloyed success and Commission enthusiasm to do it all again would not be great. *Crehan* is perhaps an indication that, with decentralization, a wholly harmonious uniform application of Articles 81 and 82 may be impossible.

2. *Criminal sanctions*

The normal sanction for a breach of competition rules is the 'administrative fine'. This is so (necessarily) for the Community, fines imposed by the Commission by authority

[69] paras 67 and 69.
[70] Reg 1/2003, Art 16.
[71] See (n 6).
[72] *Inntrepreneur Pub Company v Crehan* [2006] UKHL 38, para 67.
[73] See Reg 1/2003, Art 7(1): 'If the Commission has a legitimate interest in doing so, it may . . . find that an infringement has been committed in the past.' Legitimate interests would include clarification of a point of law in order to prevent future infractions or, as here, establishing civil liability. Any fine would be time barred; Art 25.
[74] See Decision 98/531 (*van den Bergh Foods*) OJ 1998 L246/1, in which the Commission intervened to reopen a case thought settled by the Irish courts. The Commission disagreed with the latters' findings, issued a decision at variance with them, caused a reference from the Supreme Court as to the course it ought to follow in the face of the conflicting compulsory directions (see Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369), but was eventually—17 years after the origins of the dispute—proved to have been right (Case T-65/98 *van den Bergh Foods v Commission* [2003] ECR II-4653, upheld on appeal as Case C-552/03P *Unilever Bestfoods (Ireland) v Commission*, order of 28 Sept 2006, not yet reported).

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of Regulation 1/2003 being expressly recognized 'not [to] be of a criminal law nature'.[75] Whilst this construct was confirmed by the Court,[76] it is not clear the European Court of Human Rights would agree,[77] and equivalent financial penalties imposed under the competition laws in some Member States are recognized to be criminal sanctions within the meaning of Article 6 of the European Convention.[78] However, a number of Member States have expressly made breaches of competition law criminal offences subject, upon conviction, to terms of imprisonment. This is so in Estonia,[79] France,[80] Ireland,[81] Cyprus,[82] Slovakia,[83] and the United Kingdom.[84] Of the six the Irish law is the fiercest, uniquely criminalizing not only infringements of the Competition Act but also of Articles 81 and 82 of the EC Treaty,[85] and providing penalties upon conviction on indictment of a fine of up to the higher of €4 million or 10 per cent of annual turnover (for both natural and juridical persons) or, for individual offenders, a term of imprisonment of up to five years.[86] There has been long thought given to the appropriateness, desirability and workability of this,[87] and whether a criminal conviction could ever be practically possible. Now the dam has been breached.

Over the course of 2006 trials took place of 24 persons, both individuals and corporate undertakings, accused of price-fixing of heating oil (kerosene and gas oil) in the Galway City and County area.[88] The 24 constituted 'the great bulk' of suppliers in the county. The offence with which they were charged was entering into an agreement which had as its object the prevention, restriction or distortion of competition, contrary to the Competition Act.[89] A cartel 'facilitator' or 'referee', not himself a trader, was charged also with aiding and abetting. Charges were initiated in 2004 in 11 district courts across the west of Ireland, indictments preferred in 2005 and dates for jury trials fixed before circuit criminal courts in Galway and Dublin.[90] At the time of writing convictions have been secured against 17 of the defendants (16 pleading guilty, one

[75] Reg 1/2003, Art 23(5).

[76] Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769.

[77] See *Société Stenuit v France* (1992) 14 EHRR 509.

[78] This is the case, for example, in England (and presumably the rest of the UK), see *Napp Pharmaceuticals v Director General of Fair Trading* [2002] CompAR 13, paras 91ff (CCAT); in Denmark a 'penalty' (*strafansvar*) may be imposed by a court and fixed by reference to the general rules of the Penal Code; LBK nr 785 (n 25).

[79] Karistusseadustik 2006, §§ 399–402.

[80] Code de Commerce, Art L 420–6.

[81] Competition Act, 2002 (No 14 of 2002), ss 6, 7.

[82] Νόμος 207/89, Art 32; but an offence consists only in a persisting breach in defiance of a direction of the Commission for the Protection of Competition.

[83] Zákon č. 300/2005 (Trestný Zákon), § 250.

[84] Enterprise Act 2002, s 188.

[85] Competition Act, 2002, ss 6, 7.

[86] s 8(1)(b).

[87] See eg W Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 World Competition 117.

[88] *sub nom DPP v Flanagan and ors*, a series of circuit criminal court judgments, none reported.

[89] This is an offence under s 6(1) of the Competition Act, 2002, but charges were actually brought under effectively identical provisions of prior legislation (the Competition Act, 2001 (No 24 of 1991) and the Competition (Amendment) Act, 1996 (No 19 of 1996)) because the events occurred (Jan 2001–Feb 2002) prior to the entry into force of the 2002 Act.

[90] Some of the cases were moved to Dublin in the interests of a fair trial. Under the 1991 Act indictable offences were tried before the circuit criminal court, but must now be tried before the Central Criminal Court; Competition Act, 2002, s 11.

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pleading not guilty but convicted by the jury), the Director of Public Prosecutions did not proceed with four, trials for the remaining three (and sentencing for two convicted) are still pending. Immunity was granted under the Competition Authority's Cartel Immunity Programme[91] to one corporate undertaking and two of its directors. Most of the undertakings were fined €7,500, two larger undertakings €10,000 and €12,500; individuals were for the most part fined €1,500, but one (who had pleaded not guilty but was convicted) €3,500, and another, Lambe, the cartel facilitator, fined €15,000 and given a six-month prison sentence, suspended for 12 months, notwithstanding ill health and a venerable age of 69. This is therefore the first term of imprisonment imposed for cartel activity in Europe. Total fines to date are €95,000.

It must be noted that no case could be easier. Irish law sets its sights very broadly, as compared to other Member States which have drawn the anticompetitive conduct subject to criminal sanction much more tightly.[92] And it was a textbook cartel: the parties included most suppliers of heating oil in County Galway, price-fixing took place under the cover of a trade association (the Connaught Oil Promotion Federation) formed for the purpose, a facilitator/referee was appointed who conducted association meetings, checked invoices to ensure compliance with agreed prices and settled disputes amongst members, and attempts were made to bring non-members into the fold. Moreover, under the Competition Act it is presumed (rebuttably) that a price-fixing agreement has as its object the prevention, restriction or distortion of competition,[93] so requiring the jury simply to find the existence of the agreement, and not to determine the more difficult questions of whether (a) it had an anticompetitive object, (b) if it had no such object, it nevertheless produced that effect, or (c) if this was the case, it satisfies the exemption conditions of section 4(5), being the (verbatim) equivalent of Article 81(3). Nevertheless we now have a number of courts—and juries—satisfied of anticompetitive conduct to a criminal standard of proof and prepared to punish accordingly. The cultural abhorrence of the application of the criminal law to the field in Europe may be dissipating. There is more in store from Ireland, in the form of another case under both the 1991 and the 2002 Acts (as the conduct spanned the temporal application of both) involving cartel price-fixing in the motor trade in the Cork area, estimated to have cost consumers some €650 million. Arrests have been made (again, the first in Europe) and defendants returned for trial to the Central Criminal Court.[94]

[91] Cartel Immunity Programme agreed between the Competition Authority and the Director of Public Prosecutions, established 20 Dec 2001.

[92] See, eg, the (UK) Enterprise Act 2002, s 188, which creates the 'cartel offence' but limits its application to hardcore cartels, to agreements to that end, and requires that they be accompanied by 'dishonesty'.

[93] Competition Act, 2002, s 6(2); to the same effect, Competition Act, 1991, s 4(1) in combination with Competition (Amendment) Act, 1996, s 2.

[94] *sub nom DPP v Manning*, pending. In fact this is not the first criminal case under the 2002 Act: there was an earlier case brought by the Competition Authority by summary proceedings (so tried without jury) against individual farmers and Irish Farm Association leaders for blockading a shipload of British grain in the port of Drogheda, and charged under s 6, *sub nom Competition Authority v Deasy and ors*, unreported. Convictions were secured in the district court against six accused in March 2003 and fines imposed; three of the six convictions were set aside on appeal. Whilst it is now clear that French trade associations and unions may be fined under Community competition rules for similar (if more spirited) conduct (see Cases T-217 and 245/03 *Fédération nationale de la coopération bétail et viande v Commission*, judgment of 13 Dec 2006, not yet reported) the Irish precedent of the application of criminal penalties is something at which the French authorities might usefully look.

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The Irish cases are also interesting for what did not happen. Regulation 1/2003 requires national courts to apply Articles 81 and 82, if they are joined, whenever applying equivalent provisions of national law.[95] This is a quite impossible task for a criminal court to discharge—*except*, ironically, in Ireland where a breach of Article 81 is an offence. In fact it could not have happened in this case because charges were brought under the 1996 Act, and Articles 81 and 82 were brought within the criminal domain only in 2002. But it might be instructive to ask, what if? There is a question as to whether Article 81 was in fact joined: most of the firms party to the cartel were small (some merely 'one truck operations'), and conduct of SMEs is 'rarely capable' of appreciably affecting trade between Member States;[96] however an SME caught up in a cartel involving larger players, the overall effect of which is appreciable, will not be exculpated by its size.[97] If greater London and the commune of Copenhagen are 'substantial' parts of the common market for the purposes of Article 82[98] and the UK frontier is only some 50 miles distant, it is quite possible that a cartel throughout County Galway appreciably affects trade between Member States.

It may be a matter which the Irish authorities did not address, but it is an obligation ('they *shall* also apply Article 81 of the Treaty . . .') under the regulation. As a power, and obligation, it is less problematic for administrative authorities; in some Member States the burden of Article 3 is transposed expressly into a statutory duty,[99] and the data discussed above indicate a healthy collaboration. But as an obligation imposed upon the courts it seems fundamentally to misunderstand their nature and role, which is to resolve disputes between parties in response to submissions advanced by them. This is especially so for the criminal courts, which hardly have the power to convict an accused of an offence not libelled by the prosecuting authority. But the principle applies also in civil cases, where the parties are unable, or unwilling, to lead evidence or make submissions based upon a (coterminous) infringement of Article 81 or 82.

C. Escaping the Prohibition: Undertakings and the Rule of Reason

In 2003 in *FENIN* the Court of First Instance (hereinafter CFI) determined that, because it was an end-user and so did not purchase goods for the purpose of subsequent 'economic activity', the Spanish *Sìstema nacional de salud* (SNS) was not an undertaking.[100] Whilst there is much, economically, to criticize in this, the Court upheld the CFI on appeal.[101] The Court had a more direct, and more straightforward, opportunity to pronounce on the matter again in *AOK Bundesverband*,[102] involving a dispute between a number of German sickness funds and their associations and a number of

[95] Reg 1/2003, Art 3(1).

[96] Commission notice on agreements of minor importance (n 61) para 3.

[97] Decision 85/206 (*Aluminium Imports from Eastern Europe*) OJ 1985 L92/1; Case T-56/99 *Marlines v Commission* [2003] ECR II-5225.

[98] Case 22/78 *Hugin Kassaregister v Commission* [1979] ECR 1869; decision of the OFT in *London-wide Newspaper Distribution* [2006] UKCLR 491, paras 54–7; Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion v Københavns Kommune* [2000] ECR I-3743.

[99] See, eg, the Finnish Laki Kilpailunrajoituksista, § 1a.

[100] Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission* [2003] ECR II-357; discussed in (2004) 53 ICLQ 468.

[101] Case C-205/03P *Federación Española de Empresas de Tecnología Sanitaria v Commission*, judgment of 11 July 2006, not yet reported.

[102] Case C-264/01 *AOK Bundesverband v Ichthyol-Gesellschaft Cordes* [2004] ECR I-2493.

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pharmaceutical associations affected by the formers' fixing of maximum amounts of constituents of pharmaceutical products. The Court simply adhered to its established rule, going back to *Poucet et Pistre*,[103] that bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursue an exclusively social objective and do not engage in economic activity; that this was the case with sickness funds which cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits, and which are based upon a principle of national solidarity, which are non-profit-making and which pays statutory benefits irrespective of the amount of the contributions. It applied here notwithstanding the latitude enjoyed by the funds and the fund associations in setting the contribution rate and their freedom to engage in some competition with one another; this was to encourage them to operate in accordance with principles of sound management, and pursuit of that objective does not alter the nature of their activity.

So far, so easy. The CFI also revisited the question of whether Eurocontrol is an undertaking,[104] subjected the question to much closer scrutiny than had the Court, and determined, as previously, that it was not, although this time with some reservation.[105] It also clarified a confusing passage from *FENIN* in which it had observed that the SNS 'operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover'[106] without making clear whether all or any of this was necessary in order to take an end-user outwith the concept of an undertaking; in *Eurocontrol II* it confirmed that the *FENIN* principle was of wider application: '[t]he general wording [in *FENIN*] . . . , and in particular the fact that it expressly refers to a social activity only as an example, permits the approach adopted in that judgment to be transposed to any organisation purchasing goods for non-economic activities'.[107] This is helpful clarification even if the *FENIN* principle remains suspect.

As for the 'rule of reason' as a component of Article 81(1), the direct effect of Article 81(3) could be expected to bring a blurring of the lines between it and exemption. The rule of reason has never been satisfactorily defined, or even identified, in Community competition law, but nevertheless enjoyed something of a renaissance in 2002 in *Wouters*,[108] in which the Court found that a regulation adopted by the Dutch *Orde van Advokaten* had 'an adverse effect upon competition'[109] and restrict[ed] competition,[110] yet fell outwith the prohibition of Article 81(1) because it 'could . . .

[103] Cases C-159 & 160/91 *Poucet et Pistre v Assurances Générales de France* [1993] ECR I-637.

[104] See Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43.

[105] Case T-155/04 *SELEX Sistemi Integrati v Commission* (Eurocontrol II), judgment of 12 Dec 2006, not yet reported. The CFI considered whether the various activities of Eurocontrol could be severed, and determined that its activities in technical standardization and research and development (in particular the acquisition of prototypes) were not economic activities but that its assistance to national administrations (drafting contract documents of public tenders, taking part in selection procedures, both for remuneration) was, and so Eurocontrol was, but to that extent only, an undertaking.

[106] Case T-319/99 *FENIN*, para 39.

[107] Case T-155/04 *SELEX*, para 67.

[108] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advokaten* [2002] ECR I-1577; discussed in (2004) 53 ICLQ 470.

[109] para 86.

[110] para 94.

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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.'[111] There is now (mixed) confirmation of this approach, courtesy of the growing nexus of the Community rules and sport. In 2002 the Commission rejected a complaint from two long-distance swimmers that disciplinary sanctions imposed upon them in application of anti-doping rules adopted by the International Olympic Committee (IOC) and the *Fédération internationale de natation* (FINA) were an infringement of Articles 81 and 82.[112] Upon review of the decision the CFI said the anti-doping rules at issue fell outwith the scope of Articles 81 because of their purely sporting nature.[113] On this it was wrong:

> In holding that rules could thus be excluded straightaway from the scope of those Articles [Articles 49, 81 and 82] solely on the ground that they were regarded as purely sporting . . . without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, . . . the Court of First Instance made an error of law.[114]

The Court then identified common ground that the IOC was an undertaking and an association of undertakings (of the international and national associations affiliated to it) and went on to consider the effects of the anti-doping rules:

> Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them . . .
>
> [T]he Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.
>
> In addition, given that penalties are necessary to ensure enforcement of the doping ban, their effect on athletes' freedom of action must be considered to be, in principle, inherent itself in the anti-doping rules.
>
> Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.[115]

The penal nature of the anti-doping rules at issue and the magnitude of the penalties do affect competition adversely, but so long as the restrictions are limited to what is necessary to ensure the proper conduct of competitive sport, they fall outwith the prohibition of Article 81(1).[116]

[111] para 107.

[112] Case COMP/38.158 (*Meca-Medina & Majcen*), decision of 1 Aug 2002, not published. The complaint also alleged (equally unsuccessfully) an infringement of Art 49 as a breach of their freedom to provide services.

[113] Case T-313/02 *Meca-Medina & Majcen v Commission* [2004] ECR II-3291.

[114] Case C-519/04P *Meca-Medina & Majcen v Commission*, judgment of 18 July 2006, not yet reported, para 33.

[115] paras 42–5.

[116] para 47.

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This is consistent with *Wouters*. Yet the Court then finds that a requirement imposed by *Fédération Internationale de Football Association* (FIFA) that players' agents be licensed *is* a barrier to access to that market, necessarily affects competition, and is acceptable only if it satisfies the conditions of Article 81(3)—which, according to the CFI, is likely to be the case,[117] although it is not immediately apparent how the purely economic criteria of Article 81(3) can be bent to that purpose. The assignation of this sort of restriction to Article 81(1) and an implicit rule of reason was thought to be the achievement of *Wouters*. Further clarification would be helpful here. In a final twist, the CFI found that the various association football clubs enjoyed a collective dominant position in the market for the provision of services by players' agents but that there was no abuse of that position—the absence of abuse derived apparently from its previous Article 81(3) reasoning.[118] This seems to be an odd infusion of exemption criteria into Article 82 where no exemption exists.

D. Mergers

Regulation 1/2003 was not the only innovation of 1 May 2004. Legislation for the control of mergers and takeovers ('concentrations') was introduced in 1989[119] and amended once, in 1997.[120] Under it the Commission met its *annus horribilis* in 2002, the Court of First Instance annulling three key Commission decisions adopted under the regulation,[121] a result quite remarkable, and reproachful, as the Commission is afforded a very wide latitude of economic assessment under the regulation such that review by the courts is limited to ensuring compliance with the rules governing procedure and the statement of reasons, the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers.[122] Clearly the Commission had things badly wrong. It therefore set about introducing a 'comprehensive merger control reform package' which consisted, first, in significant administrative reorganization: the break up of the Merger Task Force, its integration into sector specific directorates, the appointment of a chief competition economist (a post first held for three years by Dr L-H Röller; succeeded in September 2006 by Dr D Neven) and peer review panels for 'phase 2 investigations' (that is, close scrutiny proceedings initiated where the Commission takes the view that a notified concentration 'raises serious doubts as to its compatibility with the common market'[123]); and second, its 'cornerstone', a wholly

[117] Case T-193/02 *Piau v Commission* [2005] ECR II-209, upheld on appeal as Case C-171/05P *Piau v Commission* [2006] ECR I-37*.
[118] Case T-193/02 *Piau*, ibid para 117.
[119] Reg 4064/89 OJ 1990 L257/13; in force Sept 1990.
[120] Reg 1310/97 OJ 1997 L180/1; in force Mar 1998.
[121] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585; Case T-77/02 *Schneider Electric v Commission* [2002] ECR II-4201; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381; discussed in (2004) 53 ICLQ 472. The disputes rumble on: the CFI judgment in Tetra Laval was upheld on appeal (Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987), Schneider Electric objected to the manner in which the Commission responded to annulment of its decision (Case T-48/03 *Schneider Electric v Commission*, order of 31 Jan 2006, not yet reported, under appeal as Case C-188/06P *Schneider Electric v Commission*, pending) and both Airtours and Schneider have raised actions in damages against the Commission (Case T-212/03 *MyTravel v Commission* and Case T-351/03 *Schneider Electric v Commission*, both pending).
[122] Case T-342/00 *Petrolessence v Commission* [2003] ECR II-1161, para 101; Case T-177/04 *easyJet v Commission*, judgment of 4 July 2006, not yet reported, para 44.
[123] Reg 4064/89, Art 6(1)(c).

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new regulation which replaced its predecessor and came into force in May 2004.[124] The two are sometimes distinguished as the 'old' and 'new' (or 'recast') merger regulation.

The new merger regulation is less innovative than its earlier drafts essayed. The turnover thresholds necessary for the regulation to apply (concentrations with a 'Community dimension') remain unchanged[125] and the time limits within which the Commission is required to operate are essentially the same.[126] A concentration is appraised, under both the old and the new regulations, 'with a view to establishing whether or not [it is] compatible with the common market'.[127] But then there is a difference. The test under the old regulation was the so-called 'dominance' test, whether a concentration: 'create[s] or strengthen[s] a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it'.[128]

There was significant urging from some quarters that the new regulation ought to adopt the more flexible and comprehensive 'substantial lessening of competition' (SLC) test, as is used in Ireland and the United Kingdom.[129] This met with limited enthusiasm in the Council, particularly from Germany, the resulting political compromise produced a new test, whether a concentration: 'would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of creation or strengthening of a dominant position',[130] now coined 'the SIEC test'. It departs from the dominance test (otherwise it would omit 'in particular') and closes the gap with the SLC test, yet cleaves still essentially to the dominance test as the standard for measuring a significant impediment to effective competition, and there are indications that the purpose of the reversal of the word order was primarily to make clearer the application of the regulation to a concentration in(to) an oligopolistic market.[131] It also may be said to reflect Commission practice over the previous 10 years which came gradually to adopt a more effects-based approach. Considerable assistance as to the manner in which it approaches the SIEC test may be gleaned from the Commission's guidelines on the assessment of horizontal mergers,[132] intended to provide 'a sound economic framework for the assessment of concentrations'.[133]

Alongside the horizontal mergers guidelines the Commission adopted three other notices, on case allocation,[134] ancillary restrictions[135] and simplified procedures.[136] In

[124] Reg 139/2004 OJ 2004 L24/1. See also Commission Reg 802/2004 OJ 2004 L133/1 ('the implementing regulation').

[125] Reg 139/2004, Art 1(2)–(3).

[126] Art 10.

[127] Reg 4064/89, Art 2(1); Reg 139/2004, Art 2(1).

[128] Reg 4064/89, Art 2(2), (3); the letters in square parentheses appear in Art 2(3).

[129] (Irish) Competition Act, 2002, ss 21(2)(a), 22(3); (UK) Enterprise Act 2002, ss 22(1)(b), 35(1)(b), 35(2).

[130] Reg 139/2004, Art 2(2), (3).

[131] Preamble, recital 25. This had been addressed more clearly in an earlier draft (OJ 2003 C20/4), Art 2(2) providing that 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', but it did not survive into the final text.

[132] Guidelines on the assessment of horizontal mergers, OJ 2004 C31/5.

[133] Reg 139/2004, preamble, recital 28.

[134] Commission Notice on Case Referral in respect of concentrations, OJ 2005 C56/2.

[135] Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005 C56/24.

[136] Commission Notice on a simplified procedure for treatment of certain concentrations, OJ 2005 C56/32.

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Autumn 2006 the Commission proposed that the four pre-existing 'jurisdictional notices' (on the concept of concentration,[137] on the concept of full-function joint ventures,[138] on the concept of undertakings concerned[139] and on calculation of turnover[140]) be replaced by a single 'consolidated jurisdictional notice' in order better to clarify the Community/Member State divide;[141] it is expected to be adopted, following consultation, in early 2007. In 2005 the Commission completed an extensive in-house study of 'remedies', being an *ex post* analysis of 96 cases involving commitments offered and/or undertaken by notifying parties in order to modify a proposed concentration and so remove concerns raised by the Commission in merger decisions adopted in 1996–2000; a public version of the study was released in October.[142] It is likely to lead to stricter terms in conditions and obligations offered and greater scrutiny in following them up.

The SIEC test aside, the major innovation of the new merger regulation is the 'pre-notification referral', whereby:

(a) prior to notification the parties to a concentration may inform the Commission, by reasoned submission, that it is comfortably inside the two-thirds rule[143] yet it 'significantly affect[s] competition in a market within a Member State which presents all the characteristics of a distinct market' and ought therefore to be examined, in whole or in part, by the competent authority of that member state applying its own merger rules.[144] The Commission must first notify the relevant Member State, which may refuse the option, but if it does not the Commission may accede to the request, and no notification in the normal manner follows.[145]
(b) a variation of the 'Scandinavian clause' introduced in 1997, parties to a concentration without a Community dimension which is capable of review under the merger rules of at least three Member States may, prior to notification to them (assuming that a notification procedure exists), inform the Commission, again by reasoned submission, that it ought to be examined by the Commission.[146] If the request is opposed by any of the Member States (within 15 working days) it is not referred, but if not the concentration is deemed to have a Community dimension, is referred to and tested by the Commission by normal procedure and it escapes the application of any national merger regulation. [147]

In the 30 months of operation of the new regulation the Commission has received 785 notifications, more than one every working day; phase 2 investigations were launched in 19 cases. 693 (88 per cent of) cases were declared to be compatible with the common market, 33 of those with conditions and obligations attached. In no case

[137] OJ 1998 C66/5.
[138] OJ 1998 C66/1.
[139] OJ 1998 C66/14.
[140] OJ 1998 C66/25.
[141] Draft adopted on 28 Sept 2006, not yet published; the text of the draft is available at <http://www.ec.europa.eu/comm/competition/mergers/legislation/jn.html>.
[142] EC Commission, DG Competition, *Merger Remedies Study*, 2005, unpublished; text available at <http://www.ec.europa.eu/comm/competition/mergers/studies_reports/remedies_study.pdf>.
[143] That is, the relevant undertakings achieve more than two-thirds of their annual Community-wide turnover in more than one Member State, otherwise it is not a concentration 'with a Community dimension'; Reg 139/2004, Art 1(2), (3).
[144] Art 4(4).
[145] ibid.
[146] Art 4(5).
[147] ibid.

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has a concentration been prohibited,[148] which suggests the Commission is continuing with, or even extending, its fairly light touch. There have been 27 requests for pre-notification referrals under Article 4(4) and 24 referrals made, 82 requests for pre-notification referrals under Article 4(5) and 74 made. This suggests a healthy respect in the mutual cooperation between Commission and national authorities.

In 2005 the CFI upheld the Commission's veto of the acquisition of the entire share capital of Honeywell International by, and which would therefore become a wholly owned subsidiary of, General Electric, the Commission having found that GE's dominant position in the worldwide market for commercial jet aircraft engines would be strengthened by means of a 'vertical overlap' with Honeywell's engine starters, a dominant position would be created in various avionics and non-avionics products through a 'conglomerate effect', and the merged entity would reinforce its market power and foreclose and eliminate competition from those markets.[149] The merger was thought to be the world's then largest industrial takeover agreement, worth some $45 thousand million, and the Commission veto revisited the issue of 'unwarranted and unprecedented interference' in American affairs;[150] but surely the greater concern was that the decision had been adopted in the midst of those which had taken such a pummelling from the CFI in 2002, and it is not impossible the Commission may yet have to make good any loss caused.[151] If DG Competition welcomed the CFI judgment with some relief, it cannot be blamed.

E. Microsoft

In Spring 2004, following extensive litigation in the United States and much prevarication in Brussels, the Commission found Microsoft to have infringed Article 82 and imposed a fine of €497,196,304,[152] the highest fine ever visited upon a single under-

[148] The last prohibition decision, on a proposed acquisition of joint control of Gás de Portugal by Energias de Portugal and Ente Nazionale Idrocarburi, was taken in December 2004 (Decision 2005/801 OJ 2005 L302/69) but because all agreements defining the transactions had been signed on 31 Mar 2004 the old regulation applied. The Commission decision was challenged and heard by the CFI using the 'expedited' or 'fast track' procedure (see rules of procedure of the CFI, Art 76a) for only the third time since it was created in 2001, indicating that it attached some considerable importance to the case. In the event it upheld the Commission; Case T-87/05 *Energias de Portugal v Commission* [2005] ECR II-3745.

[149] Decision 2004/134 OJ 2004 L48/1; upheld in Case T-209/01 *Honeywell v Commission* and Case T-210/01 *General Electric v Commission*, judgments of 14 Dec 2005, not yet reported. The *Honeywell* case appears to have foundered in part upon poorly constructed submissions; the *GE* judgment—GE represented before the CFI by two senior counsel, two junior counsel, two solicitors and three other lawyers, and the judgment running to 735 paragraphs—is much more substantial.

[150] In 1997 the Commission imposed conditions upon a merger, already approved by the Federal Trade Commission, between Boeing and McDonnell Douglas (Decision 97/816 OJ 1997 L336/16). By a 416 to 2 vote, the American House of Representatives 'warned' the Community against 'an unwarranted and unprecedented interference in a Unites States business transaction' and called upon the president to make representation to the Commission; Congressional Record, 22 July 1997, p H5517.

[151] See (n 121).

[152] Case COMP/37.792 *Microsoft*, decision of 24 Mar 2004, not yet published. For a brief description of the litigation between Microsoft and various federal and state antitrust authorities see paras 14–20 of the decision. The Commission fine also illustrates its flexibility on fining, notwithstanding its 1998 guidelines (replaced in 2006; see now Guidelines on the method of

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taking. Microsoft's dominance in the market for client PC operating systems is scarcely contestable: it enjoys a long-term and increasing global (and EEA) market share in excess of 90 per cent and is the de facto market standard, thus 'approach[ing] a position of complete monopoly, and . . . hold[ing] an overwhelmingly dominant position'.[153] The abuse of which it then stands accused is twofold: first, refusing to supply 'interoperability information' (specifications for interconnexion protocols) for use in developing, producing and distributing work group server operating system products, and second, tying (or bundling) its proprietary media player (Windows media player) to its PC operating systems. Microsoft was ordered to cease the abuses and, by way of 'behavioural remedies': (a) make the interoperability information available to any interested undertaking upon reasonable and non-discriminatory terms, keep it updated and establish a mechanism for interested parties to inform themselves of the scope and terms of that information; and (b) unbundle the Windows media player by offering for sale a full functioning version of its software products without the Windows media player.

Microsoft lodged annulment proceedings which are in train.[154] It also sought suspension of the Commission decision pending the outcome of its challenge which was refused,[155] and in Summer 2006 the Commission imposed a penalty payment of €280.5 million for its continued failure to supply complete and accurate technical documentation and set up the evaluation mechanism required by remedy (a), being €1.5 million per day for the period from 16 December 2005 to 20 June 2006;[156] if not put right, the Commission promised an increase in subsequent penalty payments to €3 million per day.

The *Microsoft* decision is lengthy (the non-confidential version over 300 pages of A4) and complex. It touches upon refusal to supply, tying, the elimination of competition and market foreclosure, implicitly the (relatively) new principles of essential facilities and throughout the nexus between the competition rules and intellectual property rights, in particular the *Magill* 'exceptional circumstances'[157] in which the proprietor of a right (or here, a complex array of them) can be compelled to license its exercise to a third party competitor. It also addresses the appropriateness of behavioural remedial action in a system still wedded in principle, even under Article 82, to freedom of contract, and here the faintly ludicrous solution of compulsory marketing of a version of Windows XP stripped of its media player (Windows XP N) which costs the same as Windows XP and which nobody wants to buy. The annulment proceedings are before

setting fines imposed pursuant to Art 23(2)(a) of Regulation No 1/2003, OJ 2006 C210/2) intended to provide a degree of transparency, impartiality, and predictability in the matter: the 'initial amount' was first computed, by reference to the guidelines, as some €165 million, then doubled so as to ensure sufficient deterrent effect given Microsoft's economic capacity, and then increased another 50 per cent owing to the duration of the infringement.

[153] para 435.

[154] Case T-201/04 *Microsoft v Commission*, pending.

[155] Case T-201/04R *Microsoft v Commission* [2004] ECR II-4463.

[156] Case COMP/37.792 *Microsoft*, decision of 12 July 2006, not yet published. This is a material change introduced by Reg 1/2003: under Reg 17 the Commission could impose periodic penalty payments of no more than €1000 per day (Art 16(1)); under Reg 1/2003 the limit is increased to 5 per cent of average daily turnover in the preceding business year (Art 24(1)).

[157] Cases C-241 and 242/91P *Radio Telefis Éireann & Independent Television Publications v Commission* (Magill) [1995] ECR I-743; see more recently Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039.

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the CFI sitting as the grand chamber for only the second time since created in 2003,[158] and were heard over a full 5 days (24–28 April 2006), on some of them well into the evening; this is to be compared with the general rule in oral pleadings before the CFI, in which a party is normally allotted 15 minutes.[159] There is a real sense that the CFI sees the case as a test of its forensic mettle. Judgment is expected in Spring 2007.

It may also be that Article 82 itself is in for a general refurbishment. In July 2005 a European Advisory Group on Competition Policy, consisting of 20-odd industrial economists recommended by the chief competition economist, reported urging the adoption of a 'more economic approach', already edging to the fore in Article 81 and the new merger regulation, to Article 82.[160] This goes to a fundamental debate on the superiority/desirability of an 'effects-based', as opposed to the present, more rigid 'form-based', approach—or sometimes a consumer welfare approach as compared to a (German) ordoliberal approach. Supporters of the former claim that it ensures anti-competitive behaviour 'does not outwit legal provisions' and at the same time that statutory provision does not unduly thwart pro-competitive strategy.[161] This may be so, but it brings with it significant cost in terms of predictability and so legal certainty.

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[158] The 'formation' of the grand chamber (of both Court and CFI) of 13 judges was introduced by the Treaty of Nice (in force 2003) and is used when 'the legal difficulty or the importance of the case or special circumstances so justify' (Rules of Procedure of the CFI, Art 14). The only other case in which the CFI sat as the grand chamber was Case T-69/00 *Fabbrica italia accumulatori motocarri Montecchio v Council & Commission* and Case T-383/00 *Beamglow v Parliament, Council & Commission*, judgments of 14 Dec 2005, not yet reported, two linked and very complicated cases involving a WTO trade dispute and the non-contractual liability of the Community.

[159] Notes for the Guidance of Counsel at the Hearings of Oral Argument [before the Court of First Instance], unpublished, para II.4; the time limit may be extended, by leave of the Court, where the complexity of a case requires it ('if circumstances so require').

[160] Report by the EAGCP, *A More Economic Approach to Article 82*, unpublished; available at <http://www.europa.eu.int/comm./competition/publications/studies/eagcp_july_21_05.pdf>.

[161] EAGCP Report, p 2.

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