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# "Sorry, But There's Nothing We Can Do to Help": Schneider II and the Extra-contractual Liability of the European Commission in Merger Cases

*Anthony Dawes* and Kostandin Peci***

Damages; EC law; European Commission; Mergers

## Introduction

On July 11, 2007, the Court of First Instance (CFI) handed down its long-awaited judgment in *Schneider II*.[1] The present case, to the knowledge of the authors, represented the first opportunity for the Community courts to assess the application of the Treaty provisions on the non-contractual liability of Community institutions to the situation where the applicant asserts that the Commission has erroneously prohibited a merger under Regulation 139/2004 (the EC Merger Regulation).[2] While the CFI did not rule out the possibility for an applicant to obtain compensation where the Commission has made manifest errors in its economic assessment of a proposed transaction, the evidential burden that an applicant will have to satisfy in order to make out such a claim has been set so high that it is likely that the non-contractual liability of the Community in the field of merger control will be limited to procedural infringements by the Commission of a party's rights of defence.

Before analysing the CFI's judgment in *Schneider II* the authors will briefly summarise the factual background of the case. The article will then consider whether Art.288(2) EC is an effective tool for calling the Commission into account when it has been found to have committed "manifest errors" in its economic appraisal of a transaction. It will be argued that, on the one hand, the judgment in *Schneider II* is to be welcomed for further, and better, guaranteeing the respect by the Commission of the rights of defence of parties in Merger Regulation proceedings. On the other, the CFI's apparent reluctance to allow compensation for errors made by the Commission in its economic assessment of a transaction and the narrow definition of damages eligible for compensation suggest that Art.288(2) EC is unlikely to be an effective tool for calling the Commission into account when it has been found to have committed such errors. The article will then evaluate other alternatives to enhance the Commission's accountability in Merger Regulation proceedings. In particular, it will be argued that rather than creating a European Competition Court, which will not necessarily ensure a greater review of the Commission's factual and economic conclusions in merger cases, other paths could be explored, in order to enhance the quality of the Commission's economic analysis and the protection of the rights of undertakings under the Merger Regulation.

## Factual background of the case

In February 2001, Schneider launched a friendly offer for the shares in Legrand and, consequently, notified the proposed merger to the European Commission.

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1 *Schneider Electric SA v Commission of the European Communities* (T-351/03), July 11, 2007, unreported. As of yet, an English version of the judgment has not been published. All references to the judgment will therefore be to the French version, with corresponding English translations provided by the authors.

2 Previously Regulation 4064/89 on the control of concentrations between undertakings [1989] OJ L395/1; now Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

The transaction was successfully completed in July 2001. On October 10, 2001, the Commission issued a decision prohibiting the proposed merger[3] on the basis that the transaction would create[4] and strengthen[5] a dominant position on several markets as a result of which effective competition would be significantly impeded. Moreover, the Commission concluded that the commitments proposed by Schneider would not resolve the competition problems identified by the Commission. Subsequently, on January 30, 2002, the Commission adopted a further decision under Art.8(4) of Regulation 4064/89, ordering Schneider to divest its shares in Legrand.[6] Schneider then brought applications for annulment against both Commission decisions.[7] While these applications were pending and in order to comply with the Commission's divesture decision, Schneider, in July 2002, entered into an agreement with the private equity funds Wendel Investissement SA and Kohlberg Kravis Roberts & Co (Wendel/KKR), providing that Schneider would sell Legrand to Wendel/KKR if the merger was still not approved by December 10, 2002. Moreover, the agreement contained a clause allowing Schneider, if the Commission's decision was annulled, to repudiate the contract until December 5 in exchange for an indemnity payment.

On October 22, 2002, the CFI annulled both the Commission's prohibition[8] and divestiture decision[9] on both economic and procedural grounds. As a result, on November 15, 2002, the Commission recommenced its examination of the proposed merger.[10] On December 4, 2002, it adopted a decision under Art.6(1) of Regulation 4064/89, by which it reopened the second phase of the procedure for examining the proposed merger. As a result, it became impossible for the merger to be cleared before the deadline of December 10, 2002, as foreseen by the agreement for the sale of Legrand to Wendel/KKR, and so Schneider was forced to sell Legrand to Wendel/KKR.

On December 13, 2002, and as a result of the sale by Schneider of its stake in Legrand, the Commission then closed the merger file, without coming to any phase II decision.[11] This was subject to an unsuccessful challenge by Schneider before the CFI and Court of Justice of the European Communities (ECJ).[12] In parallel, on October 10, 2003, Schneider brought an action against the Commission under Art.288(2) EC in order to obtain compensation for the losses it suffered as a result of both the Commission's errors in its economic appraisal of the merger and its violation of Schneider's rights of defence.[13]

## The CFI's judgment

As a starting point, the CFI recalled the case law concerning the three cumulative general conditions whose fulfilment must be proved by an applicant in order to trigger the non-contractual liability of the Community institutions under Art.288(2) EC[14]: first, the institutions' conduct must be unlawful; secondly, the applicant must have suffered actual damage; and thirdly, there must be a direct causal link between the conduct and the asserted damage.

In relation to the fulfilment of the unlawfulness condition, the CFI focused its attention on the effect of the Commission's margin of discretion in merger control proceedings. It held, in line with previous case law, that

3 Decision 2004/275 declaring a concentration to be incompatible with the common market (COMP/M.2283-*Schneider/Legrand*) [2004] OJ L101/1.

4 The markets for moulded case circuit breakers, miniature circuit breakers and cabinets intended for distribution panel-boards in Italy; for miniature circuit breakers, differential circuit breakers and cabinets intended for final panel-boards in Denmark, Spain, Italy and Portugal; for connector circuit breakers in France and Portugal; for cableways in the UK; for sockets and switches in Greece; for watertight equipment in Spain; for fixing and shunting equipment in France; for electrical transformation products in France; for control and signalling accessories in France.

5 The markets for moulded case circuit breakers, miniature circuit breakers and cabinets intended for distribution panel-boards in France; for miniature circuit breakers, differential switches and boxes intended for final panel-boards in France; for sockets and switches in France; for watertight equipment in France; for security lighting systems or independent emergency lighting units in France.

6 Decision 2004/276, ordering a separation of undertakings (COMP/M.2283 *Schneider/Legrand*)—[2004] OJ U01/134.

7 [2002] OJ C56/15 and [2002] OJ C118/29.

8 *Schneider Electric SA v Commission of the European Communities* (T-310/01) [2004] All E.R. (EC) 314; [2002] E.C.R. II-4071.

9 *Schneider Electric SA v Commission of the European Communities* (T-77/02) [2002] E.C.R. II-4201.

10 [2002] OJ C279/22.

11 Initiation of proceedings and abandonment of the planned concentration (COMP/M.2283 - *Schneider/Legrand II*) [2003] OJ C29/5.

12 Order of the CFI in *Schneider Electric SA v Commission of the European Communities* (T-48/03) [2006] E.C.R. II-111 and of the ECJ in C-188/06 P, March 9, 2007, unreported.

13 [2004] OJ C7/37.

14 *Schneider II* at [113] referring to *SA Oleifici Mediterranei v European Economic Community* (C-26/81) [1982] E.C.R. 3057 at [16] and *Beamglow Ltd v European Parliament* (T-383/00) [2006] 2 C.M.L.R. 10; [2005] E.C.R. II-5459.

where an institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a serious breach[15]; by contrast, where, as in the field of merger control, the Community institutions are entrusted with the power to regulate complex situations or where they are required to apply or interpret open-worded legal provisions, they are afforded a margin of discretion and will only be liable when their conduct manifestly and gravely disregarded the limits on that discretion. This is justified, according to the CFI, by the need to protect the Commission's "room for manoeuvre and margin of discretion"[16] which, as the Community competition regulator, it exercises in the general interest both in its policy decisions and in its appraisal during the application of relevant provisions of Community law.

The CFI then went on to consider whether "manifestly serious breaches vitiating the underlying economic analysis"[17] of competition decisions can be equated with a manifest and grave disregard of the Commission's discretion in the field of merger control. While the CFI considered that this could not in principle be excluded, it also made clear that this should not limit the Commission's wide margin of discretion in its assessment of complex economic issues.[18] However, the CFI was able to partially side-step this issue[19] due to the factual circumstances of the case. Although the CFI in *Schneider I* had annulled the Commission's decision, this was only partly due to the Commission's deficient economic analysis of the competitive situation in certain markets.[20] As regards the Commission's findings concerning the competitive situation on other markets,[21] these were annulled not because of deficiencies in the Commission's economic analysis[22] but because of the infringement of Schneider's rights of defence.[23] As a result, the CFI concluded in *Schneider II* that as the deficiencies in the Commission's economic analysis were insufficient to warrant alone the annulment of the decision, they were also insufficient to have "occasioned Schneider a loss distinct from that eventually generated by the infringement of its rights of defence"[24] and were not eligible for compensation under Art.288(2) EC.

However, the CFI found that the Commission was required to compensate Schneider for the fact that:

> ". . . [T]he statement of objections did not permit Schneider to assess the full extent of the competition problems to which the Commission claimed the concentration would give rise at distribution level on the French market for low-voltage electrical equipment."[25]

This failure on the part of the Commission constituted, according to the CFI, a "sufficiently serious and manifest violation"[26] of Community law which could not be "either justified or explained by the particular constraints under which the Commission's services objectively operate".[27] Consequently, the Commission was liable for two heads of financial loss stemming from this infringement of Community law. First, the Commission must compensate Schneider for the expenses it incurred when participating in the renewed merger control procedure after the annulment of the first merger decision by the CFI on October 22, 2002. Secondly, the Commission must also compensate Schneider for the reduced

15 *Bergaderm and Goupil v Commission* (C-352/98 P) [2000] E.C.R. I-5291 at [42]. The determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question, *Bergaderm* at [46], and *Commission of the European Communities v Fresh Marine Co A/S* (C-472/00 P) [2003] E.C.R. I-7541 at [27].

16 *Schneider II* at [125], authors' own translation from the original text in French: "*la marge de manœuvre et la liberté d'appréciation*".

17 *Schneider II* at [129], authors' own translation from the original text in French: "*des vices manifestes et graves affectant l'analyse économique sous-jacente*".

18 *Schneider II*, at [132].

19 *Schneider II* at [133]: "*Point n'est toutefois besoin, en l'espèce, de statuer sur le point de savoir si les trois considérations qui précèdent permettent de considérer que les vices affectant l'analyse économique des effets attendus de l'opération sur les marchés sectoriels pertinents extérieurs à la France dépassent le seuil au-delà duquel la responsabilité non contractuelle de la Communauté doit être engagée.*"

20 These are set out in recital 782 of the Commission's decision and at [57] of the judgment in *Schneider I*.

21 Set out in recital 783 of the Commission's decision and at [58] of the judgment in *Schneider I*.

22 The CFI had found that the Commission was right to conclude that the proposed transaction would have created or strengthened a dominant position as a result of which effective competition will be significantly impeded in the Common Market or in a substantial part of it (at [415]).

23 *Schneider I* at [454]–[462].

24 *Schneider II* at [138], authors' own translation from the original text in French: "*le grief relatif à l'analyse économique défectueuse contenue dans la décision d'incompatibilité est, par construction, impropre à avoir pu, à lui seul, entraîner des conséquences quelconques sur la suite de la procédure, et, par conséquent, pu occasionner à Schneider un préjudice distinct de celui éventuellement généré par la violation de ses droits de la défense*".

25 *Schneider I* at [453].

26 *Schneider II* at [152], authors' own translation from the original text in French: "*constitue en l'occurrence une violation manifeste et grave*".

27 *Schneider II* at [154], authors' own translation from the original text in French: "*ne trouve ni justification ni explication dans les contraintes particulières pesant objectivement sur les services de la Commission*".

sale price which it was forced to grant to Wendell/KKR, in order to obtain a postponement of the divesture in order that that the proceedings which were ongoing at the time before the CFI would not have been deprived of their object before they were even concluded.[28]

The CFI did consider, though, that Schneider must bear one-third of its losses under this head as it had:

> ". . . contributed to its own loss by assuming the real risk of a subsequent incompatible decision of a legally perfect merger and that, as a result, of the eventual need for a forced resale of the acquired shareholding"[29]

in Legrand, even though at the time of Schneider's acquisition of Legrand, French law did not permit a company to make the closing of a bid conditional upon eventual approval by French or EU merger authorities.

The Commission has recently appealed the CFI's judgment to the ECJ on two grounds[30]: first, that the infringement of Schneider's rights of defence was not sufficiently serious to constitute a manifest violation of Community law; and secondly, that there is an insufficient causal link between the Commission's prohibition of the merger and the damage suffered by Schneider in choosing to defer the sale of its shares in Legrand during the renewed merger control procedure.[31]

## Article 288(2) EC and merger control: an effective tool for calling the Commission into account when it has been found to have committed manifest errors in its economic appraisal of a transaction?

While Schneider was partially successful before the CFI, this was only in relation to one aspect of the alleged infringement of its procedural rights, i.e. the fact the statement of objections did not permit it to assess the full extent of certain competition problems. Schneider had also put forward eight other grounds of infringement by the Commission of Schneider's procedural rights, which Schneider alleged had either aggravated the damage it had suffered due to the decision to prohibit the merger or which had caused it a distinct loss.[32] However, these were all rejected by the CFI in [160] to [255] of the judgment. Moreover, while the CFI was able to avoid having to come to a definitive conclusion on whether undertakings could obtain "manifest errors" in the Commission's economic appraisal of either the impact of the concentration or commitments submitted by an undertaking in order to render the transaction compatible with the Common Market, the judgment indicates that such damages will be difficult to obtain.

There are thus several reasons why Art.288(2) EC is not the most effective tool for calling the Commission into account when it has been found to have committed such "manifest errors".

### *The Commission's powers under the Merger Regulation and their review by the Community courts do not easily lend themselves to a finding that a manifest error in the Commission's economic appraisal of a proposed merger can be equated to a manifest and grave disregard by the Commission on the limits of its discretion*

This is in contrast to the situation in the United States where:

> ". . . [C]ourts can fully and unreservedly hear the case and decide on the basis of their persuasion, the EC courts may only review whether what the Commission decided was lawful and correct."[33]

Community courts are thus not trial courts but courts of judicial review.[34] This is reflected in the fact that

28 *Schneider II* at [154].

29 *Schneider II* at [332], authors' own translation from the original text in French: "*Schneider a elle-même concouru à la réalisation de son propre dommage en assumant le risque réel d'une déclaration d'incompatibilité a posteriori d'une concentration juridiquement parfaite et, par voie de conséquence, de l'éventualité d'une revente forcée des actifs acquis*."

30 *Commission v Schneider Electric* (C-440/07 P).

31 Commission Press Releases IP/07/1213 and MEMO/07/321 dated August 6, 2007.

32 Infringement of the duty of loyal co-operation (at [160]–[175]); infringement of the right to be heard by an impartial authority (at [176]–[189]); the Commission's intransigence concerning the detailed rules of the separation imposed on January 30, 2002 (at [190]–[210]); the Commission's orchestration of the relations between the parties to the concentration (at [211]–[218]); the Commission's serious and manifest failure to take into account its exclusive jurisdiction (at [219]–[224]); the lack of good faith execution by the Commission of the *Schneider I* judgment (at [225]–[237]); infringement of the applicant's defence rights (at [238]–[242]); erroneous analysis of the corrective measures proposed in November 2002 (at [243]–[255]).

33 L. Prete and A. Nucara, "Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear After Tetra Laval" [2005] E.C.L.R. 692, 694.

34 C. Bellamy, "Standard of Proof in Competition Cases" in *OECD Roundtable on Judicial Enforcement Of Competition Law* of November 27, 1997.

from the inception of EC competition law, the ECJ has recognised that the Commission should be granted a certain margin of appreciation in relation to economic matters.[35] In the field of merger control, this margin of discretion has been said to confer:

> ". . . on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations."[36]

More recently, several authors have suggested that the Community courts are increasingly willing to review the Commission's interpretation of information of an economic nature.[37] They draw this conclusion from the judgments in *Tetra Laval* and *General Electric* where it was established that:

> ". . . [N]ot only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex analysis and whether it is capable of substantiating the conclusions drawn from it."[38]

As one commentator has pointed out, "this is not the 'light' judicial review for which the Commission frequently argues in appeals before the Court".[39]

However, notwithstanding these recent judgments, one should not seek to read too much into the statements on the scope of judicial review. It seems to be incorrect to say that the CFI is over-stepping the boundaries of judicial review and unduly substituting its own view for that of the Commission.[40] Rather, a distinction is being drawn between the standard of review of the Commission's findings of fact, which should be more intense, and the review of complex economic assessments, which should remain more limited.[41] While the Community courts have rightly become willing to review the veracity of the facts upon which the Commission bases its economic analysis, provided those facts stand up to scrutiny, the Community courts have not been willing to second-guess that economic analysis, even where such an analysis has later been found to be incorrect.[42] In other words, while the Community courts are expressing an increased tendency to review the correctness of the facts on which the Commission's economic analysis is based, they continue to apply a form "self-restraint" in relation to the review of the economic theory in which these facts are inserted.

In the light of the above, it is similarly unlikely that the Community courts will be willing to limit the Commission's freedom in merger matters through the possibility that the Commission's economic assessment will render it liable under Art.288(2) EC. In any case, it appears that an answer to this question will soon be given as the CFI will have to address this point in the pending *MyTravel* case,[43] where unlike in the Schneider case, the Commission's prohibition decision was annulled purely due to manifest errors in the Commission's economic appraisal of the impact of the merger and not on procedural grounds.[44]

35 *Etablissements Consten Sarl v Commission of the European Economic Community* (56/64) [1996] E.C.R. 299 at [60].

36 *France v Commission of the European Communities (Kali und Salz)* (C-68/94 & C-30/95) [1998] E.C.R. I-1375 at [223]–[224]; *Gencor v Commission of the European Communities* (T-102/96) [1999] All E.R. (EC) 289; [1999] E.C.R. II-753 at [164]–[165].

37 M. Nicholson, S. Cardell and B. McKenna, "The Scope of Review of Merger Decisions Under Community Law" [2005] *European Competition Journal* 138.

38 *Commission of the European Communities v Tetra Laval BV* (C-12/03 P) [2005] All E.R. (EC) 1059; [2005] E.C.R. I-987 at [39] and *General Electric Co v Commission of the European Communities* (T-210/01) [2005] E.C.R. II-5575 at [63].

39 J. Killick, "The GE/Honeywell Judgment—in Reality Another Merger Defeat for the Commission" [2007] E.C.L.R. 52, 53.

40 For a contrary view, see D. Bailey, "Standard of Proof in EC Merger Proceedings: A Common Law Perspective" [2003] C.M.L. Rev. 845, 861–862.

41 Opinion of A.G. Tizzano in *Tetra Laval*, delivered on May 25, 2004, at [83]–[89] and the CFI's judgment in *General Electric* [2005] E.C.R. II-5575 at [62].

42 For example, in *Holcim (Deutschland) AG v Commission* (C-282/05 P), unreported, judgment of April 19, 2007, the ECJ upheld the CFI's refusal to award damages to an applicant whom the Commission had fined for being a member of a cartel, before that decision was overturned by the CFI in *Cimenteries CBR SA v Commission of the European Communities* (T-25/95, T-26/95, T-30/95–T-32/95, T-34/95–T-39/95, T-42/95–T-46/95, T-48/95, T-50/95–T-65/95, T-68/95–T-71/95, T-87/95, T-88/95, T-103/95 & T-104/95) [2000] E.C.R. II-491. Similarly, in *Denis Bouychou and FG Marine SA v Commission* (T-344/04 & T-360/04), unreported, judgments of July 19, 2007, compensation was also refused despite a Commission Decision ordering repayment of state aid having been subsequently annulled by the ECJ (*France v Commission of the European Communities* (C-482/99) [2003] All E.R. (EC) 330; [2002] E.C.R. I-4397).

43 *MyTravel v Commission of the European Communities* (T-212/03) [2003] OJ C200/28.

44 *Airtours Plc v Commission of the European Communities* (T-342/99) [2002] E.C.R. II-2585; [2002] 5 C.M.L.R. 7.

### *Difficulties for an applicant in quantifying the actual damage suffered where the Commission has committed a manifest error in its economic appraisal of a proposed merger.*

The second difficulty applicants will encounter when seeking to claim damages to Art.288(2) EC is in precisely quantifying the damage they have suffered due to the Commission's erroneous decision. As the Community courts have stated, the burden of proof in this matter is on the applicant[45] and:

> ". . . [T]he existence of actual and certain damage cannot be considered in the abstract by the Community judicature but must be assessed in relation to the specific facts characterising each particular case in point."[46]

However, the difficulty with a merger transaction is that it involves:

> ". . . a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted."[47]

As a result, the prospective nature of the effects of the merger and the potential benefits it may bring for the merged entity may make it difficult for an applicant to engage in such a precise quantification of the actual damage it may have suffered. For example, in the pending *MyTravel* case, the applicant is seeking to recoup "significant efficiency gains" which it claims would have resulted from the merger. Nevertheless, as it has been shown elsewhere,[48] it will be by no means easy for *MyTravel* to precisely quantify such supposed efficiency gains and show a causal link between the Commission's prohibition decision and the loss of those efficiencies.

Consequently, the second requirement under Art.288(2) EC will also constitute a further stumbling block for failed merged parties on the long route to obtaining compensation where the Commission has committed a manifest error in its economic appraisal of their proposed merger.

45 *Societe Roquette Frères v Commission of the European Communities* (26/74) [1976] E.C.R. 677 at [24], and *Blackspur DIY v Council and Commission of the European Communities* (C-362/95 P) [1997] E.C.R. I-4775 at [31].

46 *Dorsch Consult Ingenieurgesellschaft mbH v Council of the European Union* (C-237/98 P) [2000] E.C.R. I-4549 at [25].

47 ECJ in *Tetra Laval* [2005] E.C.R. I-987 at [155] and *General Electric* [2005] E.C.R. II-5575 at [64].

48 See D. Geradin, "Efficiency Claims in EC Competition Law" in Ullrich (ed.), *The Evolution of European Competition Law—Whose Regulation, which Competition?* (Edward Elgar Publishing, 2006).

### *How to establish a causal link directly imputable to the Commission's illegal decision?*

In order to establish a causal link, an applicant must show "a sufficiently direct causal nexus between the conduct of the Community institutions and the damage".[49] However, in merger cases, such a nexus is not as easy to establish as in other areas. First, it may be that the losses that the applicant is claiming are too speculative. For example, where a party claims for the appropriation of the profits achieved by the other party to the prohibited merger, these may also be the result of that other party's autonomous commercial strategy, which may not have been pursued had the merger not been prohibited.[50] Secondly, in relation to the directness of the causal link, there may be other factors apart from the Commission's illegal decision prohibiting a merger that may have impacted upon the damage suffered by an applicant. For example, there may be cases where the reasons for an applicant's loss of profit can be attributed to other economic factors. Provided that there are other reasons which indicate that the Commission's erroneous prohibition of a transaction is not the "direct and certain" consequence of the Commission's conduct, then an applicant's total loss is likely to be considered too remote to trigger compensation under Art.288(2) EC.

The issue of the absence of a direct causal link forms one of the grounds upon which the Commission has based its appeal of the CFI's judgment to the ECJ. The Commission argues that the loss incurred by Schneider has no direct causal link with the fault that the Commission allegedly committed. Rather, in the Commission's view, it is Schneider who caused such a loss by freely choosing to sell Legrand before the Commission, despite the fact that the renewed merger control procedure after the annulment of the first merger decision by the CFI was still ongoing and the Commission had not yet concluded its renewed examination of the compatibility of the *Schneider/Legrand* merger.

49 *P Dumortier Freres SA v Council of Ministers of the European Communities* (64/76, 113/76, 167/78, 239/78, 27/79, 28/79 & 45/79) [1979] E.C.R. 3091 at [21].

50 N. Petit and M. Rato, "The Commission's Non-Contractual Liability in the Field of Merger Control—-Don't Use a Hammer When You Need a Screwdriver", available at *http://www.globalcompetitionpolicy.org/index.php?&id=503&action=907* [Accessed January 9, 2008].

It is therefore by no means sure that an applicant will be able to establish a direct causal link under Art.288(2) EC in relation to all the heads of its loss stemming for a Commission Decision which illegally prohibits a merger from taking place, thereby further highlighting the insufficiencies of Art.288(2) EC as an adequate method for enhancing the accountability of the Commission in merger matters.

## The Schneider II judgment and the Commission's right to an easier life

The *Schneider II* judgment appears to have established a "free action-zone" for the Commission in its merger control activity, at least as far as the economic analysis of the prospective effects of a transaction is concerned. While the self-restraint policy of the Community Courts relating to the review of the economic appraisal of a transaction by the Commission is certainly not a novelty in the field of the annulment actions under Art.230 EC, the CFI's judgment in *Schneider II*, by limiting the possibility for undertakings to obtain the full recovery of the damages they have suffered following an erroneous prohibition of a transaction by the Commission, will now extend this trend to the field of damage actions under Art.288(2) EC. While certain damages may be available in relation to infringements of the procedural rights of merging parties, the CFI's obiter statements in relation to the possible liability of the Commission for errors in its economic analysis strongly indicate that such recovery will simply not be awarded. However, such an exclusion of liability can be criticised on several grounds.

First, and before entering into a wider policy discussion, the authors respectfully disagree with the CFI's conclusion that the economic errors of the Commission in the non-French markets should not have had any impact on the Commission's extra-contractual liability under Art.288(2) EC. According to the judgment, as these errors were not sufficient to bring about the annulment of the Commission Decision they cannot trigger the Commission's extra-contractual liability under Art.288(2) EC. However, the fact that the Commission's economic errors were not sufficient to bring about a total annulment of the Commission's Decision should be distinguished from the question of whether these errors have caused the undertakings to incur extra costs which are imputable to these errors. For example, in this case, as a result of the Commission's erroneous assessment of the competitive situation in the non-French geographic markets, the undertakings were forced to incur legal and economic consultancy costs in order to answer and/or to rebut the objections raised by the Commission in the markets where afterwards the economic analysis of the latter was found to be erroneous.

Moreover, had the Commission focused its objections to the transaction only on the competition problems identified in the French geographic market, it is likely that the merging parties would have been willing to offer remedies in the other markets and focus the "legal battle" with the Commission only in relation to the French geographic market. As a result, by limiting the right of merging parties to only obtain damages for errors that can result in the full annulment of the Commission's decision, the CFI has laid the first brick into the new wall protecting the Commission against extra-contractual liability claims under Art.288(2) EC in the field of merger control.

Secondly, it is highly questionable whether the self-restraint judicial policy of the CFI which, by making the recovery of damages conditional upon the fact that the Commission's economic errors must lead to a complete annulment of a decision, practically affords immunity to the Commission in all cases where the errors in its economic analysis have only led to the partial annulment of a Commission Decision. In this way, the CFI's policy sacrifices the rights of undertakings to effective judicial protection in order to accommodate the position of the Commission. For instance, let us assume that in its assessment of the proposed transaction, the Commission had not made any procedural errors. The question that spontaneously arises is whether, in these circumstances, the CFI would have awarded any damages to the parties. The most probable answer to the question would be a negative one because the so-called need to protect the Commission's discretion, when it engages in complex economic assessments of the potential competitive effects of a proposed transaction in merger proceedings, will lead the CFI to find that as long as the economic errors of the Commission do not lead to the total annulment of a Decision no recovery of damages can be obtained by the parties.[51]

51 As mentioned above the CFI will face a different, although similar, scenario in the much-awaited *MyTravel* case, where the Commission Decision was totally annulled because of the erroneous economic evaluations of the Commission. Nevertheless, it will be interesting to see how the CFI will decide in this case, taking into account the fact that it cannot use the full annulment argument used in the *Schneider II* judgment.

However, assuming the risk of being heretical or naive, while the Community Courts should afford the Commission a certain margin of discretion when it reviews, under Art.230 EC, and also under Art.288(2) EC, the Commission's complex economic assessments, the authors deem necessary to question if the margin of discretion afforded to the Commission should be as wide as the CFI recognised in its judgment in *Schneider II*. Already, in relation to the standard of review under Art.230 EC, while the Community Courts limit their review to manifest errors, some authors have considered, that such discretion should rather be limited to mere administrative discretion.[52] In other words, the Commission should only have a margin of discretion in choosing between several legitimate economic alternatives although they can result in different, and/or opposed conclusions if applied to a given case.

Thirdly, and with respect to the Commission's margin of discretion in Art.288(2) EC cases, the *Schneider II* judgment appears to afford the Commission a further margin of discretion by establishing a subdivision in the category of manifest errors between errors in the Commission's economic analysis that are objectively inherent and those which are not objectively inherent in the exercise of the Commission's competition law powers, with only the second category triggering the Community's extra-contractual liability under Art.288(2) EC. The authors respectfully disagree with this subdivision operated by the CFI, as there is no need for such extensive protection in order to enable the Commission to exercise its competition law powers, without feeling unduly constrained through fear of incurring extra-contractual liability under Art.288(2) EC. When the Commission makes a manifest error, it is not because the Commission is choosing between two legitimate, but alternative, economic theories, which would have entered into the normal margin of discretion granted to the body responsible for the competition policy but is simply because the Commission got a given matter wrong. Therefore, it seems to the authors that the Commission does not merit immunity in these cases.

However, as mentioned above, the CFI seems to adopt a different, albeit questionable, view of this matter. Indeed, it is interesting to read the dialogue between the Commission and the CFI in *Schneider II* on this point. In particular, the Commission tries to justify the need for it to be granted immunity in cases as the one under review by stating that:

> ". . . [I]f [the Commission's] financial liability could be triggered in circumstances such as the present case, its capacity to fully exercise its role of competition regulator, as conferred upon it by the EC Treaty would be compromised, due to the inhibiting effect on merger control which the risk of having to bear the alleged damage suffered by the undertakings party to the merger proceedings would have."[53]

In the next paragraph the CFI endorses this justification by stating that:

> "It must be admitted that such an effect, contrary to the general community interest, could arise if the notion of a serious breach of Community law were extended to cover all errors or faults which, even if they do represent a certain degree of gravity, are not foreign by the nature or by their extent to the normal behaviour of an institution entrusted to ensure the application of the competition rules, which are complex, delicate and subject to an important margin of interpretation.
> Can therefore not be held as constituting a sufficiently serious breach of Community law for the Community to incur non-contractual liability, the failure to fulfil a legal obligation which, however regrettable it may be, can be explained by objective constraints owed by that institution and its agents by the effect of the provisions governing merger control cases."[54]

The CFI is thus willing to absolve the Commission of financial responsibility for certain errors, provided that they can be explained by objective constraints owed by that Commission and its agents by the effect of the provisions governing merger control. Accordingly, the ultimate result of the CFI's judgment is that

52 M. Nicholson, S. Cardell and B. McKenna, "The Scope of Review of Merger Decisions Under Community Law" [2005] *European Competition Journal* 138, 132.

53 *Schneider II* at [121], authors' own translation from the original text in French : "*si sa responsabilité financière se trouvait engagée dans des circonstances telles que celles de l'espèce, sa capacité à exercer pleinement la fonction de régulateur de la concurrence que lui confie le traité CE s'en trouverait compromise, en raison de l'effet inhibant sur le contrôle des concentrations que pourrait engendrer le risque d'avoir à supporter les dommages allégués par les entreprises concernées*."

54 *Schneider II* at [122], authors' own translation from the original text in French: "*Il convient d'admettre qu'un tel effet, contraire à l'intérêt général communautaire, pourrait se produire si la notion de violation caractérisée du droit communautaire était entendue comme comprenant toutes les erreurs ou fautes qui, même si elles présentent un degré de gravité certain, ne sont pas étrangères par leur nature ou par leur ampleur au comportement normal d'une institution chargée de veiller à l'application des règles de concurrence, lesquelles sont complexes, délicates et sujettes à une importante marge d'interprétation. Ne peut donc être tenu pour constitutif d'une violation suffisamment caractérisée du droit communautaire, aux fins de l'engagement de la responsabilité non contractuelle de la Communauté, le manquement à une obligation légale, qui, pour regrettable qu'il soit, peut être expliqué par les contraintes objectives qui pèsent sur l'institution et sur ses agents par l'effet des dispositions régissant le contrôle des concentrations*."

undertakings that have suffered damages resulting from types of manifest errors by the Commission will have to bear the costs of these errors, merely because "this is how things go" and not because of any need to protect the Commission's policy-making powers in the field of competition. Moreover, the distinction drawn by the CFI between objectively inherent and non-inherent manifest errors is sufficiently vague so as to grant the Commission widespread immunity for any errors it may make when assessing the potential economic effects of a notified transaction.

## The need to develop other mechanisms to ensure the greater accountability of the Commission in the Merger Regulation proceedings

As a result of the CFI's judgment in *Schneider II* and the fact that Art.288(2) will not be an effective tool for calling the Commission into account when it has been found to have committed manifest errors in its economic appraisal of a transaction, it is therefore necessary to consider other ways in which the Commission's accountability in Merger Regulation proceedings could be enhanced. The authors have attentively followed the House of Lords European Union Committee's investigation[55] into the potential benefits of creating a European Competition Court, which would deal exclusively with appeals in competition cases and in particular in merger cases. The Committee's investigation was triggered by the concern that the time it currently takes the CFI to effectively review a decision by the Commission to prohibit a merger[56] effectively acts as a bar on undertakings from challenging an allegedly lawful decision.[57]

Although the Report was principally motivated by the desire to ensure a speedier review of merger decisions by the CFI, several parties pointed out that during the debate on the need to speed up merger review proceedings cannot be separated from other issues, such as the thoroughness of the review of the Commission's economic analysis by the CFI. Leaving aside issues concerning the compatibility of a more detailed review with quicker procedures,[58] the authors are of the opinion that a European Competition Court, or whatever would be the denomination of a specialised court in competition matters, could only be an effective forum for enhancing the review on the Commission decisions if the review standard is not of the same kind as the one the CFI actually adopts. In other words, it could be discussed whether the constitution of a European Competition Court could address the concerns on the length of the proceedings, but it would not, with much probability, improve the actual situation of judicial protection if it adopts the same self-restraint approach on the review of Commission decisions as the CFI currently does.

On the contrary, it appears to the authors that the existence of a power for the European Competition Court to fully review the Commission decisions, and to subsequently adopt a new decision in substitution of that of the Commission, would better guarantee the rights of the undertakings, as the decision of the Commission would be subject to the full review of an independent court. European Competition Court should be able to fully review both the factual and economic basis underlying the Commission's decision, with the ECJ only reviewing the judgment of the Competition Court on points of law.

However, and as the House of Lords Committee's Report points out, as the creation of a European Competition Court is not feasible, at least in the short term, it is important to consider other less radical ways in which the review of Commission decisions in merger cases could be enhanced. For example, the CFI could be granted the power not only to review the legality of a Commission merger decision but also, if it annuls the decision, to substitute its own decision[59] for that of

55 House of Lords, European Union Committee, 15th Report of Session 2006–2007, *An EU Competition Court*, HL Paper 75.

56 The fastest time to date being seven months in *Endesa, SA v Commission of the European Communities* (T-417/05) [2006] E.C.R. II-2533).

57 CBI Brief, "The Need for a EU Competition Court" June 15, 2006, available at *http://www.grur.de/cms/upload/pdf/CBI-Brief.pdf* [Accessed January 9, 2008].

58 Indeed, some of the parties observed that a, "more extensive retrial of issues of fact and economic assessment, whether before the CFI or a specialist tribunal, would add substantially to the time taken. There is an inherent tension between demands for greater speed and demands for greater in-depth review". See, for example, the memorandum submitted by Sir David Edward Q.C. to the House of Lords, European Union Committee, 15th Report of Session 2006–2007, *An EU Competition Court*, p.48 at para.3.3.

59 See in this direction, the memorandum submitted by Sir David Edward Q.C. to the House of Lords, European Union Committee, 15th Report of Session 2006–2007, *An EU Competition Court*, p.50 at para.4.4. See also the memorandum submitted by John Temple Lang and Robert O'Donoghue to the House of Lords, European Union Committee, 15th Report

the Commission's[60] (subject to appeal to the Court of Justice). Such a conferral of power on the CFI would be doubly beneficial: first, as the CFI would be capable of substituting its own decision for that of the Commission, this would also force the CFI to engage in a more in-depth review of the decision, including a greater review of the Commission's economic analysis upon which it based its decision; secondly it would achieve the objective of shortening the overall duration of merger review proceedings as following the annulment of a decision by the CFI, the Commission would no longer have to recommence the examination of a proposed merger under the Merger Regulation as it did in the *Schneider* case, examination which could potentially have ended with the Commission adopting a new decision that would again have been subject to appeal before the CFI.

Another way of ensuring both greater "quality control" by the CFI of the Commission's merger decisions while enhancing the rights of undertakings under the Merger Regulation could be to enhance the role of the Advisory Committee prior to the adoption of a prohibition decision by the Commission. The Advisory Committee is composed of one or more representatives from each Member State, with at least one of the representatives being a specialist in competition law.[61] Normally, the representatives of the Member States are officers of the national competition authorities.[62] The Merger Regulation foresees that the Advisory Committee on concentrations shall be consulted by the Commission:

> "before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2)".[63]

Moreover, the Advisory Committee on concentrations "shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote" and the Commission "shall take the utmost account of the opinion delivered by the Committee".[64] The Commission shall also inform the Advisory Committee "of the manner in which its opinion has been taken into account".[65] However, that opinion is currently not binding on the Commission.

The authors consider that enhancing the role of the Advisory Committee, a more independent body than the Commission[66] would both strengthen the rights of undertakings without resulting in any undesirable delay in merger proceedings. This could be achieved by transforming the Advisory Committee into an independent body which could verify the soundness of the Commission's economic analysis in merger cases. First, in order to ensure a greater review of the Commission's economic analysis, it will be necessary to ensure the presence of expert economists among the members of the Advisory Committee. In this regard, the Merger Regulation would specify that at least one of the representatives of the Member States on the Advisory Committee should also be an economic expert. Secondly, if at the end of Phase II, the Commission intends to prohibit the proposed transaction, the merging parties would have the right to initiate a new phase of the proceedings (a so-called Phase III), whereby both they and the Commission would be allowed to make their case in front of the Advisory Committee, who would then issue an opinion, based on an in-depth review of the facts and the economic theories of the case. Moreover, the Commission would then be under an obligation to give a reasoned opinion in all cases when it intends to disregard in the final decision the opinion of the Advisory Committee. As a result, where the Commission disregards a negative opinion of the Advisory Committee in relation to the veracity of the Commission's factual and/or economic analysis and where the CFI later considers on appeal that the decision, in line with the opinion of the Advisory Committee, is flawed, this would create a presumption that such errors were not within the scope of the Commission's margin of discretion in merger control

of Session 2006–2007, *An EU Competition Court*, p.161 at para.2.14 who argue that the CFI's power to substitute its decision should be limited to "cases in which the CFI considered that it could satisfactorily do so". Otherwise, the CFI should refer the case back to the Commission if "the circumstances had substantially altered, or if a new investigation was needed for some other reason".

60 A similar power is currently granted to the ECJ by Art.61 of the Statute of the Court of Justice where the ECJ annuls a decision of the CFI.

61 Merger Regulation Art.19(4).

62 Merger Regulation Art.19(4).

63 Merger Regulation Art.19(3).

64 Merger Regulation Art.19(6).

65 Merger Regulation Art.19(7).

66 Indeed several authors have pointed out the large powers that the Commission has on the basis of the Merger Control Regulation. For example, Ortiz Blanco points out that the powers granted to the Commission by the Merger Control Regulation "are set against an institutional framework where the Commission acts as investigator, prosecutor, and as it has been widely suggested, even judge and jury"; see *EC Competition Procedure*, 2nd edn (Oxford: Oxford University Press, 2006). For a detailed analysis of the compliance of the EC Competition procedure with the right of "fair trial" set forth at Art.6 of the ECHR, see A. Andreangeli, "Toward an EU Competition Court: Article 6—Proofing Antitrust Proceedings before the Commission" (2007) 30 *World Competition* 595.

cases, as the Commission will have already been alerted as to the potentially erroneous nature of its factual and economic assessments but have chosen to disregard such a warning. It will be open to the Commission to rebut such a presumption; however, the burden of proof will be on the Commission to show why it disregarded the Advisory Committee's opinion.

Furthermore, although this new para-judicial phase could delay the adoption of a decision by the Commission, it would be for the merging parties to decide, based on these time constraints, on the worthiness of having recourse to this para-judiciary phase in front of the Advisory Committee. Consequently, any additional delay would be compensated by the fact that this delay will be voluntarily accepted by the merging parties ensures the greater accountability of the Commission and gives the merging parties a greater chance of being able to recover damages under Art.288(2) EC as they will only have to prove that they have suffered actual damage and a direct causal link between the conduct and the asserted damage.

## Conclusion

This article has shown that the CFI's reluctance to allow compensation for errors made by the Commission in its economic assessment of a transaction and the narrow definition of damages eligible for compensation will mean that Art.288(2) EC is unlikely to be an effective tool for calling the Commission to account when it has been found to have committed such errors. It has also highlighted the concern that the judgment of the CFI will lead to a denial of (effective) justice for undertakings that have suffered damages as a result of the Commission's erroneous assessment of the potential anti-competitive effects of a proposed merger.

As a result, there is a need to look beyond Art.288(2) EC in order to find other ways to enhance the Commission's accountability in Merger Regulation proceedings. Unless such mechanisms are developed, the result of *Schneider II* will be that the protection afforded to undertakings by Art.230 EC may only be a symbolic one as, from a business perspective, it is of little interest, if any at all, for undertakings to obtain the annulment of a Commission prohibition decision, if they are subsequently barred from being able to recover damages under Art.288(2) EC.

# The Abuse of Dominant Market Position under Romanian Antitrust Law in Light of European Antitrust Law

*Anca Daniela Chiriţă**

Dominant position; EC law; Harmonisation; National competition authorities; Romania

## Core principles of the Romanian antitrust law

The Romanian Competition Law (RCL) 21[1] applies only to anti-competitive practices and mergers, so the title of competition law may be too broad, as it was properly enacted as an antitrust law. Article 1 RCL is aimed "to protect, maintain and stimulate competition and a normal, competitive environment" and emphasises that the consumers' interests should be protected. As a short-term goal, RCL tried to encourage and stimulate small- and medium-sized enterprises.

Article 6 of the RCL prohibits only the abuse of a dominant market position, not certain types of anti-competitive behaviour and unlike EC law uses the phrase "economic agent or agents" instead of "undertaking". The responsible Romanian investigative and enforcement institution is the Competition Council (CC),[2] which is set up as an autonomous administrative competition authority.

Under the RCL, abuse of dominance occurs when the three elements are found by the CC to exist simultaneously: one economic agent or more holds a dominant position on the Romanian market or on a substantial part of it; the economic agent or agents is abusing its dominant position by resorting to anti-competitive behaviours; and such behaviours have as an object, or may have as an effect, the distortion of commerce or the prejudice of consumers. The last condition contains two different elements from Art.82 EC. First, it is only fulfilled insofar as such behaviours have the object of distorting competition. Secondly, it emphasises the existence of an alternative to the "distortion of commerce"; namely the "prejudice of consumers". The CC has applied these conditions inconsistently, as it identified not just three,[3] but four, cumulative conditions, by splitting the last one in two.[4]

Article 6 of the RCL provides a non-exhaustive list of anti-competitive practices, which may, in particular, overlap with the examples of abuses in Art.82 EC. Article 6(a) to (d) are copied directly from Art.82. For this reason, it is only worthwhile to discuss the distinctive behaviours listed in art.6.

Article 6(a) includes a prohibition on imposing unfair fees, aside from pricing, but failed to expressly include rebates. The RCL uses the term "other unfair contractual clauses", which might provide for a broader interpretation that allows more possible new cases, but does not define what clauses are considered unfair.[5] It includes refusal to deal with certain suppliers or customers. Apparently, the legislators did not consider the possibility of firms refusing to supply or to grant access to facilities. But, art.6I(f) does prohibit an economic agent from exploiting the economic dependence of another economic agent that does not have an equivalent alternative, which could be interpreted as a refusal to grant access to facilities or a withdrawal of supply. It still does not provide explicit examples of exploitation. However, these provisions

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1 Republished in [2005] OJ 742.

2 Since 2003, the CC's decisions have been available at *http://www.consiliulconcurentei.ro*.

3 CC decision no.77, *Atlas Telecom Network Romania v RDS & RCS*, April 25, 2005, at [8].

4 CC decision no.46, *Burtila & Co Electron v Astral Telecom*, March 15, 2005, at [5].

5 Previously, the RCL had defined tying as an unfair practice.

are now made redundant by the specific rules of the Framework Guidelines[6] to access agreements in telecommunications. In this context, art.6II(f) prohibits the practice of breaking contractual relations solely because a partner refuses to accept certain unjustified commercial conditions.

Article 6I(e) explicitly mentions charging excessive or predatory prices aimed at eliminating competitors, while art.6II(e) defines a unique regulation prohibiting the abusive practice of exporting at prices below production costs and covering the difference through higher domestic prices. What could be the outcome of this provision? The question of whether this could be a cross-subsidy of low-priced exports with high domestic prices, or a safeguard against monopoly pricing, still needs to be carefully analysed.

### *Elements for establishing dominance*

Unlike EC law, whose jurisprudential definition of dominance still stands today,[7] Romanian legislators have adopted the second element of the legal test,[8] defining dominance as a situation where "an economic agent is able, to a considerable extent, to behave independently" towards its actual and potential competitors.[9]

The definition of the relevant market is decisive, because too narrow or an incorrect definition will result in finding that there is no monopoly power. The relevant product market is legally defined[10] and depends on the concept of demand substitution. Generally, the CC uses the hypothetical monopolist test ("SSNIP" test) as for mergers,[11] where the key question is whether there are close substitutes for the product(s) in question, if the product's price were raised above competitive levels by 5 to 10 per cent[12] for one year. If the profits of a supplier of services would rise, the relevant market is considered a separate one. Price correlation and ratio analysis are used when data is available. Relevant qualitative factors include products' characteristics, barriers to entry, consumers' preferences, differences between market shares of competitors and substantial differences between product prices by suppliers.

While analysing the position held by SC Romanian Cable Systems SA (RCS)[13] on the relevant market of cable TV services, the CC took its structure and performance into account; namely, that it does not benefit from a technological advantage against its competitors, as the transmission of TV programmes is always made using the same technology, the coaxial cable and the optical fibre. Then, it analysed the market behaviour of RCS, which by offering its promotional package intended to offer customers a chance to test the technical quality of the service, and encourage the use of this alternative after a long period of monopoly. As a new entrant on the market, RCS did not hold a dominant position.

The relevant geographical market as defined in the Notice on market definition[14] can be limited to neighbouring areas. In 1998,[15] the CC made a mistake by defining the geographic market for TV cable broadcasting as a national one, even though it was initially defined in the investigation report as a local one. This incorrect definition has been repeatedly followed,[16] leading to erroneous findings regarding market shares and to lack of dominance. Thus, even under the most "restrictive conditions of analysis", namely, under the hypothetical local market, Astral did not hold a dominant position, because it was a new entry on the market. Looking at the market shares of competitors, the CC clearly stated that those shares were under 1 per cent, so that Astral was not found to be dominant. The findings about dominance could have been different if the existence of local markets had been considered.

6 Guidelines on the application of the competition rules to access agreements in the telecommunications sector—framework, relevant markets and principles [2004] OJ L288.

7 *France Télécom SA (formerly Wanadoo) v Commission of the European Communities* (T-340/03) [2007] 4 C.M.L.R. 21 at [99].

8 See R. Whish, *Competition Law,* 5th edn (London: Butterworths 2005), p.179. See *Van den Bergh Foods v Commission of the European Communities* (T-65/98) [2005] All E.R. (EC) 418; [2003] E.C.R. II 4653 at [154].

9 *Potential competitors* are defined as economic agents who are able to penetrate the relevant market with products from other geographical area, including imported products.

10 Regulation for the application of the provisions of arts 5 and 6 of the Competition Law 21/1996 art.2II(1) [2004] OJ 430.

11 "Small but significant, non-transitory increase in relative prices": see Notice on market definition in order to establish the substantial relevant market art.3(4) [2004] OJ 288.

12 Regulation for the application of the provisions of arts 5 and 6 of the Competition Law 21/1996 art.2II(1), para.32 [2004] OJ 430.

13 CC decision no.77, *Atlas Telecom Network Romania*, April 25, 2005, at [10(3)(2)].

14 "Small but significant, non-transitory increase in relative prices": see Notice on market definition in order to establish the substantial relevant market Art.1(1)(b) [2004] OJ 288.

15 CC, decision no.135, December 21, 1998, not published. See C. Butacu and A. Miu, "*Aspecte teoretice şi practice ale abuzului de poziţie dominantă, în înţelesul Art. 6 din legea concurenţei*" (2000) 6 *Revista Dreptul* 46.

16 CC decision no.46, *Burtila & Co Electron*, March 15, 2005, at [6] and n.3, [10(1)].

Other difficulties measuring market power appear because of lack of economic data. The most important factors remain market shares and barriers to entry. However, the CC does not always consider market share alone as sufficient to assess dominance. It may be paradoxical to point out that the CC, by using a structural analysis of the relevant market, found Trafo, with a market share of only 18 per cent, to be dominant.[17] When looking at the period of time over which the market power is exercised, these findings were quite exaggerated. In *Atlas*,[18] the CC stated that a dominant position is "unlikely" to exist with a market share of 25 per cent. In *Regisco*,[19] the CC found dominance in the market for registration of shareholders' undertakings, by analysing only the market shares on the relevant market of 100 per cent, in 1997 and 96.4 per cent, in 1998. These were compared with the amount of shares owned by the shareholders of Regisco, without looking at the period of time of just one year.

In *Astral*,[20] its share of the national market for cable services was compared to the shares of two competitors and to assess its capacity to behave independently, the existence of barriers to entry. Given the lack or insignificance of such barriers, as the market is completely liberalised and licenses[21] for setting up cable networks are more freely granted, it concluded that market entry is not difficult. In assessing dominance, the essential premise[22] was whether Astral had a dominant position, based on which the CC rejected the alleged infringement of art.6(e) of the RCL and avoided the difficult analysis of costs.

In order to evaluate the position held by RCS[23] on the national cable TV market, the CC looked not only at the relative size of market shares owned by its competitors, but also at the exercise of its power, "over a specific period of time", that time being its first entry into the market without a big market share, and at the characteristics of the telecommunications market, which is a dynamic one. The CC concluded that in such a market, preserving dominance is more difficult than it would be in a mature, stable market.

Barriers to entry are another key issue to determine whether entry is likely to be difficult and whether there are entry costs. In *RCS*[24] no entry barriers were found as the telecommunications market is "completely liberalised" due to a simplified licensing system. The *Gas Sud* case[25] concerned the monopoly policy regarding tariffs for connections to the gas distribution network in areas requiring a distribution license. According to the Gas Law[26] the licensed distributors have exclusive access to markets in the areas specified in their licenses. The owner of such a license is obliged to build up the necessary infrastructure for bringing natural gas to consumers; afterwards, every consumer is free to apply for and obtain access to the network.[27] Such an exclusive license was not considered a barrier in the sense of impeding access to the gas market. In the industrial waste market[28] the CC examined whether the existence of two authorisations[29] was a barrier to entry and as over 500 companies owned such authorisations no barriers to entry were found.

### *Oligopoly and collective or joint dominance*

The concept of joint dominance refers to two or more economic agents possessing market power, even if no single agent is dominant.[30] In the absence of a cartel, an oligopoly market in particular can induce independent firms jointly to exercise their power. Mere "conscious parallelism" is not sufficient to demonstrate joint dominance. The CC's President initiated, *ex officio*, an investigation of the cement prices[31] demanded by Romanian producers from December 31, 2000 to the first quarter of 2004 because of the producers' "simultaneous and significant growth". The CC examined whether Lafarge Romcim,

17 CC, decision no.20, November 7, 1997, not published, upheld by the administrative section of the Supreme Court of Justice, decision no.955/1998, *Trafo* (not published).
18 CC decision no.77, *Atlas Telecom Network Romania*, April 25, 2005, at [10(2)].
19 CC, decision no.247, October 29, 1999, [2000] OJ 54.
20 CC decision no.46, *Burtila & Co Electron*, March 15, 2005, at [7].
21 Every new provider has to notify the National Regulatory Authority for Communications and to demand broadcasting permission.
22 CC decision no.46, *Burtila & Co Electron*, March 15, 2005, at [8].
23 CC decision no.77, *Atlas Telecom Network Romania*, April 25, 2005, at [10(3)].
24 CC decision no.77, *Atlas Telecom Network Romania*, April 25, 2005.
25 CC decision no.92, *Gas Sud Ghermăneşti*, May 25, 2005, at [7].
26 Gas Law 35/2004.
27 CC decision no.92, *Gas Sud Ghermăneşti*, May 25, 2005, at [8].
28 CC decision no.8, *Remat Bucureşti Sud v Romrecycling & Remayer*, January 19, 2006, at [5].
29 See National Agency for Environment Protection and National Commission for Recycling Materials.
30 For mergers, RCL refers to "*two or more*" for horizontal agreements and to "*one or more*" for vertical ones.
31 CC decision no.94, *Lafarge Romcim, Holcim (Romania) & Carpacement Holding*, May 26, 2005.

with a market share of 35 per cent, abused a dominant position, in coordination with Holcim (30 per cent) and Carpacement (33 per cent), by setting resale prices. The CC's analysis of their market structure on the domestic market did not provide clear evidence of co-ordinated conduct, as it was relatively constant over the whole period analysed.[32] But it did not focus sufficiently on the characteristics of the Romanian cement market, which is an oligopoly, as the parties did not dispute this fact and no joint dominance was found. The report also failed to present a detailed economic analysis,[33] as it was difficult to quantify the abuse committed by fixing prices. However, the above-mentioned firms have been found guilty of concerted practices and operating a cartel.[34]

Another case concerned the position of collective dominance held by the competitors of Condem Bucharest,[35] branches of the foreign producers Rigips, Knauf, Obo Bettermann and Menatwork, which produce metallic profiles for gypsum board walls and false ceilings, where the CC gave a non-exhaustive list[36] of general criteria applicable in cases of collective dominance. As none of them were fulfilled, the companies were not found to be dominant.

### *Defences, remedies and penalties*

There is no longer a block or parallel exemption for attempts by small and medium-sized enterprises to attain monopoly power[37] which results in a much more severe penalty for any firm abusing its dominant position. Previously, they were exempted if their turnover did not exceed a market share of less than five per cent in the relevant market. Article 4 of the Regulation for the application of Art.6[38] still condemns attempts to attain monopoly power by allowing a priori control through investigations of the CC. Such an investigation can no longer exist, as there are no exemptions that could justify such a demand. It is, obviously, one unintended consequence of the law.

As a general remedy, art.49 of the RCL stipulates the absolute nullity of "any agreements, conventions or contractual clauses" generated by prohibited practices. For such violations the CC applies administrative sanctions, which can be challenged by the Court of Appeal before they are applied.[39] This provision is meant to ensure legal certainty and discipline among competitors and is beneficial in case of "serious damage to a major public interest", when the CC may request, bearing the burden of proof, the Bucharest Court of Appeals to order additional measures. Public safety, a proliferation of independent economic agents, consumers' welfare, and precautionary measures[40] are deemed major public interests. The CC and economic agents may appeal any such decision to the High Court of Cassation and Review. Individuals and/or legal persons who are actually and directly affected may request an investigation by the CC[41] and have the right to bring a civil action against the business concerned requesting a complete remedy for the damage caused.

Penalties include administrative fines of up to 10 per cent of the business's total turnover and comminatory fines of up to 5 per cent of the business' daily average turnover.[42] The National Company for Freight Railway Transport, CFR Marfă SA, a former state monopoly, has been found to attain monopoly power and sanctioned with a fine.[43]

## Analysis of recent cases of abusive practices of the Competition Council

### *Pricing Practices*

#### *Monopoly pricing*

The extent to which a monopoly can exercise its power depends on the structure of the market. The *Gas Sud*

32 CC decision no.94, *Lafarge Romcim, Holcim (Romania) & Carpacement Holding*, May 26, 2005, at [17]–[18].
33 CC decision no.94, *Lafarge Romcim, Holcim (Romania) & Carpacement Holding*, May 26, 2005, at [122].
34 For the infringement of art.5(1)(a) of the RCL, Lafarge was sanctioned with €10,424,955, Holcim with €8,015,385 and Carpacement Holding with €8,655,787. The High Court of Review and Justice has annulled through its decision no.1358, March 5, 2007 the fine imposed on Lafarge.
35 CC decision no.105, *Condem Bucharest*, May 9, 2006, at [23].
36 CC decision no.105, *Condem Bucharest*, May 9, 2006, at [24]. Among them: existence of a capacity surplus in the relevant market; homogeneity of the products; resemblance in cost structures and technological processes; market transparency; symmetry of competitors' market shares.
37 RCL Art.8. See O. Căpăţînă, "*Noua reglementare antimonopolistă în dreptul concurenţei*" (1996) 7 *Revista Dreptul* 4.
38 Regulation for the application of the provisions of Arts 5 and 6 of the Competition Law 21/1996 [2004] OJ 430.
39 See art.7 of the RCL: invalidating contracts or contractual clauses; restraining or prohibiting market access; selling assets or restructuring through division of the economic agent.
40 RCL art.7(5).
41 See art.34 of the RCL.
42 See arts 51 and 54 of the RCL.
43 CC decision no.119, *CFR Marfă SA*, May 15, 2006. The fine of RON 26,987,010 is equivalent to €8 million.

case[44] concerned the artificial increase of authorisation fees charged to customers for connection to the gas distribution network and the legal policy on monopolies. The authorisation fees were higher because *Gas Sud* did not have logistical resources to connect customers and was obliged to use a subcontractor. *Gas Sud* enjoyed a legal monopoly for gas distribution and connected customers from a suburban area of Bucharest, where it held its license.[45]

The CC compared Gas Sud's fees with those set by other operators and found them "quite above the average", then looked at whether they could have been set to recoup investment costs and maintain profitability by comparing them with the number of the connected customers. Using this method it could not challenge Gas Sud's behaviour by alleging a lack of transparency regarding fees as that falls under consumer protection laws. Because Gas Sud did not force its consumers to do business with its subcontractors no infringement was found.[46] Legally, the licensed operator selected authorised companies to make a connection, and consumers could not, ultimately, make a choice. This fact should also have been analysed from the perspective of an exclusionary licensing for gas distribution and have considered the period of time for which a company may grant such an exclusive licensing.[47]

### *Predatory pricing*

Predatory pricing is defined[48] as pricing below costs for a sustained period of time with the intention of deterring competitors' entry into the market or eliminating existing competitors. A key consideration is whether a dominant firm could recoup its losses from pricing below cost[49] by raising prices later on. The CC will analyse whether the dominant firm sets prices below its avoidable total costs (ATC), and if so, whether it aims at eliminating a competitor. Both conditions must be simultaneously fulfilled. By contrast, in EC law there is no need to show that the firm may recoup losses in order to find that it is acting predatorily, nor is elimination of actual competitors required.

The flaw in the CC's approach consists of the fact that it does not apply a constant two-step approach: recoupment of costs and price-cost analysis. When a price-cost analysis is undertaken, it is not sensible to apply the *AKZO* test.[50] If prices are above AVC but below ATC, they are not presumed to be predatory, but may still be predatory if they intend to eliminate potential competitors. So, predation cannot be inferred from market and cost data alone; one needs to know the intentions of the firm and should look at its strategy and method. A price is also deemed predatory by law if it is below average long-run incremental costs. The CC made no reference at all to AVC[51] in finding that both Rigips Romania and Menatwork charged sale prices higher than the level of ATC. As Rigips and Menatwork did not eliminate their competitor, Condem, which had even increased both its sales and market shares, the second condition was not fulfilled and none of them were found to be dominant. Unlike in *AKZO*, the emphasis is placed not only on the intention; the effect upon competitors is also considered. Inherently problematic, this cost analysis should have considered both ATC and AVC.

### *Cross-subsidisation*

The RCL does not consider cross-subsidisation a per se abuse. Atlas Telecom[52] complained that RCS held a dominant position on the TV cable retransmission market, and cross-subsidised RDS, a member of the same group. The latter firm used the optical fibre networks that RCS had built to supply landline phone services, so RDS's network costs were not included in its pricing decisions, and very low for consumers. Both had a competitive advantage: RCS on the fix phone market, where the ex-monopolist Romtelecom still held a significant market share until January 1, 2003,

44 CC decision no.92, *Gas Sud Ghermăneşti*, May 25, 2005, at [3(a), (d) and (e)].
45 CC decision no.92, *Gas Sud Ghermăneşti*, May 25, 2005, at [9]. See Gas Law 351/2004. The Regulation on access to natural gas distribution systems (September 2004) establishes a strict formula to calculate costs for pipe connections.
46 CC decision no.92, *Gas Sud Ghermăneşti*, May 25, 2005, at [15]–[17].
47 See Art.14(d) of the Regulation on access to natural gas distribution systems.
48 Guidelines on the application of the competition rules to access agreements in the telecommunications sector—framework, relevant markets and principles Art.91 [2004] OJ L288.
49 CC decision no.92, *Gas Sud Ghermăneşti*, May 25, 2005, at [13].
50 According to *AKZO*, a price is presumed to be predatory if it is below average variable cost (AVC). *AKZO Chemie BV v Commission of the European Communities* (C-62/86) [1991] E.C.R. I-3359 at [95]. See A. Jones and B. Sufrin, *EC Competition Law*, 2nd edn (Oxford: Oxford University Press, 2004), pp.392–394. The *AKZO* test differs from the traditional Areeda-Turner test, where prices below AVC are presumed unlawful but, prices above this threshold are never predatory; P. Areeda and D. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (1975) 88 Harvard L.R. 697.
51 CC decision no.105, *Condem Bucharest*, May 9, 2006, at [26]–[27].
52 CC decision no.77, *Atlas Telecom Network Romania*, April 25, 2005, at [9]–[11].

by offering the "Connect 0" package to subscribers; and RDS, which owned the technology necessary for supplying its services. The CC did not consider cross-subsidisation to be per se abusive, because the essential test was dominance, and found that RCS did not hold a dominant position on both the TV cable retransmission market services and on the fix phone market. On the latter market, it was not dominant due to the existence of Romtelecom.

### *Exporting at prices below production costs*

Article 6II(e) RCL mentions exporting at prices below production costs when it could harm domestic consumers who would have to pay increased prices to cover the difference. This provision seeks to ensure that firms and consumers do not pay higher prices thus permitting a dominant firm to sell its products at lower prices to foreign firms and consumers. This type of abuse arises when a firm is using its profits from domestic sales to cross-subsidise its lower-priced international sales. A low export price, as a fair indicator of the value of the product, would be clear evidence that the domestic price is higher than the real value. However, an international price is not affected by the domestic price; export sales do not need to be "subsidised". Even if this provision would act as a safeguard against monopoly pricing, it remains difficult to determine the "right" price. Pittmann[53] analysed two possible methods to determine that price, both of which may lead to price discrimination between domestic and foreign customers and would allow the CC to attack the prices charged to domestic customers by particular firms and seek to control them. RCL includes specific provisions allowing for price control[54] but these are strict and may be challenged by the firms whose prices are to be controlled.

In *Lafarge Romcim*,[55] the CC's Plenum stated that according to its investigation these companies were not dominant. Because each of the three held almost equal market shares the CC did not undertake a cost analysis for the exported products seeking to prove that they were sold at prices below those charged on the domestic market and did not question whether such a practice would represent a subsidy and harm internal consumers' interests.

### *Tying*

Article 6(d) of the RCL is identical to Art.82(d) EC and only a few cases were heard by the CC. In the *Mitsubishi* case,[56] an exclusive supplier of video equipment for printing and cartridges was found to be dominant on the market. Mitsubishi abused its position by requiring consumers who desire its services during the warranty period for video equipment purchased from another source to buy a minimum number of film papers.

In the *NCNCA Constanţa* case[57] a possible contractual tying imposed on Hidroelectrica was examined, as some contractual clauses were unrelated to a previous contract. As for whether this created new obligations for Hidroelectrica that might have had no connection with the subject of the contracts, the CC concluded that both of the contracts referred only to the water transit service in the third shipping lane of the Danube Channel. NCNCA Constanţa argued that when the water level of the Danube River is high, Hidroelectrica must incur higher expenses than for normal transit.

## *Refusals*

### *Refusal to deal*

Article 6(a) of the RCL expressly condemns attempts to restrict firms' ability to refuse to deal with certain suppliers or beneficiaries, as both can have exclusionary or discriminatory effects. This reflects the need to impose a legal framework onto a concept that lacks both legal certainty and economic rigour at the European level, but did not clearly foresee how the circumstances might occur in practice. The key tests used to determine abusive refusal to deal are the existence of two separate markets and the elimination of effective competition. The latter is necessary, but not sufficient,[58] as there may be objective reasons for refusal. Remat[59] complained that Remayer

53 For this view and a detailed economic analysis see R. Pittmann, "High Domestic Prices that Subsidies Low Export Prices under Romania's Competition Law" [2005] E.C.L.R. 238.
54 See art.4(2) of the RCL, which states that the Government may, "in economic sectors or markets where competition is precluded or substantially restricted by law or by the existence of a monopolistic position", impose by decree price controls for a period of up to three years.
55 CC decision no.94, *Lafarge Romcim, Holcim (Romania) & Carpacement Holding*, May 26, 2005, at [123].
56 CC Plenum decision no.127, *M.I.RAPPS v Tuingdor-Mitsubishi Electric Europe GmbH*, December 21, 1998, [1999] OJ I-68. Initially, the decision was annulated by Bucharest Court of Appeals, decision no.485, May 3, 1999, not published, upheld by the SCJ, decision no.683, February 28, 2000, not published.
57 CC decision no.99, *National Company Navigable Channels Administration Constanţa*, April 26, 2006, at [51].
58 An obligation to share an essential facility with competitors could distort competition, as the business performance of the firm would be punished for competing on the merits.
59 CC decision no.8, *Remat Bucureşti Sud,* January 19, 2006, at [5].

refused to collaborate in the industry of processing iron waste on shredder equipment, as well as in the organisation of auctions on the sale of its products. As both companies held insignificant market shares of less than 3 per cent, neither Romrecycling nor Remayer, which is controlled by Romrecycling, was deemed to have a dominant position and a further analysis was avoided.

### *Refusal to supply*

The CC dealt with such a case where a producer of hard drawn steel wire and nails[60] refused to provide raw material to another nail manufacturer by claiming that the wire was used only for its own production needs. In its investigation, the CC found that only a part of the wire was used for such purposes, and therefore, the producer's practice was a refusal to supply. But the CC failed to examine whether there were alternative sources of supply, as required in *Commercial Solvents*.[61] A manufacturing company[62] refused to sell bearings to a commercial partner at wholesale prices by obliging it to pay a retail price of 15 per cent extra. As justification it argued that the partner did not fulfil its contractual obligations.

### *Refusal to grant access to "essential facilities"*

The question is under what conditions and terms the dominant firm should be forced to share its facilities. The CC is required to identify the existing or potential market in its cases and to consider whether the dominant company has fulfilled its duty not to discriminate.[63] Objective defences to a charge of refusal to grant access could be the overriding difficulties of providing access or the need for a facility owner to have sufficient time to recover its investment or to use its facility in order to place a new product or service on the market.

CFR Marfă SA[64] was found to have abused its dominant position in relation to bus depots by refusing to deal with private operators and to sign new service agreements. According to the CC private operators have been denied access to services provided by CFR Marfă without objective justification as the only reason the company gave for its denial was that the company "had no obligation as such".[65]

NCNCA Constanţa,[66] a state-owned company, administers and exploits the resources of the Danube Channel. Hidroelectrica claimed to have suffered an abusive behaviour of NCNCA Constanta, when they refused to discuss providing water transit services and imposed a fee three times higher than the price charged to railroad operators. The latter was obliged to ensure free access to and utilisation of its facilities, which are public property, and held a legal monopoly over administration of the Channel. The CC found the firm to be dominant[67] but concluded that the company did not infringe Art.6(a) as it was forced to renegotiate its tariffs.[68] Analysing the firm's expenses the CC concluded that the price set for water transit was higher because it included additional costs for water dredging.

An ongoing investigation by the CC concerns possible abuse by Orange, Vodafone and Romtelecom Romania, which jointly enjoy a dominant position in their market, resulting from their refusal to grant the other national operators telephone services access to their networks.[69]

## *Discrimination*

Article 6(c) of the RCL, like Art.82 EC forbids any price discrimination by dominant firms. A company providing parking services[70] demanded and took discriminatory fees for its services from beneficiaries. But the complaint was rejected by the CC because there was an objective justification for applying different tariffs to individuals and legal entities.

60 CC decision no.14, October 6, 1997, not published, upheld by the SCJ, administrative section, decision no.955, April 15, 1998.

61 *Istituto Chemioterapico Italiano SpA v Commission of the European Communities (Commercial Solvents)* (6/73–7/73) [1974] E.C.R. 223.

62 CC Plenum decision no.59, July 11, 1998, not published; on appeal, Bucharest Court of Appeals, decision no.265, April 3, 1999.

63 To do this, the CC may look for the simultaneous existence of the following conditions: access to the facility should be essential to compete; there is sufficient available capacity to provide access; the facility owner fails to satisfy demand in an existing market, blocks the emergence of a potential new service or product, or impedes competition on the market; the company seeking access is ready to pay a reasonable and non-discriminatory price. Guidelines on the application of the competition rules to access agreements in the telecommunications sector—framework, relevant markets and principles Art.73 [2004] OJ L288.

64 CC decision no.119, *CFR Marfă SA*, May 15, 2006, at [27].

65 CC decision no.119, *CFR Marfă SA*, May 15, 2006, at [52].

66 CC decision no.99, *National Company Navigable Channels Administration Constanţa*, April 26, 2006.

67 CC decision no.99, *National Company Navigable Channels Administration Constanţa*, April 26, 2006, at [11].

68 CC decision no.99, *National Company Navigable Channels Administration Constanţa*, April 26, 2006, at [49].

69 CC Press Bureau, Notice of July 19, 2006 (no further notifications).

70 CC Plenum decision no.85, September 5, 1998, not published.

The CC investigated alleged anti-competitive practices committed by CFR Marfă[71] concerning "discriminatory and increased charges" to companies spun off from SNCFR, the ex-monopolist, and other fees up to 20 times higher than the reference level charged to railway operators. The relevant product market was identified as a duopoly; the beneficiaries had the freedom to choose between services provided by CFR Freight and CFR Passengers, but it then became a monopoly.[72] The analysis of the price-cost ratio found a profit between 312 per cent and 1,458 per cent for charges applied to private operators, and a clear disadvantage to competitors.[73] The CC found that CFR Freight infringed art.6(c) of the RCL by abusing its dominant position and setting unequal conditions for similar services to private firms.

### *Exploitation of economic dependency*

Article 6I(f) of the RCL, like art.L420, the second point of the French Commercial Code, prohibits the exploitation of a state of economic dependency[74] of another economic agent that does not have an alternative solution under equivalent conditions. Such a definition of abuse lacks consistency, because it was inspired by a former French regulation[75] and therefore applies more to essential facilities than to discriminatory abuses. In *NCNCA Constanţa*,[76] the CC dealt with both exploitation of economic dependence and breach of contract, as provided for in art.6II(f), but failed to analyse properly the concept of economic dependence. Moreover, it looked for objective justifications for discriminatory fees when identifying the abuse, finding that the new fee was justified and still profitable for the complainant.

71 CC decision no.119, *CFR Marfă SA*, May 15, 2006, at [39].
72 CC decision no.119, *CFR Marfă SA*, May 15, 2006, at [25]–[26].
73 CC decision no.119, *CFR Marfă SA*, May 15, 2006, at [43]–[46].
74 This article states that: "*Est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l' état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Cet abus peuvent notamment consister en refus de vente, en ventes liées ou practiques discriminatoires visée a l'article L. 442-6.*"
75 Ordinance no.86-1243, December 1, 1986 on Freedom in Pricing and Competition Art.7.
76 CC decision no.99, *National Company Navigable Channels Administration Constanţa*, April 26, 2006, at [52]–[54].

## Critical remarks and policy recommendations

Romania's law on abuse of dominance tries to meet the goals already set by implementing Art.82 EC. A question still remains: could art.6 of the RCL lead to a better enforcement of the antitrust provisions? And if so, could the goals of institutional reform, which the Romanian antitrust authorities dealt with before EU accession, now be fulfilled?

Bringing Romanian antitrust law into conformity with EC law has been a challenge. Article 6 was copied directly from Art.82 EC. The use of art.6 incorporated the same problems as well as the benefits of the laws copied. Only art.6II(e), whose economic purpose is controversial, is unique. One might still recommend the following future work for the CC:

- The CC should apply general antitrust principles instead of the specific rules that it uses in the telecommunications sector. Otherwise, enforcement will continue to be limited.
- The SSNIP test seems to be poorly suited to the CC's recent cases. The CC should find a better way to analyse the characteristics of an oligopoly or duopoly domestic market and investigate joint dominance more thoroughly. The absence of a correct method for calculating market share under art.6 leads to a broad and mostly incorrect definition of the market and an erroneous identification of a lack of dominance in some cases.
- The approach of identifying local relevant markets is already established in the Framework Guidelines in Telecommunications and in the Notice on market definition. The CC should remedy its mistake, define the relevant geographic market on a case-by-case basis and recognise the existence of local markets as a major task of ensuring that the consumers' interests are protected.
- The CC should make further efforts to do proper cost analyses, and inquiries into both AVC and ATC. The legal test for predation should focus on whether a firm can recoup its initial losses incurred by a predatory strategy by raising prices in the future. If so, this should be considered one premise for a finding of predation. Only in these cases should predation be considered profit-maximising.
- Given the inherent difficulties of regulating prices in domestic and foreign markets it is difficult for the CC to analyse properly the differences in setting those prices and determine the "fair" product

price. Instead, the CC could develop a strategy for controlling domestic prices by effectively imposing price controls, without the benefit of the safeguards for extreme circumstances, as in art.4 of the RCL.

- The CC should use the following criteria to test for abusive tying practices: whether tying eliminates competition; whether the firm offers consumers no other way to obtain the tying product; and if so, whether there are objective justifications for the practice. This last test is, by its wording, contrary to art.6(d) and applies only in the telecommunications sector.
- It is unclear how the non-discrimination principle of the legal duty to deal would be applied in practice. Therefore, the CC should define such a duty. Applying such a principle could be problematic when an obligation to deal has been imposed on a firm in order to permit the emergence of a new product on the market, regardless of whether another rule would create the incentive to innovate.
- The CC should make a clear distinction between discrimination that creates disadvantages for customers who are in competition with each other and discrimination that bars competitors of the dominant firm from the market. It should do this in such a way that art.6(b) of the RCL would apply to consumer-related situations and to all exclusionary abuses, while art.6(c) would apply to competitor-related cases.

The overall evaluation of the CC should remain positive after its first 10 years of existence; the problems that the CC is facing are part of the inherent difficulties of harmonising with EC law. The key issue remains the focus on the need for creating more competition in the Romanian market, which could be beneficial for both firms and consumers. Therefore, much more severe rules should not be goals in themselves. For Romania, the law must take into account the needs of small firms acting in a domestic market whose mainly oligopoly character would require different rules and a more flexible interpretation of the law. From an economic point of view, a proper competitive business environment might need more freedom to allow innovation.

The following issues require further attention from the enforcers of antitrust laws:

- The authorities should reduce enforcement costs and create a predictable climate for competition. With only one decision finding market dominance from 2004 to 2007, but a large number of investigations, the CC's active role could be reconsidered.
- Whether to allow appeals of the CC's decisions in national courts is a sensitive political issue. The CC had imposed a record fine in a recent case in the cement industry, *Lafarge*, but the national court reversed it. This action shows the implications of creating legal uncertainty, under which enforcement remains illusory and enforcement costs only increase.

## Conclusion

Romania had to make significant substantive and institutional changes to its competition laws and policies in order to join the European Union. However, the European Commission never explained the exact scope of Romania's obligation to harmonise its antitrust laws with the European Commission's. The present state of competition policy and law in Romania is a positive change for the country's legal system and laws. But the inherent difficulties in applying Romanian and EC competitive rules reflect that even if the beneficial effects of a more economic approach seem obvious, essential economic principles should be written into national competition laws and include general principles, rather than applying specific rules. Otherwise it would limit their own enforcement and, moreover, maximise enforcement costs.

# The French Competition Council Confirms its Extensive Approach of Repeat Infringements in a New France Télécom Decision

*Jérôme Philippe and Aude-Charlotte Guyon**

LT Dominant position; EC law; Fines; France; Infringement; Internet service providers; Telecommunications

In a decision no.07-D-33 of October 15, 2007, the French Competition Council (the Council) imposed a fine of €45 million on France Télécom (FT) for having abused its dominant position in the local loop market. The abuse consisted of favouring the commercialisation of internet access services via ADSL by its subsidiary Wanadoo to the detriment of the development of competing internet access providers (IAPs).

Initially acting upon the complaints of two IAPs, namely T-Online's in November 2001 and Liberty Surf's in February 2002, which were revoked following a settlement with FT, the Council eventually decided to hear the case *ex officio*, based on the violation of the public interest in free competition.

The present decision forms part of a series of interim relief injunctions and decisions on the merits in which the Council and the European Commission sanctioned the incumbent operator for "pre-empting", for the benefit of its subsidiary Wanadoo, the emerging market for high-speed internet access via ADSL in the early years of the twenty-first century.

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According to the Council, FT occupied a monopoly position on the market for access to the local loop and implemented various abusive practices against competing IAPs:

> (i) discriminatory practices aimed at the rivals of its Wanadoo subsidiary, i.e. the information relating to the eligibility of ADSL lines would have been updated less often and less detailed, and the ADSL online order system would have been less direct and less quick, than those at the disposal of its subsidiary Wanadoo;
> (ii) practices aimed at denigrating the competitors of its subsidiary Wanadoo and (iii) the abusive use in favour of its subsidiary Wanadoo of strategic data originating from the local loop business in order to facilitate the marketing of its Wanadoo subsidiary's internet access services.

Having established the abuse of FT's dominant position, the Council then analysed the level of the fine, applying art.L. 464-2 I. of the French Commercial Code, which provides that:

> ". . . [T]he financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage caused to the economy, to the financial situation of the body or company penalised or to the group to which the latter belongs, and to the likelihood of any repetition of practices prohibited . . ."

Having found that FT's practices were particularly serious and adversely affected the economy, as they took place in an emerging market where, as a result, competing IAPs found it difficult to establish themselves, the Council clarified the extent to which the finding of past anti-competitive behaviours may be taken into account as repeat infringements, an aggravating factor in deciding the level of the fine.

First, the Council underlined that the concept of repeat infringements in competition law should not be confused with the concept of repeat offending under criminal law. In particular, the Council clarified that the concept of repeat infringements is less restrictive than the concept of repeat offending, and covers a wider array of situations.

Secondly, the Council reiterated that the repetition of practices can only be taken into account if these practices have been found to be infringements, thereby excluding cases where the infringement has not been established, such as:

(i) practices justifying the award of interim relief measures pending a decision on the merits; and
(ii) practices which resulted in decisions accepting undertakings offered by the relevant companies.

Furthermore, following the case law of the European Court of Justice in *Danone*,[1] the Council added that, "*any decision establishing an infringement* has to be taken into account when examining repeat infringements, independently of its outcome" (injunction, absence of a fine, publication . . .).

The Council clarified that an infringement could be established by a decision of the Council, by a judgment of the Paris Court of Appeals as well as by a decision of the European Commission or of any competent national authority, based on Arts 81 and 82 of the EC Treaty, which means that an infringement in a foreign Member State could lead to consider that there is a repeat infringement in France.

Thirdly, the Council reiterated that the finding under competition law of a repeat infringement does not require that the earlier condemnation has become final at the time of the repetition, but only at the time when the new facts are being examined.

Besides, in relation to the period of time to be taken into consideration, the Council and the European judges both considered that, although there is no strict time limit for decisions to be taken into account when examining repeat infringements, the lapse of time between the various decisions has to be considered in the light of proportionality.

Finally, the Council considered that the new infringements have to be identical or at least similar to the previously established infringements, but with a very broad view of "similarity". The Council clarified that this means that the practices are either identical in their anti-competitive object, a criterion relying on the legal basis used to characterise the infringement, or identical in their anti-competitive effect, "a criterion which, in contrast, goes beyond the differences in legal qualification".

In the present case, the Council considered that there had been repeat infringements and thus increased the incurred fine by 50 per cent.

On the one hand, the Council notably considered that, although the decision no.94-D-21 of 1994 established an infringement of the anti-cartel rules, this anti-competitive agreement between FT and one of its independent subsidiaries had as its object and effect the eviction of competitors from the market. The Council concluded therefore that the infringement was sufficiently similar, at least by its effect, to the ones examined in the present case, which was also aimed at preventing Wanadoo's competitors from establishing themselves on the market for the provision of high-speed internet access. This undoubtedly signals a broad approach of repeat infringements by the Council.

On the other hand, the Council underlined that there had been several decisions condemning anti-competitive behaviours by FT at regular intervals (1994 (94-D-21), 1997 (97-D-53), 1999 (judgment of the Court of Appeals of June 29, 1999) and 2001 (01-D-46)) and that there was only a short lapse of time between each of these decisions.

Finally, the Council granted FT a reduction in fines of 25 per cent due to the substantial nature of the undertakings proposed under the negotiated settlement procedure provided for by art.L. 464-2 III of the French Commercial Code. For example, FT undertook to prevent the repetition of the anti-competitive practices by putting into place a mechanism to monitor consumers complaints linked to anti-competitive practices, and to take corrective actions (training, information on competition rules, instructions).

It is thus confirmed that the concept of repeat infringements, an aggravating factor provided for by art.L. 464-2 I of the French Commercial Code, is indeed interpreted widely by the Council which, in the present case, decided that a decision establishing an infringement of the anti-cartel rules can constitute an aggravating factor when sanctioning an abuse of a dominant position, provided that the anti-competitive effect is similar.

1 *Groupe Danone v Commission of the European Communities* (C-3/06 P) [2007] 4 C.M.L.R. 18.

# The Competition Commission's Northern Ireland Banking Market Investigation—Some Unanswered Questions on the Role of Market Investigations

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LT Bank charges; Banking services; Competition Commission; Current accounts; Investigations; Northern Ireland

The UK Enterprise Act introduced the market investigation, a new instrument that allows the Competition Commission (CC) to analyse markets in which there is "an absence of effective competition" and, where applicable, to implement any one of a wide range of possible remedies.[1] The market investigation powers have been trumpeted as a device that will enable the competition authorities to fix problems and benefit consumers in areas that could not easily be reached by the mainstream competition laws against abuse of dominance and restrictive agreements. They have also been seen as a model for other European competition authorities, including the EC Commission, to follow.[2] The implicit assumption is that a competition authority has the ability to intervene in a market and achieve consumer and/or efficiency benefits in a way that would not be covered by the conventional competition laws.

This article takes a critical look at the CC's market investigation into banking in Northern Ireland, which is in many ways typical of the actions taken under these provisions. It assesses whether the investigation has identified a worthwhile gap in normal competition rule provisions, and whether adopting the concepts and language of mainstream competition law in such investigations adds to or detracts from the clarity of policy in this area.

## Background to the investigation

The investigation was prompted by a complaint from the UK Consumers' Association, which argued that the market for personal current accounts (PCAs) in Northern Ireland offered consumers "little choice and poor products". The complaint also suggested a degree of collusion between the main banks in their PCA offerings: "the market is remarkably static and displays a striking degree of similarity in terms of structure and size of bank charges".

The concerns appear to have been motivated by some significant differences between the PCAs offered by the banks in Northern Ireland when compared with the rest of the United Kingdom. Most notably, the Consumer Association highlighted the fact that the traditional clearing banks in Northern Ireland charged per-transaction fees even to PCA customers whose accounts were in credit, whereas the predominant practice in the rest of the United Kingdom was for free banking to customers with positive credit balances.

## The Northern Ireland banking market

Northern Ireland has just 1.6 million inhabitants, but PCA services are provided through the established

* The author is a partner at RBB Economics. I am indebted to Adrian Majumdar and other colleagues for comments on an earlier draft of this paper.

1 Market investigations are carried out under s.131 of the UK Enterprise Act 2002. References to the CC are made by the UK's Office of Fair Trading. Although the market investigation powers are new, it is arguable that this instrument is not wholly different from the old "complex monopoly" powers that existed for many years under the former UK regime, and which also led to in-depth investigations into market conduct and business practices in relatively unconcentrated industries.

2 Similar motivations appear to lie behind sector inquiries conducted by DG COMP pursuant to Art.17 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

branch networks of four main banks (the clearers), and a collection of at least five smaller players (the non-clearers).[3]

The traditional PCA offered by the clearers in Northern Ireland was an account that paid minimal interest on cash balances and that charged fees for transactions even when customers were in credit. This contrasts with the "fee-free" PCAs offered by the non-clearers which pay interest on positive balances and offer free banking to customers who maintain their accounts in credit, but charge penalty fees when customers go overdrawn.

The CC observed, however, that over recent years this discrepancy had broken down. Whereas in November 2005 more than half of Northern Ireland's PCA customers were on traditional PCAs, by the end of the investigation in 2007 this figure had fallen to under 20 per cent. This shift was explained partly by the non-clearers winning market share from the clearers, but mostly by the clearing banks introducing new fee-free PCA products to their customers.

## The Competition Commission's findings

The CC's findings on the market investigation are set out in a framework that has many similarities with the market assessments commonly found in merger or monopoly abuse investigations, and the report adopts much of the same terminology. However, the criteria used when evaluating these aspects of the market differ substantially from the way the same concepts are applied in those mainstream prohibition-based areas of competition law.

### *Concentration levels*

The CC looked at a variety of measures of PCA market concentration, focusing on the Herfindahl Hirschman Index (HHI) measure that is commonly cited (if not actually much used) in merger analysis. In a market with four main (and reasonably well-matched) players and a further five or more smaller rivals, the HHIs were in the range 1,400 to 1,650. The CC concluded on the basis of these figures that, "all measures show the market in 2005 to be concentrated".[4]

There is, however, no evidence to suggest these levels of concentration are inherently problematic. The CC seems to be relying on the HHI thresholds found in the 1992 US Horizontal Mergers Guidelines, which labelled HHIs over 1,000 as "concentrated" and those over 1,800 as "very concentrated". But there is no reason to believe that markets labelled as "concentrated" by this benchmark are uncompetitive. The substantive question should have been whether the levels of concentration found in the industry result in an absence of consumer choice or competitive variation that would be solved if there were more competitors and lower HHIs. But a market with four main participants and eight or nine suppliers in total has enough competitors to provide competitive outcomes. As is discussed below, the imperfections found in this market do not relate to the level of concentration, but rather to the way in which informational asymmetries affect market outcomes. Indeed, the problems that the CC found with the way the market works have if anything increased as the Northern Ireland PCA market has become less concentrated.

Hence, the CC's "high concentration" conclusion plays no substantive role in the analysis. It seems instead to have been used as a device to help to justify a competition case against the banks.

### *Entry barriers and market dynamics*

In its assessment of recent market trends, the CC found a number of striking shifts in supplier shares and product offerings. In particular, the traditional clearers had lost significant PCA share in the last five years, largely attributable to the fact that two of the main clearers, Northern and First Trust, had lost 14 percentage share points between them over the latest seven-year period.[5] There had also been a significant shift in the kind of products sold, with fee-free PCA products being phased in by the clearers. There seems little doubt that these changes in the clearers' behaviour were motivated by the competitive pressures and share gains enjoyed by the non-clearers and their fee-free model.

In short, the evidence provided no support for the original concern that the market was "remarkably

3 The clearers comprised the two main Irish banks, BOI and AIB, plus Ulster Bank (a subsidiary of Royal Bank of Scotland) and Northern (now a subsidiary of Danske Bank). The main non-clearers with physical branch networks are Halifax, Abbey, Nationwide and Alliance & Leicester, and there are also some smaller players present with a banking business based on internet and/or telephone banking models.

4 CC report summary para.15.

5 CC report para.4.19.

static". By the standards of banking markets, these changes are positively rapid.

The CC criticised the industry for having high entry barriers on the grounds that no recent entry had taken place, and that entry barriers were generated by "a lack of willingness to switch among customers".[6] As with the findings on market concentration, this is a curiously formalistic conclusion. A substantive analysis of entry barriers would have started from a clearer definition of what constitutes an entry barrier—for example, a factor that allows existing suppliers to charge prices significantly in excess of the competitive level without attracting entry. However, no such framework is provided. For example, any lack of willingness for consumers to switch provider needs to be linked to a failure of existing suppliers to provide a competitive product before it can properly be described as evidence of the existence of an entry barrier. If, as the evidence indicated, consumers were satisfied with the existing offers available to them, the absence of switching does not provide a valid basis for a negative verdict on entry.

As with the discussion of concentration levels, it is also unclear what role the assessment of entry barriers plays in the CC's competition assessment. In a market serving 1.3 million consumers that already has eight or nine suppliers, each with its own branch network, it is hard to imagine there is any need for new entrants to make the market more competitive. Given that the leading suppliers had lost significant share, and that competitive pressures had caused significant change in the products on offer, it is even harder to see what role the entry assessment plays in the competition assessment of this market. For entry barriers to play a factor in creating an absence of effective competition, it should be incumbent on the CC to show why entry would make the market work better, but the CC report does not meet this test.

## *"Unilateral effects"*

The CC then went on to look at what it described as "unilateral effects". In merger analysis, this term has a clear enough meaning, relating to the likelihood that a reduction in competitive constraints will allow the post-merger firm to raise prices even if it ignores the reactions of competing operators. But what does it mean in the context of a market investigation?

The CC report provides no clear answer to this question. A plausible answer would be that it concerns the ability of individual banks to charge prices significantly in excess of the competitive level. However, the CC's investigation of PCA profitability and price levels was unable to reach any conclusions as to whether either was excessive. There was even some evidence that PCA business had been a loss-making activity for several of the banks.[7]

One of the specific problems with assessing PCA profitability was the fact that the PCA shares many common costs with other branch-based banking services, and this leads to familiar—and insoluble—problems with how to allocate such common costs between the activities. There are additional complications arising from the fact that there are also demand-side linkages between PCAs and other banking products, since the PCA is often viewed as an "entry" product that allows banks to sell follow-on services (e.g. loans, investments, credit cards, savings products) to such customers. The CC showed some dissatisfaction with the banks' inability to separate out the profitability of PCAs, but in view of these linkages it seems doubtful whether any such exercise could be economically meaningful.

Instead, the CC evaded the question of what benchmark to use when assessing prices and profits. It concluded its assessment by asserting that banks would take advantage of the lack of customer switching by raising prices above those that "would otherwise apply".[8] But without a clear benchmark for what constitutes the competitive price level this is an essentially circular description. The fact that a firm, whether it operates in a highly competitive or a monopolised environment, chooses to charge prices that are higher than those that "would otherwise apply" says nothing about the competitiveness of those chosen price levels.

The CC did, however, make a number of partial findings which it used to justify its conclusion that the banks—both the clearers and non-clearers—were engaged in the unilateral exercise of market power against their PCA customers. First, it noted the fact that the clearers charge on average higher prices for the provision of PCAs than the non-clearers.[9] The intended implication of this seems to be that the premium charged by the clearers must be a sign of excessive prices, but this does not follow at all, especially in view of the

6 CC report para.4.107.

7 CC report para.4.332.

8 CC report para.4.287.

9 Table 12 on p.123 of the CC report reports that, after allowing for differences in average credit balances, the clearers on average earned revenues some 50% higher per customer than the non-clearers.

fact that the clearers also have more extensive branch networks than the non-clearers. Secondly, the CC cites disapprovingly the fact that similar transaction charges offered by the banks on certain aspects of the PCA service could not be justified by similar cost levels, since the banks did not even know their own costs at a product level and had very different cost structures to one another. Neither of these observations amounts to a robust case for showing that prices are in excess of competitive levels, and so the basic conclusion that the banks exercise unilateral market power remains unconvincing.

Ultimately, the CC's key findings on the absence of effective competition in PCA banking are not based on a conventional competition analysis at all. Instead, they rest on a view that, due to switching costs, banks enjoy market power over their locked-in consumers and that prices "must" therefore be higher than they would be if switching was easier. Although the conclusion that profit-seeking suppliers will exploit consumers who face high switching costs sounds intuitive, it is at best only part of the story. It is certain that switching costs and imperfect consumer information often affect the manner in which firms compete, and it is not unusual for such imperfections to create what might be characterised as distorted market outcomes (e.g. intense competition and "loss leader" prices on aspects that are visible to consumers but high margins on aspects that are hidden from them). Indeed there are numerous aspects of banking markets, and other industries, that bear this prediction out. But these phenomena do not justify a blanket a priori conclusion that the overall intensity of competition is any less in such markets. They should not therefore allow the CC to skip the requirement to find evidence of pricing or profits in the market that are at supra-competitive levels.

### *"Co-ordinated effects"*

In a further echo of the standard approach to merger analysis, the CC also analysed whether there are any adverse "co-ordinated effects" arising from the banks' actions in supplying PCAs. Again, this is a concept that has a clear meaning in the context of merger analysis. One presumes the CC's intention was to assess whether there was any basis for the Consumers' Association's complaint that the main banks were acting in a tacitly collusive manner.

The CC rejected any such concerns. However, the banks could take little comfort from having convinced the CC of the absence of co-ordinated effects problems, since the CC rejected these concerns on the grounds that there was so little competition between the banks in the first place that there would be no need, and no basis, for co-ordination of competitive behaviour:

> ". . . [T]he conditions for sustained coordination in the market were not met, principally because the clearers do not have an incentive to coordinate due to the low propensity of consumers to switch between banks." (para.4.306)

Having drawn this conclusion, the CC did not feel it necessary to reach definitive conclusions on the other items on the co-ordinated effects checklist. There is, however, a very strong indication from the evidence that collusion between the clearers was unstable because of the way in which non-clearers had gained share at the expense of the clearers, and in which the clearers themselves had reacted to this external influence by changing their PCA business models quite extensively.[10] In fact, these changes are such striking evidence of competition between the banks that they challenge the robustness of the CC's stated reason for dismissing co-ordination concerns.

One thing is clear. The basis for the original Consumers' Association complaint about the Northern Ireland banks—that their continued operation of traditional PCAs when the rest of the UK banks offered fee-free PCA banking must be a result of collusion between them—was clearly rejected by the evidence of market dynamics and changing supplier behaviour in the market.

### *Switching costs and consumer behaviour*

Assessment of consumer behaviour in the PCA market was central to the investigation. The CC found that consumers were "indifferent" about PCAs as a product and showed very little interest in, or inclination to switch, providers. It found that churn rates of around 4 to 5 per cent per annum were explained mainly by consumers who had been dissatisfied with their previous provider.

It is interesting to reflect on the implications of this finding that consumers were not interested in PCAs. One of the most prominent themes of the CC's report is that consumers showed much less interest in the product and the way it was provided than either the

10 CC report para.4.303.

Consumers Association or the CC, two agencies that exist to serve consumer interests. The CC's report even goes so far as to identify "consumer inertia" as one of the factors that contributed towards the absence of effective competition.

This paradox lies at the heart of the CC report. If consumers are indifferent about PCAs, one might legitimately ask why consumer bodies and competition authorities are so interested in them, and so keen to intervene in the way they are provided. The answer is that there is clearly a degree of paternalism in the approach that has been taken to the regulation of the sector—ultimately, the CC believed it knows better than consumers what is best for them.

This paternalism even extends to a straightforward dismissal of the CC's own evidence on consumers' views about PCAs. A MORI consumer research study conducted for the CC found that 89 per cent of respondents were "fairly satisfied" or "very satisfied" with their PCAs, but the CC preferred to disregard this evidence, arguing:

> ". . . [Q]uantitative research findings are often contradicted by in-depth qualitative research, suggesting consumers rationalize greatly in the context of quantitative surveys about subjects in which they have little interest." (para.4.254), and
>
> ". . . [W]e thought it unlikely that the lack of responsiveness to changes in charges or interest rates in the market are caused by high levels of customer satisfaction; rather, we consider that the satisfaction ratings in the MORI survey reflect an absence of active and informed customers." (para.4.255)

Choosing to disregard the evidence from the CC's own survey is particularly remarkable in view of the reliance that the CC generally places on such research. It might in principle be possible to justify this paternalistic attitude in terms of some of the recent economic literature on behavioural economics, which analyses market failures that can result when consumers are faced with uncertainty, information gaps and/or levels of complexity that are too hard to process, although the growing literature on bounded rationality indicates that making some consumers more informed does not always benefit consumer surplus.[11] However, there is no explicit reference to any such theories in the CC report's conclusions, and—more seriously—no clear description of how regulatory intervention would overcome any defined market failure.

A more straightforward explanation for low switching levels in PCAs is that consumers feel that the costs (including the hassle) of doing so outweigh the likely benefits. The CC did not seriously test this explanation, but sought to describe the potential gains from switching as follows, "the average consumer might incur a benefit from switching banks of up to £72 in 2005" (at para.4.224).

This in itself is hardly a model of clarity, and it is ironic that the language used in this assessment bears the hallmark of a drafting style that is trying to sell a proposition rather than carry out a balanced assessment. On reading the CC's small print, it emerges that £30 of the £72 benefit arises from the additional interest that would be payable from a switch to a PCA provider who paid 2 per cent interest on credit balances instead of the traditional clearers' 0.1 per cent.[12] The remainder is likely to come from avoiding transaction charges when in credit on the traditional clearers' products (and which would not even apply to PCA customers of those banks that had taken up the bank's offer of a fee-free PCA).

The CC was convinced that consumers exaggerated the costs and risks associated with switching, though it does not explain why consumers get this so wrong, or estimate what value consumers might place on the peace of mind provided by remaining with a trusted PCA provider. Nor did the CC assess other ways in which a consumer with a constant £2,000 PCA balance might achieve savings—for example, by transferring large positive balances to a linked deposit account with the same provider in order to earn a healthier rate of interest until the funds were needed.

The other factor missing from the assessment of switching is the incentive of competing suppliers to overcome any switching costs that consumers face in order to win new business. If switching costs allow suppliers to earn high margins, it is generally worthwhile for rival suppliers to pay incentives and undertake marketing activities to persuade consumers to make the switch (all the more so if the supplier in question thereby gains a new locked in customer of its own). The CC noted instances where the non-clearers had offered cash and other incentives to encourage new PCA customers, but did not explain why these *market-determined* initiatives to generate switching were either inferior or less likely to succeed than the *government-determined* initiatives that comprised the remedy package.

11 See, for example, L. Garrod, "Price Transparency and Consumer Naivety in a Competitive Market" CCP Working Paper (2007) 07-10.

12 Though Northern Bank, following its acquisition by Danske Bank, had recently started to pay interest on current account balances, so even this effect would not apply in respect of Northern PCA customers.

### *PCA banking charges and transparency*

The real core of the CC report is its criticism of the complexity of PCA charges.[13] It found that charges were unduly complex, and that banks do not do enough to communicate these charges to consumers. The greatest criticism of lack of transparency is focused on charges for unauthorised overdrafts, which comprise a high share of PCA revenues for the banks. The CC noted that these charges are not visible to consumers, largely because consumers generally do not plan to overdraw their accounts without approval, or take account of the costs of doing so.

In some respects, the problems that the CC found with the complexity and lack of transparency in charges had been increased by the competitive dynamics in the PCA market in Northern Ireland. Complexity in the market was increased by the fact that the clearers had introduced a number of new, mainly fee-free PCAs.[14] The CC also found that the (problematic) unauthorised overdraft charges tend to be higher for fee-free PCAs than for traditional PCAs.[15] Predictably, providers of fee-free PCAs tended to claw back some of the transactions fee revenues they had conceded by imposing more aggressive penalty charges for unauthorised overdrafts.

There are also some interesting interactions between the tendency of consumers to switch banks and the potential gains from doing so. The CC found that consumers who switched PCAs from one bank to another were usually motivated by dissatisfaction with specific events such as receiving high penalty charges for going overdrawn. But customers with a high propensity to incur unauthorised overdraft charges would tend to be worse off if they switched to fee-free PCAs because, although fee-free accounts provide the best value for money in general, they tend to impose higher penalty fees than traditional PCAs.

### *Too much competition?*

The market investigations regime requires the CC to find an "absence of effective competition" in order to justify remedies. In the Northern Ireland banking inquiry it did so on the basis of three factors: the undue complexity in charging structures; the lack of adequate explanation offered by the banks; and the fact that customers do not actively search for alternatives.

Standing back from the detail of the report, however, the competitive assessment did not uncover any conventional market power-based failure of competition in this market. There is no evidence of co-ordination in the PCA market, and indeed plenty of evidence of divergent behaviour and market share dynamics. There is no evidence that there is excess profits in the operation of PCAs, even from the traditional clearers whose products generally offer less good value for money than the PCAs offered by the non-clearers. On the contrary, by the standards of banking markets there are some lively competitive dynamics in the Northern Ireland banking market.

There is clear evidence that the fee-free PCA model of the non-clearers—which offers better value for money overall—has made gains at the expense of the traditional PCA.[16] The non-clearers have gained significant share at the clearers' expense, and the clearers have adopted an "if you can't beat 'em, join 'em" strategy that has allowed the benefits of competitive rivalry to spill over even to those consumers who have stayed with their traditional providers. All the above factors point to a clear rejection of the competition-related complaints levied against the sector by the Consumers Association.

However, the more aggressive competition offered by the newcomers in the market has come at a price. As competition has become fiercer, banks have had to work harder to find ways to achieve a suitable commercial return. Although that has involved offering consumers a better deal overall than the traditional PCA, it has also led to higher pricing on a smaller number of less visible elements to the PCA, and to less transparency in the market generally. This is most clearly articulated at para.4.276 of the CC report as follows:

> ". . . [B]anks have chosen their charging structures to reflect the characteristics of the market and the way customers behave. We found that bank charges are being rebalanced towards charges (for example unauthorized overdraft charges) that are less visible to customers and so banks may be able to attract customers despite such charges."

13 See CC report paras 4.109–4.186.

14 Figure 7 on p.84 of the CC report describes the array of new products and product variations initiated by the clearers during the two years over which the inquiry took place.

15 See, for example, CC report para.4.286, where the CC notes, "charges will . . . in the revised [i.e. fee-free] models be focused on a smaller group of customers who run unauthorised overdrafts, rather than a larger number of customers who run authorised or unauthorised overdrafts."

16 At para.4.39, the CC report notes that the decline of the clearers, and the growth of the non-clearers, has been more rapid in Northern Ireland than in Great Britain, which would seem to indicate that the market has worked to punish the less competitive offerings of the Northern Ireland clearing banks.

Through this process, the CC found that the minority of consumers who incur these hidden charges have been made worse off by competition even if the majority have gained from the more competitive environment.

In short, it appears that the CC's main concerns with the way in which the PCA market works have been exacerbated by "too much" competition rather than an absence of it. An investigation that was motivated by a concern that traditional PCAs offered were bad value for money compared with the PCA products offered by banks in the rest of the United Kingdom "morphed" into a criticism of the complexity and lack of transparency in the charges levied on PCA customers. Although all the banks were deemed guilty on this charge, paradoxically the problems appear to have become more acute as a result of the influence of competition from the very banks—the non-clearers—whose initiatives had done most to challenge the traditional PCA and introduce better value products into the market.

## Remedies

In common with remedies in a number of previous market investigations, the CC's main remedies were focused on improving the information available to consumers when choosing and operating a PCA.[17] The CC suggested six separate remedies to clarify and remind consumers of the way they would be charged for transactions on PCA products.

The seventh, and more interventionist, remedy was an Order designed to encourage more switching in the PCA market. Under this Order, the CC required banks to offer an interest-free overdraft facility (or a blanket commitment to refund bank charges) when accepting new customers who switched PCAs from other banks. This appears to have been motivated by the CC's belief that consumers exaggerate the costs of switching, and so they need a subsidy from the recipient bank to underwrite the risk.

It remains unclear why this remedy is required, or, if it was required, why it should succeed where the market has failed. If the CC is right in its belief that the costs to the consumer of switching are perceived rather than real, the cost to the banks of imposing a remedy forcing them to underwrite the costs of switching should be minimal. But in that case one might ask why the banks had not already introduced such provisions, especially if the CC is right in its assessment that there is an absence of effective competition in the market that allows banks to exploit locked-in PCA customers.

17 Transparency remedies have been implemented in other markets that have been subject to perceived information failures, including those into the supply of extended warranties for electrical goods and store cards.

## Assessment and conclusions

The CC's Northern Ireland banking investigation is in many ways typical of the new breed of market investigations carried out under the UK Enterprise Act. The UK competition authorities are robust in their public defence of these powers, arguing that they fill a vital gap that would otherwise exist between the mainstream prohibition-based competition rules, and other consumer legislation on unfair contract terms and prevention of fraud.

The stated aims of the UK market inquiry regime are, "to investigate 'features of markets' that . . . might lead to an 'adverse effect on competition'".[18] In contrast to the prohibition-based system of the mainstream competition rules, it is claimed that the market inquiry regime:

> ". . . is forward looking, and has as its goal the task of transforming a particular market (if it needs transformation) into one which is, and will continue to be, more competitive than it has been in the past."[19]

There is no reason to doubt the good intentions of this form of regulation, but the lessons from the Northern Ireland banking investigation provide reason to doubt whether its stated aims are being achieved.

First, the requirement of the regime to base its intervention on competition grounds, and the associated use of the language of competition economics in these reports, creates a misleading impression of the framework on which CC intervention is founded. As this paper has discussed, the misuse by the CC of terms such as entry barriers and unilateral effects, detracts from a clear analysis of the problems that exist in these markets. This is likely to create confusion when placed alongside the legitimate use of these concepts in the mainstream competition law cases for which they were devised.

18 Professor Paul A. Geroski, "The UK Market Inquiry Regime" Paper presented to the Fordham Corporate Law Institute, October 7–8, 2004, p.2.

19 Geroski, "The UK Market Inquiry Regime" Paper presented to the Fordham Corporate Law Institute, October 7–8, 2004, p.5.

Given the CC's preoccupation with improving transparency and clarity in market investigations, it is ironic that it uses the language of competition economics in these reports in a way that seems bound to create confusion. It would be preferable if a different analytical framework was used in these investigations, which clarifies that concerns with market failures that result from information problems—whilst they may be serious in their impact on consumer welfare—are different in kind from those that result from exploitation of market power.

Secondly, whilst there can be no serious argument against giving consumers clear information so that they can make informed choices, much of the bulk of the 190 page CC report and its 18 Annexes seems oddly disconnected from these arguably rather predictable remedies. It will be interesting to see whether the transparency remedies imposed by the CC really affect consumer behaviour in this market, given the evidence that consumers themselves are essentially satisfied with the current situation.

But beyond the transparency remedies, the CC report is even less clear on exactly why it proposes intervention in a market that shows many signs of working its way towards offering consumers a better deal. Specifically, when it comes to the intervention intended to subsidise consumer switching it would be preferable to see a clearer justification for the paternalistic approach that has been taken by the CC. What, precisely, is the market failure that requires an Order to force banks to offer inducements to consumers who switch to their product? Why do normal commercial incentives to win new business (in a context where the non-clearing banks have won significant PCA share from the traditional clearers over recent years) not suffice to provide such incentives? And what evidence is there that the CC's intervention will resolve that market failure in a way that improves consumer welfare?

Until the market investigations regime can provide more convincing answers to these questions, there must be scepticism as to whether in its current form it provides an efficient instrument for making markets work better for consumers.

# Vitamins Litigation: Unavailability of Exemplary Damages, Restitutionary Damages and Account of Profits in Private Competition Law Claims

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LT Account of profits; Breach of statutory duty; Cartels; Competition law claims; Exemplary damages; Private enforcement; Restitution; Vitamins

## Introduction

On October 19, 2007, Lewison J. gave a significant ruling in a trial of preliminary issues in *Devenish Nutrition Ltd v Sanofi-Aventis SA*[1] (*Devenish*). The case represents the latest claim in a series of private competition law actions based upon the European Commission Decision of November 21, 2001[2] (the Decision) relating to vitamins cartels which operated in the animal feed industry throughout the 1990s (the cartels). The claimants are a collection of vitamin pre-mix and food processing companies, which in 2005 brought an action against certain companies within the Hoffman la Roche, BASF and Aventis groups which participated in the cartels, alleging damages for the tort of breach of statutory duty based upon an infringement of Art.81 EC. Their pleaded case raised preliminary legal issues relating to the availability of a range of remedies beyond the normal compensatory measure of tortious damages.

The claimants argued that the remedies of exemplary damages, restitutionary damages and an account of profits should be available to them. In a comprehensive judgment, Lewison J. rejected each of their claimed alternative remedies. It was held that fines imposed by the Decision were both intended and sufficient to punish the defendants (including the Aventis defendants, although their fine had been reduced to zero following co-operation with the Commission) and deter potential cartelists, and therefore that, in a follow-on case, exemplary damages were not available. Lewison J. also held that restitutionary damages could not be awarded in an antitrust case and that an account of profits, only available in exceptional circumstances, was not available in this case.

The judgment (which may be appealed) is likely to dampen significantly enthusiasm for the bringing of claims in the English courts founded on antitrust violations which have already been the object of public enforcement and fines.

## Public and private enforcement

The central principles of EC competition law are found in Arts 81 and 82 of the EC Treaty, which prohibit agreements the object or effect of which is to prevent, distort or restrict competition within the European Union (Art.81) and prohibit the abuse of a dominant position (Art.82). In the sphere of public enforcement, the Commission and national competition authorities (NCAs) can impose sanctions, including fines, on undertakings who infringe these antitrust rules. Regulation 1/2003[3] (the Modernisation Regulation) encourages the complementary roles of public and private enforcement by allowing national courts to apply Arts 81 and 82 in full. In the United Kingdom, infringement of these provisions is a tort for which the principal remedy is the award of damages.[4] However,

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1 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch).

2 Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/37.512-*Vitamins*) [2003] OJ L6/1.

3 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

4 *Courage Ltd v Crehan* (C-453/99) [2002] Q.B. 507; [2001] E.C.R. I-6297.

the precise extent and type of damages available has been the subject of debate, in particular following the publication of the Commission Green Paper[5] (the Green Paper) in December 2005 and the Office of Fair Training (OFT) Consultation Paper[6] in April 2007, both of which promote a policy of facilitating private enforcement of competition law. The papers suggest a range of options to encourage claimants to recover their losses, for example expanding the repertoire of remedies. However, since the availability of antitrust remedies is derogated, through the principle of subsidiarity, to national laws of the Member States, it is accepted that the scope for change relies on national courts, subject to the principles of equivalence (rules to deal with the exercise of rights derived from Community law must be no less favourable than those governing similar actions in domestic law) and effectiveness (procedures must not render the enforcement of Community rights impossible or excessively difficult in practice). The claimants in *Devenish*, possibly buoyed by the tenor of the proposals, sought such a determination of extra-compensatory damages by the English court.

## Background to the case

*Devenish* is an example of a "follow-on" case brought after public enforcement action. During the 1990s, members of the three defendant groups of companies participated, with a number of other vitamin manufacturers, in the cartels. In its Decision, the Commission found the defendants to be in breach of Art.81 and delivered swingeing fines, intended to reflect the gravity and duration of the offences and also to represent a deterrent. The role of each defendant was assessed by the Commission on an individual basis, and fines decided accordingly: Hoffman La Roche AG was fined €462 million, BASF AG was fined €236,845,000 (following appeal of the original fine) and Aventis SA was fined €5,040,000. Aventis' relatively minor fine resulted from the fact that, as whistleblower, it applied for leniency and was granted full immunity except in respect of a vitamin product not in issue in the *Devenish* proceedings. Claiming in tort for breach of statutory duty and relying on the Decision as legal proof of an infringement of Community competition law, the claimants sought compensatory damages, exemplary damages, restitutionary damages and an account of profits. The case before Lewison J. was a preliminary hearing to assess the availability of the latter three remedies. The defendants did not contest the availability, in principle, of compensatory damages and this was not a subject of the preliminary hearing.

## Summary of the judgment

### *Exemplary damages*

The claimants argued that an award of exemplary damages should be made available to them. Exemplary damages are an award made in addition to any compensatory award, and in English law are "intended to punish and deter"[7] the defendant. In English law, such an award is a discretionary remedy available in only exceptional cases, and the discretion is exercised with caution. Exemplary damages where they may be recoverable by the court is if a claimant can show that the defendant's conduct was calculated to make a profit which might exceed damages it could be liable to pay. The claimants argued that exemplary damages should be available in this case because the fines imposed by the Commission were insufficient to punish the defendants and deter anti-competitive behaviour.

Looking first at Community law principles, Lewison J. ruled that the purpose of the Commission's fine included both punishment and deterrence and that an award to punish or deter the defendants further could compromise the Community law principle of double jeopardy or *non bis in idem*: the principle that a person should not be "sanctioned more than once for the same unlawful conduct to protect one and the same legal interest".[8] In addition, he noted that pursuant to the Modernisation Regulation, national courts must not make rulings running counter to decisions of the Commission, and concluded that to award exemplary damages would fall foul of that requirement because it would indicate the national court had decided that the Commission's fines were insufficient.

Moving on to domestic law considerations, Lewison J. referred to the difficulty of assessing exemplary

5 Commission of the European Communities, Green Paper, Damages actions for breach of the EC antitrust rules COM(2005) 672.

6 OFT Discussion Paper, "Private Actions in Competition Law: effective redress for consumers and businesses", April 2007, OFT916.

7 *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; [2002] 2 A.C. 122, per Lord Nicholls.

8 *Archer Daniels Midland Co v Commission of the European Communities* [2006] 5 C.M.L.R. 28.

damages in cases such as *Devenish* with multiple claimants and also the possible existence of parties affected by the defendants' wrongful conduct not before the court. While he noted that these factors were not, in themselves, a bar to the award of exemplary damages, he found they made calculating such an award extremely difficult. Factors contributing to this difficulty included uncertainty as to how to apportion an award between the existing claimants, how to take into consideration the range of fines already imposed on the various defendants by the Commission and the need to plead the case in such a way as to avoid "double counting". Further to his consideration of domestic law, Lewison J. also referred to the case of *Borders (UK) Ltd v Metropolitan Police Commissioner*,[9] and took the view that exemplary damages are not necessary or appropriate to "top up" compensatory damages. He stated that even if there is difficulty proving the claimants' loss with precision, the court may still be able to award effective compensatory damages, provided that such an award is fair and does not constitute a windfall in the claimants' hands. These were additional factors persuading him not to exercise his discretion to allow a claim for exemplary damages to proceed.

Pursuant to the Decision and despite a finding of "a very serious infringement" of Community antitrust law, Aventis had its fine commuted to zero (save for the minor fine referred to above) following the Commission's application of a framework for granting leniency pursuant to the Leniency Notice.[10] This regime grants partial or total immunity from fines which would otherwise be imposed on whistleblower undertakings which adduce evidence of an infringement of competition law or contribute to the Commission's or a NCA's termination of an infringement. The claimants argued that the total reduction of Aventis' fine meant it had not been sanctioned for its unlawful conduct. *Obiter*, Lewison J. noted that a reduction of the fine to zero was not reason enough to subject Aventis to further punishment by an award of exemplary damages against them. He noted that the:

> ". . . application of the Leniency Notice serves the important policy aim that it is of even more importance to encourage whistleblowers than to punish participants in a cartel."

9 *Borders (UK) Ltd v Metropolitan Police Commissioner* [2005] EWCA Civ 197.

10 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207.

A failure of wrongdoers to blow the whistle and seek leniency could leave infringements unidentified. An award of exemplary damages against such a defendant would undermine the leniency policy and conflict with the Commission's findings: a conflict that is not permissible pursuant to the Modernisation Regulation,[11] the EC Treaty[12] and case law.[13]

### Restitutionary damages

The claimants also argued for restitutionary damages to be made available. Restitutionary damages are assessed by reference to gains made by a defendant arising from a civil wrong, rather than by reference to the claimant's loss. Lewison J. noted that restitutionary damages are not readily available in all cases of breach of contract or tort[14] and held that they are not available in an antitrust case. In addition, in previous cases where a restitutionary award has been made available, the claimants were unable to prove financial loss and therefore compensatory damages claims could not be supported. As their economic expert's report demonstrated, the claimants in *Devenish* were in a position to allege financial loss and the defendants agreed that in principle compensatory damages were available; therefore Lewison J. ruled that restitutionary damages were not available.

### Account of profits

The claimants further argued for an account of profits. This award requires a defendant to open its books up to the claimant and, after an account is taken, surrender to the claimant profits made by its unlawful action. Lewison J. ruled that an account of profits was not an appropriate remedy in *Devenish* for various reasons. First, as it is only available in exceptional circumstances and because compensatory damages were available in this case, an account of profits could not be awarded. In addition, he drew attention to the various difficulties that would make such an award difficult, if not impossible, in practice: for example the disclosure

11 Regulation 1/2003 Art.16.

12 EC Treaty Arts 3(1)(g) and 10.

13 See, for example, *Crehan v Inntrepreneur Pub Co (CPC)* [2004] EWCA Civ 637.

14 *Stoke on Trent City Council v WJ Wass Ltd* [1988] 1 W.L.R. 1406; [1988] 3 All E.R. 394 and *Halifax Building Society v Thomas* [1996] Ch. 217.

burden, the number of claimants at different levels in the supply chain and the potential number of claimants affected by the tortious conduct but not before the court in this case.

## Conclusion

The private enforcement of civil remedies for antitrust violations in the European Union is a relatively undeveloped area of the law of tort. A study on private enforcement action undertaken in 2004 by Ashurst on behalf of the Commission[15] revealed an "astonishing diversity" in approaches taken by Member States. For example, within the Community an award of exemplary damages is known only in the jurisdictions of England and Wales, Cyprus and Ireland. Evidence suggests that claimants bringing private enforcement actions within the European Union and European Economic Area have been able to exploit differences in national systems and seek out favourable forums for their claim. The distinctions between practices of national courts and the different effects produced by the application of national laws are examples of the subsidiarity principle consolidated recently in the Court of Justice of the European Communities's (ECJ) judgments in *Courage v Crehan* and *Manfredi.*[16] In addition, the distinctions pose a challenge to the policy of increased harmonisation of justice systems within the European Union and are "potentially discriminatory"[17] as litigants in each Member State are treated differently.

The determination that exemplary damages, restitutionary damages and an account of profits should not be awarded by the English courts in claims for breaches of Community competition law when the infringer has already been fined has far-reaching implications for future private enforcement actions in England and Wales. While the ECJ in *Manfredi* has held that, in principle, an award of exemplary damages is not precluded by European law, *Devenish* clarifies that following the public enforcement of antitrust laws and the imposition of a fine, whether commuted or not, only compensatory damages can be awarded by an English court. This latest judgment reflects strong opposition by the English judiciary and other commentators[18] to awards of exemplary damages and the extension of their availability into new areas of law. It is unknown at this stage whether it will reduce the attractiveness of England and Wales as a jurisdiction in which to litigate antitrust disputes. The English courts may well remain a desirable forum due to favourable substantive and procedural rules such as relatively extensive rules on disclosure, the absence of requirements to prove negligence or intent on the part of the defendant and the fact that the English courts are experienced in assessing damages in complex commercial disputes. In addition, the *Devenish* judgment should assist both claimants and defendants in predicting what sums might be recoverable should a claim for breach of statutory duty derived from an infringement of competition law be initiated.

The Commission and OFT both note the need to "foster a competition culture"[19] and have both put forward a variety of suggestions to encourage private enforcement actions. It is anticipated that following consultation on the Green Paper, the Commission will publish a White Paper in early 2008, setting out its further policy proposals in this area. Ultimately, both the Commission and OFT have acknowledged the importance of guarding against opening the litigation floodgates. The decision in *Devenish* will hopefully inhibit the development of a litigation culture in the private enforcement arena and should simplify these types of actions in the English courts by clarifying the available damages and removing uncertainty which has previously existed in this area of law.

15 D. Waelbroek, D. Slater and G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules: comparative report* (2004).

16 *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2007] Bus. L.R. 188; [2007] All E.R. (EC) 27; [2006] E.C.R. I-6619.

17 *R. v Secretary of State for Transport Ex p. Factortame (No.5)* [1998] 1 All E.R. 736 (Note); [1997] Eu. L.R. 475.

18 See, for example, *McGregor on Damages*, 17th edn (London: Sweet & Maxwell, 2003).

19 Commission of the European Communities, Commission Staff Working Paper (Annex to the Green Paper) SEC(2005) 1732, para.12.

# The Politics of Cartel Criminalisation: A Pessimistic View from Australia

*Caron Beaton-Wells**

Australia; Cartels; Comparative law; Criminal liability; Enforcement; Politics and law

Since the late 1990s there has been a global movement towards tougher enforcement of anti-cartel laws, including the proscription of criminal penalties for serious cartel conduct[1] or so-called "hard-core" collusion.[2] The movement has been orchestrated by the United States' antitrust authorities as part of an aggressive strategy to deal with international cartels.[3] A decade on and there are now several countries across every continent that have introduced criminal sanctions, albeit varying in degree and scope, for collusion between competitors.[4] However, in many instances, the challenges involved in implementing and enforcing a criminal regime in jurisdictions outside the United States are also only just becoming evident.[5]

In particular, questions are being asked about the extent to which criminalisation has the support of key stakeholders, whose support is critical to ensuring that the deterrent threat of criminal penalties is real and not simply theoretical.[6] In Japan, for example, criticism has been directed in the past at the regulator, the Japanese Fair Trade Commission, in relation to perceived reticence on its part to bring criminal actions for breaches of its competition laws.[7] In Ireland, recent experience with price fixing prosecutions has led to concerns about the level of commitment on the part of the prosecutorial and judicial authorities to criminal enforcement.[8] In Britain, recent empirical research casts doubt on whether members of the public, from which jurors will be drawn for cartel trials, will embrace the idea of sending price fixers to jail.[9]

However, perhaps even more disturbingly, the Australian experience to date highlights the difficulty of shifting to a criminal regime without sufficient domestic political support. That experience, charted in this

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1 See C. Harding, "Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Cartels" (2006) 14 *Critical Criminology* 181; D.E. Vann and E. Litwin, "Recent Developments in International Cartel Enforcement" in Global Competition Review, *Cartel Regulation: Getting the Fine Down in 37 Jurisdictions Worldwide* (2007).

2 "Hard-core" was the term adopted by the Organisation for Economic Co-operation and Development to identify those practices that it considered "the most egregious violations of competition law" in its *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (1998). It is a term that since has achieved widespread usage.

3 Harding, "Business Collusion as a Criminological Phenomenon" (2006) 14 *Critical Criminology* 181, 194–197. The role of the US in this regard is acknowledged in its own literature. See: S. Hammond, "Charting New Waters in International Cartel Prosecutions" Paper presented at the 20th Annual National Institute on White Collar Crime, March 2, 2006; T. Barnett, "Global Antitrust Enforcement" Paper presented at Georgetown Law Global Antitrust Enforcement Symposium, September 26, 2007, available at *http://www.usdoj.gov/atr/public/speeches/speech_2007.htm* [Accessed October 19, 2007].

4 As at 2006, the list of countries providing criminal liability for cartel participation included Austria, Brazil, Canada, Chile, Croatia, France, Germany, Greece, Ireland, Israel, Italy, Korea, Japan, Mexico, Norway, Slovak Republic, South Korea, Switzerland, the UK and the US. Many of these did not have criminal cartel laws prior to the mid-1990s.

5 Harding, "Business Collusion as a Criminological Phenomenon" (2006) 14 *Critical Criminology* 181, 192–194; A. Riley, "Editorial—Developing Criminal Cartel Law: Dealing with the Growing Pains' (2007) 4 *Competition Law Review* 1.

6 Such questions in turn suggest the need for consideration of more fundamental issues such as whether the criminalisation movement is a movement of conversion, convergence or globalisation of antitrust enforcement. Those issues, not tackled in this brief article, are examined in C. Harding and J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control in Corporate Delinquency* (Oxford: OUP, 2003), Ch.10.

7 K. Sanekata and S. Wilks, "The Fair Trade Commission and the Enforcement of Competition Policy in Japan" in G.B. Doern and S. Wilks (eds), *Comparative Competition Policy: National Institutions in a Global Market* (Oxford: OUP, 1996). Admittedly, since this criticism was made, the Japanese Fair Trade Commission has had some significant cartel prosecution successes and has recently had its powers strengthened: see Hammond, "Charting New Waters in International Cartel Prosecutions" Paper presented at the 20th Annual National Institute on White Collar Crime, March 2, 2006.

8 P. Andrews, "Modernisation—Irish Style" [2002] E.C.L.R. 23; M.E. Curtis and J. McNally, "The Classic Cartel Hatch-Back Sentence" (2007) 4 *Competition Law Review* 41.

9 A. Stephan, "Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain" CCP Working Paper 07-12, Economic and Social Research Council, Centre for Competition Policy and Norwich Law School, University of East Anglia, p.3, available at *http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP07-12.pdf* [Accessed July 24, 2007].

article, demonstrates that without a strong commitment by the national government, cartel criminalisation may be doomed from the start. In Australia, the campaign to criminalise was initiated and has been led by the regulator, the Australian Competition and Consumer Commission (ACCC). Yet, despite a high profile, politically astute and seemingly effective campaign by the ACCC, questions have lingered as to when criminalising legislation is likely to be introduced and, when enacted, whether it will have the level of practical support by government required for its proper enforcement.

Australia is not alone in facing such questions. Sweden, for example, is another country in which the government entertains serious reservations about criminalisation as an appropriate response to cartels, albeit in that jurisdiction, unlike in Australia, it appears that such reservations are shared by the regulator.[10] In Austria, in 2002 criminal sanctions in fact were removed from the statute books for all breaches of the cartel prohibitions (except bid rigging). This was at the behest of a newly elected conservative government that apparently saw decriminalisation as an important element of its promised "modernisation" of business law.[11]

After summarising the background, this article sets out the aspects of the (now former) Australian Government's approach to cartel criminalisation that give cause for concern and, where relevant, draws comparisons with the experience in Britain. In particular, it draws attention to:

- the historical reluctance of Conservative Australian Governments to treat anti-competitive conduct as criminal;
- the delay by the Government in introducing the relevant legislation in the current instance, despite finally having accepted in principle the need for criminal sanctions;
- the process adopted by the Government in drafting the legislation, a process characterised by a lack of transparency and consultation;
- aspects of the design of the proposed cartel offence and policy for its enforcement that are ill-conceived, albeit not surprisingly given the deficient process adopted for determining these matters so far;
- the underwhelming nature of the proposed sanctions relative to the official rhetoric regarding the seriousness of the activity to be criminalised; and
- the prospect that the powers and resources given to the agencies responsible for implementing the new criminal regime will be inadequate given the formidable task that confronts them.

It is to be noted that these criticisms are levelled almost entirely at the Conservative (Liberal) Party which is the party that was in government over the period of the criminalisation debate up until very recently, ousted by the Australian Labor Party in the election held on November 24, 2007. While in opposition, Labor indicated its strong commitment to criminalisation and since election has released a draft exposure bill and Discussion Paper calling for public comment. However, as at the date of writing, it is not clear whether the new Government will ultimately take a substantially different approach on the questions relating to design, sanctions, powers and resources identified above. For the sake of simplicity the references to "the Government" in the text below are references to the former Conservative Government, unless otherwise expressly indicated.

## Background

In 2001 the then Chairman of the ACCC, Allan Fels, called for the introduction of criminal sanctions for serious forms of business collusion in Australia.[12] The call for criminalisation was formalised in the ACCC's submission[13] to an independent committee (the Dawson Committee) charged with the task of reviewing Australia's competition legislation, the Trade Practices Act 1974 (Cth) (the Act), in 2002.[14] In its January

10 C. Norgren, Director-General, Swedish Competition Authority, "Criminal Enforcement of Antitrust Laws" Fordham Law Seminar, New York, September 14, 2006, at *http://www.kkv.se/upload/Filer/Press/Tal-artiklar/tal_cn_060907.pdf* [Accessed November 1, 2007].

11 P. Lewisch, "Enforcement of Antitrust Law: the Way from Criminal Individual Punishment to Semi-penal Sanctions in Austria" in K. Cseres, M.P. Schinkel and F. Vogelaar, *Criminalization of Competition Law Enforcement* (2006), pp.290, 291–295. A similar "u-turn" was made in the Netherlands in 1998: see P. Kalbfleisch, "Criminal Competition Law Sanctions in the Netherlands" in Cseres, Schinkel and Vogelaar, *Criminalization of Competition Law Enforcement* (2006), pp.312, 313.

12 A. Fels, "Regulating in a High-Tech Marketplace" Paper presented at the Australian Law Reform Commission Conference on Penalties: Policy, principles and practice in government regulation, Sydney, June 9, 2001, available at *http://www.accc.gov.au/content/index.phtml/itemId/255481* [Accessed April 27, 2007].

13 ACCC: *Submission to the Trade Practices Act Review* (2002), available at *http://www.accc.gov.au/content/index.phtml/itemId/303044* [Accessed April 27, 2007].

14 Trade Practices Committee of Review, *Review of the competition provisions of the Trade Practices Act, January 2003*,

2003 report, the Committee agreed that the current civil penalty regime was an insufficient deterrent to the business community and it recommended that criminal sanctions be introduced, subject to the resolution of definitional and procedural issues and consideration of the implications for the ACCC's leniency policy.[15]

The Government accepted the recommendation of the Dawson Committee "in principle" and promised to "further consider" the matter, while guardedly emphasising the need for any new criminal penalty regime to apply broadly, not to impose "significant additional uncertainty and complexity for business" and to "work well in the context of the Australian legal system".[16] A Government Working Party on penalties for cartel behaviour was convened in October 2003 for the purposes of resolving these and other issues.[17] The Working Party reported to the Government some time in 2004 and on February 2, 2005, the Treasurer announced in a press release that criminal sanctions for "serious cartel behaviour" would be introduced.[18] The "cartel offence" proposed by the Treasurer would:

> "Prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from the customers who fall victim to the cartel."[19]

The proposal indicated that the maximum penalties for individuals for a cartel offence will be a term of imprisonment of five years and a fine of AU $220,000.[20] For corporations, reflecting civil provisions introduced with effect from January 1, 2007, a fine that is the greatest of AU $10 million or three times the value of the benefit derived from the cartel or where that value cannot be ascertained, 10 per cent of annual group turnover.[21]

## Historical reluctance

A historical account of the approach taken to trade practices penalties indicates a strong reluctance on the part of Australian Governments, particularly of a Liberal (Conservative) persuasion, to embrace a criminal mode of enforcement.[22] In the first attempt at competition regulation in this country, the Australian Industries Preservation Act 1906 (Cth), there were criminal penalties that attached to the prohibitions on restraints of trade and monopolisation,[23] reflecting developments in the United States and the provisions of the Sherman Act 1890. However, in what may now appear as something of a legislative aberration, those penalties have been explained on the basis that the legislation was aimed largely at curtailing incursions by overseas business interests into Australian markets.[24] They thus did not require the Government to confront the notion of treating Australian businessmen as criminals. The legislation had a short life in any event, being declared largely constitutionally invalid by the High Court in litigation concerning the reserved powers of the Commonwealth in 1909.[25]

Criminal penalties were removed from the subsequent Trade Practices Act 1965 (Cth) which, being modelled predominantly on the English rather than the American approach to antitrust, adopted an administrative

available at *http://tpareview.treasury.gov.au* [Accessed October 25, 2007].

15 Trade Practices Committee of Review, *Review of the competition provisions of the Trade Practices Act, January 2003*, available at *http://tpareview.treasury.gov.au* [Accessed October 25, 2007], pp.161–162.

16 Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974, available at *http://www.treasurer.gov.au/tsr/content/publications/TPAResponse.asp* [Accessed August 17, 2007].

17 Treasurer, "Working Party to Examine Criminal Sanctions for Cartel Behaviour" Press Release, October 3, 2003, available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2003/086.asp* [Accessed August 17, 2007].

18 Treasurer, "Criminal Penalties for Serious Cartel Behaviour" (Press Release February 2, 2005, No.4 of 2005), available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp* [Accessed April 20, 2007] (Treasurer's press release).

19 Treasurer, "Criminal Penalties for Serious Cartel Behaviour" (Press Release February 2, 2005, No.4 of 2005), available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp* [Accessed April 20, 2007].

20 Treasurer, "Criminal Penalties for Serious Cartel Behaviour" (Press Release February 2, 2005, No.4 of 2005), available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp* [Accessed April 20, 2007].

21 See Trade Practices Legislation Amendment Bill (No.1) 2006 (Cth). These amendments were also consequent upon recommendations made by the Dawson Committee (see text at fn.14 above).

22 A. Hopkins, *Crime, Law & Business: The Sociological Sources of Australian Monopoly Law*, (Australian Institute of Criminology, 1978), pp.116–120.

23 A first offence was punishable by a fine of up to £500 and a second offence by up to a year's imprisonment: Hopkins, *Crime, Law & Business* (1978), p.116.

24 Hopkins, *Crime, Law & Business* (1978), p.118.

25 *Huddart Parker and Co Ltd v Moorehead* (1909) 8 C.L.R. 330.

rather than a judicial method of enforcement.[26] One explanation for this backward step in enforcement terms may be that, in this instance:

> ". . .[T]he businessmen affected were Australian, and very much 'like us' as far as the Government was concerned. Such men could not be criminal and it was inappropriate to criminalise their business behaviour."[27]

Amendments in 1971, again at the instigation of a Liberal Government, declaring resale price maintenance illegal, were similarly non-criminal in character, allowing for civil damages and injunctive orders to be made.[28]

The current Act was introduced by a Labor Government the members of which, it has been said, were "far less inclined than the Liberals to imagine themselves in the position of businessmen".[29] Their "basic impulse" to criminalise found expression in the case of the consumer protection provisions but stopped short of full criminalisation in the case of the competition provisions, opting instead for the hybrid pecuniary penalty on account, it seems, of concerns that criminal penalties would be more difficult to enforce.[30] The difference in approach taken to the two sets of provisions might also be explained by the fact that many of the practices covered by the consumer protection provisions (misleading advertising, false pretences and the like) involved an element of fraud, long recognised as a criminal offence. On the other hand there was little precedent in English law for classifying the practices covered by the restrictive trade provisions as criminal offences.[31]

In 1977, unhappy about the criminal sanctions in the Act but sensitive to the increasingly powerful consumer lobby, the then Liberal-Country Party Coalition Government retained criminal offences for contraventions of the consumer protection prohibitions, but removed the option of imprisonment.[32] Since then, the possibility of re-introducing criminal penalties for breach of the competition provisions has been toyed with at times but not seriously considered,[33] that is, until the ACCC's proposal in 2001. With the benefit of this historical perspective, the significance of the current proposal from the Government's point of view starts to become apparent and its reticence to act at least understandable (even if not defensible).

26 Hopkins, *Crime, Law & Business* (1978), pp.116–117. The Act created a procedure for the examination of questionable practices that could then be the subject of an order by the Trade Practices Tribunal, declaring them illegal. Contravention of such an order would lead to prosecution for contempt of the Tribunal (rather than for the practice itself).

27 Hopkins, *Crime, Law & Business* (1978), p.118.

28 Hopkins, *Crime, Law & Business* (1978), p.117.

29 Hopkins, *Crime, Law & Business* (1978), pp.118–119.

30 Hopkins, *Crime, Law & Business* (1978), p.119.

31 Hopkins, *Crime, Law & Business* (1978), p.89.

32 Hopkins, *Crime, Law & Business* (1978), pp.119–120.

## Delay

It has been more than four and a half years since the recommendation by the Dawson Committee that serious cartel conduct be criminalised and the relevant legislation is yet to be introduced to Parliament. The Treasury papers for the 2006 Commonwealth Budget indicated that the legislation would be introduced to Parliament in the winter sittings of that year.[34] However, the Bill was not introduced. No explanation for the delay was offered. However, it was evident that the Government in effect was pipelining the various trade practices reform packages then under consideration, using the promised Cartel Crime Bill as leverage in negotiation with parliamentarians who were standing in the way of its other reforms, relating primarily to merger review processes and predatory pricing provisions.

In August 2007, the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill and Federal Court Amendment (Criminal Jurisdiction) Bill were listed on the Government's website as legislation proposed to be introduced in the spring sittings of Parliament.[35] Almost certainly non-coincidentally, this listing occurred within days of increased pressure to take action over petrol prices (and renewed ACCC calls for criminal sanctions for cartel conduct in this context),[36] as well as publicity given to significant penalties for price fixing in the air-conditioning industry,[37] a global

33 See the brief reference to criminalisation of contraventions of the competition provisions in Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No.68 (1992), para.9.27.

34 See Budget Paper No.2 Pt 2—*Expense Measures—Treasury* (2006), available at *http://www.budget.gov.au/2006-07/bp2/html/index.htm* [Accessed September 14, 2007].

35 Department of Prime Minister and Cabinet, available at *http://dpmc.gov.au/parliamentary/docs/proposed_legislation.doc* [Accessed August 17, 2007].

36 Editorial, "ACCC Urges Govt to Introduce Jail for Petrol Price Fixing", *AAP General News*, June 11, 2007; Editorial, "ACCC Seeks Bowser Clout", *The Australian,* June 11, 2007, pp.1, 2; M. Drummond, "Tougher Cartel Laws Slated", *Australian Financial Review* (Sydney), August 3, 2007, p.28.

37 M. Drummond, "$9.2m Punishment for Air-con Cartel", *Australian Financial Review* (Sydney), July 27, 2007, p.18.

airline cargo cartel in which the national carrier Qantas has been implicated[38] and the announcement of an ACCC investigation into price fixing in stevedoring operations on Australian wharves.[39] Subsequently, a federal election intervened and the Bills lapsed.

Even with acknowledgment of the historical significance of the reform and the complexities involved in drafting the relevant provisions, such delay may still be described as "without defence".[40] This is particularly so when one compares the process recently undertaken in Britain. There the Government issued a White Paper proposing criminal sanctions for cartel conduct in July 2001 and the Enterprise Act 2002 (UK) containing the criminal provisions was introduced to Parliament, less than a year subsequently, in March 2002. It received Royal Assent on November 7, 2002 and came into effect on April 1, 2003.

Clearly, there are differences between the Australian and British experience with competition regulation which may explain why the process was so much quicker and evidently much less agonising in the latter jurisdiction than in the former. In Britain it was no doubt material that cartel criminalisation was just one element of an overall shake-up of competition policy by the British Labour Government following its re-election—a shake-up likely to have been influenced to a large extent by the increasingly active approach to enforcement on the part of the European Commission.[41] Thus, in Britain, criminalisation was an initiative that was driven by the Government rather than by the Office of Fair Trading (OFT) which, up until the reforms in 1998, had been a relatively weak and ineffectual authority.[42] Whereas, in Australia, by contrast, the criminalisation initiative was led by the ACCC rather than the Government and in a climate in which the Government had been under siege by the big business lobby for some years to rein in a regulator that was viewed as too powerful and increasingly unaccountable.[43]

Moreover, events in the course of the recent Australian election campaign gave further reason to doubt the Government's commitment to cartel criminalisation. In October 2007, the ACCC scored a major victory in an action it had taken in relation to cartel conduct in the cardboard packaging industry by one of Australia's largest manufacturing companies, the Visy group, and their owner, billionaire and renowned philanthropist, Richard Pratt. Agreement was reached to settle the case involving admissions, a public apology and submission to record-level penalties, more than doubling the previous maximum corporate penalty imposed for collusion in Australia.[44] It might have been expected that these events, which received extensive media coverage, would provide the Government with the welcome opportunity to justify and explain further its commitment to criminal penalties for such conduct. However, to the contrary, in the inevitable media frenzy that followed, several political leaders (not least of all, the then Prime Minister) expressed publicly their admiration for Pratt and his contribution to Australian business and society.[45] Indeed, in the same breath as praising and indicating his personal liking of the Visy owner, the former Prime Minister refused to commit the Government to cartel criminalisation.[46] This led to a conflicting statement by the Treasurer[47] and subsequent media reports suggested that in fact there was also a

38 S. Creedy, "Fines Bolster Class Action Against Qantas", *The Australian* (Sydney), August 6, 2007.

39 "ACCC institutes legal proceedings against stevedores and senior executives for alleged collusion", Media release #233/07, August 24, 2007, available at *http://www.accc.gov.au/content/index.phtml/itemID/796769/fromItemId/2332* [Accessed August 30, 2007].

40 C. Hodgekiss, "Criminalising Cartels: A Slow Conversion? Comments" commentary given at fifth annual UNISA Trade Practices Workshop, October 19–20 on paper by the author, "Criminalising Cartels: A Slow Conversion?" (copies of paper and commentary are on file with the author).

41 Harding and Joshua, *Regulating Cartels in Europe* (2003), p.260.

42 D. Guy, "The UK's Experience with Criminal Law Sanctions" in Cseres, Schinkel and Vogelaar, *Criminalization of Competition Law Enforcement* (2006), pp.248, 249.

43 See generally the account given of this power struggle between the regulator and big business in F. Brenchley, *Allan Fels: A Portrait of Power* (Australia: John Wiley & Sons Australia Ltd, 2003); C. Parker, "The 'Compliance Trap': The Moral Message in Responsive Regulatory Enforcement" (2006) 40 *Law & Society Review* 591; C. Parker and V.L. Nielsen, "What do Australian Businesses Really Think of the ACCC, and Does it Matter?" [2007] F.L.R. 1.

44 See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No.3)* [2007] F.C.A. 1617. A penalty of AU $36 million was imposed on the corporate respondents (the previous maximum having been AU $15 million) and penalties of AU $1,500,000 and AU $500,000 on two individual respondents (the previous maximum having been AU $200,000). See the discussion of this case and its implications for Australian competition law enforcement generally in C. Beaton-Wells and N. Brydges, "The Cardboard Cartel Case: Was All the Fuss Warranted?" (2008) 1 *Australian Business Law Review* (forthcoming).

45 See "No Plans to Make Price Fixing Criminal", AAP, October 9, 2007; "PM Back-pedals on Cartel Penalties", *Australian Financial Review,* October 10, 2007, p.1.

46 See "No Plans to Make Price Fixing Criminal", AAP, October 9, 2007; "PM Back-pedals on Cartel Penalties", *Australian Financial Review,* October 10, 2007, p.1.

47 "Cartel Behaviour Should be Criminal", AAP, October 9, 2007.

degree of backbencher unrest about the proposal given its implications for small business owners.[48] There were also reports that, despite supporting criminalisation in its submission to the Dawson Committee, there are some members of the powerful business lobby group (the Business Council of Australia), who had been pressuring the Government to abandon its proposal.[49] All in all, the resultant impression was of a government under siege and struggling with substantial internal conflict and uncertainty about whether criminalisation is a step that is both necessary and desirable.

## Deficient process

Given the significance of this change in approach to cartel regulation in Australia, it might have been expected that the Government would engage in a transparent and consultative process to ensure not only that the reform is justified but also that the complexities involved in its design and implementation would be resolved with input from all relevant stakeholders. The process to date, however, has been just the opposite.

The Dawson Committee did have the benefit of submissions from a range of bodies and persons on the subject. The Committee received 37 submissions from the business sector alone commenting on the ACCC's criminalisation proposal. Of these, 17 (46 per cent) opposed the proposal outright. Twenty (54 per cent) supported it and of these, 12 gave their support unconditionally, while eight gave only qualified support; for example, by urging that, contrary to the ACCC's submission, there be no limit on the size of firm potentially exposed to criminal penalties. However, notwithstanding this input, the Committee failed to tackle the issues associated with the proposal in any depth, hand-balling it back to the Government with only an "in principle" recommendation.[50]

The working party comprising representatives from the ACCC, the Attorney-General's Department and the Commonwealth Director of Public Prosecutions, was then convened. The working party did not call for submissions publicly, it is not known whether it undertook any consultation beyond the bodies represented upon it and it did not release its report or its recommendations for public consumption. A subsequent request for access to its report under freedom of information (FOI) legislation was refused by the Treasury and it was indicated that consideration was being given to issuing a conclusive certificate to deny access to the report on public interest grounds.[51] The effect of such a certificate would have been to limit substantially the type of merits review available in respect of a refusal of access under the FOI statute. While ultimately the decision was made not to issue the certificate, there was significant delay by the Minister's delegate in making that decision, delay that it is hard to conclude was not politically motivated given the election campaign and the media coverage being given to the issue in light of the Visy affair.[52]

The process adopted in relation to the working party was inconsistent with the Government's Office of Best Practice Regulation policy statement.[53] It was in marked contrast to the practice commonly adopted in the areas of corporate and financial services regulation in which public discussion papers or draft exposure bills are routinely released in relation to proposed amendments. Indeed, somewhat ironically, the Government had launched a review of sanctions for contraventions of corporate law (even more ironically, one of the questions being whether to scale back reliance on criminal sanctions) and that review was undertaken in the public arena with extensive provision for consultation.[54] What arguably should have occurred in relation to cartel criminalisation is that the Government should have referred it to the Australian Law Reform Commission which has a strong track record of dealing with difficult and complex subjects, and publishing detailed reports with clear recommendations based on wide consultation. Moreover, this body only recently examined and reported on the related subjects of federal civil and administrative penalties and sentencing of

48 "Regulator to Tap Phones in Cartels Blitz", *Australian Financial Review,* October 24, 2007, pp.1, 4.
49 "Regulator to Tap Phones in Cartels Blitz", *Australian Financial Review,* October 24, 2007, pp.1, 4.
50 See the criticisms of the Committee on this score in B. Fisse, "The Dawson Review: Enforcement and Penalties" (2003) 26 U.N.S.W.L.J. 315, 317.
51 B. Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 A.B.L.R. 235, 236, Fn.4. Documents relevant to the freedom of information request are available at *http://www.brentfisse.com.*
52 B. Fisse, "Costello Working Hard to Avoid Action on Cartels", *Australian Financial Review,* October 26, 2007.
53 See the Office's policy statement on consultation, available at *http://www.obpr.gov.au/consultation.html* [Accessed October 30, 2007].
54 See "Review of Sanctions in Corporate Law" paper, available at *http://www.treasury.gov.au/contentitem.asp?Navid=037&ContentID=1182* [Accessed September 13, 2007].

federal offenders and hence would have been well placed to examine the issues involved in cartel criminalisation.[55]

The Australian process may also be compared with the process in Britain where the Government published its White Paper in which it set out its intention to criminalise hard-core cartels, its rationale for this approach and the basic elements of the proposed criminal regime.[56] The White Paper called for comments and submissions to inform the legislative drafting process.[57] This was followed by the publication of a report commissioned by the OFT by Sir Anthony Hammond Q.C. and Sir Roy Penrose OBE on the legislative and procedural changes required to operate a criminal regime.[58] The report indicates that the authors interviewed 51 people associated with the initiative.[59] Upon publishing it on its website, the OFT invited comments on any aspect of the report.[60] While on its face this process appears impressive, details concerning the number and tenor of the comments and submissions received in response to the White Paper and Hammond/Penrose report are not known.[61] Furthermore, it should be pointed out that there would have been very little opportunity for comment on the draft legislation given the lightning speed with which it passed through Parliament.

## Problematic aspects of offence design and enforcement policy

There are aspects of the Government's proposed design and policy for enforcement of the cartel offence that are ill-conceived and appear not to have been properly thought through. Two, in particular, may be singled out for criticism.[62]

First, it has been proposed that dishonesty be an element of the *mens rea* for the offence.[63] This proposal mirrors the approach that has been taken in the United Kingdom,[64] albeit in no other jurisdiction that has a criminal regime.[65] In both jurisdictions, the rationale for introducing this requirement has been that it will facilitate distinction between the conduct attracting criminal penalties and conduct that will remain subject to the civil prohibition.[66] In short, dishonesty has been seen as a way of communicating the seriousness of the conduct that is subject to criminal sanctions.[67] Yet this, as a rationale, has been described as "seriously flawed".[68] The common law test of dishonesty, invoking the "standards of ordinary people" and the idea that defendant has known his or her conduct to be dishonest

55 Australian Law Reform Commission, *Principled regulation: federal civil and administrative penalties in Australia,* Report No.95 (2002); Australian Law Reform Commission, *Same crime, same time: sentencing of federal offenders,* Report No.103, 2006, available at *http://www.alrc.gov.au* [Accessed August 4, 2007].

56 Department of Trade and Industry. *A world class competition regime White Paper.* Cm.5233, July 30, 2001.

57 Department of Trade and Industry. *A world class competition regime White Paper.* Cm.5233, July 30, 2001.

58 See Sir Anthony Hammond and R. Penrose, *Proposed Criminalisation of Cartels in the UK,* Report prepared for the Office of Fair Trading, United Kingdom (2001).

59 Hammond and Penrose, *Proposed Criminalisation of Cartels in the UK,* Report prepared for the Office of Fair Trading, United Kingdom (2001), pp.42–44.

60 Hammond and Penrose, *Proposed Criminalisation of Cartels in the UK,* Report prepared for the Office of Fair Trading, United Kingdom (2001), foreword.

61 It is understood, however, that with the exception of protest by the Confederation of British Industry, the criminalisation proposal was largely unopposed.

62 Others are discussed in B. Fisse, "The Australian Cartel Criminalisation Proposals: An Overview and Critique" (2007) 4 *Competition Law Review* 51. This article discusses not only those aspects of the proposals that have been made public but also several important elements of the new regime about which information is yet to be made available—for example, the approach to be taken to corporate responsibility under the cartel offence and the extent of powers of electronic surveillance to be given to the ACCC.

63 Treasurer's Press Release, "Criminal Penalties for Serious Cartel Behaviour" (Press Release February 2, 2005, No.4 of 2005), available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp* [Accessed April 20, 2007]. Notably, recent media reports suggest that the new Government will drop this element from the proposed offence: see Lenore Taylor and Matthew Drummond, "Business Reform to be Fast-tracked", *Australian Financial Review,* December 5, 2007, p.10.

64 See Enterprise Act 2002 (UK) s.188.

65 Note also that dishonesty is not mentioned in OECD, *Fighting Hard-Core Cartels* (2002), available at *http://www.oecd.org/dataoecd/41/44/1841891.pdf* [Accessed November 1, 2007] or in ICN Working Group on Cartels, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties* (2005), available at *http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/cartels* [Accessed October 19, 2007].

66 Treasurer's Press Release, "Criminal Penalties for Serious Cartel Behaviour" (Press Release February 2, 2005, No.4 of 2005), available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp* [Accessed April 20, 2007]; Hammond and Penrose, *Proposed Criminalisation of Cartels in the UK,* Report prepared for the Office of Fair Trading, United Kingdom (2001).

67 Hammond and Penrose, *Proposed Criminalisation of Cartels in the UK,* Report prepared for the Office of Fair Trading, United Kingdom (2001), p.10, para.2.5.

68 Fisse, "The Australian Cartel Criminalisation Proposals" (2007) 4 *Competition Law Review* 51, 53.

according to such standards,[69] has been shown in other contexts to cause problems for juries.[70] It will almost undoubtedly be problematic also in relation to cartel activity given the ambiguity surrounding both the harmfulness[71] and moral wrongfulness[72] of such activity.

Apparently, in supporting the requirement of dishonesty despite these evident flaws, the Government chose to ignore even the advice of the Commonwealth Director of Public Prosecutions (DPP)—quite astonishingly, given that it is the DPP (or members of that office) who will be responsible for persuading juries of guilt under the new offence.[73] Indeed, the DPP's concerns appear borne out by the recent British research, referred to earlier, which confirms that juries are likely to struggle with these concepts. A March 2007 survey of the British public found that only 6 in 10 Britons (63 per cent of respondents) regard price fixing as dishonest, many (65 per cent) could not relate price fixing to any other practice with which they were familiar (only 7 per cent thought theft, 8 per cent fraud) and, perhaps most disconcertingly, only 1 in 10 (11 per cent) considered that it warranted imprisonment.[74] Given these concerns, it is not surprising that the new Government was reported to be reconsidering whether dishonesty ought to be an element of the new offence.[75]

Secondly, in an attempt to confine the proposed criminal regime in Australia to cartel conduct that is "serious" in terms of harm to competition, it has been proposed that the ACCC criminally investigate only those cases in which the combined value of the line of commerce affected by the cartel exceeds AU $1 million within a 12-month period.[76] This aspect of the proposal bears some resemblance to the approach taken in the United Kingdom where one of the questions asked by the Serious Fraud Office in deciding whether or not to prosecute under the cartel offence in that jurisdiction is whether "the value of the alleged fraud exceed[s] £1 million".[77] However, the importance of this criterion is downplayed somewhat, described as, "simply an objective and recognisable signpost of seriousness and likely public concern rather than a main indicator of suitability".[78]

As has been pointed out elsewhere, the fact that the value of commerce affected by the cartel conduct exceeds AU $1 million does not in itself mean that the impact on competition has been serious.[79] Thus, the threshold, being based on a fixed monetary value, has the potential to be both under-inclusive and over-inclusive, depending on the size of the market in which the cartel members operate.[80] One possible solution that has been suggested is that prosecutions be limited to cases where the specific line of commerce likely to be affected by the cartel represents a minimum percentage (say, based on the US Sentencing Guidelines, 20 per cent) of the value of sales by all competitors who compete in that specific line of commerce in the relevant geographic market over a relevant time period, linked to the commission of the offence.[81] However, that rather sensible suggestion has

69 This test was articulated by the English Court of Appeal in *R. v Ghosh (Deb Baran)* [1982] Q.B. 1053 and has been codified in s.130(3) of the Criminal Code Act 1995 (Cth).

70 As discussed in Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 A.B.L.R. 235, 255–257.

71 In Australia, as elsewhere, such ambiguity is illustrated by the differential treatment given to cartel arrangements under the Act—some are treated as naked restraints and prohibited per se (the arrangements to be criminalised will be a subset of these), some are subject to the rule of reason, substantial lessening of competition standard. Then there are exemptions and defences (for example, for certain joint ventures) and added to that, a process of enabling arrangements to be authorised on public benefit grounds.

72 See the discussion in C. Beaton-Wells, "Capturing the Criminality of Hard-Core Cartels: The Australian Proposal" (2007) 31 *Melbourne University Law Review* 1, 20–27.

73 "Regulator to Tap Phones in Cartels Blitz", *Australian Financial Review,* October 24, 2007, pp.1, 4.

74 Stephan, "Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain" CCP Working Paper 07-12, Economic and Social Research Council, Centre for Competition Policy and Norwich Law School, University of East Anglia, p.3, available at *http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP07-12.pdf* [Accessed July 24, 2007].

75 L. Taylor and M. Drummond, "Business Reform to be Fast-tracked", *Australian Financial Review,* December 5, 2007, p.10. Whether to retain this element is one of the issues on which the new Government has called for comment.

76 Treasurer's Press Release, "Criminal Penalties for Serious Cartel Behaviour" (Press Release February 2, 2005, No.4 of 2005), available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp* [Accessed April 20, 2007].

77 Memorandum of Understanding between the Office of Fair Trading and the Serious Fraud Office, October 2003, OFT 547, p.5, available at *http://www.oft.gov.uk*. The other listed criteria are: "Is the case likely to give rise to national publicity and widespread public concern? Does the case require highly specialist knowledge of, for example, Stock Exchange procedures or regulated markets? Is there a significant international dimension? Will legal, accountancy and investigative skills need to be brought together? Is there a need to use the SFO's special powers?"

78 Memorandum of Understanding between the Office of Fair Trading and the Serious Fraud Office, October 2003, OFT 547, p.5, available at *http://www.oft.gov.uk*.

79 J. Clarke, "Criminal Penalties for Contraventions of Part IV of the Trade Practices Act" (2005) 10 *Deakin Law Review* 141, 162.

80 Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 A.B.L.R. 235, 246.

81 Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 A.B.L.R. 235, 246.

been rejected by the Government.[82] Questions also have been raised as to whether the threshold should be made a jurisdictional element of the offence, or whether it should be merely a guide to the exercise of prosecutorial discretion.[83]

## Underwhelming sanctions

In relation to the proposed sanctions, a maximum term of imprisonment of five years is by no means an overwhelming indicator of the Government's supposed conviction regarding the need for criminal sanctions for serious cartel conduct. A recurring rationale offered for cartel criminalisation by both the regulator and politicians is that it is analogous to other so-called "white collar" criminal offences and hence should be treated analogously.[84] However, even a cursory glance at the Commonwealth Criminal Code Act 1995 (Cth) demonstrates that what is proposed by the Government does not amount to analogous treatment. Under the Code, the offences of obtaining property by deception and conspiracy to defraud a Commonwealth entity attract a maximum jail term of 10 years.[85] Such comparisons have led one commentator aptly to remark that the proposed maximum is "difficult to reconcile with the rhetoric of politicians and others that serious cartel conduct is akin to theft, fraud or extortion".[86]

In terms of international standards the proposed maximum jail term could also be said to smack of compromise. It is certainly nowhere near the top end of the scale, alongside countries such as the United States and Mexico that have a 10-year maximum. Rather, it could be described as "middle-of-the-range",[87] bearing in mind that there are other jurisdictions including Britain, at the same level as is proposed in Australia with five years[88]; and others below that, with maximum terms of three or four years.[89]

It is proposed further that individuals be subject to a maximum fine of AU $220,000.[90] However, the current civil maximum is AU $500,000. This disparity is mystifying, especially when the position in other jurisdictions is compared. In the United States the maximum individual penalty is US $1 million[91] and in the United Kingdom, it is unlimited.[92] One explanation for the low maximum is that criminal conviction also attracts other adverse consequences including the social stigma of being branded a criminal and being excluded or disqualified from certain activities.[93] However, such reasoning:

> ". . . does not explain why, in cases where jail is not considered by a court to be an appropriate sentence, the maximum fine should be lower than the maximum civil penalty for the same or very similar conduct."[94]

A possible explanation is that the proposed maximum fine would be commensurate with the position under the Corporations Act 2001 (Cth) which provides for fines of up to AU $220,000 for individuals who breach its criminal provisions.

## Inadequate powers and resources

The evidentiary challenges involved in proving a cartel conspiracy have been apparent under even a civil regime for some time and have been highlighted in recent litigation brought by the ACCC in relation to price

82 Letter from The Honourable Tony Smith MP, Parliamentary Secretary to the Prime Minister to Brent Fisse, February 26, 2007 (copy on file with author, kindly supplied by Brent Fisse).
83 Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 A.B.L.R. 235, 246, 275; Beaton-Wells, "Capturing the Criminality of Hard-Core Cartels" (2007) 31 *Melbourne University Law Review* 1, 18–19.
84 See most recently G. Samuel, "Cartel Ringleaders are Well-dressed Criminals, so Why Not Send Them to Jail?", *The Age,* November 3, 2007, p.19.
85 For the offences of obtaining property by deception and conspiracy to defraud a Commonwealth entity, for example, the maximum jail term is 10 years (see Criminal Code Act 1995 (Cth) ss.13(1), 14(1)).
86 Fisse, "The Australian Cartel Criminalisation Proposals" (2007) 4 *Competition Law Review* 51, 66.
87 Clarke, "Criminal Penalties for Contraventions of Part IV of the Trade Practices Act" (2005) 10 *Deakin Law Review* 141, 165.
88 For example, the UK, Ireland, Canada and Israel all have five years: Clarke, "Criminal Penalties for Contraventions of Part IV of the Trade Practices Act" (2005) 10 *Deakin Law Review* 141, 165.
89 For example, France (four years) and Japan (three years): Clarke, "Criminal Penalties for Contraventions of Part IV of the Trade Practices Act" (2005) 10 *Deakin Law Review* 141, 165.
90 Treasurer's Press Release, "Criminal Penalties for Serious Cartel Behaviour" (Press Release February 2, 2005, No.4 of 2005), available at *http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp* [Accessed April 20, 2007].
91 Antitrust Criminal Penalty Enhancement and Reform Act 118 Stat 661 (2004).
92 Enterprise Act 2002 (UK) s.190.
93 Clarke, "Criminal Penalties for Contraventions of Part IV of the Trade Practices Act" (2005) 10 *Deakin Law Review* 141, 165.
94 Fisse, "The Australian Cartel Criminalisation Proposals" (2007) 4 *Competition Law Review* 51, 66–67.

fixing in the petrol industry.[95] Criminalisation will only aggravate these difficulties given the higher standard of proof. With this in mind, the Government's willingness to authorise telecommunications interception and other modes of electronic surveillance for the purposes of criminal investigations will be critical. So far, it is unclear whether the new Government will be prepared to invest the ACCC with this kind of power. It is one of the matters on which the new Government has called for public submissions.

With the proposed maximum jail term of five years, it will not be possible to obtain a warrant for telecommunications interception under the Telecommunications (Interception and Access) Act 1979 (Cth), given that that Act applies only in relation to offences with a seven-year jail term.[96] Media reports suggest that the ACCC will be required to refer requests for phone-tapping to the Australian Federal Police.[97] This may cause delay and give rise to inter-agency bungling. It may even lead the ACCC to consider proceeding under other offences, such as conspiracy to defraud,[98] which do allow for telecommunication interceptions.[99] Antitrust authorities in the United States, Canada and the United Kingdom have such powers.[100] Moreover, other Australian corporate regulators have them.[101] It is difficult to understand why the ACCC should be any different.

In terms of financial support, a funding package for the agencies involved in implementing the new criminal regime in Australia was announced in May 2006.[102] The package included AU $18.2 million over four years for legal expenses for the ACCC and AU $7.2 million to support investigations and enforcement. It further included AU $4.4 million over four years for the DPP for cartel prosecutions and AU $3.9 million for the Federal Court to hear cartel trials. Leading practitioners have described these figures as inadequate to fund major cartel prosecutions against the powerful, often internationally supported, deep-pocketed interests behind serious cartel activity.[103] In the *Visy* case (referred to earlier), for example, the respondents agreed to pay the ACCC's costs estimated at between AU $10 million and AU $20 million,[104] that is conceivably equal to the entire amount allocated to the ACCC over four years to meet all of its criminal cartel-related expenses. Of course, these figures pale into insignificance when compared with the fees generated in the United

95 See *Australian Competition & Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 F.C.R. 321, discussed in W. Pengilley, "ACCC Fails in Geelong Petrol Price-fixing Litigation: What are the Lessons?" (2007) 23 *Australian & New Zealand Trade Practices Law Bulletin* 54; K. Watts and J. Mortensen, "Recent Developments in Cartel Investigations and Prosecutions" (2007) 23 *Australian & New Zealand Trade Practices Law Bulletin* 61.

96 Such a warrant is available only for offences carrying a seven-year maximum jail term: Telecommunications (Interception and Access) Act 1979 (Cth) s.5D. However, as Fisse points out, presumably a warrant for a surveillance device (other than telecommunications interception) would be available under s.14 of the Surveillance Devices Act 2004 (Cth): see Fisse, "The Australian Cartel Criminalisation Proposals" (2007) 4 *Competition Law Review* 51, 67.

97 "Regulator to Tap Phones in Cartels Blitz", *Australian Financial Review,* October 24, 2007, pp.1, 4.

98 There are substantial similarities between the proposed cartel offence and the offence of conspiracy to defraud a Commonwealth entity under the Criminal Code (Cth) s.135(4). Notably, the Serious Fraud Office in the UK recently launched a major prosecution of a price fixing cartel for conspiracy to defraud (the cartel offence not having been enacted at the time that the relevant conduct took place), leading to some debate as to whether a wholly new offence is required to deal with such arrangements: see M. Furse and S. Nash, "A Rose by any Other Name" (2006) 156 *New Law Journal* 780; *cf.* the discussion in J. Lever and J. Pike, "Cartel Agreements, Criminal Conspiracy and the Statutory 'Cartel Offence'—Part I" [2005] E.C.L.R. 90; J. Lever and J. Pike, "Cartel Agreements, Criminal Conspiracy and the Statutory 'Cartel Offence'—Part 2" [2005] E.C.L.R. 164, in which the differences between the common law conspiracy to defraud offence and the statutory cartel offence are identified. Of relevance to this debate also is the decision in *Norris v United States of America* [2007] EWHC 71 (Admin); [2005] U.K.C.L.R. 1489 in which it was held that Norris could be extradited to face cartel charges in the United States given that there was an equivalent offence at the same in the UK, namely the common law conspiracy to defraud offence.

99 Fisse, "The Australian Cartel Criminalisation Proposals" (2007) 4 *Competition Law Review* 51, 67.

100 See M. Racanelli, "Bugs in the Boardroom?" (2006) (January) *Antitrust Source* 1; M. Furse and S. Nash, *The Cartel Offence* (Hart Publishing, 2004), pp.57–60 (and see further in relation to the powers of the Office of Fair Trading in the United Kingdom: OFT Code of Practice, August 2004, *Covert Surveillance in Cartel Investigations*; available at *http://www.oft.gov.uk/advice_and_resources/publications/guidance/general/oft739* [Accessed September 14, 2007].

101 Hodgekiss, "Criminalising Cartels: A Slow Conversion? Comments" commentary given at 5th annual UNISA Trade Practices Workshop, October 19–20 on paper by the author, "Criminalising Cartels: A Slow Conversion?", p.12.

102 The funding for the criminalisation proposal was described as "ongoing". See *http://treasurer.gov.au/tsr/content/pressreleases/2006/033.asp?pf+1* [Accessed August 20, 2007].

103 Editorial, "Funding to Fight Cartels 'Inadequate'", *Australian Financial Review* (Sydney), May 11, 2006, p.12; Hodgekiss, "Criminalising Cartels: A Slow Conversion? Comments" commentary given at 5th annual UNISA Trade Practices Workshop, October 19–20 on paper by the author, "Criminalising Cartels: A Slow Conversion?", p.11.

104 "Billionaire Knew he was Guilty", *The Age,* October 17, 2007, p.1.

States and Europe where cartel litigation has become "significant legal business".[105]

## Implications

Political support for cartel criminalisation is essential for several reasons. First, and most obviously, such support is necessary in order for the necessary legislation to be drafted, introduced to Parliament and, ultimately, enacted. Secondly, the Government will need to be prepared to consult widely and work through the complex and, at times, controversial aspects of the legislation—in particular, as it relates to the scope of the new offence and the sanctions imposed for its commission. Thirdly, it is inevitable that the Government's commitment to criminalisation will be tested by lobbying on the part of business groups and their political sympathisers seeking to prevent the legislation being introduced and/or to curtail the extent of the powers and resources given to the agencies charged with implementing it.[106] Fourthly, the Government must be prepared to invest those agencies with adequate powers and resources to vigorously enforce the criminal regime, taking on formidable opponents and their legal teams. Finally, the extent to which the attitude of the Government towards criminalisation will shape the perceptions of other stakeholders should not be underestimated. Business, the public, the media and, to a lesser extent, the judiciary will take cues from their political leaders as to the desirability and appropriateness of criminal penalties for cartel participants.

On each of these points, the former Australian Government scores poorly in its performance. There is still good reason to think that criminalising legislation will be enacted in this country, and that it is a question of when rather than if Australia will join the United States' "coalition of the willing" in introducing criminal penalties for serious cartel conduct. This is especially so given that the Labor Party took government on November 24, 2007 and has indicated its intention to introduce criminal sanctions as a matter of priority. Within weeks of the election, the new Assistant Treasurer was reported to have begun the process of examining the draft legislation and was of a mind to drop the element of dishonesty,[107] by mid-December 2007 it had been announced that the Bills would be introduced to Parliament in the first half of 2008 and by early January a draft exposure bill had been released.[108] That said, for the reasons previously cited, continuing political support will be necessary if the new regime is to be effectively enforced.

The difficulties being experienced outside the United States in garnering support for cartel criminalisation from relevant stakeholders have been described as "growing pains through which most of the developed world will establish effective criminal antitrust regimes".[109] That is, indeed, an optimistic view. As the experience in Australia (and other places) attests, when manifested in a substantial lack of political will, such pains may prove fatal to a national criminalisation movement and can only weaken the progress being made at the international level to combat serious cartel activity wherever it occurs.

105 Harding and Joshua, *Regulating Cartels in Europe* (2003), pp.280–283.

106 Parker, "The 'Compliance Trap'" (2006) 40 *Law & Society Review* 591, 613.

107 R. Williams, "Government Picks up Where Predecessor Left off on Law to Target Price Fixers", *The Age,* December 4, 2007, *Business Day* 1.

108 S. Moynihan, "Cartels to Face Jail Over Collusion", *The Age,* December 10, 2007, p.1.

109 Riley, "Editorial—Developing Criminal Cartel Law: Dealing with the Growing Pains" (2007) 4 *Competition Law Review* 1, 5.

COMMENT

# (Fore)closing the Gap: the Commission's Non-Horizontal Merger Guidelines—a "response" to Simon Bishop

*Femi Alese**

Abuse of dominant position; European Commission; Foreclosure; Guidelines; Mergers

While the Commission's newly minted non-horizontal merger guidelines (the "Guidelines")[1] were still being digested over the last holiday season, a leading commentator and practitioner, Simon Bishop,[2] raised some concerns over the Commission's draft guidelines on non-horizontal mergers and suggested ways to assess competitive impacts of these types of mergers.[3] The Commission's draft guidelines have now been converted into the "practising" Guidelines; however, the provisions discussed by Mr Bishop remain the same, to a great extent, under the two documents. As a result, this piece is directed at re-examining and expanding on the views expressed in the "original" article under the Guidelines and largely follows the format of that article.

## What do we mean by "foreclosure"?

The original article, like several of the positions taken by various entities during the public consultation period, takes issues with the Commission's approach to defining and separating the notion of "foreclosure" and "anti-competitive foreclosure". Essentially, the concern is that a clearer definition is needed in order to prevent the introduction of:

> ". . . an extremely low and unjustified hurdle to concluding that harm to competitors translates into harm to competition. More importantly, such a low hurdle would be at odds with the accepted view . . . that non-horizontal mergers generally do not give rise to competition concerns. For the sake of clarity, it is critical that the term 'foreclosure' should be confined to the situation where significant anti-competitive effects have been identified and, in consequence, that the distinction between 'foreclosure' and 'anti-competitive foreclosure' be removed."

The Commission describes the notion of foreclosure as that which encompasses:

> ". . . any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies ability and/or incentive to compete."[4]

Where such a situation arises and consequently results in the merging parties having the ability to unilaterally increase prices or able to do so with other participants

* Aspects of this piece were developed from F. Alese, *Federal Antitrust and EC Competition Law Analysis* (Ashgate, Feb 2008). Comments can be transmitted to femialese@hotmail.com.

1 See *Guidelines on the assessment of non-horizontal mergers under Council Regulation on the control of concentration between undertakings* (available at *http://ec.europa.eu/comm/competition/mergers/legislation/nonhorizontalguidelines.pdf* [Accessed January 14, 2008]).

2 Simon Bishop is a co-founder and Partner at RBB Economic, a leading economic consultancy in matters pertaining to EC competition law. Mr Bishop has taken lead positions in hundreds of cases including notable ones such as *Microsoft/Telewest*, *GE/Amersham*, *British Airways/City flyer* and *Carlton/Granada*. He is also a co-author of the *Economics of EC Competition Law*, 3rd edn (London: Sweet & Maxwell, 2007).

3 See [2008] E.C.L.R. 1.

4 Guidelines para.18.

in the post-merger market,[5] then the proscribed effect of the recast Merger Regulation will apply.[6]

Despite this suggesting that the aim of the document might be to protect competitors as a low level of foreclosure might trigger enforcement proceedings, a closer perusal of the document reveals that not only does it put significant emphasis on examining market reality (see the section below on efficiencies and competitive assessments); it also admits that its notion of foreclosure would largely be "activated" in instances where there exists "market power" in one of the concerned markets.[7] This approach would suggest that (given that the focus of the Guidelines on unilateral anti-competitive concerns primarily relate to conduct, such as leveraging of monopoly power or margin squeeze, exclusive dealings and group boycotts) the essence of foreclosure would be on identifying whether the concerned "market" can be "dominated" through the use of monopoly in the upstream market or used to prolong monopoly in that (upstream) market—a process which generally in merger cases requires an effects-based approach in assessing the workings of concerned "market" in relation to the upstream one, the extent of foreclosure, and feasible consequent harm to consumer. The "original" article alluded to this position in discussing the implications of the Guidelines for the reform of Art.82.

## Efficiencies: having the courage of one's convictions

The concerns of the original article here appear to be twofold: the non-recognition of the benefits of efficiency side-by-side in the respective sections dealing with vertical and conglomerate mergers and the inappropriateness of the "extension" of the two-step approach to "appraising anti-competitive and efficiency implications used in the assessment of horizontal merger" to consideration of non-horizontal mergers.

While presenting the benefits of the efficiency of vertical and conglomerate mergers separately would provide a more coherent format for the Guidelines, it cannot be disputed that the essence of non-horizontal mergers resides in the fact that they do not reduce the number of competitors and as such should not be awarded the same level of "suspicion" as horizontal mergers—a position made clear in the Guidelines and alluded to in the conclusion on the same point in the original article. Moreover, some beneficial measures such as improved specialisation, economies of scope and reduced transaction costs that can be found in conglomerate mergers can also be detected in vertical mergers, with the consequence that listing "type" benefits side-by-side in the Guidelines would largely result in repetition of words. In any event, both the Commission's Guidelines and its experience in dealing with non-horizontal mergers—particularly in light of the decisions in *Tetra Laval/Sidel* and *GE/Honeywell*[8]—reveals specifically that they are cognisant of the benefits of both conglomerate and vertical mergers.[9]

The second issue here appears in the original article to be inextricably tied to the first, in that a failure to show "type" benefits side by side is alleged to display a lack of courage in the Commission's conviction that non-horizontal mergers are generally pro-competitive. This in turn is said to be particularly evident in its two-step approach of appraising non-horizontal mergers in the same manner as horizontal mergers. The essence of the "original" article appears to be that in many non-horizontal mergers, the benefits cannot be separated from the anti-competitive harm particularly in the short term. Simply put, "the source of the potential competitive harm [can in the same case be] . . . the efficiency".

The position, however, is not specific to non-horizontal mergers; it can also apply to "certain" horizontal collaborations (such as specialisation agreements). Admittedly, while the approach to efficiency appears cautious in the Guidelines, the point here is that despite gains that mergers might bring, the Commission's primary task in all cases would always appear to be (unless there is a notion that beneficial mergers do not carry any anti-competitive harm) on identifying precisely the feasibilities of entry and foreclosure of the concerned markets in relation to the transaction and to support those assertions with cogent evidence. As a result, if there were to be concerns on assessments

5 Guidelines para.18.

6 See Art.2 of Regulation 139/2004 on the control of concentration between undertakings [2004] OJ L24/1.

7 Guidelines para.23.

8 *Tetra Laval BV v Commission of the European Communities* (T-5/02) [2003] All E.R. (EC) 762; [2002] 5 C.M.L.R. 28, upheld on appeal: *Commission of the European Communities v Tetra Laval BV* (C-12/03 P) [2005] All E.R. (EC) 1059; [2005] E.C.R. I-987 and *General Electric Co v Commission of the European Communities* (T-210/01) [2005] E.C.R. II-5575.

9 See Decision of 11 December 2006 declaring a concentration to be compatible with the common market (COMP/M.4314-*Johnson & Johnson/Pfizer Consumer Healthcare*).

steps, it would be on the theory of harm utilised by the Commission. This is a factor that is largely subject to the facts of a case under review. These are the teachings of the CFI in *Tetra Laval/Sidel* and appear to be largely reflected in the Commission's effects-based approach in the Guidelines.

## A "safe harbour" that is not safe enough

The concerns expressed here in the original article stem from its premise that the relevant market share threshold (for "exemptions") should be cast in stone: a position which does not reflect lessons learnt from dealing with the theory of unilateral effects in horizontal mergers, particularly in situations where the parties might not have the required threshold for "dominance" but possess differentiated products empirically shown to be the two most-favoured by consumers, and where competitors cannot reposition in the markets or switch into timely production.

However, the important point from the Guidelines appears to be that the 30 per cent threshold should be regarded as a "structural presumption" (that the merger would not decay the market platform) rather than a presumption of legality or a "safe harbour": perhaps, this discernable thought of the Commission is the motivation for further limiting that "exemption" only to instances where the merger does not involve parties with structural links (in the form of cross-shareholding and/or directorships), concerns expanding or maverick firms or where there is evidence of collusion or facilitating practice. In any event, the Commission's approach in presenting a structural presumption is not novel; analysis of merger rules (including those of the United States) largely indicate that the structural presumption is usually the first hurdle to be scaled in assessments.[10]

The suggestion in the original article that the Herfindahl-Hirschman Index (HHI) test (which accompanies the 30 per cent market share and requires that the post-merger HHI levels to be under 2000) be removed is, however, a credible one—particularly if we accept that non-horizontal mergers generally do not contribute to market concentration (as known in the sense of horizontal mergers). Since the Guidelines indicate that it is subject to review[11] this may be a factor for the Commission to reassess in the immediate future.

## Relationship with Article 82 reform

The original article correctly tackles the dichotomy of approaches under the Guidelines and those of the Commission under Art.82 and their effects on the reform process. It appears, however, from the Commission's approach to the issue of tying and refusal to supply in *Microsoft*[12] that the tide had since changed. *Microsoft* conclusively proves that the Commission appears to be no longer satisfied with the notion that bundling automatically equates to market foreclosure; rather assessments will now have to confirm if connected markets can be "dominated" by possession of monopoly power in one of the markets under review, and if abusive practices in a connected market prolong monopoly profits in another market under review. The approach in turn can only result in analysis examining exclusive dealings (and de jure exclusivity) cases in line with the efficiency of the outlets concerned in determining the extent of foreclosure rather than accepting that the capture of certain outlets automatically amounts to the hermetical sealing of related markets.

In addition, the sound approach to market analysis displayed in *Microsoft*[13] (and reflected in the Guidelines) might be said to stem from the approach of the Community courts to the issues of foreclosure in *Tetra/Laval Sidel* and *GE/Honeywell*. Perhaps, a significant consequence of this approach in years to come will be in requiring recoupment to be shown in predatory pricing cases,[14] given that the CFI in considering the Commission's case on possibilities of mixed bundling as an

10 See *United States v General Dynamics Corp* 415 US 486 (1974); *United States v Baker Hughes Inc* 908 F.2d 981 (DC Cir. 1992); *FTC v H.J. Heinz Co* 246 F.3d 708 (DC Cir 2001); for historical purposes contrast *United States v Philadelphia National Bank* 374 US 321 (1963); *United States v Von's Grocery Co* 384 U.S 270 (1966).

11 Guidelines para.8.

12 See Decision 2007/53 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (COMP/C-3/37.792-*Microsoft*) largely upheld on appeal, *Microsoft Corp v Commission of the European Communities* (T-201/04) [2007] 5 C.M.L.R. 11. See further, F. Alese, "Microsoft and the European Union's Antitrust Authority", *New York Law Journal*, October 4, 2007.

13 See Decision in COMP/C-3/37.792-*Microsoft*, largely upheld on appeal (except for a point on remedies), *Microsoft Corp* [2007] 5 C.M.L.R. 11. See further, F. Alese, "Microsoft and the European Union's Antitrust Authority", *New York Law Journal*, October 4, 2007.

14 See F. Alese, "Federal Antitrust and EC Competition Law Analysis" (Ashgate, Feb 2008), Ch.13.

abuse in *GE/Honeywell* recognised the importance of assessing costs-recoupment viability in markets where competitors' exit might be delayed.[15]

Precedents such as *AKZO*[16] and *CMBT*[17] might be jettisoned because these cases did not "directly" (at least at the appeal stages) concern "below average cost pricing" (as understood in relation to predatory pricing in standard economics or US law) and the decisions could be said to have mainly focused on the "general exclusionary conduct" of the firms involved (as understood in the sense of Art.82).[18] A similar position extends to the issue of according a presumption of legality to vertical price fixing, in that the eulogy heaped on the benefits of vertical mergers as provided in the Guidelines and in the above case law of the Community courts would remain at loggerheads with the present "per se" approach to vertical price fixing, unless there is an explicit refusal by the authorities, either to accept that similar efficiencies cannot be delivered in vertical price fixing schemes, or that vertical mergers and vertical resale restrictions are primarily separated only in forms of the relationships and the degree of history between the parties.[19]

## Assessing the competitive impact in practice

The main criticism of the Guidelines here in the original article appears to stem largely from not paying obeisance to the notion that Guidelines, whatever their subject-matter, are not substitutes for the authorities of the Community courts.[20] As a result, the assessments of competitive impact in practice would in all likelihood be tailored to the teachings of the decisions in *GE/Honeywell* and *Tetra Laval/Sidel*, where the Court of First Instance (CFI) ultimately required that there must be a plausible case indicating that a proposed transaction has the probability to create a significant impediment to existing competition in the relevant market—a process which, as the CFI noted, would involve a showing of associative links between the concerned markets, the incentives for engaging in the identified anti-competitive conduct (which in this case involved examining market growth in the concerned sectors), probability of anti-competitive harm (which in this case focused on the feasibility of the identified method of leveraging) and assessing the extent of the foreseeable consequences.[21] This previous point was iterated also in the *GE/Honeywell* case, where the CFI required that the Commission "provide convincing evidence to support its conclusion that the merged entity would probably behave in the way foreseen".[22]

The Guidelines cater for the concerns in the original article and its approach mirrors (to some degree) the positions in case law as it requires a showing of ability to foreclose, incentive to foreclose and the impact of foreclosure. The Guidelines acknowledge that the steps are taken together rather than separately and, presumably, in no particular order. Undoubtedly, reservations of the extent of market power in a connected market would come to play in analysing firm-ability to foreclose. The danger here for assessments (in light of dominance delineated as a position of around 40 per cent of the market) would be in identifying instances of market power from significant market power—so as to clarify where a merger might raise rivals' costs but might not have the ability to sustain anti-competitive conduct. This in itself connects to the underlying theory of harm and, of course, the issue of incentives: anti-competitive conduct would only be feasible as an incentive if the market reality provides the merged firms with the ability to do so (a position reflective of the views in the original article when assessing how certain vertical mergers would not result in price increases for consumers). Impact essentially, in light of case law, would require a showing beyond the restriction of competitive ability of particular rivals but more on the extent of the foreclosure in the concerned market and, consequently, the likelihood of the effects of the proposed transactions on consumers (a position which generally accords with the views of the original article on the notion of foreclosure).

Furthermore, although not specified in the Guidelines, the Commission should be expected from positions

15 Contrast the approach in Decision 91/619 declaring the incompatibility with the common market of a concentration (IV/M.053-*Aerospatiale-Alenia/de Havilland*) [1991] OJ L334/42.

16 *AKZO Chemie BV v Commission of the European Communities* (C-62/86) [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215 at [131]–[150].

17 *Compagnie Maritime Belge Transports SA v Commission of the European Communities* (T-24/93) [1996] E.C.R. II-1201, on appeal (C-395/96 P) [2000] E.C.R. I-1365; [2000] 4 C.M.L.R. 1076.

18 See Alese, *Federal Antitrust*, Ch.9.

19 See Alese, *Federal Antitrust*, Chs 7, 10 and 13.

20 Guidelines para.9.

21 *Tetra Laval BV* [2003] All E.R. (EC) 762; [2002] 5 C.M.L.R. 28, upheld on appeal, *Tetra Laval BV* (C-12/03 P) [2005] All E.R. (EC) 1059; [2005] E.C.R. I-987.

22 See *General Electric Co* [2005] E.C.R. II-5575.

in case law to demonstrate in adverse cases of non-horizontal mergers, why Art.82 should be regarded as a remedial measure rather than an effective deterrent for the conduct under review.

## Conclusion

The original article should be supported in its position that the Guidelines:

> ". . . represent a genuine and welcome attempt to clarify and provide guidance on its application of economic principles to the EC Competition policy."

As a result, the Commission should be congratulated for its relentless efforts to consolidate its position as a leading and effective global regulatory body (in the sense of activities wherever they may be carried out having an effect on its jurisdictional boundary). All eyes would appear now to be directed at seeing if the issuing of the Guidelines would compel the US Department of Justice to revisit its non-horizontal merger guidelines of 1984,[23] particularly given the non-existence of challenged conglomerate mergers for decades, the debate over the effectiveness of the vertical aspects of the guidelines[24] and of course, the Antitrust Modernization Report, which largely advocated withdrawal.[25] Finally, it is worth noting that on the same day that it issued the Guidelines, the Commission opened a Phase II investigation into the Tom Tom/Tele Atlas[26] vertical merger transaction (which was cleared by the FTC within the initial 15-day waiting period in the United States)[27]—hence, the wait need not be too long to see how the Commission sees its own Guidelines.

23 DOJ Merger Guidelines 1984 §4 (catering for non-horizontal mergers) still remains in operation as a policy view. The revisions made in 1992 and 1997 were limited to horizontal effects.
24 See J. Thomas Rosch, "The Challenges of Non-Horizontal Merger Enforcement" (available at *http://www.ftc.gov/speeches/rosch/070927-28non-horizontalmerger.pdf* [Accessed January 14, 2008]).
25 See *Antitrust-Modernization Commission Report and Recommendations*, April 27 2007, p.68—available at *http://amc.gov/report_recommendation/amc_final_report.pdf* [Accessed January 14, 2008].
26 See Commission Press Release, IP/07/1800.
27 See FTC's Early Termination Listings for 10/16/2007 (available at *http://www.ftc.gov/bc/earlyterm/*2007/10/*et071015pdf* [Accessed January 14, 2008]).

CASE COMMENT

# The Remedies (Not) Available for Breaches of Article 81 EC

*Tony Singla**

LT Account of profits; Breach of statutory duty; Cartels; Competition law claims; Exemplary damages; Private enforcement; Restitution; Unjust enrichment; Vitamins

## Introduction

The Court of Justice of the European Comunities' (ECJ) landmark judgment in *Courage Ltd v Crehan*,[1] establishing the right to damages for infringements of Arts 81 and 82 EC as a matter of Community law, was not immediately followed by a rush of litigation in the national courts.[2] On the contrary, in 2004 the Ashurst Report[3] noted the "total underdevelopment" of damages actions in the Member States. In order to address this problem, the European Commission published a Green Paper[4] in 2005 and earlier this year the Office of Fair Trading published its own Discussion Paper.[5] Private enforcement is therefore a rapidly developing area. In this respect the latest significant staging post is the judgment of Lewison J. in *Devenish Nutrition Ltd v Sanofi-Aventis SA*.[6] The case is extremely important since it is the first time that an English court has considered the availability of different remedies in response to a breach of Art.81.

## Trial of preliminary issues

*Devenish Nutrition* concerned the trial of certain preliminary issues in follow-on proceedings brought in relation to the well-known "vitamins cartels". On November 21, 2001, the Commission adopted a decision[7] that found that 13 vitamin manufacturers had infringed Art.81 by entering into worldwide cartels in respect of various vitamins. The cartels were of the most serious nature: high-level executives of the manufacturers were found to have met regularly in order to fix prices, allocate sales quotas, agree and implement price increases, and issue agreed price announcements. Moreover, the cartelists had set up machinery to monitor and enforce adherence to their agreements. The Commission levied what were at the time record fines: €462 million on F. Hoffman-La Roche AG, €5.04 million on Aventis SA, and €296.16 million[8] on BASF AG, although the fine on Aventis was commuted under the 1996 Leniency Notice[9] on account of its "whistleblowing".

Following the Commission's decision, numerous purchasers of the vitamins issued a claim in the English High Court against Roche, Aventis, and BASF, seeking compensation for the damage suffered by them as a result of the unlawful cartels. The claimants had

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1 *Courage Ltd v Crehan* (C-453/99) [2002] Q.B. 507; [2001] E.C.R. I-6297.

2 Although see *Healthcare At Home Ltd v Genzyme Ltd* [2006] CAT 29, where the Competition Appeal Tribunal made an interim payment order of damages.

3 *Study on the conditions of claims for damages in case of infringement of EC competition rules—Comparative Report*, Ashurst, Brussels, August 31, 2004.

4 *Damages actions for breach of the EC antitrust rules*, December 19, 2005.

5 *Private actions in competition law: effective redress for consumers and business*, April 18, 2007.

6 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch). Judgment was handed down on October 19, 2007.

7 Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/37.512-*Vitamins*) [2003] OJ L6/1.

8 Subsequently reduced on appeal by the CFI to €236.845 million: *BASF AG v Commission of the European Communities* (T-15/02) [2006] 5 C.M.L.R. 2.

9 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4.

purchased the vitamins either directly from the cartelists or indirectly, in the form of animal feed containing the vitamins. At the trial of preliminary issues, the claimants were represented by one direct purchaser and one indirect purchaser. Devenish Nutrition Ltd, a producer of animal feedstuffs, had purchased vitamins from the cartelists and incorporated them into its products which it sold onto third parties, and Moy Park Ltd, a poultry producer, had purchased vitamins as part of animal feedstuffs for feeding to its poultry, which it sold on to supermarkets.

The preliminary issues tried by Lewison J. concerned the availability of various remedies beyond compensation. It is well established that in English law a breach of Art.81 is actionable as a breach of statutory duty.[10] The general principle in tort law is that a claimant is entitled to recover:

> "That sum of money which will put the party who has been injured, or has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".[11]

In *Devenish Nutrition*, however, the representative claimants argued that they should in principle be entitled to an account of profits, restitutionary damages, and exemplary damages, subject to a right of election. Lewison J. rejected all of these remedies, and held that even on the facts as pleaded by the claimants (i.e. taking the claimants' case at its highest) they were confined to compensatory damages. The remainder of this article will consider the judgment of Lewison J. with regard to each of the remedies sought by the claimants. Attention will also be drawn to a claim attempted, and then abandoned, by the claimants, for restitution based on unjust enrichment.

## Compensatory damages

A common method of calculating compensatory damages in cartel cases is to ascertain the quantity of vitamins purchased by the victims and multiply this by the "overcharge"; that is, the actual price charged by the cartelists less the price which would have been charged if there had been no cartel (the "but for" price). Indeed this was the methodology adopted by the Commission itself in its Staff Working Paper annexed to the Green Paper on Damages.[12] In *Devenish Nutrition* it was agreed between the parties for the purposes of the trial of preliminary issues that the claimants would be entitled to compensatory damages on this "overcharge" basis. Nevertheless, the claimants sought to argue that the complexity of calculating compensatory damages was a sufficient justification for a restitutionary award or exemplary damages.

Lewison J. was correct to reject this argument based on difficulty of proof. For while it is undoubtedly true that the courts (even with the assistance of an economic expert) may experience difficulties in calculating the "overcharge"—a particularly obvious problem in the context of hard-core cartels is that important historic paperwork may be lost or destroyed—these problems of evidential proof are by no means unique to antitrust cases. In personal injury cases, for example, the courts regularly undertake the difficult task of quantifying a victim's pain and suffering. As long as a claimant can establish on a balance of probabilities the fact that they have suffered a loss, the courts will adopt a pragmatic stance and will not insist on a precise quantification of damages. As Bowen L.J. said over 100 years ago:

> "As much certainty and peculiarity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."[13]

## Exemplary damages

Although exemplary damages are only recognised in a few Member States, European law itself does not preclude their award. In *Manfredi v Lloyd Adriatico Assicurazioni SpA*,[14] the ECJ held that the availability of exemplary damages was purely a question for national law:

10 *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130. Consider whether it is correct that a breach of Art.81 is also now actionable in the tort of conspiracy in light of *Norris v United States of America* [2007] EWHC 71 (Admin); [2007] 1 W.L.R. 1730.

11 *Livingstone v Raywards Coal Co* (1880) 4 App. Cas. 25 at 39, per Lord Blackburn.

12 At paras 126 and 127.

13 *Ratcliffe v Evans* [1892] 2 Q.B. 524.

14 *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2007] Bus. L.R. 188.

> "As to the award of damages and the possibility of an award of punitive damages, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.
> In that respect, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law."

In *Devenish Nutrition* Lewison J. refused to award exemplary damages on three grounds. First, he held that an award of exemplary damages in circumstances where the defendants had already been fined by the Commission would run counter to the fundamental Community principle of *non bis in idem*, which prohibits any person being punished twice for the same wrong. Secondly, Lewison J. held that if a national court were to award exemplary damages subsequent to a Commission fine, it could only do so if it regarded those fines as being insufficient; but such second-guessing of the Commission by a national court is prohibited by Art.16 of Regulation 1/2003[15] (the Modernisation Regulation). Thirdly, Lewison J. held that exemplary damages were not available as a matter of English domestic law, notwithstanding that the House of Lords removed the cause of action test in *Kuddus v Chief Constable of Leicestershire*[16] and that the defendants' cartel behaviour fell squarely within the second category of case identified by Lord Devlin in *Rookes v Barnard*,[17] whereby a tortfeasor with a cynical disregard for a victim's rights calculates that the money to be made out of his wrongdoing will probably exceed the compensation payable. English law itself recognises a principle of double jeopardy[18] and Lewison J. was also troubled by the prospect of awarding what is essentially a windfall only to those claimants who came before the court, when the effects of the vitamins cartels had clearly been far more widespread.[19]

Lewison J.'s refusal to award exemplary damages is to be welcomed. There are undoubtedly arguments in favour of exemplary damages for breaches of Art.81: for example, the availability of exemplary damages would help to facilitate more damages actions and would thereby lessen the investigative burden on the Commission and National Competition Authorities. It would also bring EC competition law more closely in line with the United States, where treble damages are awarded.[20] However, the crucial point is that in a case like *Devenish Nutrition*, where the defendant vitamin manufacturers had already been fined by the Commission, exemplary damages have no role to play since the two have the same objectives, namely to punish and deter. This much is clear from the Guidelines on the Method of Setting Fines[21] applied by the Commission in the vitamins case, which state:

> "It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect."

Meanwhile in the context of exemplary damages, Lord Nicholls said in *Kuddus*:

> "Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages . . . they are intended to punish and deter."

And the Commission Decision in the vitamins case itself stated:

> "In order to ensure that the fine has a sufficient deterrent effect the Commission will determine whether any further adjustment of the starting point is needed for any undertaking."

In light of this common objective to punish and deter, the fact that the Commission had already levied fines upon the defendants was fatal to the claimants' claim for exemplary damages. Moreover, it was irrelevant that the fine imposed on Aventis had been commuted by the Commission since an award of exemplary damages against Aventis would have completely undermined

15 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
16 *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; [2002] 2 A.C. 122.
17 *Rookes v Barnard (No.1)* [1964] A.C. 1129.
18 See, for example, *Archer v Brown* [1985] Q.B. 401; *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197, and *AB v South West Water Services Ltd* [1993] Q.B. 507.
19 It should be noted that the claimants are intending to seek permission to amend their pleadings in two respects: first, following *Borders* [2005] EWCA Civ 197, they intend to frame their claim for compensatory damages as exemplary damages because of the difficulties of proof in relation to the former, and secondly, following the decision of the House of Lords in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; [2007] 3 W.L.R. 354, the claimants are seeking compound interest.
20 See s.4 of the Clayton Act 1914.
21 [1999] OJ C9/3.

the policy aim of the Leniency Notice in encouraging whistleblowers.

In some respects *Devenish Nutrition*, on its facts, was an easy case: the Commission had already fined the defendants, and the level of those fines was extremely high (setting a record at the time). However, a question which Lewison J. posed during the course of the hearing is what would happen if an English court were to establish a breach of Art.81 *before* a Commission investigation? Would it be open to the court to award exemplary damages in such a scenario? If so, would the operation of the *non bis in idem* principle preclude the Commission from imposing a fine? And what if the Commission regarded the level of exemplary damages awarded as being inadequate to punish and deter the cartelists? This is an extremely interesting issue which will need to be decided in another case, and it is regrettable that Lewison J. did not explore it further in his judgment.

## Restitutionary damages and account of profits

Lewison J. also rejected the claimants' claims for restitutionary damages and an account of profits based on *Attorney General v Blake*.[22] It is important to clarify these measures of recovery: restitutionary damages would have entitled the claimants to the overcharge, while an account of profits would have led to the recovery of *all* of the profits earned by the vitamins manufacturers from the sale to the claimant purchasers. One immediate problem for the claimants, suing in breach of statutory duty, was that in English law the only torts which ground a restitutionary claim are those involving some infringement of a claimant's proprietary or possessory title, such as trespass to goods or land.[23] Lewison J. was therefore bound by two Court of Appeal authorities[24] to dismiss the claimants' claims for restitutionary damages and an account of profits.

As a matter of principle, the more important reason provided by Lewison J. for refusing such restitutionary remedies was that they are traditionally only available where compensatory damages would be inadequate. Lewison J. was correct to hold that *Devenish Nutrition* was not such a case: for the purposes of the trial of preliminary issues it was agreed between the parties that the claimants could recover the overcharge as compensation and, as discussed above, any potential difficulties as to the precise quantification would not render this an "exceptional case" as envisaged by Lord Nicholls in *Attorney General v Blake*.

## Unjust enrichment

It is important to consider one final claim brought by the claimants, although it was abandoned midway through the hearing and is not referred to by Lewison J. in his judgment. In addition to claiming restitutionary damages for the tort of breach of statutory duty, the claimants put forward a claim for restitution based on the cause of action of unjust enrichment.

There were a number of insurmountable obstacles to the claim in unjust enrichment. First, the claimants' attempts to argue that English law now recognises a general right of unjust enrichment (without recourse to particular unjust factors) were wholly incompatible with the recent decision of the House of Lords in *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners*.[25] Secondly, it is a fundamental principle that a claim in unjust enrichment to recover a benefit will not be available where there is a valid contractual obligation to transfer that benefit. This has been affirmed by the courts on numerous occasions. For example, Lord Goff stated in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*[26]:

> "All this is important for present purposes, because it means that, as between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in this matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate. Of course, if the contract is proved never to have been binding, or if the contract ceases to bind, different considerations may arise . . ."
> "It is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to

22 *Attorney General v Blake* [2001] 1 A.C. 268.

23 An example of a "proprietary tort" leading to restitution is *Ministry of Defence v Ashman* (1993) 25 H.L.R. 513; (1993) 66 P. & C.R. 195.

24 *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 W.L.R. 1406 and *Halifax Building Society v Thomas* [1996] Ch. 217.

25 *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 A.C. 558.

26 *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 W.L.R. 161 at 164 and 166.

> redistribute risks for which provision has been made under an applicable contract."

The same point was also made by Millett L.J. in *Portman Building Society v Hamlyn Taylor Neck*[27]:

> "The continuing validity of the transaction under which the money was paid to the firm is, in my judgment, fatal to the Society's claim. The obligation to make restitution must flow from the ineffectiveness of the transaction under which the money was paid and not from a mistake or misrepresentation which induced it. It is fundamental that, where money is paid under a legally effective transaction, neither misrepresentation nor mistake vitiates consent or gives rise by itself to an obligation to make restitution."

In the case of Devenish, the direct purchaser, it had a valid contractual obligation to pay the defendants for the vitamins and this was unaffected by the defendants' participation in unlawful cartels.[28] The claimants therefore sought to argue that Devenish's contracts with the defendants were void for unilateral mistake and in relation to Moy Park, that its contracts with its suppliers were void for common mistake. This would have entitled Devenish and Moy Park to recover the monies they had paid for the vitamins on the ground that they had been paid as a result of a mistake of law (mistakenly believing in the validity of their contractual obligations to pay for the vitamins). However, it simply would not have been possible for the claimants to demonstrate either a unilateral or a common mistake. In relation to Devenish, there was no unilateral mistake as to terms[29] since it was not a term (express or implied) of any contracts between Devenish and the defendants that the prices charged therein were set as result of a lawful competitive process. Moreover, in respect of Moy Park, the test for common mistake is that the parties must have shared a common assumption which, having proved to be false, renders performance of the contract *impossible*.[30] Plainly the fact that the defendants had participated in cartels did not render Moy Park's contracts with its suppliers impossible.

## Conclusion

The judgment of Lewison J. in *Devenish Nutrition* clarifies the remedies available in English law for breaches of Art.81. Where a cartelist has already been fined by the Commission, it seems that neither exemplary damages nor restitutionary remedies will be available to the victims. Moreover, a cause of action in unjust enrichment will be precluded by the presence of valid contractual obligations on the victims to pay the purchase price.

It therefore appears that the only remedy that will be available is compensatory damages. In the context of compensatory damages an extremely important issue that did not fall for consideration by Lewison J. is whether English law should adopt a passing-on defence as exists in the United States, whereby there is a blanket rule prohibiting indirect purchasers from recovering damages.[31] Considerable uncertainty will remain in this area of law until this is resolved.

27 *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All E.R. 202 at 208.

28 It is clear from *Société de Vente de Ciments et Betons de L'Est SA v Kerpen & Kerpen GmbH & Co KG* (C-319/82) [1983] E.C.R. 4173 at 4184–4185 that the effect of Art.81(2) is only to render the horizontal cartel agreements void, and not also all downstream supply agreements.

29 *Smith v Hughes* (1870-71) L.R. 6 Q.B. 597.

30 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] Q.B. 679, per Lord Phillips M.R. at [76].

31 See *Illinois Brick Co v Illinois* 431 US 720 (1977). See also Mark Brealey Q.C., "Adopt *Perma Life*, but Follow *Hanover Shoe* to *Illinois*?—Who Can Sue for Damages for Breach of EC Competition Law?" [2002] *Competition Law Journal* 127.

# BOOK REVIEWS

*Vinod Dhall (ed.) Oxford University Press, New Delhi, 2007*
*ISBN 978-0-19-568802-3*
**Competition Law Today Concepts, Issues, and the Law in Practice**

As confirmed by the foreword to this volume by the Chairman of the Economic Advisory Council to the Prime Minister of India and the pages entitled "Law and Economics" from a Senior Advocate in the Supreme Court of India and President of the Bar Association of India, both the theory underpinning and effective implementation of competition laws in practice have become increasingly accepted as an essential feature of a modern market-based economy and, as a result, competition law regimes are being promulgated in an ever increasing number of jurisdictions worldwide.

This book, by Mr Vinod Dhall, a member of the Competition Commission of India, comprises a collection of 23 dissertations on general aspects of competition law as well as examining more closely the specific features in a number of countries. The book is not in any way restricted to Indian competition law; nor does it take a government or regulator point of view.

The volume is divided into four parts:

1. A number of essays deal with issues facing competition law generally contained in Pt 1 entitled "Competition Law—Substantive Provisions and Major Issues".
2. The second part comprises chapters dealing with competition law in select jurisdictions, namely Australia, the European Community, Germany, Mexico, South Africa, Korea, the United Kingdom and the United States.
3. The third part of the book deals with competition law, economics and policy and the interaction between the three.
4. The final part of the book deals with the Indian competition law and contains chapters by both Vinod Dhall and by Amitabh Kumar, who is also a member of the Competition Commission of India.

While the book is primarily aimed at those who have a working knowledge of competition law, the overview written by Mr Dhall would serve as a good introduction to readers who may be less familiar with this area of law.

The universal themes of competition law: horizontal (including cartels) or vertical arrangements affecting markets, unilateral conduct or abuse of a dominant position and merger control are all the subject of exposition in the introductory part of the volume. There are also some interesting insights in relation to developing economies and government businesses and the application of competition laws.

It is fitting that the first more detailed essay in the book relates to cartels, which is without a doubt one of the most critical issues in competition law today and which becomes increasingly recognised as an insidious drag on economic development and consumer welfare globally. This is a priority enforcement area for agencies globally and the increased coordination of prosecution efforts by competition enforcement agencies attest to the importance of being fully aware of the prohibitions on price fixing, bid rigging and market sharing in this area of the competition law.

The chapter about leniency programmes provides an interesting overview and comparison of the various jurisdictions and their programmes, noting that these programmes are not just a feature of the more mature competition law systems, but can be a useful tool in jurisdictions with more recent experience of competition law. It is apparent that a common theme across the jurisdictions which have leniency policies is the "race to the door" dynamic.

The chapter on merger control written by Alan Goldberg, President of the Australian Competition Tribunal, has a strong focus on the common law countries: Australia, New Zealand, the United Kingdom, the United States and Canada, but also discusses South Africa and the European Union.

The jurisdiction-specific chapters give the reader an opportunity to learn more about other jurisdictions in which they are interested. The book does not deal solely with large countries typically considered in competition law texts, but deals also with other less frequently referred to jurisdictions, such as Mexico.

The collection of material in this volume provides an interesting viewpoint of competition law globally, with several universal themes apparent in the materials, as well as providing an interesting perspective from the authors on issues faced in particular areas within the overall field of competition law or from the perspective of specific jurisdictions around the world.

**Bruce Lloyd, Ellie Palmer**

*Jonathan Faull and Ali Nikpay (eds) 2nd edn, Oxford University Press, 2007, 1,785 pages (+ prelims, tables and index)*
*ISBN 978-0-19926-929-7*
**The EC Law of Competition**

The first edition of Faull and Nikpay established itself very quickly amongst the pre-eminent competition texts. Both editors have relevant experience at very high levels (although Ali Nikpay has since moved on to the Office of Fair Trading), and they have marshalled a team of 37 contributors on the second edition the list of which includes some of the most astute commentators in the area. I have waited for the second edition for what feels like an age—it is eight years since the first was published—and am not disappointed. As the editors note in the preface, much has changed since 1999. The modernisation project of the EC Commission has been largely completed (there remains work to be done in promoting procedural consistency and the development of private rights in Member States, and the review of exclusionary abuses appears to have slipped down the agenda recently), the merger control regime has been overhauled, and a raft of new notices and guidance has replaced older versions, or added material where none previously existed.

The text is structured in four sections: general principles, specific practices, special sectors, and state aid. Article 81 dominates the text—130 pages in the General Principles section, and some 570 pages in the Specific Practices section (horizontal co-operation, cartels, and vertical agreements). Article 82 on the other hand merits only 108 pages in the General Principles section). It seems unfair to suggest that in a work of this length something should be added, but some further treatment of abusive practices would be welcome. For example, excessive pricing is dealt with in less than five pages (and a significant part of this is a discussion of the *Napp* case, which, strictly speaking, is a domestic case in which Art.82 EC was not applied—although of course the effect of s.60 ensured substantial discussion of the application of the Art.82 treatment and jurisprudence). The discussion of the *Helsingborg* decision of the EC Commission certainly could be usefully expanded. The editors have certainly made the right decision in focusing on those areas in which practitioners are more likely to be engaged, but I would welcome guidance of this quality to be as expansive as possible.

The book is not alone in starting with a treatment of the relevant economic principles and techniques, but the 82 pages here is stronger and better supported than most. Although some may struggle with the degree of technical detail (for example: "Economic theory predicts that, at its profit-maximising point, a firm's margin will be the reciprocal of the elasticity of demand facing it" (p.57). Persistence is repaid, however—technical points are explained clearly, with good use of examples from practice. The discussion of procedure (the enforcement system) is very strong, but is targeted more towards public than private enforcement, and given the current trend it is likely that a greater emphasis on private enforcement may need to be adopted in future editions. The treatment of Art.81 is at least as good in its detail as anything published in a single volume, and alone would merit the purchase price. The chapter on merger control is strong (unfortunately the text had to be prepared before the old notices were replaced—but writers always have to stop sometime).

It is impossible in a review of this length to provide a close critique, section by section, of a work of nearly 2,000 pages. Having used the first edition extensively over the past seven years, and having dipped in and out of this edition with varying degrees of intensity in the course of updating my knowledge over the summer period I am confident in recommending this text most strongly. It is an exceptionally good single volume treatise of the area, and my only complaint is that it is not even longer—perhaps the third edition will need to be published in two volumes!

**Mark Furse**
*Professor of Competition Law and Policy, University of Glasgow*

# News Section

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# EUROPEAN INSTITUTIONS

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# NATIONAL REPORTS

## Croatia

## Anti-competitive agreements

**Competition Authority**
*Bus operators—price fixing—infringement decision*

September 24, 2007

Anti-competitive practices; Bus services; Croatia; Horizontal agreements; Price fixing

On September 24, 2007, the Croatian Competition Agency adopted a decision establishing that 14 bus operators infringed competition rules by reaching an explicit agreement and/or concerted practice to fix ticket prices. It was established that the undertakings agreed to charge the same price for the same service (Zagreb-Split, and Zagreb-Šibenik) with simultaneous application of higher prices as of July 1, 2006. The undertakings individually notified the price increases to the relevant bus stations within a very short period of time (only six days). Several citizens gave notice to the Agency of the price increases, which were very obvious to consumers since prior to July 1, 2006 price competition between bus operators flourished. This prompted the Agency to start the proceedings. This is the first decision where the Competition Agency had to decide on the issue of parallel price increases in its 10-year practice, and it is the most complex and elaborate decision so far in the area of horizontal restrictive practices.

Although no explicit, written agreement of the parties to fix prices was submitted as evidence, the decision was based on the finding of continuous anti-competitive contacts between the undertakings (phone contacts with the aim to fix prices, a written instruction to a bus station containing reference to the agreement of parties on prices, long-term contacts within the association of undertakings). It is important to note that the decision was not founded on the parallelism of price increases but on the basis of material, direct evidence. The parties tried to justify the increase of prices by pointing to the fact that costs have increased. The Agency held that since individual cost structure of undertakings was very different it was not possible for a common price level to be reached without an explicit agreement to fix prices.

*Jasminka Pecotić Kaufman*

## Czech Republic

## Procedure

**Brno Regional Court**
*National law—EC law—non bis in idem—decision of Competition Office overturned*

October 22, 2007

Annulment; Competition law; Czech Republic; Dominant position; Double punishment; EC law; Fines; Gas supply industry; Regulatory bodies

On October 22, 2007, the Regional Court in Brno, handling appeals in competition cases, annulled the Competition Office's decision of March 13, 2007 in which a fine of CZK 240 million (approximately €8 million) was imposed on a dominant gas supplier RWE Transgas (RWE) for infringement of Art.82 of the EC Treaty and s.11 of the Competition Act. This was one of the first proceedings conducted by the Competition Office under the modernised antitrust enforcement rules and procedures introduced by Regulation 1/2003[1].

The judgment relates to the decision in which the Competition Office declared that RWE had abused its dominant position through discriminatory practices against regional gas distributors that were not members of RWE Group and by restricting natural gas supplies to individual regional distributors. Accordingly, the Office held that such conduct constituted abuse of a market position within the meaning of Art.82 and corresponding national competition rules.

From the text of the judgment, it is clear that the Regional Court found one serious fault on the part of the Competition Office. The Court did not assess the substantive part of the Office's decision; nevertheless, it considered that the Office was not permitted to apply Community competition rules in parallel with the national competition law within the same proceedings. In particular, the Court held that the Competition Office could apply either Art.82—if the contested practices affected interstate trade—or, if such effects were not proved, corresponding

1 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

domestic competition rules, i.e. s.11 of the Competition Act. However, in this case, the Court came to the conclusion that the Office by applying concurrently both Community and domestic competition laws prosecuted RWE twice for the same conduct in violation of the *ne bis in idem* principle. The decision therefore had to be annulled according to the Court.

The application of the *ne bis in idem* principle raises difficult and controversial questions under Regulation 1/2003. It must be recalled in this connection that *ne bis in idem* is respected as a general principle of law. However, the scope of this principle has been, so far, narrowly construed by the Community courts. In particular, the Court of Justice in its *Walt Wilhelm* judgment acknowledged the principle of concurrent application of national and Community competition law in recognition of the fact that the competition laws of the Community and of Member States protect different interests. Therefore, both legal regimes can apply cumulatively. Taking all of those factors into account, it is questionable whether the Regional Court's position on parallel application of both Community and national competition rules will be accepted by the Supreme Administrative Court.

*Josef Vejmelka and Tomáš Fiala*

# France

## Anti-competitive agreements

**Competition Council**
*Tenders—hospital restructuring—two bidders—whether process distorted—no infringement*

October 24, 2007
Decision No.07-D-34

LT Anti-competitive practices; Concerted practices; France; Horizontal agreements; Hospitals; Tenders

In decision no.07-D-34, the Competition Council ruled on a call for tenders procedure concerning the *Centre hospitalier de la Côte Basque* (Basque Coast Hospital Centre) for the restructuring of the Bayonne Hospital and on a possible anti-competitive agreement between the bidders.

At the time of the first call for tenders, two bids were submitted, one by MAS Corp and the other by the GTM GCS/Faure-Silva group. Both bids exceeded the contract giver's estimate by more than 50 per cent. The market was declared to be ineffective by the call for tenders commission and a new bid was launched. The two corporations, present this time as a combination of businesses, MAS/GTM-Faure-Silva, issued a joint bid which was accepted, against the advice of project management.

In a referral by the Minister of the Economy, Finance and Industry, the Competition Council, while making note of its decision-making practice where business combinations are involved, concluded that there were no anti-competitive agreements between the bidding businesses.

MAS Corp and the GTM GCS/Faure-Silva group were accused of using practices which raised suspicions of an anti-competitive agreement. The investigation by the DGCCRF revealed that while these two businesses were the only candidates at the time of the first bid announcement, and had submitted their bids separately, at the time of the second call for tenders, they had joined forces and proposed a higher price than that tendered during the first bid for substantially identical services.

Relying on this evidence, investigators gave notice to the businesses of the violation of art.420-1 of the French Commercial Code based on the implementation of an anti-competitive agreement through the exchange of information and the unwarranted formation of a group of businesses.

The Council referred, first, to its consistent decision-making practices relating to business combinations, noting that [translation]:

> ". . . [T]he formation by independent and competing businesses of a group in order to respond to a call for tenders is not by itself illegal (decision no. 95-D-83 dated December 12, 1995; decision no. 04-D-20 dated June 14, 2004; decision no. 05-D-24 dated May 31, 2005)"

and that such combinations can have [translation]:

> ''. . . [a] procompetitive effect if they enable the businesses, as combined, to work together where they would not have been capable of doing so individually or to work together on the basis of a more competitive bid (decision no. 04-D-57 dated November 16, 2004; decision no. 01-D-16 dated April 24, 2001; decision no. 03-D-19 dated April 15, 2003).''

Referring to a decision by the Court of Appeal of Paris dated February 18, 2003, the Council set out possible justifications for business combinations, including where they help the business resorting to such a combination to [translation]:

> ''. . . [a]cquire a skill that it lacks, increase its chances of success, distribute the workload among more parties in order to increase flexibility, place it in a situation where it is able to perform work that would have been difficult for it to perform alone given the scope thereof.''

The justifications taken into account by the Council consisted not only of the technical complementarity of the businesses, but also the complementarity of means. Finally, the Council, referring to its decision no.07-D-01 dated January 17, 2007, considered that [translation]:

> ''. . . [W]hile the lack of technical or economic necessities justifying such combinations can give rise to a presumption of their anticompetitive nature, it does not constitute sufficient proof thereof.''

According to the referral, the formation of this combination was not justified because there were sufficient technical, human and financial means available to each business individually to meet the worksite requirements alone. Furthermore, the investigation considered that the price tendered during the second call for tenders was overestimated. The business combination was also accused of having had the purpose or effect of eliminating the competition. Finally, the investigation relied on various documents which revealed that each business had had knowledge of the other's position at the time of the bid and indicating that both businesses had planned, at the time of the first bid, to submit a second tender.

With respect to the means of each business, the Council held that one must not take into account the general means of the business, but its ability to mobilise these means [translation]:

> ''. . . [T]he assessment of each company's ability to fulfill this contract alone is not a function of its total manpower but the number of employees under the direction of the local structure. . . One cannot therefore assert that these companies had sufficient manpower to meet the requirements of this worksite alone on the basis of their national dimensions.''

Furthermore, the Council agreed with the companies' argument to the effect that the purpose of combining their businesses had been to apportion the risk between them related to the ambiguity in the file and the delays in orders by the contract givers. The investigators had moreover already noted in their report that [translation]:

> ''. . . [T]he complexity of the work to be performed in an operational hospital was capable of justifying the precautions taken by the businesses in joining forces.''

With respect to the overestimate of the price of the second bid, the Council noted that the project manager had made computational errors, that the worksite was more complex than the report had suggested, and that additional services had been requested between the two bids. In addition, the economic circumstances, on the one hand, particularly the prices of materials, had changed in the meantime, as had the regulatory circumstances, on the other hand, since a new regulation had been passed that also explained the increase in the cost of the worksite.

The Council therefore found that the price proposed by the group had not been overestimated.

With respect to the elimination of the competition, the Council noted that other businesses had expressed interest at a meeting organised by the project manager prior to the second call for tenders, and also, that there was no evidence to suggest that the formation of the group had prompted any business to abandon submitting a bid.

Finally, with respect to the various documents referred to in the investigative report, the Council noted that there were material errors, particularly in the date of the documents, concluding therefore that there was no exchange of information.

## Anti-competitive agreements

**Competition Council**
*Sirona Dental Systems—distributors—vertical agreement—consideration of terms of agreements*

November 7, 2007
Decision 07-D-35

LT Anti-competitive practices; Dentistry; France; Medical equipment; Pricing; Selective distribution agreements

Following a referral by the Minister of the Economy, Finance and Industry relating to practices implemented by Sirona Dental Systems (SDS), a dental materials and equipment supplier, and its national distributors, the Competition Council, in decision 07-D-35 dated November 7, 2007, had the opportunity to provide a detailed overview of the ‘‘series of indicators’’ method used to determine the existence of an anti-competitive vertical agreement. During the relevant period under consideration at the hearing, the selective distribution network of SDS was not covered by a contract, but was governed by unwritten commercial customs.

According to the Minister's letter of referral, SDS had committed three anti-competitive practices: a pricing agreement, a strict territorial distribution, and a restriction on the distribution of spare parts. The series-of-indicators method was applied by the Council in the determination relating to the pricing agreement.

SDS was accused of intending to uniformise the sales prices charged by the members of the network by imposing the resale price on its distributors through the communication of price schedules and by implementing objective discounts calculated on the distributors' sales figures in order to pressure them not to deviate from the prices communicated by SDS.

The Council, first, noted that, apart from the cases where the anti-competitive practice stems from the clauses of the contract, anti-competitive vertical agreements are proven through a series of converging indicators, in particular [translation]:

> ‘‘. . . [T]he existence of discussions on the sales prices which the supplier wishes to charge, effective compliance with these prices by the distributors, the implementation of false commercial cooperation, the existence of artificial supplier discounts, the implementation of a pricing policy or threat of reprisals.’’

The Council analysed the material evidence of the case which could provide sufficient indicators to establish an imposed pricing practice. The three indicators that could lead to the conclusion that a pricing agreement existed were, in this case, the existence of a pricing schedule, compliance with the schedule by the distributors, and monitoring of the prices by SDS.

With respect to the pricing schedule, the referral made reference to a letter from SDS to its subsidiary SMD relating to a price list, another letter in which SDS wrote to its distributors that the price list of its subsidiary SMD could become the common reference, and a letter referring to a meeting during which a recommended price schedule was discussed. The investigative report was also based on statements by distributors referring to the existence of recommended prices.

The Council noted, first, that the documents on which the investigative report relied to support the contention that the prices were imposed referred to an internal rate for the group and did not mention recommended prices to the distributors. The meeting during which the recommended pricing system was debated was held three months before the end of the hearing, and could not therefore be taken into account in determining the convergence of earlier prices. Finally, a price schedule was effectively communicated to the distributors.

According to the Council's analysis, these prices were only recommended and not imposed. Furthermore, this point was not contested by the investigative report. Thus, the Council considered that the evidence of an imposed pricing schedule had not been documented.

With respect to the compliance with the schedule by the distributors, the investigation noted that the end-of-year bonus and objective discounts granted to the distributors brought great pressure to bear on them to comply with the prices in the schedule in order to benefit from these discounts and bonuses.

The Council noted that the schedule provided was in fact identified by the distributors as a recommended pricing schedule, and not imposed, and no indication of the prices charged by the distributors supported the contention that this schedule was effectively observed. The Council also considered that the objective discounts were not necessarily obtained by complying with an imposed price. In this case, the Council therefore found that the indicator of compliance by the distributors with the price had not been met.

With respect to the monitoring conducted by SDS over the prices, the referral relied on statements by the distributors to the effect that the prices charged by the distributors as a whole were similar, and on a letter from SDS to a distributor referring to the average price of the equipment sold at retail in the market.

The Council considered that the mere convergence of the prices charged by the distributors was not sufficient to prove the existence of an anti-competitive agreement and, in this case, that this convergence was justified by a similar costs structure. The letter from SDS referring to the average price in the market was only an observation by SDS that the market price was at a sufficient level to enable the distributor to maintain a suitable margin. The proof of a pricing policy was therefore not established.

Thus, using the series of indicators, the Council, by examining each allegation in relation to these indicators, concluded that there was no anti-competitive vertical agreement between SDS and its distributors.

The investigative report by the national investigative directorate also contained complaints with respect to the geographical partitioning of each distributor and the restriction of access by independent repairers to spare parts. In light of the evidence in the file, the Council found, first, that the zones of each distributor were zones for their action and not zones of exclusivity, and that passive sales were not prohibited and, secondly, that the restricted access by independent repairers to spare parts was justified in this case by the high-tech nature of the products and the necessity of providing high-quality after sales service. The Council therefore also dismissed these last two complaints.

## Procedure

**Court of Cassation, Commercial Division**
*Limitation periods—conditions under which suspended*

November 6, 2007

LT France; Investigations; Limitation periods; National competition authorities; Summonses

In a decision dated November 6, 2007, the commercial division of the Court of Cassation, on an appeal brought by the Minister of the Economy, considered the scope of acts that interrupt the limitation period in connection with an investigation by the competition authorities.

This case involved a proceeding brought against businesses and business groups that had responded to a call for tenders for the construction of a hemicycle and offices for the European Parliament in Strasbourg. An investigation was conducted and the matter was referred by the Minister of the Economy to the Competition Council for a ruling on the anti-competitive practices of these businesses in the aforesaid market. The referral was made in February 1996 and the complaints were served on the businesses in question in September 2000.

Article 462-7 of the French Commercial Code provided at the time that [translation]:

> ". . . [T]he Council may not be seized of facts dating back more than three years if no instrument aimed at investigating, recording or penalizing such facts has been established."

It is therefore sufficient to issue an instrument for the investigation, recording or penalising of the facts as charged to interrupt the limitation period.

In this case, only a letter of summons issued by the Council's executive case officer was sent in January 1999 to the President and CEO of one of the companies involved [translation], ''to collect useful information for a review of the file''. In the end, no hearing was held.

On September 21, 2005, the Competition Council rendered decision no.05-D-51 in which it convicted several bidding companies for offences under art.420-1 of the French Commercial Code relating to anti-competitive agreements.

These companies appealed this decision to the Court of Appeal of Paris, pleading, in particular, the defence that an action based on these facts was barred by the limitation period. According to the appellants, the limitation period was not interrupted by the letter of summons from the executive case officer, as the true purpose of this letter had not been to investigate, record or penalise the acts as charged.

The Court of Appeal agreed with them in the following terms [translation]:

> ''. . . [W]hile a summons is effectively an act that interrupts the limitation period, unless this principle is to be given a purely formal effect with no other consequence than that of systematically depriving the principle of the limitation of actions of any effectiveness, one must seek to ascertain the true purpose of such an act.''

The Court of Appeal thus conferred on itself a right of control over the purpose of acts under art.462-7 of the French Commercial Code. It therefore found that the summons had never occurred and that the executive case officer had had the necessary evidence available to him, on the date the letter of summons was sent, for the investigation, recording and penalising of the anti-competitive practices in question. The Court of Appeal inferred from this that the letter had had the sole purpose of artificially extending the limitation period and did not therefore have the effect of validly interrupting the limitation period. Thus, the Court of Appeal considered the actual, and not apparent, purpose of the act in assessing its scope.

The Court of Cassation rejected this argument. Pursuant to art.462-7 of the Commercial Code, it indicated that [translation]:

> ''. . . [A] summons for hearing . . . aimed at investigating, recording or penalizing facts set forth in the referral to the Competition Council which this executive case officer is charged with instructing, is an act that interrupts the limitation period.''

The high court therefore overturned the material approach of the Court of Appeal, which was sanctioned for a violation of the law. The Court of Cassation considered that the summons to a hearing was an act that interrupts the limitation period, without the need to ascertain the actual purpose of the act in order to decide that it had only had the purpose of artificially extending the limitation period, and quashing it. The Court of Cassation's analysis therefore has the effect of conferring a purely formal dimension on the acts referred to in art.462-7 of the French Commercial Code.

*Yann Utzschneider and Alexandre Glatz*

# Hungary

## Abuse of dominant position

**Competition Authority**
*E.ON—excessive pricing—investigation—terminated—no infringement*

April 26, 2007
Vj-156/2005—E.ON

LT Dominant position; Energy; Hungary; Investigations; Market definition; Pricing

On April 26, 2007, the Hungarian Competition Authority (hereinafter GVH) adopted a decision terminating an investigation against E.ON Észak-dunántúli Áramszolgáltató Zrt. (hereinafter E.ON). The investigation was initiated due to claims about excessive pricing leading to exploitative abuse of a dominant position.

It is the approach of the GVH rather than the factual background that is interesting in the case. Three important issues need to be highlighted.

First, the GVH while defining the relevant market stated that theoretical substitutability should be considered only if that also means a real economic alternative in practice.

Secondly, and more importantly, the NCA expressed its views about excessive pricing and exploitative abuses indicating a possible policy change to its former theoretical approach. After a general discourse about the profit maximising behaviour of undertakings, the GVH went on to say that it can be against public interest to interfere with market processes in particular circumstances, since the competition authority has to protect dynamic competition and long-term consumer welfare. Achieving a monopoly position by excellent performance is not only—save in some exceptional circumstances—safe, but means that the undertaking concerned can provide a good or service on the market which others cannot and the high profits are the reward for that. According to the Competition Council (hereinafter CC), long-term consumer interest requires the competition authority not to indispose undertakings to invest and to enterprise by ruling high prices unlawful. While protecting public interest one cannot leave aside the consideration that, if a competition authority intervenes with the price setting of the undertakings due to high prices, this behaviour of the authority prejudices the profit expectations of the undertakings, which in turn leads to the chilling of investments both generally and in the sector where intervention occurs. This kind of intervention obviously prejudices investments in the case of natural monopolies (infrastructural investments), so intervention is more than undesirable from a long-term consumer welfare perspective.

Finally the CC also considered that since the shift to market economy has already happened, today sectoral regulators are there to intervene if that is necessary. If the competition authority would only state that prices of an undertaking are too high, that would lead to uncertainty on the market, because there would be no guidance as to the issue of how far the prices are treated as lawful, and at what point the prices begin to be treated as unlawful. On the other hand, if the competition authority would set the ‘‘right price’’, that would mean that the authority would become a price regulator, which—in the view of the CC—is undesirable in a market economy. This is nevertheless qualified, since the CC underlines that the above-mentioned considerations do not apply if the high prices lead to foreclosure, meaning that it affects market competition and the process of competition.

The decision of the NCA seems to be very much influenced by the recently appointed chief economist and its staff and reflects a very relaxed approach to price setting and the level of prices. Not only does this decision signal a possible shift in policy but also a shift in the approach to sectoral regulators.

*Dr Szilagyi Pal*

# The Netherlands

## Mergers

**Competition Authority**
*Coöperatie Bloemenveiling Aalsmeer U.A/Coöperatieve Bloemenveiling FloraHolland U.A—flowers and plants—cleared*

August 21, 2007

LT Dominant position; Horticulture; Market share; Mergers; Netherlands; Product markets

On December 22, 2006, Coöperatie Bloemenveiling Aalsmeer U.A. (Bloemenveiling Aalsmeer) and Coöperatieve Bloemenveiling FloraHolland U.A. (Bloemenveiling FloraHolland) notified a proposed concentration to the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit*; the NMa).[1]

Bloemenveiling Aalsmeer and Bloemenveiling FloraHolland's main activities include the selling of flowers and plants by auction. Besides auctioning, they offer sellers and buyers services with regard to logistics, packing materials, information services and business accommodation. On February 19, 2007, the NMa decided that the concentration required a licence.[2] Bloemenveiling Aalsmeer and Bloemenveiling FloraHolland subsequently applied for the license after which the NMa started an in-depth second phase investigation of the proposed concentration. The NMa concentrated its second phase investigation on the definition of the relevant product and geographical markets.

In its investigation, the NMa took into account the question whether alternative channels for selling flowers and plants, such as supplying directly to wholesalers and retailers or selling through associations of growers and producers' co-operative societies, offer a substitute for selling ornamental products by auction. In the context of this question, the NMa held that both sellers' and growers' sides of the market must be assessed jointly, because the choice for a sales channel is influenced both by buyers and sellers of the products. With regard to substitution for selling by auction, the NMa interviewed experts, wholesalers, buyers and consumers of ornamental products, internet auctions and foreign companies that act as a marketplace. In addition, the NMa investigated the question whether Bloemenveiling Aalsmeer and Bloemenveiling FloraHolland after the concentration could successfully implement deterioration of competition parameters, for instance by raising the provision for growers by 5 per cent. The NMa found that the actual loss percentages exceeded the critical loss percentages with regard to all the competition parameters. Consequently, increasing prices or a decrease in service cannot be implemented remuneratively because too many sellers and buyers will start using other sales channels. The NMa concluded that the various sales channels for ornamental products form, to a sufficient extent, each other's substitutes and can together be considered as one single product market. Therefore, the relevant product market according to the NMa is the auctioning of ornamental products. This can take place by means of the auction clock and intermediating but also through alternative channels.

In its earlier decision, the NMa held that the relevant geographical market was national. In the second phase investigation, however, the NMa held that over 40 per cent of the growers and buyers that will switch when the service deteriorates, answered to be able to switch to an alternative sales channel, such as supplying or buying directly to or from wholesalers and retailers. Also, over 20 per cent of those growers and buyers stated that they would switch to an auction outside the Netherlands. There are enough possibilities to buy and sell the products outside the Netherlands, for the most important European sales channels are Germany, the United Kingdom, France and Italy. Furthermore, the NMa took into account the African-European trading zone, the absence of obstacles for trading within the European Union, the current trading stream in the European Union and the comparable price level on the European market. The NMa thus concluded that the relevant geographical market is the European Union.

Based on its definition of the relevant (product and geographical) markets, the NMa held that approximately 30 to 40 per cent of the total stream of ornamental products in Europe, is handled by Bloemenveiling Aalsmeer and Bloemenveiling FloraHolland jointly. When distinguishing between types or ornamental products, the parties' market share with regard to flowers is 40 to 50 per cent and on the market for plants, the market share is 20 to 30 per cent. The NMa therefore concluded that the concentration between Bloemenveiling Aalsmeer

1 Decision of the NMa, August, 21, 2007, case 5901/184.
2 Decision of the NMa, February 19, 2007, case 5901/40.

and Bloemenveiling FloraHolland did not create or strengthen a dominant position that will significantly restrict competition on the Dutch market or a part thereof.

*Pierre Bos*

## United States

## Anti-competitive agreements

*Visa system—American Express—suit—settlement—US $2.1 billion*

Visa/American Express
November 7, 2007

LT Anti-competitive practices; Competition agreements; Credit cards; Settlement; United States

Visa has agreed to pay $2.1 billion to its credit card rival American Express to settle damages relating to a 2004 antitrust lawsuit.

The settlement, believed to be the largest amount ever paid to resolve an antitrust matter, came nearly three years after the Supreme Court ruled that Visa and MasterCard had violated antitrust rules by barring their member banks from offering their customers credit cards that could be used on rival payment networks. American Express and Discover Financial quickly filed suit, seeking billions of dollars in damages based on the revenue they believed they had lost. The settlement is likely to put pressure on Visa to strike a similar deal with Discover Financial. It also will turn the heat up on Visa's long-time rival MasterCard, which is the target of similar lawsuits by both American Express and Discover.

The settlement, by resolving the financial uncertainties posed by the lawsuit, is expected to pave the way for Visa's initial public offering as early as this spring. The agreement will be financed by Visa's member banks. The industry has changed significantly in the wake of the antitrust ruling. Bank of America and Citigroup, two of the three largest credit card issuers, signed a deal to offer their own customers American Express branded cards, and HSBC and General Electric's financial service arms reached agreements with Discover. With the American credit card market largely saturated, debit cards and payments using mobile phones are the areas that are most ripe for growth.

The agreement resolves American Express's claims against Visa's members, including some of the industry's biggest issuers, like JP Morgan Chase, Capital One, Washington Mutual and Wells Fargo. Visa will pay American Express $945 million now and an additional payment by the end of next March, its statement said. It will then pay American Express $70 million each quarter until the full settlement is paid. That payment is expected to be made largely with the proceeds of Visa's I.P.O., which will reduce the liabilities of each of its individual members. It will also significantly reduce the gains they might realise from the offering, however. Visa's new structure as a publicly traded company is expected to insulate shareholders from exposure to legal claims in several major cases. Those liabilities will be passed along to its member banks instead.

But Visa still has to resolve its case with Discover, which has similarly high stakes. The $2.1 billion settlement with American Express will establish a benchmark, but it is not clear if the damages in the Discover case will be higher or lower. While Discover's own customers tend to charge less on their cards, holders of Discover cards issued through other banks spend significantly more. Discover's user fees may be lower than those of American Express, its more prestigious rival, however. Leslie Sutton, a Discover spokeswoman, declined to comment on any pending litigation.

The Discover lawsuit could cost MasterCard another billion dollars or more in damages. Sharon Gamsin, a MasterCard spokeswoman, said the company was ''confident in our legal position and believe we have a strong defense''.

*Douglas F. Broder and Shari A. Alexander*

## Legislation

**US Senate**
*Vertical price fixing—Senate Bill—overturns Leegin*

October 30, 2007

LT Bills; Price fixing; United States; Vertical agreements

On October 30, 2007, Senator Herb Kohl of Wisconsin introduced a Bill to restore the rule of per se illegality for vertical agreements to fix minimum prices. According to Senator Kohl, the proposed Discount Pricing Consumer Protection Act (s.2261) would ''correct the Supreme Court's mistaken interpretation of the Sherman Act'', in its decision in *Leegin Creative Leather Products Inc v PSKS Inc* 127 S.Ct. 2705 (2007).

Specifically, the Bill would amend s.1 of the Sherman Act to add, after the first sentence:

> ''Any contract, combination, conspiracy, or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler or distributor shall violate the Act.''

Senator Kohl stated that:

> ''. . . [A]llowing manufacturers to set minimum retail prices will threaten the very existence of discounting and discount stores and lead to higher prices for consumers.''

He added that, by holding that resale price fixing agreements must be judged under the rule of reason, the Court had improperly applied an onerous and difficult burden for a plaintiff in an antitrust case.

Consideration of the Bill is still in its very early stages making it impossible to predict the likelihood of passage. Even if the Bill passes both Houses of Congress, it would still be subject to presidential veto, a real possibility given the Department of Justice's and the Federal Trade Commission's having filed a joint brief in *Leegin* supporting abolition of the per se rule against vertical price fixing.

*Douglas F. Broder and Shari A. Alexander*

## Mergers

**Federal Trade Commission**
*Owens Corning/Compagnie de Saint Gobain—glass fibre and composites—challenge—proposed consent order*

October 26, 2007

LT Acquisitions; Glass industry; Regulatory bodies; Substantial lessening of competition; United States

The Federal Trade Commission (FTC) challenged Owens Corning's proposed acquisition of the glass fibre reinforcements and composite fabric assets of French-based Compagnie de Saint Gobain (Saint Gobain), charging that the deal would lead to reduced competition in the North American market for continuous filament mat (CFM) products. But the acquisition may proceed under the terms of a proposed consent order that would require Owens Corning to divest its North American CFM business, along with related licenses and intellectual property. Under the agreement, the assets would have to be sold to AGY Holding Co (AGY) within 10 days of Owens Corning completing its acquisition of the Saint Gobain assets.

Glass fibre reinforcements are intermediate products which, when combined with resins, form compounds used in the construction, automotive, and electronics sectors. Composite fabrics, made of glass fibre reinforcements, are used to produce high-strength composite applications such as shipping containers, ballistic armour, and wind generator blades.

Owens Corning and Saint Gobain originally planned to combine their respective glass fibre reinforcement businesses in a new entity called Owens Corning Vetrotex Reinforcements. However, in response to antitrust concerns, the companies restructured the deal and entered into an agreement in which Owens Corning will instead acquire Saint Gobain's glass fibre reinforcements and composite fabric business assets worldwide, with several important exclusions. First, Owens Corning would not acquire Saint Gobain's glass fibre reinforcement assets in the United States. Next, certain assets in Europe would be divested under an agreement between the parties and the European Commission. Owens Corning will still acquire Saint Gobain's CFM assets, including a CFM production facility in Italy.

According to the FTC's complaint, the acquisition as proposed would have substantially lessened competition in the already highly concentrated North American market for the development, manufacture, and sale of CFM and related technology. The FTC contended that for many years Owens Corning and Saint Gobain have been the primary competitors in the CFM market, with the two companies accounting for more than 90 per cent of the CFM sold in North America. Entry into the market by a new competitor would not be timely, likely, or sufficient to deter or offset the anti-competitive effects of the acquisition, the FTC added.

The proposed consent order specifically would require Owens Corning to divest its Huntingdon, Pennsylvania, CFM facility to AGY and to divest a furnace in South Carolina that currently supplies the Huntingdon facility with glass fibre marbles used in the production of CFM. In addition, Owens Corning would be required to grant AGY two licenses, the first for intellectual property related to the production, marketing, and distribution of CFM, and the second to the furnace technology related to CFM as used in two Owens Corning facilities. Finally, the order allows the parties to enter into transition agreements over the short term, including an agreement for the supply of raw materials for the production of marbles. It also precludes Owens Corning and Saint Gobain from entering into any agreement that would reduce the value of the assets still owned by Saint Gobain.

*Douglas F. Broder and Shari A. Alexander*

## Mergers

**Department of Justice**
*Cal Dive International Inc—merger—consent decree—violation—settlement*

November 26, 2007

LT Acquisitions; Conditions; Contempt of court; Fines; Settlement; United States

On November 26, 2007, the Department of Justice (DOJ) filed a petition in the US District Court for the District of Columbia requesting that the court find Cal Dive International Inc and its parent company Helix Energy Solutions Group Inc (Cal Dive) in civil contempt for violating a consent decree issued in 2005. The DOJ simultaneously filed a settlement agreement and order, subject to court approval. Pursuant to the settlement agreement, Cal Dive will pay $2 million to resolve alleged violations of the 2005 consent decree. The $2 million payment is comprised of the profits Cal Dive earned through its alleged violations and the costs incurred by the DOJ during its investigation of Cal Dive.

The 2005 consent decree had required Cal Dive to divest certain assets related to its saturation diving business due to antitrust concerns arising from its purchase of saturation diving assets from Stolt Offshore Inc and S&H Diving LLC (Stolt). Cal Dive's purchase of those assets reduced the number of major suppliers of saturation diving services in the Gulf of Mexico from three to two.

Under the terms of the consent decree, Cal Dive was to divest two saturation diving vessels and a separate saturation diving system. The consent decree also prohibited Cal Dive from interfering with the divestiture or operation of the assets to be sold. Nonetheless, according to the DOJ, Cal Dive delayed the sale of one of the vessels as well as other assets, allowing Cal Dive to profit from the market for sub-sea repair work that occurred following Hurricanes Katrina and Rita.

Thomas O. Barnett, Assistant Attorney-General in charge of the Department's Antitrust Division, stated, "[t]he Antitrust Division will vigorously prosecute violations of court orders, which prevent harm to consumers from certain mergers, acquisitions, and other conduct". He further added, "[t]he Division will not allow parties to benefit from their failure to comply with their legal obligations".

*Douglas F. Broder and Samantha J. Katze*

## Procedure

**Department of Justice**
*Foreign executives—targeted enforcement activity*

LT Cartels; Competition policy; Foreign companies; Managers; National competition authorities; Prosecutions; Sentencing; United States

Foreign executives have become a common target of antitrust investigations by the US Department of Justice (DOJ) as a result of the DOJ's increased focus on international cartel prosecutions. This crackdown on foreign executives has produced a rise in the number of jail sentences and guilty pleas by foreign executives as well as a lengthening of the prison terms served by those executives.

Since 1999, the DOJ's Antitrust Division has entered into plea agreements with 29 executives from nine countries. Foreign executives now receive prison sentences averaging 12 months, almost twice the average length of terms a year ago, and four times the length of the average sentence in 2001. Furthermore, the past year has witnessed the two longest sentences ever obtained by the Antitrust Division against foreign executives.

In 2004, Congress increased the maximum sentence for Sherman Act violations from 3 to 10 years leading to a doubling of the average sentence since 2005. In the fiscal year ending on September 30, foreign and US executives received about 31,000 jail days. In May 2007, the Department of Justice imposed a 14-month prison term on a foreign executive for a price fixing conspiracy. During that same month, the DOJ arrested eight executives from the United Kingdom, France, Italy and Japan amid allegations of price fixing and market allocation for sales of marine hose. In addition, in August, the DOJ reached plea agreements with British Airways Plc and Korean Air Lines Co for their roles in an airline flight price fixing conspiracy. Both companies agreed to pay $300 million in fines.

The trend toward increased prosecutions of international executives for antitrust violations may be attributed to two primary sources. First, foreign nationals convicted of US antitrust violations are now subject to deportation as a result of a 1996 memo of understanding between the DOJ's Antitrust Division and the US Immigration and Naturalisation Service (INS). The memo of understanding states that violations of the Sherman Act constitute, ''crimes involving moral turpitude'' and thus form a basis for deportation. At the same time, however, the agreement directs the INS not to seek deportation if a foreign national agrees to co-operate.

Secondly, the DOJ has started to work more closely with antitrust enforcement agencies in other countries as a means to obtain guilty pleas. The DOJ employs border watches to detect executives' entry into the United States. It also uses notices through the International Criminal Police Organisation to help extradite the executives. According to Scott D. Hammond, head of criminal enforcement at the DOJ's Antitrust Division, foreign executives cannot remain international fugitives with the same ease as before because foreign countries have become increasingly co-operative with the DOJ.

*Douglas F. Broder and Samantha J. Katze*