

Court could be tempted to repeat, *mutatis mutandis*, what it had said in the *Mox Plant* litigation, namely the prohibition to submit instruments of EU law to an Arbitral Tribunal to which the EU is not a party for purposes of their interpretation and application.⁵⁶ The stalemate would then be complete.

E. Conclusion

The EU may well be proud of its leadership in carbon emission abating policy. Some facts should however not be forgotten. Civil aviation still accounts for only 2 per cent of all carbon emissions worldwide, even if the percentage is rapidly increasing. For the sake of comparison, the light-duty vehicles and the high-duty vehicles sectors are responsible for respectively 8 per cent and 6 per cent of all European carbon emissions, but here the EU Commission has just started to consider a comprehensive strategy on how to tackle the issue.⁵⁷ The Commission's slow pace does not come as a surprise, given the traditional extraordinary effectual lobbying power of this strategically important economic sector in the EU.

The suspicion inexorably arises that through Directive 2008/101 the EU Commission just wanted to set an example selecting the transport sector, in which the publicity effect of such measures and the favourable reaction of domestic constituencies would be maximized as compared to the costs to the European economy. The increased costs sustained by the aircraft operators will most probably be passed over to the passengers anyway, meaning an average increase of flight tickets from 2 to 10 euros depending on the distance of the flight. If that will prove a severe enough incentive to meaningfully abate emissions in a foreseeable future is more than doubtful.

By obediently endorsing the validity of Directive 2008/101, the Court might have thought to both contribute to the noble cause of climate change mitigation and to reaffirm the supremacy of EU law. Possibly, it will not reach either of the two goals.

ANDREA GATTINI*

COMPETITION LAW

The period under review (January 2010 – June 2012) has been a time of consolidation (or exhaustion) for the Union generally, as the *Lisbon* changes are allowed to bed in.

thriving force in rendering Directive 2008/101 as strict as possible with regard to extra-European aircraft operators; see Havel and Mulligan (n 3) 6.

⁵⁶ Case C-459/03, *Commission of the European Communities v Ireland* [2006] ECR I-4635, paras 151–152.

⁵⁷ Succinct, but none the less telling information available online at <http://ec.europa.eu/clima/policies/transport/vehicles/heavy/index_en.htm>.

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The competition sphere is no exception. There has been limited initiative, certainly nothing ambitious to come out of the Commission over the period. At the same time a new Commission took up office—three months late, and by a little-remarked constitutional sleight of hand¹—in 2010, and with it came a new Commissioner for Competition (Mr Almunia) and with him a new Director-General of DG Competition (Mr Italianer—Dutch notwithstanding the name), which event sometimes, but not always, marks a reorientation of Union competition policy. Both are economists which, again, may or may not influence the direction of policy. At the same time the Union has been buffeted by a financial crisis not wholly of its own making in which the competition rules must have a significant role to play.

A. The Economic Crisis

Having in the early days of the crisis remained on the sidelines, in October 2008 the Ecofin Council resolved that a common Union response to the economic crisis was necessary² and a month later Mrs Kroes, then Commissioner for Competition, declared the crisis to be ‘systemic’ and that adherence to the competition rules was ‘part of the solution, not part of the problem’.³ In particular, the integrity of the internal market required to be re-entrenched and protected. This could, and should, be prosecuted on a number of fronts.

1. Article 101

The Commission has not always set itself resolutely against crisis cartels, or ‘industrial restructuring agreements’ marked by efforts to reduce production capacity in a crisis industry: it had in the past smiled upon them occasionally, finding infringement of Article 101 but granting an exemption under Article 101(3).⁴ Similar generosity could be a flexible means of allowing firms in difficulty to cope with the fallout of the crisis and the credit squeeze. But more recently the Court of Justice found a crisis cartel in the Irish beef market to be a restriction of competition by object.⁵ This does not mean that Article 101(3)—a matter no longer exclusively for the Commission—cannot apply,⁶ but it makes it all the more difficult. The Commission moved to submit *amicus curiae*

¹ The Union was bound by primary (Treaty) law to appoint a new Commission by 31 October 2009 (2003 Act of Accession, art 45(2)(b)). But political events in flux owing to the last minute flurry of Lisbon ratifications it failed to do so, the existing Commission simply staying in office, by grace, it claimed, of a principle of continuity of public service, competent to ‘deal with current business’ (*expédier des affaires courantes*). The (fortuitous?) delay allowed the new Commission to be appointed (in February 2010) in accordance with the new (Lisbon) procedure prescribed for the 2009–14 term of office and not by the immediately previous scheme which would have required cutting the number of Commissioners (Protocol [annexed to the pre-Lisbon TEU, the EC and Euratom Treaties] on the Enlargement of the European Union, art 4(2)–(3)) contrary to promises made—without Treaty authority—by the heads of state and government (Brussels European Council, 11/12 December 2008, Presidency Conclusions, Bulletin EU 12-2008, p 8, para I.4.2) to the Irish in order to coax them into voting ‘yes’ in the second Lisbon referendum.

² Ecofin Council of 7 October 2008, Conclusions, Council Doc 13930/08.

³ Memo/08/757.

⁴ Decision 84/380 (*Synthetic Fibres*) OJ 1984 L207/17; Decision 94/296 (*Stichting Baaksten*) OJ 1994 L131/15.

⁵ Case C-209/07 *Competition Authority v Beef Industry Development Society and anor* [2008] ECR I-8637.

observations under Article 15(2) of Regulation 1/2003⁷ to the Irish High Court when it was considering the issue of Article 101(3) justification⁸ and it has indicated general lack of enthusiasm elsewhere.⁹ It appears that undertakings seeking mutual accommodation from the crisis may expect limited respite from the Commission in the context of Article 101.

However, it does appear to be easing up in the ferocity of its fines in competition matters. It is true that the third, sixth and seventh heaviest cartel fines ever imposed by the Commission—in, respectively, the air freight cartel (€799.4 million),¹⁰ the liquid crystal display (LCD) panels cartel, involving exclusively Korean and Taiwanese firms (€648.9 million),¹¹ and the bathroom fittings cartel (€622.3 million)¹²—were imposed in 2010. But these were egregious cartels and matters already in the pipeline. Total cartel fines were annually, from 2006 to 2010, €1,850 million, €3,340 million, €2,238 million, €1,540 million and €3,056 million. In 2011 they were (merely) some €614 million and €372 million in the first half of 2012. Whilst this is not to anticipate gentleness in the *Google* case, not a cartel but an Article 102 investigation, for, it is claimed, lowering the ranking of competing services in its search engine results and imposing exclusivity obligations upon its advertising partners,¹³ and which, if the infringement is made out, could put all previous fines in the shade, it seems clear that the Commission's avarice is diminishing. Whether this marks a sensitivity to the economic crisis, or Mr Almunia is of gentler disposition than Mrs Kroes, or it is merely a coincidence is difficult to say. Certainly inability to pay ('ITP') is recognized as a ground to be taken into account by the Commission in 'exceptional cases' in setting a fine,¹⁴ and although Mr Italianer has recently confirmed that fines 'should be punitive'¹⁵ it seems the Commission is taking some note of the hard times we are in.

⁶ See the opinion of A-G Trstenjak who suggests (at para 86) that production levies limited in time (to one year) 'may possibly be taken into account under Article [101](3)'.

⁷ Regulation 1/2003 OJ 2003 L1/1.

⁸ The Supreme Court accepted the Court of Justice finding that the agreement was one which distorted competition by object but remitted the case back to the High Court to hear argument on whether art 101(3) was joined: *Competition Authority v Beef Industry Development Society and anor* [2009] IESC 72, [2010] 1 IR 767. The BIDS eventually withdrew its claim and the High Court entered judgment for the Competition Authority in January 2011.

⁹ See the Commission submission to the OECD in the latter's *Global Forum on Competition: Crisis Cartels*, DAF/COMP/GF(2011)11, pp 112-120.

¹⁰ Case COMP/39.258, decision of 9 November 2010; under review as Cases T-36 etc/11 *Japanese Air Lines and ors v Commission*, pending.

¹¹ Case COMP/39.309, decision of 8 December 2010; under review as Cases T-91 etc/11 *Chimei InnoLux Corp and ors v Commission*, pending.

¹² Case COMP/39.092, decision of 23 June 2010; under review as Cases T-362 etc/10 *Duravit and ors v Commission*, pending.

¹³ Cases COMP/39.740 (*Foundem/Google*), COMP/39.768 (*Ciao/Google*) and COMP/39.775 (*IplusV/Google*); investigation initiated in November 2010.

¹⁴ See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C210/2, point 35. Case COMP/38.866 (*Animal feed phosphates cartel*), OJ 2011 C111/19 (summary publication).

¹⁵ Studienvereinigung Kartellrecht Conference, Brussels, 14 March 2012, Recent Developments regarding the Commission's cartel enforcement, p 3.

2. Mergers

The first merger prohibited by the Commission under the new (2004) merger regulation¹⁶ was the proposed acquisition of Aer Lingus by Ryanair in 2007.¹⁷ There have now been two more:

- a proposed merger consisting in the acquisition by the owners of Aegean Airlines of majority control of Olympic Airways, which would have led to a ‘quasi-monopoly’ in the markets for flights between Athens and Thessaloniki and between Athens and eight island airports.¹⁸ This was not dissimilar to the issues raised, *mutatis mutandis*, in *Ryanair/Aer Lingus*, but it cannot be taken as natural Commission antipathy to airline mergers, for six months prior to *Olympic/Aegean* it approved the merger (into the International Airlines Group) of British Airways and Iberia,¹⁹ and a year later it allowed IAG to acquire British Midlands (from Lufthansa),²⁰ albeit at the cost of a quarter of BMI’s London slots and access of some of BA’s competitors to its network of internal connecting flights from Heathrow.²¹
- a merger of Deutsche Börse and NYSE Euronext which would create another quasi-monopoly in the area of European financial derivatives traded globally on exchanges, the two taken together controlling more than 90 per cent of global trade in these products and no new market entry likely.²²

The prohibition of three mergers since the new merger regulation entered into force in 2004 and 22 in total since the start in 1990 suggests a light touch, and one not perceptibly altered since the onset of the economic crisis, in which a failing firm criteria might be expected to attract greater sympathy. But this is of course heavily misleading, for most contentious mergers are cleared by the Commission only with conditions (‘commitments’).²³ The Commission views commitments as an important part of its merger control armoury, for there is in Union law no post-merger control save for enforcing compliance with commitments made, or the general application of Article 102. Parties to a merger are of course aware of this, so frequently offering remedies at an early stage of discussion so that problems are pre-empted. In other words, the 22 prohibitions are only the tip of the merger iceberg.

Whilst having nothing to do with the economic crisis, it is worth noting that although Germany has long championed the dominance test in merger control, in Spring 2012 the federal government proposed the adoption instead of the ‘significant impediment to effective competition’ (SIEC) test.²⁴ The proposal was welcomed by the

¹⁶ Regulation 139/2004 OJ 2004 L24/1.

¹⁷ Case COMP/M.4439 (*Ryanair/Aer Lingus*), OJ 2008 C47/9 (summary publication). A subsequent petition by Aer Lingus inviting the Commission to require Ryanair, under art 8(4) of Regulation 139/2004, to divest its existing control of Aer Lingus (some 30 per cent of shares) was rejected by the Commission (Decision C(2007) 4600 of 11 October 2007, unpublished), the refusal upheld by the General Court in Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691.

¹⁸ Case COMP/M.5830, decision of 26 January 2011, not yet published.

¹⁹ Case COMP/M.5747, decision of 14 July 2010, not yet published.

²⁰ Case COMP/M.6447, decision of 30 March 2012, not yet published.

²¹ For the (extensive) commitments see pp 164–95.

²² Case COMP/M.6166, decision of 1 February 2012, not yet published.

²³ Of 147 mergers cleared following a phase 2 investigation (that is, where a proposed merger ‘raises serious doubts as to its compatibility with the common market’; Regulation 139/2004, art 6(1)(c)) to June 2012, 96 required commitments.

Bundeskartellamt²⁵ and is, at the time of writing, before the Bundestag. If adopted it will bring German law tightly into line with Union law. The holdouts which prefer the ‘significant lessening of competition’ (SLC) test, Ireland and the United Kingdom, having each come to it only in 2002,²⁶ show no enthusiasm to depart from it. (And whilst on this detour it is also worth noting, for it has no natural home elsewhere in this comment, that Portugal has adopted a comprehensive new competition law, bringing Portuguese law into close alignment with Union law.²⁷)

3. State aid

The Commission continues to scrutinize new aids swiftly and generously, and not only under Article 107(3)(c) (facilitating the development of certain economic activities or regions) but Article 107(3)(b) (remediating a serious disturbance in the economy of a member state),²⁸ a category more malleable and previously available only sparingly. It has set out parameters on its approach to guarantees covering the liabilities, recapitalization, controlled winding up of, and other forms of liquidity assistance to, financial institutions, so long as ‘undue distortions’ to competition are avoided, and has adopted a number of ‘temporary’ communications as an aid to the (gentle) application of the state aid rules in favour of banks and financial institutions reeling from the financial crisis, on:

- the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (the Banking Communication);²⁹
- recapitalization of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition (the Recapitalisation Communication);³⁰
- the treatment of impaired assets in the Community banking sector (the Impaired Asset Communication);³¹ and
- the return to viability and the assessment of restructuring measures in the financial sector in the current crisis (the Restructuring Communication).³²

There is also a temporary framework for state aid measures to support access to finance in the current financial and economic crisis,³³ revised in 2011,³⁴ and another to support measures, from January 2012, in favour of banks in the context of the financial and sovereign debt crises.³⁵

²⁴ Gesetzentwurf der Bundesregierung vom 28. März 2012, Achstes Gesetz zur Änderung des GWB (8. GWB-Novelle); see the proposed § 36 I GWB.

²⁵ Stellungnahme des Bundeskartellamts zum Regierungsentwurf zur 8. GWB-Novelle vom 22. Juni 2012.

²⁶ Respectively, Competition Act, 2002, s 22(3); Enterprise Act 2002, ss 35, 36. Previously the tests had been the far woollier contrary to the common good or against the public interest.

²⁷ Lei n.º 19/2012 de 8 de maio 2012 aprova o novo regime jurídico da concorrência, Diário da República, 1.ª série—N.º 89—8 de maio de 2012; in force 7 July 2012.

²⁸ See Communication from the Commission—The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ 2008 C270/8, para 9.

²⁹ OJ 2008 C270/8.

³⁰ OJ 2009 C10/2.

³¹ OJ 2009 C72/1.

³² OJ 2009 C195/9.

³³ OJ 2009 C83/1.

³⁴ OJ 2011 C6/5. See also the Commission Staff Paper, The Effects of temporary State aid rules adopted in the context of the financial and economic crisis, SEC(2011) 1126 final.

³⁵ OJ 2011 C356/7.

Aid to the financial sector is now generally reckoned to be about €1.6 billion (*sic*).

As regards state aid more generally, in Spring 2012 the Commission adopted a communication on state aid modernisation (SAM),³⁶ intending to draw the state aid regime more effectively ('actively and positively') into the Europe 2020 programme. The three 'pillars' of the initiative are more focused and better-quality aid, simplification, and shifting of the focus to a more structured policy approach. As a first step it has launched a review of the (four-year-old) general block exemption regulation (GBER)³⁷ with a view to proposing a revised version in 2013.

B. Services of General Economic Interest

In 2005 the Commission adopted a decision (under Article 106(3)) on the application of Article 106 to state aid in the form of public service compensation granted to undertakings providing services of general economic interest (SGEIs).³⁸ It was replaced in early 2012 with a new comprehensive 'package' on the application of state aid rules to SGEIs.³⁹ Exempted from any obligation to notify is subvention for the running of social services, more specifically health and long-term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups.⁴⁰ Other services (other than transport and transport infrastructure) receiving public compensation are exempted up to a cap of €15 million per year.⁴¹ A communication sets out the manner in which the Commission will analyse cases falling outwith the decision and notified to it.⁴² The final element of the package is a *de minimis* regulation for SGEIs, exempting from the prohibition of Article 107 subvention of up to €500,000 over a given three-year period.⁴³

C. Enforcement

I. Commission enforcement

Fines imposed under Regulation 1/2003 are still nominally administrative, not criminal, penalties,⁴⁴ but this is a view coming increasingly under serious challenge.⁴⁵ Even the Court of Justice is wavering: Advocate-General Kokott finds the enforcement

³⁶ COM(2012) 209 final.

³⁷ Regulation 800/2008 OJ 2008 L214/3.

³⁸ Decision 2005/842 OJ 2005 L312/67. The decision was more of the nature of a block exemption (see immediately below) and so arguably improperly adopted under art 106(3).

³⁹ Decision 2012/21 OJ 2012 L7/3 on the application of Article 106(2) of the TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs; also Communication on the application of European Union State aid rules to compensation granted for the provision of SGEIs, OJ 2012 C8/4.

⁴⁰ Decision 2012/21, *ibid.*, arts 2, 3.

⁴¹ Decision 1/2003, arts 2(1)(a), 3.

⁴² European Union framework for State aid in the form of public service compensation, OJ 2012 C8/15.

⁴³ Regulation 360/2012 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid granted to undertakings providing services of general economic interest, OJ 2012 L114/8.

⁴⁴ Art 23(5); confirmed by the Court of Justice in Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769.

⁴⁵ See eg I. Forrester, 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 EL Rev 185.

mechanisms of Regulation 1/2003 combined with the severity of fines which may be imposed to be ‘an issue which is time and again the subject of discussion and currently ... of increasing attention’⁴⁶ and believes the Union regime of sanctions to mean that ‘the area is at least akin to criminal law’,⁴⁷ whilst Advocate-General Sharpston speaks of the ‘*de facto*’ and ‘ongoing’ “‘criminalisation” of competition law’.⁴⁸ In all cases it has ramifications for the procedural safeguards afforded by Article 6 of the European Convention on Human Rights, but which sets stricter standards in the criminal arena. However, as Ms Sharpston allows, ‘[t]he requirements a system of judicial review must meet to comply with Article 6(1) ECHR have yet to be fully clarified, but it is uncertain whether the existing system of EU competition law enforcement, including judicial review, meets those requirements’.⁴⁹ With Lisbon the Union is required to accede to the Convention,⁵⁰ and perhaps with this in mind there is now before the Court a number of challenges to the machinery and review of Commission fines. According to the Court of Human Rights Article 6 requires the Union judicature to exercise ‘full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision’.⁵¹ This it does vigorously in other contexts,⁵² and there is no question it has the power to do so under Article 261 TFEU and Article 31 of Regulation 1/2003 (at least where a decision has imposed a fine or a periodic penalty payment), but there are doubts as to whether it discharges this jurisdiction adequately. Given the Union’s judicial architecture it is a task which falls primarily to the General Court; but that Court’s articulation of its proper role in *Microsoft*⁵³ is one which seems to fall short of the mark. There were hopes in some quarters that the Court of Justice would take a robust stand in the *KME* cases⁵⁴ and in *Chalkor*⁵⁵ but they were dashed in late 2011, the Court finding no affront in Union procedure to the right to effective judicial review and, implicitly, to Article 6 ECHR. Recent indications from Strasbourg suggest the Court of Human Rights might not, now, disagree.⁵⁶ There remain other high-profile cases in the pipeline,⁵⁷ but it is difficult to see how the General Court can now, even were it minded to do so, say otherwise.

⁴⁶ Cases C-628/10 & 14/11P *Alliance One International and ors v Commission*, pending, at para 95 of her opinion.

⁴⁷ Case C-97/08P *Akzo Nobel and ors v Commission* [2009] ECR I-8237, at para 39 of her opinion (‘es sich um einen dem Strafrecht zumindest verwandten Bereich handelt’).

⁴⁸ Case C-272/09P *KME Germany and ors v Commission*, judgment of 8 December 2011, not yet reported, at paras 46 and 51 of her opinion.

⁴⁹ At para 51 of her opinion.

⁵⁰ TEU, art 6(2).

⁵¹ *Janosevic v Sweden* (2004) 38 EHRR 22, at para 81; expressly recognized by the General Court in Case T-138/07 *Schindler Holding Ltd and ors v Commission*, judgment of 13 July 2011, not yet reported, at paras 56, 107.

⁵² See the robust language of the General Court in Case T-85/09 *Kadi v Commission* (Kadi III) [2010] ECR II-5177.

⁵³ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, at paras 87–88; the approach reconfirmed in Case T-301/04 *Clearstream Banking & Clearstream International v Commission* [2009] ECR II-3155, at paras 93–95.

⁵⁴ Case C-272/09P *KME Germany*, *fn 48 above*; Case C-389/10P *KME Germany and ors v Commission*, judgment of 8 December 2011, not yet reported.

⁵⁵ Case C-386/10P *Chalkor Exergasias Metallon v Commission*, judgment of 8 December 2011, not yet reported.

⁵⁶ *Menarini Diagnostics v Italy* (Application n° 43509/08), judgment of 27 September 2011, not yet reported. Cf the earlier *Société Stenuit v France* (1992) 14 EHRR 509; *Dubus v France* (Application No 5242/04), judgment of 11 June 2009, not yet reported.

Yet the matter is not closed. Here is Advocate-General Bot, in an appeal against a judgment of the General Court confirming a fine of €38 million imposed upon E.ON for breaking a seal in the course of a Commission investigation:⁵⁸

‘I am inclined to think that the General Court did not fully exercise its unlimited jurisdiction.

Indeed, I consider that the Court should not have merely asserted . . . that ‘contrary to what the applicant maintains, a fine of EUR 38 million cannot be regarded as disproportionate to the infringement, in the light of the particularly serious nature of a breach of seal, the size of the applicant and the need to ensure that the fine has a sufficiently deterrent effect’.

Although [that assertion] must obviously be read in the light of [previous] paragraphs, the fact remains that the Court did not, in my opinion, act like an appeal court examining and taking possession of the case as from the beginning, as required by Article 6 ECHR.

First of all, I think that the General Court’s appraisal was not sufficiently independent of that of the Commission.

In the present case, the question was whether the fine of EUR 38 million imposed by the Commission was a just penalty for the appellant’s alleged conduct. Did a fine of that amount make it possible to penalise the applicant’s unlawful conduct effectively, in a manner which is not negligible and which remains sufficiently deterrent? On that point I have a feeling that the General Court did not form its own opinion, relying on the amount fixed in a rather general way by the Commission.⁵⁹

and so recommends that the judgment be set aside and the case remitted back to the General Court for proper (‘unlimited jurisdiction’) consideration. If the Court follows him it could re-open the issues of the effective (Article 6) judicial protection in the matter of fines, if not of the procedures of Regulation 1/2003 more generally.

2. Settlement

The settlement procedure introduced in 2008,⁶⁰ providing for settlement of cartel cases through a simplified procedure involving acknowledgement of cartel involvement and liability for it in return for a 10 per cent reduction in a fine, was used for the first time in 2010⁶¹ and, as of June 2012,⁶² has been used six times. Settlement can be reached in a ‘hybrid’ case, involving settlement with some but not all undertakings.⁶³

3. Block exemption

The year 2010 saw the natural death of almost all the block exemptions in force and their replacement. The insurance block exemption was replaced,⁶⁴ as were the motor vehicle block exemption⁶⁵ and the ‘horizontal’ block exemptions on research and

⁵⁷ Case T-56/09 *Saint-Gobain Glass and ors v Commission* and Case T-286/09 *Intel v Commission*, both pending.

⁵⁸ Case COMP/39.326 (*E.ON Energie*), decision of 30 January 2008, unpublished, upheld in Case T-141/08 *E.ON Energie v Commission*, judgment of 15 December 2010, not yet reported.

⁵⁹ Case C-89/11P *E.ON Energie v Commission*, pending, at paras 116–120 of his opinion (delivered 21 June 2012).

⁶⁰ Regulation 622/2008 OJ 2008 L171/3.

⁶¹ Case COMP/38.511 (*DRAMS cartel*), OJ 2011 C180/15 (summary publication).

⁶² Case COMP/39.611 (*Water management products cartel*), decision of 27 June 2012.

⁶³ Case COMP/38.866 (*Animal feed phosphates cartel*), OJ 2011 C111/19 (summary publication).

⁶⁴ Regulation 267/2010 OJ 2010 L83/1. See also Communication from the Commission on the application of Article 101(3) of the TFEU to the insurance sector, OJ 2010 C82/2.

⁶⁵ Regulation 461/2010 OJ 2010 L129/52. Also Supplementary guidelines on vertical restraints in the sale, repair and distribution for motor vehicles, OJ 2010 C135/8.

development and specialization agreements.⁶⁶ Of widest application and interest, a new vertical agreements block exemption applies from June 2010 (until June 2022).⁶⁷ None of them marked a significant change in style, that having occurred with their predecessors and the incorporation of a 'more economic approach' which marked them out from their own predecessors. The exercise was thus one more of renewal than of replacement. One significant change in the vertical agreements block exemption, the exclusion of its benefits to suppliers with greater than a 30 per cent market share is extended to apply equally to buyers,⁶⁸ whereas previously this was so only for agreements containing exclusive supply obligations.⁶⁹ This is of course recognition that a buyer may also have and exert market power. The previous extension of exemption to non-reciprocal vertical agreements between competing undertakings on condition that the buyer has a total annual turnover not exceeding €100 million⁷⁰ has disappeared. There is also recognition that the regulation must apply to online sales,⁷¹ which have the capacity to imperil the integrity of traditional selective (and exclusive) distribution systems, they traditionally turning significantly upon geographic contract territory. This has now been considered in detail by the Court of Justice.⁷²

The 2004 technology transfer block exemption⁷³ is scheduled to expire in Spring 2014; at the end of 2011 the Commission initiated a public consultation in order to air suggestions for its amendment and renewal.

4. Decentralization

Following the 2005 Green Paper⁷⁴ and the 2008 White Paper⁷⁵ the Commission continues to champion the cause of private enforcement, but *sotto voce*. The 2009 'phantom' directive on actions for damages,⁷⁶ surfacing in the sunset of Mrs Kroes's term as Commissioner for competition, sunk without a trace. It was in any event a damp squib⁷⁷ and failed to address a number of questions now coming to the fore.

In particular the Court of Justice has opened a can of worms in *Pfleiderer*.⁷⁸ In 2008 the Bundeskartellamt imposed significant fines upon a number of décor paper manufacturers for price fixing and capacity closure agreements contrary to both Article 101 TFEU and § 1 GWB.⁷⁹ Having purchased more than €60 million worth of paper and other items from the cartel, Pfeleiderer AG launched a civil claim for damages,

⁶⁶ Regulation 1217/2010 OJ 2010 L335/36 and Regulation 1218/2010 OJ 2010 L335/43 respectively. Also Guidelines on the applicability of Article 101(3) of the TFEU to horizontal cooperation agreements, OJ 2010 C11/1 (applicable to both).

⁶⁷ Regulation 330/2010 OJ 2010 L102/1. Also the (very useful) Guidelines on vertical restraints, OJ 2010 C130/1.

⁶⁸ Regulation 330/2010, art 3(1).

⁶⁹ Regulation 2790/1999 OJ 1999 L336/21, art 3(1).

⁷⁰ Art 2(4)(a).

⁷¹ See the Guidelines on vertical restraints, paras 51–55.

⁷² Case C-439/09 *Pierre Fabre Dermo-Cosmétique v Président de l'Autorité de la concurrence and anor*, judgment of 13 October 2011, not yet reported.

⁷³ Regulation 772/2004 OJ 2004 L123/11.

⁷⁴ *Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final.

⁷⁵ *Damages actions for breach of the EC antitrust rules*, COM(2008) 165 final.

⁷⁶ Proposal for a Council Directive on rules governing actions for damages for infringements of Articles 81 and 82 of the Treaty, unpublished.

⁷⁷ See discussion in [2010] 59 ICLQ 489.

⁷⁸ Case C-360/09 *Pfleiderer v Bundeskartellamt*, judgment of 14 June 2011, not yet reported.

⁷⁹ Bundeskartellamt, Entscheidung vom 21. Januar 2008 (*Dekorpapier*); Pressemeldung vom 5. Februar 2008.

in the course of which it applied to the Bundeskartellamt for full access to its file, including documents submitted to it under the (German) leniency programme. The Bundeskartellamt refused, a decision challenged by Pfeleiderer in the Amtsgericht Bonn. Referred to it under Article 267 TFEU, the Court of Justice said that the Commission leniency programme had no binding effect upon national courts, the matter was not covered by EU rules, the effectiveness of the leniency programme could be undermined if documents were to be disclosed to prospective damage claimants for the cartelist would thus be deterred from engaging and cooperating with the competent administrative authorities, but a right to damages was well established Union law which is itself a powerful deterrent to anticompetitive behaviour, and so it was for the national courts to determine whether leniency documents ought to be disclosed, weighing up these various interests.

The judgment raises complex problems for the coexistence of leniency and civil action, or, put otherwise, public and private enforcement of the competition rules. Certainly it may have a chilling effect upon the (considerable) success of the Commission's leniency programme, a cartelist likely to be wary of seeking (or assisting) leniency if the documentation and information it supplies becomes easily available to any party injured by the cartel, so leading to liability in damages which may many times outstrip the costs of an administrative fine. At the least it is likely very carefully to sift any information it provides, and may be less than frank and forthright with the more inculpatory material. And, like many of the problems with civil enforcement, it is likely to lead to variations from Member State to Member State: in the event the Amtsgericht decided against disclosure,⁸⁰ but in a follow-on claim in the UK under Section 47A of the Competition Act stemming from the gas insulated switchgear cartel,⁸¹ Mr Justice Roth in the High Court found the *Pfeleiderer* rule to apply to the Commission as well as national leniency programmes and, applying it, ordered disclosure of a number of leniency documents in the defendants' possession.⁸² The issue is again before the Court in a reference from the Oberlandesgericht in Vienna,⁸³ and it may wish to take the opportunity to provide greater clarity if not security. It is worth noting a Hungarian solution to the problem, whereby any party granted immunity under the leniency programme gains also immunity from civil liability, the liability borne by other parties to the cartel.⁸⁴

In fact the whole body of Union law on confidentiality of documents is in a state of confusion and flux. The Union rule on the privilege adhering to lawyer–client communications dates from the *AM&S* judgment in 1982,⁸⁵ conferring the benefit of confidentiality only upon 'outside' legal advice, and not upon communications from 'enrolled in house lawyers'⁸⁶ within a firm's legal department. It being a rule distilled from the principles applying generally throughout the Member States, this was an

⁸⁰ Amtsgericht Bonn, 18. Januar 2012 (*Pfeleiderer II*), EuZW 2012, 193.

⁸¹ Case COMP/38.889 OJ 2008 C5/7 (summary publication).

⁸² *National Grid Electricity Transmission plc v ABB Ltd and ors* [2012] EWHC 869 (Ch), [2012] All ER (D) 92.

⁸³ Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie and ors*, pending.

⁸⁴ 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról (as amended by 2009. évi XIV. törvény), 88/D. §.

⁸⁵ Case 155/79 *AM&S Europe v Commission* [1982] ECR 1575.

⁸⁶ Case C-550/07P *Akzo Nobel Chemicals and anor v Commission* [2010] ECR I-8301, per A-G Kokott at para 1 of her opinion ('abhängig beschäftigter Syndikusanwalt').

uncommonly narrow construction. The Court had the opportunity of altering it in *Akzo Nobel Chemicals*⁸⁷ but despite spirited urging to do so it declined, the reasoning being⁸⁸ that the in-house lawyer does not enjoy the same degree of independence from his or her employer and is less able to deal effectively with conflicts between professional obligations and employer's interests. It is not certain this view could withstand a challenge under the European Convention. The Court is traditionally far more generous with the Union institutions, finding that public policy requires the advice of their legal services to be afforded confidentiality, even to the extent that the advice of the Council legal service, obtained unofficially by an applicant, must be removed from the case file and any direct reference to it deleted from the application.⁸⁹ But the mood is changing, perhaps a function of the new (Lisbon) commitment to transparency and openness.⁹⁰ An undertaking dissatisfied with a Commission decision taken under the merger regulation has a right of access to neither documents relating to the administrative procedure in the course of the Commission investigation nor to the opinion of the legal service.⁹¹ However, on the same day the Court said, also in a merger case, that the opinion of the legal service does not enjoy immunity from disclosure where all issues of the case have become *res judicata*.⁹² As a general rule advice to the Commission from its legal service is not necessarily privileged and the Commission must make the case that it meets the necessary tests if it wishes to withhold it.⁹³ Nor is authorization of a Member State necessary for the Commission to allow access to documents produced by the Member State in the course of enforcement proceedings (under Article 258 TFEU) which have been closed.⁹⁴ Of especial relevance to civil enforcement of the competition rules, the interests of a cartelist in avoiding follow-on civil damages claims does not constitute a legitimate commercial interest meriting protection from disclosure.⁹⁵

In the matter of civil enforcement generally the Member States will, in the absence of firmer direction, be obliged to go their own way. A few recent examples: the collective redress favoured by the Commission⁹⁶ cannot be comfortably accommodated in English law.⁹⁷ The passing-on defence is now recognized as legitimate and to be admitted in German civil procedure.⁹⁸ As for quantification of injury, the Hungarians have introduced legislation whereby, if a hardcore cartel agreement is shown to exist, there is a presumption, which may be rebutted by proof to the contrary, that the infringement increased prices by a factor of 10 per cent;⁹⁹ the UK government proposes following

⁸⁷ Case C-550/07P *Akzo Nobel Chemicals*, *ibid.*

⁸⁸ At para 45.

⁸⁹ Case T-18/10R *Inuit Tapiriit Kanatami v Parliament & Council* [2010] ECR II-75*.

⁹⁰ See TEU, art 1, 2nd para; TFEU, art 15.

⁹¹ Case C-404/10P *Commission v Éditions Odile Jacob*, judgment of 28 June 2012, not yet reported.

⁹² Case C-477/10P *Commission v Agrofert Holdings*, judgment of 28 June 2012, not yet reported.

⁹³ Case C-506/08P *Sweden v MyTravel & Commission*, judgment of 21 July 2011, not yet reported.

⁹⁴ Case T-59/09 *Germany v Commission*, judgment of 14 February 2012, not yet reported.

⁹⁵ Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v Commission*, judgment of 15 December 2011, not yet reported.

⁹⁶ See Commission Staff Working Document, Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final.

⁹⁷ *Emerald Supplies Ltd v British Airways* [2010] EWCA Civ 1284, [2011] Ch 345.

⁹⁸ BGH, 28. Juni 2011 (*SD-Papier-Kartell*), WuW 2012, 57.

suit but setting the figure at 20 per cent.¹⁰⁰ The *Gerechtshof* in Amsterdam found that Commission fines imposed under Regulation 1/2003 are not deductible from taxable profits.¹⁰¹ Pending legislative intervention from the Council and/or Commission this babel of civil rules and remedies is likely to grow only more diverse and complex.

5. Rights of defence

In 2011 the General Court sustained the Commission in the lift/escalator cartel case almost completely.¹⁰² The judgments have been appealed to the Court of Justice.¹⁰³ In the meanwhile the Commission, acting for the Community, had already raised an action in the *Rechtbank van koophandel te Brussel* seeking damages from those four companies (which had installed and serviced lifts and escalators in various of its buildings around Brussels) of €7,061,688. It raises not only the constitutional issue of who acts for the Community/Union in civil proceedings¹⁰⁴ but, in the competition sphere, knotty issues of (presumed) Commission reliance in a private action upon information it had itself gathered in the course of an investigation (in principle to be used only 'for the purpose for which it was acquired'),¹⁰⁵ of judicial independence protected by Article 47 of the Charter of Fundamental Rights and of the principle of equality of arms in civil proceedings, the latter one recognized by both the European Convention¹⁰⁶ and Union law.¹⁰⁷ The *Rechtbank* has referred these issues to the Court of Justice¹⁰⁸ which affords it the opportunity of fixing more firmly the rights of defence in the competition constellation. In the meantime, the Ombudsman found errors in the

⁹⁹ 1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenycorlátozás tilalmáról (as amended by 2009. évi XIV. törvény), 88/C. §.

¹⁰⁰ Department for Business Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform*, April 2012, paras 4.40–4.43.

¹⁰¹ *Gerechtshof te Amsterdam*, kenmerk 06/00252, uitspraak van 11 maart 2010, which followed loyally the submissions made by the Commission to it under art 15(3) of Regulation 1/2003.

¹⁰² Case T-138/07 *Schindler Holding Ltd and ors v Commission*, Cases T-141 etc/07 *General Technic-Otis and ors v Commission*, Case T-144 etc/07 *ThyssenKrupp Liften Ascenseurs and ors v Commission* and Case T-151/07 *Kone and ors v Commission*, judgments of 13 July 2011, not yet reported. The Court reduced the fines within the ThyssenKrupp Group by between 1 and 40 per cent for the Commission misapplying an increase in fine for recidivism to members of the group.

¹⁰³ Cases C-493, 494, 501, 504, 505, 506, 510, 516 and 519/11P, pending.

¹⁰⁴ The general rule is that the Commission acts for the Community/Union in legal proceedings in which the latter's interests are in issue except in matters relating to the operation of an institution, in which case, owing to a principle of administrative and operational autonomy, the institution acts for itself (TFEU, art 335 (ex art 282 EC)). The latter proviso was added by Lisbon, prior to which authority was required to be delegated by the Commission, as to which see Case C-137/10 *European Communities v Région de Bruxelles-Capitale*, judgment of 5 May 2011, not yet reported.

Regulation 1/2003 OJ 2003 L1/1, Art. 23(1)(e).

¹⁰⁵ Regulation 1/2003, art 28(1). An exception is made for ('without prejudice to') the transmission from the Commission of information in its possession relevant to matters before a requesting national court (art 15) but this does not solve the problem of the Commission's direct interest in the case.

¹⁰⁶ Eg, *Kress v France* (Application n° 39594/98), judgment of 7 June 2001, 2001-VI.

¹⁰⁷ Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3816, esp at para 66; Case C-404/07 *Katz v Sós* [2008] ECR I-7607.

¹⁰⁸ Case C-199/11 *Europese Gemeenschap (optredend via de Europese Commissie) v Otis and ors*, pending.

Commission's investigation in the *Intel* case¹⁰⁹ amounting to maladministration¹¹⁰ but made no finding as to whether it infringed Intel's rights of defence. Doubtless that will be aired before the General Court.

6. Criminal enforcement

The momentum in enforcement of competition law by means of criminal sanctions has stalled. Following successful prosecutions in Ireland for price fixing by Ford¹¹¹ and Citroën¹¹² motor dealers, the last prosecution in the Galway heating oil cartel concluded in May 2012, the accused (individual) convicted and sentenced to a term of two years' imprisonment (suspended) and a fine of €30,000.¹¹³ Otherwise the Irish courts are resting. In the United Kingdom, following first convictions secured (albeit following guilty pleas) and custodial sentences imposed for commission of a cartel offence under Section 188 of the Enterprise Act 2002 in *Whittle*,¹¹⁴ the criminal guns of the Office of Fair Trading were brought to bear upon four British Airways executives following its transatlantic price fixing cartel in fuel surcharges with Virgin Atlantic, for which BA was fined £121.5 million by the Office of Fair Trading (OFT)¹¹⁵ and \$300 million by the US Department of Justice.¹¹⁶ But the criminal trial collapsed spectacularly in Spring 2010, the OFT prosecutors having failed in the rudimentary duty to disclose key documents to the defence and having, perhaps, relied overmuch upon the evidence supplied by Virgin in exchange for immunity. The OFT subsequently more than halved the fine it had imposed (which BA had not challenged) to £58.5 million 'in light of subsequent cooperation', which is as much an admission of its own mishandling of the case and perhaps also recognition of the disapproval it meets frequently for the Competition Appeal Tribunal in the matter of penalties. It raises serious questions about the OFT's competence as a criminal prosecutor, and maybe the very legitimacy of the cartel offence. As the OFT retires to lick its wounds it is thought unlikely to raise further criminal proceedings in their present guise—it has not touched the air freight cartel notwithstanding a Commission fine of €799.4 million,¹¹⁷ a settlement with the American Department of Justice by BA of a class action claim for \$89.5 million, and its Heathrow-based senior manager for cargo sales and marketing (Mr Keith Packer) fined \$20,000 and sentenced to eight months' imprisonment in a Florida prison¹¹⁸—and the threat of imprisonment for would-be cartelists, and its deterrent effect, are thus lifted.

¹⁰⁹ Case COMP/37.990 (*Intel*), OJ 2009 C227/13 (summary publication), under review as Case T-286/09 *Intel v Commission*, pending.

¹¹⁰ Case 1935/2008/FOR, decision of 14 July 2009.

¹¹¹ *DPP v Manning*, judgment of the Central Criminal Court of 9 February 2007, unreported.

¹¹² See inter alia *DPP v Durrigan & Doran*, guilty pleas in circuit criminal court in May and October 2008; *DPP v Duffy* [2009] IEHC 208.

¹¹³ *DPP v Hegarty*, judgment of Galway Circuit Court of 2 May 2012, not yet reported.

¹¹⁴ *R v Whittle, Allison & Brammar* [2008] EWCA 2560, [2008] All ER (D) 133; discussed in previous comment at (2010) 59 ICLQ 489.

¹¹⁵ OFT, decision of 1 August 2007 (*BA/Virgin Atlantic*), not yet published.

¹¹⁶ See *United States v British Airways*, plea agreement in the District Court, District of Columbia of 23 August 2007.

¹¹⁷ Case COMP/39.258, decision of 9 November 2010; under review as Cases T-36 etc/11 *Japanese Air Lines and ors v Commission*, pending.

¹¹⁸ *United States of America v Packer*, plea agreement in the District Court for the District of Columbia of 7 November 2008.

However, the cartel offence may acquire a new lease of life. Since its creation it is a statutory requirement that a constituent component of the offence is one of ‘dishonesty’, recognized by the Court of Appeal as a difficult and ‘plainly very significant’ hurdle.¹¹⁹ The UK government proposes now to drop the requirement.¹²⁰ It was suggested from some quarters that another qualifier—the ‘secret’ cartel or the ‘furtive’ cartel—ought to take its place, but the government seems resolved simply to remove it entirely. If it does so, it cannot but make the securing of a conviction significantly easier. At the same time the OFT took another drubbing from the Competition Appeal Tribunal, its finding of a ‘price matching’ cartel amongst two tobacco companies and ten retailers for which it imposed a (record) total fine of £225 million,¹²¹ set aside for faulty reasoning based upon inadequate evidence,¹²² and so requiring the OFT to repay the fines and leaving it liable for very substantial costs. This is one more factor leading to the reorganization of UK competition authorities, the merging the OFT and the Competition Commission into a single ‘Competition and Markets Authority’ by Spring 2014. It is unlikely we shall see developments of much significance in the UK before then.

D. Microsoft

The Microsoft saga has finally ground to a close. The original bicephalous breach of Article 102 found by the Commission in 2004¹²³ was upheld by the General Court in 2007¹²⁴ and, unexpectedly to many, not appealed. The Commission had imposed in the initial decision a behavioural remedy, requiring Microsoft to make available its interoperability information on reasonable terms to interested competitors.¹²⁵ Taking the view a year later that Microsoft failed in this obligation, the Commission ordered it to comply by mid-December 2005, failing which it would become liable for a periodic penalty payment of €2 million per day.¹²⁶ For (partial) non-compliance the Commission six months later fixed the penalty payment at €280.5 million and upped the ante for continuing disobedience to €3 million per day.¹²⁷ Finally satisfied that Microsoft complied in October 2007, the Commission fixed a second tranche penalty payment at €899 million,¹²⁸ and this was challenged by Microsoft. In what it must hope is its last Microsoft business for a while, in June 2012 the General Court found for the Commission essentially throughout.¹²⁹ Pleas challenging the (alleged) in clarity of the obligation, errors of calculation of remuneration and innovative technology, reliance

¹¹⁹ *IB v The Queen* [2009] EWCA Crim 2575, [2009] All ER (D) 90, at para 27. See also *R v George and ors* [2010] EWCA 1148, determining that the offence did not require mutual dishonesty.

¹²⁰ Department for Business Innovation and Skills, *Growth, Competition and the Competition Regime*, March 2012, paras 7.7 – 7.11.

¹²¹ OFT, decision of 15 April 2010 (*Tobacco*), not yet published.

¹²² *Imperial Tobacco Group and ors v OFT* [2011] CAT 41, judgment of 12 December 2011, not yet reported.

¹²³ Decision 2007/53 (*Microsoft*) OJ 2007 L32/23 (summary publication).

¹²⁴ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

¹²⁵ Decision 2007/53, art 5.

¹²⁶ Case COMP/37.792 (*Microsoft*), decision of 10 November 2005, unpublished.

¹²⁷ Case COMP/37.792 (*Microsoft*), decision of 12 July 2006, unpublished.

¹²⁸ Case COMP/37.792 (*Microsoft*), decision of 27 February 2008, OJ 2009 C166/20 (summary publication).

¹²⁹ Case T-167/08 *Microsoft v Commission*, judgment of 27 June 2012, not yet reported.

upon the monitoring trustee's reports, infringement of rights of defence and excessive and disproportionate penalties came to naught. Unfortunately (for the onlooker) the argument could not go to the legality of the behavioural remedy ordered by the Commission, which had been canvassed (although not fully) in the Court's order refusing Microsoft interim relief from those remedies.¹³⁰ Nor was there discussion of the differences between periodic penalty payments under Regulations 17 and 1/2003: the latter allows a penalty not exceeding 5 per cent of average daily turnovers¹³¹ so that the 488 days addressed in the 2008 decision could have meant a penalty payment, for Microsoft, of €1.423 thousand million;¹³² had Regulation 17 still been in force, the penalty could have been fixed at no higher than €488,000.¹³³ The only crumb for Microsoft was a finding that an infelicitous letter sent by the Commission which, combined with subsequent conduct, led Microsoft reasonably to follow a course of conduct for which it was now being criticized, so that the Court, in light of its unlimited jurisdiction in the matter of fines, knocked €39 million (roughly 4.5 per cent) off the fine. It is, finally, comforting to have recognition from the Court that Articles 101 and 102 'are themselves drawn up using imprecise legal concepts, such as distortion of competition and "abuse" of a dominant position',¹³⁴ something the rest of us have always known.

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¹³⁰ Case T-201/04R *Microsoft v Commission* [2004] ECR II-4463.

¹³¹ Regulation 1/2003, art 24(1).

¹³² Case T-167/08 *Microsoft*, at para 203.

¹³³ Regulation 17/62 JO 1962, p 204, art 16(1).

¹³⁴ Case T-167/08 *Microsoft*, at para 91.

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