III. COMPETITION

IN the period covered by this note (early 1994 to the middle of 1995) some significant and interesting judgments have been handed down by the Court of Justice and the Court of First Instance on both substantive and procedural issues of competition law, in particular that of the Court of Justice in the *Magill* case, which deals with the relationship between Article 86 and intellectual property rights. In the legislative field there is now a group exemption on the operation of liner transport services. As regards general problems of enforcement, the Commission's 1993 Notice on Co-operation between National Courts and the Commission[1] has provoked a good deal of discussion and a number of commentators and also the Commission itself are now advocating sharing responsibility for enforcement with national competition authorities rather than relying on the direct effect of Articles 85(1) and 86 being invoked before national courts.[2]

A. Article 86 and Intellectual Property Rights

In April 1995 the Court of Justice upheld the views of the Commission and the Court of First Instance (but did not follow the opinion of Advocate General Gulmann) on the question of copyright protection for programme listings and its relation to Article 86 raised in the *Magill* litigation.[3] The case dates back to 1985 when Magill TV Guide Ltd attempted to publish a weekly guide to television programmes shown in Ireland and Northern Ireland. This conflicted with the copyright protection given by national law to the existing guide published by the three television stations in Ireland and Northern Ireland and Magill asserted that the stations' refusal to supply programme listings to a potential competing publisher was a breach of Article 86, so giving rise to important questions concerning the scope of the concept of abuse under Article 86.

Although the Court of Justice confirmed that exclusive rights of reproduction form part of the rights of a copyright holder and that a refusal to grant a licence would not in itself constitute an abuse of a dominant position, it stated that such a refusal could do so in exceptional circumstances. In the present case no substitute for Magill's weekly guide was available to consumers since each of the TV stations published guides to its own programmes only; refusal to provide the information to Magill therefore prevented the appearance of a new product, which the right-holders were not willing to provide but for which there was a consumer demand. There was no justification for the refusal to supply and the right-holders had

1. (1993) O.J. C39/6. See the note by Harding (1994) 43 I.C.L.Q. 721, 723.

2. For a general discussion and reference to recent literature, see Jo Shaw, "Decentralization and Law Enforcement in EC Competition Law" (1995) 15 Legal Studies 128. See in particular the Commission's 23rd Report on Competition Policy, paras.190–191. The Commission proposes to publish a new notice on the matter.

3. Joined cases C-241 and 242/91 *Radio Telefis Eireann* v. *Commission*, *Independent Television Publications Ltd* v. *Commission*, judgment of 6 Apr. 1995, C.M.L.R. Antitrust Reports 1995 p.718. For another critical assessment of the cases see the note on Intellectual Property in the July 1995 issue of the I.C.L.Q. (Vol.44, Part 3, p.714).

thereby excluded all competition from the secondary market in weekly television guides.

This judgment reinforces the stance taken by the Court of Justice in the earlier case of *Volvo* v. *Erik Veng*,[4] where it stated that in principle the exercise of an exclusive right by its proprietor could, in exceptional circumstances, amount to abusive conduct. The issue is sensitive since it involves the limitation of the scope of intellectual property rights in the interests of protecting competition, a question on which intellectual property lawyers and competition regulators have already crossed swords. But it remains difficult to predict the exact impact of the judgment, especially since the protection relating to programme listings in this case is not covered by the scope of copyright protection in many of the other member States. Some lawyers will no doubt wish to argue that the Court's principle is limited to the rather unusual facts of the *Magill* case.

B. Other Interpretations of Articles 85(1) and 86

Recent litigation has also provided the opportunity for further interpretation of some of the key concepts in the prohibitions of Article 85(1) and 86 of the Treaty. One issue has been the nature of the persons subject to Article 85. In *SAT Fluggellschaft* v. *Eurocontrol*[5] the Court of Justice had to consider whether Eurocontrol, an international organisation created by an international convention and responsible for controlling certain international airways, could act in violation of Article 86, and held that such an organisation is not an undertaking within the meaning of Article 86. On another point, the Commission, in reimposing fines on members of the well-known PVC Cartel, had to consider which companies within a group should be addressees of the decision imposing the fine. Two of the Cartel members, Enichem and Montedison, argued that it should be those companies within the group actually responsible for thermoplastic manufacture (to which the cartel related). However, the Commission took the view[6] that, since responsibility for marketing PVC was shared by other companies within the group, it would be appropriate to address the decision to the main holding companies.

The issue of affecting trade between member States arose before the Court of First Instance in *Parker Pen* v. *Commission*.[7] An agreement between Parker Pen and Herlitz contained a clause, which was not actually implemented, prohibiting exports. The Court considered that nonetheless trade between member States was affected in the circumstances of this arrangement, in view of the importance of Parker in the relevant market, the size of its production and sales and the proportion of Parker products handled by Herlitz. The mere existence of the clause created a "visual and psychological" effect which contributed to a partitioning of the market. Once again, it is clear that in drafting agreements care should be taken

4. Case 238/87 [1988] E.C.R. 6211.
5. Case 364/92 [1994] E.C.R. I-43.
6. (1994) O.J. L239/14.
7. Case T-77/92 [1994] E.C.R. II-549.

that effect on "trade between Member States" should not be interpreted too literally.

C. *Procedural Questions*

As is often the case now, there has been no shortage of procedural questions coming before the Court of First Instance and adverse decisions from the Commission provide fertile ground for exploring such issues. The right to challenge action taken by the Commission has arisen on more than one occasion recently. In *Air France* v. *Commission*[8] the applicant company sought the annulment of a Commission decision approving the acquisition by British Airways of 49.9 per cent of the share capital in TAT European Airlines. The essential procedural question was whether Air France was directly and individually concerned by the Commission's decision within the meaning of Article 173 of the Treaty so as to make the challenge admissible. The Court found that Air France was individually concerned in that Commission officials had been told by the Commissioner for Competition to take Air France's comments fully into account, the Commission had been significantly concerned about Air France's position in relation to the proposed concentration and there had been a prior agreement with the Commission and the French government under which Air France had given up the whole of its interest in TAT. Air France's claim did not succeed on the merits, however. But the case provides a fuller idea of what amounts to direct and individual concern in this context.

Scottish Football Association v. *Commission*[9] concerned another problem of admissibility: whether a Commission decision taken under Article 11(5) of Regulation 17, requiring information from the applicant body, could be challenged as regards its legality. Information had been sought concerning the Association's role in possibly preventing the broadcasting of Argentinian football matches in Scotland. The Association had replied to the Commission's initial questions but this was not acknowledged by the Commission, which subsequently adopted a decision under Article 11(5) requiring the information requested and threatening penalties. The Court of First Instance confirmed that the decision could be challenged: it was liable to affect the legal position of the party concerned and, even if the request had already been complied with, there was still an interest in securing annulment of the decision, since the Commission may be required by the Court to take measures to comply with its judgment and the annulment would have a dissuasive effect in cases of bad administrative practice. In the event, the Court did not annul the Commission's decision since the Association had not fully replied to the request for information.

Third-party rights were considered by the Court of First Instance in *Matra Hachette* v. *Commission*,[10] in which the applicant wished to challenge the legality

8. Case T-2/93 [1994] E.C.R. II-121.
9. Case T-46/92 [1994] E.C.R. II-1039.
10. Case T-17/93 [1994] E.C.R. II-595.

of a Commission decision to exempt a joint venture set up by Ford and Volkswagen. The challenge itself, although held to be admissible, was unsuccessful on the merits of the claim. One of the grounds of challenge concerned the extent of the applicant's rights as a third-party objector. The Court ruled that under Article 19 of Regulation 17 this right is confined to that of participating in the administrative procedure but not to the extent of having access to the file compiled by the Commission.

Finally, reference may be made to some of the arguments concerning the calculation of fines raised by Tetra Pak in its appeal against the heavy fine (75 million ECUs) imposed by the Commission for its violation of Article 86.[11] The company argued that the Commission had not specified clearly enough how it was deciding on the amount of the fine in relation to different aspects of the infringement. However, the Court of First Instance stated that the Commission was not obliged to break down the fine as between the various aspects of the abuse. That would have been impossible anyway in this kind of case, where all the infringements had been part of an overall strategy and had therefore to be dealt with globally. The company had also urged that the size of the fine was far in excess of the total of any of the fines previously imposed by the Commission and in the light of previous practice was disproportionate and excessive. The Court did not agree with this view, in the light of the company's level of anti-trust awareness and its dominant position, and the duration and gravity of the infringement. Moreover, even if in some respects the process of defining the relevant markets and scope of Article 86 had been a matter of some complexity, this could not mitigate the deliberate and conscious character of the abuse.

D. Producer Cartels

Proceedings against two other major producer cartels have been completed by the Commission. In relation to the Cartonboard Cartel[12] the Commission has imposed fines amounting to more than 132 million ECUs on 19 companies which had operated a price-fixing and market-sharing cartel for some considerable time in the European cardboard sector. The Cartel was both sophisticated and highly furtive, operating in the guise of an apparently legitimate association known as Product Group Paperboard. Special care was taken to eliminate incriminating evidence, bogus minutes relating to innocent subjects were drafted for meetings, and company employees were trained to deal with surprise inspections by competition officials. The Commission had also been conducting a lengthy investigation into the European cement industry, which has now resulted in a decision on the Cement Manufacturers Cartel[13] and the imposition of fines in excess of 130 million ECUs on 30 European cement producers. In response to structural overcapacity in the cement sector the companies had engaged in conventional market-sharing and price-fixing activities reinforced by monitoring and enforcement arrangements. As noted above, the Commission has also reimposed fines on members of the PVC Cartel in a fully reasoned decision[14] which explores the evidence of collu-

11. Case T-83/91 *Tetra Pak International SA* v. *Commission* [1994] E.C.R. II-755.
12. (1994) O.J. L243/1.
13. (1994) O.J. L343/1.
14. (1994) O.J. L239/14.

sion and deals with procedural matters such as the appropriate addressees of the decision (see above) and the running of the limitation period in respect of fines. Legal activity in regard to the thermoplastic cartels now extends well over a decade.

E. Power to Conclude International Agreements

A constitutional dispute was brought before the Court of Justice when France challenged the legal basis of a co-operation agreement concluded by the Commission with the US government in 1991.[15] The agreement is designed to promote co-operation and co-ordination as regards application of the parties' respective systems of competition rules and provides for notification of enforcement measures which may affect important interests of the other party, exchange of information on matters of mutual interest, co-ordination of enforcement activities and reciprocal consultation. The Court agreed with the French argument that the Commission had exceeded its powers in concluding the agreement: only the Council had competence under Article 228 of the EC Treaty to conclude, as distinct from negotiating, an international agreement which was legally binding on the Community. It therefore declared void the act by which the Commission sought to establish the agreement.

F. Group Exemption for Sea Transport Liner Consortia

The Commission added a new group exemption to its list of such measures when it adopted a regulation in the field of liner transport services.[16] Broadly speaking, the measure exempts from Article 85(1) the joint operation of liner shipping transport services (for instance, joint use of port terminals, participation in tonnage or revenue pools, joint marketing and the use of joint bills of lading). There are limiting conditions as regards the availability of the exemption: the consortium must hold less than 30 per cent of the market share by reference to the goods carried in the relevant trade where it operates within a conference, and less than 35 per cent market share if operating outside a conference. There must also be effective price competition and competition as to terms of service as between conference members. There is also provision for an opposition procedure.

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IV. INSURANCE AND BANKING

A. The Legislative Programme and the Role of the Court

There are still unresolved conflicts at the final stage of the completion of the internal financial market.[1] Member State actions have been brought against the Euro-

15. Case C-327/91 *French Republic* v. *Commission* [1994] E.C.R. I-3641. For further particulars see the note on External Relations in the January 1995 issue of the I.C.L.Q. (Vol.44, Part 1, p.232) and the short article in the July 1995 issue (Vol.44, Part 3, p.659).

16. Reg.870/95, 28 Apr. 1995 (1995) O.J. L89/7.

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1. See the overview of the adopted financial markets directives in "Current Developments" (1994) 43 I.C.L.Q. 728.