that a Joint Action on airport transit visas fell within the scope of Article 100c of the EC Treaty (as it then was), rather than Title VI EU, but the Court did rule that it had jurisdiction to consider the case. It found that Article M of the EU Treaty (now Article 47 EU, and not amended by the Amsterdam Treaty) gave it power to determine whether a third pillar measure should have been adopted in the first pillar, and to annul the measure if it "encroached" upon an EC Treaty power. There may well be similar such disputes in future.[39] Moreover, the boundary between Title IV EC and the "mainstream" EC Treaty may become highly contested, given the different roles of the institutions and different territorial scope of the two. In another case, the Court ruled that the Council's Decision on access to documents covered third pillar documents, and that moreover it had jurisdiction to rule on the application of the Decision to those documents.[40] Finally, the Court ruled on the validity of internal border controls maintained by member States, finding that Article 7a EC (now Article 14) lacked direct effect and that the right of EU citizens to "move and reside freely" did not preclude member States demanding to see their passports.[41]

C. Conclusion

The Amsterdam Treaty's creation of an area of "Freedom, Security and Justice" began with an early allocation of the Schengen *acquis*, a raft of proposed legislative measures, and a reorganisation of the EC institutions. The Council and Commission also agreed a very detailed Action Plan on implementing the new Area,[42] and a European Council was called for October 1999 in Tampere to discuss implementation further. It remains to be seen whether the Council will overcome the political deadlock which characterised much of the Maastricht-era third pillar, and whether post-Amsterdam JHA measures will take greater account of civil liberties, human rights and criminal justice principles than their predecessors.

STEVE PEERS*

III. COMPETITION

A. Cartels

The period under review (Spring 1998—Autumn 1999) is one in which the prohibition of cartels under Article 81(1) of the EC Treaty figured prominently, the Court of Justice clearing up a backlog of unfinished business relating back, in some cases, over a decade. The 1986 *Polypropylene* cartel decision[1] was finally put

39. The Commission has already argued that the proposed third pillar Decision on counterfeit travel documents (*supra* n.20) falls within the first pillar.

40. Case T-174/95 *Svenska Journalistforbundet* [1998] E.C.R. II-2289.

41. Case C-378/97, judgment of 21 Sept. 1999 (not yet reported).

42. O.J. 1999, C19/1.

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1. Decision 86/398 (1986) O.J. L230/1.

to bed with the Court of Justice dismissing a number of appeals raised on the sole ground of the non-existence of the decision.[2] It also dismissed an appeal involving the 1989 *Welded Steel Mesh* cartel decision[3] except that, in an important development, for the first time the Court expressly applied Article 6(1) of the European Convention on Human Rights, which provides a right to a fair and public hearing within a reasonable time before an impartial tribunal, and reduced a Commission fine (marginally, knocking 50,000 ECUs off a 3 million ECU fine) as "reasonable satisfaction" for the excessive duration of proceedings (five-and-a-half years) before the Court of First Instance.[4] The Court of First Instance itself upheld on review the 1994 Commission decision in the *Cartonboard* cartel,[5] leaving of major cartel cases only review of the *Cement* decision still outstanding.[6]

The notorious 1989 PVC cartel decision[7] was found to be non-existent by the Court of First Instance in 1992 because of the shambles of Commission procedure,[8] which finding was overturned on appeal by the Court of Justice but which annulled the decision for procedural flaws in 1994.[9] Immediately thereafter the Commission simply readopted the original decision,[10] recycling measures and procedures preparatory to the first (annulled) decision but this time paying closer attention to its own procedural rules on its final adoption by the college of Commissioners, and in April 1999 the Court of First Instance found that this was not improper in terms of *res judicata*, that neither any rule of prescription nor any rights of defence had been infringed, and this time sustained the Commission.[11] The judgment has been appealed,[12] and the Court of Justice may take a less generous view of Commission procedural liberties.

A number of companies censured and fined by the Commission in the 1985 *Woodpulp* cartel decision[13] declined at the time to challenge it before the Court and simply paid up. When the decision was eventually annulled for the most part in 1993 in proceedings raised by various other addressees,[14] the former raised an action claiming that the annulment ought to apply equally to them and the Commission ought to reimburse the fines paid. The Court of Justice has now confirmed, reversing the Court of First Instance in part, that a Commission decision and fine under Regulation 17 is definitive and binding upon an addressee which fails to raise review proceedings under Article 230, even if it is annulled by

2. In a number of judgments the first of which is Case C-49/92P *Commission* v. *Anic Partecipazione*, judgment of 8 Jul. 1999, not yet reported.
3. Decision 89/515 (1989) O.J. L260/1.
4. Case C-185/95P *Baustahlgewebe* v. *Commission* [1998] E.C.R. I-8417.
5. Decision 94/601 (1994) O.J. L234/14, upheld in a number of judgments the first of which is Case T-295/94 *Buchmann* v. *Commission* [1998] E.C.R. II-813.
6. Decision 94/815 (1994) O.J. L343/1, under review as Cases T-25 etc./95 *Cimenteries CBR and Ors.* v. *Commission*, pending.
7. Decision 89/190 (1989) O.J. L74/1.
8. Cases T-79 etc./89 *BASF and Ors* v. *Commission* [1992] E.C.R. II-315.
9. Case C-137/92P *Commission* v. *BASF and Ors* [1994] E.C.R. I-2555.
10. Decision 94/599 (1994) O.J. L234/14.
11. Cases T-305 etc./94 *Limburgse Vinyl Maatschappij and Ors.* v. *Commission*, judgment of 20 Apr. 1999, not yet reported.
12. Case C-238/99P *Limburgse Vinyl Maatschappij* v. *Commission*, pending.
13. Decision 85/202 (1995) O.J. L85/1.
14. Cases 89 etc./85 *Åhlström and Ors.* v. *Commission* [1993] E.C.R. I-1307.

means of proceedings raised by other addressees, and it has no claim upon the Commission to reconsider the matter.[15]

B. Article 81(2)

Article 81(2) of the Treaty provides that agreements which fall within the prohibition of Article 81(1) are "automatically void". Surprisingly, its legal consequences have been left largely to be determined in accordance with national contract law. Note ought to be taken of two recent judgments of the English Court of Appeal. The first, in *Passmore* v. *Morland*[16] determined that the automatic nullity of Article 81(2) is of a temporaneous or transient character: a contract which is void for breach of Article 81(1), even if void at its formation, is nevertheless not void *ab initio*, and so if owing to a change in circumstances the prohibition ceases to apply to it the contract will cease to be void and becomes valid and enforceable. Litigants in other member states may press their courts to emulate the Court of Appeal, but it seems unlikely that the contract law of many other national legal systems could accommodate the same conclusion. Second, the Court of Appeal has now settled that a contract prohibited by Article 81(1) is in English law not only void but illegal, so that a party to it has no claim to recover any loss either in reparation or in restitution.[17] However in *Crehan* v. *Courage* it accepted that the Court of Justice may take a different view and so has referred the question to it under Article 234. This will afford the Court the opportunity to provide (much needed) guidance on the ambit and application of Article 81(2).

C. Joint Dominance

The principle that undertakings which are not themselves dominant but which with other undertakings occupy a "joint" or "collective" dominant position and so fall subject to the discipline of Article 82, first recognise in *Flat Glass*,[18] continues to be developed. It also continues to increase in importance as more oligopolistic markets are created or evolve. The most recent judicial pronouncement is that in *Irish Sugar*, in which the Commission found a joint dominant position held by an Irish dominant undertaking and its sole Irish distributor where the two were linked by the former's equity interest in and representation on the board of the latter and the variety of economic ties between them[19]—also noteworthy as the first and only case which libels the existence of joint dominance as a function of vertical, not horizontal, links. On review the Court of First Instance upheld the Commission in all essentials;[20]the fact of a vertical, and not horizontal, relationship was immaterial.[21] Further, the Court for the first time provides a provisional answer to the question of whether an undertaking which is collectively (but not

15. Case C-310/97P *Commission* v. *AssiDomän Kraft Products*, judgment of 14 Sept. 1999, not yet reported.
16. [1999] Eu.L.R. 501.
17. *Gibbs Mew* v. *Gemmell* [1998] Eu.L.R. 588; *Trent Taverns* v. *Sykes* [1999] Eu.L.R. 492; *Crehan* v. *Courage*, judgment of 27 May 1999, not yet reported.
18. Cases T-68, 77 & 78/89 *Società Italiano Vetro* v. *Commission* [1992] E.C.R. II-1403.
19. Decision 97/624 (1997) O.J. L258/32.
20. Case T-228/97 *Irish Sugar* v. *Commission*, judgment of 7 Oct. 1999, not yet reported.
21. at para.63.

individually) dominant can abuse that position unilaterally or whether exploitative abuse arise only in joint conduct:

> "Whilst the existence of a joint dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abusive conduct. It is enough for the abusive conduct to relate to the exploitation of the joint dominant position which the undertakings hold on the market."[22]

As a general principle this must however be treated with caution. The joint dominance aspects of *Irish Sugar* (there were others in which it was not at issue) were established by a vertical relationship between producer and distributor. But since a vertical relationship will be entered into only for mutual advantage it is much easier to find pursuit of a common policy—a necessary test for joint dominance—which is a function ("one of the manifestations") of the joint dominance within that context. It will be more difficult to show where joint dominance and abuse thereof exists on the horizontal plane. For that, further elucidation may come with the appeal judgment in *Compagnie Maritime Belge* which is still awaited.[23]

D. Mergers

Following the 1997 amendments to the Merger Regulation (in force March 1998)[24]the number of notifications has, as expected, risen significantly, to 235 in 1998 (up from 172 in 1997) and 209 in the first nine months of 1999. Three concentrations were vetoed outright,[25] bringing the total since the entry into force of the Regulation in 1990 to 11. The first fines were imposed under the Regulation, for unintentional[26] and "grossly negligent"[27] failure to notify and nonetheless proceed with a concentration and for supplying incomplete information in a notification,[28] and for the first time a decision by a national government purporting to prohibit a concentration with a Community dimension was suspended by the Commission;[29] enforcement proceedings raised under Article 226 against the member State in question (Portugal) for breach of Community law (i.e. the Merger Regulation) are now in train. In *Gencor* the Court of First Instance reaffirmed that the Regulation could be applied to prohibit a concentration which produced not single but joint (*in casu* duopolistic) dominance, also noteworthy in its extraterritorial aspects in that the merger in question involved

22. at para.66.
23. Cases C-395 & 396/96P *Compagnie Maritime Beige* v. *Commission*, pending.
24. Reg.1310/97 (1997) O.J. L180/1; see discussion at (1998) 47 I.C.L.Q. 717.
25. Decision 1999/153 (*Berteismann/Kirch/Premiere*) O.J. 1999 L53/1; Decision 1999/154 (*Deutsche Telekom/BetaResearch*) O.J. 1999 L53/3 1; Case M.1524 (*Airtours/First Choice*), decision of 22 Sept. 1999, not yet published.
26. Decision 1999/594 (*Samsung/AST Research Inc*) (1999) O.J. L225/12.
27. Decision 1999/459 (*A. P. Møller*) (1999) O.J. L183/29.
28. Case M.1497 (*Sanofi/Synthélabo*), decision of 28 Jul. 1999, not yet published.
29. Case M.1616 (*Banco Santander Centro Hispanio/Champalimaud*), decision of 20 Jul. 1999, not yet published.

South African mining interests and had previously been approved by the South African Competition Board.[30] Finland has now adopted its own merger control legislation,[31] leaving only Denmark and Luxembourg without and so little likelihood of further references of national mergers to the Commission under Article 22(3) of the Regulation ("the Dutch clause").

E. Reform of Regulation 17

The most important developments in competition law are those addressing the reform of enforcement procedures—remarkable not only for their breadth but also their author, a Commission which had resigned *en masse* and so ought, on one view, to be discharging caretaker functions only until replaced. Since 1997 the Commission has adopted a new benevolence towards vertical agreements—those which impose restraints upon competition but are agreements between or amongst undertakings at different levels on the production or distribution chain.[32] The present fruits of this change of heart are two: first, Article 4(2) of Regulation 17,[33]which exempts certain agreements from the obligation of notification to the Commission in order to gain exemption from Article 81(1) of the Treaty, has been amended by the Council[34] so that it applies now to all vertical agreements regulating conditions of sale or re-sale, even if two or more undertakings are party to them, and including the marketing of services. The primary advantage of Article 4(2) is that it allows for exemption without notification and, if notified, retroactive exemption effective from the date of conclusion of the agreement. The amendment, conferring this advantage upon a very large number of agreements, therefore increases appreciably its practical significance and, owing to the possibility of retroactive exemption, the difficulties facing national courts, when considering the lawfulness of an Article 4(2) agreement, of the type considered by the Court of Justice in *Delimitis*.[35] Second, the basic Regulation governing block exemptions (Regulation 19)[36] has been amended by the Council[37] so as to authorise the Commission to adopt a block exemption regulation applying to vertical agreements to which any number of undertakings are party on the purchase, sale or re-sale of goods and services. Using this new power the Commission has now proposed a single block exemption regulation[38] which is intended to replace the present vertical block exemptions (exclusive distribution, exclusive purchasing, franchising) which are scheduled to expire at the end of

30. Case T-102/96 *Gencor* v. *Commission*, judgment of 25 Mar. 1999, not yet reported; this judgment is discussed in 172.

31. *Laki Kilapailunrajoituksista* 11–11 i § (303/1998), in force 1 Oct. 1998.

32. See the Commission Green Paper on vertical restraints in competition policy, COM(96)721 final; Follow-Up to the Green Paper on vertical restraints: Communication on the application of the Community competition rules to vertical restraints, (1998) O.J. C365/3.

33. Reg.17/62 (1962) J.O. 24.

34. Reg.1216/1999 (1999) O.J. L148/5.

35. Case C-234/89 *Delimitis* v. *Henninger Bräu* [1991] E.C.R. I-935.

36. Reg.19/65 (1965) J.O. 533.

37. Reg.1215/1999 (1999) O.J. L148/1.

38. Draft Commission Regulation on the application of Art.81(3) of the EC Treaty to categories of vertical agreements and restrictive practices, not yet published.

1999 and which will apply to vertical agreements as so described except those involving (a) a supplier which along with connected undertakings enjoys a combined market share exceeding 30 per cent of the relevant market,[39] (b) an association of distributors with a combined annual turnover exceeding € 50 million[40]and (c) competing undertakings (entering into a non-reciprocal vertical agreement) where the buyer is a manufacturer (and not merely a distributor) with an annual turnover exceeding € 100 million.[41] The draft regulation provides a "black list" excluding certain hardcore restraints such as the imposition of fixed or minimum resale prices, certain resale conditions and forms of territorial protection, "non-compete" clauses except of short duration and restraints following termination of the agreement,[42] but unlike all presently existing block exemptions it sets out no white list. The Commission and national competition authorities (which can show within their territory the characteristics of a distinct geographic market) may withdraw the benefits of exemption in a particular case where a vertical agreement falling within the regulation nevertheless produces effects incompatible with Article 81(3);[43] the Commission may do so with blanket effect, by regulation and without showing incompatibility with Article 81(3), where parallel networks of similar vertical restraints cover more than 50 percent of a relevant market.[44] If adopted the regulation will, says the Commission, create a "safe harbour" for vertical agreements,[45] especially for parties which are small and medium sized undertakings, and allow for a greater degree of suppleness, lessening the "straightjacket" effect of present block exemptions, without sacrificing legal certainty.[46]

Important though these changes are, they pale in comparison with (and may be rendered otiose by) the Commission White Paper produced in April 1999 and proposing significant further reform to the enforcement of the competition rules,[47]amongst which are fundamental changes to the application of Article 81(3). Since the adoption by the Council of Regulation 17 in 1962 the Commission has enjoyed a monopoly on the power to grant exemption under Article 81(3) to agreements which offend Article 81(1).[48] According to the White Paper, this monopoly, and the consequent plethora of notifications to it, has been justified in order to enable the Commission to establish the uniform meaning and parameters of Article 81(1)—"to build up a coherent body of precedent cases, and to ensure that the competition rules are applied consistently throughout the member States".[49]Now however, following more than 35 years of Commission activity and

39. Draft Reg., art.2(1).
40. Art.1(2).
41. Art.1(4). The Commission had proposed that this be written into Reg.19 (Commission proposal for a Council Regulation amending Regulation No.19/65, COM(98)546 final) but on it the regulation remained silent.
42. Arts.3, 4.
43. Arts.5, 6.
44. Art.7.
45. Draft Guidelines on vertical restraints attached to the Draft Regulation, Chap.III 1.
46. COM(98)546 final, Explanatory Memorandum.
47. White Paper on Modernisation of the Rules Implementing Arts.85 and 86 of the EC Treaty, Programme No.99/027.
48. Reg.17, art.9(1).
49. White Paper, para.76.

case law of the Court of Justice the law is "clarified" and "more predictable",[50] it consists of a "set of clear rules"[51] and the conditions for exemption under Article 81(3) "have been largely clarified by case-law and decision-making practice and are known to undertakings".[52] The centralised system of Regulation 17 is therefore "cumbersome, inefficient and impose[s] excessive burdens on economic operators"[53]and is "no longer consistent with the effective supervision of competition".[54] The White Paper therefore supports the adoption of a "directly applicable exemption system" and "*ex post* control"[55] whereby legislation adopted under Article 83 would scrap the notification system (except for partial function production joint ventures, at present subject to Article 81 but which will be absorbed into the Merger Regulation[56]) and require that all national competition authorities and all national courts before which Article 81(1) was raised also apply Article 81(3). The whole of Article 81, sundered by Regulation 17, would therefore be reunited, parties could rely directly upon Article 81(3), and restrictive practices prohibited by Article 81(1) but which meet the criteria of Article 81(3) would be valid and enforceable from the time they were concluded without need of a prior decision to that effect. Similarly, restrictive practices which meet the criteria of Article 81(3) and so are valid *ab initio* would cease to be valid if, and at the point at which, the conditions for exemption were no longer fulfilled. In other words, Article 81(3) would become directly effective.

This is a bold turn indeed. It must be read as an admission—according to the president of the *Bundeskartellamt*, "capitulation"[57]—that administration of the present system is well beyond the Commission's resources and so ability. If the White Paper is followed up it will be freed from its present onerous task of processing notifications and so allow it to concentrate its resources in other areas as it sees fit. But it will also self evidently mark a far reaching change to the enforcement of Article 81. The concurrent reform of the block exemption system for example, which is stated to be a complement to the White Paper proposals, *prima facie* makes no sense if Article 81(3) is to become directly effective. The Commission view is that it has a utility as a means of defining more precisely the scope of Article 81(3); but it is inevitable that there will be disharmony between the Commission view of Article 81(3) and that of various national competition authorities and courts. In fact, only eight member states have administrative competition authorities competent to enforce Articles 81 and 82; if the White Paper is to be effective the other seven will be required to create them. But once created, there is no guarantee they will pursue anticompetitive conduct with the vigour, with the impartiality, or in the same manner as the Commission would wish. Whilst the White Paper canvasses certain safeguards (exchanges of information and files, an option of Commission intervention before national

50. Para.48.
51. Para.51.
52. Para.78.
53. Para.42.
54. Para.9.
55. Paras.69 ff.
56. Paras.79–81.
57. "Perspektiven des Europäischen Kartellrechts", a position paper delivered by Dr Dieter Wolf to the Frankfurter Institut—Stiftung Marktwirtschaft und Politik, 8 Jul. 1999.

courts as *amicus curiae*, amendments to Regulation 17 or its successor and codification of various *modi operandi* in notices), the proposals will necessarily bring about fundamental problems of regulating the relationship amongst the Commission, national competition authorities and national courts and imperil the uniform application of the law. Whether Commission confidence in the maturity of the system is well founded and whether upon reflection it is sufficient to justify letting the genie out of the bottle remains to be seen.

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IV. EXCISE, VAT AND CUSTOMS

A. Excise and VAT

One of the major activities of the European Community for achieving its objectives is to establish an internal market characterised by the abolition, as between member States, of obstacles to the free movement of goods, persons, services and capital.[1]

The Community was required to adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with, and subject to, the provisions of the EC Treaty.[2] That aim was substantially achieved, but some measures necessary for the better functioning of the internal market could either not be agreed before that date or, if they had been agreed, could not, for commercial or political reasons, be implemented immediately.

Two such measures which were agreed before 31 December 1992 but which, for commercial or political reasons could not be implemented immediately after that date, concerned measures dealing with the incidence of excise duty and VAT in respect of goods sold in tax-free shops at ports and airports and at the terminals of the Channel tunnel to persons intending to make a journey from one member State to another (an intra-Community journey), or sold to passengers on a ship or aircraft in the course of an intra-Community journey.

There is clearly scope for debate whether the excise duty chargeable on such goods or the VAT chargeable on the supply of such goods should be that of the member State of departure of the passenger or of the member State of his arrival, but it is equally clear that it is anomalous for such goods to be completely free of duty and VAT within an internal market.

However, it was agreed that a further period of time was required after 31 December 1992 before such duty- and VAT-free treatment could be abolished, in order to allow measures to be taken to alleviate both the economic repercussions in the sectors concerned and regional difficulties, particularly in border regions between member States. That further period of time was set, at the outset, to

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1. EC Treaty, Arts.2 (ex Art.2) and 3.1(c) (ex Art.3(c)).
2. *Ibid.* Art.14 (ex Art.7a).