whereby all unsuccessful bidders who so request are given feedback after the contract is awarded. All Member States, except Denmark (which has an opt-out in the area of defence policy) and Romania, and Norway participate in this regime.

The second parallel trend is apparent in what was, under the previous dispensation, the Community legal order and has to do with the applicability of common rules to defence industries. Article 296 EC (now article 346 TFEU) is relevant: this enables Member States to deviate from the entire body of EC law in order to protect certain arms, munitions, and war material in cases where this is necessary for the essential interests of national security. For a long time, this had been interpreted by the Member States as exempting them from EU law altogether, an approach largely tolerated by the Union institutions. However, after a number of initiatives by the Commission in the 1990s[38] and mid 2000s,[39] this approach changed. On the one hand, the Commission made it clear that it would bring enforcement actions against Member States in cases where the strict criteria for the application of article 296 EC were not met.[40] Indeed, the Court of Justice adopted recently a rigorous approach to the application of this provision.[41] On the other hand, two sets of common rules have been adopted which will apply specifically to defence products, namely Directive 2009/43 on intra-EU transfers of defence products,[42] and Directive 2009/81 on public procurement.[43] These aim to bring the benefits of the internal market to this sensitive area without compromising its unique security characteristics.

What we see here is a gradual shift towards the normalisation of the status of national defence industries within the multilayered EU system. Concerted action at intergovernmental and supranational level has created a momentum which is a welcome addition to the grand rhetoric about the Union's role in the international security architecture which emerges from EU statements and policy documents.

Panos Koutrakos*

II. COMPETITION

A. The Lisbon Treaty

The single most important event in the life of the Union during the three year period (January 2007–January 2010) under review, and long before, is of course the Lisbon

[38] *The Challenges facing the European Defence-Related Industry. A Contribution for Action at European Level* COM(96) 10 final; *Implementing European Union Strategy on Defence Related Industries* COM(97) 583 final, adopted on November 12, 1997.

[39] *European Defence—Industrial and Market Issues. Towards an EU Defence Equipment Policy* COM(2003) 113 final, adopted on March 11, 2003; *Toward a programme to advance European security through Research and Technology* COM(2004) 72 final, adopted on February 3, 2004; *Security Research: The Next Step* COM(2004) 590 final, adopted on September 7, 2004.

[40] COM(2006) 779 final, adopted on December 7, 2006.

[41] Case C-337/05 *Commission v Italy* [2008] ECR I-2173, and Case C-157/06 *Commission v Italy* [2008] ECR I-7313.

[42] [2009] OJ L 146/1.

[43] [2009] OJ L 216/76.

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Treaty. It and its failed predecessor have defined, and wracked, Union affairs since the Laeken declaration in 2001. Now, after extensive gestation, lively litigation against ratification—some meritorious, some not—in the courts of six member states (the United Kingdom,[1] the Czech Republic,[2] Belgium,[3] Latvia,[4] Germany,[5] Denmark[6] and the Czech Republic (again)[7]), two referendums in Ireland and an eleventh hour bribe to the Czech president,[8] Lisbon entered into force on 1 December 2009. Its primary importance lies in change to the constitutional structure of the Union: the dismantling of the Maastricht pillar system, fusing the European Community (though not Euratom) and the Union into one, and the blueprint for the Union's External Action. But amongst the many, apparently lesser, changes there is one which has gone largely unremarked: the provisions on competition law are to undergo their first material change since 1958.

Since the beginning an article 3 'activity' of the Community has been 'ensuring that competition in the common market is not distorted.'[9] The Court of Justice was moved to observe that the competition rules are 'so essential that without [them] numerous provisions of the Treaty would be pointless';[10] and subsequently: '[A]ccording to Article 3[(1)(g)] of the EC Treaty. . ., Article 81 . . . constitutes a fundamental provision which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, the functioning of the internal market.'[11] In the same way article 3(1)(g) informed and nurtured article 82 (now article 102 TFEU)[12] and article 87 (now article 107 TFEU).[13] This is consistent with the manner in which the Court long called upon the principles of Part One of the EC Treaty. The result is that the competition rules were fundamental to and accorded a shared primacy in the Community scheme; put otherwise, according to a past president of the Court, Judge Rodríguez Iglesias, 'the rules on free movement and competition . . . constitute the core and best established

[1] *R (on the application of Wheeler)* v *Office of the Prime Minister* [2008] EWHC 1409 (Admin), [2008] All ER (D) 333.

[2] Pl. ÚS 19/08 ze dne 26. listopadu 2008 (*Lisabonská smlouva*).

[3] Grondwettelijk Hof, Arrest Nr 58/2009, van 19 maart 2009 (*Sleeckx* t/ *Vlaamse Gewest*).

[4] Satversmes tiesa, 2009.gada 7. aprīļa spriedums lietā Nr 2008-35-1 (*Lisabonas līgum*).

[5] BVerfG, 30. Juni 2009 ('*Lissabon-Vertrag*' or '*Solange IV*').

[6] Østre Landsret, *Hausgaard* mod *Statsminister & Udenrigsminister*, dom af 28. oktober 2009.

[7] Pl. ÚS 29/09 ze dne 3. listopadu 2009 (*Lisabonská smlouva II*).

[8] Ratification was eventually coaxed from Mr Klaus only with a promise from the European Council to extend the application of a Protocol moderating the application of the Charter of Fundamental Rights in Poland and in the United Kingdom to the Czech Republic 'at the time of the conclusion of the next Accession Treaty'; Brussels European Council, 29–30 October 2009, Presidency Conclusions, para I.2 and Annex I.

[9] EEC Treaty, Art 3(f); EC Treaty, Art 3(1)(g), 'internal' substituted for 'common' market by Maastricht.

[10] Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, para 24.

[11] Case C-126/97 *Eco Swiss China Time* v *Benetton International* [1999] ECR I-3055, para 36; repeated essentially *verbatim* in Case C-453/99 *Courage* v *Crehan* [2001] ECR I-6297, para 20; Cases T-217 & 245/03 *Fédération nationale de la coopération bétail et viande v Commission* [2006] ECR II-4987, para 97.

[12] Cases 6 & 7/73 *Istituto Chemioterapico Italiano & Commercial Solvents Corporation v Commission* [1974] ECR 223, para 25; Case 13/77 *GB-INNO-BM v Association des détaillants en tabac (ATAB)* [1977] ECR 2115, para 29; Case 27/76 *United Brands v Commission* [1978] ECR 207, para 183; Case C-95/04P *British Airways v Commission* [2007] ECR I-2331, paras 106, 143.

[13] Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para 56.

layer of the [Community] legal order.'[14] Since entering its current extended phase of semi-permanent revision the Treaty has swirled and changed around them, but until Lisbon the competition provisions survived untouched.

Their pre-eminence was recognized, and boosted, in the Treaty establishing a Constitution for Europe, which provided, at the very outset, as a Union objective: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.'[15] Codification maybe, yet it would have the effect of entrenching competition at the head of the Treaty, second in terms of the Union's objectives only to the promotion of peace, its values and the wellbeing of its peoples,[16] and formally at the very heart of the internal market.

The Lisbon Treaty which rose from the Constitutional Treaty's ashes still 'offer[s] . . . an area of freedom, security and justice without internal frontiers' and 'establish[es] an internal market',[17] but the final (competition) clause is gone. Indeed, even the existing, never mind promoted, commitment to competition is stripped away. article 3(1)(g) disappears, the erstwhile 'activities' of the Community being dissolved into Union 'competences'[18] with no mention of competition save that the TFEU recognizes (syllogistically) 'the establishing [*sic*] of the competition rules necessary for the functioning of the internal market' to be an exclusive Union competence.[19] The substantive rules of Articles 81-89 EC survive essentially unscathed, becoming Articles 101 to 109 TFEU,[20] but they are left without the prop at the head of the Treaty which for so long anchored them there.

This eleventh hour change was implemented at French insistence, which won the (surprising?) acquiescence of the other heads of State and government. But as a response to those who feared the total absence from the Treaty of a commitment to competition, the European Council agreed, and the IGC homologated, a new protocol attached to the Treaties, reading as follows:

> THE HIGH CONTRACTING PARTIES,
> CONSIDERING that the internal market as set out in article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,
> HAVE AGREED that:
> to this end the Union shall, if necessary, take action under the provisions of the Treaties, including under article 352 of the Treaty on the Functioning of the European Union.[21]

This is a wretched provision. It is badly drafted: it would be difficult to marshal more flannel in so short a passage. The internal market is not 'set out' (*défini*; *beschrieben*) in article 3, it is simply postulated there to exist. Contrary to general conventions of legislative (and judicial) drafting, the text of the protocol is not self-contained: rather, the operative part is logically (if not grammatically) dependent upon and subordinate to

[14] GC Rodríguez Iglesias, inaugural address to the FIDE XX Congress, 2002, London.
[15] Treaty establishing a Constitution for Europe, Art I-3(2).
[16] Art. I-3(1). The Union's values were set out in Art I-2.
[17] TEU (Lisbon), Art 3(2), (3).
[18] TFEU, Arts 2–6.
[19] Art 3(1)(b).
[20] The only significant change is introduction of authority for the Council to remove (five years after the entry into force of Lisbon) the privileged position enjoyed by Germany under Art 107 TFEU since 1958 and not altered at reunification, in granting state aids to areas 'affected by the division of Germany'; see TFEU, Art 107(2)(c).
[21] Protocol (No 27) on the internal market and competition.

the preamble, which does no more than rehearse a 'consideration' of the Contracting Parties. Nor does it have the character of an integration clause (*Querschnittsklausel*) such as those now forming Title II of Part One of the TFEU (the provisions having general application). If it has utility at all it would appear to lie in supplying a Treaty base for Union action, and in particular action which exceeds the authority granted by article 103 TFEU (article 83 EC)—which is what article 352 provides anyway, without need of assistance from this protocol. And any such action must be 'necessary', which is presumably (but not necessarily) a matter for the judgment of the political institutions.

Its greater impact is likely to lie less in its wording that in its location at (or lagging behind) the tail end of the Treaties. Given the Treaty style of progression from the general to the specific, and the core to the peripheral, the fall from a Community activity (EC Treaty) or a Union objective (constitutional Treaty) to a preambular reference in the 27th of 37 protocols attached to the Treaties which recites a view held by the parties is by any measure a demotion. What then will the Court of Justice make if it? Not, perhaps, a frontal assault on the core provisions— Articles 101 and 102—which can stand on their own, but maybe at the periphery. For example, there is a complex of settled case law which draws upon articles 101/102 in combination with articles 3(1)(g) and 10 EC (now absorbed into article 4(3) TEU) which determines and defines the duty of a member State not to introduce or maintain in force any national rules which might render the application of Articles 101 and 102 ineffective.[22] It has always been a fine balance. With article 3(1)(g) gone, can it survive and be maintained? Maybe there will be no change: the Court may determine competition, as developed by 50 years of case law, salvaged (just) by the competition protocol, to be in the very DNA of the internal market irrespective of the Lisbon reordering. It might, on the other hand, find that the *Herren der Verträge* must have intended the change to have some outcome, and downgrade competition concerns accordingly. Whichever it chooses, it is to be watched closely.

B. Microsoft

No comment upon competition law during the period would be complete without mention of the *Microsoft* judgment, 'widely described as the most important antitrust case in European history',[23] delivered by the Court of First Instance (hereinafter CFI,

[22] See Case 311/85 *Vereniging van Vlaamse Reisebureaus v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiesten* [1987] ECR 3801; Case 267/86 *van Eycke v ASPA* [1988] ECR 4769; Case C-41/90 *Höfner v Macrotron* [1991] ECR I-1979; Case C-2/91 *Criminal Proceedings against Meng* [1993] ECR I-5751; Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff* [1993] ECR I-5801; Case C-245/91 *Criminal proceedings against Ohra Schadeverzekeringen* [1993] ECR I-5851 (the latter three, along with the *Keck* judgment (Cases C-267 & 268/91 *Criminal proceedings against Keck & Mithouard* [1993] ECR I-6097), comprising the 'November revolution' on greater deference to national regulation); see most recently Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* v *LIBRO Handelsgesellschaft*, judgment of 30 April 2009, not yet reported, *per* A-G Trstenjak, paras 109–196 of her opinion.

[23] Buck, 'Microsoft bows to the EU system' *Financial Times*, 17 September 2007.

although now, post-Lisbon, styled the General Court) in September 2007.[24] Even before then the case had attracted controversy, as part way through the proceedings Judge Legal complained (publicly) of a fifth column of 'ayatollahs de la libre entreprise' amongst the *référendaires* in the Court,[25] and as a result was relieved of the responsibility of judge-rapporteur and the case was removed from the extended chamber of which he was president and referred to the Grand Chamber. If some other retired judges share similar sentiments, they give them voice with greater circumspection.

In brief, the CFI sustained the Commission in finding that Microsoft had infringed article 102 in two distinct respects: by refusing to supply protected interoperability information to competing workshop server operating systems and by tying its Windows Media Player (WMP) to its dominant operating system.[26] Whilst the case was before the CFI the Commission imposed record fines for failure to comply with behavioural remedies it had ordered as part of the original decision,[27] with which Microsoft complied to its satisfaction only in October 2007. The widely expected appeal to the Court of Justice never materialized, largely because Microsoft simply lost the necessary heart to carry on, so the judgment of the CFI is now *res judicata*. In order to extract a final pound of flesh, in early 2008 the Commission instituted proceedings afresh against Microsoft for (alleged) tying of the internet explorer to the Windows operating system, but Microsoft has now offered a series of commitments on increasing the choice of web browser and improved operability, to which, at the time of writing, the Commission seems kindly disposed.[28]

A great deal of ink has been spilled on the judgment and there is little space here to do it justice. To its critics the CFI weakened the 'exceptional circumstances' test first recognized in *Magill*,[29] rendering instances of compulsory licensing much more likely, impairing legal certainty, diminishing intellectual property rights and so having a chilling effect upon innovation and economic progress. The burdens for Microsoft of article 102 are emphasized: they have always been especially onerous for a monopoly or for an undertaking which enjoys 'dominance approaching monopoly', 'super-dominance' or 'overwhelming dominance verging on monopoly.'[30] But the CFI seems to suggest that merely acquiring a significant market share may be an abuse of a dominant position:

> It must be borne in mind that it is settled case-law that article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure. In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.[31]

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

[25] 'Le contentieux communautaire de la concurrence entre contrôle restreint et pleine juridiction', *Concurrences*, N° 2-2005, 1–2.

[26] Decision 2007/53 (*Microsoft*) OJ 2007 L32/23 (summary publication).

[27] See below.

[28] Case COMP/39.530 (*Microsoft (Tying)*), OJ 2009 C242/20.

[29] Cases C-241 & 242/91P *RTE & ITP v Commission* (Magill) [1995] ECR I-743.

[30] Cases C-395 & 396/96P *Compagnie Maritime Belge v Commission* [2000] ECR II-1365, *per* AG Fennelly, paras 132, 137 of his opinion.

[31] Case T-201/04 *Microsoft* (n 24) para 664.

This appears to reproach Microsoft simply for becoming dominant, which would seem to turn article 102 on its head. Whether or not it is 'Microsoft-specific' waits upon the next Commission decision involving superdominance.[32]

A more general outcome worth noting in particular is the CFI's view of its own authority. The Court of Justice has said surprisingly little about the standard of proof required to show an infringement of Articles 101 or 102. To the terse consideration set out in 1984[33] the CFI (which since its inception has held the Commission to greater account than did the Court of Justice previously) added useful guidance in 2007: evidence must be adduced 'to the requisite legal standard', it is necessary to take account of the presumption of innocence, 'any doubt in the mind of the Court' must operate to the advantage of the undertaking, and 'the Commission must show precise and consistent evidence in order to establish the existence of the infringement and to support the firm conviction that the alleged infringements constitute appreciable restrictions of competition. . ..'[34] This is very helpful. Yet here is the CFI in *Microsoft*:

> Although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court . . . .[35]

Given the extensive powers of sanction enjoyed by the Commission under Regulation 1/2003 and the manner in which it is exercised, this approach is surely unduly timid. Yet it has been reconfirmed by the CFI, again in the context of article 102, since *Microsoft*.[36] It is problematic not only in itself, but for keeping on the right side of article 6 of the ECHR and for the civil enforcement of Articles 101 and 102, promoted vigorously by the Commission as part of the decentralisation programme,[37] especially where Articles 101/102 are applied co-terminously with equivalent provisions of national law, now compulsory where both Union and national law are joined,[38] yet different standards of proof apply to the national provisions.

1. GlaxoSmithKline

But the Court sometimes giveth with the same hand it taketh. GlaxoSmithKline plc (GSK) is a dominant firm in various pharmaceuticals markets in Europe and beyond, of

[32] Passing reference was made to *Microsoft* in the Commission's *Intel* decision (Case COMP/37.990 (*Intel*) OJ 2009 C227/13 (summary publication), para 880; under review as Case T-286/09 *Intel v Commission*, pending) but without the vehemence.

[33] Cases 29 & 30/83 *Compagnie Royale Asturienne des Mines & Rheinzink v Commission* [1984] ECR 1679.

[34] Case T-36/05 *Coats Holdings & JP Coats* v *Commission* [2007] ECR II-110*, paras 68–71.

[35] Case T-201/04 *Microsoft* (n 24) paras 87–88.

[36] Case T-301/04 *Clearstream Banking & Clearstream International* v *Commission*, judgment of 9 September 2009, not yet reported, paras 93–95.

[37] See below.

[38] Regulation 1/2003, Art 3(1).

late involved in polycephalous litigation before the Court of Justice. Its strategy for the distribution of a number of prescription medicines in Greece attracted the attention of the Greek Competition Authority (the Επιτροπή Ανταγωνισμού, or 'EpAnt'), which referred a number of questions to the Court on the circumstances in which a refusal to sell may constitute an infringement of article 102. This of course raised issues related to those of *Bayer*[39] but in the context of article 102 rather than 101. The reference resulted in a deft and, in the event, prescient opinion from Advocate-General Jacobs but was rebuffed by the Court because the EpAnt was not a court or tribunal for purposes of article 267 TFEU.[40] A sister action raised by disgruntled intermediary wholesalers (amongst them complainants to the EpAnt) in the civil courts resulted in a fresh reference, questions effectively identical to those already referred, and so the case returned to the Court 'like a boomerang.'[41]

GSK did not dispute that its purpose in refusing to meet the Greek wholesalers' orders was to limit parallel exports by wholesalers to the markets of other member States in which the selling prices of the medicinal products in dispute were higher. Normally such restriction of parallel trade by a dominant undertaking is to be reproached under article 102 where the curbing of parallel trade is an effect of the practice, never mind its object.[42] However, here the Court of Justice, possibly taking its cue from Advocate-General Jacobs' earlier opinion, said that a dominant undertaking 'must nevertheless be in a position to take steps that are reasonable and in proportion to the need to protect its own commercial interests.'[43] This would include (implicitly) safeguarding investment in the research and development of medicines and (explicitly) taking such reasonable and proportionate measures in relation to the threat that parallel exports represent to its legitimate commercial interests.[44] It was therefore justified in refusing to fill orders which were out of the ordinary in terms of quantity.[45] Such is the heavy regulation, and so distortion, of markets in medicinal products that peculiar considerations may apply which are not applicable elsewhere. Nevertheless this marks a suppleness to article 102 which is consistent with the more economic approach now encouraged it its application, and is largely to be welcomed.

A GlaxoSmithKline footnote involves yet another case, a review launched by GSK of a Commission decision finding an infringement of article 101(1) in its price discrimination on the Spanish market and (this happening prior to 2004) refusing an exemption.[46] The CFI found the infringement proven but annulled the decision not to grant an exemption.[47] An appeal (by GSK, on the infringement) and cross-appeal

[39] Case T-41/96 *Bayer v Commission* [2000] ECR II-3383; on appeal, Cases C-2 & 3/01P *Bundesverband der Arzneimittel Importeure* v *Bayer & Commission* [2004] ECR I-23.

[40] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait)* v *GlaxoSmithKline* [2005] ECR I-4609.

[41] Cases C-468 etc/06 *Sot. Lélos Kai Sia* v *Glaxosmithkline Farmakeftikon Proïonton* [2008] ECR I-7139, *per* A-G Ruiz-Jarabo Colomer, para 1 of his opinion.

[42] See e.g. Case 26/75 *General Motors Continental* v *Commission* [1975] ECR 1367.

[43] Cases C-468 etc/06 *Sot. Lélos* (n 41) para 69.

[44] ibid para 70.

[45] ibid para 76.

[46] Decision 2001/791 (*Glaxo Wellcome*) OJ 2001 L302/1.

[47] Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969.

(by the Commission) was dismissed by the Court of Justice,[48] an otherwise unremarkable judgment noteworthy for the following passage:

> It must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.[49]

This apparently innocuous proposition, easily missed at first reading, is, maybe, a bombshell. It harks back to an earlier view of the competition rules, disavowed vigorously for many years now, not least by Mrs Kroes: 'the objective of article 82 is the protection of competition on the market. . .. [I]t is competition, and not competitors, that is to be protected.'[50] It is quite possibly a slip of the rapporteur's pen, but if not, could lead to significant change to our understanding of Articles 101 and, perhaps more so, 102.

C. Enforcement

1. Commission enforcement

Commission avarice continues apace, fines imposed, for cartel infringements alone (which 'by reason of their very nature . . . merit the severest fines'[51]), of €3,334 million in 2007, €2,271 million in 2008 and €1,822 million in 2009. To date the highest cartel fine, imposed in 2008, is €1,384 million, in respect of a five year cartel amongst four undertakings in the automotive glass sector,[52] one of the participating undertakings, Saint-Gobain SA, fined €896 million (its fine increased by 60 per cent as a 'repeat offender'), representing the then highest single fine imposed upon an undertaking for a competition law infraction anywhere in the world. Within a year the Saint-Gobain record was eclipsed, Intel Corporation suffering a fine of €1,060 million for breach of article 102 involving fidelity rebates and direct payments to downstream manufacturers to halt or delay use of its (only effective) competitor's components.[53] The highest total fines imposed upon a single undertaking is €1,677 million, upon Microsoft, comprising a fine of €497 million in 2004 for the two concurrent infringements of article 102 and a further €1,180 million (€280.5 million in 2006 and €889 million in 2008) for failure to comply with behavioural remedies ordered by the Commission in the 2004 decision.[54] Whether this ferocity will be maintained when

[48] Cases C-501, 513, 515 & 519/06P *GlaxoSmithKline Services Unlimited* v *Commission* and *Commission* v *GlaxoSmithKline Services Unlimited*, judgment of 6 October 2009, not yet reported.

[49] ibid para 63.

[50] 'Preliminary Thoughts on Policy Review of Article 82' a speech at Fordham Corporate Law Institute, 23 September 2005.

[51] Case T-127/04 *KME Germany v Commission*, judgment of 6 May 2009, not yet reported, para 64.

[52] Case COMP/39.125 (*Automotive Glass*) OJ 2009 C173/13 (summary publication); under review as, *inter alia*, Case T-73/09 *Compagnie de Saint-Gobain v Commission*, pending. The total of €1,383,896,000 came after a reduction was made (to Asahi of Tokyo, 50 percent for cooperation) under the Commission's leniency programme, the fines originally computed at €1,497 million.

[53] Case COMP/37.990 *Intel* (n 32).

[54] Case COMP/37.792 (*Microsoft*), decisions of 12 July 2006 and of 27 February 2008, unpublished.

Mr Almunia assumes the post of competition Commissioner is anyone's guess. Also worth noting is some light relief provided by the German energy firm E.ON AG: in the course of an investigation into a market sharing cartel in the German and French gas markets, for which E.ON and GDF Suez SA were in due course each fined €553 million,[55] someone at E.ON broke the seals left overnight by the Commission during its on-site investigation at E.ON's premises in Munich and re-affixed them (badly). For this E.ON was fined €38 million.[56] Protestations that that the incriminating damage to the seals was caused instead by poor adhesion, wiping by a cleaner with a liquid detergent, shearing stress and/or peeling, age-related deterioration, 'creeping', building vibration or humidity were rebuffed. It is the first fine to be imposed by the Commission under Regulation 1/2003 for 'intentionally or negligently' breaking seals affixed by the Commission in the course of, and so seeking to frustrate, a Commission inspection.[57]

2. *Civil enforcement*

That infringement of Articles 101 and 102 may result in liability in damages for any injury or loss to a third party was finally recognized by the Court of Justice implicitly in 2001[58] and explicitly in 2006.[59] Since then the Commission has been championing the cause of private enforcement, producing to that end a Green Paper in 2005[60] and a (brief) White Paper in 2008.[61] As if to emphasize its resolve, in mid-2008 the Commission raised a follow-on claim for damages before the Brussels *Tribunal de commerce* against the four parties to the lift/escalator cartel,[62] resulting in a (then record) fine of €992 million, they having supplied the lifts and escalators in various of the Commission buildings. It raises interesting 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')[63] and a cartel the existence of which it had itself formally established.

[55] Case COMP/39.401 (*E.ON/GDF*) OJ 2009 C248/5 (summary publication).

[56] Case COMP/39.326 (*E.ON Energie*), decision of 30 January 2008, unpublished.

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

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

[59] Cases C-295 etc/04 *Manfredi* v *Lloyd Adriatico Assicurazioni* [2006] ECR I-6619; see the previous current developments report at (2007) 56 ICLQ 422, 427.

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

[61] *Damages actions for breach of the EC antitrust rules*, COM(2008) 165 final. See also the (more extensive) Commission Staff Working Papers accompanying the White Paper, SEC(2008) 404 and 405 and the (very extensive) impact report commissioned and published by the Commission, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, December 2007. For criticism see editorial comments, 'A little more action please!—The White Paper on damages actions for breach of the EC antitrust rules' (2008) 45 CMLR 609–615; Kortmann & Swaak, 'The EC White Paper on Antitrust Damages Actions: Why the Member states are (Right to be) Less Than Enthusiastic' [2009] ECLR 340–351.

[62] Case COMP/38.823 (*Lifts and Escalators*) OJ 2008 C75/19 (summary publication).

[63] 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.

Following up its own initiatives, in 2009 the Commission drafted a proposal for a directive, the first ever under article 103, on actions for damages.[64] It was never formally proposed to the Council and it has now been disavowed, in part a result of a disagreement between Commission and Parliament as to correct legal base (article 103 or 114 (internal market harmonization) and/or 352, maybe even 81 (judicial cooperation in civil matters)).[65] But it has, inevitably, leaked. Its purpose was to set out 'the rules necessary to ensure that anyone who has suffered a harm [*sic*] caused by an infringement of article 81 or 82 of the Treaty can effectively enforce the right to full compensation.'[66] 'Full' compensation is intended to restore the injured party to the position s/he would have been in had the infringement not occurred, so including actual loss, loss of profit and payment of interest from the time of the event to the time of compensation,[67] effectively codifying the *Manfredi* case law. The measure required provision for group actions brought by two or more injured parties[68] and representative actions brought by 'qualified entities'[69] (without specifying an 'opt-in' or 'opt-out' approach) and contained provisions on disclosure of evidence,[70] passing on of overcharges[71] and—a difficult issue marked by a wide variety in national law—limiting any requirement of proof of fault beyond proof of the infringement and of injury, to erring undertakings not reasonably having been aware that their conduct distorted competition.[72] Otherwise it did not interfere with civil procedure save for the standard recitation (already recognized in *Manfredi*) of the requirements of effectiveness and equivalence.[73]

Given the enthusiasm the Commission has invested in the issue the proposal is surprisingly unambitious. It does little to settle the difficulties the Commission itself canvassed in the White Paper. It does not address the fraught question of quantifying injury or loss (although it did subsequently publish a useful report it had commissioned on that matter[74]) and makes no provision for the double damages Mrs Kroes had thought 'worth considering',[75] nor does it seem to be alive to the risks and costs of private litigation or recognize the chilling effect the encouragement of follow-on claims may have upon the (considerable) success of the Commission's leniency programme. Not yet out of the starting blocks, the matter will now fall to Mr Almunia, and his enthusiasm, or otherwise, for the project is an unknown quantity.

[64] Proposal for a Council Directive on rules governing actions for damages for infringements of Arts 81 and 82 of the Treaty, unpublished.

[65] The draft Directive proposes Art 103 as its legal base but, in the view of the Parliament, '[t]he Commission can certainly not base its measures in the area of national damages and procedural law on Treaty Article [103]'; Committee on Economic and Monetary Affairs, *Report on the White Paper on damages for breach of the EC antitrust rules*, A6-0123/2009, p 9.

[66] Art 1(1). [67] Art 1(2).

[68] Art 5. There are difficulties here for some member states in which it is contrary to general principles of civil law. [69] Arts 6, 7.

[70] Arts 8, 9. [71] Art 11. [72] Art 14. [73] Art 2.

[74] *Quantifying antitrust damages: Towards non-binding guidance for courts*, December 2009.

[75] 'Reinforcing the fight against cartels and developing private antitrust damages actions: the tools for a more competitive Europe', a speech to the Commission/International Bar Association joint conference, 8 March 2007.

3. Damages from the Commission

Mention should be made of fallout from the Commission's *annus horribilis* of 2002 in merger control. Following the pasting the Commission received from the CFI in the *Airtours* case,[76] Airtours (having become MyTravel) raised an action seeking damages from the Commission in the region of £500 million. Schneider Electric SA was less modest: having been barred by the Commission from acquiring control of a competitor (Legrand SA) by means of a public exchange offer, that decision also set aside by the CFI,[77] it sought €1.6 thousand million in damages.

For an action in damages against a Union institution to succeed it is necessary to show not only illegality, injury and causation, but a breach of its legal duty which is 'sufficiently serious', one by which it manifestly and gravely disregarded the limits on its discretion.[78] In the administrative sphere the margin of discretion may narrow such that the duty may be characterized as one of ordinary care and diligence:[79] where the institution 'has only considerably reduced, or even no, discretion, [so that] the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.'[80] The functions the Commission discharges under Regulation 1/2003 are, certainly in some measure, of an administrative character. Yet MyTravel was rebuffed.[81] Notwithstanding the original Commission decision having been 'vitiated by a series of errors of assessment as to factors fundamental to any [proper] assessment. . .',[82] the CFI said:

> It is necessary to bear in mind that the economic analyses necessary for the characterisation in competition law . . . involve generally . . . complex and difficult intellectual exercises, which may inadvertently contain some inadequacies, such as approximations, inconsistencies, or indeed certain omissions. . . . That does not mean . . . that the Commission committed a manifest and grave infringement of its discretion . . ., provided that—as in the present case—it is capable of explaining the reasons for which it could reasonably form the view that its assessments were well founded.[83]

Schneider Electric fared slightly better. The CFI said that damages cannot lie against the Commission for:

> all errors or mistakes which, even if of some gravity, are not by their nature or extent alien to the normal conduct of an institution entrusted with the task of overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion. . .. On the other hand, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action

[76] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585 (annulling Decision 2000/276 (*Airtours/First Choice*) OJ 2000 L93/1).

[77] Case T-77/02 *Schneider Electric* v *Commission* [2002] ECR II-4201 (annulling Decision 2004/275 (*Schneider/Legrand*) OJ 2004 L101/1).

[78] These are tests which adhere to the case law attending actions for damages against the Union under Arts 268 and 340 TFEU; see Case C-352/98P *Laboratoires Pharmaceutiques Bergaderm and anor* v *Commission* [2000] ECR I-5291; Case C-312/00P *Commission v Camar & Tico* [2002] ECR I-11355; Cases T-344 & 345/00 *CEVA Santé Animale & Pharmacia Entreprises v Commission* [2003] ECR II-229.

[79] Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331.

[80] Case C-312/00P *Camar & Tico* (n 78) para 54; Case 282/05P *Holcim (Deutschland) v Commission* [2007] ECR I-2941, para 47.

[81] Case T-212/03 *MyTravel Group v Commission* [2008] ECR II-1967.

[82] Case T-342/99 *Airtours* (n 76) para 294.

[83] ibid paras 81, 87.

> manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, operating normally, is objectively subject.[84]

Accordingly the CFI found infringements of Schneider's rights of defence and awarded it damages for expenses it had incurred in respect of participation in the resumed merger control procedure following the 2002 judgment and (partial) damages for loss of the sale price when complying with a Commission order of divestment. The Court of Justice was less generous, setting aside the second award for lack of sufficient causal link.[85] Although damages for serious flaws in the Commission's economic reasoning (sufficient to lead to the annulment of the decision) 'cannot be ruled out in principle',[86] the breadth of Commission latitude and the article 340 requirement of a sufficiently serious breach by which it 'manifestly and gravely disregarded the limits on its discretion'[87] appears to confer upon it (virtual) immunity. On one view, if the Commission escaped liability in *MyTravel*, it will prove almost impossible to find it on a substantive matter in a merger case.

4. Damages from within an undertaking

An even bolder claim has been launched in England, in a matter involving UK competition law but the result easily transferable to the Union stage. In 2007 the Office of Fair Trading found, provisionally, a breach of Section 2(1) of the Competition Act (=article 101(1) TFEU) in price fixing of dairy products amongst a number of British supermarkets, through repeated exchange and disclosure of commercially sensitive retail pricing intentions. One of the supermarkets, Safeways, entered into an 'early resolution' agreement with the OFT, as part of the terms of which it admitted the breach of Section 2(1). Safeways (now Morrisons) has now brought a claim for damages and/or equitable compensation against a number of defendants, all of them directors or employees of Safeways at the material time, for breach of fiduciary duty and/or breach of contract of employment and/or negligence, and conspiracy, identifying the defendants as direct participants in the price fixing, being anticompetitive measures and unlawful acts, and seeking recovery of the loss it incurred (the penalty imposed by the OFT, likely to be £10.7 million with leniency) and legal costs.[88]

Certainly Safeways has mountains to climb. It must show that the unlawful conduct can be attributed to the directors and/or employees, that they can be held civilly liable (the Competition Act being silent on this), that it can overcome the *ex turpi causa non oritur actio* rule,[89] and that it can, in effect, pass on the penalty, so arguably depriving it of its teeth, certainly its (legitimate) deterrence purpose. But should it succeed it will start a new chapter in enforcement of the competition rules. The question then will be

[84] Case T-351/03 *Schneider Electric* v *Commission* [2007] ECR II-2237, paras 122–124.

[85] Case C-440/07P *Commission v Schneider Electric*, judgment of 16 July 2009, not yet reported.

[86] Case T-212/03 *MyTravel* (n 81) para 80.

[87] ibid para 37.

[88] *sub. nom. Safeway Stores Ltd* v *Twigger and ors*, pending.

[89] See *Gibbs Mew* v *Gemmell* [1998] 1 EGLR 43 (CA), applying the rule in the context of a breach of Art 101; now moderated by the judgment of the Court of Justice in Case C-453/99 *Crehan* (n 58).

whether it is a remedy specific to English private law or whether it will have a wider currency.

5. Criminal enforcement

Enforcement of competition law by means of criminal sanctions gathers momentum. In Ireland, where infringements of the Competition Act have attracted criminal penalties since 1996,[90] custodial sentences have now been imposed in five cases,[91] each a price fixing cartel and each for infringement of Irish law alone, and not of article 101 which is possible under the Competition Act. In no case was the guilty party required to serve his sentence. In the United Kingdom first convictions have been secured for commission of the 'cartel offence' created by section 188 of the Enterprise Act 2002. Unlike the Irish legislation, the cartel offence is not wholly co-terminious with the prohibitions of the Competition Act: it is instead a distinct offence, the bar set very high (the parties must enter into a price fixing, production or supply limitation, market sharing or bid rigging agreement and must do so with dishonesty), such that it was thought by some that a prosecution could never succeed. Now it has. The case arose out of the global price fixing and bid-rigging marine hose cartel, parties to which were the six principal manufacturers, from three continents, of marine hoses worldwide (Bridgestone Corp, Yokohama Rubber Co (both of Japan), Dunlop Oil & Marine Ltd/ ContiTech AG (England/Germany), Trelleborg Industrie SA/Trelleborg AB (Sweden/ France), Parker ITR Srl/Parker Hannefin Corp (Italy/USA) and Manuli Rubber SpA (Italy)). The cartel attracted the attention of the Department of Justice in the United States, the Japanese Fair Trade Commission (the *Kōtorii*) and, eventually, the Commission, which imposed fines totalling €131.5 million for multiple infringements of article 101.[92] It also marked the first time the Commission inspected a private home, that of the owner/manager of a consulting firm who was effectively the cartel coordinator, under article 21 of Regulation 1/2003.[93] The matter is still subject to proceedings under the Australian Competition and Consumer Commission which filed papers in the federal courts in the summer of 2009. The three accused were managing director, sales and marketing manager of Dunlop Oil and Marine and a Dunlop ex-employee, subsequently cartel coordinator through his private consultancy (for which he earned an annual fee of $50,000 from each participating company). They were given custodial sentences of 24, 20 and 30 months respectively (after reduction by the Court of Appeal from the 36, 30 and 36 months imposed by the Crown Court)[94] and disqualified from acting as a director of a limited company for 7, 5 and 7 years. But we are little wiser as to the meaning and breadth of the cartel offence as the three entered guilty pleas as part of a plea agreement with US authorities. A clearer picture may emerge following the

[90] See now Competition Act, 2002 (No 14 of 2002), ss 6, 7.

[91] *DPP* v *Flanagan and ors* (or the *Connaught Oil* cases), a series of circuit criminal court judgments between 2004 and 2006, none reported (one sentence of six months imposed upon the cartel 'facilitator', suspended); *DPP* v *Manning*, judgment of the Central Criminal Court of 9 February 2007, unreported (12 months, suspended); *DPP* v *Durrigan & Doran*, guilty pleas in circuit criminal court in May and October 2008 (three months, suspended); *DPP v Duffy* [2009] IEHC 208 (six and nine months concurrently, suspended).

[92] Case COMP/39.406 (*Marine Hoses*) OJ 2009 C168/6 (summary publication).

[93] ibid para 6.

[94] *R* v *Whittle, Allison & Brammar* [2008] EWCA 2560, [2008] All ER (D) 133.

transatlantic price fixing cartel in fuel surcharges between British Airways and Virgin Atlantic, for which BA was fined £121.5 million by the Office of fair Trading[95] and $300 million by the US Department of Justice,[96] both BA and Virgin facing extensive civil liability in both the UK and the US. Charges were subsequently preferred against four BA executives in England (Virgin and its executives having gained the immunity from prosecution afforded whistleblowers),[97] the matter is now before the Crown Court. On an interlocutory appeal (which failed) the Court of Appeal addressed, but did not try to resolve, the fraught and 'plainly very significant' constituent requirement of dishonesty in the offence.[98]

There is a new wild card put into play in the shape of the common law. In a case involving extradition of a British citizen to the United States to stand trial on an indictment for price fixing in the carbon industry there, it was argued that, the events having occurred prior to creation of the cartel offence (the Enterprise Act coming into force in June 2003), the accused could not be extradited owing to the double criminality rule. True enough as regards the (statutory) cartel offence, but the House of Lords established that whilst there is no common law offence of price fixing, it could, in circumstances, constitute the (common law) offence of conspiracy to defraud, and remitted the case to a district (immigration) judge to determine whether the necessary constituent elements were present.[99] This too requires dishonesty, but the bar might otherwise be lower than that of the cartel offence.

As for the European Union, it has long been accepted that Union competition law could not itself be made subject to criminal sanctions, owing essentially to lack of Community/Union *vires* in the field. But the principle has been eroded. It is now established in matters of environmental policy that the Union may, through directives, compel the adoption of criminal sanctions where based upon implicit powers associated with a specific legal basis, where there is a clear need to combat serious shortcomings in the implementation of Union objectives, and where two conditions—necessity (essentially a proportionality test) and consistency (measures adopted must respect the overall consistency of the Union's system(s) of criminal law, whether adopted on the basis of express authority in criminal matters (ex-third pillar matters) or normal Union activity—are met.[100] Whether or not these tests are met in the field of competition law may be argued, but in light of the environmental law case law the Commission certainly could, or could try, to provide for criminal sanctions in an enforcement directive. That it has not may indicate satisfaction with Regulation

[95] OFT, decision of 1 August 2007, not yet published.

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

[97] See *The Cartel Offence: Guidance on the Issue of No-Action Letters for Individuals*, OFT423.

[98] See *IB v The Queen* [2009] EWCA Crim 2575, [2009] All ER (D) 90, rejecting an interlocutory appeal that the (criminal) courts were barred from proceeding as only a designated national competition authority within the meaning of Regulation 1/2003 has the power to impose a fine or other penalty upon a cartel which falls also within the prohibition of Art. 101. For the discussion of dishonesty see para 27 of the judgment.

[99] *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920.

[100] Case C-176/03 *Commission v Council* [2005] ECR I-7879; Case C-440/05 *Commission v Council* [2007] ECR I-9097; Commission Communication to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C 176/03 Commission v Council), COM(2005) 583 final.

1/2003 and its plans for civil remedies, or that it does no wish to go down the criminal route.

E. The Financial Crisis

The Union response to the ongoing financial crisis is waged on two competition fronts. First, the Commission has approved a number of bank (and other financial institution) mergers which it might, in other circumstances, not have done, or at least might have required modification/commitments.[101] True, the Commission has not been harsh on mergers, prohibiting only one concentration since the entry into force of the new Merger Regulation in 2004,[102] but this is generosity (applying essentially failing firm criteria) on a much grander scale. Second, in October 2008 it adopted a notice on State aids applicable to financial institutions 'in the context of the current global financial crisis' (the banking communication)[103] by which it noted that 'the level of seriousness that the current crisis in financial markets has reached' was such as to justify scrutiny of new aids not only under article 107(3)(c) (facilitating the development of certain economic activities or regions) but article 107(3)(b) (remedying a serious disturbance in the economy of a member State),[104] a category hitherto available exceedingly sparingly, but here justified, according to the Commission, owing to the 'genuinely exceptional circumstances where the entire functioning of financial markets is jeopardised.'[105] In the notice it set out (generous) parameters on its approach to guarantees covering the liabilities, recapitalisation, controlled winding up of, and other forms of liquidity assistance to, financial institutions, so long as 'undue distortions' to competition were avoided. Further notices followed, on recapitalization,[106] re-structuring[107] and access to finance.[108] It further undertook to respond swiftly to any complete notification of a State aid, 'if necessary within 24 hours and over a

[101] See Case M.5278 (*Banque Fédérative du Crédit Mutuel/Citibank Private Banking Germany*), decision of 28 August 2008; Case M.5296 (*Deutsche Bank/ABN Amro Assets*), 1 October 2008; Case M.5360 (*RBSK Group/DZ Bank Group/RZB Group/HVB Banca Pentru Locuinte*), 3 December 2008; Case M.5384 (*BNP Paribas/Fortis*), 3 December 2008; Case M.5363 (*Banco Santander/Bradford and Bingley Assets*), 17 December 2008; Case M.5228 (*Rabobank/Bank Gospodarki Żywnościowej*), 11 February 2009; Case M.5605 (*Crédit Mutuel/Monabanq*), 8 September 2009; Case M.5660 (*Royal Bank of Scotland/Deutsche Bank/Spin Holdco*), 10 December 2009; Case M.5720 (*Bayerische Landesbank/Banque LBLux*), 16 December 2009.

[102] Case M.4439 (*Aer Lingus/Ryanair*), decision of 27 June 2007, not yet published; subject to (partial) review in Case T-411/07 *Aer Lingus Group v Commission*, pending.

[103] 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; following and adapting the established thinking on rescuing and restructuring firms as set out in Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 2004 C244/2 (the 'R & R Guidelines').

[104] Banking communication, ibid para 9.

[105] ibid para 11.

[106] Communication from the Commission—The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ 2009 C10/2.

[107] Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ 2009 C195/9.

[108] Communication from the commission—Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, OJ 2009 C83/1 (modified OJ 2009 C303/6).

weekend.'[109] Anyone accustomed to the normal, leisurely Commission pace in these matters could be forgiven a degree of scepticism, but the Commission has largely been true to its word. In the eight months following publication of the notice the Commission approved guarantee measures to the value of €2.9 billion and recapitalization measures worth €313 thousand million.[110] In December 2009 it approved, under article 107(3)(b), impaired asset relief measures and the restructuring plan for the Royal Bank of Scotland of between €70–110 thousand million,[111] the largest amount of State aid disbursed in the Community/Union's history.

This is uncommon generosity, but these are uncommon times. The Commission is, maybe, exceeding the limits the Treaty intended and designed for State aids. But to most it is appropriate flexibility in the face of unprecedented market turmoil. It can be assumed that the Commission is not unmindful of the possibility that, should it set about limiting State aids with the vigour it has at its disposal, it would simply be ignored. And that would have repercussions for the Union far beyond the fields of State aids and competition.

Robert Lane*

[109] Banking communication (n 103) para 53.

[110] DG Competition, *Review of guarantee and recapitalisation schemes in the financial sector on the current crisis*, 7 August 2009, para 7.

[111] Cases N422/2009 and N621/2009 (*Royal Bank of Scotland*), decisions of 14 December 2009, not yet published.

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