Articles 81 and 82 EC in 2006—The Year in Review

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The year 2006 brought a fundamental revision of the Commission’s fining guidelines and a revamping of its leniency program, along with a new record of fines being assessed for hardcore violations of Art.81 and a number of important court judgments in the same area. A new—but by no means final—chapter was added in the continuing saga of the battle between the Commission and Microsoft, as the Commission for the first time issued periodic penalty payments under its new powers in order to force Microsoft to implement the Commission’s decision pending appeal. This article will focus on the most important developments.

1. Legislation and Notices

Over the past few years, the Commission has succeeded in eliminating a number of jurisdictional and substantive peculiarities relating to the transport industry, bringing them under the umbrella of the general rules that apply to the enforcement of Art.81. This process continued with two measures adopted in 2006. More significantly, the Commission substantially revised both its Fining Guidelines and Leniency Program.

1.1. Repeal of Liner Conferences block exemption

In September 2006, the Council of Ministers repealed Council Regulation 4056/86 and amended Regulation 1/2003 accordingly, extending Regulation 1/2003 to include cabotage and international tramp services.¹

1.2. Revision of block exemption for IATA Tariff Conferences for Passengers

In September 2006, the Commission revised the existing block exemption for IATA Tariff Conferences for Passengers to the effect that the existing block exemption will be phased out and as of October 31, 2007 there will be no longer any block exemptions available.²

1.3. New fining Guidelines

The Commission adopted new fining guidelines for breaches of Arts 81 and 82 of the EC Treaty: “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003” (the 2006 Guidelines).³

The 2006 Guidelines apply to fines imposed for infringements of EC competition rules such as cartels and abuses of dominant positions. They replace the Guidelines adopted in 1998 and will apply to all cases where a Statement of Objections has been notified to the parties after September 1, 2006, the day of publication of the 2006 Guidelines in the Official Journal. Fines will remain subject to the statutory maximum of 10 per cent of the turnover of the undertaking on which the fine is imposed.⁴

The most significant changes introduced by the 2006 Guidelines are the following:

² Commission Reg.1459/2006 on the application of Art.81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports [2006] O.J. L272/3.
⁴ See Art 23(2) of Council Reg.1/2003.
The Commission will employ a new methodology for the calculation of the basic amount of the fine, which will now be tied to the turnover achieved in the goods in which the infringement occurred. The duration of the anticompetitive conduct will have a far greater weight on the amount of the fine. Recidivists will receive even harsher treatment than in the past. Overall, the 2006 Guidelines will result in even higher fines than are currently being imposed by the Commission under the 1998 Guidelines.

A Three-step methodology for calculating the basic amount of the fine

Under the 1998 Guidelines, the basic amount of the fine was a lump sum assessed considering the gravity of the infringement and other factors that were difficult to predict. Most serious infringements (such as horizontal price fixing and market sharing cartels) qualified for higher basic amounts. A 10 per cent increase was then applied for each year of participation in the infringement.

The 2006 Guidelines introduce a new three-step methodology for setting this basic amount. The starting point will now be the undertaking’s turnover in the last business year of participation in the infringement in the products to which the infringement extended. Even though the Commission avoids using the term “market”, an accurate definition of the relevant product and geographic market will assume a greater importance than in the past.

Once the undertaking’s turnover in the affected products has been determined, the Commission will begin the fine calculation by taking a certain proportion of that turnover according to the gravity of the infringement. As a general rule, the proportion will be up to 30 per cent of the relevant turnover. The exact amount will depend on the type of infringement as well as on the specific features of the case. For more serious infringements—such as horizontal price fixing or market sharing agreements—the Commission intends to set the proportion at the higher end of the scale (i.e. 30 per cent).

The resulting amount will then be multiplied by the number of years of participation in the infringement. This is a notable change from the 1998 Guidelines, where each additional year of involvement in the cartel merely led to an increase of 10 percent of the basic amount of the fine.

Additional amounts

An important additional innovation introduced by the 2006 Guidelines is the so-called “entry-fee,” i.e. an amount ranging from 15 to 25 per cent of the defendant’s turnover that was initially established as the basis for the fine calculation. Thus, in addition to the amount resulting from the exercise above, the Commission will include in the basic amount of the fine for horizontal cartels an “entry-fee”, regardless of the specific features of the case or duration of the infringement. The rationale for the “entry-fee” is that any company involved in a serious antitrust infringement must receive a substantial fine so as to be deterred from future illegal conduct. The “entry-fee” may also be added to the basic amount of the fine in other cases such as abuses of a dominant position.

According to the Commission, the new methodology, even when including the entry fee, could lead to fines that do not sufficiently deter firms that have a particularly large turnover in other business lines not affected by the particular infringement. In order to address this alleged risk, such firms could be subject to a further increase to ensure adequate deterrence. This increase will be discretionary and it is likely in particular to affect large multinationals.

Retroactive application

The 2006 Guidelines will be applied by the Commission to conduct that occurred prior to their introduction. For this proposition, the Commission can rely on the judgment by the Court of Justice in Pre-insulated Pipes. According to the Commission, the new methodology, even when including the entry fee, could lead to fines that do not sufficiently deter firms that have a particularly large turnover in other business lines not affected by the particular infringement. In order to address this alleged risk, such firms could be subject to a further increase to ensure adequate deterrence. This increase will be discretionary and it is likely in particular to affect large multinationals.

More predictability?

In addition to the primary goal of increasing fine levels to create a more effective deterrent, the Commission has also sought to increase the predictability of fines in order to lay the ground for possible plea bargaining. The Commission recognises that plea bargaining (which the Commission prefers to refer to as “direct settlement”) can only take place if the defendant has an idea of the size of the sanction it would encounter in the absence of
a settlement. Whether the Guidelines will achieve this second goal remains to be seen.

1.4. New leniency regime

In December 2006, the Commission published a new leniency notice,7 which replaces the old leniency notice of 2002. The new Notice is in line with the European Competition Network’s Model Leniency Program.8 The principal innovation is the introduction of a “marker” system, allowing leniency applicants to secure their place in the queue on the basis of submitting a limited amount of information, with additional data to be provided within a set timeframe.

The new Notice sets a somewhat higher standard for immunity applicants, requiring them to submit information which allows the Commission to carry out a “targeted” inspection.9 The Notice also clarifies the procedures to be followed by companies wishing to qualify for immunity from fines or a significant reduction thereof. Finally, the Notice formalises a number of measures the Commission has developed in order to try to protect corporate statements from discovery in US civil damage actions. Applicants are allowed to make corporate statements in oral form and access to the transcripts of such statements will only be granted to the addresses of the Statement of Objections, on the condition that no copies in any form will be made.

2. Article 81 EC

2.1. Hardcore cartels—Commission decisions resulting in record fines

The Commission continues to step up its enforcement activities against companies suspected of having participated in what is now commonly referred to as Hardcore Cartels. To this end, the Commission, in 2006, imposed a total of €1,846.3 million in fines in seven Art.81 cartel cases—a new record.10

2.2. Notion of agreement and restriction of competition—Volkswagen II

The limits of the notion of “agreement” in Art.81(1) EC have been litigated over the past few years, most notably in the Bayer/Adalat case.11 It is, of course, critical for the Commission’s ability to intervene in vertical cases involving alleged restrictions of competition imposed by the manufacturer of goods on dealers.

In 2001, the Commission ruled that Volkswagen had agreed with its dealers to restrict the resale price of the new Passat model, citing circulars and letters sent by Volkswagen to its German dealers calling for strict price discipline. The Commission imposed a €30.96 million fine on Volkswagen. In 2003, the CFI annulled that decision on the rationale that consent in the agreements to follow the instructions of Volkswagen did not by itself constitute consent by the dealers to an unlawful variation of the agreement.

The ECJ disagreed with the CFI’s reasoning. According to the ECJ, an instruction by a manufacturer which is contrary the competition rules can be authorized by seemingly neutral clauses of a dealership agreement.12 However, the ECJ upheld the CFI’s judgment on the

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8 Under the 2002 Leniency Notice, the Commission has received a relatively high number of immunity applications which the Commission either rejected as insufficient or which otherwise turned out to be defective.
9 Case COMP/38.620 (Hydrogen Peroxide), see Commission Press Release IP/06/650 of May 3, 2006 (fine of €388.13 million); Case COMP/38.645 (Methacrylates), see Commission Press Release IP/06/698 of May 31, 2006 (fine of €344.5 million); Case COMP/38.456 (Road Retarders), see Commission Press Release IP/06/1179 of September 13, 2006 (fine of €266.72 million); Case COMP/38.121 (Copper Fasteners), see Commission Press Release IP/06/1222 of September 20, 2006 (fine of €314.76 million); Case COMP/38.807 (Steel Beams), see Commission Press Release IP/06/1327 of November 8, 2006 (fine of €10 million); Case COMP/38.636 (Synthetic Rubber), see Commission Press Release IP/06/1647 of November 29, 2006 (fine of €519 million); Case COMP/39.234 (Alloy Surcharge), see Commission Press Release IP/06/1851 of December 20, 2006 (fine of €3.17 million).
10 This record, however, will surely be surpassed in 2007 where the first two hardcore cartel decisions have already resulted in a total of €1,743 million of fines being assessed: Case COMP/38.809 (Gas insulated switchgear), Commission Press Release IP/07/780 of January 24, 2007 (fine of €751 million); Case COMP/38.823 (Elevators and escalators), see Commission Press Release IP/07/209 of February 23, 2007 (fine of €992 million).
basis that the agreement not only provided for thedealers generally to follow Volkswagen’s instructions, butalso stated that Volkswagen’s recommendations as toresale price were non-binding. As a result, the agreementdid not amount to a restriction of competition.

2.3. Restriction of competition and assessment under Article 81(3)—Glaxo

Pharmaceutical markets continue to be the subject ofscrutiny by the European Commission and nationalcompetition authorities, as producers try to reconcileincreasingly restrictive national regulatory schemesfixing the price of prescription drugs at a certain levelwith the Art.81 rules outlawing restrictions of paralleltrade. The application of Art.81 to unilateral limitationson the quantities provided to wholesalers was the subjectof the 2004 ECJ judgment in Bayer, referred to above.15

Unilateral quantity limitations are not a fullysatisfactory tool for the pharmaceutical industry,however, since continued exports can lead to productshortages in the low price country. In Glaxo Smith Klinev Commission, the CFI reviewed a Commission decisionconcerning a “dual price” system, where the wholesaler paida lower price for products resold within the local market(where prices were subject to government control). TheCFI annulled the Commission’s 2001 decisionfinding that this pricing system infringed Art.81 EC.14The CFI rejected the Commission’s finding that anyprovision intended to restrict parallel trade constituted a restriction of competition by object; holding that theCommission was required to look at the legal andeconomic context in an individual case when analysingboth the object and the effect of an agreement.15According to the Court, the control of pricing overpharmaceutical products by Member States meant thatit could not be inferred that the agreement had the objectto restrict competition. However, the CFI accepted theCommission’s alternative finding that the agreement hadthe effect of restricting competition.

The CFI also overturned the Commission’s conclu-sions under Art.81(3) EC. According to the CFI, theCommission had failed to properly consider the possi-blle gains in efficiency arising from a pricing structurethat helped fund investments in R&D. The CFI also

rulled that the Commission had not carried out a properbalancing exercise of the loss of intra-brand competitionas against benefits to inter-brand competition. Accord-ingly, the CFI annulled the Commission’s decision.16

3. Article 82

3.1. Article 82 review process

The most significant Art.82 development concerns theCommission’s Art.82 review initiative. The Commissionissued its Discussion Paper on exclusionary abuse onDecember 19, 2005, with a deadline for comments ofMarch 31, 2006. This generated over 100 responsesfrom a wide range of commentators. The Commissionconvened a hearing on the Discussion Paper on June 14,2006.17 In the following months senior officials made numerousspeeches outlining the DG Competition’sreaction to the comments. The current indication isthat a revised paper on exclusionary abuse will becirculated for comment in 2007, first to Member Statesand subsequently to third parties. The Commission isalso reportedly preparing further discussion papers onexploitative abuses and discrimination which may alsobecirculated for comment in 2007.

The debate on the Discussion Paper has focused ontheproposed tests for abuse. The Paper proposesabuse tests more firmly based in economics, particularlyfor assessing practices such as predatory pricing,exclusionary rebates or bundling. While this approachhas been broadly welcomed, substantial questions haveemerged regarding the appropriate economic tests. Forexample, there is a real issue as to whether recoveryof Long Run Average Incremental Costs (LRAIC) orof Average Avoidable Costs (AAC) is the appropriatebenchmark for assessing the abusive nature of rebates. Another issue that has generated considerable debatehas involved the burden of proving the efficiencybenefits associated with allegedly abusive practices. TheDiscussion Paper suggests that this burden should shiftto the dominant firm, but most commentators agree thatboth legal and policy reasons dictate that an assessmentof possible benefits must be part of the initial assessmentof abuse by the Commission or other enforcementauthority.

13 See fn.10 above.
14 Case T-168/01, GlaxoSmithKline Services Unlimited v Commission, judgment of September 27, 2006.
15 See also Case T-328/03, O2 GmbH & Co OHG v Commission, judgment of May 2, 2006.
16 Both GSK and the Commission have appealed.
3.2. Publication of Astra Zeneca Decision

The focus of the Commission staff on the policy issues raised by the Discussion Paper may explain why there has been little reported Art.82 enforcement activity during 2006. The Commission did publish a non-confidential version of its Astra Zeneca decision on its website on July 19.18 The published decision provides more insight into the reasoning behind the Commission decision. Of particular interest is the suggestion that where the obligations imposed on a dominant firm by national regulation are uncertain, the special obligations of a dominant firm require it to interpret those obligations in a way that does not tend to exclude rivals.

3.3. Prokent/Tomra

The Commission did issue one Art.82 decision, however, that is interesting because of the light that it sheds on the Commission’s “more economic” approach to Art.82 enforcement. In its March 29, 2006 Prokent/Tomra decision, the Commission fined Tomra €24 million for abuse of its dominant position on the market for “reverse vending machines”.19 (Reverse vending machines are used by supermarkets or drinks markets in some Member States for collecting returnable bottles/cans).

The Commission found that Tomra had entered into unlawful exclusivity agreements, individualised “quantity commitments” in return for discounts, and target rebate schemes. The Commission did not, however, rely on a form-based abuse assessment supported by precedents such as Hoffmann-La Roche or Michelin II, but instead engaged directly with Tomra on the question of whether the practices had significant exclusionary effects. Thus the Tomra decision reflects the shift indicated in the Discussion Paper away from per se rules to economic assessment. The Commission’s finding that up-front commitments to purchase a fixed quantity of machines in return for a discount is abusive shows, however, that an economics-based approach can sometimes be more interventionist—straight quantity discounts have generally not been subject to Art.82 under the old regime.

4. Sectoral inquiries—energy and financial services

In 2005, the Commission had launched two sector inquiries, using for the first time its new powers under Art.17 of Reg.1/2003, i.e. into the energy markets and into retail banking/business insurance.20

4.1. Electricity and gas

On January 10, 2007, the Commission published the final report on its inquiry into the energy sector.21 The Report largely confirms the Commission’s preliminary findings that were published on February 16, 2006,22 identifying a number of shortcomings in both the gas and electricity markets that hinder the attainment of the EU’s policy objectives of “competitiveness, security and sustainability” in a single European energy market. Together with the Report, the Commission published regulatory proposals to remedy the identified shortcomings.23

The main findings of the Report (which apply to both the gas and electricity markets) are:

(i) existence of too much market concentration and lack of liquidity;
(ii) insufficient integration between the different national markets;
(iii) lack of transparent market information leading to distrust in the pricing mechanisms used by the energy companies; and
(iv) vertical integration between supply and generation and infrastructure facilitates anti-competitive behaviour.

19 See “Prokent/Tomra, a textbook case? Abuse of dominance under perfect information” Frank Mauer-Rigaud/Denis Vaganovskitte, Competition Policy Newsletter, Number 2, Summer 2006.
20 See Kallaugher/Weitbrecht, above, p.143.
22 Ibid.
The most important measure the Commission has discussed over the past couple of months, which features prominently in the Remedies Document, is ownership unbundling, i.e. the separation of the network from the supply and generation activities of the energy companies. According to the Commission, legal and functional unbundling, as currently required by the gas and electricity directives, has proven ineffective in that it does resolve the conflicts of interest inherent in both the transmission network and production and distribution being part of one group. An alternative to ownership unbundling would involve the introduction of independent system operators without the unbundling of ownership. The system operator would be a separate company in which supply/generation companies could not hold a significant stake, but the transmission assets themselves would stay within the vertically integrated group. It appears that the Commission’s preference lies with the full-fledged functional unbundling, as currently required by the gas and electricity directives, has proven ineffective in that it does resolve the conflicts of interest inherent in both the transmission network and production and distribution being part of one group.

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5. Procedure and sanctions

5.1. “Direct settlements”—early Commission thinking

During 2006, the Commission has begun to explore ways in which it could bring enforcement proceedings for violations of Art.81 (hardcore cartels) to an expedited conclusion, similar to what is known in the United States as plea-bargaining. Presumably and in the absence of an explicit basis in the legislative framework of Regulation 1/2003 direct settlements would mean that after the issuance of a Statement of Objections companies would be invited by the Commission to enter into a direct settlement of the infringement: Companies would not contest the Statement of Objections and instead would accept the Commission’s proposal and pay the fine proposed by the Commission, which would include a rebate in recognition of the fact that the company accepted the direct settlement route. This option obviously is quite attractive to the Commission, as it would free up administrative resources, both within the Directorate-General for Competition and within the Legal Service (which handles appeals against Commission decisions). At the same time, the introduction of such a procedure raises numerous legal and practical issues and it remains to be seen whether the Commission will try to introduce such a practice within the existing legal framework or whether it will seek to have Regulation 1/2003 amended.

5.2. Austrian Banks—publication of Commission Decision and transmission of Statement of Objections to complainant

In an important procedural ruling that is part of the Austrian Banks case, the CFI held that the Commission is entitled to publish, as part of a public version of a cartel decision, the main content of this decision as prescribed under Art.21(2) of Regulation 17/2003 and that the publication of additional facts is lawful. In the meantime the Commission has adopted a practice of publishing in the Official Journal only an abbreviated version of the decision—and in a more timely fashion than in the past—while reserving publication of a more complete version of the decision for the website and a later point in time, once agreement has been reached between the Commission and companies concerned as regards the deletion of business secrets. The CFI also ruled that the Hearing Officer’s decision in the Austrian Banks case to make available to the complainant the decision in the absence of an explicit basis in the legislative framework of Regulation 1/2003 direct settlements would mean that after the issuance of a Statement of Objections companies would be invited by the Commission to enter into a direct settlement of the infringement: Companies would not contest the Statement of Objections and instead would accept the Commission’s proposal and pay the fine proposed by the Commission, which would include a rebate in recognition of the fact that the company accepted the direct settlement route. This option obviously is quite attractive to the Commission, as it would free up administrative resources, both within the Directorate-General for Competition and within the Legal Service (which handles appeals against Commission decisions). At the same time, the introduction of such a procedure raises numerous legal and practical issues and it remains to be seen whether the Commission will try to introduce such a practice within the existing legal framework or whether it will seek to have Regulation 1/2003 amended.

26 The Commission, however, prefers the term “direct settlement”. 27 It is in this connection that the Commission’s fines need to be more transparent and predictable, a goal that the new 2006 Guidelines most likely will achieve; otherwise there is no rational way for companies to calculate and confirm that they are indeed receiving a lower fine in exchange for agreeing to a direct settlement.

FPO, a right-wing political party, a non-confidential version of the Statement of Objections, taken pursuant to Art. 9 of the Hearing Officer’s Mandate, was capable of judicial review and as a legal matter was correctly taken. The FPO had received as a complainant in the Austrian banks case a non-confidential version of the Statement of Objections and had disclosed that Statement of Objections to the press.

5.3. Periodic penalty payments (Microsoft)

On July 12, 2006, the Commission issued a decision under Art. 24(2) of Regulation 1/2003 against Microsoft for failure to comply with the obligations imposed in its March 2004 decision, imposing periodic penalty payments totalling €280.5 million. The obligations in question resulted from the Commission’s finding that Microsoft had abused its dominant position by refusing to supply interoperability information for rival producers of server systems software. The 2004 decision obliged Microsoft to make interoperability information available. After the President of the CFI rejected Microsoft’s application for suspension of this remedy pending its appeal of the 2004 decision (in December 2004), disputes regarding the way in which Microsoft implemented the disclosure obligations led the Commission to issue a warning letter to Microsoft on November 10, 2005. The Commission then instituted the full procedures for adoption of an adverse decision (issuing a Statement of Objections and holding an oral hearing) before ruling that Microsoft had failed to make “complete and accurate” interoperability information available. The Commission based this finding largely on the assessment by the independent monitoring trustee appointed by the Commission pursuant to the March 2004 decision. The decision left open the possibility of further sanctions, if Microsoft did not achieve full compliance.

5.4. Assessment of fines—court cases

In 2006, as in previous years, the Community Courts have continued to review numerous Commission decisions in which companies challenged the Commission’s imposition of fines, mostly in cases involving hardcore cartels. Despite the fact that the Community courts enjoy unlimited jurisdiction when reviewing the legality of the fines assessed by the Commission, the Courts and in particular the ECJ have shown an overwhelming support for the Commission’s overall approach, while reducing fines only rarely and usually only by a small portion.

The following cases are selected examples from the vast number of judgments rendered in 2006 in this area.

Liability of parent company for cartel infringements of subsidiary—joint venture between Avebe and Akzo

In European law there are no clear-cut rules attributing the behaviour of natural persons to legal entities and there are likewise no clear-cut rules for attributing the behaviour or liabilities of subsidiaries to the parent company. The Commission has taken a very expansive view and routinely attributes the infringement of a wholly-owned subsidiary to the parent company. This method allows the Commission to assess significantly higher fines as the 10 per cent limit of Art. 23(2) of Regulation 1/2003 will then relate to the—much larger—turnover of the parent company. According to the Commission and the CFI, where the parent company otherwise exercises decisive influence over the subsidiary—which is usually the case—there is a presumption that the parent company was aware or could have been aware of the infringing behavior of the subsidiary and it is for the parent company to rebut that presumption. Parent companies routinely—and unsuccessfully—seek to rebut that presumption and continue to challenge the underlying concept.

A particular situation arises where a subsidiary is a joint venture with two or more parent companies exercising joint control. In this situation the attribution of the subsidiary’s behaviour to—all—parent companies will usually not take place, as a joint venture is governed much more loosely by the parents than a wholly-owned subsidiary, especially if it is a full-function joint venture.

33 See for instance Case COMP/F/C.38.443, Commission Decision of December 21, 2005, Rubber Chemicals [2006] O.J. L331/30, where Repsol had sought to rebut that presumption as regards its subsidiary General Quimica.
However, the situation may be different where there are special circumstances. This was the case with respect to a joint venture between Avebe and Akzo which had no legal personality of its own. While one parent was responsible for production, the other one was responsible for sales and marketing. In this situation, the CFI ruled that both parents were jointly responsible for the conduct of the subsidiary.14

**Instigator vs. leader of a cartel—BASF in Vitamins**

In the Vitamins case, the CFI reduced the fines assessed by the Commission against BASF on the basis that the Commission had not sufficiently demonstrated BASF’s role as instigator or leader in four of the cartels. As a result, the CFI annulled the 35 per cent increase of the basic amount of the fine imposed for these infringements. The CFI differentiated between instigation and leadership, as instigation is concerned with the establishment or enlargement of a cartel whereas leadership is concerned with its operation.15 According to the CFI, an instigator is a company that has encouraged or persuaded others to join a cartel; merely having been a founding member does not constitute instigation. A leader is a company that is a significant driving force in the cartel. In a long term infringement the members of a cartel may at various times take turns in exercising such leadership.

**Ne-bis-in-idem**

The *ne-bis-in-idem* principle has been invoked by many defendants in global cartel cases, arguing that the imposition of a fine by the Commission violated this principle where other authorities, such as the US Department of Justice had already fined the same conduct. Both the CFI16 and the ECJ17 have rejected this argument on the basis that as a matter of public international law this principle does not apply between different sovereigns. For this proposition, the courts can also rely on Art.4 of Protocol 7 to the European Convention of Human Rights, according to which this principle is applicable only between the different authorities within a given jurisdiction.

This result is also rationalised on the basis that each jurisdiction only punishes the conduct as regards the effects it had on the particular territory, e.g. that US authorities only sanction the damage that was inflicted upon US consumers. Therefore, in *Citric Acid*, the CFI considered that the principle of fairness would in certain specific circumstances require the Commission to take account of sanctions imposed in other jurisdictions for worldwide cartels, but this obligation was limited to cases where the foreign jurisdictions had punished conduct and effects in the community.18 In any event, in the exercise of its wide discretion to set the appropriate fine, the Commission is entitled—but not obliged—to take into account the sanctions imposed in other jurisdictions.

**Increases of fines on appeal**

In the *Graphite Electrodes* case, the fine assessed against SGL Carbon had been reduced by the Commission from €80 million to €60.69 million.19 On appeal by the Commission the ECJ increased the fine on SGL Carbon to €75.7 million.20 This judgment is another indication among others that the Community Courts will increase fines on appeal in the exercise of their unlimited jurisdiction. However, to date it appears that such increases have always been combined with reductions of the fine on other grounds and have to date never led to ultimately a fine being assessed which was higher than what the Commission had imposed.

The CFI has also—it would appear for the first time—increased a fine that they would have otherwise assessed against a company’s negligence in providing turnover information to the Commission.21 In this case the CFI reduced the fine, because the US authorities had already imposed a fine of US$69 million on the same conduct. The CFI reduced the fine assessed by the Commission of defendant SGL Carbon when it provided incriminating documents to the Commission in response to an information request.22

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14 Case T-314/02 Avebe v Commission, judgment of September 27, 2006.
16 e.g. Case T-59/02 Archer Daniels Midland v Commission, judgment of September 27, 2006.
17 Case C-397/03 P Archer Daniels Midland v Commission, judgment of May 18, 2006; Case C-308/04 P SGL Carbon v Commission, judgment of June 29, 2006.
18 See fn.36 above, at [66].
20 Case C-301/04 P Commission v SGL Carbon, judgment of September 27, 2006.
5.5. Requirements for Member States’ law on private enforcement—Manfredi judgment of the ECJ

In July 2006, the ECJ delivered its preliminary ruling in a case arising from Italy where several actions for damages were pending against three insurance companies. The defendant insurance companies had been found to be part of a cartel which was subject to a decision from the Italian competition authority in 2000. Four individuals brought action to recover the overcharge in insurance premiums resulting from the cartel and the Italian judge referred a number of questions to the ECJ.

The judgment confirms and takes further the well-known requirements emanating from EC law that national law provide remedies for breaches of Art.81 that are both equivalent to violations of national competition law (principle of equivalence) and that it provide for effective relief (principle of effectiveness). According to the ECJ, the principle of effectiveness may be violated where under national law the limitation period for damages actions runs from the moment when the unlawful behaviour began, particularly if the period is relatively short, as this might make it practically impossible to obtain effective relief. Again following from the principle of effectiveness, the ECJ ruled that the plaintiff must be entitled to compensation not only for the actual loss, but also for loss of profit, including interest. On the other hand, Art.81 EC does not require the national judge to assess punitive damages against the defendants where national law does not provide for them.

6. Outlook for 2007

The themes that have been at the forefront of developments in 2006 are expected to also shape events in 2007: (i) a strict enforcement of the prohibition against cartels with ever-increasing fines and (ii) guidelines and discussion papers explaining the economic concept of abuse under Art.82. In addition, we can expect a judgment from the CFI in Microsoft as well as Commission enforcement actions against large energy companies for alleged violations of Arts 81 and 82.