Microsoft and More—Developments under Articles 81 and 82 EC in 2007

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The year 2007 will be remembered for the Commission’s decisive victory against Microsoft in the Court of First Instance, leading Microsoft to settle that case later in the year on terms sought by the Commission. With fines totaling €3,134 million, the year also brought new records for the total amount of fines imposed during a year and in a single cartel proceeding (€392 million in Elevators/Escalators).

Legislation and Notices—Commission proposal on settlement procedures in cartel cases

In October 2007, the Commission made public its legislative proposals for the introduction of settlement procedures in hard core cartel cases. The proposal follows almost three years of internal debate, not only within the Directorate General for Competition, but with the Commission’s legal service and Member States. The package consists of a proposal to amend Regulation 773/2004— the implementing Regulation to Regulation 1/2003—and of a Draft Notice on settlement proceedings. An amendment of Regulation 1/2003 is thought not to be necessary, even though the introduction of a settlement procedure would once more fundamentally change the nature of cartel enforcement procedures, perhaps as fundamentally as the introduction—also without involvement of the legislature—of the (first) leniency program in 1996.

Any settlement procedure implies a large amount of discretion for the public authority and therefore raises significant issues with respect to the observance of the rule of law. Nevertheless, settlements are attractive not only for the Commission (offering a higher output of faster fining decisions; faster payment of fines since settlements and appeals do not mix well) but also for companies: a settlement, if fairly administered, will give the company a discount to the otherwise applicable fine and will allow the company to bring closure to an altogether negative experience with a definite figure; stock markets uniformly react positively to such news.

The proposed settlement procedure

According to the proposed new Art. 10a(1) of Regulation 773/2004, the Commission, following the initiation of a cartel enforcement procedure, may offer alleged participants the possibility to indicate their willingness to engage in settlement discussions. Following such an indication, the Commission may, according to the proposed Art. 10a(2), inform the party about the envisaged objections; the evidence supporting the objections; and the potential fines. If the party continues to be interested in settlement, it is to submit a so-called written settlement submission, which is supposed to
reflect the results of the settlement discussions both as regards the main facts of the case and as regards their legal qualification as infringement of Art.81(1) EC.5

While the statement of objections remains an indispensable element of any Commission procedure under Arts 81 and 82 EC, in a settlement procedure it can be much shorter, saving valuable time and resources. Subsequently, the settling defendant is supposed to confirm that the statement of objections is in accord with its written settlement submission. In any event, the choice to settle the case has implications on the party’s right to access the Commission’s file and to an oral hearing at the Commission. In its written settlement submission, the party has to waive full access to the file and to confirm that it will ask for an oral hearing only if the statement of objections does not reflect its written settlement submission.

Settlement discount

Undertakings settling a case will receive a discount of between 10 and 20 per cent of the total fine after the 10 per cent-cap of Art.23(2) para.2 of Regulation 1/2003 has been applied and after any discount under the Leniency Notice.6 The definite extent of the discount is still under discussion.

Handling of hybrid cases—the most important unresolved issue

The procedural efficiencies of the settlement procedure can only be achieved where all participants in a cartel agree to settle. Accordingly, the Commission wishes to retain the discretion whether or not to settle a case until the very end. Parties interested in a settlement may have to accept liability for an infringement of Art.81 EC without being assured that the Commission will ultimately settle the case.

6 According to Art.27(1) of Regulation 1/2003, the Commission has to give companies the “opportunity of being heard on the matters to which the Commission has taken objection”. Even a company fully co-operating with the Commission in a cartel procedure must therefore be provided with a detailed statement of objections before a decision is imposed, see BAAG AG v Commission of the European Communities (T-15/02) [2006] E.C.R. II-497; [2006] 3 C.M.L.R. 92.

7 See recital 32 of the Draft Settlement Notice.

Art.81

The Commission’s enforcement activities as to Art.81 EC centered on hard core cartels and on the important payment cards industry.8

Cartel enforcement

In 2007, the Commission imposed a total of €1,334 million in fines in eight cases of hard core cartel enforcement, an all-time record high.9 Figure 1 demonstrates the development of the fines imposed by the Commission in hard core cartel cases over the last 10 years.

Commission Decision in Gas Insulated Switchgear

In the Gas Insulated Switchgear Decision of January 24, 200710 the Commission fined 11 groups of companies for an infringement of Art.81 EC by participating in a cartel for gas insulated switchgear projects. The total fine imposed in this case of over €730 million makes it one of the largest sets of fines ever imposed on a single cartel. The individual fine on Siemens ($396 million including a 50 per cent increase under the 1998 fining guidelines for being a ringleader) constitutes the largest

5 The “written settlement submission” will most likely also be possible in oral form—an parallel to the practice with respect to corporate statements made in connection with leniency applications. In both cases the aim is to make discovery and use by private plaintiffs more difficult.

8 There were also four commitment decisions in 2007 in Art.81 cases. These made binding upon DaimlerChrysler, Fiat, Toyota and General Motors commitments to give independent repairers proper access to repair information related to their respective car models; see Commission Press Release IP/07/1332 and J. Clark and A. Nykiel-Mateo, “Four decisions bind DaimlerChrysler, Fiat, Toyota and General Motors to commitments to give independent repairers proper access to repair information” [2007] 3 Competition Policy Newsletter 50.

9 Apart from the decisions in Elevators/Escalators and Gas Insulated Switchgear described in detail below, these were the following: Case COMP/37.766-Netherlands beer market, see Commission Press Release IP/07/0309, April 18, 2007 (fine of €273.78 million); Case COMP/39.108-Fasteners, see Commission Press Release IP/07/3162, September 19, 2007 (fine of €328.64 million); Case COMP/38.710-ITMikon Spain, see Commission Press Release IP/07/3479, October 5, 2007 (fine of €183.65 million); Case COMP/38.432-Professional videotape, see Commission Press Release IP/07/1723, November 20, 2007 (fine of €74.79 million); Case COMP/39.163-Flat glass, see Commission Press Release IP/07/1781, November 28, 2007 (fine of €486.9 million); Case COMP/39.165-Professional videotape, see Commission Press Release IP/07/1855, December 5, 2007 (fine of €243.21 million).

fine ever imposed by the Commission for a single cartel infringement.\textsuperscript{11}

The cartel had a complex structure.\textsuperscript{12} On the global level, there was a “common understanding” between the participants that the Japanese undertakings would not sell in certain European countries (generally Western Europe) and the European undertakings would not sell in Japan. A number of countries were excluded altogether from the agreement, notably the United States and Canada. Projects outside defined European countries and Japan were divided on the basis of global quotas. The European undertakings discussed projects in European countries among themselves. Certain European countries in which the European producers had their manufacturing capacities were designated as “home countries”, which were reserved for home-producers. Sales in them were not accounted for under the global quotas reserved for the European companies. Although the cartel ran for more than 15 years (1989–2004) with some undertakings’ participations being interrupted from time to time, the Commission considered it to be a single complex and continuous infringement characterised by a coherent set of measures put in place and unified by a common purpose.\textsuperscript{13}

\textbf{Commission Decision in Elevators/Escalators}

On February 21, 2007, the Commission imposed its largest ever fines in a cartel enforcement case.\textsuperscript{14} The four groups Otis, KONE, Schindler and ThyssenKrupp were fined a total of over €992 million for operating cartels for the sale and servicing of elevators and escalators in Germany and the three Benelux countries (Belgium, the Netherlands and Luxembourg). The individual fine assessed against ThyssenKrupp (over €479 million) for its participation in all four cartels is the highest fine ever assessed against a defendant in a single cartel enforcement proceeding.

The Commission concluded that the addressees of the Decision participated in four separate single complex and continuous infringements\textsuperscript{15} of Art.81 EC between 1995 and 2004, and that each of the four infringements covered the whole territory of a Member State. The infringements consisted of collusion between the cartel participants to share markets or freeze market shares by allocating projects for the sale and installation of new elevators and/or escalators, as well as the agreement not to compete with each other for maintenance and modernisation of elevators and escalators. The Commission outlined its objections against the four cartels in a single statement of objections noting that all four arrangements exhibited common elements, such as the same participants; the same products or services in

\textsuperscript{11} The fine assessed against ThyssenKrupp in Elevators/Escalators, discussed below, encompassed participation in four different cartels.


\textsuperscript{13} With regard to the concept of “single and continuous infringement” see also judgment of the CFI of December 12, 2007 in BASF AG, UCB SA v Commission of the European Communities (T-101/05 & T-111/05) [2008] 4 C.M.L.R. 13, discussed below.


\textsuperscript{15} With regard to the concept of “single complex and continuous infringement” see also BASF and UCB [2008] 4 C.M.L.R. 13, discussed below.
In its long-expected MasterCard interchange fees MasterCard—Prohibition of multilateral sector. These concerned the Europe-wide MasterCard in 2007 the Commission took major decisions in that respect to payment cards and payment systems, and had identified competition barriers in particular with the Commission’s sector inquiry into retail banking 17 and Visa MasterCard, Groupement des Cartes Bancaires Payment cards—Commission procedures in MasterCard, Groupement des Cartes Bancaires and Visa

The Commission’s sector inquiry into retail banking17 had identified competition barriers in particular with respect to payment cards and payment systems, and in 2007 the Commission took major decisions in that sector. These concerned the Europe-wide MasterCard organisation and the French CB payment card scheme. Another Commission Decision imposed on Visa a fine of €10.2 million for refusing from 2000 to 2006 to admit Morgan Stanley Bank as a member of its organisation.18

MasterCard—Prohibition of multilateral interchange fees

In its long-expected MasterCard Decision of December 19, 2007,19 the Commission prohibited the levying of a specific multilateral interchange fee (MIF), the so-called “intra-EEA fallback fee”, as far as payments with MasterCard and Maestro consumer credit and debit cards are concerned. A MIF is a fee charged by a cardholder’s bank (the issuing bank) to a merchant’s bank (the acquiring bank) following a card payment. The charged MIF is subtracted from the sales proceeds that are transferred to the acquiring bank. The acquiring bank reimburses to the merchant only the sales proceeds less the amount of the MIF (and, in addition, its own merchant service charge), so that in effect the merchant pays the MIF.

The particular fee in question in the MasterCard Decision had to be paid in all cases of payments with MasterCard and Maestro cards where no other specific MIF was agreed upon between issuing and acquiring bank. This included almost all cross-border payments by credit and debit cards within the EEA.

The Commission took the view that MIFs as such restrict competition, as they virtually set a price with level on the fees merchants are charged by their acquiring bank, and that MasterCard had not provided sufficient and conclusive evidence that the “intra-EEA fallback fee” generated efficiencies qualifying it for an exemption under Art.81(3) EC.

The MasterCard decision contrasts with the Commission’s 2002 decision to exempt, following commitments from Visa, the MIFs levied within Visa for cross-border payments until the end of 2007.20 After expiry of the exemption, the Commission has launched a formal antitrust procedure to investigate Visa’s MIF for cross-border payments.21

Groupement des Cartes Bancaires

In the Decision Groupement des Cartes Bancaires of October 17, 2007,22 the Commission objected to the rate setting mechanisms within the Carte Bancaire (CB) payment card system, the principal domestic system in France, on the ground that it restricts competition between issuing banks. Groupement des Cartes Bancaires (Groupement) is the association of all CB card issuers, but is managed by a board of directors whose members are delegated only by the 11 largest French banks. The Commission had opened a case with regard to the rates following their notification in 2002.

The highly complex fees were differentiated according to the extent of card issuers’ activities in acquiring merchants and in operating cash machines—the less an issuing bank is engaged in these activities, the higher the fee per transaction which the issuing bank had to pay to Groupement. Although the fees apply uniformly to all members of Groupement, they affect relatively new members and are higher for other members than for Groupement—Prohibition of multilateral interchange fees

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cash machine network, but focus solely on the issuing of payment cards.

In that structure the Commission saw not only a restriction of competition by effect—since the fees prevented banks from offering credit cards to consumers at the low prices which their own cost structure would allow—but also a restriction of competition by object, as according to the Commission, the incumbent banks represented in Groupement’s board intended to use the fees to fend off the “threat” posed by more cost-effective competitors. The Commission dismissed the justification brought forward by Groupement under Art.81(3) EC that the fees were necessary to prevent free-riding on investments made by other Groupement members and to encourage acquisition activity.

**Article 82**

**Distrigaz—Commission Decision concerning long-term contracts for the delivery of gas**

Following the publication of the report on the sectoral enquiry into the energy sector in January 2007,23 the Commission applied its newly acquired insights into the European gas markets in a Decision dealing with the supply of natural gas to large industrial purchasers in Belgium.24 The Commission concluded that the long-term supply arrangements of the dominant Belgian supplier had the effect of excluding new competition, but accepted that the supplier could maintain such arrangements, provided that such contracts did not last longer than five years and that on average each year 70 per cent of the gas Distrigaz has contracted to supply would return to the market, principally because the contract ends. This Decision provides a clear signal from the Commission of the direction that the Commission hopes Member State competition authorities will take in dealing with their domestic gas markets.25

23 See for details J. Kallaugher and A. Weitbrecht, “Articles 81 and 82 EC in 2006—the year in review” [2007] E.C.L.R. 320. 24 Decision of 11 October 2007 in Case COMP/B-1/37966 Distrigaz, Summary Decision published in [2008] OJ C99, full text of decision available at http://ec.europa.eu/comm/competition/antitrust/cases/decisiondsp/37966en.pdf. 25 A prohibition decision addressing similar concerns with regard to the German gas market was taken by the Bundeskartellamt on January 13, 2006 in Case B 8-113/03-1. E.ON Rudrur, available in German at http://www.bundeskartellamt.de/de/Deutsch/download/pdf/Kartell/Bundesrecht/B8-113-03.pdf. This decision was confirmed by the Oberlandesgericht Düsseldorf on October 4, 2007 in Case VI-Kart 106. The Bundeskartellamt has in the meantime adopted decisions addressed to all eight regional gas suppliers on the German market which involve commitments designed to open up regional gas markets. With regard to market foreclosure by long-term agreements see also the discussion of the CFI judgment in Alrosa Co Ltd v Commission of the European Communities (T-340/04) [2007] E.C.R. II-107, discussed in this Review—Article 82 below. The Commission’s approach to margin squeezing under Art.82 EC has also been confirmed very recently by the judgment of April 10, 2008 in Case T-271/03, Deutsche Telekom AG v Commission of the European Communities, not yet reported.

**Telefónica—Fine for alleged margin squeeze**

The Commission in July 2007 imposed a fine on Telefónica, the dominant Spanish telecoms operator, for operating a margin squeeze in respect of broadband access fees.26 The case raised difficult issues of cost allocation for introduction of new network services similar to those addressed in the Wanadoo judgment of the CFI27 although the legal theory which the Commission relied on in Telefónica was different. The Commission imposed a fine of over €151 million despite the complexity of the cost calculations and despite the fact that the Spanish telecoms regulator had approved the tariffs in question.

**Procedure and sanctions—fine for alleged breach of a Commission seal**

E.ON became the first company ever to be sanctioned for breach of a Commission seal on January 30, 2008.28 The Commission imposed a fine of €38 million. Its officials had affixed the seal during a dawn raid in May and according to the Commission the seal had been found broken the following day. E.ON submitted extensive expert opinions designed to cast doubt on the reliability of the seal used by the Commission. E.ON claimed, inter alia, that the damaged condition of the seal might be due to vibrations between the door and frame, humidity, an aggressive cleaning product and that the seal was too old to function properly.

The fine against E.ON is the first one imposed for breach of a seal pursuant to Art. 231(1)(e) of Regulation 1/2003. Although the Commission has been faced with incidents of obstruction of its investigations in the past, this is the first case ever in which a fine for an alleged violation of procedural provisions is imposed by way of a separate decision. Previously, the Commission chose to take into account obstruction attempts when determining the fine for infringement of substantive rules, instead of following a separate procedure.

Judicial review—a plethora of judgments from CFI and ECJ

The year 2007 brought many significant judgments from the European courts. The most important one without any doubt was the CFI ruling in Microsoft delivered in September which endorsed the Commission’s approach to Art. 82 EC in several aspects. With regard to hard core cartels, the Commission’s record in the CFI is somewhat mixed, while in the ECJ the Commission continued its successful run, with the ECJ not only confirming several CFI judgments which had largely upheld decisions fining hard core cartels, but also confirming the CFI judgment in British Airways. On the procedural front, the CFI ruled in favour of the Commission on the issue of legal privilege in Akzo Nobel Chemicals, but annulled a Commission Decision adopting commitments for the first time in Alrosa.

Article 81

CFI in BASF and UCB—single complex and continuous infringement

In its decision in BASF AG, UCB SA v Commission of the European Communities, the CFI addressed the scope of the “single complex and continuous infringement” of Art. 81.

The case concerned a Commission Decision which imposed fines on producers of choline chloride (vitamin B4 used in animal feed, not subject to the Commission decision of 2001), among which BASF, UCB and Akzo Nobel for their participation in what the Commission considered to be one “single complex and continuous infringement” from 1992 to 1998.

The Commission had found that the cartel operated at two levels. The first involved global agreements between North American and European producers, having as a purpose the allocation of worldwide markets by limiting imports from North America to Europe and vice versa, between June 1992 and April 1994. The second involved arrangements among European producers, within the EEA, according to which the European market was shared, individual customers were allocated and prices were increased in the period between March 1994 and October 1998.

The Commission had taken the view that both arrangements constituted “a single complex and continuous infringement” because they both had the same anti-competitive aim: the distortion of competition in the choline chloride market.
The CFI rejected the Commission’s reasoning by stressing that the concept of single objective cannot be determined by a general reference to the “distortion of competition in the market”, because any conduct covered by Art.81 EC distorts competition, by object or effect. According to the CFI, such a wide scope would deprive the concept of “single complex and continuous infringement” of its meaning, because it could lead to different forms of conduct being systematically characterised as elements of one single infringement. The CFI made clear that in order for the “common objective” to provide a sufficiently unifying umbrella, the various illegal activities comprising the single complex and continuous infringement must be complementary in nature and, by interacting, contribute to the realisation of such a common objective.

Applying this standard, the CFI considered that the global and European agreements were two different cartels (and, therefore, two separate infringements) because there was no overlap in time, because they had different objectives and because they were implemented by dissimilar methods. As a result, the CFI annulled that part of the Decision which imposed fines on BASF and UCB for their participation in the global infringement, as such infringement was held by the CFI to be time-barred. BASF, however, did not profit from this partial annulment: the CFI in fact provided for a procedural novelty by exercising its unlimited jurisdiction in order to increase the fine imposed on BASF. This aspect of the case is dealt with further below.

CFI—reduction of fines in “Carbonless Paper” cartel
As regards the carbonless paper cartel fined in December 2001, the CFI reduced the penalties imposed on two out of seven cartel participants, which altered the total fine from originally €313.7 million to €270.9 million. The CFI on the one hand took a more favourable view than the Commission of the evidence provided to the latter by Arjo Wiggins Appleton, which led to a larger fine reduction in application of the Leniency Notice. Secondly, the Court found that the Commission had not established the participation of another cartel participant, Papelera de Guipuzcoana de Zucuñaga, in market-sharing practices, so that the fine imposed on that undertaking was reduced as well.

CFI—reduction of fine in “Needles and other Haberdashery” cartel
Another reduction of fines was ordered by the CFI on appeal by Coats, a participant in the needles and other haberdashery products cartel fined in October 2004. Here the Court held that according to the evidence brought forward by the Commission Coats was a “mediator” of the cartel rather than a full member, and for a shorter period of time than the Commission had alleged. Consequently, the CFI reduced the fine imposed on Coats significantly from €30 million to €20 million.

Judicial review—Article 82

CFI—Commission largely confirmed in Microsoft
The most important Art.82 event in 2007 was the CFI judgment in Microsoft Corp v Commission of the European Communities. The CFI upheld the Commission’s 2004 Decision imposing a fine of €495 million.
million for refusal to provide competitors in the server systems market with interoperability information and for unlawful bundling of the Windows Media Player with the Windows PC operating system. The CFI judgment focused on the specific factual findings made by the Commission, concluding that the Commission had not made any manifest errors of assessment. This factual focus means that the broader legal significance of the judgment is limited. The CFI has, however, provided some clarification for the law regarding both refusals to license and bundling under Art.82 and has also provided a helpful ruling on the controversial issue of the burden of proof for objective justification under Art.82.

The CFI treated the refusal to provide interoperability information as a refusal to license subject to the rules established by the ECJ in Radio Telefis Eireann v Commission of the European Communities44 and IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG.45 Those cases had established that a refusal by a dominant firm to license intellectual property can be abusive when three conditions are met:

(i) the dominant firm is active in a downstream market where the input protected by intellectual property would be used;
(ii) the input is essential for rivals to compete in that market; and
(iii) the competitor seeking the input would supply an unmet consumer need.

The CFI provided a useful gloss on the second and third elements of this test. As regards “essentiality”, the CFI ruled that it was not necessary to show that refusal to provide the input would eliminate all competition in the downstream market. It was sufficient that the refusal would eliminate effective competition in that market. As regards the unmet consumer need, the CFI stated that this requirement needed to be read as an application of the general rule of Art.82(b) that a “limitation of technical progress” by a dominant firm constitutes an abuse. The CFI endorsed the Commission’s findings that the cumulative effect over time of Microsoft’s refusal to provide interoperability information had limited technical progress across a whole range of products in the server market.

As regards the bundling abuse, the CFI approved the Commission finding that the media player was a separate product, because there was a distinct demand for media players that could be satisfied by third parties. The CFI rejected the argument that the Commission needed to show that the bundling had led to direct consumer harm (although it reviewed and approved the part of the Commission Decision finding such effects). The CFI ruled instead that the “inevitable and significant consequences” for rival producers of media players were sufficient to make Art.82 applicable.

The CFI also considered Microsoft’s arguments that both the refusal to provide interoperability information and the media player bundling were objectively justified. Although the CFI rejected Microsoft’s arguments in this regard, it made an important ruling regarding the burden of proof in showing justification under Art.82. The CFI stated that where a dominant firm wishes to rely on a plea of objective justification, it is required to raise the matter “before the end of the administrative procedure” and support the plea with “arguments and evidence”. The Commission, however, has the obligation of showing that the arguments relied on by the dominant firm “cannot prevail”. Thus the CFI imposed an evidentiary burden on the dominant firm in respect of a justification argument, but the ultimate burden of proof remains with the Commission. This contrasts with the position advocated by the Commission in the Art.82 discussion paper; that the burden of showing objective justification or efficiency should shift to the dominant firm.

Following the CFI judgment, Microsoft in October 2007 also settled the long-going dispute with the Commission over the conditions of supply of its interoperability information by heavily reducing the royalties claimed.46 Nevertheless, the Commission on February 27, 2008 imposed on Microsoft a penalty of €899 million based on Art.24(2) of Regulation 1/2003 for failure to comply with the 2004 Decision prior to the settlement.47 Together with the penalty already imposed in June 2006,48 this decision brings the total amount of penalties imposed on Microsoft for non-compliance to the amount of €1.1795 billion, and the total amount of payments imposed on Microsoft to an unprecedented €1.6767 billion.

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ECJ—Commission confirmed in British Airways

In a July 1999 Decision, the Commission had found that British Airways held a dominant position in the market for purchase of airline booking services from travel agents, even though it had a market share of less than 40 per cent.49 The Commission had ruled that the incentive schemes operated by British Airways, which rewarded agents for generating bookings in excess of the amounts generated by the same agent during the same period in the previous year, were abusive. This Decision was endorsed by the CFI in a December 2003 judgment,50 that was notable (along with the Michelin II judgment51 in the same year) for its conclusion that there was no need to show that conduct caused actual competitive harm to establish abuse. In a March 2007 judgment,52 the ECJ affirmed the position taken by the CFI. One interesting new point that did emerge concerned the application of Art.82(c). The ECJ considered the circumstances where unequal treatment would lead to a “competitive disadvantage” for the disfavoured trading partner, ruling that a competitive disadvantage could be implied where the different treatment was significant and the market where the discrimination occurred was highly competitive (like the UK travel agency market).

CFI—de facto exclusivity in Alrosa

The CFI judgment in Alrosa Co Ltd v Commission of the European Communities53 is primarily of interest because of its implications for Commission practice in accepting commitments under Art.9 of Regulation 1/2003.49 The Alrosa case is also significant, however, because it sheds light on the treatment of de facto exclusivity or quasi-exclusivity under Art.82. Alrosa arose from a Commission investigation of the commercial relationship between De Beers and Alrosa, which are both major suppliers of raw diamonds. De Beers was the principal purchaser of Alrosa’s diamonds—buying approximately €800 million worth annually, although there was no contractual limit on Alrosa selling to third parties. The Commission challenged the arrangements on the basis that De Beers was a dominant buyer and that the quantity commitments entered into by Alrosa constituted a form of de facto exclusivity benefiting De Beers. De Beers offered commitments under Art.9 under which it would terminate the Alrosa purchase relationship. The CFI ruled, however, that these commitments further than was necessary to deal with the Art.82 concerns. The CFI suggested that a cap on purchases by De Beers (e.g. 35 per cent) would eliminate the risk of foreclosure of third parties and therefore of any Art.82 concerns. Both this case and the Distrigaz decision discussed above clearly reflect the special circumstances of the markets involved. Nonetheless it is evident that de facto foreclosure can raise Art.82 issues, but that the nature of those issues depends on the percentage of the market foreclosed. This contrasts with the position where contractual restrictions lead to foreclosure, in which British Airways and Michelin II have established that no foreclosure analysis is necessary.

CFI—predatory pricing in Wanadoo

The CFI issued a judgment54 on January 30, 2007 upholding the Commission’s 2003 Decision,55 according to which Wanadoo had engaged in predatory pricing to exclude competitors in the French market for broadband access. The Commission had found in that Decision that Wanadoo (a subsidiary of France Télécom) had implemented a strategic plan to exclude rivals, first by pricing its broadband services at below average variable costs and subsequently by pricing at below total costs. The Commission Decision relied on documents showing an “intent to preempt the market” as a basis for describing the Wanadoo conduct as an anti-competitive scheme making prices below average total costs predatory under the AKZO rule.57

In rejecting the Wanadoo appeal, the CFI made a number of important points. The CFI reaffirmed the principle that a predatory pricing claim under

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54 These are discussed below.
Art. 82 does not require evidence of the possibility of recoupment. The CFI rejected the argument that Art. 82 should not be applicable in a dynamic and rapidly growing market, observing that where high market shares remain stable over time they are still indicative of dominance even though the market is expanding. The CFI ruled that a dominant firm had no absolute right to align its prices on those of rivals, if the alignment is intended to strengthen the incumbent’s dominant position. The CFI also ruled that “intend to preempt rivals” is sufficient to establish an anti-competitive scheme (even though this could be seen as the object of much legitimate competitive activity.)

The CFI rejected the argument that the documents showing such intent were “informal and spontaneous”, finding that in their context they reflected the considered views of senior management. Finally, the CFI rejected the argument that uncertainty regarding the application of Art. 82 to BASF in an expanding market meant that a heavy fine was inappropriate.

Sanctions and procedure

CFI judgment in BASF—increase of fine on appeal

The CFI judgment in BASF and UCB v Commission 54 will, apart from its relevance for the concept of the single complex and continuous infringement of Art. 81(1) EC, become notorious for being the first case in which a Community court increased a fine imposed on a company on appeal, 59 albeit by the relatively modest sum of €54,000.

The recalculation of the fine on BASF dealt with two aspects: first, the criteria used by the Commission to account for the duration of the infringement; secondly, the reduction granted to BASF for not substantially disputing the accuracy of the facts.

Regarding the duration, BASF’s infringement lasted for 3 years and 10 months. The Commission calculated a 10 per cent increase per each full year of infringement, and a 5 per cent increase for each period of 6 full months, thus imposing a 35 per cent increase to BASF. The CFI raised this percentage to 38 per cent, considering that, regarding the last 10 months of infringement, an increase of only 5 per cent was not proportionate.

As for the second, the CFI maintained only 10 per cent of the initial 20 per cent reduction applied by the Commission. The CFI considered that BASF was not entitled to the other 10 per cent reduction for co-operation with the Commission, because the company did not provide any information on the European cartel, but only supplied documents related to the cartel at global level. Since the CFI considered the global arrangements as a separate cartel, 60 fining of which was already time-barred, it decided that the information provided by BASF about the global cartel could no longer qualify for fine reduction.

The CFI also exercised its unlimited jurisdiction to recalculate the remaining fine imposed on UCB, but in this instance decided to grant a higher reduction than that initially applied by the Commission.

CFI judgment in Akzo Nobel—legal professional privilege

In this long-anticipated decision, 61 the CFI examined the conditions under which undertakings may exercise their right not to disclose information covered by legal professional privilege to the European Commission during a dawn raid or when responding to a formal request for information under Regulation 1/2003. Three main points may be highlighted in connection with this ruling.

As regards the scope ratione personae, the CFI refused to go beyond existing case law and ruled that legal professional privilege does not apply to in-house lawyers, following the ECJ in the Australian Mining & Smelting Europe Ltd (A M & S) v Commission of the European Communities case, 62 according to which legal privilege applies only to communications exchanged with “independent lawyers”. The CFI refused to draw a distinction between in-house counsel who are enrolled with the bar associations in their own countries, and therefore are subject to the same obligations, ethics rules

60 See above.
61. Akzo Nobel Chemicals Ltd v Commission of the European Communities [T-123/03] [2008] 4 C.M.L.R. 3. Akzo had lodged an application, first, for the annulment of Decision C (2003) 559/4 of 10 February 2003 and, so far as necessary, Decision C (2003) 854 of 30 January 2003 ordering to submit to an investigation and for an order requiring the Commission to return certain documents seized in the course of the investigation and not to use their contents (T-120/03) and, secondly, for the annulment of Decision C (2003) 1533 final of 8 May 2003 rejecting a request for the protection of those documents on grounds of legal professional privilege protecting communications between lawyers and their clients (T-25/03).
and sanctions applicable to outside counsel, and in-house counsel who must suspend their bar membership while employed. Also in line with the A M & S ruling, the CFI made clear that within the European Union, legal privilege only applies to communications with lawyers registered with a Member State bar.

However, ratione materiae the CFI slightly extended the scope of legal professional privilege. According to the previous case law, legal privilege covers: (i) written communications exchanged with independent lawyers in exercise of the undertaking’s right of defence in relation to an ongoing or foreseeable investigation; and (ii) internal communications that merely reproduce the content of the advice given by an outside lawyer. These points were confirmed by the CFI, but the Court went further to rule that preparatory documents are also covered by legal privilege—even if they are not exchanged with a lawyer or are not created for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence.

As regards the procedure to invoke the legal professional privilege, the CFI stressed that the Commission is precluded from taking even a cursory look at documents with respect to which legal professional privilege is claimed. The CFI went on to clarify the procedural steps that should be followed by the parties in a dawn raid, should a dispute on the rights of the defence.

(i) the undertaking may invoke the legal privilege and refuse to allow the officials a cursory look at the documents;
(ii) if the Commission does not agree with the undertaking’s view, the Commission may place the controversial documents in a sealed envelope and remove the envelope from the undertaking’s premises; and
(iii) it is for the CFI to examine the documents placed in the sealed envelope and decide the dispute before the Commission can read them.

In order to allow the matter to be brought before the Court, the Commission must issue a formal decision rejecting the undertaking’s request for legal privilege, from which the undertaking can appeal to the CFI, which will then decide the matter.

**CFI judgment in Alrosa—proportionality of the Article 9 Decision**

With a judgment delivered on July 11, 2007, the CFI annulled the Commission Decision that had made binding the commitments proposed by De Beers to cease all purchases of rough diamonds from Alrosa. This marked the first occasion ever that a Decision adopted pursuant to Art.9(1) of Regulation 1/2003 was annulled.

The Luxembourg company De Beers and the Russian company Alrosa occupy the number one and number two positions respectively on the worldwide market for the production and supply of rough diamonds. Following their notification of a five-year trading agreement the Commission initiated two sets of proceedings—one based on Art.81 EC against both companies and one based on Art.82 EC against De Beers alone. The two companies submitted joint commitments designed to respond to the Commission’s concerns and providing for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, which were to go down to US $275 million in 2010 and subsequently to be capped at that level. In light of the negative outcome of a market test conducted by the Commission, De Beers individually offered new commitments providing for a progressive reduction of purchases of rough diamonds from Alrosa and their subsequent definitive cessation with effect from 2009. The Commission sent to Alrosa a copy of the commitments proposed by De Beers, inviting it to submit its observations and at the same time provided it with a non-confidential copy of the third party comments. The Commission then made binding the individual commitments proposed by De Beers. On appeal by Alrosa the CFI held that while the Commission is under no obligation to decide to make commitments binding according to Art.9(1) of Regulation 1/2003 rather than proceeding according to Art.7 of that Regulation, it is obliged to comply with the principle of proportionality when adopting commitment decisions. The Court conducted an objective review of
proportionality by assessing the appropriateness and necessity of the measure adopted by the Commission in relation to the aim pursued. While the Commission is not formally required to adduce evidence of the existence of an infringement, it must nonetheless establish the reality of the competition concerns which led it to envisage the adoption of a decision under Arts 81 and 82 EC and which ultimately justify that certain commitments are made binding on the undertaking concerned.

According to the Court the principle of proportionality in practice requires an appraisal of alternative solutions. Observing that in the case under review the Commission had not considered alternative solutions and had merely accepted the commitments proposed by De Beers, the CFI held that its decision was vitiated by a manifest error of assessment as solutions existed which might have been equally appropriate to address the identified competition concerns and which would have been less onerous on third parties, i.e. Alrosa.

The Court further held that Alrosa had not been able to fully exercise its right to be heard in the proceedings leading to the adoption of the contested decision. Merely providing Alrosa, the party to the contract in dispute, with a copy of the individual commitments proposed by De Beers and at the same time a non-confidential version of the third party observations was not sufficient to allow Alrosa to reply effectively and to propose new joint commitments together with De Beers.

**Conclusion and outlook**

The adoption of the Commission’s direct settlements package will bring a sea change to the way in which the Commission enforces the prohibition against cartels. As regards Art.82, the Commission’s political will to formalise the changes to the way in which it analyses possible infringements of Art.82 appears to be on the wane and we will most likely see the abandonment—at least for the time being—of any effort to publish guidelines on the application of Art.82.