Developments under Articles 81 and 82 EC—The Year 2004 in Review

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The year 2004 will be remembered as the year when the seismic shift in the enforcement of Arts 81 and 82 EC finally occurred: Regulation 1/2003 came into force on May 1, 2004. The long-term significance of this development cannot be overestimated: direct applicability of Art.81(3) EC; supremacy of substantive EU competition law over national competition law; joint enforcement of Arts 81 and 82 through a network of European competition authorities.

At the level of substantive law, the enactment of a new Technology Transfer Block Exemption and accompanying Guidelines completes the modernisation of Art.81; a comparable modernisation process is underway with respect to Art.82. Among individual Commission cases the decision against Microsoft stands out not only for its fine of €497 million—a new record—but also for its potential significance for the development of the software industry.

This article summarises the most significant developments during the year 2004. Separate sections deal with Art.81, Art.82, remedies/sanctions and procedural issues.

1. Article 81

With respect to Art.81, the Commission in 2004 concluded a number of projects and individual proceedings that had been pending for some time, as Commissioner Mario Monti put his house in order before turning the post over to Neelie Kroes. The Court of Justice (“ECJ”) and the Court of First Instance (“CFI”) rendered, as is typically the case, a number of significant judgments.

1.1. New Technology Transfer Regime

On April 27, the Commission issued Regulation 772/2004, the new Technology Transfer Block Exemption (“TTBE”). On the same day, the Commission issued Guidelines on the Application of Art.81 to Technology Transfer Agreements. Taken together, the TTBE and the Guidelines apply the post-modernisation structure for application of Art.81 to technology licensing. The Guidelines provide the basic approach for self-assessment and the TTBE provides a “safe harbour” for arrangements that would normally be consistent with Art.81 on the basis of the guidelines.

The Guidelines and the TTBE create three categories of license agreements: (i) agreements between non-competitors; (ii) non-reciprocal agreements between competitors; and (iii) reciprocal licenses between competitors. (“Non-competitors” are defined as firms that were not competitors in respect of the product produced using the technology before the agreement).

As regards agreements between non-competitors (which as defined by the Commission covers most classic “vertical” license arrangements) the Guidelines signal a relatively relaxed approach to applying Art.81. The Guidelines suggest that many common vertical restraints in license agreements (exclusive license commitments; field of use restrictions, or structuring of royalty obligations, passive sales restrictions regarding customer groups or territories) either fall outside Art.81 altogether or qualify for exemption under Art.81(3). The cases where the Guidelines suggest that Art.81 might apply mostly involve cases where a licensee will compete with the licensor in the market for products produced with the technology after conclusion of the license. In these cases Art.81 may be applicable to some restrictions on sales or output where the licensor has significant market power. The TTBE provides a safe harbour for agreements between non-competitors, provided that market share in the downstream market does not exceed 30 per cent and provided that the agreement...
does not include listed restrictions on pricing or active sales by the licensee.

Non-reciprocal licenses between competitors (where the licensee does not license the licensor in respect of technology used in the same market) are treated in a manner similar to agreements between non-competitors. The principal differences involve restrictions that could lead to partitioning of markets or customers between the competing firms (e.g. territorial or customer restrictions) where the Guidelines suggest that more careful consideration is warranted. The TTBE safe harbour for these arrangements is limited to agreements where the parties have a 20 per cent combined market share.

The treatment of reciprocal licenses between competitors breaks new ground because the old TTBE did not cover such agreements. The new TTBE provides a limited safe harbour for such agreements up to a market share threshold of 20 per cent and provided that the agreement does include restrictions on pricing, output, territories, fields of use or customers. The Guidelines recognise that restrictions in agreements between competitors can often lead to consumer benefits and provide a structure for analysing those benefits. The Guidelines also address the specific issues that apply to technology licensing in the context of patent pools and standardisation.

1.2 Concept of agreement—Bayer/Adalat and Volkswagen II

The question whether dealings between undertakings constitute an agreement—one of the principal elements of Art.81(1)—has never been a real issue in horizontal relationships, where the presence of concerted behaviour usually renders the point superfluous. Vertical relationships present more challenging issues, since concerted behaviour occurs very seldom in the relationship between supplier and customer, with each side trying to maximise its profit.

These issues have been at the forefront of the litigation between the Commission decision and Bayer with respect to the pharmaceutical Adalat. Rather than prohibiting the Spanish wholesalers—Spain is a low-price country—from exporting Adalat to other Member States, Bayer had unilaterally reduced the quantities that it supplied to them. The Commission considered this to be a part of an agreement restricting competition and prohibited the practice. The ECJ in January 2004 upheld the judgment of the CFI from 2000 which had found in favour of Bayer. According to the ECJ “the mere fact that a measure adopted by the manufacturer which has the object or effect of restricting competition (i.e. restricting parallel imports) falls within the context of continuous business relations...is not sufficient for a finding that... an agreement (prohibited by Art.81) exists”. As a result, the Commission is left to intervene on the basis of Art.82, if the manufacturer is considered dominant.

In Volkswagen II the issue was whether the Commission could find an unlawful agreement merely because there was a distributorship agreement in place in the course of which Volkswagen admonished its dealers not to give discounts on the VW Passat. Again the CFI considered that the Commission has not established the acquiescence of dealers, expressed or implied, in the restriction of discounts proposed by the manufacturer.

1.3 Cartel enforcement—ECJ judgment in Cement

Almost 15 years after the first Commission dawn raid in April 1989, the huge Cement cartel case came to an end. After having sent Statements of Objections to 76 undertakings and associations of undertakings, the Commission in 1994 had imposed fines of approximately €248 million on 42 of these undertakings. On appeal, the CFI had reduced the amount of fines by approximately €140 million. The CFI had found that with respect to some firms the Commission had failed to prove participation in the cartel. Fines against two of the companies were annulled because the Commission had given them insufficient access to the file and as a result they had been deprived of evidence which would have aided their

6 Joined Cases C-2/01 P & 3/01 P Bundesverband der Arzneimittel-Importeure eV v Bayer AG, January 6, 2004, not yet reported.
8 Bundesverband der Arzneimittel-Importeure eV v Bayer AG, cited above at [141].
9 The application of Art.82 presents issues of its own. See Conclusion of the A.G. Jacobs delivered on October 28, 2004 in Case C-33/03 Synetarismos Farmakopoion Aitolas & Akarnanias (Syfai) v GlaxoSmithKline AEVE, pending in the ECJ. See also T-168/01 Glaxo Wellcome v Commission, pending in the CFI.
10 Case T-208/01 Volkswagen AG v Commission, December 3, 2003, not yet reported.
11 The CFI judgment has been appealed, see C-74/04, pending.

defence. Six companies had appealed to the ECJ, which in January 2004 largely affirmed the CFI’s judgment.¹⁴

1.4 Cartel enforcement—Commission decisions

During 2004 the Commission, as is usual, concluded a number of cartel enforcement proceedings with fines against the companies involved.

In Spanish raw tobacco, the Commission assessed fines of €20 million against a purchasing cartel of five Spanish tobacco processing companies as well as against tobacco growers (by a symbolic amount) for having engaged in collective price negotiations to counterbalance the purchasers’ cartel.¹⁵

The Commission also imposed fines totalling €222.3 million on eight groups of companies for participating in a cartel in the European market for copper plumbing tubes.¹⁶ The cartel was considered to have operated between 1988 and 2001 in a market, where the total amount of affected commerce was estimated to be at €1.15 billion in 2000, the last full year during which the cartel was considered to have operated.

Coats Holdings and William Prym, were fined €30 million each for operating, together with a third company, a cartel in the sewing needle market and for segmenting the EU market for haberdashery products (needles, pins, buttons, fasteners and zips) between September 1994 and the end of 1999.¹⁷ This infringement was considered very serious in a European market totalling €1 billion in 2003; however, the cartel was a pure product and geographic market sharing agreement which explains the—by today’s standards—relatively low fines.¹⁸

As is now customary, most of these cartels were originally brought to the Commission’s attention by an informant company, blowing the whistle on its fellow cartel participants and thus escaping a fine altogether.¹⁹

The decisions brought to more than €4.6 billion the total amount of fines imposed by the Commission during the tenure of Commissioner Mario Monti.

1.5. Repsol service stations—proposed commitments

The Commission has been quick to make use of the new instrument, provided by Art.9 of Regulation 1/2003, whereby the Commission can close a proceeding if the companies accept certain commitments.²⁰ In October 2004, the Commission published a notice pursuant to Art.27(4) of Regulation 1/2003 relating to Repsol’s motor fuel distribution system in Spain.²¹ The Commission indicated that, subject to comments received, it is planning to declare commitments binding under Art.9 of Regulation 1/2003. The agreements which had been notified in 2001 concerned the exclusive purchase of fuel by service station operators in Spain where Repsol was found to have market shares ranging between 35 per cent and 50 per cent on fuel wholesale market for gasoline and diesel and similar shares on retail markets for fuel. The Commission had objected to the duration of non-compete clauses in the case where the stations were not owned by Repsol. Given Repsol’s market shares, the Commission was concerned about vertical foreclosure effects resulting from Repsol’s network.

Repsol offered a complex package of commitments that would remain valid until May 31, 2010. Among others, Repsol would limit to five years non-compete clauses for new fuel distribution agreements where Repsol is not the owner of the service station concerned. Repsol also agreed not to buy existing service stations which are not currently tied to its network until the end of 2006. Repsol will advertise the expiry of fuel distribution agreements with service stations which allows competing fuel suppliers to contact service station owners. According to the Commission, Repsol’s commitments provide a “practical response to the Commission’s concerns about the foreclosure effects on the Spanish market”. As is now customary in the case of complex remedies, monitoring by a third party trustee (auditor) is foreseen.

The decision, if adopted, will be the first articulation of the Commission’s policy as regards vertical restraints and the role of market power in oligopolistic markets covered by parallel networks of distribution agreements.

¹⁴ Joined Cases C-204/00 etc. Aalborg Portland A/S v Commision, January 7, 2004, not yet reported. The judgment also confirms and clarifies existing case law as regards access to file.
¹⁸ See also Decision of September 29, 2004 (not yet published), Press Release IP/04/1153, relating to a fine of €2.5 million on two main brewery groups in France for having agreed to refrain from aggressive competition in the French horerca markets. In setting a low fine, the Commission considered the infringement serious but took into account that the agreement was never implemented.
1.6 Hollywood output deals—MFN clause

In October 2004, the Commission closed its investigation into contracts between Hollywood studios and European television stations. According to the terms of original agreements used by the eight Hollywood majors, European Pay TV stations were required to grant each Hollywood producer a most favoured nation status (MFN-Clause); in effect this was an English clause in reverse, benefiting the supplier rather than the customer. As this clause was used by all upward Hollywood producers, it had the effect of leading to an alignment of prices and conditions; all except two Hollywood producers have agreed to no longer use this clause, and the case was closed against them; the procedure continues against NBC Universal and Paramount Pictures.

1.7 Application of competition law to professional activities

Recently, the Commission has been focusing on the application of competition rules to the liberal professions. It has now stepped up its activities: In February 2004, the Commission issued a “Communication on Competition in Professional Services”, which is in effect a European-wide warning letter to lawyers, notaries, accountants, architects, engineers and pharmacists. It concludes that restrictions on price setting, advertising and other competitive parameters are preventing the delivery of benefits to the economy and consumers in particular. The Commission invites professional associations to review the proportionality of any restrictive practices into which they have entered. The implied threat is that a national competition authority or the Commission itself would intervene against unjustified practices, either directly against the professions concerned or indirectly by challenging laws that the Commission considers to contravene Arts 10 and 81 EC.

2. Article 82

The modernisation process has required the Commission to articulate its policy for application of Art.81, leading to the economics-based approach expressed in the Commission’s Art.81 Guidelines. As regards Art.82, in contrast, the legal formalism characteristic of the “old” Art.81 cases remains evident and the role of economic analysis in identifying either dominance and abuse is, at best, uncertain. Recognising this problem, the Commission has initiated a major review of Art.82 practice. If this ambitious project can be successfully concluded, it should ultimately lead to the adoption of guidelines on the application of Art.82.

During 2004, the most important developments under Art.82 include the Commission’s decision against Microsoft, the decision against financial clearing house Clearstream, the settlement of the long-running Marathon gas supply case, the proposed acceptance of commitments by Coca-Cola as well as the judgment from the Court of Justice in IMS.

2.1 Microsoft

After five years of investigation and the issuance of three Statements of Objections, the Commission has finally issued its decision against Microsoft. The Commission’s decision which imposed a record fine of €497 million, is without any doubt one of the most important decisions taken by the Commission in the application of Art.82 EC.

The Commission identified two infringements of Art.82: (1) refusal to provide interoperability information to competitors in software for work group servers; and (2) bundling the Windows Media Player with the Windows operating system. The common point of departure for both findings was the conclusion—ultimately not contested by Microsoft—that Microsoft enjoyed a dominant position in PC operating systems; its market share in this market has been stable over the years at a super-dominant level of 90 to 95 per cent.

Server interoperability—refusal to supply. As regards server interoperability, the Commission defined an additional market for operating systems software used by “work group servers”, i.e. by servers that provide such basic functions as printing, file-sharing and administration to a group of users of PCs within a corporate IT

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24 The Commission fined the Belgian Association of Architects €100,000 considering that their price-setting scheme violated Art.81, see Decision of June 24, 2004, unofficial version available at http://europa.eu.int/comm/competition/antitrust/cases/decisions/38549en.pdf.  
25 The soundness of the Commission’s legal basis is somewhat open to doubt, since the existing case law regarding professional associations from the ECJ tends to be quite ambiguous, see Case C-359/99 Arredamento v Italy [2002] E.C.R. 1-1529 and Case C-309/99 Wouters v Algemene Raad van de Nederlandse Orde van Advocaten [2002] E.C.R. 1-1577.  
network. The Commission found Microsoft dominant in this market as well, even though its market share was much lower than in the market for PC operating systems and even though significant competitors were present in this market. The key relevance of this market for the Commission, however, was the way in which refusal to supply interoperability information for work group servers with Windows 2000, (in contrast to the practice of sharing such information in respect of previous versions of Windows) had contributed to the dramatic strengthening of Microsoft’s position in this market. The Commission considered that refusal to supply the interoperability information constituted an abuse because the information is essential for companies wishing to compete effectively in the server systems market.

Media player—bundling. As regards media players, the Commission found that Microsoft had abused its overwhelmingly dominant position in the market for PC operating systems by bundling its media player product with the Windows operating system. The Commission condemned this practice as “tying” for purposes of Art. 82(d) EC because a “media player and an operating system are two different products”.27 According to the Commission, the efficiencies resulting from supplying these two products together were not sufficient to counterbalance the anti-competitive effects resulting from the practice. The Commission requires Microsoft to offer to PC makers and consumers a version of the Windows PC operating system which does not include the Windows Media Player. However, Microsoft retains the right to offer a bundle of both products.

Legal issues raised by the decision. Both aspects of the decision pose interesting legal issues. In finding the refusal to provide interoperability information abusive, the Commission conceded that some of the information withheld by Microsoft might be protected by intellectual property rights. The Commission found that the “exceptional circumstances” of the case (including in particular the fact that Microsoft had previously supplied such information) meant that the refusal was abusive. The Commission reached this conclusion even though the facts did not fall squarely within the range of exceptional circumstances previously approved by the Court in Magill.28

As regards the finding of “tying” of Windows and the Windows Media Player, the Commission builds a strong case that Microsoft’s conduct was exclusionary and not justified. However, the Commission’s application of Art. 82(d) is not free from doubt. The mere fact that two products are in distinct product markets is not necessarily by itself sufficient to prove a tie. Article 82(d) allows a dominant firm to sell products together where the tied product and the tying product “by their nature or commercial usage” are sold as a package. Yet the Commission did not address this point. This case also differs from previous Art. 82(d) cases because the Windows Media Player is not sold to customers—it is given away. This makes the abuse finding hard to square with the language of Art. 82(d) which requires that the dominant firm make a contract contingent on acceptance of a “supplementary obligation.” The use by the Commission of a “rule of reason” balancing of anti-competitive harm and consumer benefits is also noteworthy, since the Commission has not previously applied such an assessment in cases under the Art.82 examples.29

Subsequent events—appeal by Microsoft. Microsoft applied to the CFI for annulment of the Commission decision and sought suspension of the Commission’s remedies, pending the outcome of that application. The President of the Court of First Instance on December 22 rejected Microsoft’s application for interim relief. Microsoft has also reached agreement with the major complainants who have now withdrawn from the case.30

2.2 Clearstream—securities clearing houses

Application of the competition laws to the financial services sector has been a priority of the Commission for some time; nevertheless, because of the complexities of this sector, the Commission’s practice to date must still be considered to be in its infancy.

In June 2004, the Commission announced its decision finding that Clearstream Banking AG (“Clearstream”) had infringed Art. 82 by refusing to supply certain services to Euro Clearbank and by applying discriminatory prices.31 Clearstream is the only German Wertpapiersammelbank—Central Securities Depository—and therefore the only German provider for primary clearing and settlement services for securities issued under German law. As the only provider of such services the Commission found Clearstream to be dominant in this market and regarded the service

29 Art.82(a)–(d).
offered by Clearstream as an essential facility for Euroclear, which acts as one of the two International Central Securities Depositories in Europe, the other one being a subsidiary of Clearstream.

The Commission considered that Clearstream had abused its dominant position by refusing to supply these services to Euroclear. The Commission also found that Clearstream had engaged in discriminatory conduct by charging Euroclear higher prices per transaction and by delaying the provision of the service. The Commission did not impose a fine, because this was the first case involving this complex commercial area and the abusive conduct had been brought to an end well before the conclusion of the infringement procedure.

2.3 Marathon Gas—third party access in gas markets

On April 30, the Commission announced the final conclusion of the long-running Marathon Gas investigation as Gaz de France and Ruhrgas have offered detailed commitments to improve third party access to their respective transport networks. The Commission investigation had begun on the basis of complaints from Marathon in the 1990s that the refusal by various gas supply network operators to give it access to their networks for delivery of gas infringed Art.81 and/or Art.82. The Commission reached settlement with three other operators in 2001 and 2003.

This case illustrates how the desire of companies to terminate costly investigations allows the Commission to impose regulatory solutions that it cannot achieve through the normal regulatory process. Since the second phase of the investigation started in the late 1990s, two Council Directives have been enacted that require third party access to gas supply networks. The Commission’s press release makes it clear, however, that the detailed regulation of access agreed in Marathon exceeds the requirements of the most recent directive.

Whatever the merits of Marathon’s claims regarding conduct in the 1990s, it is not clear that the Commission could successfully mount an Art.82 case today if companies comply with the Directive. The development of sector-specific regulation in areas like energy and telecommunications makes it particularly important to clarify the relationship of these specific rules to the general law of abuse under Art.82.

2.4 Coca-Cola distribution—proposed commitments

On October 19, the Commission announced that it planned to terminate its investigation of The Coca-Cola Company and certain bottlers of Coca-Cola products in the EU on the basis of commitments submitted by the companies under investigation. These commitments conclude a five-year investigation of marketing practices covering sale of products to supermarkets, shops, bars and restaurants, which the Commission believed might have an exclusionary effect on rival drinks producers.

The Commission has now initiated the procedure under Art.9 of Regulation 1/2003, by publishing a notice in the Official Journal that describes the commitments. This marks the first use of Art.9 to make commitments formally binding in an Art.82 case.

The proposed undertakings include the following commitments:

- target rebates are prohibited;
- assortment payments must be agreed and paid separately for “Regular Cola”; “Diet Cola” and (in countries where “Fanta Orange” is a strong brand) orange flavoured carbonated drinks;
- shelf space payments must be calculated separately for Colas and non-Colas with a cap on the space that can be required;
- customers that obtain a drinks cooler “free-on-loan” can use 20 per cent of the capacity for other products, if they do not have other cooling equipment for drinks on the premises;
- the duration of “availability” agreements, financing agreements, and fountain equipment drinks supply agreements is limited.

2.5 IMS Health—judgment by the ECJ

On April 29, 2004, the Court of Justice issued its long-awaited judgment on the reference from the German courts regarding application of Art.82 to compulsory licensing claims.

36 Case C-418/01 IMS GmbH & Co. OGH v NDC Health GmbH & Co. KG, April 29, 2004.
IMS is a company that collects and collates data on sale of pharmaceutical products to pharmaceutical companies. To provide data in a manner useful to the customers while preserving anonymity for specific outlets, data is aggregated on the basis of geographical units. In Germany, IMS developed a system based on 1860 geographic units—the 1860 Block System—for this purpose.\(^{37}\) An ex-director of IMS founded a rival firm, later acquired by NDC, to provide pharmaceutical data collection services in competition with IMS.

When the competitor began using the 1860 Block System for reporting data, IMS brought an action in the German courts to block the use of its copyrighted system. In October, 2000, the German trial court issued an interim order barring use of the 1860 Block System “or any derivative thereof”. The trial on the merits was suspended, however, because the trial court had referred to the ECJ the question of whether the refusal of IMS to license the 1860 Block System could constitute an abuse of a dominant position under Art.82.

In March, 2001 and acting upon a complaint from NDC the Commission issued a decision imposing interim measures on IMS, which it considered to be the dominant provider of statistical services to the pharmaceutical industry in Germany.\(^{38}\) The Commission required IMS to allow NDC to use the copyright-protected 1860 Block System, finding that access to the block system was necessary for effective entry into the market for providing statistical services and that refusal was not objectively justified. The effectiveness of this decision ordering interim measures was suspended on appeal by the President of the CFI\(^{39}\) and the Commission in 2003\(^{40}\) ultimately closed the file.\(^{41}\)

The principal question of the German court concerned whether refusal to grant a license for the use of a data bank protected by copyright would constitute an abuse where the applicant seeks to compete with the copyright holder and where potential customers reject products that are not produced on the basis of that data bank.

Much of the discussion in the opinion of A.G. Tizzano,\(^{42}\) the Court’s judgment and the academic commentary turned on the question whether such an obligation can only exist if an upstream market for the input, protected by copyright, can be identified in addition to the downstream market, in which the applicant wishes to compete.

The Court rejected the Commission’s position that the existence of a “primary” and a “secondary” market was irrelevant. But rather than requiring proof of an existing upstream market where the licensor holds a dominant position, (as proposed by IMS) the Court ruled that “it is sufficient that a potential market or even a hypothetical market can be identified”. According to the Court, “such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable” and “it is determinative that two different stages of production may be identified and they are interconnected”.

The decision seems to be consistent with existing case law: The multi-channel television guide in Magill,\(^{43}\) clearly had different characteristics from the single channel guides produced by its competitors and met a specific demand—consumers clearly wanted a one-stop guide and the incumbents could not produce one. In Volvo,\(^{44}\) in contrast, the clear implication was that as long as Volvo continued to produce body panels for older models (and did not overcharge for those panels or withhold them from independent repair shops), the makers of imitation panels would be kept out of the market. The fact that the imitation panels were cheaper, or lighter, or available more quickly, would not be relevant.

On this basis, the IMS ruling does not necessarily open the door to Art.82 claims from “copycat” suppliers. If the claimant must show that the proposed goods and services that it will produce are genuinely of a different nature and meet specific consumer needs that are not satisfied (even if imperfectly) by existing products, then the application of the rule may be more limited than appears from the language of the Court itself.

37 IMS has more recently introduced a refined structure with 2,847 blocks.
39 Case T-184/01 IMS Health Inc./Commission [2001] E.C.R. II-3193, affirmed by the President of the ECJ in Case C-418/01 P (R).
41 The full review by the CFI of the Commission decision ordering interim measures was suspended following the reference to the ECJ until the Court could act on that reference.
42 Conclusions of A.G. Tizzano, October 2, 2003 in Case C-418/01 IMS GmbH & Co. OGH v NDC Health GmbH & Co KG.
3. Sanctions and remedies

The continuing increase of the level of the fines assessed by the Commission and the review of the Commission’s practice by the CFI continue to attract significant attention.\(^{45}\) Of considerable long-term significance is the Commission’s project of facilitating the recovery of damages in private actions based on Arts 81 and 82.

3.1 Graphite Electrodes—extent of legal obligation to respond to information requests

In its judgment in the Graphite Electrodes case,\(^{46}\) the CFI very carefully reviewed the evidence on which the Commission relied for each element of the assessment according to the Commission’s Fining Guidelines in order to ascertain whether the Commission had committed manifest errors. The judgment addresses many elements relevant to assessing the fine; perhaps the most significant relates to the amount of credit the Commission must give to evidence provided by companies in response to an information request from the Commission.

The Commission now frequently sends very extensive Information Requests to the parties and refuses to give companies credit under the leniency notices for their voluntary waiver of their defence right. Nevertheless responding to these questions and providing such information, the companies went beyond what they were legally required to do and as a result were entitled under the leniency notice of 1996 to credit for voluntary waiver of their defence right.

3.2. Increased private enforcement—Commission plans

The private enforcement of EC competition law has long been on the Commission’s wish list and it is obvious that Regulation 1, making Art.81(3) directly applicable, removes one obstacle to private enforcement actions. It is, however, only one of many obstacles and certainly not the most important.

A thorough survey of the state of the law in Member States has now been published on the Commission’s website.\(^{49}\) The Commission is planning to publish a Green Paper on the matter in 2005; the Green Paper is likely to consider such measures as introducing improved fact-finding procedures for plaintiffs, class actions, contingency fees, denial of the passing-on defence, double (but not treble) damages. Any such instrument on the basis of EU law, whether by Council Regulation or Directive, will face considerable political opposition, if for no other reason than the fact that it would require fundamental changes in national procedural and substantive law. However, even in the absence of such an instrument, the discussion initiated by the Commission is causing the legislatures of Member States to consider some measures going in this direction based on purely national law.

4. Procedure

4.1 Regulation 1/2003 and modernisation package

As far as procedural law is concerned, the most significant development by far relates to the coming into force of Regulation 1/2003 which replaces Regulation 17/1962 and which brings a systemic change in the enforcement of Arts 81 and 82.\(^{50}\) The modernisation rests on three pillars:


\(^{46}\) Joined Cases T-236/01 etc. Tokai Carbon Co Ltd v Commission, April 29, 2004, not yet reported.


\(^{48}\) Case T-44/00 Mannesmannröhr-Werken AG v Commission, July 8, 2004.


Direct applicability of Article 81(3) EC. Whereas previously para.3 of Art.81 had been interpreted as a norm that permits the Commission or the Council to decree, by individual decision or measure of general application (block exemption), when the conditions of this norm are met, Art.81(3) is now directly applicable and is to be applied by every authority, court and by companies evaluating the legality of their conduct. The Commission has issued Guidelines in this respect, summarising its interpretation of Art.81(3).

Supremacy of substantive EU competition law over national competition law. Article 3 of Regulation 1/2003 creates for the first time a level playing field as regards the substantive standard by which companies' competitive conduct is being judged, regardless of the Member State in which the conduct takes place or has effects. The only requirement is, that EU competition law be applicable, i.e. that the agreement or practice is capable of having an effect on trade between member states. Again, the Commission has published a notice.

Joint enforcement of Articles 81 and 82 through a network of European competition authorities. Whereas under Regulation 17 national competition authorities tended to apply their own national competition law rather than EU law and EU law was almost exclusively enforced by the Commission, the modernisation seeks to decentralise the application of EU competition law by putting the day-to-day enforcement into the hands of the national competition authorities, which act in concert with the Commission and the national competition authorities of other member states. Early indications are that the Commission will be playing very much of a leading role in this network.

Prior to May 1, 2004 the Commission also published an implementing regulation and three further notices which address issues of procedure (treatment of complaints; treatment of opinion letters; relations with national courts).

4.2 Access to file—Draft Commission Notice
Following The ECJ judgment in the Cement case, which had clarified and confirmed a number of important procedural points as regards access to file, the Commission, in October 2004, invited comments on a draft notice relating to access to file which will replace the previous notice from 1997.

The Commission continues to adhere to a relatively restrictive position according to which access to file is a right of defence and can only be asserted after the issuance of a Statement of Objections. The draft notice clarifies that where companies seek leniency in a paperless process, as is now almost routinely the case, the minutes taken by the Commission may be accessible to other defendants as part of their access to file; such corporate statements may also be relied on by the Commission in the case. The draft notice also confirms that material can also be withheld, if its disclosure would significantly harm a person or undertaking.

4.3 German Banks/Eurozone Case—win by default
A particularly egregious procedural mishap occurred to the detriment of the Commission in the German Banks/ Eurozone case, where the CFI annulled completely the Commission’s decision fining German banks a total of €100 for an alleged agreement to fix the calculation of currency exchange charges in the transitional period, immediately before the introduction of physical notes and coins for the Euro. The banks contested the fact that there had been any agreement or concerted practice. When the Commission filed its defence by telefax, an inexperienced clerk placed the document in the fax machine with the wrong side of the paper facing the scanning device and as a result the Commission submitted nothing but blank pages as a defence. The CFI held that the Commission had not submitted its defence in time. The CFI therefore assessed the applicant arguments against those contained in the Commission’s

52 The Guidelines also contain important statements with respect to the Commission’s interpretation of Art.81(1). As regards Art.81(3), the threshold for the application of this norm seems to have been raised quite a bit by the Commission compared to previous practice.
57 Joined Cases C-204/00 etc. Aalborg Portland A/S v Commission, January 7, 2004. See discussion above s.1.3 of the present article.
decision, but without taken into account the Commission’s defence, and found for the plaintiffs.

4.4 Legal professional privilege

The law of legal professional privilege, an institution that forms an integral part of procedural law in common law countries, has been left largely untouched since the AM&S judgment from the ECJ in 1982\(^60\) which had held that as parts of the rights of defence a legal professional privilege exists under EU law, the precise contours of which are, however, unclear and which does not extend to in-house counsel. The extent of the privilege is at the heart of the litigation instigated by Akzo Nobel. Acting upon an application for interim measures, the President of the CFI ruled that a number of documents seized by the Commission would likely be covered by the legal professional privilege and should have therefore been inaccessible to the Commission.\(^61\) This order was later reversed by the President of the ECJ.\(^62\) The litigation continues.\(^63\)

5. Outlook for 2005

Looking ahead towards 2005 and beyond, three major issues demand attention: can the new enforcement system established by Regulation 1/2003 cope with the inevitable friction generated in a world where harmonisation is limited to substantive law and each competition authority applies its own procedural rules? Will the Commission succeed in issuing usable draft Guidelines for the Application of Art.82? Can the Commission implement its ambitious project to facilitate private enforcement of Arts 81 and 82? The response to these challenges will determine the success of the Commission in implementing its enforcement policy in relation to Arts 81 and 82 over the years to come.

61 Joined Cases T-125/03 R & 253/03 R Akzo Nobel Chemicals v Commission, Order of the President of the CFI, October 30, 2003, not yet reported.
62 Case C-7/04 P (R) 1 Commission v Akzo Nobel Chemicals, Order of the President of the ECJ, September 27, 2004, not yet reported.